

An appeal

- by -

Hometown Pizza Inc.

- 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 Groves

**FILE No.:** 2006A/44

**DATE OF DECISION:** June 13, 2006

## DECISION

### SUBMISSIONS

Terry Manoussakis	on behalf of Hometown Pizza Inc.
Ge Lin	on behalf of himself
Connie Jansen	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Hometown Pizza Inc. (“Hometown”), filed on its behalf by its president, Eleftherios Manoussakis (“Mr. Manoussakis”). The appeal is brought pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “*Determination*”) issued by a delegate of the Director of Employment Standards (the “*Delegate*”) on March 10, 2006 in respect of a complaint filed by one Ge Lin (“Mr. Lin”).
2. The *Determination* asserts that Hometown contravened the *Act* when it failed to pay Mr. Lin wages, annual vacation pay, and interest amounting, in all, to the sum of \$121.58. In addition, Hometown was found to be liable to pay two administrative penalties, each for \$500.00, levied under section 29 of the *Employment Standards Regulation* (the “*Regulation*”), as a result of its having been found to have contravened sections 18 and 46 of the *Act*. In total, therefore, the *Determination* required Hometown to pay \$1,121.58.
3. Hometown’s appeal was received by the Tribunal on March 30, 2006. On the same day, the Tribunal wrote to the *Delegate* and Mr. Lin inviting them to make submissions and, in the case of the *Delegate*, requesting in addition that she forward the record before her at the time the *Determination* was made.
4. The Tribunal received a written submission from Mr. Lin dated April 18, 2006, and the record and a written submission from the *Delegate* dated April 19, 2006. The Tribunal then requested final submissions. Mr. Manoussakis delivered a further written submission dated May 4, 2006.
5. By letter dated May 10, 2006, the Tribunal informed the parties that the appeal would be determined by a Member based on the written submissions received from the parties.

### FACTS

6. Hometown operates a pizzeria. It employed Mr. Lin as a delivery person commencing August 10, 2005. It is common ground that Mr. Manoussakis dismissed Mr. Lin on August 17, 2005.
7. Mr. Lin then filed a complaint against Hometown with the Employment Standards Branch pursuant to section 74 of the *Act*, alleging that Hometown had failed to pay him all his wages earned during the time he had been employed.

8. The Reasons for Determination prepared by the Delegate in support of her Determination reveal that in aid of her investigation the Delegate telephoned Mr. Manoussakis on November 14, 2005 and requested that he deliver Mr. Lin's daily records to her for her review, as Mr. Manoussakis had claimed that he had fully paid Mr. Lin for all the work he had performed while employed. Mr. Manoussakis replied that he could not deliver the records because he would be in hospital for a test, which would take a few days. He provided the Delegate with his cell phone number and asked her to call him again on November 21, 2005.
9. Following several further attempts at contact, the Delegate again spoke with Mr. Manoussakis by telephone on November 25, 2005. He again protested that he had paid Mr. Lin in full, but when the Delegate requested proof, Mr. Manoussakis is said to have become irate, and to have alleged, in effect, that the Delegate was biased in favour of Mr. Lin. The Delegate suggested mediation, but Mr. Manoussakis is said to have responded that he did not have time for "this bullshit" and could not be bothered. The Delegate informed Mr. Manoussakis that she would send him a letter. Mr. Manoussakis is stated to have then said "go ahead, I'll throw it away."
10. I pause here to say that in his submissions on appeal, Mr. Manoussakis did concede that he was rude, defensive, and belligerent to the Delegate.
11. The Delegate states that on December 2, 2005, she forwarded, by certified mail, a Demand for Records relating to Mr. Lin, as she was authorized to do pursuant to section 85 of the *Act*. That Demand, and the letter which accompanied it, were addressed to "Terry Manoussakis, Operating as Hometown Pizza". The Delegate states that she forwarded those documents to Mr. Manoussakis' home address, and also to the registered and records office address for Hometown Pizza Inc. The Canada Post documentation contained in the record shows that Mr. Manoussakis signed for, and therefore received, the letter, and the Demand, on December 7, 2005. The materials sent to Hometown's registered and records office were returned unclaimed. The Demand stated that it must be complied with by December 16, 2005, but the Delegate received no material from either Hometown or Mr. Manoussakis by that date.
12. Perhaps believing that Mr. Lin's employer had been misdescribed in her December 2, 2005 correspondence and Demand, the Delegate prepared a further letter, and Demand for Records, dated December 23, 2005. This time the material was addressed to Hometown Pizza Inc., at its registered and records office. The letter is marked "Certified mail". In her Reasons the Delegate states that she forwarded the material to Hometown, with a copy to its directors.
13. All the Demands the Delegate forwarded to Mr. Manoussakis, to Hometown, and to its directors, contained a warning, in bold letters, that a failure to produce the records might result in the issuance of a determination and the application of the escalating administrative penalty regime contemplated in the *Act* and *Regulation*, with its \$500.00 minimum. That warning was reproduced by the Delegate in the December 23, 2005 letter. The letter further required compliance with the Demand by January 6, 2006, failing which it stated that the Delegate would proceed based on the information provided, issue a determination, and impose an administrative penalty for failure to comply with the Demand.
14. The record includes Canada Post documentation corroborating the Delegate's assertion that both December 23, 2005 letters, and the Demands accompanying them, were returned to the Branch on January 18, 2006, marked "unclaimed".
15. Prior to the Delegate's issuing the Determination, Hometown did not deliver any records in response to the Demand(s).

## ISSUES TO BE DECIDED

16. Can it be said that Hometown has established any basis upon which the Determination should be cancelled?

## ANALYSIS

17. Section 112(1) of the *Act* sets out the grounds upon which an aggrieved person may appeal a Determination. It 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:

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

18. Here, Hometown's appeal is grounded in section 112(1)(b). It is asserted that the Delegate failed to observe the principles of natural justice in making the Determination. In general, such a challenge gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in an appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence (see *Moon Arc Interiors Co. Ltd.* BC EST #D200/04).

19. In the context of proceedings under the *Act*, the obligation to observe the principles of natural justice is informed by the language of section 77, which reads:

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

20. Previous decisions of the Tribunal have held that the duty embodied in section 77 does not necessarily give rise to the full panoply of natural justice rights which might arise if the matter were a proceeding before the courts (see *Inshalla Contracting Ltd.* BC EST RD054/06). Having said that, it is clear that the duty normally requires notice to all parties of a type which affords to them a reasonable opportunity to present evidence and argument, and to respond to the position of the other party.

21. In this case, the record shows that the Delegate contacted Mr. Manoussakis at least twice by telephone regarding the complaint. The Delegate made clear to Mr. Manoussakis, and Mr. Manoussakis understood, that Mr. Lin was claiming unpaid wages. Mr. Manoussakis' response was to insist that he had paid Mr. Lin for all his hours worked. In reply to the Delegate's lawful request for proof, however, Mr. Manoussakis became irate, and refused, in effect, to participate in the balance of the investigative process.

22. The Demands for Records which the Delegate subsequently forwarded constituted a further opportunity made available to Hometown to provide tangible evidence in support of the company's contention that Mr. Lin had been paid in full. The record shows that Mr. Manoussakis did receive one of the Demands

sent. That Demand was accompanied by a letter dated December 2, 2005 which also set out in detail the substance of Mr. Lin's complaint, and the allegations of fact on which it was based. The fact that another Demand forwarded to Hometown by certified mail was returned marked "unclaimed" is of no moment. This is so because the combined effect of sections 122(1)(b) and 122(2) of the *Act* deems service to have occurred on the company eight days after the Demand was deposited in a Canada Post Office, where the Demand was sent by registered mail to Hometown's last known address.

23. In this case, the Delegate conducted a corporate search for Hometown, which disclosed an address for its registered and records office. The December 23, 2005 correspondence, and accompanying Demand, were forwarded to that address. Certified mail is deemed to be included within the definition of "registered mail" pursuant to section 29 of the *Interpretation Act*. The material was returned to the Employment Standards Branch by Canada Post on January 18, 2006, which means it must have been deposited in a Canada Post Office at some time prior. The Determination was not issued until March 10, 2006, almost two months later. At no time prior to the issuance of the Determination did Hometown respond to the Demand.
24. In his submissions on behalf of Hometown delivered in support of its appeal, Mr. Manoussakis states that his failure to respond to the Delegate's requests, and the Demands, was due to his suffering from a respiratory illness, and the effects of injuries suffered in a motor vehicle accident. It does not appear, however, that Mr. Manoussakis ever informed the Delegate of these debilities, or sought extensions of time for the purpose of providing the documents and information requested. All Mr. Manoussakis appears to have communicated to the Delegate was that he was unavailable on a particular day for a discussion because he had to attend hospital for tests.
25. Mr. Manoussakis asserts that his physician can provide evidence to verify his medical condition, yet no such evidence has been tendered. In this regard, I point out that it is Hometown's obligation to ensure that its material in support of its appeal is complete. There is no obligation on the Tribunal to ferret out information in support of an appellant's contention, whether invited to do so or not.
26. Mr. Manoussakis also states that his lack of education and poor understanding of the English language hindered him in his dealings with the Delegate on behalf of Hometown. I note, however, that Mr. Manoussakis delivered lengthy, and in my view articulate, written submissions in English in support of Hometown's appeal. I saw no evidence in those submissions that Mr. Manoussakis suffered from any disability related to his command of the English language, and the Delegate's account of her discussions with Mr. Manoussakis demonstrate that he is capable of expressing himself in English in a way that is, to put it kindly, entirely devoid of ambiguity.
27. There is ample evidence in the record, and the submissions made to the Tribunal on this appeal, to support a conclusion that Hometown, through Mr. Manoussakis, understood completely the nature of the complaint brought by Mr. Lin, but chose to ignore it. As Mr. Manoussakis says in his own submission, "(t)his matter just didn't garner my full attention until Ms. Jansen leveled her fine and started her actions against me." By that time, of course, the Determination had been made, and it was altogether too late.
28. Can it be said that the Delegate acted unfairly in proceeding in the way she did? I do not think so. Once Hometown declined to respond to the Demands, or make submissions in response to the substance of Mr. Lin's complaint, the Delegate was entitled to draw an adverse inference against Hometown (see *Tyler Wilbur* BC EST #D196/05, application for reconsideration dismissed #RD052/06). It follows that I see no merit in Hometown's claim that the Delegate failed to observe the principles of natural justice.

29. There are, however, two other aspects of this appeal on which I feel obliged to comment. In his submissions filed on appeal, Mr. Manoussakis alleges that Mr. Lin lied to the Delegate concerning his hours worked. He also makes disparaging remarks about Mr. Lin's character, and personality traits, in comparison to his own. He says that Hometown has "the witnesses and the books to back this up." In support, he provides the names of two persons whom he invites the Tribunal to contact, and a one-page sheet attached to Hometown's Appeal Form which purports, I believe, to set out the hours worked of several employees of the company, including Mr. Lin.
30. Concerning the witnesses, I reiterate that it is for Hometown to provide the Tribunal with the material on which it seeks to ground its argument on appeal. It is not for the Tribunal to search it out.
31. The attacks on Mr. Lin are, I take it, meant to support an argument that the Delegate erred in law in accepting Mr. Lin's information relating to the hours he worked for Hometown, and the amount he was paid for that work. While Hometown did not formally indicate that it intended to raise any error of law as a basis for its appeal, the Tribunal will seek to discern the true basis for a challenge to the Determination, in order to do justice to the parties, regardless of the particular box an appellant has checked off on the Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03).
32. It is trite to say that an appeal to the Tribunal is not meant to be a proceeding *de novo*, based on an appellant's hope that the Tribunal will conduct a re-investigation of a complaint, and come to a different conclusion on the facts than the Delegate reached in the Determination. As was stated in *MSI Delivery Services Ltd.* BC EST #D051/06, an appeal is designed to correct error, provided that the error constitutes an error of law. An error of fact cannot come within the purview of the Tribunal when considering the merits of an appeal unless it amounts to an error of law. Where the Delegate relies on some evidence to make a finding of fact, and where the finding is neither perverse nor inexplicable, given the substance of the evidence available, there is no error of law.
33. In this instance, Hometown declined to submit payroll records to the Delegate in respect of Mr. Lin, despite repeated requests for same. In the result, the Delegate considered Mr. Lin's statements as to his hours worked, and the wages he received, which were supported by an original calendar on which Mr. Lin had noted his relevant particulars of work. The Delegate accepted the veracity of Mr. Lin's evidence, as she was entitled to do. Given that there was, therefore, some evidence on the basis of which the Delegate could draw the conclusions she did, and scant evidence of substance to the contrary, I see no reason to conclude that the Delegate committed an error of fact amounting to an error of law.
34. As for the time-sheet, it does not appear in the record supplied to the Tribunal by the Delegate, which I suppose should not be a surprise, given Hometown's refusal to co-operate with the Delegate's investigation, and its failure to respond to a single Demand for Records. Having regard for the provisions of section 112(1)(c) of the *Act*, the provision of the time-sheet would only weigh important if it could be established by Hometown that it constituted evidence that was now available, but which was unavailable to it at the time the Determination was being made. No submission is made by Hometown with respect to these matters, however. Accordingly, I cannot conclude that the time-sheet was unavailable to Hometown at the relevant time. It follows that the time-sheet cannot form the basis for an argument that Hometown's appeal should be allowed.

**ORDER**

35. Pursuant to section 115 of the *Act*, I order that the Determination dated March 10, 2006 be confirmed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**