

An appeal

- by -

Three Jay Holdings Ltd. carrying on business as North Delta Inn  
(“Three Jay”)

- 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.:** 2007A/78

**DATE OF DECISION:** September 20, 2007

## DECISION

### OVERVIEW

1. This is an appeal by Three Jay Holdings Ltd. carrying on business as North Delta Inn (“Three Jay”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued July 4, 2007 (the “Determination”).
2. The complainant, Sunny Jaura (“Jaura”), filed a complaint pursuant to Section 74 of the Act alleging that his employer, Three Jay, contravened the Act by failing to pay him regular wages, annual vacation pay and overtime wages (the “Complaint”).
3. The Director’s delegate (the “Delegate”) held a hearing of the Complaint on June 11, 2007 (“Hearing”) and considered the following questions or issues:
  - (1) Whether Jaura was an independent contractor or an employee?
  - (2) If Jaura was an employee, was he a manager?
  - (3) If Jaura was an employee, was he owed regular hourly wages?
  - (4) If Jaura was an employee, was he owed any overtime?
  - (5) If Jaura was an employee, was he owed any annual vacation pay?
4. After considering all the evidence adduced at the Hearing by both parties, the Delegate determined that Jaura was an employee of Three Jay and not an independent contractor. The Delegate also determined that Jaura was a managerial employee and therefore, pursuant to section 34 of the Employment Standards Regulation (“Regulation”), he was not entitled to any overtime pay. Further, the Delegate did not find persuasive evidence to support Jaura’s claim for regular wages and dismissed the said claim. However, the Delegate found that Jaura, as an employee of Three Jay, was entitled to vacation pay on his total earnings pursuant to section 58 of the Act and that he should have, pursuant to section 18 of the Act, received that vacation pay six days after he quit his employment with Three Jay but did not. Accordingly, the Delegate found Three Jay to have contravened Section 58 of the Act and ordered Three Jay to pay Jaura a total of \$806.40 for vacation pay plus interest thereon in the amount of \$17.10 (pursuant to Section 88 of the Act) for a total of \$823.50.
5. The Delegate also issued an administrative penalty of \$500.00 against Three Jay for the latter’s contravention of Section 58 of the Act.
6. Three Jay is appealing the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
7. Three Jay is asking the Tribunal to change or vary the Determination or refer it back to the Director of Employment Standards.

8. Three Jay has not requested an oral hearing of its appeal and the Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this appeal. Therefore, the Tribunal will determine the appeal based on the review of the Determination, the written submissions of Three Jay and the Director, and the Section 112 (5) "Record".

## ISSUES

9. The issues to be determined in this appeal are:
1. Did the Director err in law in making the Determination?
  2. Did the Director fail to observe the principles of natural justice in making the Determination?

## FACTS

10. The appellant, Three Jay, operates a nightclub within British Columbia and falls within the jurisdiction of the Act.
11. Jaura worked as a manager for Three Jay from August 1, 2006 to February 9, 2007.
12. Jaura filed the Complaint on February 26, 2007.
13. The Delegate sent a Notice of Mediation Session dated March 13, 2007 to both Three Jay and Jaura by regular mail notifying both parties that mediation would be held on March 26, 2007.
14. The Record shows that there was a fax to Mr. Scott Hartley ("Hartley"), current general manager of Three Jay, from the Delegate on March 29, 2007 rescheduling the mediation date from March 26, 2007 to April 12, 2007.
15. The Notice of Rescheduled Mediation Session dated March 29, 2007 was sent to both parties by regular mail as well as by fax.
16. While the record does not contain any information on how the mediation between the parties went, it is safe to assume that the mediation was a failure as the delegate subsequently, on May 4, 2007, sent a Demand for Employer Records as well as Notice of Complaint Hearing by registered mail to both Three Jay and Jaura. The Record shows that these documents were successfully delivered to both parties.
17. The Record also contains a fax dated June 5, 2007 from the Delegate to Hartley enclosing a copy of the same Notice of Complaint Hearing and the Demand for Employer Records previously sent to Three Jay by registered mail together with a note on the fax cover suggesting that the Delegate had some previous discussion with Hartley pertaining to the Complaint and the Hearing of the Complaint.
18. Hartley, the General Manager of Three Jay, Scott Moir ("Moir"), the Director and President of Three Jay, and George Holmes ("Holmes"), the former General Manager of Three Jay, all attended on behalf of Three Jay at the Hearing and Jaura attended the Hearing on his own behalf.

19. At the Hearing, Three Jay maintained that Jaura was an independent contractor, and therefore the Employment Standards Branch (the “Branch”) did not have jurisdiction to deal with the Complaint.
20. In support of its argument that Jaura was an independent contractor and not an employee, Three Jay contended that:
- Jaura’s company, Jaura Enterprises, submitted to Three Jay a proposal pertaining to the management services to be provided to Three Jay’s Nightclub;
  - Three Jay hired the services of Jaura Enterprises and not Jaura;
  - Jaura Enterprises was hired to increase the revenues of Three Jay’s nightclub;
  - Jaura Enterprises invoiced Three Jay and Jaura Enterprises was not subject to any withholding taxes;
  - Jaura Enterprises charged goods and services tax in its invoices to Three Jay;
  - Jaura Enterprises was involved in other ventures;
  - Jaura did not have a set schedule and was not on Three Jay’s payroll; and
  - All employees of Three Jay had schedules and were on payroll, unlike Jaura.
21. In further support of its argument that Jaura was an independent contractor, Three Jay contended that Jaura was afforded flexibility in regard to the hours he worked and was given his own keys and an alarm code in order for him to complete his work for Three Jay as needed.
22. Three Jay also contended that Jaura took a week off to go to a wedding, and Three Jay paid him for this absence. Similarly, when Jaura took a day off to work on a concert put on by his company, Jaura Enterprises, Three Jay states that it paid him for that day.
23. Jaura, on his part, argues that he was an employee of Three Jay and not an independent contractor.
24. Jaura explained that he invoiced Three Jay for the work he did because Holmes, the then General Manager of Three Jay, requested that he invoice Three Jay for his services. Holmes agreed that that was true.
25. The Delegate noted in the Determination that Three Jay’s argument that it received a proposal from Jaura Enterprises and hired the latter to increase the revenues of the Three Jay’s Nightclub is not determinative of whether or not Jaura was an employee.
26. The Delegate, instead, considered the statutory definitions of “employer” and “employee” in the context of the evidence adduced by both parties at the Hearing in determining whether Jaura was an employee or an independent contractor.

27. In this regard, the Delegate noted Moir's evidence that if Jaura had not been a part of Three Jay's organization, other employees of Three Jay such as the General Manager or the bartenders would complete his duties.
28. The Delegate further noted that Jaura's duties which included stocking the bar; ensuring the premises were safe; directing, supervising and disciplining staff; interviewing new hires; advertising, marketing and making other efforts to increase the revenues of Three Jay are all duties that are integral to the operation of Three Jay's nightclub that would normally be performed by an employee of Three Jay. The Delegate, therefore, concluded that Three Jay allowed Jaura to perform work normally performed by an employee within the meaning of the definition of "employee" under section 1 of the Act.
29. The Delegate also noted that while there is evidence of some discretion on the part of Jaura as to when he could be at Three Jay's nightclub because Three Jay did not schedule his hours, both Three Jay and Jaura agreed that he was required to be at the nightclub during the operating hours of the nightclub.
30. The Delegate further noted that while Three Jay may not have controlled the hours that Jaura worked, it exercised control and direction in many other areas of Jaura's activities. In particular, Three Jay provided Jaura training on how to run the nightclub and made him responsible for supervising and directing the staff, although most final decisions were made by the then General Manager, Holmes, who also had a final say on all decisions that affected the budget.
31. The Delegate, after taking into consideration all the facts adduced by both parties, on the balance, concluded that Jaura was an employee of Three Jay and not an independent contractor.
32. With respect to vacation pay, the Delegate noted that Jaura, as an employee of Three Jay, was owed vacation pay pursuant to section 58 of the Act based on his total earnings of \$20,159.99 during the course of his employment. However, the Delegate found that Three Jay had not paid him any part of the vacation pay in accordance with section 18 of the Act, that is, within six days after he quit his employment. Accordingly, the Delegate found Three Jay to have contravened section 58 of the Act.
33. There is no indication in the Record of any submissions on the part of Three Jay on the issue of vacation pay and the Determination does not indicate any evidence in the form of documentation or otherwise from Three Jay to support Three Jay's position on appeal that it paid Jaura vacation pay in full.
34. As there is no challenge by Three Jay or Jaura to the Delegate's finding in the Determination that Jaura was a manager and the resultant determination that he was not owed any overtime wages, I will not review the evidence at the Hearing and the findings of fact of the Delegate on this matter.
35. Similarly, I will not review any facts or evidence pertaining to Jaura's failed claim for outstanding regular hourly wages as Three Jay, understandably, is not appealing this ruling of the Director favourable to Three Jay.

## ARGUMENT

### *Three Jay's Submissions*

36. Since Three Jay's substantive submissions on appeal are quite brief and contained in a single page, I have decided to delineate them verbatim below. Three Jay states:
- The director of employment standards erred in law by overlooking evidence that was presented and clearly stated in the determination handed down on July 4, 2007. (please refer to page nine, paragraph 5, lines 4 and 5) of the determination.
  - Sunny Jaura was paid in excess of \$806.40 as entitled to him in the determination for vacation pay.
  - The North Delta Inn is not in contravention of section #58 of the act.
  - The Director or [sic] Employment Standards failed to observe the principles of natural justice in making the determination.

### *The Director's Submissions*

37. The Director disputes Three Jay's allegation that it erred in law by overlooking the evidence at page 9, paragraph 5, lines 4 and 5 of the Determination—that is, Three Jay's assertion that Jaura took a week off to go to a wedding and was paid by Three Jay and that he also took a day off to work on a concert that was put on by his company, Jaura Enterprises, and paid for that day as well. While the Director disputes Three Jay's contention above, the Director does not clearly formulate an argument in respect thereof. However, if one reviews the Determination, one can deduce that the Director, on the balance, was not persuaded that the evidence of Three Jay above supported the latter's position that Jaura was an independent contractor and not an employee.
38. With respect to Three Jay's assertion that Jaura was paid in full in respect of his vacation pay, the Director contends that Three Jay did not maintain any records of hours that Jaura worked and did not present any evidence to support the assertion that Jaura was paid vacation pay in accordance with the Act.
39. With respect to Three Jay's assertion that the Director failed to observe the principles of natural justice, the Director argues that the onus is on Three Jay to demonstrate how the Director failed to observe the principles of natural justice. In this regard, the Director argues that Three Jay has adduced no evidence and made no submissions to support its bare assertion. The Director further argues that Three Jay was notified of the Hearing, afforded an opportunity to respond to the case against it and the Director only made the Determination after weighing the evidence presented by both parties. Accordingly, the Director disputes Three Jay's ground of appeal based on denial of natural justice.

## ANALYSIS

40. I will deal with the grounds of appeal of Three Jay in the reverse order, starting with the natural justice ground of appeal first.

### *Natural Justice*

41. As indicated by the Tribunal in *Re 607730 B.C. Ltd.* (c.o.b. English Inn & Resort) [2005] B.C.E.S.T.D. No. 55 (Q.L.), the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, a right to present their evidence, and the right to be heard by an independent decision-maker. An appellant claiming a breach of natural justice has the onus to adduce evidence in support of its claim, and a bare assertion it has been denied a fair hearing is not sufficient. In the case at hand, Three Jay has made a bare assertion that it has been denied its natural justice rights. However, Three Jay has not adduced any evidence to support that claim. To the contrary, I find that Three Jay has been afforded its natural justice rights. Three Jay was provided ample notice of the Complaint and the Hearing in at least two forms, by way of registered mail and by fax. Three Jay also had representation at the Hearing by its former General Manager, Holmes, its Director and President, Moir, and its current General Manager, Hartley. From my review of the Record and the Determination, it is clear that all three gentlemen representing Three Jay at the Hearing had a sufficient opportunity to respond to the allegations in the Complaint as well as any evidence and argument adduced by Jaura at the Hearing. In the circumstances, I see no basis for Three Jay's ground of appeal based on denial of natural justice.

### *Error of Law*

42. Three Jay's argument based on error of law has two parts to it. The first relates to the Director's finding relating to Jaura's status as an employee and not an independent contractor. It should be noted that a finding relating to one's status as an employee is a question of mixed law and fact. For Three Jay to succeed in its appeal, Three Jay must show an error in the legal analysis applied to the facts as found by the Delegate (see *Re Pro-Serve Investigations Ltd.* [2005] B.C.E.S.T.D. No. 59 (Q.L.); *Re Koivisto* (c.o.b. Finn Custom Aluminium) [2005] B.C.E.S.T.D. No. 6 (Q.L.) reconsideration denied [2006] B.C.E.S.T.D. No. 86 (Q.L.)). Having reviewed the legal analysis applied by the Delegate to the facts as found, I cannot find that the Delegate made an error of law. In my view, the Delegate appears to have taken into consideration the evidence and arguments adduced by both Three Jay and Jaura and analyzed them properly in the context of the statutory definitions of "employer" and "employee" in the Act leading to a well-reasoned explanation of why he found Jaura to be an employee.
43. I have also considered whether or not the Delegate made any errors on findings of fact that could amount to an error of law but discovered none in this case. It should be noted that the onus is really on the appellant, Three Jay, to show either that there was no evidence to support the findings of fact made by the Delegate or that the Delegate took a view of the facts that could not reasonably be entertained based on the evidence before the Delegate at the Hearing. Three Jay, in my view, has not discharged that onus.
44. Finally, the second aspect of the error of law ground of appeal of Three Jay relates to Three Jay's submission on appeal that Jaura was paid in excess of \$806.40 for vacation pay (the amount the Delegate found Jaura was owed for vacation pay in the Determination). If the Delegate had evidence before him at the Hearing that Jaura was paid vacation pay but failed to consider that evidence then there is a possibility

that that may amount to an error of law. However, Three Jay has not shown that the Delegate took a view of the facts that could not reasonably be entertained based on the evidence before him. More specifically, in this case Three Jay did not produce any records or other form of evidence at the Hearing to show that Jaura was paid his full vacation entitlement- i.e. \$806.40. Moreover, Three Jay, in its appeal, also does not provide any supporting evidence other than a bare assertion that Jaura has been paid vacation pay in full. Accordingly, I am not convinced that the Delegate erred in law in making the Determination in respect of Jaura's claim for vacation pay.

## **ORDER**

45. Pursuant to section 115(1)(a) of the Act, I order that the Determination be confirmed as issued together with any further interest that may have accrued, pursuant to section 88 of the Act, since the date of issuance of the Determination.
46. I also confirm the Determination relating to the administrative penalty of \$500 against Three Jay.

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