

An appeal

- by -

0965319 B.C. Ltd. carrying on business as Maverick's Sports Lounge
(“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: Kenneth Wm. Thornicroft

FILE No.: 2014A/102

DATE OF DECISION: October 21, 2014

DECISION

SUBMISSIONS

Michael O'Connell

on behalf of 0965319 B.C. Ltd. carrying on business as
Maverick's Sports Lounge

OVERVIEW

1. On July 9, 2014, and following an investigation into several complaints (originally 19) filed by former employees of 0965319 B.C. Ltd., carrying on business as Maverick's Sports Lounge ("Maverick's"), a delegate of the Director of Employment Standards (the "delegate") issued a Determination against Maverick's under section 79 of the *Employment Standards Act* (the "*Act*"). By way of the Determination, Maverick's was ordered to pay \$4,034.97 on account of unpaid wages and section 88 interest owed collectively to 10 of the complainants and a further \$2,500 reflecting five separate \$500 monetary penalties (see section 98). Thus, the total amount payable under the Determination is \$6,534.97.
2. Maverick's appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (see subsection 112(1)(b) of the *Act*). At this juncture, I am considering whether this appeal should be dismissed under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding. I have reviewed the Determination and the delegate's accompanying "Reasons for the Determination" (the "delegate's reasons"), the extensive subsection 112(5) record that was before the delegate (258 pages) and Maverick's appeal submissions. Having considered all of this material, I am of the view that this appeal must be dismissed under subsection 114(1)(f) of the *Act*.

FINDINGS AND ANALYSIS

3. Maverick's operates a restaurant and lounge in Vancouver. The complainants alleged that they had not been paid all of their earned wages (including regular wages, overtime pay and vacation pay). On August 27, 2013, the delegate contacted Maverick's sole director (and representative in this appeal), Michael O'Connell, and advised him about the complaints. On August 29, 2013, the delegate issued a demand for payroll records to Maverick's and also forwarded an e-mail communication identifying the complainants. Certain records were produced in response to the demand but Maverick's records were incomplete. On November 14, 2013, the delegate met with Mr. O'Connell and Maverick's accountant, Mr. Sunny Sodhi. The record before me shows that Maverick's (represented by Mr. O'Connell and/or Mr. Sodhi) and the delegate exchanged many e-mails and had other communications during the period from late August to mid-November 2013.
4. On November 29, 2013, Mr. Sodhi sent an e-mail to the delegate setting out Maverick's position regarding the total amount of wages due to the complainants and stated "We agree to pay the amounts calculated in the attached attachment" but no funds were ever paid. The delegate carried on with her investigation (and continued to be in contact with Maverick's) and eventually issued the Determination on July 9, 2014.
5. Several points should be noted. First, the delegate noted "Maverick's provided little if any evidence to refute the allegations filed against them" (delegate's reasons, page R4). Second, "Maverick's produced incomplete and inaccurate payroll records" (delegate's reasons, page R4). This latter fact appears to have been attributable to several factors including Maverick's unreliable point of sale computer system and its failure to maintain complete employment records as mandated by the *Act*. Third, since Maverick's records were "unreliable and unpersuasive", the delegate gave in many instances, but certainly not all, greater weight to the

records provided by the complainants regarding their hours worked. In several cases, Maverick's own records showed that an employee had worked overtime hours but had not been paid overtime pay.

6. The delegate carefully reviewed each complainant's unpaid wage claim and evaluated their records as well as Maverick's records and other corroborating evidence in determining each complainant's unpaid wage claim. The individual claims varied from \$12.49 to \$1,167.09 with many claims being in the \$200 to \$400 range.
7. Maverick's appeal is based on the assertion that the delegate failed to observe the principles of natural justice in making the Determination. To a degree, the delegate's natural justice obligation is codified in section 77 of the *Act*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." My review of the record shows that the delegate, through various telephone conversations, e-mails and other formal correspondence provided a complete listing of the complainants' claims and afforded Maverick's a reasonable opportunity to respond. In reaching her conclusions with respect to each individual complainant, the delegate carefully reviewed all of the evidence before her touching on each former employee's claim. There is no evidence before me, or even a suggestion, that the delegate was, or appeared to be, biased by reason of some past or present relationship with any of the parties.
8. In fact, the submissions filed by Maverick's simply do not, in any fashion, raise even a *prima facie* natural justice concern. Maverick's position on appeal is that some complainants are not owed any monies whereas others are only entitled to a much smaller sum than was determined by the delegate. In essence, Maverick's says that the delegate erred in making her unpaid wage findings. In some cases, Maverick's says that "it would like more time to investigate" the claims in question. However, Maverick's was already given a full and fair opportunity to present its case to the delegate and an appeal to the Tribunal is not a *de novo* hearing. Taking the most charitable view of Maverick's appeal submissions, it appears that it is saying that the delegate erred in law in making certain unpaid wage findings.
9. In its appeal submission, Maverick's asserts: "The reason for the appeal is that the [delegate] did not have all the information (see attached labour reports) in making a fair decision based on fact". However, the attached "labour reports" are not properly before me. These reports appear to have been generated from Maverick's payroll system – a system the delegate already found to be unreliable and unpersuasive since information was frequently not properly (or at all) inputted into the system. Further, evidence is not admissible on appeal unless it was "not available at the time the determination was being made" (subsection 112(1)(c) of the *Act*) and this evidence clearly does not meet that statutory condition (see also *Davies et al.*, BC EST # D171/03).
10. A finding of fact can constitute an error of law but only where there is no evidentiary foundation to support it. In this case, Maverick's records were incomplete and, in some cases, demonstrably unreliable. However, the delegate did not simply accept the complainants' evidence at face value but rather closely scrutinized the evidence in order to arrive at a conclusion that was most probable. Maverick's was given a full and fair opportunity to participate in the delegate's investigation and, in fact, did so. It now complains that the delegate's findings are incorrect. However, the delegate's findings, in each case, were based on a careful analysis of the evidence before her. I cannot conclude that any of her findings regarding the amount of wages due to an individual complainant was perverse in the sense that there was no evidence to support it.
11. Whether one characterizes this appeal as an assertion that the delegate erred in law, or deals with it on the asserted "natural justice" ground, or assumes the appeal is based on "new evidence", it is simply an untenable appeal with no reasonable prospect of succeeding. Accordingly, it must be dismissed.

ORDER

- ^{12.} Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of \$6,534.97 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal