

An appeal

- by -

Mahmoud Sharafaldin, a Director and Officer of 658847 B.C. Ltd. carrying on
business as Tom and Jerry's Restaurant
(“Mr. Sharafaldin”)

- 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: Carol L. Roberts

FILE No.: 2014A/66

DATE OF DECISION: August 21, 2014

DECISION

SUBMISSIONS

Mahmoud Sharafaldin on his own behalf as a Director and Officer of 658847 B.C. Ltd. carrying on business as Tom and Jerry's Restaurant

Annette Fraser on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Mahmoud Sharafaldin has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 11, 2014.
2. Karen Rubkiewicz filed a complaint with the Director alleging that 658847 B.C. Ltd. carrying on business as Tom and Jerry's Restaurant ("Tom and Jerry's") had contravened the *Act* by failing to pay her wages. On October 25, 2013, the Director issued a Determination (the Corporate Determination) finding Tom and Jerry's in contravention of section 18 of the *Act* in failing to pay wages to Ms. Rubkiewicz.
3. The total amount of wages and accrued interest was \$1,908.80. The Director also imposed a \$1,500 penalty on Tom and Jerry's for the contraventions, pursuant to section 98 of the *Act*. The Corporate Determination, which included a Notice to Directors/Officers explaining their personal liability under the *Act*, was sent to Mr. Sharafaldin, Tom and Jerry's registered and records office, and to Tom and Jerry's business address. The date for appealing the Corporate Determination was December 2, 2013.
4. On April 11, 2014, the Director's delegate found that the Corporate Determination had not been satisfied, nor had it been appealed. The delegate determined that Mr. Sharafaldin was a director of Tom and Jerry's between January 24, 2013, and March 23, 2013, when Ms. Rubkiewicz's wages were earned and payable, and that Mr. Sharafaldin was personally liable to pay \$1,865.76 representing two months' unpaid wages for Ms. Rubkiewicz, pursuant to section 96 of the *Act*. The delegate concluded that there was insufficient evidence that Mr. Sharafaldin authorized, permitted or acquiesced in Tom and Jerry's contraventions, and found him not personally liable for the administrative penalties.
5. Mr. Sharafaldin filed an appeal on May 20, 2014, contending that evidence has become available that was not available at the time the Determination was being made.
6. These reasons are based on the written submissions of the parties, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

7. The record contains the following information:
 - A BC Registry Notice of Change of Directors, filed August 15, 2012, indicating that on December 1, 2011, Paul Cheng became the sole director of Tom and Jerry's and that Gasha Gill ceased to be a director.

- A BC Registry Notice of Change of Directors filed April 8, 2013, indicating that on April 8, 2012, Mr. Sharafaldin became a new director of Tom and Jerry's and Paul Cheng ceased to be a director.
- A copy of the Notice of Articles issued by the Registrar of Companies on April 8, 2013, indicating that Mr. Sharafaldin was the sole director of Tom and Jerry's.

8. On May 14, 2013, the delegate sent Mr. Sharafaldin copies of the BC Registry documents and asked that he provide her with documentation showing that he was not a director from December 20, 2012, to March 17, 2013 (emphasis in original). In response, Mr. Sharafaldin submitted a certified copy of the April 8, 2013, Notice of Articles with the following statement:

Attached is a copy of the change of director for Tom and Jerry's restaurant. I circle with red the date I become the director.

9. On October 23, 2013, Mr. Sharafaldin sent the delegate a copy of a Share Purchase Agreement. The agreement, which is between Gasha Gill and Mr. Sharafaldin, provides that Mr. Sharafaldin is to purchase the shares of Tom and Jerry's in 50 equal installments commencing April 9, 2013. Mr. Sharafaldin contended that "Paul Chan" was Tom and Jerry's sole director from August 15, 2012, until August 8, 2013, when he became the director. (I believe Mr. Sharafaldin misstated the date and that he meant to say April 8, 2013).

10. On October 23, 2013, the delegate wrote to Mr. Sharafaldin as follows:

Please review the attached Notice of Change of Directors with your lawyer. The Notice clearly states that as of April 8, 2012 you became the new Director for BC0658847 and Paul Cheng ceased to be a director. It is your responsibility to show that the information provided by BC Registry Services was a mistake or incorrect.

11. Attached to Mr. Sharafaldin's appeal form is the Share Purchase Agreement he previously submitted to the delegate. Mr. Sharafaldin says that the BC Registry has made a "mistake in [the] typeset" and asks that the Determination be canceled because he was not a director of Tom and Jerry's at the time Ms. Rubkiewicz's wages were earned.

12. The delegate submits that the evidence submitted by Mr. Sharafaldin is not new and that it was considered when she was making the Determination.

13. The delegate says that during her investigation of Ms. Rubkiewicz's complaint, Ms. Rubkiewicz advised her that Paul Cheng was the owner of the restaurant during the period of her employment. The delegate then spoke with "Lana", the manager of the restaurant who informed her that Mr. Cheng was the owner until March 2013 and that he signed the payroll cheques. The two NSF pay cheques issued to Ms. Rubkiewicz bore Lana's signature. The delegate said that her attempts to contact Mr. Cheng were unsuccessful.

14. The delegate further says that she spoke with Paul De Lange at Tom and Jerry's registered and records office and that he advised her that "at some point in time which he did not specify, Mahmoud Sharafaldin resigned as a Director and Paul Cheng stepped in as a Director..."

15. The delegate submits that the BC Registry records indicate that Paul Cheng became a director of Tom and Jerry's on December 1, 2011, and that Mahmoud Sharafaldin became a director as of April 8, 2012. She says that she provided this information to Mr. Sharafaldin and in response, Mr. Sharafaldin gave her a copy of the Share Purchase Agreement. She submits that Clause 8.1 of the Agreement states that, at closing, the vendor is to provide the purchaser with minutes of the shareholder's meeting dismissing Paul Cheng as director and officer and employee of the company. She says that she did not receive a copy of those minutes.

16. The delegate submits that she considered all information before her, and determined that Mr. Sharafaldin was a director of Tom and Jerry's at the time Ms. Rubkiewicz's wages were earned. The delegate asks to have the appeal dismissed.
17. Mr. Sharafaldin did not reply to the Director's submissions.

ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.
19. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

20. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favor of the appellant. I have therefore considered whether or not Mr. Sharafaldin has demonstrated any basis for the Tribunal to interfere with the Determination.

New Evidence

21. I accept that the delegate considered the Share Purchase Agreement before issuing her Determination. I therefore find no basis for the appeal on this ground.

Error of Law

22. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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. adopting a method of assessment which is wrong in principle.

23. Having considered the record and the submissions of the parties, I am persuaded that the Director acted on a view of the facts that could not be reasonably entertained in concluding that Mr. Sharafaldin was a director of Tom and Jerry’s at the time Ms. Rubkiewicz’s wages were earned.

24. Section 96 of the *Act* provides as follows:

- (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.

...

25. Section 126 of the *Business Corporations Act* [SBC 2002] c. 57 provides that:

A company must keep a register of its directors and enter in that register

- (a) the full name and prescribed address for each of the directors,
- (b) the date on which each current director became a director,
- (c) the date on which each former director became a director and the date on which he or she ceased to be a director, and
- (d) the name of any office in the company held by a director, the date of the director’s appointment to the office and the date, if any, on which the director ceased to hold the office.

26. The following information was before the delegate at the time the Determination was being made:

- Ms. Rubkiewicz’s evidence that Paul Cheng was the owner of the restaurant during her period of employment (information that the delegate only mentions for the first time in her written submission);
- A BC Registry Notice of Change of Directors indicating that, as of December 1, 2011, Mr. Cheng was the sole director of Tom and Jerry’s;
- A BC Registry Notice of Articles specifying that, effective April 8, 2013, Mr. Sharafaldin was the sole shareholder of Tom and Jerry’s;

- A BC Registry Notice of Change of Directors, filed April 8, 2013, indicating that as of April 8, 2012, Mr. Cheng ceased to be Tom and Jerry's sole director and Mr. Sharafaldin became a new director.
- A Share Purchase Agreement between Mr. Gill and Mr. Sharafaldin specifying that as of April 8, 2013, Mr. Sharafaldin was purchasing the shares of Tom and Jerry's. The Agreement further provides that Mr. Gill is to provide Mr. Sharafaldin minutes of a shareholder's meeting dismissing Paul Cheng as a director and officer as well as certified copies of the resolutions of the directors of the company authorizing the transfer of shares to Mr. Sharafaldin. (Clause 8)

27. It is not clear to me how the delegate arrived at the conclusion she did. In my view, there is a strong inference that Mr. Sharafaldin did not become a director of Tom and Jerry's until April 8, 2013, one month after Ms. Rubkiewicz ceased to be an employee. It is illogical that Mr. Sharafaldin would enter into an agreement to purchase the shares of Tom and Jerry's on April 8, 2013, and, as a condition of that purchase, require that Mr. Cheng be dismissed as a director if he was himself the sole director.
28. The BC Corporate registry documents indicate that Mr. Sharafaldin became a director of Tom and Jerry's on April 8, 2012, exactly one year before Mr. Sharafaldin entered into the share purchase agreement. In light of all of the other conflicting documentation, it appears that the date of the corporate registry document is in error, as Mr. Sharafaldin contends. In my view, given all of the evidence as well as the fact that Mr. Sharafaldin is not legally trained, the delegate ought to have done more to ascertain the correctness of the Change of Notice of Directors. While the delegate advised Mr. Sharafaldin that it was his responsibility to show that the BC Registry Information was incorrect or mistaken, when he provided her with the information he could, she simply relied on what appears to be an error in the BC Registry documents.
29. In her appeal submissions, the delegate says that she had a conversation with Mr. De Lange, whom she identified as being at "the Appellant's" registered and records office. The record indicates that Mr. De Lange's law office is the registered and records office for Tom and Jerry's. The record also indicates that Mr. De Lange drafted the Share Purchase Agreement on behalf of Mr. Gill. There is no evidence, other than in the delegate's submission, that Mr. De Lange represents Mr. Sharafaldin.
30. The delegate says that Mr. De Lange advised her that "at some point Mr. Sharafaldin resigned as a Director and Paul Cheng stepped in as a Director". This statement appears at odds with the documentary evidence and it does not appear that the delegate challenged Mr. De Lange about this statement in light of the conflicting documentary evidence. Nor does it appear that the delegate attempted to obtain from Mr. De Lange either documents confirming the date of the Change of Directors or inquired with him about the possible error in the Corporate Registry documents. As a lawyer, he appears to have been the person best placed to confirm the accuracy of the BC Corporate records.

ORDER

31. Pursuant to section 115(1)(b) of the *Act*, I refer the matter back to the delegate for further investigation.

Carol L. Roberts
Member
Employment Standards Tribunal