

An appeal

- by -

George Niavis

- 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.: 2007A/7

DATE OF DECISION: April 11, 2007

DECISION

SUBMISSIONS

George Naivis	on his own behalf
Greg Brown	on behalf of the Director of Employment Standards
Bobby Virk	on behalf of Golden Temple Investments Ltd.

OVERVIEW

1. This is an appeal by the George Naivis, pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued January 24, 2007.
2. Golden Temple Investments Ltd. carrying on business as Knight & Day Restaurants (“the employer”) operated a restaurant in Maple Ridge, B.C. On September 1, 2006, the landlord changed the lock and cancelled the lease, and the restaurant closed. 28 employees filed complaints alleging that the employer had failed to pay regular wages, overtime wages, compensation for length of service and vacation pay.
3. Following an investigation, the delegate concluded that the employer had contravened Sections 17, 18, 40, 58 and 63 of the *Act* in failing to pay the employees regular wages, overtime, compensation for length of service and vacation pay for the period August 21, 2006 until September 3, 2006. The delegate awarded the employees, collectively, the amount of \$30,905.12, including interest. The delegate also imposed a \$1,000 penalty on the employer for the contraventions, pursuant to section 29(1) of the *Employment Standards Regulation*.
4. One of the 28 employees, Mr. Niavis, contends that the delegate failed to observe the principles of natural justice in making the Determination. Mr. Niavis says that the delegate erred in calculating his entitlement to vacation pay and compensation for length of service.
5. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I conclude that this appeal can be adjudicated on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

1. Whether the delegate failed to observe the principles of natural justice, and
2. Whether the delegate erred in calculating Mr. Niavis’ wage entitlement.

FACTS AND ARGUMENT

6. All 28 employees filed separate complaints. The delegate contacted each complainant and confirmed the amount of their claims, their wage rates and their hours of work. He also established that none of the complainants were given written working notice, and some were issued cheques that had been dishonoured.
7. The delegate contacted the owner of Golden Temple Investments Ltd., who said that the business had been sold and asserted that the new owner was liable for the wages. The new owner initially expressed a willingness to pay the wages, but suggested she did not have any payroll information necessary to do so. Ultimately, the delegate, as I understand the Determination, explained the liabilities of the parties to the previous owner as well as the new owner. Neither party was willing to pay the outstanding wages.
8. The delegate found that the previous owner's payroll information to be accurate and consistent with the information provided by the employees. The delegate also had regard to payroll cheques that had failed to clear the financial institution on which they were drawn. The delegate determined that neither overtime wages for the final pay period nor vacation pay on those wages had been paid. The delegate also determined that the previous owner had not provided written working notice, nor had he paid compensation for length of service.
9. Mr. Niavis now suggests that the delegate erred in calculating his wage entitlement. He says that he was employed with the employer since 1977, and was entitled to one week's wages as compensation for length of service. The record shows that the delegate awarded him two weeks' compensation, in the total amount of \$369.24. In a reply submission however, Mr. Niavis suggests he is owed \$300 for "two weeks notice" in addition to a "compensation package for length of service by the Law" in an unspecified amount.
10. Although the Determination indicates that each of the complainants confirmed to the delegate that they were paid their vacation pay along with the wages for the July 23 – August 5, 2006 pay period, Mr. Niavis says that the delegate did not properly calculate his vacation pay, and that he did not receive vacation pay for the period June 2005 to September 2006.
11. The delegate provided the "record", and contended that Mr. Niavis was given the opportunity to fully participate in the investigation of his complaint. The delegate says that Mr. Niavis is attempting to have the Tribunal "re-weigh" the evidence already considered, and seeks to have the appeal dismissed.
12. Mr. Virk submitted that Mr. Niavis quit his job as an assistant chef and line cook in September 6, 2005, and that he was paid his full wage entitlement at that time. Mr. Virk said that Mr. Niavis returned to work as a line cook at a lower rate of pay on September 23, 2006, and that his vacation pay entitlement is \$287.11.

ANALYSIS

13. 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; or

(c) evidence has become available that was not available at the time the determination was being made

14. The burden of establishing the grounds for an appeal rests with an Appellant. The Appellant must provide persuasive and compelling evidence that there were errors of law in the Determination, or that the delegate failed to observe the principles of natural justice. In this instance, although Mr. Niavis has framed his issue as a failure to observe the principles of natural justice, his arguments, in substance, allege factual errors. I have addressed both these issues in my analysis.

Natural Justice

15. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. There is no evidence Mr. Niavis was denied natural justice. Mr. Niavis' claim, which was for \$3,956, was investigated by the delegate. The delegate considered the employers' records and found them consistent with the employees' claims. While I note that Mr. Niavis's claim was for substantially more than what he was awarded, Mr. Niavis has not demonstrated he was denied any opportunity to respond to the employer's evidence. Although Mr. Niavis now says that "it would be appropriate an investigation to the accounting records that Mr. Virk holds" (sic), there is no evidence the delegate did not review those records in the course of the investigation and afford Mr. Niavis an opportunity to comment on them.
16. I find no basis to conclude that the delegate failed to observe the principles of natural justice, and deny the appeal on this basis.

Error of Law

17. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
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 reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
18. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
19. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error. Mr. Niavis has not persuaded me that the delegate has made such an error.

20. Mr. Niavis's hourly wage was \$9.50, and he agrees with the delegate's calculation of his hours worked (52.5). Therefore, Mr. Niavis is owed \$498.75, as calculated by the delegate. Mr. Niavis was entitled to compensation for length of service (which Mr. Niavis calls "2 weeks notice") in the amount of \$396.24. Mr. Niavis is not entitled to double recovery on this amount, as he seems to allege. I find no error in the delegate's calculations in this respect.
21. Finally, although the delegate calculated Mr. Niavis' vacation pay only on the unpaid wages rather than his total earnings, as it appears that Mr. Niavis confirmed that he had been paid his vacation pay along with wages for the July 23 – August 5, 2006 pay period. Mr. Niavis provided no information on which I could conclude that the delegate's Determination in this respect was based on no evidence, or on a view of the facts which could not reasonably be entertained. Although he submitted what appeared to be paystubs for a number of pay periods, I am unable to conclude, on this information, that there was an overriding error in the delegate's calculations on Mr. Niavis' vacation pay entitlement.
22. Therefore, I dismiss the appeal.

ORDER

23. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated January 24, 2007, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal