

An appeal

- by -

Marcello Ristorante & Pizzeria Ltd. carrying on business as
Marcello Pizzeria and Restaurant
("Marcello")

- 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.: 2010A/11

DATE OF DECISION: April 20, 2010

DECISION

SUBMISSIONS

Elizabeth Reid

Counsel for Marcello Ristorante and Pizzeria Ltd. carrying on business as Marcello Pizzeria and Restaurant

J. R. Dunne

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Marcello Ristorante and Pizzeria Ltd. carrying on business as Marcello Pizzeria and Restaurant, (“Marcello”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued December 17, 2009.
2. Pascal Christeller worked for Marcello from February 16, 2009, to May 1, 2009, as a waiter. Mr. Christeller filed a complaint alleging that Marcello had contravened the *Act* in requiring him to pay costs on behalf of the employer.
3. The Director’s delegate held a hearing into Mr. Christeller’s complaint on November 3, 2009. Mr. Christeller appeared on his own behalf. Marcello Lombardo, the owner of Marcello, appeared on behalf of the employer.
4. The delegate determined that Marcello had contravened Section 21 of the *Act* in requiring Mr. Christeller to pay costs on behalf of the employer and found Mr. Christeller entitled to wages and interest in the total amount of \$608.62. The delegate also imposed a \$500 penalty on Marcello for the contravention pursuant to section 29(1) of the *Employment Standards Regulation*.
5. Marcello contends that the delegate erred in law in arriving at this conclusion. Marcello also contends that the delegate failed to observe the principles of natural justice in making the Determination. Marcello also requested a suspension of the Determination until the appeal is decided, a request which was granted by the Tribunal.
6. The delegate contends that the appeal is without merit and seeks to have the Determination confirmed.
7. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 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). This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination

ISSUES

8. 1. Whether or not the delegate acted on a view of the facts that could not be reasonably entertained in concluding that Marcello had required Mr. Christeller to pay Marcello’s business costs; and
9. 2. Whether or not the delegate failed to comply with the principles of natural justice in not allowing Marcello a full opportunity to know the case it had to meet and a fair opportunity to respond.

FACTS AND ARGUMENT

10. The evidence and factual findings of the delegate are as follows.
11. At the end of each night of work, Mr. Christeller paid into a tip pool which was then allocated between the busser, bartender, hostess, food runner and drink runner. In addition to contributing to the “tip pool”, Mr. Christeller was required to tip the house an amount that was equal to 2% of his gross sales which the employer then paid out to the kitchen staff. It was the employer’s experience that wait staff received an average of 12.5 % of their gross sales in the form of tips so it used this figure as a proxy for actual tips to simplify the tip sharing amount calculations. Mr. Christeller acknowledged that at no time did he have to pay more money to the tip pool and the house tip than he actually received in tips from customers.
12. Mr. Lombardo said that the house tip was distributed to the kitchen staff in the form of a bonus because those employees were not part of the tip pool. It was Mr. Lombardo’s evidence that, on occasion, the money from the house tip was used to pay people who swept sidewalks or washed the windows, and that these payments were made in cash.
13. The delegate noted that while gratuities were not considered wages under the *Act*, if an employer used gratuities to pay for its business costs, they would be deemed wages. The delegate determined that the gratuities paid at Marcello were direct gratuities, and as such, did not constitute wages. He also determined that while tip pooling or sharing policies did not contravene the *Act*, if an employer used gratuities to cover its business costs, such use would constitute a contravention of sections 21(2) and 21(3) of the *Act*.
14. The delegate found that Marcello was intimately involved in the tip pool business given that the house tip was based on total sales rather than gratuities and that it was a policy that servers contribute to the house tip. The delegate found that Marcello’s involvement in the tip pool arrangement was not a contravention of the *Act*. However, he concluded that Marcello’s payment of a bonus to the kitchen staff from the house tip did contravene the *Act* on the basis that such a policy “had the effect of increasing the wages of the kitchen staff through the payment of discretionary bonuses which come not from the gratuities received directly though a tip sharing scheme, but rather are paid by the restaurant as wages”. The delegate concluded that the mandated contribution to the house tip was simply a way of passing on some of the payroll costs to the servers.

Error of law

15. Counsel for Marcello says that the delegate erred in this conclusion. She contends that the bonus did not come from Marcello but from the customers, and thus does not fall within the definition of wages. She submits that the fact that the employer collected the kitchen’s share of the tips and distributed them did not change their character as tips, as the distribution method was done for administrative convenience only.
16. Counsel submits that the delegate correctly decided that there was nothing improper about a tip sharing policy. She says that in having the servers contribute to a house tip, Marcello was not asking them to contribute to payroll. However, she submits that there is no legal basis for the delegate to distinguish between the floor staff gratuities (the “tip pool”) and the kitchen staff gratuities (the “house tip”) and that the delegate erred in concluding that Marcello required Mr. Christeller to contribute to its payroll from his tips.
17. Counsel further submits that the delegate misunderstood Mr. Lombardo’s evidence regarding the use of house tip funds to pay for window cleaning and sweeping sidewalks. Counsel submits that, in fact, Mr. Lombardo raised this example in response to Mr. Christeller’s argument that the restaurant did nothing to

help Mr. Christeller earn tips. Counsel says that, in fact, all of the house tips go to kitchen staff and that the window cleaning and sidewalk sweeping costs are paid from sales revenue. Mr. Lombardo's affidavit on these points was attached to the submissions.

18. The delegate contends that the Determination is an accurate record of the hearing. He says that counsel is incorrect in contending that tips given to the kitchen staff do not come from the employer but from customers. He says that Mr. Lombardo presented, as part of his evidence, two cheques as evidence that money from the house tip was paid as bonus to the kitchen staff. The delegate submits that it is clear that Mr. Lombardo is using money collected from the "house tip" to supplement the wages of kitchen staff.
19. The delegate also denies that he misunderstood Mr. Lombardo's testimony about the house tip money being used to pay for window cleaning and sweeping the sidewalk. He said that Mr. Lombardo's evidence on this point was in response to questions from the delegate, not in response to Mr. Christeller. The delegate contends that the appeal is simply an attempt to re-argue the case on its merits.
20. In reply, Marcello's counsel acknowledged that Mr. Lombardo put into evidence two cheques written on the company account that expressly say "bonus" on them. However, she submits that the cheques did not come from the house tip but from the restaurant's general operating funds and that the delegate misunderstood that the money came from the house tip. Marcello's counsel states that Marcello collects the house tip and then distributes it to the kitchen staff in cash. She submits that in addition to the house tip, kitchen staff receive bonuses paid out from the restaurant's general account. She says that the kitchen staff are part of the regular tip pool although they are not paid out immediately, as wait staff and bartenders are. Counsel further submits that even if the "bonus" money came from the house tip, Mr. Lombardo was simply the "middle man". She submits there is no basis in law for concluding that the tips collected for the kitchen staff change in character simply because Mr. Lombardo acts as a conduit to distribute them and the delegate has provided no logical basis for that conclusion. A second affidavit from Mr. Lombardo was attached to the reply submissions.

Failure to observe principles of natural justice

21. Marcello's counsel further contends that the delegate failed to observe the principles of natural justice in not giving it a fair opportunity to meet the case against it. She says that the only issue raised in Mr. Christeller's complaint read as follows:

Forced to give 2% of overall sales to owner. Paying owner to work.

22. Counsel contended that Mr. Lombardo had never received an Employment Standards complaint in the 10 years he owned the restaurant and that he had never participated in proceedings at the Branch. She submits that Mr. Lombardo understood Mr. Christeller's complaint was that he was being forced to give his own money to Marcello, and that he addressed this issue in response to Mr. Christeller's request for payment. She contended that Mr. Lombardo also understood this was to be the issue at the hearing of the complaint and that the issue of improper payment of business costs under s. 21 of the *Act* was never raised in the original complaint nor, to Mr. Lombardo's recollection, was it raised during the hearing before the delegate. Mr. Lombardo's affidavit on these points accompanied counsel's submissions.
23. Consequently, counsel submitted that the employer did not know the full case against it and did not have a reasonable opportunity to respond. Counsel says that although the delegate believed that section 21 would be an issue at the hearing, he failed to communicate that to the parties in advance. Further, counsel argued that even if the issue was raised at the hearing, it was unfair to Mr. Lombardo to proceed given that he was unrepresented and was participating in English, his second language. She argued that the delegate ought to

have raised the issue and rescheduled the hearing at a later date to allow the parties to review section 21 and obtain such advice and evidence as they thought necessary.

24. The delegate submitted that, contrary to the statements Mr. Lombardo's sworn affidavit, there have been 10 complaints against Marcello in the past 10 years, one of which resulted in a Determination against Marcello. The delegate says that he reviewed the notes of the delegate who first had contact with Mr. Lombardo about the complaint and confirmed that Mr. Lombardo was advised about section 21 of the *Act*. Further, he says that the delegate faxed Mr. Lombardo information about section 21 as part of the education package for the mediation session between the parties. He submits that to say Marcello was unaware of the complaint issues would be to ignore the educational information provided by the delegate during initial discussions with Mr. Lombardo, the written information provided to him and the mediation session that was held between the parties.
25. Further, the delegate says that at no time did Mr. Lombardo have difficulty expressing himself at the hearing or advise the delegate that he did not understand the evidence or the proceedings.
26. In reply, counsel for Marcello states that Mr. Lombardo struggles to express himself well in English, that Mr. Lombardo did not understand the case against him, and that Mr. Lombardo did not understand what documents or other evidence he would need to make his case. She acknowledges the discrepancy between Mr. Lombardo's affidavit and the Director's records and says that Mr. Lombardo understood "proceedings" to mean a challenge to the Director's Determination. In Mr. Lombardo's second affidavit, he deposes that what he meant to say in response to the Determination is that he had never had a section 21 complaint against him previously.

ANALYSIS

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
28. The burden of establishing the grounds for an appeal rests with an Appellant. Marcello must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to comply with the principles of natural justice.
29. I have concluded that Marcello has not demonstrated either a denial of natural justice or an error of law.

Natural Justice

30. Mr. Lombardo says that he did not understand the case he had to make because the delegate failed to comply with the principles of natural justice in communicating that to him or affording him an adjournment so he could seek assistance in doing so. In Mr. Lombardo's first affidavit, he deposed that "*this was the first and only time that my restaurant has received a complaint against it...*" This statement is, at best, misleading. Mr. Lombardo did not dispute the delegate's statement that Marcello had been the subject of at least 9 prior complaints with at least one of them resulting in a Determination against him so it is clear that he has had some experience with the process. Mr. Lombardo also did not dispute that he participated in a mediation session with a

Branch mediator prior to the hearing at which the issues were canvassed. I accept that Mr. Lombardo was provided with information sheets on both the requirements of the *Act* as well as the hearing process. I find that Mr. Lombardo was aware that he could have been accompanied by someone who could assist him with the process if he felt that necessary. While I accept that Mr. Lombardo's English may be imperfect, the fact is that he operates a successful business with English speaking staff. There is no evidence that he demonstrated any language difficulties in the mediation or the hearing. I do not accept his assertion that the delegate misunderstood his evidence because of his accent. I also note that Mr. Lombardo had the advice and assistance of counsel in preparing the affidavit in which he deposed that Mr. Christeller's complaint was *the first and only* time the restaurant had been the subject of a complaint. This misleading assertion is not a result of Mr. Lombardo's English language skills.

31. I find that Mr. Lombardo was aware of the issues in the hearing and was given full opportunity to respond to them. I dismiss the appeal on this ground.

Error of Law

32. 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

33. 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.

34. 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.

Factual findings

35. Marcello challenges the delegate's factual findings about how the house tips are distributed to the kitchen staff. As recorded by the delegate, Mr. Lombardo stated that the money received as the "house tip" goes to kitchen staff in the way of bonuses, and provided cancelled cheques as evidence of this method of payment. In his initial affidavit, Mr. Lombardo deposed that all of the money collected for the house tip was distributed to the kitchen staff. In Mr. Lombardo's second affidavit, he states that the bonuses are separate from the house tips that he collects and distributes to the kitchen staff. He deposes that the bonuses are paid from the restaurant's general account and that the kitchen staff are part of the regular tip pool. Mr. Lombardo's evidence about the nature and method of payment of the house tip is inconsistent, even after receiving advice from counsel. In light of these inconsistencies, I find no basis for concluding that the delegate made a palpable or overriding error.

Misinterpretation or misapplication of a section of the Act

36. Wages is defined in the *Act* to include

(a) salaries, commissions and money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

...

but does not include

(f) gratuities

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency

...

37. Section 21 of the *Act* provides

(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

38. It is not a contravention of the *Act* to require employees to pay a monetary percentage into a tip pool, the proceeds of which are shared with employees who do not receive tips. (*Faux*, BC EST # D150/00)

39. Gratuities are payments for service that are discretionary and not related to an employee's hours of work, production or efficiency and are not considered wages. (*Pfeffer*, BC EST # D504/02) If the payments are guaranteed, or are related to hours worked and efficiency, they will be considered wages.

40. There is no evidence Marcello's directly or indirectly withheld, deducted or required payment of Mr. Christeller's wages for any purpose. Although Mr. Christeller was required to pay a percentage of his tips into a common pool, the delegate concluded, correctly, that those tips did not constitute wages.

41. Bonuses are paid based on the efficiency, production or hours of work of an employee. As such, they constitute wages and are part of an employer's business cost. Mr. Lombardo's initial evidence was that kitchen staff were paid their share of the house tip as a bonus. While I may have been prepared to accept that Mr. Lombardo erroneously characterized the payment of kitchen staff's portion of the house tip as a "bonus" when in reality, it was simply his way of "redistributing" the tip pool, he later deposed in a reply submission that the bonuses were separate from the house tips and that kitchen staff were part of the regular tip pool. Given the inconsistencies in the evidence and in light of my conclusion about the delegate's factual findings, I am also unable to conclude that the delegate misinterpreted or misapplied section 21 of the *Act*.

42. I deny the appeal.

ORDER

43. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 17, 2009, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal