Employment Standards TRIBUNAL

An appeal

- by -

PK Chahal Holdings Ltd. carrying on business as
Traveller's Rest Motel
("Traveller'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/104

DATE OF DECISION: September 26, 2014

DECISION

SUBMISSIONS

Paramjit S. Chahal	on behalf of PK Chahal Holdings Ltd. carrying on business as Traveller's Rest Motel

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), PK Chahal Holdings Ltd. carrying on business as Traveller's Rest Motel ("Traveller's") has filed an appeal of a determination issued by a delegate of the Director of the Employment Standards (the "Director") on July 18, 2014 (the "Determination").

2. The Determination concluded that Traveller's contravened Part 3, section 18 (payment of wages on termination); Part 4, section 40 (overtime); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (vacation pay); and Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Kelly Little ("Ms. Little"), and ordered Traveller's to pay Ms. Little wages and interest in the amount of $2,378.40, inclusive of accrued interest under section 88 of the *Act*.

3. The Determination also levied seven (7) administrative penalties of $500.00 each against Traveller's for contraventions of sections 18, 27, 40, 45, 46, 58 and 63 of the *Act*.

4. The total amount of the Determination is $5,878.40.

5. Traveller's has appealed the Determination on all available grounds under section 112(1) of the *Act*, namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination, and new evidence has become available that was not available at the time the Determination was being made.

6. By way of remedy, Traveller's is seeking the Employment Standards Tribunal (the "Tribunal") to change or vary the Determination.

7. 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. At this stage of the proceeding, I will assess the appeal based solely on a review of the Reasons for the Determination (the "Reasons"); the written submissions of Paramjit S. Chahal ("Mr. Chahal"), the sole director and officer of Traveller's; and the "record" that was before the delegate when the Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Ms. Little will and the Director may be invited to file further submissions. Alternatively, if the I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

8. Is there a basis on which the Determination should be changed or varied?

THE FACTS

9. Traveller's is disputing the awards of regular wages and overtime made to Ms. Little in the Determination and the administrative penalties levied against it pursuant to section 98(1) of the *Act*. Therefore, the main focus

of this appeal and my decision is on the delegate's analysis in relation to the awards of regular and overtime wages and the administrative penalties levied under the Determination.

10. Having said this, by way of background, Traveller's operates a motel business in Salmon Arm, British Columbia, and employed Ms. Little as a motel worker from July 21, 2013, to December 28, 2013.

11. Ms. Little filed a complaint against Traveller's on December 29, 2013, alleging that Traveller's contravened the *Act* by making illegal deductions from her pay and failing to pay her regular wages, overtime wages, annual vacation pay, statutory holiday pay and compensation for length of service (the "Complaint").

12. The delegate of the Director conducted a hearing into the Complaint on May 8, 2014 (the "Hearing"). Ms. Little attended at the Hearing on her own behalf, and Traveller's was represented by Mr. Chahal. Both parties called their witnesses, and they each were afforded the opportunity to cross-examine the other's witnesses and test the evidence that the other party adduced at the Hearing.

13. It was not disputed at the Hearing that Ms. Little signed a contract dated July 18, 2013, wherein she agreed to perform certain duties outlined in the contract at Traveller's motel for a wage of $2,400.00 per month less $900.00 for the rent of the manager's suite at the motel. The contract also required her to work six (6) days each week, attend the desk of the motel and clean rooms as required for an additional payment of $7.00 per room. She was to be paid room cleaning separately from the monthly wage, and Traveller's made no deductions from those amounts.

14. In the Reasons, with respect to her claim that Traveller's made illegal deductions from her pay, Ms. Little argued that she did not provide any written authorization to Traveller's to deduct the rent for the manager's suite from her wages. In dismissing Ms. Little's claim here, the delegate noted Ms. Little first raised the issue of illegal deductions at the Hearing and not before, and she did sign a contract which stated that $900.00 for rent would be deducted from her monthly wages. Therefore, the rent deduction made by Traveller's was not illegal.

15. With respect to Ms. Little's claim for annual vacation pay, the delegate concluded that there was no evidence that Traveller's paid any annual vacation pay to Ms. Little on the wages she received for cleaning rooms and, therefore, Traveller's contravened section 58 of the *Act*. The delegate ordered Traveller's to pay Ms. Little $59.52 for vacation pay, based on the income of $1,488.00 she earned for cleaning rooms at the motel.

16. The delegate also levied an administrative penalty of $500.00 against Traveller's for contravention of section 58 of the *Act*.

17. With respect to Ms. Little's claim for statutory holiday pay, the delegate found that Traveller's contravened section 45 of the *Act* by failing to pay Ms. Little statutory holiday for Labour Day, Thanksgiving Day, Remembrance Day and Christmas Day.

18. The delegate also found that Traveller's contravened section 46 of the *Act* because Ms. Little worked on Thanksgiving Day and Remembrance Day, but Traveller's failed to pay her for working on both those days. The delegate ordered Traveller's to pay Ms. Little a total of $461.60 for statutory holiday pay, and levied penalties of $500.00 each for contraventions of sections 45 and 46 of the *Act*.

19. With respect to Ms. Little's claim for compensation for length of service, the delegate found Traveller's contravened section 63 of the *Act* by terminating her employment and preventing her from working out the notice period. In particular, the delegate stated:

> The evidence shows that on December 24, 2013, the Employer sent a text to Ms. Little providing her with fifteen days' notice of termination and further advising that her work schedule was to be 3:00 p.m. to 11:00 p.m. Monday to Friday. Subsequently, on December 26, 2013, the Employer by text instructed Ms. Little to move out of the manager's suite immediately. Ms. Little refused to move and on December 28, 2013, the dispute with the Employer escalated to a degree which resulted in the police being called. Ms. Little was prevented from carrying out her work by the actions of the Employer in nailing the door shut between her suite and the office on December 28, 2013.
>
> The employment contract stated that the provision of the manager's suite was a part of the contract notwithstanding Ms. Little was required to pay rent for the suite. The employment contract further provided that the Employer would provide two weeks [*sic*] written notice and Ms. Little would vacate the premises…Clearly, the evidence was that the Employer was not prepared to wait for even the two weeks as stated in the contract and took certain actions designed to get Ms. Little to vacate prior to the date in the contract.
>
> I find the Employer contravened section 63 of the Act by terminating the employment of Ms. Little on December 28, 2013, when actions were taken which prevented Ms. Little from working out the notice period.

20. In the circumstances, the delegate ordered Traveller's to pay Ms. Little one week's wages as compensation for length of service as she had been employed for more than three (3) months before Traveller's terminated her employment.

21. The delegate also levied an administrative penalty of $500.00 against Traveller's for contravention of section 63 of the *Act*.

22. With respect to Ms. Little's claim for overtime wages, Traveller's stated that Ms. Little was a "manager". Traveller's relied on the contract of the employment to support its position. While the contract of employment referred to Ms. Little as a manager, the delegate found that Ms. Little was not a "manager" as defined in the *Employment Standards Regulation* (the "*Regulation*"). The delegate indicated that Ms. Little's duties did not consist of supervising and directing other employees and she did not participate in the control, supervision or management of the business, and required the permission of Traveller's to perform various duties that characteristically a "manager" would be able to perform. Accordingly, the delegate ruled that Ms. Little was entitled to the benefit of the *Act* with respect to overtime wages.

23. In terms of determining what regular wages and overtime Ms. Little was owed, the delegate noted that Ms. Little provided a handwritten journal that she said she created on a daily basis, as she worked. This journal contained the time she first worked each day and the time she last worked each day and, in some cases, included notes of circumstances that happened during the day, but no record of what work was actually being performed by her during the hours noted in the journal. The delegate noted that Ms. Little did provide examples of what she would have done, and also presented witnesses who gave evidence of work she was performing when they saw her at the motel. However, with respect to Ms. Little's claim that she was required to work excessive hours for Traveller's, the delegate stated:

> The evidence of Ms. Little is inconsistent with respect to her claim of excessive hours. She stated she worked so many hours she was physically worn out; yet she agreed to work for the Employer at another business, the Copper Island Pub, in the evenings. She confronted the Employer about the non-payment of annual vacation pay in early September, did not hesitate to contact the Fire Department about the fire extinguishers and called in WorkSafe BC in regard to working alone, concerns about violence and mould in some rooms. Ms. Little stated that the Employer refused to accept the computer generated hours of work record she created each pay period but provided no evidence with respect to those records. There was no evidence that Ms. Little took any action in regard to the records she claims to have created each

> pay period. In summary, the evidence of Ms. Little was that she provided her hours worked to the Employer on scraps of paper, some of which he would not accept; she created a computer generated report of her hours worked but provided no evidence she gave them to the Employer each pay period; and finally, she faxed and e-mailed a computer generated report for all her hours of work during her period of employment on December 26, 2013.
>
> Ms. Little resided on the premises and, when she was not actively working, she would have been on call in her residence. The Act does not consider being on call in your residence as work. I do not dispute that Ms. Little performed work at various times during the day but that is not the same as working all of the time from the first instance of work in that day until the last instance of work in that day.
>
> Based on the evidence and on the balance of probabilities, I find that the computer generated record of hours provided by Ms. Little includes her on call time, and as such, there is insufficient evidence to distinguish what hours Ms. Little actually worked from the on call hours, as she claimed them all as hours worked.

24. The delegate also notes that Traveller's evidence was also unreliable, and commented as follows:

> The Employer's daily work records how that Ms. Little worked a varied schedule of hours per day, however, those hours add up to 80 hours semi-monthly. The Employer did not provide any of the scraps of paper he claimed were given to him by Ms. Little with her hours of work to support his created record of hours.
>
> I find the Employer's records of the daily hours worked to be simply not credible, as it was extremely unlikely given the nature of the work performed by Ms. Little, that her semi-monthly work hours would add up to be exactly 80 hours for the majority of her employment.

25. The delegate, therefore, decided to consider the contract of employment between the parties which required Ms. Little to work six (6) days per week. The delegate noted that the contract did not contain any reference to daily work hours but, at the Hearing, there was a significant amount of evidence adduced with respect to the work Ms. Little was required to do. Based on the evidence at the Hearing, the delegate concluded, on the balance of probabilities and in the absence of credible records from Traveller's, that Ms. Little worked at least eight (8) hours per day, six (6) days per week. The delegate then went on to establish the regular wage for Ms. Little based on these findings and the contract of employment as follows:

> …The contract provided that she was to be paid $2,400.00 per month. Her regular wage is therefore calculated as follows:
>
> $2,400.00 per mo. X 12 mos. ÷ 52 weeks ÷ 48 (the normal hrs. of work) = $11.54 per hr.
>
> Ms. Little states that she worked for the Employer until December 28, 2013. The evidence was that Ms. Little's text to the Employer on December 26, 2013, and the Employer's response is confirmation that she worked that day. Her text indicates she worked eight hours which was not disputed by the Employer, either at that time or at the hearing. With respect to work alleged to have been done on December 27, 2013, the only record is a note in Ms. Little's journal stating 'worked'. That note was clearly added after the journal was photocopied for the hearing. I am not prepared to accept the journal entry for December 27, 2013, as it is written as evidence of work performed. There was no verbal evidence provided by Ms. Little that she worked on December 27, 2013. Ms. Little alleged that she registered a guest on December 28, 2013, which was not disputed by the Employer. There was no other evidence provided with respect to any other work performed on December 28, 2013.
>
> With respect to calculating the amount of wages earned by Ms. Little on December 26 and 28, 2013, there was no dispute that she worked eight hours on December 26, 2013, as stated in her text to the Employer. The only evidence of work on December 28, 2013, was the registering of one guest. There was no evidence of other work being performed on December 28, 2013. It is most likely that the registration

> would not have taken more than the two hours minimum daily pay required to be paid for an employee who performs work on a day.
>
> I find that the amount of wages earned by Ms. Little on December 26 and 28, 2013, are eight hours and two hours respectively.
>
> Those regular wages are calculated as: $11.54 per hour X 10 hours = $115.40
>
> The evidence was that the Employer did not pay wages for work performed on December 26 and 28, 2013. The evidence was that Ms. Little did not perform any work for the Employer subsequent to December 28, 2013. The evidence was that the Employer paid wages on a semi-monthly basis, on the 15th of the month and at the end of the month. The next scheduled pay day was to be December 31, 2013, however Section 18 of the Act requires that an employer pay all wages earned to an employee within 48 hours of the termination of the employment of that employee. I have elsewhere in this Determination found that the Employer terminated Ms. Little's employment on December 28, 2013.
>
> I find the Employer has contravened section 18 of the Act by failing to pay Ms. Little for work performed on December 26 and 28, 2013. For the purposes of penalty administration, I find that the date of the contravention of section 18 was December 30, 2013, the expiry of the 48 hour period in which to pay wages.
>
> With respect to overtime in the absence of credible Employer records, I am unable to determine how much daily overtime might have been worked. However, as I have previously found that Ms. Little normally worked 48 hours each week and, with no record of any overtime wages having been paid, there are overtime wages outstanding. Ms. Little's wages covered the straight time pay for 48 hours per week, so I have calculated the outstanding weekly overtime wages as follows:
>
> 8 hrs. per week $5.77 (1/2 time) x 23 weeks (July 21 – Dec. 28/13) = $1,061.68

26. Accordingly, the delegate found that Traveller's contravened section 40 of the *Act* for failing to pay Ms. Little overtime wages for overtime hours worked and levied an administrative penalty against Traveller's for this contravention.

27. The delegate also levied an administrative penalty for contravention of section 27 of the *Act* against Traveller's, as the wage statements the latter provided to Ms. Little did not contain the address of Traveller's nor the hours worked by Ms. Little, as required by section 27(a) and (b).

SUBMISSIONS OF TRAVELLER'S

28. Mr. Chahal, on behalf of Traveller's, made written submissions.

29. With respect to Traveller's contention that the Director erred in calculating overtime, Mr. Chahal states:

> As per employment contract, $2,400 was given to a manager for working 6 days a week. From contract of employment vs actual working condition Ms. Little is not considered is [*sic*] working as a manager. Also working 8 hrs extra each week is not supported by any evidence provided by Ms. Little than [*sic*] employment contract written by employer.
>
> The decision to award overtime 8 hrs per week for whole length of employment 23 weeks [sic] is unreasonable and not justified by evidence. There is no evidence showing Ms. Little was working **48 hrs each week of employment. (boldface** in original text**)**
>
> If benefits of doubt [*sic*] are given to Ms. Little then 50% of total weeks of employment is fair to award for overtime.

30. With respect to the administrative penalties levied against Traveller's, Mr. Chahal is seeking the Tribunal to dismiss all but one (1) of the penalties, based on "fairness and compassionate grounds". He states:

> If calculations were done with 50% overtime hrs then total amount owing to Ms. Little is $1,847.56 but penalties amount [*sic*] is $3,500.00 is a very heavy burden [sic] to a business in small town Sorrento, BC.
>
> As per statistics of Canada total population of Sorrento is 1255 (including older population and children). I, being director [sic] of PK Chahal Holdings Ltd. understand that my employment records were not 100% according to employment standards but I did my best to keep all records. It is not feasible for me to hire full-time accountant to keep all records for a business is [*sic*] a small community.
>
> If the information is not provided, I'm born [*sic*] a handicap person. My right side of body is not working including right hand and leg. I cannot stand on both legs so there is a very little opportunity for me to work for someone else. I run my family business to look after my family of four dependents.
>
> Under humanitarian and compassionate basis please reduce penalty amount to $500.00 for this occurrence.

ANALYSIS

31. The grounds upon which an appeal may be made are found in subsection 112(1) of the *Act*, which provides:

> (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.

32. As indicated previously, Traveller's appeals on all three (3) available grounds of appeal under section 112(1) of the *Act*.

33. With respect to the error of law ground of appeal, I note that the British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Areas #12 – Coquitlam)*, [1998] B.C.J. No. 2275 is instructive on the subject of what constitutes an error of law. The Court of Appeal in *Gemex*, delineated the following instances as amounting to an error of law:

> (1) a misinterpretation or misapplication of a section of the Act;
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> (2) a miscalculation of an applicable principle of general law;
>
> (3) acting without any evidence;
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> (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.

34. Based on Mr. Chahal's submissions, it would appear that Traveller's is arguing that there is no evidence to show that Ms. Little worked eight (8) hours extra each week during her entire period of employment. However, I note that the delegate meticulously delineated the evidence of both Traveller's and Ms. Little on the subject of overtime, and he found neither party's evidence satisfactory. In the case of Ms. Little, the delegate found that her evidence was inconsistent with respect to her claim of excessive hours, and appeared to include her "on call" time. In the case of Traveller's, the delegate noted that it provided work records that showed that Ms. Little worked a varied schedule of hours per day, and they added up to exactly 80 hours semi-monthly and lacked the source documents such as the "scraps of paper" Mr. Chahal claimed he received from Ms. Little setting out the hours she worked each day. The delegate found Traveller's records to be

"simply not credible", as it was extremely unlikely, in light of the type of work Ms. Little did for Travellers, that her semi-monthly work hours would add up to be exactly 80 hours.

35. Therefore, the delegate relied upon the contract of employment between the parties which required Ms. Little to work six (6) days per week. While the contract did not contain any reference to daily work hours, the delegate relied upon the witness evidence regarding the amount of work Ms. Little was required to do and, based on that evidence, and in the absence of credible records from Traveller's, concluded that Ms. Little worked at least eight (8) hours per day, six (6) days per week. In my view, in the absence of proper or credible records to calculate the amount of hours an employee worked, the delegate may rely upon the best evidence available. In this case, the delegate did just that, and relied upon the contract of employment and evidence adduced at the Hearing regarding the work Ms. Little performed during her employment, and made a reasoned decision, based on an evaluation of all the records in evidence available to him, to determine the best evidence of the number of hours Ms. Little actually worked (see *Hofer v. Director of Employment Standards*, BC EST # D538/97). In these circumstances, I do not find the delegate to have committed an error of law, and I dismiss the error of law ground of appeal.

36. With respect to the natural justice ground of appeal, in *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring the 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 an opportunity to respond to the evidence and arguments presented by an adverse party: (see *B.W.I. Business Worlds Incorporated*, BC EST #D050/96).

37. Having carefully reviewed the Reasons, including the section 112(5) "record" and the written submissions of Mr. Chahal, I am not persuaded that there is any evidence of a breach of natural justice on the part of the Director or the delegate in making the Determination. I find Mr. Chahal has made a bare assertion that the Director breached the principles of natural justice in making the Determination, and failed to adduce any evidence in support of this ground of appeal. Accordingly, I do not find there is any basis to disturb the Determination on this ground of appeal.

38. I also find that Mr. Chahal has advanced the "new evidence" ground of appeal without adducing any new evidence. Therefore the new evidence ground of appeal, too, fails.

39. With respect to Traveller's appeal of the administrative penalties, it should be noted that section 98 of the *Act* provides that a person in respect of whom the Director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the *Regulation*:

> **98** (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
>
> (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.
>
> …

40. Having said this, it should be noted that section 29(1) of the *Regulation* delineates a schedule of monetary penalties for persons who have contravened the requirements of the *Act* and sets out escalating administrative penalties. The amounts of the administrative penalties are fixed by the *Regulation* and once a contravention of the *Act* has been found in a determination, the imposition of an administrative penalty is mandatory (see *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04, and *Kimberley Dawn Kopchuk*, BC EST # D049/05).

41. In *Summit Security Group Ltd.* (BC EST # D133/04), the Tribunal explained that administrative penalties under the *Act* are part of a larger scheme designed to regulate employment relationships in the non-union sector and that penalties are generally consistent with the purposes of the *Act* and, further, the design of the penalty scheme established under section 29 of the *Regulation* complies with the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.

42. In *Actton Super-Save Gas Stations Ltd.* (BC EST # D067/04), the Tribunal stated:

> [T]he legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme.

43. Based on the foregoing decisions, the Tribunal does not have discretion to set aside administrative penalties imposed on Traveller's on "fairness and compassionate" grounds advanced by Mr. Chahal. As a result, I am unable to set aside any of the mandatory administrative penalties levied against Traveller's in the Determination.

ORDER

44. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination dated July 18, 2014, is confirmed, together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal