

An appeal

- by -

887715 Restaurant Ltd. carrying on business as Jupiter Lounge
("Jupiter")

- 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: Margaret Ostrowski Q.C.

FILE No.: 2008A/151

DATE OF DECISION: March 16, 2009

DECISION

SUBMISSIONS

Tony Hedayati	on behalf of 887715 Restaurant Ltd.
Joshua Leakey	on his own behalf
Ian MacNeill	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 887715 Restaurant Ltd. (“Jupiter”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 3, 2008. In that decision, the Director ordered Jupiter to pay the sum of \$6,563.79 to its former employee Joshua Leakey (“Leakey”) for wages totalling \$2,960.40 pursuant to section 18 of the *Act*, annual vacation pay of \$239.48 pursuant to section 58 of the *Act*, compensation of \$922.80 for length of service pursuant to section 63 of the *Act*, and other of \$2,103.81 pursuant to section 21 of the *Act*, and \$337.30 accrued interest required under section 88 of the *Act*. It was also required to pay three administrative penalties of \$500 each under section 29 of the *Employment Standards Regulations* for contraventions of sections 63, 21 and 18 of the *Act*.
2. The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) record and has determined that a decision can be made without an oral hearing as there are extensive written submissions from the parties setting out their respective cases.
3. Tony Hedayati (“Hedayati”) on behalf of Jupiter has appealed the Determination on the grounds that: the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was being made.

ISSUE

4. The issues to be determined by the Tribunal are as follows:
 - a) did the Director err in law;
 - b) did the Director fail to observe the principles of natural justice in making the Determination; and
 - c) does the evidence that Jupiter tendered evidence that was not available at the time the Determination was made and if so, is that new evidence sufficient to justify the Tribunal to vary or cancel the Determination under appeal or to refer the matter back to the Director.

BACKGROUND

5. Jupiter operates Jupiter Lounge, a cocktail lounge (also referred to as a café) in Vancouver. The term of employment in issue was Leakey's employment by Jupiter from January 20, 2007 to November 25, 2007. Leakey filed a complaint on February 26, 2008 stating that Jupiter contravened the *Act* by requiring him to pay business costs, failed to pay his final wages and terminated his employment by making a substantial alteration in his conditions of employment.
6. It was set out in the Determination that Leakey was appointed manager a short time after January 20, 2007. On appeal from the Determination, Hedayati on behalf of Jupiter submitted that he was not a director of Jupiter when Leakey was appointed as manager and was not involved in the day to day activities as there had been a legal action by two of the previous shareholders and Hedayati had been removed from the operation of the business. He says in his submissions that he resumed being the director of Jupiter and returned to the café/lounge on November 2, 2007 as ordered by the court. He submitted as new evidence copies of two unentered court orders in regards to the directorship of Jupiter and a buy-out process, copies of cheques, and copies of legal correspondence regarding the buy-out.
7. In regards to that part of the Determination which orders Jupiter to pay wages to Leakey at the manager's rate from November 1 to November 15, 2007, Heyadyati says that on November 2, 2007 he demoted Leakey from a manager position to a server position and submitted as new evidence a memo from Ashley Presidente, the floor manager of the Café, that she witnessed the demotion of Leakey to server, that Leakey agreed with this decision and "he never performed management after November 2, 2007".
8. Hedayati on behalf of Jupiter submitted that he was not treated fairly as it "goes back to the severity of his financial situation" - that when he returned to the business, it was in its worst condition and Leakey had been cooperating with Hedayati's former partners in the business against him. He further stated that "please do not expect me to pay a person with such characteristics when I was not involved in assigning him as a manager".
9. Hedayati further submitted that the new evidence that he tendered be considered and that he could not employ a lawyer to represent him.

ANALYSIS

10. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):
 - 112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 made.
11. Hedayati has appealed on all three grounds. I will deal firstly with ground (c), that is, is there evidence now available that was not available at the time the determination was made that should be considered in this appeal. If I so find, then such evidence can be used in my analysis of ground (a) and ground (b).

New Evidence

12. In *Davies et al (Merilus Technologies Inc.)* BC EST #D171/03, the Tribunal set out the following test regarding the ground for “new evidence”:

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions: (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 potential 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.

13. I adopt the test set out in the above decision as a reasonable statement of a standard to follow in the analysis of whether to give weight to the newly tendered evidence.
14. Hedayati in his first submission tendered a memo dated January 7th, 2009 from Ashley Presidente, the floor manager of the Jupiter Café. This memo was a statement that she witnessed that Hedayati demoted Leakey to the position of a server, that Leakey agreed with this decision and from the date of November 2, 2007 he “never performed management”. Firstly, there was no reason given as to why this statement could not have been given in evidence at the complaint hearing held on November 3, 2008. More importantly however, this evidence is not relevant to the requirement of section 63(3) of the *Act* that written notice be given. Therein the Director wrote that on the issue of the payroll wherein Leakey’s wages had been cut in half from November 1 to 15, 2007 (from manager rate to server), Hedayati acknowledged that he had not given any written notice of this change and had not talked with Leakey about a wage rate at that time. I therefore find Ms. Presidente’s memo is not new evidence that is relevant. Accordingly, there are no justifiable reasons to exercise discretion and accept this evidence as it does not satisfy the test set out above.
15. In Hedayati’s second submission he attaches copies of unentered court orders of hearings held on March 28, 2007 and October 5, 2007, the first which confirm that Hedayati was prohibited from acting as a director of Jupiter until further order of the court and other related conditions; the latter order made by Madam Justice Gray on October 5, 2007 dealt with the process for buy/sell of the shares of Jupiter by the shareholders such that Jupiter’s former shareholders were to run the business until the sale closed; there is no mention in that order of the issue of directorship. However, the order does speak to the continuing liability of the seller to the purchaser for liabilities caused which are not on the financial statements. Additional documents tendered by Jupiter are copies of cheques and legal correspondence relating to the fact that Hedayati bought out the shares of Jupiter and became active in its management on November 2, 2007. There was no reason given as to why these documents were not submitted in evidence at the complaint hearing other than the reason that

Hedayati could not financially afford to hire a lawyer. I find this not to be a sufficient reason - Hedayati has obviously been involved in contentious legal matters previously and was sufficiently sophisticated to manage a business – and he was able to submit those documents in this appeal without any reference by him to the use of a lawyer. Furthermore the submitted documents are not relevant to the fact of the wages and other costs owed to Leakey; Hedayati admits in his submissions that he resumed being a director of Jupiter in November, 2007 and “returned” on November 2, 2007. Under section 18 of the *Act* all wages owed to Leakey were due and payable by his employer within 48 hours of his termination of employment. In this case, Leakey’s employment was terminated on November 25, 2007. There is no submission that Jupiter was not the employer at the time Leakey was terminated from his employment.

16. Furthermore these documents were tendered in support of Hedayati’s submission that he was not a director when Leakey was hired. I am in agreement with the submission of the Director that nothing in the Determination turns on who were the directors of Jupiter at the time Leakey was hired.
17. I therefore find these documents not to be relevant new evidence that would have led the Director to a different conclusion and accordingly they do not satisfy the test for the exercise of discretion for admission into evidence.
18. I need not deal with the documents submitted by Leakey and the Delegate in light of my decision set out below.

Errors of Law

19. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the following definition of “error of law” set out 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;
 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 be reasonable be entertained; and
 5. adopting a method of assessment which is wrong in principle.
20. Hedayati on behalf of Jupiter alleges that the Director erred in law; in particular, he submitted that he was not a director of Jupiter when Leakey was appointed as a manager and “has nothing to do with any wages” due to Leakey before he took over. At the complaint hearing, it was confirmed by Hedayati that there was no written employment agreement, and there only was the implied terms and conditions established by the past practice. Section 97 of the *Act* contains provisions that deal with the status of employees when businesses change hands or assets are disposed of. It reads as follows:

97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of the employees of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

21. Hedayati submitted that his return date to Jupiter was November 2, 2007 and he resumed being a director in November, 2007. The Director in the Determination found wages owed by Jupiter to Leakey pursuant to section 18 of the *Act* from November 1 – 15, 2007, from November 16 – 22, 2007 and from November 23-25, 2007. It is not disputed that when the wages became due to Leakey on November 15, 2007, Hedayati was a director of Jupiter. There is no evidence that Leakey's employment was not continuous and interrupted. The findings of the Director in the Determination in regards to whether Hedayati was or was not a director at various times up to November, 2007 is not material. I therefore find that there was no error by the Director in his finding in this regard.
22. In regards to the Director's finding that Leakey was due wages from November 1 to 15 at the rate of a manager, I have not found the memo from Ashley Presidente to be new evidence for reasons given above. I do not find any err in law by the Director in his reliance on Hedayati's statements that he had not given any written notice to Leakey of a substantial change in employment status as is required under section 63 of the *Act*. There is no submission that the change in Leakey's employment from manager to server was not substantial therefore constituting a termination of employment. I therefore find the Director's finding in this regard was not in error.

Failure to Observe the Principles of Natural Justice

23. Natural justice in practice requires that parties have an opportunity to know the case against them, it includes the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus is on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that he was denied natural justice.
24. I have reviewed the submissions of Hedayati on behalf of Jupiter carefully and find no evidence of such a breach of natural justice. Hedayati has set out some unsavoury allegations about his former partners in the business and Leakey's association with those partners, but an allegation as to Leakey's character traits as a reason for a lack of fairness does not constitute a denial of natural justice. There is no evidence that Hedayati on behalf of Jupiter has been denied a chance to defend his case in a fair manner.

ORDER

25. Pursuant to section 115 of the *Act*, I order the Determination dated December 3, 2008 be confirmed.

Margaret Ostrowski Q.C.
Member
Employment Standards Tribunal