

An appeal

- by -

Anducci's Restaurant (Hastings) Ltd.  
(the "Employer")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2009A/060

**DATE OF DECISION:** July 21, 2009

## DECISION

### SUBMISSIONS

Andy Mollica	on behalf of Anducci's Restaurant (Hastings) Ltd.
Ginette Legal	on her own behalf
Scott Macfadyen	on his own behalf
Eriks (Juri) Raiska	on his own behalf
Stephanie Bogaert	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal filed by Andy Mollica, presumably on behalf of Anducci's Restaurant (Hastings) Ltd. (the "Employer"), of a Determination issued on April 8, 2009 by a delegate of the Director of Employment Standards (the "delegate") against the latter firm in the total amount of \$7,445.23 (the "Determination"). I understand that Mr. Mollica is a director and one of the principal operating executives of the Employer. The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* (the "*Act*").
2. I am adjudicating this appeal based solely on the parties' written submissions. I have before me written submissions filed by Mr. Mollica on behalf of the Employer and by three of the four complainants (Ms. Legal, Mr. Macfadyen, and Mr. Raiska) as well the section 112(5) record that was before the delegate. Having reviewed the material before me, I am of the view that this appeal is not meritorious and, accordingly, I am confirming the Determination.

### THE DETERMINATION

3. At all material times, the Employer operated a restaurant under the trade name "Anducci's" at 6011 Hastings Street in Burnaby, B.C. The Employer appears to have suffered some financial setbacks and several employees filed complaints alleging that they had not been paid their full wages.
4. The delegate conducted an investigation into four unpaid wage complaints filed by Ms. Jennifer Chen, Ms. Ginette Legal, Mr. Scott Macfadyen, and Mr. Eriks (Juri) Raiska and subsequently determined that each was entitled to the following:

<u>Complainant</u>	<u>Particulars</u>	<u>Award (including interest)</u>
Jennifer Chen	vacation pay	\$621.92
Ginette Legal	regular wages/vacation pay	\$434.45
Scott Macfadyen	regular wages/vacation pay	\$1,642.94
Eriks (Juri) Raiska	compensation for length of service/ vacation pay/unlawful wage deductions	<u>\$3,255.92</u>
Total		<u>\$5,955.23</u>

5. In addition, the delegate issued three separate section 98 monetary penalties each in the amount of \$500. Thus, the total amount payable by way of the Determination is \$7,455.23.

## THE APPEAL

6. Mr. Mollica, on behalf of the Employer, filed an Appeal Form in which he asks the Tribunal to cancel the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (section 112(1)(b)). However, it is clear from the material filed by Mr. Mollica that his principal challenge to the Determination is not based on natural justice grounds but, rather, he takes issue with several factual conclusions set out in the Determination. Factual determinations may constitute an error of law (section 112(1)(a)) but only if the disputed fact is not based on a proper evidentiary foundation. Thus, I shall address the appeal in terms of both the “natural justice” and “error of law” grounds.

## FINDINGS

7. In my view, there is absolutely no merit to the “natural justice” ground. As is detailed in the delegate’s “Reasons for Determination”, the delegate made extensive efforts, consistent with section 77 of the *Act*, to apprise the Employer (through Mr. Mollica) about the fact of the complaints and several efforts were made to obtain the Employer’s position. It appears that the Employer failed to respond to various written requests for information, failed to answer telephone calls, and declined to attend in-person meetings with the delegate. When Mr. Mollica did respond, he seemingly did so in an incomplete and apparently misleading manner. I am wholly satisfied that the Employer was given every reasonable opportunity to participate in the delegate’s investigation, to directly respond to the complaints, and to otherwise provide the delegate with its “side of the story”.
8. As noted above, the Employer principally challenges certain findings of fact made by the delegate. I shall address the Employer’s attack as it relates to each separate complainant.
9. The Employer says that it has no records in hand regarding Ms. Chen’s claim but also asserts that her vacation pay was paid in full. This claim appears to be wholly frivolous. Ms. Chen was given a cheque for her vacation pay but this cheque did not clear and there is no evidence of any replacement cheque ever having been issued yet alone clearing for payment.
10. The Employer says that it has no records relating to Ms. Legal and that she was hired at \$8 per hour rather than the \$9 per hour that was used to calculate her unpaid wage entitlement and that she was never employed at the Hastings Street restaurant. Again, this attack is wholly without merit. The \$9 hourly wage and other details concerning her employment are corroborated by the Employer’s own payroll records. A portion of her unpaid wage claim concerns a cheque that was returned “NSF” and a valid replacement cheque was never issued.
11. The Employer says that Mr. Macfadyen was never employed at the Hastings Street restaurant and has been paid in full. The material before me indicates that the Employer conceded (via e-mail communications) that Mr. Macfadyen had not been paid in full and there is nothing in the record before evidencing that he ever was paid the wages conceded to be owing to him.
12. Finally, with respect to Mr. Raiska, the Employer says that he voluntarily quit (the Employer seemingly concedes that it did not give written notice of termination as mandated by section 63 of the *Act*). However, the Record of Employment issued by the Employer indicates that it ended Mr. Raiska’s employment due to a “shortage of work”. The unlawful wage deductions relate to three separate \$50.65 deductions for health

insurance premiums. Although these deductions were authorized, the monies were not remitted to the insurer (a fact corroborated by the insurer's own records and not credibly disputed by the Employer). The balance of Mr. Raiska's claim concerns vacation pay and the Employer says that it has paid vacation pay but never provided any records whatsoever to corroborate that assertion and Mr. Raiska's own wage statements do not show that he ever received vacation pay.

### **ORDER**

13. Pursuant to section 114(1)(c) and 115(1)(a) of the *Act* I order that the Determination be confirmed in the amount of \$7,455.23 together with whatever interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**