

An appeal

- by -

KPRE Venture Corp. carrying on business as Black Garlic Bistro
(“BGB”)

- 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.: 2013A/20

DATE OF DECISION: June 11, 2013

DECISION

SUBMISSIONS

Kristin Passmore

on behalf of KPRE Venture Corp. carrying on business as
Black Garlic Bistro

OVERVIEW

1. This is an appeal by KPRE Venture Corp. carrying on business as Black Garlic Bistro (“BGB”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued February 15, 2013. In that Determination, the Director ordered BGB to pay its former employee, Michael England, \$4,054.69 in wages, vacation pay, statutory holiday pay, unauthorized deductions from wages and interest. The Director also imposed six administrative penalties in the total amount of \$3,000 for BGB’s contravention of sections 16, 17, 21, 28, 40 and 46 of the *Act*, for a total amount payable of \$7,054.69.
2. BGB appeals the Determination contending that the delegate erred in law and failed to comply with principles of natural justice in making the Determination. BGB also contends that evidence has become available that was not available at the time the Determination was being made.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based on BGB’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under Section 114 (1), the Respondent and the Director may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed and the Determination will be confirmed.

FACTS AND ARGUMENT

5. Briefly, the facts and argument before the delegate are as follows.
6. Michael England worked for BGB from November 13, 2011, to December 30, 2011. On June 28, 2012, Mr. England filed a complaint with the Employment Standards Branch alleging that BGB had failed to pay him wages, including regular wages, overtime wages, statutory holiday pay and vacation pay. Mr. England also alleged that BGB withheld amounts from his wages for living accommodations without his written authorization.
7. The delegate held a hearing into Mr. England’s complaint on January 8, 2013. At issue before the delegate were whether or not Mr. England was a manager, whether he had been paid all wages he was entitled to, and whether BGB had unlawfully deducted rent from his wages.
8. Ms. Passmore, BGB’s sole director, appeared on behalf of BGB. She argued that Mr. England was not entitled to overtime wages and statutory holiday pay because he was a manager as defined by the *Act*. She also argued that the salary and vacation pay Mr. England received satisfied the requirements of the *Act*.

9. Ms. Passmore did not dispute that BGB had deducted \$900 from Mr. England's wages, but claimed that Mr. England and Robert Erickson, a former BGB director, verbally agreed to this deduction.
10. Mr. Erickson offered Mr. England employment at BGB as a sous-chef at an annual salary of \$24,000. Mr. England understood his primary duties were cooking and overseeing kitchen responsibilities when Mr. Erickson was absent. Mr. England testified that, despite his title, his role was better understood as an assistant chef. Mr. England denied that he was a manager, as his primary function was cooking. He did not create the bistro's menus nor made decisions about daily specials. While Mr. England purchased food, supplies and tracked inventory, these tasks were performed to ensure the kitchen was prepared.
11. Ms. Passmore argued that Mr. England was a manager, contending that he was responsible for the bistro's kitchen, including creating the menus, cooking, training other staff, purchasing food and supplies, developing recipes and providing support for tracking inventory.
12. There was no dispute that Mr. England never disciplined or terminated the employment of any other employee or that he had any control over BGB's finances.
13. Mr. England arrived at BGB on November 2, 2011, for the bistro's opening but discovered that the bistro was still undergoing renovations. Mr. England testified that he assisted with the renovations on November 3, 2011, and on November 15, 2011, preparing for a promotional opening. The Bistro opened to the public on November 17, 2011, with hours of operation between 11:30 am and 11:00 p.m.
14. On December 12 or 14, Mr. Erickson quit after a dispute with Ms. Passmore, and Mr. England assumed all of the cooking responsibilities after that time. Mr. England testified that he regularly worked each day in excess of 12 hours. He contended that he worked 33 consecutive hours from 3:00 pm December 23, 2011, until 12:00 am December 25, 2011, preparing dishes for the Christmas special. Mr. England provided the delegate with a record of his hours of work.
15. Although BGB did not maintain a record of Mr. England's hours of work, Ms. Passmore disputed Mr. England's record. While she did not deny that Mr. England worked every day and that he worked long hours, she noted that he took regular smoke breaks that had not been accounted for. She contended that if Mr. England had not been a "salaried manager" she would not have allowed him to work long hours. Ms. Passmore further asserted that Mr. England had been overpaid by \$200 in December.
16. The delegate heard from two witnesses on BGB's behalf. The first was a director of Meranti, the company hired by BGB to renovate the bistro, the second was Ms. Passmore's mother, Celeste McLaren, who worked for Meranti and provided bookkeeping services to BGB.
17. The delegate concluded that Mr. England was not entitled to wages from November 3 – 11, 2011. He found Mr. England's evidence that he assisted with renovations to be both implausible and contradicted by BGB's witness. The delegate noted that the only evidence Mr. England performed this work was Mr. England's oral evidence along with his record of hours worked. The delegate expressed concern about the reliability of Mr. England's record, noting that it showed two 16 hour shifts on November 11 and 12, finishing at 4:30 a.m. He found these records "not within the range of acceptable probabilities", given that Mr. England offered little evidence to corroborate the work performed during these shifts.
18. The delegate found no evidence Mr. England participated in the control, supervision or administration of BGB business affairs or that he was employed in an executive capacity, and determined that Mr. England was not a manager.

19. The delegate noted that BGB was required to maintain a daily record of Mr. England's hours of work, regardless of whether or not he was paid a salary. In the absence of any employer records, the delegate considered, and rejected, Mr. England's record. The delegate determined Mr. England's records to be unreliable, as there was "no corroborating evidence to prove the charted hours of work would be identical to the notebook". The delegate also noted that the records were copies of the original source, which was a notebook that Mr. England was unable to produce to the delegate. The delegate expressed concern about the authenticity of the copy and whether or not it was made contemporaneously. Rather than relying on Mr. England's records, the delegate chose to make findings on "the balance of evidence provided by the parties regarding the nature of Mr. England's job and the operation of the business."
20. The delegate concluded that, because BGB paid Mr. England wages for work performed between November 13 - 30, 2011, Mr. England did provide labour and services prior to the bistro opening on November 17, 2011. He therefore concluded that Mr. England did work on November 13, 14, 15 and 16, but in the absence of a reliable record of hours, determined that he was entitled to two hours minimum daily pay for November 13, 14 and 16, and six hours on November 15. The delegate arrived at this conclusion based on Ms. McLaren's testimony that the bistro's promotional opening started at 5:00 p.m. and Mr. England typically cooked until 11 p.m.
21. The delegate noted that there was no dispute that Mr. England handled cooking responsibilities on a daily basis for the period November 17 to December 30, 2011, and that the bistro's hours of operation were from 11:00 a.m. until "late" and that last call for orders was 10:00 p.m. The delegate concluded, on a balance of probabilities, that Mr. England worked Sunday through Saturday 11:00 a.m. until 11:00 p.m. from November 17, 2011, until December 30, 2011, with the exception of Christmas Day. The delegate accepted Mr. England's evidence that he worked from 2:15 p.m. until 12:30 a.m. on that day as it was undisputed by BGB. The delegate rejected Mr. England's assertion that he worked 33 consecutive hours from December 23 to December 25, 2011. The delegate determined that Mr. England worked no more than 12 hours per day on December 23 and 24, 2011.
22. The delegate found that Mr. England's wage rate, based on his hours of work and his annual salary, was below the minimum wage prescribed by the *Employment Standards Regulation* ("Regulation"). The delegate also determined that Mr. England had not been paid statutory holiday pay for Christmas day. The delegate concluded that Mr. England was entitled to wages in the amount of \$2,905.06.
23. The delegate also found that there was no dispute that BGB deducted \$900.00 from Mr. England's wages for living accommodations. He determined that as this deduction was made without any written authorization from Mr. England it contravened section 21 of the *Act*.

Argument

24. In her appeal submissions, Ms. Passmore contends that the delegate erred in law in finding that Mr. England was not a "salary manager" and was therefore paid in full for his hours of work. She contends that, in the absence of a head chef, a sous-chef is required to fulfill the duties of a manager. She contends that Mr. England was responsible for "supervising and directing human and other resources" at an executive capacity.
25. BGB also contends that although BGB was obliged to pay Mr. England semimonthly under section 17 of the *Act*, BGB was unable to do so because Mr. England refused to provide necessary information and paperwork.

26. Ms. Passmore contends that the deductions from Mr. England's salary for rent were made with Mr. England's authorization even though there was no written agreement.
27. Ms. Passmore argues that the delegate failed to observe the principles of natural justice. She submits that the mediation process was unfair and unjust and that the mediator was an advocate for Mr. England. Ms. Passmore further argued that the adjudication process was biased. As I understand Ms. Passmore's argument, after finding Mr. England's record of hours of work to be unreliable, the delegate ought to have rejected all of his evidence on the basis that it was not credible. Ms. Passmore says that "the entire process only supported in favor of the 'employee'."
28. Finally, Ms. Passmore says that evidence has become available that was not available at the time. She says "there are more witness statements I would like to submit to prove that everything I claim is in fact true". On April 3, 2013, the Tribunal's Appeal Manager wrote to BGB, stating that, after a review of the appeal documents, the Tribunal had left a telephone message requesting that BGB submit the documents referred to in the appeal submission no later than April 10, 2013. The Tribunal did not receive any additional documents from BGB by April 12, 2013.

ANALYSIS

29. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
30. Having reviewed the Section 112 record and BGB's submissions, I dismiss the appeal.
31. 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;
 - evidence has become available that was not available at the time the determination was made.
32. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I conclude that BGB has not met that burden.
33. I will address each of BGB's grounds of appeal separately.

Error of Law

34. BGB contends that the delegate erred in law in concluding that Mr. England was not a manager. I am not persuaded the delegate erred in his conclusion.
35. The burden of establishing that a person is excluded from the protection of the *Act* or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion. (see *Northland Properties Ltd.*, BC EST # D423/98).
36. Section 34(1)(f) of the *Regulation* provides that Part 4 of the *Act* (that part relating to overtime wages) does not apply to a manager. Section 1 of the *Regulation* defines “manager” to be:
- (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
 - (b) a person employed in an executive capacity.
37. The issue of whether a person’s primary employment duties consisted of supervising and directing other employees was addressed by the Tribunal in BC EST # RD479/97 *Director of Employment Standards (re Amelia Street Bistro)*. In the decision, the Tribunal said that a conclusion as to whether a person falls within s. 1(a) provisions:
- ...depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a “manager”. That would be putting form over substance. The person’s status will be determined by law, not by the title chosen by the employer or understood by some third party.
38. The Tribunal has said that, in order to be employed in an executive capacity, the person must have duties that relate to active participation in control, supervision and management of the business.
39. In my view, the delegate correctly assessed the evidence in light of the *Act* and Tribunal jurisprudence. Although BGB is unhappy with the result, Ms. Passmore’s submission consists of nothing more than a re-statement of the position she took at the hearing. As the Tribunal has repeatedly stated, an appeal is not an opportunity to re-argue a dispute that has already been argued before the delegate. I find this ground of appeal without merit.
40. The delegate also concluded that BGB had made a deduction from Mr. England’s wages in respect of his rent without his written consent, contrary to section 21(1) of the *Act*. Although BGB argues that the delegate erred in his conclusion, BGB conceded that it did not have Mr. England’s written permission to deduct any portion of his wages. I also find this ground of appeal without merit.

Natural Justice

41. 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.

42. BGB asserts that the mediation was “unfair and unjust”. Mediations are voluntary “off the record” discussions on a “without prejudice” basis. As the mediator is not a decision maker, any allegations of bias have no foundation. In any event, as the mediation did not lead to a resolution of the dispute, the complaint proceeded to an adjudication hearing on the merits.
43. BGB also asserts that the adjudication process was “bias”. BGB submits that the delegate was biased against BGB when he accepted aspects of Mr. England’s claim after finding that Mr. England’s records to be unreliable.
44. BGB failed to provide records it was statutorily obliged to maintain, leaving the delegate with no choice but to arrive at a reasoned assessment of Mr. England’s hours of work. As I understand the Determination, the delegate rejected Mr. England’s records in part because they were unreliable, in part because they appeared to be overstated and in part because they were not made contemporaneously. However, the Employer’s witnesses as well as Ms. Passmore herself confirmed other aspects of Mr. England’s claim. The parties did not disagree that Mr. England worked long hours after Mr. Erickson left the bistro abruptly. In my view, the delegate fairly weighed all the evidence before him and made his own assessment as to Mr. England’s hours of work. I find no reason to interfere with his conclusion, nor can I find any evidence that his reasoning exhibited a bias against the Employer.

New Evidence

45. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- (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.
46. Although the Tribunal requested that BGB provide its new evidence no later than April 10, 2013, no new information was provided. I therefore find no basis for the appeal on this ground.
47. Accordingly, the appeal is dismissed.

ORDER

- ^{48.} Pursuant to Section 115 (1)(a) of the *Act* the Determination, dated February 15, 2013, is confirmed in the amount of \$7,054.69, 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