



An appeal

- by -

Sarak Holdings Ltd. carrying on business as Premier Mountain Lodge & Suites
(“Sarak”)

- 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: Carol L. Roberts

FILE No.: 2014A/161

DATE OF DECISION: March 11, 2015

DECISION

SUBMISSIONS

Karim Merali	on behalf of Sarak Holdings Ltd. carrying on business as Premier Mountain Lodge & Suites
Ailie Beaudry	on her own behalf
Christina Ewasiuk	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the Employment Standards Act (the “Act”), Sarak Holdings Ltd. carrying on business as Premier Mountain Lodge & Suites (“Sarak”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on October 31, 2014. In that Determination, the Director found that Sarak had contravened sections 40 and 58 of the *Act* in failing to pay its former employee, Ailie Beaudry, \$2,556.69, representing overtime wages annual vacation pay and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for the contraventions, for a total amount owing of \$3,556.69.
2. Sarak appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination.
3. This decision is based on the submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Sarak operates a hotel in Valemout, at which Ms. Beaudry was employed as a front desk sales clerk from August 8, 2013, until October 28, 2013. On April 17, 2014, Ms. Beaudry filed a complaint with the Director alleging that Sarak had failed to pay wages for all work performed for the period September 15 - 25, 2013.
5. After investigating Ms. Beaudry’s complaint, the delegate determined that she was entitled to wages noted above. The relevant facts are as follows.
6. Mr. Merali was absent from Valemout from September 15 – 28, 2013, leaving Ms. Beaudry in charge of the hotel. Ms. Beaudry alleged that, during that time, she was unable to leave the hotel and often had no one to replace her. She contended that Mr. Merali asked her not to record more than 8 hours per day on her time cards and to keep a separate record of her hours for which he would pay her at a later date. She told the delegate that she was told to record her extra hours in a blue book at the front desk, a book she did not have access to at the time she filed her complaint. Ms. Beaudry provided the delegate with copies of her time cards, her personal calendar for the month of September 2013, her September 28, 2013, wage statement, her 2013 T4 and the names of two witnesses.
7. The delegate spoke to the two witnesses, neither of whom were able to confirm Ms. Beaudry’s hours of work.

8. Mr. Merali contended that Ms. Beaudry had not accounted for the hours she said that she worked and that, in contrast to the pay periods before and after this two week period, she had no valid time card. He also contended that Ms. Beaudry refused to account for her hours and told him that she worked 80 hours, for which he paid her on October 4, 2013. He asserted that Ms. Beaudry had been paid all wages owed. In support of his position, Mr. Merali provided the delegate with Ms. Beaudry's original time cards and accompanying wage statements for all pay periods except the one in question.
9. The delegate found that Sarak failed to provide a valid time card for the pay period in question. The delegate noted that on August 29, 2014, she spoke to Mr. Merali, who advised her that he had additional records, and she gave him until September 5, 2014 to provide them. Mr. Merali stated that he required additional time to provide them, and on October 3, 2014, he advised the delegate that Ms. Beaudry was "*Outstanding only 30 hours as she already got . and she got her 40 hours a week time card. She got paid the total 80 hours already.*" [reproduced as written]
10. The delegate found that Ms. Beaudry's contention that she worked 196 hours in the two week period was not excessive or unreasonable given that she worked two jobs, that of front desk clerk and manager, for a two week period. She noted Ms. Beaudry's recorded hours ranged from 8 hours to, on one occasion, 21 hours.
11. The delegate stated:

Having considered the circumstances of the overall situation, I find Ms. Beaudry's record of hours of hours worked to be credible and the best evidence available. Her recall of events was consistent each time she spoke of them and she responded to my questions in a straightforward manner. The Employer does not dispute that she was filling in for him for this period of time and concedes that she is owed 30hours.

12. The delegate concluded that Ms. Beaudry was entitled to compensation for an additional 67 hours at 1.5 of her regular rate and 49 hours at double her regular rate. The delegate also found Ms. Beaudry entitled to vacation pay on the outstanding wages plus interest.

Argument

13. Sarak's argument, while stated to be a denial of natural justice, is, in essence, an argument that the Determination is wrong.
14. Mr. Merali makes the following points:
 - all employees were required to record their time using a punch clock, which is used by the bookkeeper to make payroll. Mr. Merali says that he has been in business for 12 years and that he does not rely on a verbal reporting of hours worked;
 - the hotel's office hours are from 8 am to 10 pm, not 24 hours as asserted by Ms. Beaudry;
 - Ms. Beaudry kept the "open" sign on when she went to sleep, and that he had "staff to prove it";
 - he honoured Ms. Beaudry's written "demand" to pay an additional 30 hours which Ms. Beaudry found insufficient, after which she obtained a "blank time sheet on good faith for 40 hours a week"
 - Mr. Merali denies the existence of a blue book, contending that he does not operate in this fashion, and that for the past 17 years he has operated in accordance with the *Act*.

15. Finally, Mr. Merali says that Ms. Beaudry had no proof that she worked the hours she claimed and questioned why she did not approach him for overtime wages immediately.
16. Mr. Merali submitted a copy of a document signed by Ms. Beaudry with his appeal, suggesting that Ms. Beaudry agreed to be paid for 80 overtime hours. This document appears to be a record of Ms. Beaudry's hours of work for October and is unsigned.
17. On January 9, 2015, after filing Sarak's appeal, Mr. Merali submitted Ms. Beaudry's time card for the time period in question which he contended he had just located, along with a handwritten note from Ms. Beaudry. Mr. Merali suggested that he only owed Ms. Beaudry an additional 40 hours, and that he could pay this amount without difficulty. The October 16, 2013, note, which appears to be signed by Ms. Beaudry, is as follows:

Still owed 80 hours banked, so pay period ending October 12 = 52 hours worked so... 28 hours to use up.

18. The delegate submits that Sarak's appeal is, in essence, a dispute about findings of fact, all of which were reached based on the available evidence. The delegate further submits that although Sarak appears to dispute the amount of wages owed, it does not dispute that wages are in fact owed. She says that Sarak "has yet to provide evidence for the disputed pay period."
19. In conclusion, the delegate submits that Sarak appears to be using the appeal period as an attempt to negotiate a settlement to this matter, but has not provided an argument either challenging the correctness of the Determination or supporting its contention that the Director failed to provide natural justice.
20. Ms. Beaudry says that Mr. Merali told her not to punch a time clock because it would demonstrate she worked overtime, and that she was to maintain a separate account of her overtime hours. She says she was never paid for any banked hours. She says that Mr. Merali then told her he was unable to afford to pay her, refused to pay overtime and claimed not to understand how to pay banked hours.
21. Mr. Merali did not reply to the submissions of the delegate or Ms. Beaudry.

ANALYSIS

22. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
23. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while
 - ... most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive “fair treatment” [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant’s explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

24. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not Sarak has demonstrated any basis for the Tribunal to interfere with the Determination.

Failure to observe the principles of natural justice

25. The sole ground of Sarak’s appeal is that the delegate failed to observe the principles of natural justice. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that suggests, or establishes, that Sarak was denied natural justice.

Error of law

26. The Tribunal as adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

27. I have considerable difficulty with the delegate’s conclusion as it is not entirely clear to me why she preferred Ms. Beaudry’s evidence to Sarak’s. Although she states that she found Ms. Beaudry’s evidence “consistent,” and that she responded to the delegate’s questions “in a straightforward manner,” she gives no explanation why she dismissed Sarak’s evidence. In a letter dated June 27, 2013, the delegate noted that Ms. Beaudry had no record of banked hours, had no timecards for her alleged hours of work and that her documented hours existed only on a photocopied calendar sheet. Furthermore, neither of Ms. Beaudry’s witnesses was able to confirm or corroborate her allegations.

28. Furthermore, the delegate did not address the question of the existence of a “blue book,” which Ms. Beaudry claims existed and Mr. Merali denied. However, in view of all of the evidence and submissions, I conclude that the delegate made her decision based on the best evidence before her.

29. Ms. Beaudry provided documentation in support of her claim. While I question the accuracy of that documentation, I am unable to find the delegate’s conclusion to be in error. Mr. Merali did not dispute that Ms. Beaudry was entitled to additional wages. Section 28 of the *Act* requires an employer to maintain certain

records, including the hours worked by the employee each day, for each employee. It appears that Mr. Merali agrees that Sarak's records were not accurate. In the absence of accurate records, the delegate had to determine Ms. Beaudry's hours of work based on the best available evidence. I conclude that she did so.

30. I find that this ground of appeal has not been made out.

New evidence

31. Mr. Merali submitted additional documentation in support of Sarak's ground of appeal.

32. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.

33. The "new evidence" was clearly available during the investigation (and is likely the documents Mr. Merali suggested he would provide the delegate, but did not, prior to the issuance of the Determination). I find no basis for this ground of appeal.

34. The appeal is dismissed.

ORDER

35. Pursuant to section 115 of the *Act*, I deny the appeal. I Order that the Determination, dated October 31, 2014, be confirmed in the amount of \$3,556.69 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal