Employment Standards TRIBUNAL

An appeal

- by -

Istvan Szilagyi operating as Rivers Mediterranean Grill & Tapas Bar

- 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

**TRIBUNAL MEMBER:** John M. Orr

**FILE No.:** 2005A/10

**DATE OF DECISION:** April 26, 2005

# DECISION

## OVERVIEW

This is an appeal by Istvan Szilagyi ("Szilagyi") from a Determination issued by the Director of Employment Standards dated January 13, 2005. The Determination found that Szilagyi operated a business known as Rivers Mediterranean Grill and Tapas Bar and owed wages to two employees Jennifer Watts ("Watts") and Tara Neigel ("Neigel"). The Director also imposed two administrative penalties for breaches of Section 18 and 46 of the *Act*. These sections require the payment for statutory holidays and that all wages be paid within 48 hours of the termination of employment.

Watts and Neigel ("the complainants") filed complaints alleging that they had not been paid regular wages from May 14 to May 24, 2004 and compensation for length of service.

A delegate of the Director scheduled a mediation session for September 20, 2004. According to the delegate this was an attempt to resolve the dispute prior to an oral hearing. Szilagyi attended the mediation but neither Watts nor Neigel showed-up.

The delegate then proceeded to schedule an oral hearing of the complaints for November 23, 2004. Szilagyi requested an adjournment of the hearing due to medical reasons. A newly assigned Branch officer granted the adjournment and a new hearing date was scheduled for 10:00 a.m. on January 6, 2005.

On December 29, 2005 a Doctor provided a note indicating that Szilagyi was not fit to attend the hearing on January 6th, 2005. Szilagyi states that this note was faxed to the Director that day but the Branch says it was received on January 2, 2005.

The Branch officer was concerned about prejudice to the complainants, as they may have made arrangements for time off work or other arrangements to attend the hearing. There is no indication that the delegate sought the opinion of the complainants. The delegate denied the adjournment request.

On January 6th, the day set for the hearing Szilagyi contacted the Director's office. He was informed that because the adjournment request was denied he should attend the hearing. Szilagyi did not attend but neither did the complainants.

The Branch officer states in the Determination that the parties were contacted by telephone to advise them to attend within thirty minutes. Neigel was contacted at 10:15 a.m. but stated that she could not attend because of "snow conditions". Watts did not answer her phone but a message was left for her that the hearing would proceed in one half hour with or without her attendance.

According to the Determination none of the parties had attended by 11:00 a.m. The Branch officer proceeded in absence of the parties and issued the Determination that is under appeal.

Szilagyi has appealed to the Tribunal and checked a box indicating that he felt the Director erred in law but it is apparent that the substance of the appeal also alleges a failure to observe the principles of natural justice. This decision accepts that the appeal is based on both principles.

Szilagyi submits that the Director made an error in law, or failed to observe the principles of natural justice, in holding a "hearing" in his absence and despite the non-appearance of the complaints and in failing to grant an adjournment in face of medical evidence that Szilagyi was unable to attend. Szilagyi also indicates a substantive defence to the claims.

In the exercise of its authority under section 36 of the *Administrative Tribunals Appointment and Administration Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

## ANALYSIS

When a complaint is received the Branch has several procedural choices regarding how to review the complaint including mediation. The nature of its procedural choice is set out in ss. 76 and 77 of the *Act*, set out below:

**Investigations**

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

(2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.

(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(a) the complaint is not made within the time limit specified in section 74 (3) or (4),

(b) this Act does not apply to the complaint,

(c) the complaint is frivolous, vexatious or trivial or is not made in good faith,

(d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint,

(e) there is not enough evidence to prove the complaint,

(f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,

(g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint,

(h) the dispute that caused the complaint may be dealt with under section 3 (7), or

(i) the dispute that caused the complaint is resolved.

**Opportunity to respond**

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

As the heading to section 76 makes clear, one option is to "investigate" the complaint. In the past, the Branch investigated all complaints, and it continues to do so in some cases. An investigation process in

this case would have allowed the delegate to hear from the parties separately provided the delegate shared the gist of the other party's key evidence with both parties (s.77). In the circumstances here, the delegate might have been able to hear from the complainants in December and Szilagyi at some future date and then issue a Determination after appropriate opportunities were given for response.

In this case the investigation option was not chosen. Instead, the Branch followed its relatively new "adjudication" option, a practice whereby the delegate schedules and convenes a hearing with both parties present, and adopts practices and a posture more akin to that of a judge or adjudicator. The decision to deal with this case through some sort of hearing process was made at least by September 27, 2004. It appears that the delegate who had been handling the file was replaced by something called a "Branch Adjudicator".

The decision to proceed by way of a "hearing" appears to have been made after the September 20th mediation session but it may have been earlier as the record provided by the Director seems to be incomplete as there is no notice or documents in relation to the mediation process. However, it is noted in the Determination that the complainants did not show up for the scheduled mediation. One option open to the delegate at that time would have been to decline to pursue the complaints under section 76(3)(d):

> (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
>
> (d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint.

Instead, on September 27, 2004 a Notice of Complaint Hearing was signed by the delegate and sent to the Rivers Mediterranean Grill & Tapas Bar and to a Marsha Eschak, a director or officer of Rivers Mediteranean Grill and Tapas Bar Ltd and also to Szilagyi as the alleged operator of the restaurant.

It is evident that there was some very real issue about the ownership of the business at the time in question and whether or not the complainants actually worked in the month of May as they claimed.

There is also no reason to doubt the veracity of Szilagyi's inability to attend the scheduled hearings as Doctor's notes were provided. There is nothing to suggest that these medical notes were anything but genuine.

On the other hand the complainants did not attend the mediation session and there is no explanation offered for their non-attendance. In addition the complainants did not attend the scheduled "hearing". Only one of the complainants offered an explanation for non-attendance at the "hearing".

Despite the non-appearance of any of the parties it seems that the "Branch Adjudicator" proceeded with a "hearing", although it is not clear what he was hearing, as there was no one to hear. The cover page of the Reasons for the Determination states that there was a "hearing" on January 6, 2005. The Determination decision is dated January 13, 2005.

In the Determination the Officer points out that the parties had been given notice of the hearing. However on the file materials provided there is no proof that the corporate owner or the director, Marsha Eschak, were notified of the January hearing date. The Officer notes that where proper notice has been given a "hearing" may proceed in the absence of the party. But this does not contemplate proceeding with a "hearing" in the absence of all of the parties.

The Officer states:

> Having decided that both complainants and Szilagyi were aware of the hearing and had a reasonable opportunity to give evidence and present their case but did not, I ***must*** now decide the issues based on a review of all of the information on file provided by the parties prior to the hearing. (*emphasis added*)

Of course this was not the only option open to the Officer. He could have reconsidered the issue of the requested adjournment in light of the information he now had that one of the complainants could also not attend because of snow conditions and the other complainant had not attended without any apparent reasons. Clearly there was no longer any issue of prejudice in granting Szilagyi the requested adjournment which was supported by a medical note.

The Officer could also have considered the option to stop or postpone adjudicating the case pursuant to section 76(3)(d) noted above. The Officer did purport to apply section 76(3)(e) to dismiss some parts of the complaints made by complainants. Section 76(3)(e)

> (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
>
> (e) there is not enough evidence to prove the complaint,

While the Officer found there was a lack of evidence and purported to apply s.76(3)(e) he did not refuse to accept, review, mediate, investigate or adjudicate the complaint. He did not stop or postpone the adjudication. Instead he proceeded to adjudicate the complaints but found that he was unable to determine issues in relation to annual vacation pay and statutory holiday pay due to lack of evidence. He was also unable to determine the complainants' wage rate but chose instead to apply the minimum wage provisions.

Despite these findings of lack of evidence and the non-attendance of the complainants, the Officer accepted their alleged dates and hours of work despite the employer's submission that they didn't work at all in May 2004. There is no rationale provided for findings of credibility in the absence of any presentation by the parties.

The Officer cites, in part, as a rationale for proceeding, the Supreme Court of Canada in *Kane v. Board of the University of British Columbia* (1980) 110 D.L.R. (3rd) 311 to say, " *In any particular case the rules of natural justice will depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with…*". Unfortunately the Officer did not continue the quotation which goes on to emphasise that "*to abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument*."

More to the point is the Supreme Court decision in *Prassad v. Canada* [1989] 1 S.C.R. 560 in which the court adopted the statement made by Wydrzynski, in *Canadian Immigration Law and Procedure* (1983), at p. 265:

> The adjudicator is given discretion to determine whether an adjournment shall be granted, but, of course, this discretion is guided by the notion of a "full and proper" inquiry. In other words, the discretion must be exercised in accordance with principles of fairness and natural justice.

As noted by another Tribunal member arising out of a somewhat similar situation: *Kyle Freney* BCEST D130/04:

> The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body provided they comply with the rules of fairness: see most recently, *Congregation des temoins de Jehovah v. Lafontaine (Village),* 2004 SCC 48. It is what the English have concisely referred to as "fair play in action".

There is no indication in the Employment Standards legislation that would indicate any intent to abrogate these fundamental principles. To the contrary, the stated purposes of the *Act* include the purpose to promote the fair treatment of employees and employers and to provide fair and efficient procedures for resolving disputes.

Based on the file materials it is evident that Szilagyi was diligent in presenting his defence to the complaints. He attended the scheduled mediation session and applied for the adjournment in a timely fashion providing written medical confirmation. While the Officer may have been concerned about the possible prejudice to the complainants there is no evidence that he sought their input on this issue. In fact, on the day of the hearing, a failure to grant an adjournment to Szilagyi acted to the prejudice of the complainants as one was not able to attend because of snow conditions and the other did not attend for unexplained reasons. The Officer found against the complainants on at least two of their claims because of a lack of evidence. Clearly the denial of the adjournment was not necessarily in the best interests of any of the parties.

I am not ignoring the fact that certain Employer records were not provided following a demand for such records, but it is not clear who was responsible for complying with the demand as there appears to have been a change in ownership and the demand was served on a corporation as well as Szilagyi. It is not clear that the corporation was properly served.

In my opinion the principles of natural justice in this case required the Officer to do one of several things other than continue the "hearing" in the absence of all of the parties.

The Officer could have exercised his discretion to refuse to accept, review, mediate, investigate or adjudicate a complaint or stop or postpone reviewing, mediating, investigating or adjudicating the complaints because the employees had not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint.

The Officer could have exercised his discretion to refuse to accept, review, mediate, investigate or adjudicate a complaint or stop or postpone reviewing, mediating, investigating or adjudicating the complaints because there was not enough evidence to prove the complaint.

The Officer could have granted an adjournment on the basis of Szilagyi's application once he realised there was no prejudice to the complainants.

The Officer could have "postponed" the proceedings in light of one of the complainants' inability to attend the hearing due to the weather conditions.

The Officer could have stopped the adjudication proceedings and conducted an "investigation".

It seems that the fixation with the hearing process led the Officer into believing that despite the non-attendance of all of the parties he "must" proceed with the hearing as scheduled. This was an error in law as he clearly had other options. It was also a breach of the principles of fairness that the Supreme Court has said must govern these types of proceedings. It would only have been fair to grant an adjournment to Szilagyi once medical evidence had been provided and it was evident that there was no prejudice to the other parties. It would also have been reasonable and fair to postpone the hearing to allow the complainants to attend. If it was not possible to proceed with the "hearing" process the *Act* provides other means for the Director to use to review the complaint. This may well have been a case where the Director could have considered reviewing the matter by way of an investigation.

I would like to add and endorse the comments of the Tribunal member in *Kyle Freney* BCEST D130/04:

> I wish to conclude these reasons by emphasizing that I appreciate the circumstances in which the Delegate found himself. It is honestly frustrating for a decision-maker to take the time and effort to convene a hearing only to find that a claimant has "failed to show up for his own party". This is especially so where, as here, it turns out after the fact that the claimant may not have had a good reason for failing to appear. There is a valid legislative interest in finality, and a legitimate interest in ensuring that parties are subject to appropriate discipline in pursuing and documenting their claims. It is, however, part of the beauty of the law of natural justice that it forces decision-makers to look beyond inconvenience, understandable frustration and the need for clarification and efficiency, to a broader conception of fair play in action, which is not far from asking how any of us would reasonably expect to have been treated in similar circumstances.

In this case it was not just one party who was unable to attend the "hearing" but in effect none of the parties were able to attend. Having decided to proceed by way of a "hearing" process, fair play in those circumstances called for some consideration by the Officer to ensure an opportunity for the parties to present their case in person. This could have been achieved through postponing the hearing or switching to an investigation. It was not fair play to any of the parties to proceed with a "hearing" at which none of the parties are present and no one is heard.

It is also evident from the file materials that there are substantive issues of credibility to be resolved and substantive issues involving the ownership and liability in relation to the business that were not addressed in the determination.

However and fundamentally, the appeal is granted in this case as there was an error in law and a failure to comply with the principles of natural justice. Fairness called for the parties to be given the opportunity to re-schedule the "hearing" if the Officer was intending to proceed in that manner. In the language used by the Supreme Court said in *Prassad* (supra) the decision is "voidable for not complying with the requirements of natural justice". In addition the Officer made an error in law in finding that he had no option but to proceed with a "hearing" in the absence of all of the parties. He could have proceeded in a number of other ways recognised by the legislation.

**ORDER**

The appeal is allowed and the Determination is cancelled. The result is that the Director remains under an obligation to review the complaint under section 74 by way of adjudication or investigation.

**John M. Orr**
**Member**
**Employment Standards Tribunal**