An appeal

- by -

All India Restaurants & Sweets (2001) Ltd.
(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: Robert E. Groves

FILE No.: 2012A/33

DATE OF DECISION: June 13, 2012

DECISION

SUBMISSIONS

Gurbakhsh Singh Khatkar	on behalf of All India Restaurants & Sweets (2001) Ltd.
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. In this appeal, All India Restaurants & Sweets (2001) Ltd. (the "Employer") challenges a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated February 24, 2012.

2. The Determination followed an investigation of a complaint filed by Subash Mankatala ("Mankatala"), a former employee of the Employer, alleging that the Employer had contravened the *Employment Standards Act* (the "*Act*") when it neglected to pay Mankatala all his wages for the work he had performed while employed.

3. The Delegate found that the Employer had contravened sections 17, 40, 45, and 58 of the *Act* as it had not paid Mankatala regular wages, overtime pay, statutory holiday pay and annual vacation pay as required. Together with interest, the Delegate determined that the Employer owed Mankatala $11,391.04.

4. In addition, the Delegate imposed three $500.00 administrative penalties.

5. The total owed by the Employer was, therefore, $12,891.04.

6. I have reviewed the Determination, the Reasons for the Determination, the Employer's Appeal Form and supporting material by way of submission, the record the Director has delivered pursuant to section 112(5) of the *Act*, and a submission from the Delegate.

7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

8. The Employer operates a restaurant. Mankatala was employed as a sweet maker at the restaurant until February 2010. Different dates for the commencement of his employment are referred to in the Reasons for the Determination, but there appears to be no dispute that Mankatala began his work for the Employer no later than March 2008.

9. In his complaint, Mankatala alleged that he worked ten hours per day, from 9:30 am until 8:00 pm, six days a week, throughout the period of his employment. He said that he was not paid for all his regular hours worked. He also said that he never received payment for the overtime hours he put in.

10. The Employer's position was that it had paid Mankatala all his wages up to the date in February 2010 when the Employer said that Mankatala quit. In support of this position, the Employer delivered to the Delegate its payroll records for Mankatala for the last six months of his employment. Those records stated that Mankatala was paid semi-monthly, on the 15th and last day of each month. For each pay period, apart from the last one, Mankatala was paid for 80 hours of work, at an hourly rate of $11.88. For the final pay period, Mankatala was only paid at his hourly rate for 64 hours of work.

11. The Delegate noted that the payroll records nowhere indicated that the Employer had paid Mankatala statutory holiday pay, notwithstanding that the evidence from the Employer was to the effect that Mankatala worked eight hours per day, Monday to Friday.

12. The Employer also supplied a copy of the Record of Employment it issued to Mankatala. The ROE stated that Mankatala had been employed from March 14, 2008, until February 26, 2010, and that Mankatala's insurable hours for that period were 1520.

13. The Delegate asked the Employer to provide daily records of hours worked by Mankatala. The Employer provided a handwritten summary stating that Mankatala worked an eight hour shift from 10:00 am until 6:00 pm Monday to Friday. The summary was incomplete. It did not show Mankatala's daily hours of work. Instead, it was a weekly summary, but only for every second week, covering the period from August 23, 2009, to February 26, 2010. Each entry referred to a single weekly period of 40 hours, eight hours per day, with no overtime hours worked.

14. A further query from the Delegate as to Mankatala's hours of work elicited the response from the representative of the Employer that Mankatala's duties only involved sweet making so his hours of work were driven by the volume of sweets required. If, then, the restaurant was overstocked with sweets, Mankatala might have three or four days off.

15. The Employer referred the Delegate to its accountant. When the Delegate spoke to the accountant he was advised that the payroll for the restaurant operation was prepared from information supplied by the Employer, and that all full-time employees were paid on a semi-monthly basis, with each pay period stipulated to include 80 hours of work, as this was what the Employer could afford.

16. The record indicates that the Delegate wrote to the Employer on October 14, 2011, expressing his views on the evidence received to that date. The position of the Delegate is captured in the following excerpts from that letter:

> As I have been given contradictory accounts of hours worked, the assessment of what wages...are owed will depend on which set of records are most believable. The payroll records submitted by the Employer show that Mr. Mankatala was paid for 2 pay periods each month, one from the 1st to the 15th and one running from the 16th to the end of the month. In each of these periods he was paid for 80 hours. You then provided daily records of hours worked which show that he worked 8 hours per day, 5 days per week from Monday to Friday throughout the period in question. The trouble with the Employer's records is that these two sets of records do not match. If I take, for example, the period 16-31 August 2009, the payroll shows that Mr. Mankatala worked 80 hours in total, whereas he would have actually worked 88 hours if he worked 8 hours per day, Monday through Friday. The same problem arises in the second pay period in September, October and November as well as the first pay period in January 2010.
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> The conclusion that I would draw from this is that the Employer would pay Mr. Mankatala 80 hours in each semi-monthly period regardless of what hours he actually worked. I would further conclude that the Employer's records of hours worked were not reliable and that I should instead rely on the records of Mr. Mankatala...

> Please review all of this and get back to me to discuss how ee (*sic*.) move forward in dealing with [this] complaint[]...

17. There is no indication in the record that the Employer responded to this correspondence. A copy of it was forwarded to the Employer by the Tribunal as the appeal was processed. Nowhere has the Employer stated it was not received. The Employer has provided no comments regarding it in its material submitted for the purposes of this appeal.

18. The Reasons for the Determination echoed the Delegate's reservations concerning the reliability of the Employer's payroll records. The Delegate said this:

> I find that the contradictions in the Employer's various versions of Mr. Mankatala's hours of work raise sufficient questions that I cannot rely on those records. This leaves me with three options. I can accept Mr. Mankatala's claim that he worked 10 hours per day and 6 days per week as the best available evidence with respect to hours of work. I could determine that the facts support a different conclusion with respect to hours of work. I could find that there is not enough evidence to establish what hours were worked.
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> With respect to the second option, there is nothing in the evidence available which would provide the basis for an alternative assessment of hours worked. With respect to the third option, this would amount to an arbitrary rejection of Mr. Mankatala's claim without any evidence other than the Employer's unreliable records to challenge his assertion. Mr. Mankatala's claim is not patently unreasonable on the surface and accordingly, I find that Mr. Mankatala worked 10 hours per day, 6 days per week with Mondays off throughout the 6 month period covered by this complaint, 27 August 2009 to 26 February 2010, inclusive.

19. The Determination attached a calculation of the amounts owed to Mankatala based on the Delegate's findings. I do not discern that the Employer challenges the Delegate's arithmetic. However, it does say that the legal basis for the Delegate's award is incorrect.

ISSUE

20. Has the Employer established that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

21. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 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:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

22. Section 115(1) of the *Act* should also be noted. It says this:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

(a) confirm, vary or cancel the determination under appeal, or

(b) refer the matter back to the director.

23. The Employer alleges that the Determination should be cancelled on the basis of all three appellate grounds set out in section 112(1).

24. I will deal with the Employer's assertions in reverse order.

25. I see nothing in the documentary material attached to the Employer's submission on appeal that would satisfy the requirements of section 112(1)(c). It consists of a written argument, which is not evidence. It also attaches some of the payroll records that the Employer delivered to the Delegate during the course of his investigation. For that reason, it cannot be described as evidence that is "new". This ground of appeal must fail.

26. The Employer also relies on section 112(1)(b). A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by a delegate was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case it is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if, as occurred here, an investigation is conducted, the Director, and a delegate acting on her behalf, must make reasonable efforts to give a person under investigation an opportunity to respond.

27. A review of the material before me shows no failure on the part of the Delegate to meet these requirements. The Delegate's correspondence to the Employer, and the notes of communications referred to in the Reasons for the Determination, reveal that the Employer was made aware of the substance of Mankatala's complaint, and the Delegate's concerns arising from it. Moreover, it is clear that the Employer was given ample opportunity to make submissions and lead evidence in response to the questions posed by the Delegate relating to the issues that were ultimately dealt with in the Determination.

28. What the Employer says, however, is that even though it did respond, the Delegate did not consider its submission, and ignored, in essence, the Employer's documentary evidence produced to show that it paid all the wages owing to Mankatala.

29. I suppose one could say this assertion from the Employer creates a process issue. If it were proven that the Delegate simply ignored the Employer's evidence and submission, it might well form the basis for a conclusion that the Delegate had not afforded the Employer a fair hearing. On the facts of this case, however, such an assertion is untenable.

30. As the excerpts from the Delegate's correspondence to the Employer, and the Reasons for Determination, both noted above, conclusively show, the Delegate scrutinized the Employer's records, and its submissions, with great care. At its core, the Employer's objection does not relate to whether the Delegate considered its position. Rather, it relates to the fact that the Delegate considered it, and rejected it. That is a matter that does not raise the spectre of a failure to observe the principles of natural justice. This ground of appeal must also fail.

31. It remains for me to consider the Employer's third ground of appeal. It says that the Delegate erred in law.

32. In its appeal submission, the Employer alleges that Mankatala quit his job in February 2010 without adequate notice, with the result that the Employer suffered financial loss because it was without a sweet maker for the

busy time during the Vancouver Olympic Games. This was an allegation the Employer also raised with the Delegate. The Delegate did ignore this point when he issued the Determination. It was entirely appropriate for the Delegate to do so. The circumstances under which Mankatala departed were irrelevant to the resolution of the question whether Mankatala was entitled to wages for work he had performed prior to his departure. The Determination does not deal with a claim for compensation for length of service.

33. The Employer also says that Mankatala never complained about the wages he was receiving while he was employed with the company. In his Complaint Submission Review Form, Mankatala states that his education level is low, he cannot read or write English, and he was unaware of his rights. But even if Mankatala had agreed to waive payment of some of his wages, section 4 of the *Act* makes it clear that any such agreement would have been of no force and effect.

34. The real essence of the Employer's position on appeal is that the Delegate was wrong to conclude that its payroll records were unreliable, and that the uncorroborated evidence of Mankatala concerning his hours of work should form the basis for the outcome of the complaint.

35. The Delegate preferring Mankatala's evidence over the evidence tendered by the Employer was a decision relating to the Delegate's inquiry as to what actually happened while Mankatala was working for the Employer. If, then, the Delegate committed an error in determining what actually happened, it was an error relating to the findings of fact he should make in order to determine the outcome of the complaint.

36. The appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

37. The difficulty for the Employer is that the payroll records it produced during the investigation led the Delegate to conclude that they had been prepared in a pro forma manner, without regard to the actual hours worked by Mankatala. In my view, it was entirely reasonable for the Delegate to draw that inference. The records were incomplete, and the information the Delegate received regarding them was at times contradictory. Some of the records were inaccurate on their face. Semi-monthly pay periods calculated at the 15th, and at the end, of each month could not always generate the same remuneration to Mankatala, notwithstanding the pay stubs stated that was in fact what had occurred. When the Delegate drew this to the attention of the Employer, there is no evidence that the Employer provided any explanation.

38. It must be remembered that section 28 of the *Act* makes it the employer's responsibility to keep the required payroll records. No such obligation is placed upon employees, and it is not surprising that few employees will keep detailed records.

39. There are several decisions of the Tribunal which confirm that where an employer fails to deliver proper payroll records, or where it is reasonable to conclude that the records which are delivered are inaccurate, the Director is entitled to consider any records the employee may have, and if there are none, the oral evidence of the employee concerning his or her hours of work. Indeed, at least in circumstances where no proper records have been kept as required by section 28, the employer will have the onus of proving that the employee's evidence should not be relied upon (see *Hofer*, BC EST # D538/97; *Kelco Drywall Ltd.*, BC EST # D058/09).

40. Here, the Employer kept records, but the Delegate found them to be unreliable. Mankatala's evidence, on the other hand, was at least plausible. In the absence of reliable records from the Employer, and having no other evidence to refute the evidence of Mankatala apart from the Employer's bare denial, the Delegate was entitled to prefer the characterization of the facts as presented by Mankatala.

41. For these reasons, the Employer's appeal based on section 112(1)(a) must also fail.

ORDER

42. Pursuant to section 115 of the *Act*, I order that the Determination dated February 24, 2012, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal