



An appeal

- by -

Persepolis Restaurant & Lounge Corp.
(the “Employer”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2012A/21

DATE OF DECISION: May 7, 2012

DECISION

SUBMISSIONS

Mohsen Elahi on behalf of Persepolis Restaurant & Lounge Corp.
Megan Roberts on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Mohsen Elahi, who I understand to be the sole director and officer of Persepolis Restaurant & Lounge Corp. (the “Employer”). The appeal is filed pursuant to section 112(1)(b) of the *Employment Standards Act* (the “Act”). It would appear, despite the information set out on the Appeal Form, that this appeal was not filed by Mr. Elahi in his personal capacity but, rather, in a representative capacity on behalf of the Employer. It may be, if it has not already occurred, that a section 96 determination will be issued against Mr. Elahi personally. However, the only determination before me in these proceedings is one issued against the Employer on February 24, 2012, requiring it to pay its former employee, Afshin Afarinesh (the “Employee”), the total sum of \$10,098.15 on account of unpaid wages and section 88 interest (the “Determination”). I am proceeding on the basis that Mr. Elahi filed this appeal on behalf of the Employer.
2. The Employer seeks an order cancelling the Determination and referring the Employee’s unpaid wage claim back to the Director of Employment Standards for further investigation. The Employer did not participate in the investigation conducted by a delegate of the Director of Employment Standards (the “delegate”) and now says that the delegate failed to observe the principles of natural justice in making the Determination.
3. As will be seen, I do not consider this appeal to be well founded; indeed, in my view, it borders on being frivolous and vexatious. In any event, my reasons for dismissing this appeal are set out below.

FACTUAL BACKGROUND

4. The Employer formerly operated a restaurant in North Vancouver and the Employee was employed in the restaurant as a cook. The Employee’s position was that he was employed from March 1, 2011, to August 15, 2011, and generally worked 6 days per week, often working 12-hour shifts, but never received his full regular wages let alone his overtime pay. The Employee says that while he did receive some wage statements (and some wage payments), the statements were inaccurate and the payments he received did not reflect his actual earnings. He says that his regular wage was supposed to be \$10 per hour rather than the \$15 per hour set out in some of his wage statements. The delegate calculated the Employee’s unpaid wage entitlement based on the lower \$10 per hour figure.
5. The delegate assigned to investigate the Employee’s complaint was obviously alive to her obligation under section 77 of the *Act* to ensure that the Employer was made aware of the fact of the complaint as well as the broad outlines of the Employee’s unpaid wage claim. To that end, the delegate made various efforts to contact the Employer, and to obtain its position, prior to issuing the Determination. First, the delegate conducted a search of the B.C. Corporate Registry and ascertained the location of the Employer’s registered and records office as well as the identity of, and address for, its principal, Mr. Elahi. The delegate also conducted a search of the federal bankruptcy registry and confirmed that the Employer was not involved in any insolvency proceeding under the federal *Bankruptcy and Insolvency Act*. Second, on February 7, 2012, the delegate mailed, by registered mail, a demand for employment records and a letter outlining the nature of the

Employee's unpaid wage claim. In her letter, the delegate provided both her mailing address and her direct office telephone number. The delegate asked the Employer to respond by no later than February 21, 2012. These documents were sent to the Employer's former business address, to its registered and records office as recorded in the B.C. Corporate Registry, and to Mr. Elahi's personal mailing address as recorded in that same registry. Third, the delegate made several efforts to contact Mr. Elahi by telephone and she also contacted the lawyer who handled the sale of business transaction relating to the restaurant operation. Despite these various efforts, the delegate never heard from Mr. Elahi, or anyone else purporting to represent the Employer, prior to issuing the Determination.

6. I note that the section 122 of the *Act* contains a "deemed service" provision as follows:

- 122 (1) A determination or demand or a notice under section 30.1(2) that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination or demand or the notice under section 30.1(2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.

7. I might also add that the material contained in the section 112(5) "record" shows that the registered letter mailed to the Employer's former business address was successfully delivered by Canada Post but that the letters delivered to Mr. Elahi and to the Employer at the latter's registered and records office were both eventually returned to the Employment Standards Branch as "unclaimed" mail.

8. Since the delegate did not hear from anyone on behalf of the Employer prior to the February 21, 2012, deadline, she proceeded to issue the Determination (along with accompanying "Reasons for the Determination" – the "delegate's reasons") on February 24, 2012. The delegate, in finding in the Employee's favour, relied on his statements as well as some documents he provided in support of his claim. The delegate accepted the Employee's evidence as to his wage rate and hours worked and thus calculated his unpaid wage claim under the *Act* to be \$10,098.15 including interest. The bulk of the unpaid wage claim (\$7,500) represented unpaid overtime pay (before interest and concomitant vacation pay). The Determination also included a further \$3,000 in administrative penalties assessed against the Employer under section 98 of the *Act* for 6 separate contraventions. Accordingly, the total amount payable under the Determination is \$13,098.15.

9. On February 27, 2012, the Determination and the delegate's reasons were sent out by registered mail to the Employer at its former business address and to its registered and records office. These documents were also mailed, by registered mail, to Mr. Elahi personally at the same registered/records office address. Canada Post records contained in the record indicate that the envelope sent to the former business address was successfully delivered but that the letters to Mr. Elahi and to the Employer's registered and records office were both returned to the Employment Standards Branch as "unclaimed" mail.

10. Even though the envelope containing the Determination and Reasons sent to the registered/records office were returned "unclaimed", the Employer obviously received the documents sent to the former business address since Mr. Elahi filed a timely Appeal Form with the Tribunal on March 6, 2012.

REASONS FOR APPEAL

11. Mr. Elahi appended a 1-page memorandum to his Appeal Form in which he makes the following assertions in support of his appeal:
- “My part and evidence was not considered in the [delegate’s] ruling ... as I did not have a fair chance to provide my response to the claim whatsoever prior to the ruling...”;
 - “During the time, which the investigation was taking place, I was not in the country because of a family emergency”;
 - “I no longer have had any affiliation with Persepolis Restaurant & Lounge as I sold the restaurant in October [and] any mail or contact to the restaurant is up to the current management to forward to me at their discretion”;
 - “the Determination was unjustly made without any consideration to my response and solely based upon evidence and allegations submitted by the opposing party ultimately making the ruling a one-sided judgment”; and
 - “The Determination is the only documentation I have actually received and been able to review.”
12. In a final reply submission, Mr. Elahi made some further allegations most of which were not at all proper reply submissions – and for this reason, I allowed the delegate to file a final response to these further allegations. These further allegations included an assertion that he was “out of the country” due to a “family emergency” when the investigation was underway; that the Employee’s claim was fabricated, at least in part; that the Employee was an “irresponsible and unaccountable employee” and that he resigned without giving proper notice. Mr. Elahi also identified a wholly inconsequential typographical error in the delegate’s reasons and finally asserted that he had lost quite a sum of money as a result of his involvement in this business – an assertion that is not relevant to the Employee’s unpaid wage claim or, more importantly, to the “natural justice” issue that is now before me in this appeal.

FINDINGS AND ANALYSIS

13. The delegate was under a statutory duty to investigate the Employee’s complaint in an expeditious and fair manner. The Employer appears to have been fixed and determined to simply avoid the matter altogether. I wonder what more could have been asked of the delegate in these circumstances. The delegate conducted appropriate searches, left several telephone messages for Mr. Elahi, and sent out relevant documents to separate addresses by registered mail. The Employer ignored all reasonable attempts to communicate with it.
14. Further, there are deemed service provisions in the *Act* and the delegate was quite rightly entitled to rely on those provisions. Mr. Elahi, for the Employer, says he was out of the country but has not provided a scintilla of evidence to support that assertion. When was he away? Where was he? Is there any corroborating documentation to confirm the absence? The silence in response to these sorts of questions is highly problematic.
15. The Employer is a registered corporation and as such has an obligation to maintain a registered and records office and persons wishing to deal with the corporation have a right to rely on the corporate registry’s records regarding the location of those offices. In addition, section 9 of the *Business Corporations Act* provides that records may be validly served on a corporation by registered mail delivered to its registered and records office. Although the restaurant business may have been sold, Mr. Elahi could have made arrangements with

the new owner to forward mail or, better still, with Canada Post to have such mail redirected to a new address of his own choosing.

16. If – and I am extremely sceptical about the assertion – Mr. Elahi was not aware that the delegate was undertaking an investigation in February of this year relating to the Employee’s unpaid wage complaint, then he only has himself to blame for that state of affairs.
17. In my opinion, there was no failure on the delegate’s part to observe the principles of natural justice in this case. I find that the delegate fully complied with the dictates of section 77 of the *Act*.

ORDER

18. Pursuant to section 115(1)(A) of the *Act*, the Determination is confirmed as issued in the total amount of \$13,098.15 together with whatever additional interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal