

An appeal

- by -

Patara Holdings Ltd. carrying on business as Canadian Lodge
(“Patara”)

- 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: David B. Stevenson

FILE No.: 2009A/091

DATE OF DECISION: September 18, 2009

DECISION

SUBMISSIONS

Major Patara	on behalf of Patara Holdings Ltd. c.o.b. Canadian Lodge
Brijesh Ansal and Mohan Godyal	on their own behalf
William C. Boyte	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Patara Holdings Ltd. carrying on business as Canadian Lodge (“Patara”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 22, 2009.
2. The Determination was made by the Director on complaints filed by Brijesh Ansal (“Mr. Ansal”) and Mohan Godyal (“Mr. Godyal”), collectively the “complainants”, who alleged Patara had contravened the *Act* by failing to pay wages. The Determination found that Patara had contravened Part 2, section 8, Part 3, sections 16 and 28, Part 4, section 40, Part 5, section 46 and Part 7, section 58 of the *Act* and ordered Patara to pay the complainants an amount of \$31,254.00, an amount which included wages, interest and the out of pocket expense of plane fare from India to Vancouver.
3. The Director also imposed administrative penalties on Patara under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$11,000.00.
4. The total amount of the Determination is \$42,254.00.
5. Patara has appealed the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. Patara has also indicated in the appeal that evidence has become available that was not available when the Determination was being made.
6. None of the parties to this appeal has requested a hearing before the Tribunal and while we have a discretion whether to hold a hearing on an appeal – see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575 – I have reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and have decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue in this appeal is whether Patara has shown the Director failed to observe principles of natural justice, or erred in any other way, in making the Determination.

THE FACTS

8. The Determination is fairly lengthy and addresses the claims of both complainants. I will only summarize the facts, findings of fact and conclusions made.

9. Patara is a hotel operating in Valemount, BC. The complainants are Indian nationals who were recruited by Patara to work as cooks at the hotel and came to Canada as part the Federal Temporary Worker Program. Mr. Ansal's employment commenced on March 31, 2008 and ended on August 31, 2008. Mr. Godyal's employment commenced April 9, 2008 and ended on October 8, 2008.
10. The complainants filed timely complaints alleging Patara had failed to pay regular wages, overtime wages, annual vacation pay and statutory holiday pay. The complainants also claimed their airfare from India to Vancouver.
11. The Director investigated the complaints. The Determination notes the complainants provided a significant portion of the evidence by way of written submissions and that they were personally interviewed about their claims on one occasion and interviewed by telephone on two other occasions.
12. The complainants each signed six month employment contracts which generally described wages, benefits and work duties for the position of "Indian Cook". The Determination indicates the complainants worked, with very little exception, not as cooks but as housekeepers, initially at a hotel in Kamloops which was also owned by the principals of Patara and then for the duration of their employment at the hotel in Valemount.
13. Mr. Ansal kept a record of the complainants' hours worked in June, July and August, 2008. Mr. Godyal did not maintain a record of his hours after Mr. Ansal stopped working for Patara on August 31, 2008.
14. The Director issued a Demand for Employer Records for each of the complainants and received payroll information in the form of wage statements indicating wages were paid to each of the complainants during their employment and the amount of those wages. The information was disputed by the complainants and additional information was demanded and provided by Patara.
15. The Director interviewed the former manager of the hotel.
16. The Director interviewed Darcy Patara, one of the principals of Patara, and received a written submission from Patara in response to the claims of the complainants and the factual allegations made by the complainants supporting the claims. The Director interviewed a representative of the RCMP about some of the allegations that had arisen during the process and a representative of the Canadian Imperial Bank of Commerce concerning some of the documents and allegations of facts that had been provided by both parties.
17. The Director, faced with conflicting evidence on many aspects of the complaints, made the following findings of fact:
 - The complainants did not receive the amounts set out in the monthly wage statements;
 - The complainants received cash payments: Mr. Ansal received four cash payments totalling \$4,000.00 and Mr. Godyal received four cash payments totalling \$3,750.00;
 - Mr. Godyal also received two cheques which netted him a total of \$2,000.00;
 - The complainants worked 590.44 hours in June, July and August, 2008;
 - For the other periods of employment, the complainants worked eight hours a day and 40 hours a week;

- The complainants qualified for statutory holiday pay for Victoria Day, Canada Day, BC Day and Labour Day;
 - The complainants worked Canada Day and BC Day;
 - The complainants were entitled to annual vacation in the amount of 4% of gross wages earned; and
 - The appropriate wage rate for the complainants for the purpose of calculating any wage entitlements under the *Act* was \$17.00 an hour;
18. Based on the above findings of fact, the Director found that wages, including regular wages, overtime wages, annual vacation pay and statutory holiday pay, were owed to each of the complainants and calculated those wages to be the amounts set out in the Determination.
19. The Director found Patara had contravened several provisions of the *Act* and that the contraventions of sections 16, 28, 40 and 46 of the *Act* fell within the period that attracted increased administrative penalties under section 29(1)(b)(ii) of the *Regulation*.
20. The Director found it was appropriate in the circumstances to investigate whether Patara had contravened section 8 of the *Act* by misrepresenting aspects of the employment that was offered to the complainants and concluded that it was. The Director offered Patara the opportunity to make a submission on a possible contravention of that provision, but received none. The Director found Patara had contravened section 8 by falsely misrepresenting the type of work to be performed by the complainants and that the cost of air fare incurred by each complainant from India to Vancouver was causally connected to the misrepresentation. The Director ordered Patara to pay the complainants the cost of that air fare – an amount of \$815.00 for each complainant.
21. The Director found a consideration of section 8 was not barred by subsection 74(4) of the *Act* because even though the initial misrepresentation was made in December 2007, it was an ongoing misrepresentation which was not apparent to the complainants until they arrived in Valemount, in May 2008, learned the restaurant was not ready to open and that they would not be working as cooks.

ARGUMENT

22. The submission provided by Patara in their appeal is sparse and can be summarized as raising two arguments:
1. the Director failed to observe natural justice in making the decisions in the Determination; and
 2. the administrative penalties should not have been imposed in the amount of \$11,000.00.
23. The first argument seems to be related to the Director's findings on whether the complainants had actually been paid the wages Patara said they had received. In support of this argument, Patara has introduced what it refers to as "new evidence". The "new evidence" comprises a letter from the complainants to the principals of Patara dated April 28, 2009 and four wage statements for Mr. Ansal for the months of April, May, June and July, 2008. In fact, none of this material can be considered as "new evidence" since all of material existed when the Determination was made. The four wage statements were specifically considered in the Determination.
24. The Director has provided a response to the appeal. Essentially, the Director points out what I have already observed about the "new evidence" and observes that Patara has provided no evidence to support the breach

of natural justice allegation. The Director also says the administrative penalties imposed on Patara are consistent with the statutory provisions and with the facts. Finally, the Director says the issue between the parties concerning the passports is largely a matter outside of the provisions of the *Act* but says Patara's submission that the complainants had sold their passports when they arrived in Canada is improbable and unreliable based on other, uncontroverted, facts.

25. The complainants have provided a response on the submission by Patara relating to the April 28, 2009 letter and to the allegation that they had sold their passports. They say they have never said nothing was paid to them by Patara and have told the Director what amounts were received. In respect of the passport issue, the complainants reiterate their assertion that their passports were taken by one of the principals of Patara during their period of employment and have never been returned to them.

ANALYSIS

26. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 made.*

27. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A 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.

28. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

29. I will first address the “new evidence” submitted by Patara with the appeal. The Tribunal has stated in many decisions that while there is discretion to allow new or additional evidence, a relatively strict approach will be taken to this ground of appeal, indicating it is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence was reasonably available and could have been provided to the Director before the Determination was issued. As well as considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and *Senor Rana's Cantina Ltd.*, BC EST # D017/05.

30. As alluded to above, I am not inclined to accept any of this “new evidence”. The wage statements were provided to the Director during the complaint investigation and specifically considered in the Determination.

The April 28, 2009 letter does not satisfy the conditions on which the Tribunal has indicated new evidence will be received in an appeal – it is neither “new”, relevant, nor probative.

31. As a result of this decision, the appeal will be decided on the material found in the section 112 Record and on the submissions of the parties.
32. In respect of the allegation that the Director failed to observe principles of natural justice in making the Determination, the Tribunal, in *Imperial Limousine Service Ltd.*, BC EST # D014/05, has briefly summarized the natural justice concerns that typically operate in this context:

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.

33. Patara’s burden in alleging a failure by the Director to observe principles of natural justice is to provide facts which show they have been denied the procedural rights described above.
34. Patara has not met this burden. They have failed to either identify any particular failure by the Director to observe principles of natural justice in this case or provide any evidence to support an allegation of breach of natural justice. In fact, the material in the section 112 Record clearly demonstrates there was no denial of the procedural rights as they are described in *Imperial Limousine Service Ltd.*, *supra*.
35. Patara’s allegation that the Director failed to observe principles of natural justice in making the Determination is in substance nothing more than an expression of disagreement that the Director rejected much of the evidence provided by them as not being credible ~~any~~ and accepting the evidence of the complainants. The response to that kind of expression of disagreement was provided in *Dongoh Educational Company Ltd.*, BC EST # D049/09, at para. 32:

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.

36. The above describes the circumstances of the Determination under appeal. The Director was required to make choices in the positions and the evidence of the respective parties. Choices were made, primarily based on an assessment of the relative credibility of the evidence of the respective parties involved. Reasons for the choices made were provided. Those reasons are based on relevant considerations and are well supported by

an analysis of the evidence given and submissions made to the Director during the complaint process. The result of making those choices does not amount to failure to observe principles of natural justice because one of the parties is dissatisfied with the choices made. In every respect Patara was provided with the opportunity required by section 77 of the *Act* and the principles of natural justice to present their position and to respond to the position presented by the complainants.

37. In sum, Patara has failed to show there was a failure by the Director to observe principles of natural justice in making the Determination and, accordingly, this part of the appeal is dismissed.
38. Finally, Patara has questioned the administrative penalties imposed by the Director. As the Tribunal has consistently noted, administrative penalties are part of a larger scheme regulating employment relationships in the non-union sector and are generally consistent with the purposes of the *Act*. Particularly, the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*: see *Summit Security Group Ltd.*, BC EST # D059/04, (Reconsidered in BC EST # RD133/04).
39. As stated by the Tribunal in *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04:

Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory and are thus not subject to mediation. . . .

40. The facts which were before the Director relating to the administrative penalties justified, and required, the amounts that were imposed. There is no authority for the Tribunal to ignore the facts and no basis upon which the Tribunal may substitute its own view of the amount of the administrative penalties over that chosen by the legislature and fixed in the *Regulation*.
41. This part of the appeal is also dismissed.

ORDER

42. Pursuant to Section 115, I order the Determination dated May 22, 2009 be confirmed in the amount of \$42,254.00, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal