

An appeal

- by -

Diar Restaurant Ltd. also known as Diyar Restaurant
(“Diar”)

- 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.: 2011A/57

DATE OF DECISION: June 29, 2011

DECISION

SUBMISSIONS

Jason D. Ellis	counsel for Diar Restaurant Ltd. also known as Diyar Restaurant
Shahram (Shawn) S. Shamsian	on his own behalf
Joy Archer	on behalf of the Director for Employment Standards

OVERVIEW

1. This is an appeal filed by Diar Restaurant Ltd. (“Diar”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a determination that was issued by a Delegate of the Director of Employment Standards (the “Director”) on March 25, 2011, (the “Determination”). The Determination found that Diar contravened Part 3, sections 17, 18 (wages) and 21 (employer costs), Part 7, section 58 (annual vacation pay), and Part 8, section 63 (compensation for length of service) of the *Act* and ordered Diar to pay the complainant, Shahram S. Shamsian (“Mr. Shamsian”), an amount of \$16,464.63. This amount included wages and interest.
2. The Director also imposed three (3) administrative penalties of \$500 each on Diar under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for a total of \$1,500.
3. The total amount of the Determination is \$17,964.63.
4. Diar has appealed the Determination, alleging the Director erred in law and failed to observe the principles of natural justice in making the Determination.
5. As a remedy, Diar is seeking the Tribunal to cancel the Determination or, in the alternative, to refer it back to the Director.
6. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (pursuant to section 103) and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal may be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

7. Did the Director err in law or fail to observe the principles of natural justice in making the Determination?

FACTS

8. On or about May 29, 2010, Mr. Shamsian filed a complaint under section 74 of the *Act* alleging that Diar, a Mediterranean restaurant in Coquitlam, contravened the *Act* by failing to pay him regular wages and reimbursing him for employer costs.

9. On August 4, 2010, the Delegate held mediation between the parties, which did not result in a resolution of Mr. Shamsian's complaint.
10. Subsequently, on August 18, 2010, the Delegate sent a demand to Diar for its payroll records pertaining to Mr. Shamsian with a deadline for delivery of those records set at September 16, 2010. However, Diar did not keep any payroll records and therefore, was unable to produce them.
11. On September 30, 2010, the Delegate conducted a hearing into Mr. Shamsian's complaint (the "Hearing"). Mr. Shamsian attended the Hearing on his own behalf, and Abdolla Nozadgagin ("Mr. Nozadgagin") and Sandar Barahmand ("Mr. Barahmand"), as owners and Directors of Diar, attended on Diar's behalf.
12. In the Reasons for the Determination (the "Reasons"), the Delegate delineates the issues she had to consider which went a little beyond what Mr. Shamsian claimed in his complaint. More particularly, the issues the Delegate dealt with at the Hearing included the following:
 - Is Mr. Shamsian an Employee of Diar?
 - If so, is Mr. Shamsian owed regular wages? If so, in what amount?
 - If so, is Mr. Shamsian owed compensation for length of service? If so, in what amount?
 - If so, is Mr. Shamsian owed annual vacation pay? If so, in what amount?
 - If so, is Mr. Shamsian owed for employer costs? If so, in what amount?
13. In the Analysis portion of the Reasons, after reviewing all of the evidence of the parties (which evidence I have carefully reviewed), the Delegate summarizes the pertinent evidence as it relates to each of the issues set out above. Starting with the question of whether Mr. Shamsian is an employee, the Delegate considers the inclusive definition of "employee" in the *Act*, as well as the definition of "work" and reasons as follows in concluding that Mr. Shamsian, contrary to Diar's contention, is an employee of Diar:

Mr. Shamsian states that he is an employee of Diar's. He was approached by Mr. Nozadgagin to be the General Manager of Diar. He did not have a previous social relationship to Mr. Nozadgagin.

Mr. Nozadgagin, states that the work done by Mr. Shamsian for Diar, [*sic*] was done because he and Mr. Shamsian were friends, he was not an employee of Diar [*sic*]. Mr. Nozadgagin also states that the monies paid to Mr. Shamsian were given because of the friendship, and because Mr. Shamsian needed the money for personal reasons, so he helped him out – it was not money paid for work done.

...

Not surprisingly in claims such as this one, the evidence of the parties is at opposite ends of the spectrum. That said, none of the information provided by Diar's Director's [*sic*] suggest that Mr. Shamsian did not do the work that he stated he did for Diar.

Mr. Shamsian provided a detailed document to verify his employment relationship with Diar. In this document, Mr. Shamsian outlined and provided supporting documentation (building lease, Telus contract) that he signed in the capacity of a Manager for Diar. He listed contacts that he liaised with and contacted as the Manager of Diar. Mr. Shamsian provided copies of the logo and menus that he created for Diar. He provided copies of the documents that he witnessed as the Manager of Diar on behalf of Diar. Mr. Shamsian also provided copies of the 'Serving it Right' receipts for taking the course as directed by Diar. These receipts show that Mr. Nozadgagin's MasterCard paid for Mr. Shamsian to take the course on behalf of Diar.

In addition, Mr. Shamsian provided documents showing his role as the Manager of Diar in directing the contractors during the construction of the restaurant. He provided copies of the in house materials that he created such as flyers, marketing information, company policies and numerous e-mail communications regarding various business matters between himself and the Owners/Directors and various third party contacts from the company e-mail account as well as his personal account.

Mr. Shamsian also provided a copy of Diar's budget that he created for Diar, [*sic*] this budget also serves to provide additional support as to his employment relationship with Diar as it included his salary for 2009 as the Manager of Diar. He also provided documents showing the research and work he did in purchasing and programming Diar's cash register, which Diar changed in the end.

Mr. Shamsian also provided the Business Plan that Diar had paid a company to draw up for them. In this business plan, there is an organization chart which lists Mr. Shamsian as the 'VP Marketing & Sales'.

...

Mr. Nozadgagin and Mr. Barahmand did not dispute that Mr. Shamsian performed all of this work as he claimed. Both Directors continued to maintain their position that Mr. Shamsian did this work to help Diar out, not in the capacity of a Manager of Diar, but as a friend. Diar also stated that Mr. Shamsian would have been hired as the 'future Manager' of Diar once the restaurant opened, but he had not yet been hired as the Manager because the restaurant had not opened for business yet.

Each one of the tasks outlined above would reasonably be considered to be a duty that would normally be performed by an employee. Mr. Shamsian did not have an investment in Diar, and it would seem odd that Mr. Shamsian would perform all of these tasks for free as he did not stand to gain anything, financially or otherwise. In addition, Mr. Nozadgagin agreed that had Mr. Shamsian not done this work for Diar, Diar would have had to hire and pay an employee to do it.

By the definition of an employee and an employer as extracted from section 1 of the *Act* and outlined above Diar allowed Mr. Shamsian to perform these tasks. In fact, in most cases, Diar not only allowed Mr. Shamsian to perform these duties, they also directed Mr. Shamsian to complete these duties therefore not only making Mr. Shamsian an employee, but also making Diar an employer by definition under the *Act* [*sic*].

14. Having determined that Mr. Shamsian is an employee of Diar, the Delegate then proceeds to the question of whether Mr. Shamsian quit his employment or whether his employment was terminated due to constructive dismissal. With respect to this question, the Delegate notes that Mr. Shamsian, in his complaint, indicated that he quit his employment with Diar, but during the Hearing, Mr. Shamsian testified that he left his employment with Diar because Diar failed to pay him his wages in full and it was clear to him that he would never receive his full wages from Diar.
15. The Delegate also notes that Diar, on the same question, did not explain how Mr. Shamsian's employment ended, nor deny that the employment ended. Diar maintained that Mr. Shamsian was simply helping out Diar and was not an employee and, therefore, there was no employment for Mr. Shamsian from which to quit, resign or be terminated.
16. Having reviewed the different positions of the parties on this question, the Delegate concluded that the credibility of the parties was in issue here. The Delegate then went on to note the decision of the Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 and the instructive and often quoted passage in the Court's decision on how to assess credibility of interested witnesses and thereafter went on to reason as follows:

In assessing credibility, one factor to consider includes the manner of the parties (for example, if the parties are clear, forthright and convincing or evasive and uncertain). However, of greater significance is the individuals' ability to recall details; the consistency of what is said; the reasonableness of the story; the

presence or absence of bias, interest or other motive; and the capacity to know (*Werachai Laoha*, BC EST # D370/01).

Thus, the essential task which I am faced with is to decide what is most likely to be the truth given the circumstances. On a whole, applying the above cited test, I prefer Mr. Shamsian's evidence, which I found to be more believable, consistent, coherent, detailed, true and reasonable in all of the above areas. In addition, I find that Mr. Shamsian's evidence was presented in a clear, consistent, forthright and convincing manner, he did not waiver in his position at all. I find it reasonable to believe that Mr. Shamsian would have left his employment after not being paid any wages since his first month of employment.

In the reverse, Diar's evidence constantly waived and appeared to be contrived to demonstrate the position they were taking.

In the event of a termination under section 66 of the Act, if a condition of employment is substantially altered, the employee's employment may be deemed by the Director of Employment Standards to be terminated.

In order to find a termination under this section of the Act, it must be shown that the employer unilaterally made a substantial change in the nature of the employment duties or in compensation. This change, in effect, creates a new employment relationship with substantially different terms. In this situation, the Director may consider that there has been a termination of employment under section 66 of the Act.

It must be shown that the change made by the employer places the employee in a position of having to accept as a condition of continued employment, changes to wages, working conditions or benefits which an objective, reasonable person would find to be unfair, unreasonable and unacceptable. It is not necessary to show that the employer's intent was to encourage the employee to leave their employment.

If a substantial adverse change is made unilaterally by an employer and as a result of this change the employee makes the decision to quit, either immediately or within a reasonable period, it could still be considered that the ending of the employment relationship was the result of the employer's actions and the employee would be considered to have been terminated for purposes of this section.

If the Director determines that the employee is terminated under this section of the Act, the provisions of section 63 would apply. Section 63 requires an employer to pay compensation for length of service pay when employment is terminated. The entitlement increases with length of service. For an employee such as Mr. Shamsian with more than three months but less than one year of employment, the entitlement is the equivalent of one week's wages. The entitlement is discharged if the employer provides written working notice of the termination, compensation for length of service pay or if the termination was for cause.

From the second month of Mr. Shamsian's employment, Diar never paid him any wages even though he continued to work for Diar to try to get the restaurant open. When Mr. Shamsian would ask for his wages, he would be told that there was no money to pay him.

Eventually Mr. Shamsian could not take it anymore; he was desperate for money, so he decided to cut his losses and to quit his employment with Diar. It soon got to the point where he felt he had no choice but to leave his employment with Diar to seek out other employment so that he would be paid his wages when they were due.

Diar unilaterally changed the wage portion of his employment contract by not paying Mr. Shamsian his full wages for the work that he did for them when they were due.

17. The Delegate then went on to conclude that Diar constructively dismissed Mr. Shamsian from his employment and contravened section 63 of the *Act* for failing to pay him compensation for length of service. The Delegate calculated the compensation due to Mr. Shamsian for this contravention at \$646.15.

18. With respect to the matter of regular wages owed to Mr. Shamsian, the Delegate, in reviewing the evidence of the parties, noted Mr. Shamsian's evidence that as an employee of Diar he was to be paid \$2,800 per month until Diar was opened for business, thereafter his salary would be adjusted. However, the Delegate notes that Mr. Shamsian submitted that he was only paid \$2,800 in wages for October 2009, and did not receive any wages thereafter. With respect to Diar's position on the matter, the Delegate notes that Diar's position changed "many times throughout the hearing". First, Mr. Nozadgagin submitted that the monies paid to Mr. Shamsian were not wages but a gift to help him out with issues he was having with his family, but later Mr. Nozadgagin stated that the same monies were an advance to Mr. Shamsian on his wages for October 2009. Mr. Nozadgagin also testified that when Mr. Barahmand became a Director of Diar, Mr. Shamsian was owed wages from November 1, 2009 to December 31, 2009. The Delegate summarizes that Diar's position was effectively that Mr. Shamsian was not to be paid wages until he became a Manager once the restaurant opened, and that the monies paid to Mr. Shamsian in October 2009 were simply a gift.
19. The Delegate further states that when she asked the Directors of Diar what Mr. Shamsian would gain from doing the work that he did for Diar, Mr. Nozadgagin stated that he was compensated for his help with the \$2,800 gift.
20. Mr. Shamsian, on the other hand, denied that the monies paid to him were a monetary gift to help him out with his family issues, and submitted that the monies were an advance on his October 2009 wages and he was expected to, and did, provide Diar services for the said payment. The Delegate then noted that the question of whether the \$2,800 Diar paid to Mr. Shamsian was on account of wages or a gift raised an issue of credibility between the parties calling for consideration of the test in *Faryna v. Chorny*, *supra*. In preferring the testimony of Mr. Shamsian to Mr. Nozadgagin's and Mr. Barahmand's, the Delegate stated:

Again I am faced with an issue of credibility and whose evidence I prefer, and again I am guided by the tests in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.). Once again, I prefer Mr. Shamsian's testimony. Mr. Shamsian's evidence was presented in a clear, consistent, forthright and convincing matter, once again he did not waiver in his position at all.

Mr. Barahmand was only able to provide information relevant to the time he was actively a Director of Diar, and Mr. Nozadgagin has extensive gaps in his memory as to what happened where and when. In general, both jointly and separately Mr. Barahmand [*sic*] and Mr. Nozadgagin's testimony is inconsistent and unreliable. The only parts of their testimony throughout the whole process that appears [*sic*] believable was Diar's agreement as to the amount of money that was paid to Mr. Shamsian and when it was paid, and Mr. Nozadgagin's testimony that monies (\$5,250.00) were owed to Mr. Shamsian up to January 7, 2010 when Mr. Barahmand joined Diar as a Director.

Mr. Nozadgagin's testimony confirmed that some of the monies were payments for services rendered. In fact his initial testimony was that the monies paid to Mr. Shamsian were advances paid on future wages, which is likely the truth in this circumstance as it confirms Mr. Shamsian's testimony. In addition, Mr. Barahmand testified that when he became a Director at Diar on January 8, 2010, there was an outstanding wage amount owed to Mr. Shamsian, which according to the partnership agreement was the responsibility of Mr. Nozadgagin, and Mr. Nozadgagin acknowledged this debt.

Lastly, with all of the financial difficulties that Diar was having as introduced by Mr. Nozadgagin, I find it hard to accept that Diar or Mr. Nozadgagin were in a financial position to be giving monetary gifts to anyone. It seems more likely and believable that this money was paid to Mr. Shamsian by Diar as an advance on his October 2009 wages as initially stated by Mr. Nozadgagin.

As a result I find that the monies paid to Mr. Shamsian were in fact wages as defined under the *Act*.

In addition, Mr. Shamsian claims that his wage was supposed to be \$2,800.00 per month until Diar opened its doors for business. Mr. Nozadgagin stated that wages were not discussed, and addressed the \$2,800.00 paid to Mr. Shamsian as a gift. As I have already found that Mr. Shamsian was an employee,

and the money paid to him was a wage, I must also make a determination as to what the monthly salary was to be.

Again, I am faced with an issue of credibility and whose evidence I prefer. Once again, I prefer Mr. Shamsian's evidence. Again, his testimony is clear, concise and consistent.

Mr. Nozadgagin initially referred to the \$2,800.00 as an advance on wages, and then he stated that the amount was a gift. In these circumstances, as the wages paid and the wage amounts claimed are the same amount, I find that the salary agreement between Diar and Mr. Shamsian was that Mr. Shamsian's salary was to be \$2,800.00 per month until such time as Diar opened its doors for business. As Diar never did open the restaurant prior to Mr. Shamsian's departure, I also find that his monthly salary for the term of his employment with Diar was \$2,800.00 per month.

21. The Delegate, having found that Mr. Shamsian was an employee of Diar and that the \$2,800 paid to him were wages, then went on to determine if further wages were owed to Mr. Shamsian and in what amount. Here, in concluding in the Reasons that Mr. Shamsian was owed \$14,000 in unpaid regular wages for five (5) months of work at \$2,800 per month, the Delegate reasoned as follows:

Again the evidence of Mr. Nozadgagin, Mr. Barahmand and Mr. Shamsian differs, and again I am faced with deciding what is most likely to be the truth given the circumstances, and whose evidence I prefer. Again, I prefer the evidence of Mr. Shamsian, and some of the testimony given by Mr. Barahmand. Mr. Nozadgagin's testimony is unclear and inconsistent. He often could not remember what the circumstances were and his testimony was skewed to support his position that Mr. Shamsian is not owed any wages. The only part of Mr. Nozadgagin's testimony that appeared to be true was that Mr. Shamsian was owed \$5,250.00 from November 1, 2009 to January 7, 2010.

That said, inadvertently both Mr. Nozadgagin and Mr. Barahmand both agreed that Mr. Shamsian did perform work for Diar during the period in question, [sic] their argument seems to lie with how much work was performed and who is responsible for what portion of the unpaid wages. The latter of which is not at issue at this point.

Once again, Mr. Shamsian's testimony is consistent, clear and reasonable. Mr. Shamsian gave a detailed account of what happened when, who he received direction from and what duties he performed for Diar. Mr. Shamsian described in detail how he filled his days working for Diar.

As the only evidence before me is the evidence provided by Mr. Shamsian, I accept this evidence as the best evidence. As a result, I find that Mr. Shamsian did perform work for Diar during the period November 1, 2009 – March 31, 2010. In addition I also find that Diar did not pay Mr. Shamsian his wages for this same period.

Section 17 of the Act states that at least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period. As Diar did not do this, I find that Diar contravened section 17 of the Act.

Section 18 of the Act provides that an employer must pay all wages owing to an employee within 48 hours after an employer terminates their employment. As Diar did not do this, I find that Diar has contravened section 18 of the Act.

Consequently I find that Mr. Shamsian is owed \$14,000.00 in unpaid regular wages.

My calculations are as follows, based on the information provided by Mr. Shamsian.

$$\$2,800.00 \text{ per month} \times 5 \text{ months} = \$14,000.00$$

22. With respect to whether Mr. Shamsian was owed annual vacation pay, the Delegate noted that while Mr. Shamsian did not claim any annual vacation pay in his complaint, as part of her task to apply the "full scope" of the Act, she would look into this question. In examining the evidence of the parties on this question, the Delegate noted that Mr. Shamsian said he had not been paid vacation pay and Diar, on its part, did not

adduce any evidence of payment of any vacation pay to Mr. Shamsian. As a result, the Delegate concluded that Diar breached section 58 of the *Act* and ordered Diar to pay Mr. Shamsian \$700 in vacation pay, based on 4 percent of the total of both the previously paid wages and also the unpaid wages owing to him.

23. With respect to the issue of whether Mr. Shamsian was owed monies by Diar on account of payment by him of the employer's costs, the Delegate concluded in the affirmative and found Diar in contravention of section 21 of the *Act* and ordered the latter to pay Mr. Shamsian \$693:

Mr. Shamsian claimed that on the direction of Mr. Nozadgagin he paid Yakob Babanajad ("Mr. Babanajad"), the Cook for Diar, \$500.00 in cash as a part of his salary on November 15, 2009. In addition, in January 2010 and again on the direction of Mr. Nozadgagin he bought work clothes (consisting of a shirt, a pair of pants and a pair of shoes) at "Winners" for Mr. Babanajad so that he could begin working for Diar, these clothes totalled \$93.00 [sic]. Lastly, Mr. Shamsian also stated that he paid \$100.00 (2 purchases of \$50.00 each) in gas in Mr. Nozadgagin's vehicle on behalf of Diar for company business. Mr. Nozadgagin told Mr. Shamsian that he would reimburse him for all of these purchases that he paid for on behalf of Diar. Mr. Shamsian submitted all of the receipts to Diar for reimbursement however he has never been reimbursed for these amounts.

Diar does not dispute these purchases; in fact Mr. Nozadgagin confirms these purchases were made by Mr. Shamsian on behalf of Diar.

24. In terms of administrative penalties for contraventions of the *Act*, the Delegate imposed on Diar three (3) penalties of \$500 each, pursuant to section 29 of the *Regulation*. These penalties were for failure to produce employer payroll records when demanded (s. 28), failure to pay all wages owing to Mr. Shamsian within 48 hours after terminating his employment (s. 18) and failure to pay Mr. Shamsian wages at least semi-monthly and within eight (8) days after the end of the pay period (s. 17). It should be noted that with respect to Diar's contraventions of sections 21, 58 and 63 of the *Act*, the Delegate held that the administrative penalties for those contraventions were subsumed under the penalty for contravention of section 18 of the *Act*.

SUBMISSIONS OF DIAR

25. Counsel for Diar, in his submissions on appeal, with respect to the natural justice ground, argues that the Delegate "failed to observe the principles of natural justice when she failed to inform Mr. Nozadgagin and Mr. Barahmand of their rights to have a certified translator present at the hearing". More particularly, counsel notes that as part of the principles of natural justice, parties should be afforded a reasonable opportunity to know the case being made against them, the right to present their evidence and the right to be heard by an independent and impartial arbiter. In this particular case, counsel states that there are numerous instances in the Reasons where the Delegate acknowledges that both Mr. Nozadgagin and Mr. Barahmand possessed "limited comprehension of the English language" and despite these acknowledgements, they were "not advised of or given the opportunity to avail themselves of the services of a certified translator". The instances in question in the Reasons are identified in counsel's written submissions as follows:

For example, on page 2 of the Reasons, the Delegate states,

'Diar needed someone who had experience in the business, and *who knew the language...*'.

On page 6, the Delegate writes,

'When Mr. Nozadgagin wanted to start Diar he approached Mr. Shamsian stating that *he needed someone to translate and do his talking for him*'.

On page 7,

{Barahmand} was aware that Mr. Shamsian was still doing some work with Mr. Nozadgagin and Diar as well, *perhaps only as a translator...*

Further, on page 8,

Mr. Barahmand had only contacted Mr. Shamsian...*because he was new to Canada and he could not speak English very well*

(emphasis added.)

Conversely, the Delegate noted on page 6 of her Reasons that the Complainant possessed a greater comprehension of English,

There were a few times that Mr. Shamsian went places with [Nozadgagin] in relation to the restaurant to help out with translation as *his English is not very good and Mr. Shamsian's is.*

26. Further, counsel states that as they are “new to Canada”, neither Mr. Nozadgagin nor Mr. Barahmand “speak or write English fluently”. In the case of Mr. Barahmand, he is only “now learning” to speak or write English, according to counsel. He further submits that Mr. Barahmand, at the time of the Hearing, “was incapable of fully comprehending the legal matters before him” and “unable to provide testimony in a manner that would effectively challenge the Complainant’s version of events”.
27. According to counsel, only Mr. Shamsian and the Delegate fully understood the proceeding. He also notes that since Mr. Barahmand is now the sole director of Diar as a result of Mr. Nozadgagin’s personal bankruptcy, Mr. Barahmand alone has been “left to shoulder the full weight of the Delegate’s decision”. Therefore, it is important that Mr. Barahmand or Diar is provided “the opportunity to properly understand and prepare a defence” and to do otherwise would “embarrass the administration of justice”.
28. With respect to the error of law ground of appeal, counsel states that while the Delegate properly cited the test for assessing credibility of witnesses delineated in *Faryna v. Chorny, supra*, when assessing in her Reasons the testimony of Mr. Shamsian against that of Mr. Nozadgagin and Mr. Barahmand, she did not correctly apply the test. More particularly, counsel points to the following passage in the Reasons where the Delegate, in preferring the testimony of Mr. Shamsian over that of the testimony of Mr. Nozadgagin and Mr. Barahmand, states that Mr. Shamsian’s testimony is: “more believable, consistent, coherent, detailed, true and reasonable...in addition, I find that Mr. Shamsian’s evidence was presented in a clear, consistent, forthright and convincing manner...” Counsel states that the ability of Mr. Shamsian “to appear coherent, detailed, clear, etc., was directly associated with his ability to speak English fluently and had little to do with the merits of his position”. Conversely, counsel states that the Delegate’s conclusion that both Mr. Barahmand’s and Mr. Nozadgagin’s “testimony appeared ‘unclear and inconsistent’...and therefore ‘inconsistent and unreliable’...relates to the inabilities of both to properly understand and respond to the allegations made against Diar”.
29. Counsel argues that the Delegate, in the circumstances, erred in relying “upon the fluidity and clarity of testimony” of Mr. Shamsian rather than assess the “reasonableness of the circumstances surrounding the matters in dispute” which is what the Court in *Faryna v. Chorny* calls for:

The test in *Faryna* is to enquire, what would a practical and informed person think reasonable in the circumstances?

In the matter at hand, we have a person alleging to be an employee, who was initially hired for a fixed term (until the restaurant opened), who understood in November that there were serious financial issues with the owner, who had the skills and experience to obtain other employment, and yet continued to work for four months without receiving a paycheque and even paid out-of-pocket business expenses that, given the circumstances, no reasonable person could expect to recoup.

There is no indication that the Delegate critically questioned the reasonableness of this situation. With respect, to accept Mr. Shamsian's explanation of events strains the imagination. It is not reasonable.

The Respondent submits that in failing to assess whether a practical and informed person would consider the Complainant's actions as 'reasonable', the Delegate failed to properly effect the principles in *Faryna* and therefore, erred in law.

SUBMISSIONS OF THE DIRECTOR

30. The Director, in response to the natural justice ground of appeal of Diar, states that the passages Diar's counsel has quoted and attributed to the Delegate as evidence of the latter's acknowledgement of Mr. Nozadgagin's and Mr. Barahmand's poor or limited comprehension of the English language do not represent the Delegate's view but rather "the statements of the positions of either the Director(s) [of Diar] or Shahram Shamsian."
31. The Director further submits that the Delegate did not discuss the matter of Mr. Nozadgagin's or Mr. Barahmand's comprehension of the English language in the Findings and Analysis portion of the Determination because the Delegate did not consider the matter to be an issue or relevant. Instead, the Director states:

...Mr. Nozadgagin and Mr. Barahmand both appeared to have a very good comprehension of the English language. At the start of the hearing all parties were sworn, and both Mr. Nozadgagin and Mr. Barahmand responded appropriately to the asked questions during the oath. The exhibits were entered and Diar clearly objected to, and clearly explained their reasons for doing so, to two of the documents being entered as exhibits by Mr. Shamsian. Both Mr. Nozadgagin and Mr. Barahmand presented their positions clearly (in reference to their speaking ability) and with ease. Mr. Barahmand cross-examined Mr. Shamsian on the evidence that he provided, and did so in English and without issue. Neither Mr. Nozadgagin nor Mr. Barahmand stumbled with answers to questions, asked for clarity on questions or requested that questions be simplified so that they could understand them. Both Directors answered questions appropriately which would suggest that they understood the question(s) and what was being asked of them.

32. The Director further adds:

In addition, at the start of the hearing the hearing process was explained to all parties. The Delegate explained to all of the parties how the hearing was going to proceed; that she would be determining whether the employer was in compliance with or in contravention of the *Act* and how this would be determined. The Delegate also explained that the opportunity to take advantage of the services of a mediator would be available should (at any time) either party not understand any issue or any part of the process. The Delegate clarified the issues, and all parties agreed to what the issues before the Delegate were. At each point during the introduction the Delegate asked the parties if they understood and/or if they had any questions. The Delegate did this again at the end of the introduction as well. At no time during this process, although given numerous opportunities, did Mr. Nozadgagin or Mr. Barahmand indicate that they did not understand the process or what exposures both Diar and themselves further as Directors of Diar were facing. In fact both Mr. Nozadgagin and Mr. Barahmand stated that they understood the process they were about to enter into, and so the hearing proceeded.

It is also important to note that the adjudication hearing was not the first contact that Mr. Nozadgagin and Mr. Barahmand had with the Branch. When the application was received from Mr. Shamsian, as per any other complaint, the Branch contacted Diar to inform them of the complaint and to educate them on the *Act* and the process. From there the file was scheduled for a mediation with a Branch Mediator where again the issues, exposures and process would have been explained to Diar, from there the adjudication was scheduled [*sic*]. Not once during this process did Diar's Directors indicate that they did not

understand the process, the language or the case against them. In addition, in the time between the hearing and the issuing of the Determination, once again neither Mr. Nozadgagin or Mr. Barahmand contacted the conduct Officer (or anyone at the Branch for that matter) or Mr. Ellis to indicate that they did not understand the language or the process. In fact, it was not until the Determination was issued, showing that wages were outstanding, did Diar retain the services of a lawyer who would raise the issue of their alleged poor understanding of the English language or what was happening to them.

33. The Director concludes his submissions, stating:

...if a person is not fluent in the language and/or does not have an understanding of the process it is incumbent upon them to accept personal responsibility and protect their own interests early on in the process. The Delegate would have adjourned the hearing to allow for Mr. Nozadgagin and Mr. Barahmand to retain legal counsel and/or to obtain the services of a certified translator had either party indicated the need to do so or more so demonstrated that they did not comprehend [English]....

34. With respect to the error of law ground of appeal, the Director submits that the Delegate not only relied on the correct test delineated in *Faryna v. Chorny*, *supra*, to assess the credibility of interested witnesses, but she also applied it correctly. The Director, here, counters Diar's allegation that the Delegate failed to question the reasonableness of the circumstances surrounding Mr. Shamsian's decision to continue working for Diar without pay as follows:

...As noted in the Determination, Mr. Shamsian kept bring forward his concerns over his unpaid wages, and continually requested that they be paid to him. Mr. Shamsian was also promised his wages when Mr. Nozadgagin found an investor to inject some much needed financial help into the flailing business. When Mr. Barahmand became a Director in Diar, once again there was an acknowledgement of his unpaid wages, but again Mr. Shamsian was promised his unpaid wages once the contractors were paid off so that construction on the restaurant could continue and the restaurant could open for business. Mr. Shamsian had loyalty to the business. He believed in the business and wanted to see it succeed, that is why he stayed on – that coupled with the promises that he would eventually be paid his unpaid wages. Considering the circumstances and what Mr. Shamsian already had invested in Diar demonstrates the reasonableness of Mr. Shamsian's claims and position.

35. The Director also points to another factor militating against the credibility of Mr. Nozadgagin and Mr. Barahmand; namely, "their inability to continue to tell the same 'story'...consistently and clearly throughout their testimony". It is this, argues the Director, and not Mr. Nozadgagin's and Mr. Barahmand's alleged inability to speak English fluently, that made their testimony lack reliability.

36. In summary, the Director argues that Diar has failed to provide a sufficient basis to substantiate either grounds of its appeal. In the Director's view, Diar is simply using the appeal mechanism to "avoid paying the wages that were found to be owing [in the] Determination". The Director argues that the appeal should, therefore, be dismissed.

SUBMISSIONS OF MR. SHAMSIAN

37. Mr. Shamsian submits that at the beginning of the Hearing, the Delegate asked both parties if a translator was required, but the parties "declined". Mr. Shamsian also submits that both Mr. Nozadgagin and Mr. Barahmand "have a good knowledge of English language and communicated well in English at the mediation session and also at the Hearing". Mr. Shamsian does not feel that the Delegate breached any principles of natural justice in this case.

38. With respect to the error of law ground of appeal of Diar, Mr. Shamsian indicates it was not his English skills that influenced the Delegate to prefer his evidence (as he is an immigrant like Mr. Nozadgagin and Mr. Barahmand) but the “concrete evidence” and materials he presented. He then goes on to review some of the evidence, which he previously presented at the Hearing and is delineated in the Reasons, which I do not find necessary to reiterate here.

FINAL REPLY OF DIAR

39. In the final Reply of Diar, counsel for Diar, referring to Diar’s earlier challenge of the Delegate’s application of the test in *Faryna v. Chorny*, *supra*, in preferring the evidence of Mr. Shamsian to the Diar’s representatives, submits that Diar has, since the filing of its appeal, learned that Mr. Shamsian received Employment Insurance benefits from September 2009 to April 2010, during the same period for which he claimed and was awarded wages in the Determination. Counsel further states Human Resources Skills Development Canada (“HRSDC”) is presently investigating Mr. Shamsian’s claim for insurance benefits and particularly his failure to report employment income at the time he was claiming and receiving Employment Insurance benefits in violation of the *Employment Insurance Act* (“EIA”).
40. According to counsel, if HRSDC’s investigation results in a finding that Mr. Shamsian was collecting Employment Insurance benefits during his employment with Diar, then Diar “is entitled to offset the value of such benefits from the award against it for unpaid wages and interest”, otherwise, the Determination will have overcompensated Mr. Shamsian.
41. Counsel then goes on to set out the following five (5) questions, which he states require answers from Mr. Shamsian so that the Tribunal can properly decide whether “to either adjourn or allow this appeal”:

There are several questions demanding clarification as follows:

1. whether Mr. Shamsian received employment insurance benefits during the period of time that he claimed unpaid wages;
 2. if so, Mr. Shamsian’s reasons for not informing the Delegate that he had received such benefits;
 3. if so, what effect does this additional income have on the Delegate’s award for unpaid wages and interest;
 4. whether the HRSDC has a right of subrogation to any payment made by the Defendant to Mr. Shamsian; and
 5. whether the Defendant faces risk of being liable to HRSDC for any payments made to Mr. Shamsian.
42. Until Mr. Shamsian answers these questions, counsel argues that the appeal should be “placed in abeyance”.

ANALYSIS

43. As indicated previously, Diar appeals the Determination on the basis of the “error of law” ground of appeal in section 112(1)(a) of the *Act*, as well as the “natural justice” ground of appeal in section 112(1)(b) of the *Act*. I propose to deal with each under separate descriptive headings below starting with the natural justice ground of appeal.

(i) *Natural Justice*

44. As indicated previously, under the natural justice ground of appeal, Diar’s counsel contends that the Delegate failed to observe the principles of natural justice in making the Determination because she failed to inform Mr. Nozadgagin and Mr. Barahmand of their rights to have a certified translator present at the Hearing.
45. The Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explained that the 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.
46. Subsequently, the same Tribunal, in *Imperial Limousine Service Ltd.*, BC EST # D014/05, expounded on the principles of natural justice, stating:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision-maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.
47. In this case, having completed my review of the Reasons, including the section 112(5) “record” and the submissions of the parties, for the reasons set out below, I am not persuaded by Diar that the Delegate failed to observe the principles of natural justice in making the Determination.
48. More specifically, after reviewing the five (5) passages quoted by counsel for Diar in support of his arguments that they evidence acknowledgement by the Delegate that both Mr. Nozadgagin and Mr. Barahmand possessed limited comprehension of the English language, I find that a closer and more contextual reading of those passages would show that none of the quoted passages suggest that the Delegate acknowledged that either Mr. Nozadgagin or Mr. Barahmand possessed limited comprehension of the English language and understanding of the proceeding during the Hearing. I agree with the Director the passages quoted by counsel simply represent the statements of the positions of either Mr. Shamsian or the Directors of Diar, Mr. Nozadgagin or Mr. Barahmand, as the case may be as summarized or repeated by the Delegate in the Reasons.
49. I also note, based on the section 112(5) “record”, that Diar, well in advance of the Hearing, was apprised of the nature of Mr. Shamsian’s complaint under the *Act* when Mr. Shamsian employed the Employment Standards Self-Help Kit to attempt to resolve his complaint without any success. Subsequently, Diar was a party to a mediation between the parties held on August 4, 2010. This was another opportunity for Diar and its Directors to participate and understand the full scope of Mr. Shamsian’s complaint and if they did not understand the nature of the complaint or had any issue with comprehension of the English language or communicating their responses, one would have thought that one or both of the Directors would have raised the matter before the Delegate, but that did not happen.
50. Subsequently, at the Hearing, Mr. Shamsian says that the Delegate afforded the parties an opportunity to have a translator attend, but the parties “declined”. Whether or not this is true, I would think that the Hearing was yet another opportunity for both Directors, who are businessmen, to raise any issue(s) they were having with comprehension of the language of the proceeding in which they were involved, but they chose not to do so.

51. I also note, based on the Delegate's observation at the Hearing, neither Mr. Nozadgagin nor Mr. Barahmand seemed to be having any difficulty with comprehension of the English language and seemed to respond to questions asked of them in the English language without exhibiting any difficulty. If Mr. Nozadgagin and Mr. Barahmand required a translator, they should have said so, and it is not for the Delegate to divine, in these circumstances, that a certified translator is required.
52. I also note almost six (6) months passed before the Determination was made following the Hearing into Mr. Shamsian's complaint against Diar. If either Mr. Nozadgagin or Mr. Barahmand felt unsettled because of their alleged lack of comprehension of the English language at the Hearing, one would have thought that, before the Determination was made, they would have contacted the Delegate or perhaps counsel (as they did for the appeal) to assist in making contact with the Delegate to either provide clarification of evidence they previously submitted or provide further evidence they were not able to give as a result of their lack of comprehension of or facility with the English language.
53. As indicated, I am not persuaded with the submissions of Diar on the natural justice ground of appeal, and I reject this ground of appeal.

(ii) Error of Law

54. With respect to the error of law ground of appeal, counsel for Diar, as previously indicated, submits that the Delegate, when assessing in her Reasons the testimony of Mr. Shamsian against Mr. Nozadgagin and Mr. Barahmand, failed to correctly apply the test for assessing credibility of witnesses delineated in *Faryna v. Chorney, supra*, and thereby committed an error of law. More specifically, counsel states that the Delegate only preferred the testimony of Mr. Shamsian to that of Mr. Nozadgagin and Mr. Barahmand because Mr. Shamsian possessed the ability to speak English fluently and, therefore, appeared "coherent, detailed, clear, etc." Whereas, Mr. Barahmand and Mr. Nozadgagin appeared "unclear and inconsistent" because they were both unable "to properly understand and respond to the allegations made against Diar".
55. Counsel for Diar, also under the error of law ground of appeal, submits that the Delegate appears to have failed to critically question "the reasonableness of [the] situation". More particularly, counsel appears to question the reasonableness of the Delegate's decision to prefer the evidence of Mr. Shamsian when Mr. Shamsian, as counsel points out, was hired for a limited or fixed term until the restaurant opened, understood (as early as November) that the owner of the restaurant had financial issues and was receiving payment for continued work over the course of four (4) months, and having to use his own funds to pay business expenses of the restaurant. Counsel suggests that the actions of Mr. Shamsian, in the eyes of a practical and informed person, are not reasonable, and the Delegate failed to properly or critically assess that evidence when he decided to prefer the evidence of Mr. Shamsian to Mr. Nozadgagin's and Mr. Barahmand's.
56. Having said this, I note that the Tribunal has consistently adopted the following definition of "error of law" delineated in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C. J. No. 2275:
1. a misinterpretation or misapplication of a section of the *Act*;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. exercising discretion in a fashion that is wrong in principle.

57. While the Tribunal, on appeal, does not become involved in the investigation and assessment of credibility of witnesses and substitute its opinion for that of the Delegate, if there is a finding of credibility by the Delegate on a view of the facts which could not reasonably be entertained then this may give rise to an error of law reviewable by the Tribunal on appeal. However, in this particular case, I find that the Delegate's finding of credibility in favour of Mr. Shamsian is well reasoned and in my view reasonably supportable on the evidence. More specifically, the Delegate, in the Reasons, notes that the English language and comprehension skills of the representatives of Diar did not influence her, but the inconsistency in their stories against the consistency of Mr. Shamsian's evidence. The Delegate notes specifically the influencing evidence of Mr. Shamsian that he maintained his concern over his unpaid wages while he was working for Diar and continually requested that he be paid and was promised his wages with the entry of Mr. Barahmand and the latter's financial investment into the restaurant venture. He was also given an acknowledgement of his unpaid wages and promised that he would be paid once the contractors were paid after the construction of the restaurant was completed. In the circumstances, the Delegate's credibility Determination cannot be said to have been arrived at on a view of facts which could not reasonably be entertained.
58. In the circumstances, I do not find that Diar has satisfactorily shown an error of law on the part of the Delegate in making the Determination.
59. With respect to the final submissions of Diar's counsel questioning further the credibility of Mr. Shamsian's evidence in the employment standards proceeding on the basis of some new information regarding an alleged investigation by HRSDC into Mr. Shamsian's claim for insurance benefits and the latter's alleged failure to report employment income while receiving employment insurance benefits, I note that HRSDC has not made any decision and furthermore, this Tribunal is not bound by any decision of HRSDC under the federal *Employment Insurance Act* which decision would not have any precedential value with respect to the provincial *Employment Standards Act* (see *Re: Hill*, BC EST # D219/99; *Re: Lake*, BC EST # D320/00).
60. In my view, the Delegate reviewed all of the evidence carefully and arrived at a well-reasoned Determination. None of the questions raised by counsel for Diar in context of the alleged HRSDC investigation into Mr. Shamsian's alleged employment insurance benefits claim, in my view, impact on the Determination or would cause me to change it or cancel it or hold it in abeyance until HRSDC makes its decision. I also note that while it is not appropriate for me to get into an hypothetical exercise on what may happen if HRSDC makes a determination one way or another, I note that HRSDC, under its governing legislation, the *Employment Insurance Act* and related regulations, has the discretion to rectify any wrong perpetrated by anyone on the employment insurance scheme.

ORDER

61. I order, pursuant to section 115 of the *Act*, that the Determination, dated March 25, 2011, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal