

An appeal

- by -

Mrs. Convenience – Meat, Hot Pot & BBQ Specialty Store Ltd.
(“Mrs. Convenience”)

- 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.: 2012A/69

DATE OF DECISION: September 19, 2012

DECISION

SUBMISSIONS

Jaclyn Leong	counsel for Mrs. Convenience – Meat, Hot Pot BBQ & Specialty Store Ltd.
Jason Wong	on his own behalf
Greg Brown	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 Mrs. Convenience – Meat, Hot Pot. BBQ & Specialty Store Ltd. (“Mrs. Convenience”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 18, 2012.
2. The Determination found that Mrs. Convenience had contravened Part 4, section 34, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Jason Wong (“Mr. Wong”) by failing to pay Mr. Wong wages, annual vacation pay and length of service compensation and ordered Mrs. Convenience to pay Mr. Wong an amount of \$3,719.55, an amount which also included interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on Mrs. Convenience under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,000.00.
4. The total amount of the Determination is \$5,719.55.
5. Mrs. Convenience says the Director erred in law and/or failed to observe principles of natural justice in making the Determination by finding that Mr. Wong was an employee or, in the alternative, if he was an employee, by finding he was dismissed without cause and by wrongly calculating the amount of wages owed to him under the *Act*.
6. Mrs. Convenience seeks to have the Determination cancelled or, in the alternative, varied.
7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

ISSUE

8. The issues in this appeal are whether Mrs. Convenience has shown the Director erred in law and/or failed to observe principles of natural justice in finding Mr. Wong was an employee under the *Act*, in finding he was entitled to length of service compensation under section 63 of the *Act* and/or in calculating the amount of wages owed to him under the *Act*.

THE FACTS

9. I shall reiterate what I expressed in the appeal from the Determination filed by Mr. Wong:

The facts are well organized in the Determination and are generally not in dispute. I do not need to recite all of the facts in detail. By way of background, it suffices to say Mr. Wong filed a claim for wages against Mrs. Convenience, alleging he was owed a substantial amount of wages for work he performed in the six month statutory claim period prior to his termination.

Mrs. Convenience opposed the claim, arguing he was never an employee of the business and was not entitled to any wages under the *Act*.

The Director found Mr. Wong was an employee of Mrs. Convenience and entitled to wages under the *Act*. However, in the absence of a credible record of the hours worked by Mr. Wong and of any evidence of an agreed wage rate, Mr. Wong's wage entitlement under the *Act* was calculated on the minimum statutory entitlements found in the *Act* – minimum daily pay and minimum wage – for a 180 day period. His claim for length of service compensation was accepted and calculated on the same basis. His claims for overtime and statutory holiday pay were rejected by the Director for the reasons stated in the Determination. Neither of the claim for length of service compensation nor the claim for statutory holiday pay has specifically been raised in this appeal and will not be addressed in this decision, although the amount of length of service compensation to which he was found to be entitled might be varied if the appeal is successful.

The Director found Mrs. Convenience did not keep a record of the hours worked by Mr. Wong and Mr. Wong kept no contemporaneous record of the hours claimed to have worked. The Director found the claim by Mr. Wong that he had worked “12 hours a day, seven days a week over a period of 21 months without taking any time off” and without being paid any wages was “patently unreasonable” and was not believed or accepted.

On the other hand, Ms. Ida Woo, a director and majority owner of Mrs. Convenience, acknowledged during the complaint investigation that Mr. Wong, with whom she was in a personal relationship at the time, had accompanied her to the workplace “almost every day” and did not deny that he performed some tasks daily with her, such as opening the store. She also said Mr. Wong's contribution to the work required to be done in the business was almost non-existent, but it is apparent her assertion on this was not accepted by the Director

10. It is relevant to this appeal to add the following facts, which have been gleaned from the Determination.
11. The factual basis for finding Mr. Wong was an employee of Mrs. Convenience was the conclusion by the Director that, on the evidence, Mr. Wong “performed work normally performed by an employee”. That conclusion was based on evidence, accepted by the Director, that Mr. Wong accompanied Ms. Woo to work “on an almost daily basis”, would help her open the store and performed a variety of duties that would normally be performed by an employee, including helping to chop chickens, dealing with customers while Ms. Woo worked in the back and tending the store in Ms. Woo's absence. All of these matters were acknowledged by Mrs. Convenience in their September 10, 2010, submission to the Director. Mr. Wong was provided with a “Mrs. Convenience” business card.

ARGUMENT

12. Counsel for Mrs. Convenience says the Director failed to consider and apply all of the relevant evidence and such a failure constitutes an error of law or a breach of natural justice. She says the relevant evidence demonstrated Mr. Wong did not perform duties normally performed by an employee. She argues that the Director's reference to Mr. Wong having a business card supplied by Ms. Woo is not evidence of work being

performed. Counsel for Mrs. Convenience also points out that the surveillance pictures of Mr. Wong working in the store cannot be considered evidence of work performed as the pictures were taken after the date the Director accepted as Mr. Wong's termination date and after his permission to be on the premises had been revoked.

13. Counsel for Mrs. Convenience makes a broad statement that the Director failed to take into account relevant evidence and took into account superfluous evidence in finding Mr. Wong to be an employee under the *Act*, although, apart from the above matters, the evidence she refers to is not identified in the appeal submission.
14. Counsel for Mrs. Convenience submits the relevant evidence showed Ms. Woo had no "control or direction" over Mr. Wong and the Director erred by relying on what was, in effect, no evidence, while ignoring Ms. Woo's assertions that Mr. Wong was never assigned regular work duties, was never ordered to work a fixed work schedule, did not report to Ms. Woo with respect to the business, would come and go at his leisure, would chat and smoke with friends, customers and neighbouring store owners, read the newspaper, cook his own food, nap and eat the store's products.
15. Counsel for Mrs. Convenience also submits the Director failed to consider all of the relevant evidence in deciding whether Mr. Wong was terminated without cause. She refers to the allegations made by Ms. Woo that on June 29, 2010, Mr. Wong had broken into the store's office, removed files without permission and threatened to "ruin her life". The Director also ignored evidence that showed Mr. Wong in the store on or about June 30, 2010, and July 1, 2010, engaging in unauthorized activity and pocketing money at the premises.
16. Finally, counsel for Mrs. Convenience says the Director incorrectly calculated the wages owed to Mr. Wong by including the period from June 30 to July 8, 2010, in the wage calculations. Counsel also challenges the finding that Mr. Wong was entitled to wages based on 180 days worked in six months, noting it was Mrs. Convenience's position that Mr. Wong rarely engaged in any task typically performed by an employee.
17. The Director and Mr. Wong have responded to the appeal.
18. The Director says the evidence did support the conclusion that Mr. Wong performed work normally performed by an employee, that there are numerous references to such evidence in the Determination and that the finding regarding the status of Mr. Wong under the *Act* was based on that evidence. The Director submits the argument by Mrs. Convenience concerning the reference to the business cards ignores that that reference was only one component of the analysis. The Director says all of the evidence presented by the parties on the issue of Mr. Wong's status was addressed in the Determination.
19. On the matter of "just cause", the Director says Mrs. Convenience never took the position that Mr. Wong was dismissed for just cause; this position is raised for the first time in the appeal. The Director says the allegations being made against Mr. Wong now as justifying termination for cause were never raised during the complaint process as a basis for termination and, in any event, have never been proven.
20. The Director submits there is no evidentiary basis for challenging the finding that Mr. Wong performed some work on 180 days of the six month claim period. The Director says there was, on the other hand, a factual basis for the finding based on the information provided by the parties during the complaint process, including the evidence that the store was open seven days a week, including holidays, and that Mr. Wong accompanied Ms. Woo to the store, if not every day, as he claimed, then almost every day, as she acknowledged.
21. Mr. Wong's response comprises a refile of the submission he made to the Director during the complaint process supplemented by a summary of his view of the facts, accompanied by a large number of documents

that were not provided to the Director before the Determination was made. I do not accept the documents and do not find Mr. Wong's submission, which essentially reflects his appeal position, to be very helpful.

22. In the final reply, counsel for Mrs. Convenience has filed brief responses to the submissions of the Director and Mr. Wong.

ANALYSIS

23. As I outlined in the appeal of the Determination filed by Mr. Wong, 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.*

24. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.

25. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

26. 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. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
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.

27. 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. I shall first address the argument that the Director made an error of law by failing to consider and apply all relevant evidence in finding Mr. Wong was an employee of Mrs. Convenience. In *D. Kendall & Son Contracting*

Ltd., BC EST # D107/09, I accepted, as a general proposition, that a failure by the Director to consider relevant evidence is a breach of natural justice and an error in law which can result in a setting aside of the Determination, referring to and adopting the analysis from *Jennifer Oster*, BC EST # D120/08, at paragraphs 42-45, describing the relationship between errors of fact, error of law and failure to observe principles of natural justice. I also accepted and adopted the remarks of the Tribunal in *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05 that described the limitations of intervening in a Determination on the basis the Director “failed to consider relevant evidence”. Those limitations are reflected in the following excerpt from the analysis of the *Jane Welch* decision at paras. 40-43:

. . . there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700,

. . . any attempt to determine whether an administrative decision-maker has considered “all of the evidence” as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.

Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence. Although the Director and his delegates have a duty, both under the Act and at common law, to provide reasons for their determinations, “[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision”: *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also *Manuel D. Gutierrez*, BC EST #D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate’s reasons.

Third, even if an appellant establishes that a delegate failed to consider relevant evidence, it does not automatically follow that the delegate failed to observe the principles of natural justice in making the determination. In *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at 491-92, Lamer C.J. held that the rejection of relevant evidence is not automatically a breach of natural justice; rather, whether it constitutes a breach of natural justice depends on the impact of the rejection of the evidence on the fairness of the proceeding:

For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

29. In respect of the last point, relevant factors in an analysis of this point include the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue. Thus, whether a failure to consider relevant evidence amounts to a breach of the principles of natural justice will depend on the particular circumstances of each case.
30. In this case, Mrs. Convenience has not persuaded me the Director ignored relevant evidence in deciding Mr. Wong was an employee under the *Act*. The argument made by counsel for Mrs. Convenience is really about a disagreement with the Director’s conclusion from the evidence provided by the parties. In the areas addressed by counsel for Mrs. Convenience in the appeal submissions, there was other evidence available on the issue besides what has been raised and argued in the appeal submission. They are referred to in the Determination and in the recitation of facts, above, in this decision. I do not accept the argument that the

fact of Mr. Wong having a Mrs. Convenience business card could not be indicative of an employment relationship. There was no suggestion by Mrs. Convenience during the complaint process – as they make in the appeal – that Mr. Wong could have been given the card to reflect his status as a partner or independent contractor. In my view, the reference in the Determination to Mr. Wong having a business card was a relevant component of the overall assessment of the evidence that on a reasoned analysis, and in the circumstances, pointed to the conclusion reached by the Director.

31. The Determination indicates the available evidence clearly pointed to a finding that Mr. Wong performed duties as an employee. In accepting that evidence, some of it provided by Ms. Woo, and making the finding, it is apparent the Director did not completely accept how Ms. Woo characterized Mr. Wong's presence at the store. While the Director might have been more concise and complete in providing the reasons for the decision made, read in context I am unable to say the Director ignored "relevant" evidence, as opposed to simply not accepting all of the evidence provided, in finding Mr. Wong was an employee of Mrs. Convenience under the *Act*.
32. In respect of the Director's reference to work that Mr. Wong was showed performing in the surveillance pictures, I do not agree with the position of counsel for Mrs. Convenience that the depiction of Mr. Wong performing those duties was entirely irrelevant to a consideration of whether he was an employee of Mrs. Convenience. While I wouldn't disagree the pictures are not highly probative overall, they do show Mr. Wong performing functions on June 30 and July 1 that he says he consistently performed at the business and lend credence to his position from that perspective.
33. Counsel for Mrs. Convenience argues evidence of "control or direction" over Mr. Wong is absent. I disagree. "Control" and "direction" may be exhibited in many ways. "Control" and "direction" does not need to be overt; it can be shown in something as innocuous as the owner of the business knowingly allowing an individual to perform work for the business. There can be no dispute that Ms. Woo was the owner of the business at the relevant time. The evidence accepted by the Director showed Mr. Wong performed work normally performed by an employee, Ms. Woo knew he was doing such work and allowed him to do it. That is sufficient evidence of "control or direction" for the purposes of the *Act*, which is in the final analysis, remedial and benefits conferring legislation which is to be given broad and liberal interpretation. There is no merit to this argument and it is rejected.
34. Counsel for Mrs. Convenience argues the Director erred in law in failing to consider all the relevant evidence in deciding whether Mr. Wong was terminated for cause. The question of whether there is cause for termination is substantially one of fact. The Director made a finding of fact on the available evidence. Mrs. Convenience says there was ample evidence provided to justify Mr. Wong's termination. Counsel lists several pieces of "evidence" that were before the Director when the Determination was made. The Director says that Mrs. Convenience never alleged Mr. Wong had been terminated for cause and provided no evidence to support the allegations that are being made in the appeal submission.
35. This argument has all the earmarks of the kind of argument the Tribunal has consistently refused to consider – one which was not advanced during the complaint investigation, but which is presented for the first time on appeal. The Tribunal has said in many decisions, stemming from the decisions in *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented during the complaint process. The principle is stated in the *Tri-West* decision as follows:

This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the

Determination when they disagree with it. . . . The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

36. I do not say that Mrs. Convenience refused to participate, but their focus was single-minded – on Mr. Wong’s status under the *Act* – and failed to address any issue, including the “just cause” issue, that might have relevance if Mr. Wong were found – as he was – to be an employee under the *Act*. Those issues may not be raised in this appeal. The approach taken by the Tribunal in circumstances such as this preserves the integrity of the Director’s decision-making process and the statutory directive against allowing appeals based on disagreements of fact that could reasonably have been presented to the Director before the Determination was made but were not. If it were not for the principle adopted by the Tribunal and affirmed in many other decisions, the ability of the Director to make quick and final decisions on complaints made under the *Act* would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.
37. Finally, counsel for Mrs. Convenience disputes the wage calculation made by the Director. To a large extent, the comments made immediately above also apply to this argument. More directly, however, this argument simply expresses Mrs. Convenience’s disagreement with the factual conclusions on which the calculation was made and for which there was some evidence. The argument restates the position taken by Mrs. Convenience about the work Mr. Wong performed, or rather the work Mrs. Convenience alleges he did not perform. This argument has been addressed above and need not be repeated here. To reiterate: the Director found, on the evidence, that Mr. Wong performed work normally performed by an employee. In doing so, some of the allegations made by Mrs. Convenience were rejected in favour of a more reasonable and probable view of the evidence. These were findings of fact over which I have no authority unless they are shown to be errors of law and I find Mrs. Convenience has not met the burden of showing an error of law in that respect.
38. In sum the appeal is dismissed.

ORDER

39. Pursuant to section 115 of the *Act*, I order the Determination dated May 18, 2012, be confirmed in the amount of \$5,719.55, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal