

An appeal

- by -

6307485 Canada Ltd. carrying on business as  
McDonald's Restaurant  
("McDonald's")

- 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:** Shafik Bhalloo

**FILE No.:** 2009A/049

**DATE OF DECISION:** June 17, 2009

## DECISION

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), brought by Danny Swidinsky (“Mr. Swidinsky”), a director of 6307485 Canada Ltd. carrying on business as McDonald’s Restaurant (“McDonald’s”) of a Determination that was issued against McDonald’s on March 13, 2009 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that McDonald’s contravened sections 8, 18, 40, 46 and 58 of the *Act* in respect of the employment of Louie Canete (“Mr. Canete”) and ordered McDonald’s to pay Mr. Canete \$2,244.88 for unpaid wages, overtime pay, statutory holiday pay, annual vacation pay and accrued interest pursuant to section 88 of the *Act*.
2. The Determination also imposed five administrative penalties of \$500.00 each under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for the said contraventions of the *Act*.
3. The total amount of the Determination is \$4,744.88.
4. I note that the Appeal Form, in paragraph 1, shows that Mr. Swidinsky is the “person making the appeal” and the latter also, in his Affidavit in support of the Appeal refers to himself as the “appellant in these proceedings”. However, the Determination is not against Mr. Swidinsky; it is against McDonald’s. Having said this, I note that Section 112 of the *Act* provides:

... a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds ...
5. The Director appears to have recognized Mr. Swidinsky as a director of McDonald’s and copied him with the Determination and therefore, pursuant to Section 112 of the *Act*, Mr. Swidinsky “as a person served with a determination” has a standing to appeal it on behalf of McDonald’s.
6. The grounds of appeal advanced by Mr. Swidinsky on behalf of McDonald’s are two, namely, the Director erred in law as well as failed to observe the principles of natural justice in making the Determination.
7. Mr. Swidinsky is seeking the Tribunal to change or vary the Determination although he does not specify precisely how he wants the decision changed or varied.
8. Pursuant to Section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (s. 103), and Rule 17 of the *Tribunals Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the Section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

### ISSUE

9. The issues in this appeal are two-fold:
  - (i) Did the Director err in law in making the Determination?
  - (ii) Did the Director fail to observe the principles of natural justice in making the Determination?

## FACTS

10. Mr. Swidinsky is a franchise owner of a McDonald's restaurant at 6060 Russ Baker Way, Richmond, British Columbia.
11. Mr. Canete was employed as a food service supervisor with McDonald's from September 13, 2008 to November 29, 2008 at the rate of pay of \$10.00 per hour.
12. On January 8, 2009, Mr. Canete filed a complaint against McDonald's under Section 74 of the *Act* alleging that the latter contravened the *Act* by misrepresenting to him his wage rate, failing to pay him regular and overtime wages and failing to pay him holiday pay (the "Complaint"). More specifically, Mr. Canete complained that he was hired by McDonald's based on a promise of a wage rate of \$13.50 per hour for a period of two years. In support of this assertion, he provided the delegate a copy of the Labour Market Opinion ("LMO") document, which Service Canada sent to Mr. Swidinsky, confirming the said wage rate and term of employment.
13. Mr. Canete submitted to the delegate that he accepted the terms of the LMO but on his first day at work he was informed that he would be paid \$11.00 per hour and he actually received \$10.00 per hour in contravention of Section 8 of the *Act*. As a result, Mr. Canete claimed in his Complaint the difference in pay between the rate he was paid - \$10.00 per hour - and the rate he was offered as evidenced in the LMO - \$13.50 per hour.
14. With respect to statutory holiday pay claim, the delegate notes that Mr. Canete claimed that he worked eight hours on November 11, 2008 for which he should have been paid at time-and-a-half based on the \$13.50 per hour wage rate and not seven hours at \$10.00 per hour he was actually paid by McDonald's.
15. The delegate also notes in the Determination that Mr. Canete submitted his own record of hours worked along with wage statements in support of his claims.
16. On January 20, 2009, within two weeks after Mr. Canete filed the Complaint, the delegate sent McDonald's a general notice of his investigation of the Complaint as well as a Demand for Records (the "Demand") requesting production from McDonald's of payroll records pertaining to Mr. Canete. In the Demand, the delegate specifically asked for the records to be produced on or before 4:00 p.m. on February 3, 2009.
17. On February 3, 2009, the delegate indicates, Mr. Swidinsky responded to the January 20 correspondence by providing "certain payroll records by fax". However, the delegate appears not to have been satisfied with those records and on February 5, 2009, he sent a further letter to McDonald's delineating more specifically Mr. Canete's claims in the Complaint and advised McDonald's that the payroll records previously produced "do not provide Mr. Canete's hours of work during the full period of his employment and do not include any wage statements". The delegate requested McDonald's to provide the records requested "and to either provide a reply to Mr. Canete's allegations in writing or ... to arrange a time to discuss them in person by 4:00 p.m., February 13, 2009."
18. On February 13, 2009, Mr. Swidinsky contacted the delegate by email and advised the latter that he had contracted pneumonia and was "restricted to the house except for medical appointments". He further advised the delegate in the same email that he understood that his condition "may last up to one month" and he was not in any condition to go to his storage facility to retrieve additional documents at this time.

19. In response to Mr. Swidinsky's email, the delegate on the same date sent an email to Mr. Swidinsky stating:

I am sorry to hear about your illness Mr. Swidinsky. However, I would like to point out that these additional documents are not needed to respond to the substance of Mr. Canete's complaint. Mr. Canete has provided documents showing he worked beyond 80 hours in a two week period without receiving his overtime rate of pay. Also, he had presented to you the Labour Market Opinion that states he should be paid at a different rate than what he received.

I do not expect you to compromise your health for this investigation. However, if I am to postpone it, I will require medical proof of your condition, as well as the establishment of a new deadline within which you must reply to Mr. Canete's allegations. Please contact me, preferably by phone, to discuss this matter further.

20. In response to the delegate's email, Mr. Swidinsky, on the same date, sent a further email to the delegate advising that he would request a letter from his physician provided the delegate referred him to his authority in the *Act* for requiring medical proof from him. He further advised the delegate "I am unable at present to delve into this further until I am fully recuperated".
21. In response to Mr. Swidinsky's last email, the delegate, on the same date, sent Mr. Swidinsky an email stating *inter alia*:

It is in the interest of all parties that Mr. Canete's complaint is resolved in a timely and efficient manner. You have stated that you will not be participating due to illness and have provided no date at which you will comply with the demand for records or respond to the allegations. I am not obligated to allow parties to indefinitely wait out proceedings. I do not dispute that you are ill; however, if I am to postpone my investigation I require proof that you are in fact too sick to provide the records and to respond to Mr. Canete's allegations.

To clarify, if I am to permit a delay in responding to Mr. Canete's allegations I require a note from a physician which specifies that you have pneumonia and that you are restricted to your house. You must provide this by February 20 or provide a date by which you can send this information to the Branch.

22. On February 18, 2009, Mr. Swidinsky sent an email to the delegate attaching, in PDF form, his doctor's note dated February 14, 2009. The doctor's note stated that Mr. Swidinski "has been ill with bronchitis [from] January 24/09 to today and will need at least two weeks to recover".
23. After Mr. Swidinski's last email, the delegate indicates in the Determination that he emailed Mr. Swidinski and advised the latter that he had not received any indication whether Mr. Swidinski disagreed with Mr. Canete's allegations although invited to respond. The delegate also notes that that he did not inform Mr. Swidinsky that he was postponing his investigation. Unfortunately, the Section 112 record provided to me in this appeal does not contain that email, although all other emails referenced above are contained in the record produced.
24. The delegate, based on Mr. Canete's evidence in the investigation and his own conclusion that Mr. Swidinsky did not disagree with the allegations of Mr. Canete (although afforded an opportunity to do so), went on to make the Determination against McDonald's.

### **SUBMISSIONS OF McDONALD'S**

25. In support of McDonald's appeal, Mr. Swidinsky submitted his Affidavit sworn on April 8, 2009 as well as the Affidavit of Erwin Patrick Uy ("Mr. Uy"), restaurant manager of McDonald's. In addition to the said

Affidavits, there is also a final reply submission dated June 5, 2009 from counsel for McDonald's, Ms. Erin F. Berger ("Ms. Berger").

26. While I have read all of the submissions made on behalf of McDonald's, I do not intend to reiterate them here except those concerning the issue of natural justice as I find that the appeal can be properly adjudicated based on the natural justice ground of appeal only.
27. Having said this, on the natural justice issue, Mr. Swidinsky, in his Affidavit, submits that he did not have an opportunity to be heard and that while he sent "documents" to the delegate, he did not have "an opportunity to speak to the meaning of the documents".
28. Mr. Swidinsky further submits in paragraph 3 of his Affidavit:

I received a letter dated January 20, 2009 from Andres Barker, Delegate of the Director of Employment Standards directing me to send in pertinent records. I received another letter dated February 5, 2009 requesting further documents and a meeting. I informed Mr. Barker that I had a bronchitis [sic] which further resulted in a back injury from coughing, and [sic] was off according to doctor's order for a period at least two weeks. Attached as "Exhibit A" is my doctor's note, which I sent to Mr. Barker. I recovered and was able to return to work on March 16, 2009. But Mr. Barker did not get back in touch with me to check on the status of my recovery, or tell me that there were imminent deadlines. I heard nothing further until the Determination of March 13, 2009.

29. The balance of Mr. Swidinsky's submissions in his Affidavit as well as the evidence contained in Mr. Uy's Affidavit relate to a challenge of the evidence of Mr. Canete upon which the delegate relied in making the Determination and I do not find it necessary to reiterate those submissions here in light of my decision in this appeal.
30. With respect to the submissions of counsel for McDonald's, Ms. Berger, on the issue of natural justice, she states:

The appellant, Danny Swidinsky, submits that the failure of the Director to call viva voce evidence in this circumstance amounted to lack of due process.

The Director considered no affidavit evidence from Mr. Swidinsky or Mr. Uy in making his decision; nor was viva voce evidence contemplated by the Director. The Director considered only the evidence of Mr. Canete in making a determination in this matter, and that the appellant submits is a breach of the principles of natural justice.

31. Ms. Berger further states:

In terms of notification, Mr. Swidinsky did advise the Director of his illness and did obtain a physician's note. Mr. Swidinsky was indisposed and not in a position to properly address the matter when he was ill. It is a failure of due process to ignore Mr. Swidinsky's subsequent obtaining of a physician's record or to consider it to be "too late" for consideration.

32. Ms. Berger also refers to the decision of *Re: Merilus Technologies Inc.*, BC EST # D171/03 and submits that the affidavits of Mr. Swidinsky and Mr. Uy constitute new evidence and qualify under the four-fold criteria in *Re: Merilus Technologies Inc.* for adducing new evidence.

## THE DIRECTOR'S SUBMISSIONS

33. The Director's submissions address the natural justice, the error of law as well as the new evidence grounds of appeal in the submissions of Mr. Swidinsky and Ms. Berger.
34. With respect to the natural justice ground of appeal, the Director reviews the exchange of emails and contacts between the delegate and Mr. Swidinsky referred to under the heading "Facts" above and states:

The record clearly shows McDonald's was sent a demand for records and a notice of investigation with a deadline to reply of February 3, 2009. McDonald's failed to comply. McDonald's was sent a second letter with additional details of Mr. Canete's claim with a deadline to reply of February 13, 2009. McDonald's failed to comply with this deadline. Mr. Swidinsky then informed the delegate he was unable to participate in the investigation because he had pneumonia and was confined to his house. The Delegate responded to this information by stating the only grounds under which the investigation would be postponed is if Mr. Swidinsky provided a physician's note to corroborate that he had pneumonia and was confined to his home. Mr. Swidinsky provided a note from his doctor dated February 14, 2009. The note stated Mr. Swidinsky had bronchitis and needed at least two weeks to recover.

35. The Director then goes on to argue:
36. McDonald's was provided with two deadlines, and did not provide any valid excuse for their failure to comply with either of them. McDonald's appears to argue that it is a breach of the principles of natural justice for the Director to not continually engage and monitor a party as to whether they feel they are able to participate. Mr. Swidinsky had ample opportunities to provide the records, to contact the Director to participate, or to delegate someone from the restaurant to deal with the complaint. It is pertinent that this appeal is the first time McDonald's has produced any indication they disagree with Mr. Canete's allegations. Most of the relevant records to Mr. Canete's complaint were supplied to the Branch by Mr. Canete and forwarded to McDonald's along with the substance of his allegations. Even if Mr. Swidinsky was confined to his home, there is no reason he could not have provided a reply to some stage of the process.
37. The Director then addresses the error of law ground of appeal stating that the substance of McDonald's argument under this ground of appeal is a challenge to the delegate's finding of fact that Mr. Canete was offered by McDonald's employment at the rate of \$13.50 per hour. According to the Delegate, this finding of fact is based on the evidence that was before the delegate and not appealable.
38. Finally, with respect to Mr. Berger's submissions on behalf of McDonald's that the affidavits of Mr. Swidinsky and Mr. Uy constitute new evidence and should be considered as such, the Director argues that all of the evidence in these affidavits is either contained in the record or could have been put before the Director during the investigation of the Complaint and therefore fails to qualify as new evidence under the criteria set out by the Tribunal in *Re: Merilus Technologies Inc., supra*.

## SUBMISSIONS OF MR. CANETE

39. Mr. Canete has filed a two-page submission in response to McDonald's appeal which does not address the natural justice ground of appeal but deals with the merits of his complaint and responds to the challenges to the merits of his complaint made in Mr. Swidinsky's and Mr. Uy's Affidavits. I do not find it necessary to set out those submissions here as my decision turns strictly on the natural justice ground of appeal.

## ANALYSIS

40. I have reviewed the submissions of the parties and while I do not reiterate in this decision those submissions unrelated to the natural justice ground of appeal upon which the appeal turns, I do not want to be taken as not having reviewed the submissions on the error of law ground of appeal as well as submissions invoking the new evidence ground of appeal. I simply do not find it necessary to deal with these grounds of appeal as I find I am properly able to dispose of this appeal on the natural justice ground only.
41. Having said this, as indicated by the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn and Resort)*, [2005] B.C.E.S.T.D. No. 55 (QL), principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker.
42. In this case, I am convinced on the evidence contained in the Section 112(5) record that McDonald's and Mr. Swidinsky were apprised of the case against McDonald's. More specifically, McDonald's received notification of Mr. Canete's Complaint by way of correspondence dated January 20, 2009, which also included the delegate's Demand.
43. Unlike the case of the employer who declines or is unresponsive to a delegate during the investigation of a complaint and only appears to appeal the determination if it is a negative one, McDonald's, through Mr. Swidinsky (albeit on the last day provided for responding to the Demand) was in contact with the delegate initially on February 3, 2009 when providing some payroll records by fax to the delegate. Those records were not sufficient for the delegate's investigation and the delegate made that clear to Mr. Swidinsky and McDonald's in his letter subsequently on February 5, 2009 in which he set out specifically the payroll records he needed and delineated with greater specificity Mr. Canete's claims in the Complaint and imposed a deadline for McDonald's to respond by 4:00 p.m. on February 13.
44. Again, on the very last day of the deadline imposed by the delegate for a response, February 13, 2009, Mr. Swidinsky contacted the delegate by email and indicated that he was ill as he had contracted pneumonia and therefore he was not able to go to his storage facility to retrieve additional documents at the time. The delegate, in response, sent an email to Mr. Swidinsky indicating clearly that he did not expect Mr. Swidinsky to compromise his health for this investigation but if he were to postpone the investigation, he would require medical proof of Mr. Swidinsky's condition and there would have to be a new deadline set for Mr. Swidinsky to reply to Mr. Canete's allegations. In response, Mr. Swidinsky emailed the delegate advising him that he would provide a "letter" from his physician provided the delegate identified his statutory authority for his request of the medical letter. The delegate, in his reply email, on the same date, indicated that he did not dispute Mr. Swidinsky was ill but reiterated that if he were to postpone his investigation, he would require proof that Mr. Swidinsky is "in fact too sick to provide the records and to respond to Mr. Canete's allegations". The delegate ended his email by stating to Mr. Swidinsky "you must provide this [the medical note] by February 20 or [*emphasis added*] provide a date by which you can send this information to the Branch." The alternative options set out by the delegate in this email suggest to me that either option presented by the delegate to Mr. Swidinsky, if satisfied by the latter, would allow him some form of a postponement or an extension of time to respond to the Complaint.
45. In my view, Mr. Swidinsky appears to have complied with the first option, in that he, on February 18, 2009, two days before the deadline imposed by the delegate, provided a medical note from his physician dated February 14, 2009 indicating that he was ill with bronchitis since January 24, 2009, and would require "two weeks to recover". While the delegate indicates that he subsequently responded to Mr. Swidinsky by email stating that he had not received from Mr. Swidinsky any indication as to whether he disagreed with

Mr. Canete's allegations in the Complaint and invited him to respond, the delegate does not say that he positively advised Mr. Swidinski that the physician's note the latter adduced on February 18 was insufficient to postpone the investigation of the Complaint or that he was continuing with his investigation and expected an immediate response from Mr. Swidinski to Mr. Canete's allegations. Instead, the Director submits in the negative that the delegate did not inform Mr. Swidinsky that he was postponing his investigation, after having received the physician's note.

46. In my view, Mr. Swidinsky having provided a medical note to the delegate in a timely fashion, on February 18, 2009, was entitled to assume that the note was satisfactory to grant him an extension of time to respond as he had arguably met the precondition set out by the delegate for obtaining some form of an extension of time to respond to the Complaint or Mr. Canete's allegations. While I do not believe that the rules of natural justice go so far as to require the delegate to check in with Mr. Swidinsky, with any particular frequency, when the latter would be ready to respond to Mr. Canete's allegations or participate further in the investigation of the Complaint, in the circumstances of this case where the delegate knows that Mr. Swidinski is ill and leads the latter in his email to believe that he would consider a postponement of the investigation pending production of a satisfactory medical note from Mr. Swidinski and where Mr. Swidinski produces such a note, the onus is on the delegate to show that the note was unsatisfactory and that he so advised Mr. Swidinski and further informed him that he would proceed with his investigation. I do not see such evidence from the delegate in this case.
47. In the circumstances, the delegate's decision to proceed with the investigation and make a decision based largely, if not wholly, on Mr. Canete's evidence, in my view, was improper and a denial of natural justice to McDonald's. In my view, one of the few important features of natural justice rights is that a party who is the subject of a complaint is provided a fair hearing. This does not mean an oral hearing necessarily as suggested by Ms. Berger or Mr. Swidinski in their submissions on behalf of McDonald's, but rather an opportunity to be heard. Here, McDonald's was denied that opportunity. Therefore, in my view, this case is appropriate for a referral back to the delegate for further investigation and consideration of the evidence of McDonald's in response to the Complaint.

## **ORDER**

48. Pursuant to Section 115 of the *Act*, I order that the Determination dated March 13, 2009, be referred back to the delegate for further investigation.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**