

An appeal

- by -

0965319 B.C. Ltd.  
(“Maverick’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.:** 2014A/96

**DATE OF DECISION:** September 15, 2014

## DECISION

### SUBMISSIONS

Michael O'Connell

on behalf of 0965319 B.C. Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 0965319 B.C. Ltd., carrying on business as Maverick’s, (“Maverick’s”) has filed an appeal of a determination issued by the Director of Employment Standards (the “Director”) on June 17, 2014 (the “Determination”).
2. The Determination concluded that Maverick’s contravened Part 3, sections 17 and 18, and Part 7, section 58 (vacation pay) of the *Act* in respect of the employment of Robert E. Sanchez (“Mr. Sanchez”), and ordered Maverick’s to pay Mr. Sanchez wages and interest in the amount of \$15,559.40.
3. The Determination also levied an administrative penalty in the amount of \$1,000.00 against Maverick’s for contraventions of sections 17 and 18 of the *Act*.
4. The total amount of the Determination is \$16,559.40.
5. Maverick’s has appealed the Determination on the ground that the Director failed to observe the principles of natural justice in making the Determination.
6. By way of remedy, Maverick’s is seeking the Employment Standards Tribunal (the “Tribunal”) to change or vary the Determination. Pursuant to section 114 of the *Act*, the Tribunal has discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. Therefore, at this stage, the Tribunal will assess the appeal based solely on a review of the Reasons for the Determination (the “Reasons”); the written submissions of Michael O’Connell (“Mr. O’Connell”), a director of 0965319 B.C. Ltd.; and the “record” that was before the delegate when the Determination was being made. If the Tribunal is satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Mr. Sanchez will and the Director may be invited to file further submissions. Conversely, if the Tribunal finds the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

### ISSUE

7. The sole issue in this appeal is whether the Director breached the principles of natural justice in making the Determination.

### THE FACTS AND ARGUMENT

8. 0965319 B.C. Ltd. operates Mavericks, a pub and restaurant in Metro Vancouver, and was incorporated on March 18, 2013.
9. Mr. O’Connell is a both director and Owner of 0965319 B.C. Ltd.
10. Maverick’s employed Mr. Sanchez from March 2013 to August 11, 2013, first as a line cook and then as General Manager.

11. On August 9, 2013, Mr. Sanchez filed a complaint against Maverick's claiming that the latter owed him wages, including overtime wages (the "Complaint").
12. On May 27, 2014, a delegate of the Director held a hearing into the Complaint (the "Hearing") and, on June 17, 2014, made the Determination.
13. With respect to Mr. Sanchez's claim for overtime pay, the delegate noted in the Reasons that Mr. Sanchez was employed as a Manager throughout the period of his claim, and Part 4 of the *Act* did not apply to the Complaint and, therefore, the overtime claim was dismissed.
14. Before reviewing the balance of Mr. Sanchez's wage claim, I note, in the Reasons, the delegate also considered the question of whether Mr. Sanchez was entitled to compensation for length of service. After considering the evidence of both parties, she concluded that Mr. Sanchez's departure from Maverick's was voluntary and his behaviour was consistent with resignation in both his intent and action, and, therefore he was not entitled to compensation for length of service.
15. Maverick's, understandably, does not appeal the delegate's decisions on the overtime and compensation for length of service claims. Therefore, I will not deal with the evidence that was proffered to the delegate by the parties with respect to these claims here. However, Maverick's disputes in the Appeal the delegate's calculation of regular wages owed to Mr. Sanchez and related conclusions. I will only address the latter dispute and evidence relating to it in this decision.
16. Having said this, as indicated before, Mr. Sanchez was promoted to General Manager on or about April 2013. During his period of employment as a General Manager, there is a dispute between the parties whether Mr. Sanchez employment was based on an hourly rate of pay or a fixed salary (based upon an agreed number of hours he was required to work per week). Mr. O'Connell states that Mr. Sanchez was not an hourly employee while Mr. Sanchez contends that he was.
17. In the Reasons, the delegate summarizes Mr. Sanchez's evidence with respect to his wage claim as follows:

Mr. Sanchez states he was not paid for all hours worked and claims he worked seven days per week, between fourteen and twenty four hours per day. For each pay period he provides a written summary of days and hours worked. The summary which was completed for the hearing and Employment Insurance claim, indicates that from April 1 – 15 he worked 255 hours but was paid for only 71.27, from April 16 to August 8, he normally started work between 9 am and 11 am and worked until 4 am and on August 9, 10 and 11<sup>th</sup> he worked from 2 pm to 4 am. Mr. Sanchez states that he decided to live at the restaurant as he was exhausted from always working and needed to be there for deliveries, managing the establishment, performing line duties such as prepping and cooking, overseeing the kitchen and bar staff, closing the business down and cleaning the restaurant at night. He states after Dave was fired in April, Mr. O'Connell deleted the time card information that was stored on the restaurant's computer and replaced it with a new time system that was inaccurate. As a result of the time system being messed up, he relies upon his recollection of the hours he was at the business and bases his complaint upon those. He also provides a related ruling from Employment Insurance to show his hours worked.

18. The delegate also summarizes in the Reasons Mr. O'Connell's evidence on behalf of Maverick's:

Mr. O'Connell states the restaurant used a punch clock to record employees' hours until April 2013 but he changed this to a Point of Sale ('POS') system from Planet Logix where employees would swipe in and out on the restaurant computer to perform transactions and ring out at the end of the night. He provided POS records for Mr. Sanchez which record the time between the time between 'Time In' and 'Time Outs' as substantially less than what Mr. Sanchez claims to have worked. He states where the Time Out shows

6 am, this is not representative of actual hours worked but is a system default time for when employees did not clock out. Mr. O'Connell states the POS records should form the basis on which Mr. Sanchez's hours should be calculated as they reflect his actual hours worked.

19. The delegate then goes on to note that both parties provided contradictory records of hours worked by Mr. Sanchez. While Mr. O'Connell argued that the POS records were accurate and should be relied upon in calculating Mr. Sanchez's hours, the delegate rejected the POS records as she found them inaccurate. She also identified deficiencies in Mr. Sanchez's evidence:

The POS system is activated when an employee swipes their card to submit an order or ring out their sales at the end of the shift. It does not reflect the time that was spent working before and after the Time In or Time Outs, nor does it show breaks taken during the shift. Furthermore the POS entries recorded for Mr. Sanchez are inconsistent with the Employee Clock out reports taken from the restaurant computer, text messages which show he was working before the Time In time and the undisputed fact he had to be at the business before and after its open hours to let staff in, completed their cash outs and lock up after all staff left. Mr. Sanchez on the other hand provides a written summary of hours worked that indicates he worked until 4 am every night. He argues he normally started at 9 am as he took deliveries and did other odd jobs. However, his summary of hours written on the back of photocopied wage statements appears to have been created after the fact, lists generalised start and end times and lacks information on what work he performed on each day. Furthermore, the summary includes claims for hours worked on days that he was not working (August 11<sup>th</sup>) or did not start until afterwards as shown in a text from July 12<sup>th</sup> at around 1:40 pm when he states he was on the bus as his car broke down but claims to have started at 11 am.

In the case of such divergent and unconvincing evidence I must rely on the best evidence available to me to determine what was most likely the truth under the given circumstances. In order to establish what if any wages are owed I must determine how many hours were worked and at what wage rate.

...

As no evidence has been provided to convince me otherwise, I accept Mr. Sanchez worked seven days per week at Maverick's. While he claims he worked an average of 17 hours per day due in part to the fact he was 'living there' and always working, I find otherwise. Instead I accept that Mr. Sanchez was working during Maverick's opening hours. I find this in part because Mr. O'Connell provided no conclusive evidence that Mr. Sanchez was not at the establishment every day or that he or anyone else took over the managerial duties such as supervising staff, overseeing operation, opening and closing the business and cleaning the establishment each night. Maverick's provides POS records to show when Mr. Sanchez swiped in and out of the pub's computer. While these records document when Mr. Sanchez used his card to access the computer to take an order or void another's staff's item [sic], they do not [sic] show when he started or ended work. The text evidence clearly shows that Mr. Sanchez was working on days and at times that are not reflected in the POS records and I find the system, while sufficient for tracking transactions, was not set up and utilised as a time tracking system for Mr. Sanchez....

With respect to the time worked by Mr. Sanchez before and after Maverick's regular hours of operation I find the following: Mr. Sanchez testifies that he resided at the business. No evidence is provided that he was required to live there and as a result, I accept he chose to stay there for his own benefit, whatever that may have been. In reviewing his hours he appears to claim his overall waking hours as time worked. He justifies this by stating he had to be available for food and alcohol deliveries which often occurred before Maverick's was open. While he provided some suppliers as witnesses, none testified that deliveries were made in the morning before the restaurant was open.

Mr. Sanchez provided evidence that he performed janitorial duties and locked up the business after it closed to the public. I accept this was part of his job duties and that it would fall under the definition of work for which wages are payable. While he states he worked until 4 am every night I find this assertion unpersuasive. In review of the time sheets for other employees and in consideration of their testimony, I accept there were a few occasions where they did not sign out until almost or after 4 am. However, the

balance of evidence leads me to believe that while Mr. Sanchez did perform work after the business closed to the public, this was reasonably limited to an additional one and half hours after closing. With respect to Mr. Sanchez's testimony that he resided on the premises I note that as set out in the definition of work included in the Act, an employee is not deemed to be working while on call in their residence.

20. The delegate then goes on to determine how Mr. Sanchez was paid - based on an hourly rate or a fixed salary. In deciding that Mr. Sanchez's salary was based on an hourly rate, the delegate states:

Mr. O'Connell states Mr. Sanchez's salary was based upon working between forty and fifty hours per week. Mr. Sanchez disagrees his salary was based upon working 50 hours per week and suggests it was based on \$17 per hour as set out on the wage statements. Maverick's provides no corroboration - either a contract or witness to such - that they entered into an agreement with Maverick's [sic] that he work up to 50 hours per week. While their accountant, who did not attend and was therefore not subject to examination, supports Mr. O'Connell's assertion that Mr. Sanchez was not paid an hourly basis [sic], the information contained on the wage statements which Mr. Sanchez received throughout his employment supports his accounts that he understood and agreed he was being paid \$17 per hour. Furthermore, \$17 is the hourly wage rate amount set out by him on the August 9, 2013 Complaint and Information Form received by the Employment Standards Branch. Finally, while Mr. O'Connell states he did not post the job advertisement for a manager at the pay rate of \$17.50 per hour, he provides no evidence as to refute this such as detail of what terms and conditions the new manager was hired at and what hours they were expected [to] work to support his position. Accordingly and on a balance of probabilities, I find Mr. Sanchez's wage rate was \$11.00 per hour from April 1 to 22 and increased to \$17 per hour from April 23 to August 11<sup>th</sup>.

21. The delegate then goes on to calculate the wages Mr. Sanchez earned and was owed, if any, during his period as a General Manager. With respect to the period April 1 to 15, 2013, the delegate found that there was insufficient evidence to satisfy her that Mr. Sanchez worked more hours than he was paid and, therefore, no wages were owed to him for this period.
22. With respect to the period April 16 to 20, 2013, the delegate found that Mr. Sanchez worked eight (8) hours per day as set out in wage statement, and not 19 hours per day every day, as he claimed. The delegate calculated the wages he was owed accordingly, based on the regular rate of pay of \$17.00 per hour.
23. With respect to the period April 20 to 21, 2013, the delegate concluded that Mr. Sanchez worked from 5:00 p.m. to 8:00 a.m. on April 21/22, but was not owed any wages for April 22.
24. With respect to April 23 to August 10, 2013, the delegate concluded as follows:

Mr. Sanchez provides a summary of hours worked that indicates he typically started at 9 am every day and finished at 4 am. While I accept that he may [have] sporadically performed work such as taking random deliveries and briefly meeting with Selina from Social Shopper two or three times, this does not satisfy me that he was working from 9 am onwards as claimed. Furthermore the fact that Mr. O'Connell would bring him coffee in the morning does not satisfy me that this constitutes work. Mr. Sanchez resided at the restaurant, the two had a personal relationship in addition to an employment one and I find the majority of the texts showing Mr. O'Connell was coming by with coffee provided no detail on what if any work was performed during those liaisons. Similarly, without explicit evidence on what Mr. Sanchez did every day from 9 am onwards I cannot find the hours he claims as work were in fact that. Instead, I accept that as General Manager, he sometimes took deliveries before the business opened to the public, did kitchen prep work and was reasonably at the restaurant prior to opening to let staff in. In addition, I accept he performed closing duties including staff cash outs, clean up and janitorial work that continued beyond the restaurant's business hours. In the absence of credible and detailed time records or other relevant evidence, I find it reasonable that on average Mr. Sanchez worked for one hour before the

business opened and continued to work for one and half hours after it closed to the public. I accept that from April 23<sup>rd</sup> onwards, Maverick's opened at 3 pm. The business closed at 2 am on Fridays and Saturdays, 12 am on Sundays and 1 am on weekdays. Accordingly, for those days Mr. Sanchez worked, I find he worked from 2 pm to 3:30 am (13.5 hours) on Friday and Saturday, 2 pm to 1:30 am (11.5 hours) on Sundays and 2 pm to 2:30 am (12.5 hours) Monday through Thursday. In making these findings I have considered that while there may have been times when Mr. Sanchez worked slightly beyond these hours, there were also times when he reasonably worked slightly less.

25. The delegate further added that with respect to June 22, Mr. Sanchez claimed that he worked 24 hours due to a carpet installation at Maverick's, although he did not provide any evidence with respect to what work, if any, he performed. Therefore, the delegate rejected Mr. Sanchez's claim for 24 hours' pay.
26. The delegate also noted that Mr. Sanchez was owed no wages on August 5 as he admitted that he did not work on August 5.
27. Lastly, the delegate also concluded that Mr. Sanchez did not work on August 11, as that was the day he quit. Therefore, he was not owed any wages for the said day.
28. Based on the above analysis, the delegate went on to determine that Mr. Sanchez was owed \$14,596.50 in regular wages earned between April 15 and August 10, 2013, plus concomitant vacation pay and interest.
29. The delegate also went on to levy two administrative penalties of \$500 each for Maverick's breach of sections 17 and 18 of the *Act*, because Maverick's failed to pay Mr. Sanchez wages "at least semimonthly and within 8 days after the end of the pay period" and also failed to pay all wages earned by Mr. Sanchez within 6 days after his employment terminated.

### **SUBMISSIONS OF MAVERICK'S**

30. In his written submissions on behalf of Maverick's, Mr. O'Connell submits that the Director, when calculating Mr. Sanchez's hour of work, failed to consider "lack of evidence that actual work was being performed during Mr. Sanchez's alleged shifts". Mr. O'Connell submits that Mr. Sanchez "clocked-in for all shifts" on the POS system. He states that all staff is required to clock-in using this system upon entering the premises. He also states that he provided "clocked hours", based on this POS system, "proving when Mr. Sanchez began and completed work", and argues that the delegate should have based her calculation of wages owed to Mr. Sanchez based on that evidence and system.
31. Mr. O'Connell also argues that Mr. Sanchez was "salaried" and had the freedom to complete "tasks as required". He disputes that Mr. Sanchez was an hourly employee, and states that "I am not admitting to any wrongdoing in terms of employment [of] Mr. Sanchez...."
32. Finally, he concludes his submissions stating "I ask that the Employment Standards Tribunal review calculated hours owed as per the hours recorded in the POS system."

### **ANALYSIS**

33. Maverick's has appealed the Determination on the ground that the delegate breached the principles of natural justice in making the Determination.
34. The Tribunal, in *Imperial Limousine Services Ltd.* (BC EST # D014/05), explained the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the 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 *BWT Business World Incorporated* BC EST #D050/96.)

35. The Tribunal has stated that the party alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99). In this case, Mr. O'Connell, on behalf of Maverick's, is simply making a bare assertion of breach of natural justice on the part of the delegate, but has not provided any evidence to support this claim nor related any aspect of the appeal to that allegation. Mr. O'Connell seems to presume that a natural justice argument lies because the Director did not accept his evidence on the calculation of wages and terms of Mr. Sanchez's employment- whether he was an hourly employee or salaried.

36. In *Dongoh Educational Company Ltd.*, BC EST # D049/09, the Tribunal stated:

The Tribunal recognizes persons without legal training do not always appreciate what "natural justice" means, and the concept can be confusing and complex to a lay person. Generally, the notion of "natural justice" requires a decision maker to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long as reasons are provided for the choice made and those reasons are based on relevant considerations, which I find they were in this case. In deciding the merits of the complaint, the Director had to make some choices between the competing positions of the parties. The reasons for those choices are explained in the Determination. Dongoh may not like the choices made, but they were provided with an opportunity to present their position in evidence and argument and, in the circumstances, I am unable to accept there was any failure by the Director to observe principles of natural justice in making the choices and the resulting Determination.

37. In my view, the passage above in *Dongoh* describes closely the circumstances of the Determination under appeal. The delegate had to decide between conflicting evidence of the parties- with respect to both the matter of the hours Mr. Sanchez worked and the payment terms of his employment (whether Mr. Sanchez was an hourly-paid employee or salaried). The delegate made her decision which for the most part prefers the evidence of Mr. Sanchez and she also set out her reasons for her decisions. Those reasons appear to me to be based on sound and rational considerations. Maverick's is not accepting the delegate's findings of fact and is now challenging those findings in this Appeal. The Tribunal has repeatedly said in past cases that an appeal is not an opportunity to challenge findings of fact unless such findings could be said to be perverse in the sense that there was absolutely no evidence upon which a particular finding of fact could have been grounded. In my view, it cannot be said that there was no evidentiary foundation for the findings of fact the delegate made. While Maverick's takes issue with those findings of fact, Maverick's disagreement does not constitute a breach of natural justice or any legally-sufficient ground for appeal. In the circumstances, I do not find the delegate or the Director to have breached the principles of natural justice in making the Determination.

38. I also find that Mr. O'Connell is simply reiterating Maverick's position at the Hearing. The Tribunal has repeatedly stated in past cases that an appeal is not an opportunity for a dissatisfied party to re-argue its case and have a "second kick at the can". To allow a party to re-argue its case on appeal is also contrary to the

stated objective of the *Act* in section 2(d), namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.

## **ORDER**

- <sup>39.</sup> Pursuant to section 114(1)(f) of the *Act*, I dismiss Maverick's appeal on the ground that it has no reasonable prospect that it will succeed. In accordance with section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

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