

An appeal

- by -

Nga Fong Chang and So Dai Vuong
(the “Employers”)

- 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.: 2016A/52

DATE OF DECISION: June 10, 2016

DECISION

SUBMISSIONS

Y. H. Ambrose Ng

counsel for Nga Fong Chang and So Dai Vuong

Sarah Orr

on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Nga Fong Chang and So Dai Vuong (“the Employers”) have filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on March 8, 2016.
2. On July 29, 2015, Marivic Ogoy Asuncion (“Ms. Asuncion”) filed a complaint with the Director alleging that the Employers contravened the *Act* in failing to pay her regular and overtime wages.
3. Following a hearing, a delegate of the Director concluded that the Employers had contravened sections 18, 40, 45, 46 and 58 of the *Act* in failing to pay Ms. Asuncion wages. The delegate determined that Ms. Asuncion was entitled to wages, overtime, statutory holiday pay, annual vacation pay and accrued interest in the total amount of \$9,551.64. The delegate also imposed seven administrative penalties in the total amount of \$3,500 for the Employers’ contraventions of the *Act*, for a total of \$13,051.64.
4. The Employers contend that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
5. 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.

ISSUE

6. Whether or not the Employers have demonstrated any statutory ground of appeal.

FACTS AND ARGUMENT

7. A delegate of the Director held an oral hearing into Ms. Asuncion’s complaint on December 7, 2015. Ms. Asuncion appeared at the hearing by telephone from the Philippines. Ms. Asuncion’s sister Marjorie (“Marjorie”) appeared at the hearing as a witness, an advocate, and for several questions, as an interpreter, for Ms. Asuncion, despite objections from Counsel for the Employers. Two witnesses for Ms. Asuncion, April Geronimo and Rommel Faustino, also appeared in person. The Employers were represented by Y. H. Ambrose Ng (“Mr. Ng”).
8. The delegate encountered a number of difficulties during the hearing. Rather than Ms. Asuncion calling the teleconference number, Marjorie telephoned Ms. Asuncion using a calling card. Marjorie went through a number of calling cards in the morning, and the hearing was adjourned so she could purchase additional cards. The hearing continued for one hour after a lunch break, at which time the connection was lost. Marjorie had no additional calling cards. Ms. Asuncion did not call into the hearing using the teleconference number even though the delegate had warned her that the hearing would continue in her absence if she did

not call in. At the time the connection was lost, Ms. Asuncion had finished giving her own evidence and had been cross-examined by Mr. Ng. Ms. Asuncion was not present for the Employers' evidence.

9. Briefly, the evidence and facts as found by the delegate are as follows.
10. On June 6, 2013, the Employers entered into a written agreement with Ms. Asuncion while they were all residing in Hong Kong. According to that agreement, Ms. Asuncion was employed by Nga Fong Chang ("Ms. Chang") as a domestic helper for a two year period, commencing the date Ms. Asuncion arrived in Hong Kong, at a rate of \$3,920 (Hong Kong) per month. The contract provided that Ms. Asuncion was to reside at Ms. Chang's residence, and that Ms. Chang was to provide Ms. Asuncion with free accommodation. All of the parties moved to Canada in October 2013. Ms. Asuncion worked for the Employers between October 13, 2013, and July 10, 2015, caring for their children and performing domestic duties including cleaning, laundry, ironing and cooking for the entire family.
11. Ms. Asuncion testified that she worked Monday through Saturday, from 06:00 until 20:00 or 21:00 and resided at the Employers' residence. She said she did not have her own room and slept in the same bed as the Employers' daughter, who was four years old. She paid no rent.
12. Although she had the occasional Saturday off, Ms. Asuncion did not keep a record of those dates. Ms. Asuncion said that she went to Marjorie's each Saturday, returning to the Employers' home on Sunday nights.
13. The Employers' evidence was that Ms. Asuncion did not live at their residence, and that she worked four to five days per week for four to five hours each day and that she took a 10 day or so vacation during the period of her employment. The parties agreed on the chores performed by Ms. Asuncion.
14. The delegate concluded that Ms. Asuncion was a domestic, as defined by the *Act*, finding that she both worked and resided at the Employers' residence. The delegate also determined that Ms. Asuncion was entitled to wages as noted above.

ARGUMENT

15. Counsel for the Employers argues that the delegate erred in law and denied them a fair hearing. As I have concluded that the delegate failed to observe the principles of natural justice, I will address only that issue in this decision.
16. Counsel submits that the delegate failed to properly identify the complainant and prevented the Employers the opportunity to face their accuser. Counsel says that because Ms. Asuncion appeared by telephone, there was no opportunity to place any evidence before her, to have her identify records or to observe her reaction at any time during the hearing. Counsel also says that there was also no way to identify the person on the telephone to ensure it was Ms. Asuncion. He says that, despite a request for video conferencing and video playback facilities, none were made available for the hearing.
17. Counsel argues that the delegate's decision to allow Marjorie to act as both witness and translator over the Employers' objections and despite the Employment Standards Branch's (the "Branch") own notice requiring an independent translator was an improper exercise of her discretion to control the proceedings and a denial of natural justice. Counsel says that, in contrast, the Employers had an independent translator who assisted the witnesses in giving their evidence without superfluous extra-testimonial conversation. Counsel submits that the delegate treated the parties differently, and that a reasonable person, knowing all the facts, would conclude that the delegate was biased.

18. Counsel relies on the Tribunal's comments in *Super Star Trucking Ltd.* (BC EST # D096/15) at para. 5:

The delegate's reasons indicate (page R2): "Mr. Gill, who speaks Punjabi, provided the following testimony with the assistance of his translator, daughter Randeep Gill." While nothing turns on this fact in this appeal, in my view, there may well be a natural justice concern when a translator - who must be scrupulously neutral - is a relative of one of the parties.

19. Counsel also says that Marjorie frequently prompted Ms. Asuncion during Ms. Asuncion's telephone testimony during cross-examination when there was no response forthcoming to questions from the Employers and the delegate. Counsel also asserts that Marjorie similarly prompted Ms. Asuncion's witnesses during the giving of their evidence, and that the prompting continued despite the delegate cautioning Marjorie from doing so. In support of this assertion, counsel submitted an affidavit from Ms. Chang. In that affidavit, Ms. Chang deposed that, "[o]n at least eight to ten occasions at the hearing", during the time that Ms. Asuncion or other witnesses gave evidence, Marjorie spoke to the witnesses in a language other than English. She deposed that this occurred when there was a delay in responding to questions by the Employers' counsel, or questions by the delegate. Ms. Chang further deposed that "Majorie [sic] appeared to be prompting the witnesses whenever there was hesitation." Ms. Chang also deposed that Marjorie was permitted to remain in the hearing despite several warnings.
20. Counsel further argues that the Facebook record admitted into evidence by the delegate contained messages that were not in English and not properly translated for any of the parties.
21. The delegate submitted that there was no denial of natural justice in conducting the hearing by telephone. She submitted that there was nothing about that form of hearing that denied the Appellants the opportunity to know the case they had to meet and to respond to it.
22. The delegate submitted that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes. She says that this means that the Branch must provide the opportunity for unsophisticated parties with limited financial resources to have their complaint addressed. She says that at the time of the hearing, Ms. Asuncion resided in the Philippines and requiring her to access videoconferencing facilities in the middle of the night, even if it were possible for her to do so, would not fulfill this purpose.
23. The delegate further contends that the Employers were sufficiently familiar with Ms. Asuncion's voice to recognize it on the telephone and that there is no basis for their concern that the person attending the hearing by telephone was not Ms. Asuncion.
24. While agreeing that the Employers objected to Marjorie's role as translator, advocate and witness for her sister, the delegate says that she told the parties she would permit Marjorie fulfilling all these roles but it would affect the weight she placed on Ms. Asuncion's evidence. However, she says that Marjorie's role was extremely limited, translating only a few questions from her and the Employers' counsel. She notes that all of this was made clear in the Determination.
25. The delegate submits that the Facebook messages were used solely to identify which dates Ms. Asuncion was or was not working and that they were not translated by Marjorie or by anyone:

Rather, Marjorie testified on the contents of the Facebook messages to specify certain dates on which [Ms. Asuncion] was or was not working, and the [Employers] had the opportunity to cross-examine Marjorie on her evidence.

26. While the delegate also agrees that Marjorie “did speak out of turn multiple times” at the hearing, she says that she cautioned Marjorie each time and warned her that her behavior was inappropriate. The delegate submits that, while disruptive, such behavior is not unusual. She says that she had “no basis on which to believe that Marjorie coached [her sister] during her testimony, or that [Ms. Asuncion] changed her story during her testimony based on Marjorie’s interjections.”

ANALYSIS

27. 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.

28. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

29. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. The nature and content of the duty of fairness has been commented upon on many occasions by this Tribunal. In *D. Hall & Associates Ltd.*, BC EST # D266/00 (Reconsideration of BC EST # D503/99) the Tribunal said as follows:

At common law, natural justice does not dictate that the only fair hearing is an oral hearing according to the traditional civil trial model in which *viva voce* evidence is led and witnesses are cross-examined. It has long been recognized that what is procedurally fair varies with the circumstances. Administrative tribunals are created as an alternative to courts, and it would therefore be wrong to automatically import the full panoply of trial procedures onto such tribunals.

Several factors inform the content of the duty of fairness at common law. These include the nature of the decision being made, the terms of the statute, the impact of the decision on the individual, any legitimate expectations occasioned by agency promises or procedural practices and the agency’s own choice of procedures made in light of its institutional constraints. The common law’s concern is not for perfect or idealized justice, but for a hearing in which each side has been given a meaningful opportunity to be heard: *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.). Even in those administrative contexts requiring “full and fair consideration of the issues”, where a claimant’s “important interests are affected by the decision in a fundamental way”, an oral hearing is not necessarily a pre-condition to fairness: *Baker*, paras. 32-34. The courts themselves recognize that fundamental justice in civil proceedings does not require a full trial proceeding, and that justice may be done in summary proceedings, even in the face of conflicting evidence: *Johnstone v. Island Scales Ltd.*, [1999] B.C.J. No. 1892 (S.C.), citing *Inspiration Management Ltd. v. McDermid* (1989), 36 B.C.L.R. (2d) 202 (C.A.). The same is true in judicial review proceedings: *BX Neighbourhood Pub Ltd. v. British Columbia (Minister of Labour and Consumer Services)* [1990] B.C.J. No. 2946 (S.C.).

30. I am unable to conclude that the delegate denied the Employers natural justice by holding a hearing by teleconference. While there are clearly disadvantages to this form of hearing, including the difficulty of determining credibility (which in this case would be compounded by the fact that at least some of the evidence was further affected by having it interpreted), the disadvantages must be weighed against other factors, including the cost of providing videoconferencing facilities, the time zones of the parties and the ease by which the parties were able to participate, all of which are identified as the purposes of the *Act*. In my

view, the delegate's decision to hold the hearing by teleconference did not deny the Employers a meaningful opportunity to be heard. As the delegate has properly noted, the Employers ought to have been sufficiently familiar with Ms. Asuncion's voice to recognize it on the telephone. In the circumstances, it appears that because Marjorie ran out of calling cards, the individual who was most disadvantaged was Ms. Asuncion, who was not present to hear the Employers' evidence.

31. However, I find that the delegate failed to observe the principles of natural justice in permitting Marjorie to act as advocate, witness and interpreter for Ms. Asuncion at the hearing.

32. In *Kyle Freney* (BC ET # D130/04) the Tribunal said at page 7:

The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body: see most recently, *Congregation des temoins de Jehovah v. Lafontaine (Village)*, 2004 SCC 48. It is what the English have concisely referred to as "fair play in action".

33. More recently, in *Bernhausen Specialty Automotive* (BC EST # D043/16), the Tribunal said at para. 38:

As a matter of law, it is the obligation of the Director to ensure the process is fair, both actually and perceptually.

34. While there is no doubt that linguistic access remains a significant hurdle for many parties in the judicial process including Branch hearings, in my view, allowing the complainant's sister to act in the multiple roles she did cannot be considered fair play in action. In my view, a reasonable person with knowledge of the facts would not consider what occurred at the hearing to be fair.

35. In my view, natural justice requires that an interpreter must not be in any way involved with the parties to the dispute. The Employment Standards Branch's own Information "Fact Sheet" on Complaint Hearings provides:

If a party requires translation assistance, they **must** bring their own translator, as the Branch does not provide this service. **The translator must be someone who is not involved in the complaint as a witness.** (my emphasis)

36. I note, as an aside, that translation properly refers to the written word while interpretation refers to the spoken word. Nevertheless, I would read this Fact Sheet to include interpreters as well as translators. Although Branch Fact sheets do not expand nor define the scope of procedural fairness (see *Bernhausen, supra*), they do create expectations of fairness which can then give rise to allegations of bias, as they have in this case.

37. Despite the instructions to the parties to provide for an independent translator/interpreter, the delegate exercised her discretion to both ignore these instructions and dismiss the Employers' objection to Marjorie acting in the multiple roles. In light of the relationship between Ms. Asuncion and Marjorie, it is simply impossible for the delegate to determine whether Marjorie coached either Ms. Asuncion or the other witnesses, as was suggested by the Employers. In my view, the delegate failed in her duty to ensure that the process was fair, both actually and perceptually.

38. I allow the appeal and send the matter back for a new hearing before a different delegate.

ORDER

39. Pursuant to section 115 of the *Act*, I order the Determination dated March 8, 2016, be cancelled and the complaint is referred back to the Director for a new hearing before a different delegate.

Carol L. Roberts
Member
Employment Standards Tribunal