Employment Standards TRIBUNAL

An appeal

- by -

Della Casa Hospitality Inc.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE No.: 2016A/138

DATE OF DECISION: February 27, 2017

DECISION

SUBMISSIONS

Roger Mpania — counsel for Della Casa Hospitality Inc.

OVERVIEW

1. On July 15, 2016, the Director of Employment Standards (the "Director") issued a determination (the "Determination") according to section 79 of the *Employment Standards Act* (the "*Act*") in which Della Casa Hospitality Inc. (the "Appellant") was found to owe the complainant, Sadaf Jabarkhel (the "Complainant"), wages, statutory holiday pay, and vacation pay, in the aggregate amount of $4,058.68, together with interest calculated according to section 88 of the *Act*. The Appellant was also ordered to repay the sum of $86.24 to the Complainant, originally deducted from wages contrary to section 21 of the *Act*, and to pay administrative penalties for breaches of sections 17, 18, 21, and 28 of the *Act*.

2. The Appellant does not challenge the Determination with respect to the improper wage deduction or, apparently, the administrative penalties.

3. Rather, it says that the Director both erred in law and failed to observe the principles of natural justice – permitted ground for appeal under sections 112(1)(a) and 112(1)(b) of the *Act*, respectively – in making orders with respect to regular wages, overtime wages, statutory holiday pay, and vacation pay, and it asks this Tribunal to refer this matter back to the Director.

FACTS

Chronology

4. In considering this appeal, a review of the chronology is helpful:

   (a) The originating complaint was filed with the Director on January 18, 2016. In it, the Complainant alleged to be outstanding the sum of $3,169, including $1,569 in regular wages, $1,500 in vacation pay, and $100 for an unauthorized deduction relating to the Complainant's work uniform.

   (b) Notes included in the Record indicate that, after approximately seven attempts, the Employment Standards Branch spoke to Mr. Rathour by telephone on February 10, 2016, notifying him of the complaint. Mr. Rathour requested that a copy of the complaint form be sent to him by electronic mail. Attempts to do so were unsuccessful, because the address provided by Mr. Rathour was either incorrect or non-functioning.

   (c) Mr. Rathour did not return subsequent telephone messages and, ultimately, on February 17, 2016, the Employment Standards Branch sent, to the Appellant, a copy of the complaint, several Employment Standards fact sheets, a Notice of Complaint Hearing, and a Demand for Employer Records. Deliveries to the Appellant's business address were successful; not so for attempted deliveries to the Appellant's registered and records office.

   (d) The Appellant did not respond to the Demand for Employer Records.

(e) The complaint hearing was convened on March 30, 2016. Neither the Complainant nor the Appellant appeared. The Employment Standards Branch tried, but was unable to contact Mr. Rathour. The Employment Standards Branch was able to reach the Complainant, who was out of province owing to the death of a family member.

(f) In the absence of the Appellant, the Director elected to proceed with an investigation under section 76 of the *Act*, in place of a formal hearing. The Complainant was interviewed by telephone, and instructed to tender any documents in support of her position by April 13, 2016. (A summary of the interview is included in the Record. It does not appear to have been made contemporaneously with the interview, but sometime afterwards.)

(g) The Employment Standards Branch received the Complainant's evidence on April 10 and 11, 2016. That evidence is included in the Record and consists primarily of a series of text messages between the Complainant and Mr. Rathour, two electronic mail messages, and pay statements for the month of November 2015.

(h) On April 12, 2016, the Director sent to the Appellant, a registered letter outlining the Director's preliminary findings and enclosing copies of the Complainant's documents. (The actual letter included in the Record appears to be missing every second page; the complete letter is included with the Appellant's submissions.)

(i) The Appellant, through counsel, responded to the Director's preliminary findings by letter dated April 27, 2016. A copy was sent to the Complainant on April 29, 2016.

(j) Following a review of the Appellant's response, the Employment Standards Branch sent electronic mail to the Complainant on May 6, 2016, asking questions, to which the Complainant responded verbally on May 10, 2016. Of note, the Complainant alleges the existence of additional evidence corroborating her claims, including video recordings and witnesses. She did not identify those witnesses.

(k) The Record discloses subsequent discussions between the Director and the Appellant's lawyer on May 10, 2016, culminating in a written settlement proposal sent on May 20, 2016, in respect of which the Appellant's counsel was unable to obtain instructions.

(l) Hearing no more from the Appellant, the Director issued the Determination on July 15, 2016, without reasons.

(m) The Determination was delivered to the Appellant's place of business on July 18, 2016, and to the Appellant's counsel by facsimile on July 21, 2016. Attempts to deliver the Determination to Mr. Rathour and to the registered and records office of the Appellant were unsuccessful.

(n) Neither the Appellant nor its lawyer requested reasons before the close of business on July 28, 2016, being the last day to do so according to section 81(1.2) of the *Act*.

(o) On July 31, 2016, Appellant's counsel suffered the loss of a family member, and was required to leave the province. He did not return until sometime after August 22, 2016, the last day on which to appeal the Determination. By then, apparently, Mr. Rathour had left town. I do not know if counsel delivered a copy of the Determination to the Appellant on receipt.

(p) On September 26, 2016, the Appellant's counsel submitted a request for an extension of time.

(q) On September 27, 2016, he submitted the appeal form and submissions (the "Appellant's Submissions").

5. What should be obvious from the foregoing is the Appellant's failure to fully engage in the process. The failure to return telephone calls, to respond to a demand for records (or, in fact, to keep adequate records), to appear at the complaint hearing, to respond to attempts at settlement, and to request reasons in a timely manner, suggests a level of apathy for the adjudicative process and, generally, the obligations of an employer under the *Act*, which is entirely unhelpful to the Appellant.

Facts

6. In considering this appeal, I have reviewed the Appellant's Submissions, together with the Director's 128-page Record, received on October 17, 2016, and submissions from the Director received on January 13, 2017 (the "Director's Submission").

7. Although given an opportunity to do so, the Appellant provided no response to the Director's Submission.

8. Out of all of these materials, I summarize those facts relevant to the substance of this appeal:

(a) The Appellant carries on business under the name "Char 631", a steak and seafood restaurant located in Coquitlam, British Columbia.

(b) Mr. Rathour is the Appellant's sole director and officer.

(c) The Complainant was employed with the Appellant as an Assistant Manager, working between December 28, 2014, and December 23, 2015. (There is some dispute on this point, in that the Appellant says that the Complainant did not work at Char 631 in December 2015.) The Complainant served both in a supervisory capacity, and as a server for breakfast, lunch, and dinner shifts. Notwithstanding her title, the Appellant does not argue that the Complainant was a "manager" within the meaning of the *Employment Standards Regulation*.

(d) The Complainant worked ten hours per day, six days per week. (This is disputed by the Appellant.)

(e) The Appellant did not keep, or at least did not submit, a separate record of hours worked. (The Appellant says that pay statements included in the Appellant's materials are a record of hours worked. In fact, they are little more than a record of hours paid and, for reasons I point out below, an unreliable record, at that.)

(f) The Complainant received a salary of $3,000.00 per month. Until November 2015, that salary was paid entirely by cheque. In October 2015 and November 2015, the Appellant unilaterally decided to pay a portion of this salary ($500.00) in cash. The cash payment was made in October 2015. No cash payment was made in November 2015.

(g) The Complainant's equivalent hourly rate of pay was $11.54, as determined by the Director.

(h) The Complainant was not paid any wages for the period December 1, 2015, to December 23, 2015. (Again, there is some dispute on this point, in that the Appellant says that the Complainant did not work at Char 631 in December 2015.)

(i) For the period from November 1, 2015, to December 23, 2015, the Director found that the Complainant worked a total of 460 hours, of which 140 hours were overtime hours. At the equivalent hourly rate of pay, total wages payable would be $6,115.39, of which $3,798.07 remains unpaid.

(j) The Director was unable to say with certainty that the Complainant worked on November 11, 2015. As such, the Complainant was found to be entitled to pay of $92.31, for 8 hours, according to section 45 of the *Act*.

(k) Vacation pay on wages, at the rate of four percent, would be $268.31 (including $20.00 for the cash portion of wages for October 2015), less $100.00 paid, leaving the net amount of $168.31 due.

ANALYSIS

9. In reaching a determination, the Director would have had to consider whether or not the Complainant was entitled to receive additional regular wages, overtime, or statutory holiday pay.

10. Before the Director and in this appeal, the Appellant concedes that there is due and owing for November 2015, $682.68 regular wages. However, the Appellant rejects the findings that regular wages are payable for the period December 1, 2015, to December 23, 2015, and that overtime wages are payable for the period November 1 to December 23, 2015.

11. The Appellant also says that both vacation pay and statutory holiday have been paid (as shown on the Complainant's pay stubs), and no further amount is due and owing.

12. Central to the Director's findings and the argument in this Appeal are the answers to two key questions –

(a) Did the Complainant work between December 1, 2015, and December 23, 2015?

(b) Did the Complainant work an average of six days and sixty hours per week?

13. The Appellant argues that, by preferring the Complainant's evidence over the Appellant's evidence, the Director erred in law. The Appellant further says that the Director's failure to explain why it preferred the Complainant's evidence over the Appellant's evidence amounts to a breach of natural justice.

Did the Director err in law?

14. An "error of law" exists where:

(a) a section of the *Act* has been misinterpreted or misapplied;

(b) an applicable principle of general law has been misapplied;

(c) the Director acts in the absence of evidence;

(d) the Director acts on a view of the facts which cannot reasonably be entertained; or

(e) the Director adopts a method of assessment which is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

15. I understand the Appellant to argue that the Director has acted in the absence of evidence, or on a view of the facts that cannot reasonably be entertained.

16. Although I agree that the evidence is light, and somewhat unfulfilling, I do not think that either argument ultimately succeeds.

Did the Complainant work between December 1, 2015, and December 23, 2015?

17. The Appellant says that the Complainant did not work between December 1, 2015, and December 23, 2015. It says that she quit her employment at the end of November 2015. It points to the absence of pay statements as definitive proof of both claims.

18. In my review of the evidence, however, I note the following:

(a) notwithstanding the Appellant's claim that the Complainant quit her employment in November 2015, there is no corroborating Record of Employment, and electronic mail correspondence included in the Record and incorporated in the Appellant's submissions quite clearly indicate that the Appellant was working for the Appellant in early December 2015;

(b) text messages supplied by the Complainant included in the Record indicate that:

(i) as at December 17, 2015, the Complainant was still trying to arrange two weeks' vacation, which implies that she was working at that time;

(ii) it was Mr. Rathour who told the Complainant, on December 24, 2015, "no more shifts", implying again that, she continue to work until December 23, 2015.

19. I am also of the view that the pay statements on which the Appellant seeks to rely are wholly unreliable. Pay statements are not a record of "hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis", as required by section 28(d) of the *Act*; rather, they are – at best – a statement of "the employee's gross and net wages for each pay period" required under section 28(f). In this case, they are not even that, given that, firstly, they do not reflect the $500 cash payments made (or to be made) by the Appellant and, secondly, they do not correctly reflect wages actually paid (which is why, for November 2015, the Appellant acknowledges that wages of $682.68 remains due and owing to the Complainant notwithstanding what the pay statements for that period show.)

20. It is not unreasonable to conclude from the evidence that the Complainant did, in fact, work from December 1, 2015, to December 23, 2015.

Did the Complainant work an average of six days and sixty hours per week?

21. On the one hand, the Complainant's evidence appears to have been reasonably detailed. She was able to describe her job and duties to the Director, and to account for her time spent during an average workday. On the other, that is all there is; the Complainant did not or was unable to provide documents, video, or witnesses to corroborate her claim.

22. The Appellant, in turn, offered little more than a bare denial coupled with pay statements that, for reasons explained previously, cannot be interpreted in the manner that the Appellant suggests.

23. The Appellant is hurt by its failure to keep adequate records.

24. The Director is not acting in the absence of evidence, nor can I say that the Director is acting on an unreasonable view of what evidence there is.

Regular Wages, Overtime Wages and Vacation Pay

25. Having accepted that the Complainant did work between December 1, 2015, and December 23, 2015, for an average of six days and sixty hours per week, the Director's wage calculation summaries do not appear to me to be unreasonable, or wrong. Certainly, the Appellant does not offer any basis upon which I can properly disturb the claim amounts and, considering the Appellant's failure to satisfy its obligations under section 28(1)(d) of the *Act*, I see no basis to revisit the Director's math.

26. There are no separate records of hours worked, as is required by section 28(1)(d) of the *Act* and, for the reasons set out previously, I am satisfied that the pay statements are not a reliable source of information.

27. Vacation pay is calculated on the basis of wages earned. Having accepted the Director's math with respect to wages found to be owing, I see no basis to reject the Director's calculation of vacation pay owing on top.

Statutory Holiday Pay

28. Section 45(1) of the *Act* provides as follows:

> *45 (1) An employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday under section 48, must be paid an amount equal to at least an average day's pay…*

29. Section 46(c) of the *Act* provides that:

> *46 An employee who works on a statutory holiday must be paid for that day*
>
> *(a) 1 1/2 times the employee's regular wage for the time worked up to 12 hours;*
>
> *(b) double the employee's regular wage for any time worked over 12 hours, and*
>
> *(c) an average day's pay, as determined using the formula in section 45 (1).*

30. Having found that the Complainant worked an average of six days per week, it is reasonable to assume that either the Complainant worked on November 11, 2015, or that she worked November 8 to 10 and 12 to 14.

31. In either case, the Complainant is entitled under section 45(1) to at least an average day's pay, calculated to be $92.31.

32. In the circumstances, I am not prepared to say that the Director's finding is unreasonable.

Did the Director breach the principles of natural justice?

33. Principles of natural justice require the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to a decision on the evidence (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05 at paragraph 15).

34. Those requirements must be considered in the context of the *Act*.

35. Section 81(1) provides, in part, that a Determination must set out the amount of any wages, compensation, interest, or penalties to be paid, and the manner in which those amounts are calculated. Until it was repealed in May 2002, section 81(1)(a) also required the Director to provide reasons. That is no longer the case.

36. Notwithstanding that repeal, it has generally been the practice of the Director to provide reasons. That is the prudent action and, in my view, it ought to be encouraged. However, there is nothing in the *Act* that obliges the Director to provide reasons, and no statutory basis to hold the Director to account for refusing to provide them where none are requested under section 81(1.1) within the time specified in section 81(1.2).

37. If the Appellant had requested reasons in a timely fashion, I agree that the Director would have been obliged to explain why it reached the decision that it did. However, the Appellant did not and, accordingly, the Director need not, do so.

38. This does not mean that the Director is not obliged to reach a decision based on the evidence; rather, it is only relieved of the obligation to explain why it made the decision that it did. It remains open to the Tribunal, to find that the decision was not made on the evidence.

39. The evidence is far from perfect. It suffers from the absence of reliable, corroborating documents, as well as the inattention (deliberate or otherwise) of both the Complainant and the Appellant. It is the Director's function to assess that evidence, to determine what is credible and what is not, and to find – on a balance of the probabilities – what it means.

40. For the reasons I gave previously when considering whether or not the Director erred in law, I am satisfied that the Director's preference for the Complainant's imperfect evidence when compared to the Appellant's unreliable evidence, is logical.

41. I am unable to say that the Appellant has been deprived of the right to a decision on the evidence. The appeal under section 112(1)(b) must fail.

Conclusion

42. The evidence of both parties is unsatisfactory, in my estimation, exacerbated by the low levels of attention paid by employer and employee alike, whatever the reason.

43. However, it is the Director and not this Tribunal who is charged with weighing the evidence of both parties, and making a determination which does justice between them in a manner befitting the purposes of the *Act*. I am satisfied that the Director, in the Determination, has done exactly that.

44. In my view, the Appellant's argument before the Director and again in this appeal is grievously injured by the failure to keep records. Those records could have more clearly answered questions surrounding the Complainant's entitlement to regular wages and overtime.

45. Accurate employee records are both the employer's burden and a statutory obligation under section 28 of the *Act*. It would be contrary to the spirit and intent of the *Act* to deny an employee's claim for wages – that the Director otherwise finds credible and believable – simply because the Appellant, firstly, failed to meet its statutory record keeping obligation and, secondly, claimed that there were no records to support the employee's claim.

46. For these reasons, I decline to grant the relief sought and, having so found, I find it unnecessary to consider the Appellant's request for an extension of time to file.

ORDER

47. Pursuant to section 115 of the *Act*, I confirm the Determination issued on July 15, 2016, and I dismiss this appeal pursuant to section 114(1)(f) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal