

An appeal

- by -

Dan Joe Levesque, also known as  
Daniel Brown Levesque, carrying on business as  
Granby River Roadhouse  
("Mr. Levesque" or "GRR")

- 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.:** 2016A/70

**DATE OF DECISION:** July 28, 2016

## DECISION

### SUBMISSIONS

Dan Joe Levesque on his own behalf, also known as Daniel Brown Levesque, carrying on business as Granby River Roadhouse

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Dan Joe Levesque, also known as Daniel Brown Levesque, carrying on business as Granby River Roadhouse (“Mr. Levesque” or “GRR”) has filed an appeal of the Determination issued by a delegate of the Director of the Employment Standards (the “Director”) on April 29, 2016 (the “Determination”).
2. The Determination found that Mr. Levesque had contravened Part 3, section 18 (wages), Part 5, section 45 (statutory holiday), Part 7, section 58 (vacation pay) and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Charmaine Hanslit (“Ms. Hanslit”) and ordered Mr. Levesque to pay wages to Ms. Hanslit in the amount of \$2,045.32 inclusive of accrued interest. The Determination also levied administrative penalties against Mr. Levesque in the amount of \$500.00 each for breach of sections 17 and 18 of the *Act*. The total amount of the Determination is \$3,045.32.
3. Mr. Levesque’s appeal is grounded in an assertion that new evidence has become available that was not available at the time the Determination was being made. Mr. Levesque seeks the Tribunal to change or vary the Determination.
4. The deadline to file the appeal of the Determination was June 6, 2016. While the Tribunal received Mr. Levesque’s appeal on June 6, 2016, it did not include a copy of the Director’s written reasons for the Determination, which is a statutory requirement for inclusion with an appeal (see subsection 112(2)(a)(i.1) of the *Act*).
5. By correspondence dated June 8, 2016, the Tribunal informed Mr. Levesque that his appeal was incomplete and requested that he provide a copy of the Director’s written reasons for the Determination and his written reasons for the request to extend the deadline to file the appeal no later than 4:00 p.m. on June 22, 2016.
6. The June 8, 2016 correspondence of the Tribunal also included a request to the Director to produce the section 112(5) “record” (“Record”) and notified the other parties, among other things, that no submissions were being sought from them and pending a review of the appeal by the Tribunal and that following such review all, or part of the appeal, might be dismissed.
7. On June 13, 2016, the Director provided the Tribunal with the Record. A copy of the same was delivered to Mr. Levesque by the Tribunal on June 29, 2016, and the latter was given an opportunity to object to its completeness. Mr. Levesque did not object to the completeness of the Record and the Tribunal accepts it as complete.
8. On June 22, 2016, the Tribunal received a submission from Dave Leitner (“Mr. Leitner”) on behalf of Mr. Levesque or GRR. Mr. Leitner’s submission was in the form of a short email advising the Tribunal that he was the manager for GRR until January 3, 2016, and that he was available to receive a call presumably to provide any evidence.

9. On June 23 and 24, 2016, the Tribunal received three additional written submissions on the merits of the appeal from Mr. Levesque.
10. On June 29, 2016, the Tribunal forwarded Mr. Levesque's and Mr. Leitner's submissions to the Director and Ms. Hanslit for informational purposes only.
11. On July 18, 2016, the Tribunal informed the Director and Ms. Hanslit that Mr. Levesque verbally advised the Tribunal that he did not have a copy of the written reasons for the Determination. In the same correspondence, the Tribunal informed the parties that the appeal had been assigned to a Tribunal Member, that it would be reviewed, and following the review, all or part of the appeal may be dismissed.
12. I have reviewed the appeal, the submissions and the Record. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Determination, the Appeal Form and accompanying written submissions of Mr. Levesque and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind for any of the reasons listed in section 114(1). If satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Ms. Hanslit and the Director to file a reply on the merits of the appeal. Mr. Levesque will then be given an opportunity to make a final reply to their submissions, if any.

## ISSUE

13. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

## THE FACTS

14. There are no reasons for the Determination and, therefore, I am left to rely upon the Record to determine the facts and the steps taken by the delegate in making the Determination.
15. The Record shows that Ms. Hanslit filed her complaint against Mr. Levesque on January 27, 2016 (the "Complaint"). In the Complaint, Ms. Hanslit indicates that she was employed as a waitress with GRR between May 31, 2015 and January 22, 2016 at a rate of pay of \$11.25 per hour.
16. She states that GRR was shut down on January 22, 2016, by its landlord, the Ramada Inn, and Mr. Levesque has not paid her wages for the period December 5, 2015, to January 16, 2016. In particular, she is seeking a total of \$1,833.08 on account of regular wages, annual vacation pay, statutory holiday pay and deductions Mr. Levesque made from her past wages.
17. She also indicates that she was not given notice of termination of her employment and assumes that she was "laid off" when the landlord shut down GRR.
18. On March 21, 2016, the delegate of the Director sent Mr. Levesque the Complaint with instructions to pay Ms. Hanslit all outstanding wages owed to her by April 4, 2016. In the same correspondence, the delegate issued a Demand for Employment Records to Mr. Levesque and indicated that if payment of wages was not made to Ms. Hanslit by April 4, 2016, then Mr. Levesque should provide payroll records of all employees, including Ms. Hanslit, who worked at GRR during the period July 15, 2015, to January 22, 2016.

19. On April 4, 2016, Mr. Levesque responded to the delegate's request by email explaining that his landlord unlawfully closed the restaurant. He further advised that he has an outstanding small claims court action against the landlord relating to that closure and Ms. Hanslit "was a valued employee" and that "everybody deserves their wage" and "she will be a priority" when his assets from the restaurant are sold.
20. In a subsequent email of Mr. Levesque to the delegate on April 8, 2016, he asks the delegate if Ms. Hanslit's Complaint could be delayed until after his small claims action against his landlord, scheduled to be heard on May 10, 2016, is completed. The delegate responded, by a reply email, on the same date advising Mr. Levesque that she could not hold off Ms. Hanslit's Complaint. The delegate also asked Mr. Levesque, in the same email, if he disagreed with any of the wages Ms. Hanslit was claiming she was owed in her Complaint. She also alerted Mr. Levesque that Ms. Hanslit may be due termination pay if her employment was terminated with no written notice or termination pay in lieu of notice.
21. On April 11, 2016, Mr. Levesque responded by email acknowledging that the delegate could not delay the investigation of the Complaint and confirmed that he did not disagree with any of the wages claimed by Ms. Hanslit. He also went on to state "I noted that she did not include termination pay on her complaint that may also be owing *if* she was terminated with no written notice of termination pay in lieu". He also added that "I do not disagree that wages are owed as per the complaint but simply do not have the means to pay at this time, I am advising you of this matter." [*sic*].
22. On April 21, 2016, the delegate sent Mr. Levesque a further email advising him that based on the evidence before her, it appeared that Ms. Hanslit is owed \$1,490.63 in regular wages, \$182.82 in statutory holiday pay, \$278.91 in termination pay and \$78.09 in vacation pay for a grand total of \$2,030.45. The delegate also advised Mr. Levesque that if he had any response to her calculations or wished to make a voluntary payment then he should do so no later than April 28, 2016, failing which a determination would be made based on the evidence before her.
23. On April 28, 2016, Mr. Levesque emailed the delegate indicating that with respect to the termination pay of \$278.91 she calculated for Ms. Hanslit, he "had no knowledge that a third party [the landlord] had illegally closed the doors to the restaurant". Otherwise, Mr. Levesque does not dispute any of the other calculations. He reiterates that he has a small claims court date of May 10, 2016, and he hopes that "this dilemma can be rectify [*sic*] A.S.A.P.!"
24. On April 29, 2016, the delegate issued the Determination against Mr. Levesque.

### **SUBMISSIONS OF MR. LEVESQUE**

25. Accompanying Mr. Levesque's appeal form is an email dated June 6, 2016, with written appeal submissions of Mr. Levesque. In this email, Mr. Levesque states that he is attaching "pay stubs concerning Charmaine Hanslit" and a time sheet showing how often Ms. Hanslit cancelled her shifts. Mr. Levesque submits that GRR closed its doors on January 15, 2016. In the documents attached to the email, there is a single page calendar for the month of January 2016 reportedly showing who was scheduled to work on any particular day at the restaurant. The document shows three dates, namely, January 12, 13 and 14, 2016, where Ms. Hanslit's name is cancelled. Also attached to the email submissions are copies of cheques (not pay stubs as claimed) made out to Ms. Hanslit dated various dates from August 27, 2015, to January 6, 2016. He also attaches a copy of a single page "Daily Time Card" recording purportedly a summary of hours Ms. Hanslit worked during the period December 5 to 18, 2015. This document also has written on the face of it "Paid" and the date "1/8/2016" scribbled next to it.

26. On June 6, 2014, Mr. Levesque submitted two further emails to the Tribunal at 4:01 p.m. and 6:44 p.m. respectively. In these emails, he indicates that Ms. Hanslit never came to work on time, cancelled her shifts on many occasions and she took advantage of the manager's failure to check the hours she actually worked. He states she was "on call half the time" and questions whether she collected welfare or employment insurance while working for him.
27. He states that he has witnesses he can produce who will submit that Ms. Hanslit behaved similarly with the restaurant's previous owner.
28. Finally, he also states that he finds it unfair that he has to pay Ms. Hanslit an extra week's pay on account of the termination of her employment when the restaurant closed on January 15, 2016, as a result of his landlord's actions.
29. On June 24, 2016, Mr. Levesque, by email to the Tribunal, submitted the following additional reasons for appealing the Determination:

- I was told Charmaine Hanslit insisted on taking off the Christmas holidays even though she was scheduled to work them. She actually, I was told by Dave Leitner & Wendy Evans (who volunteered her services) ended up working Charmaine's shifts. I was not there ¾'s of the time because my Mother had just suffered her third stroke & I had to tend to her. Charmaine never worked Dec. 25<sup>th</sup> to Jan. 1<sup>st</sup>.
- Then there are the penalties that were issued to me regarding that she worked on Statutory Holidays. Like said, she did not [*sic*].
- And then there are the penalties that she was wrongly dismissed. She knew very well what had transpired & what kind of dilemma occurred at the time.

I do understand I still owe her wages as you will see with the schedule information I sent your office. Please call if you have any further questions. I do not know why but this whole affair seems to be one sided.

30. Finally, as previously noted, also forming part of the submissions of Mr. Levesque or GRR is Mr. Leitner's email in which he indicates that he was the manager of GRR until January 3, 2016, and advises that he is available to receive a telephone call presumably to give evidence on Ms. Hanslit's Complaint.

## ANALYSIS

31. Mr. Levesque appeals the Determination under section 112(1)(c) of the *Act* on the ground that "evidence has become available that was not available at the time the determination was being made".

32. Section 112(2) of the *Act* states:

- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) *must*, within the appeal period established under subsection (3),
- (a) deliver to the office of the tribunal
- (i) a written request specifying the grounds on which the appeal is based under subsection (1),
- (i.1) *a copy of the director's written reasons for the determination*, and
- (ii) payment of the appeal fee, if any, prescribed by regulation, and

(b) deliver a copy of the request under paragraph (a)(i) to the director.

[emphasis added]

33. The requirements of subsection (a) above are mandatory, that is, an appeal *must* both specify the grounds on which the appeal is based *and* include a copy of the director's written reasons for the determination. The appellant must deliver these materials to the tribunal before the end of the appeal period – “30 days after the date of service of the determination, if the person was served by registered mail” (see section 112(3) of the *Act*).
34. In this case, Mr. Levesque has failed to include a copy of the Director's written reasons for the Determination with his appeal and also failed to comply with the Tribunal's deadline to provide the same by June 22, 2016.
35. Having said this, I note that the Determination provides, at page 2, that “**A person named in a Determination may make a written request for reasons for the Determination**” and that request “must be delivered to an office of the Employment Standards Branch **within seven days of being served** with this Determination.” The Determination also states that “you are deemed to be served eight days after the Determination is mailed, so **your request must be delivered by May 16, 2016.**” [boldface in original]
36. It seems very probable that the failure of Mr. Levesque to comply with the Tribunal's request to provide the reasons for the Determination by June 22, 2016, is due to Mr. Levesque's failure to request them within the time limit specified in the Determination – May 16, 2016. It is noteworthy that at the time the Tribunal first requested Mr. Levesque to provide the Director's reasons for the Determination – June 8, 2016 – Mr. Levesque was over three weeks past the expiry date for requesting the reasons from the Employment Standards Branch (the “Branch”). In the circumstances, it is likely that Mr. Levesque did not request the reasons for the Determination or, if he did, his request was rejected by the Branch for being out of time. In either case, Mr. Levesque's appeal has not been perfected.
37. Having said this, pursuant to section 114(1)(h) of the *Act*, the Tribunal has the discretion to dismiss an appeal where the appellant has failed to meet one or more of the requirements of section 112(2) of the *Act*. Mr. Levesque, by failing to submit the Director's reasons for the Determination, has failed to meet the requirements of section 112(2)(a)(i.1) of the *Act*. In the circumstances, I dismiss Mr. Levesque's appeal.
38. In the alternative, if I am wrong in dismissing Mr. Levesque's appeal under section 114(1)(h) of the *Act*, I also find that his appeal has no reasonable prospect of succeeding pursuant to section 114(1)(f) of the *Act*. More particularly, I am not persuaded with the merits of Mr. Levesque's “new evidence” ground for appeal under section 112(1)(c) of the *Act*.
39. The test governing the admission of the new evidence on appeals is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In this decision, the Tribunal indicated that for new evidence to be considered in the appeal, it must satisfy the following four conditions which are conjunctive:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) the evidence must be relevant to a material issue arising from the complaint;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have lead the Director to a different conclusion on the material issue.

40. I am not convinced that the evidence Mr. Levesque now presents in the appeal of his Determination meets the conditions set out in *Re: Merilus Technologies Inc., supra*. In particular, I am not convinced the evidence meets the first of the conditions. With respect to the copies of the pay cheques made out to Ms. Hanslit between August 27, 2015, and January 6, 2016, the cheques themselves predate Ms. Hanslit's complaint and the Determination. They all appear on CIBC's letterhead and it is probable that he requested CIBC to produce copies at some point after the Determination was made as they do not form part of the Record. He does not explain why he did not request them from CIBC during the investigation of Ms. Hanslit's complaint or before the Determination was made.
41. Further, while Mr. Levesque represents these cheques as "pay stubs", they are not pay stubs and do not indicate precisely what pay periods and shifts worked by Ms. Hanslit the cheques cover. Therefore, I am uncertain whether they meet the fourth criteria or condition in the *Re: Merilus Technologies Inc.* test, that is, I find it is questionable whether the photocopied cheques have high potential probative value, in the sense that, if believed, they could, on their own or when considered with other evidence, have lead the Director to a different conclusion on the issue of whether or not Ms. Hanslit was owed any wages by Mr. Levesque.
42. With respect to the single page calendar showing shifts of various employees including Ms. Hanslit in January 2016 as well as the Daily Time Card for Ms. Hanslit for the period December 5 to 18, 2015, with the notation "Paid", it is unclear why these documents are produced, for the first time, in the appeal of the Determination and not previously. There seems to be a suggestion in Mr. Levesque's submissions that he did not have access to these documents because the landlord had restricted his access to the restaurant. Even if this is true, I am not convinced that the fourth condition in *Re Merilus, supra*, is met in respect of the content of these documents.
43. I also note that Mr. Levesque indicates that he has witnesses available and there is also Mr. Leitner who is available to take a call regarding this matter. The time for presenting witnesses is long past now. Mr. Levesque should have produced any witnesses or presented their evidence to the delegate during the investigation of Ms. Hanslit's Complaint and before the Determination was made; not after.
44. I am also troubled that Mr. Levesque, during the investigation of the Complaint, did not dispute Ms. Hanslit's claim for wages. In particular, on April 4, 2016, he informed the delegate that "everybody deserves their wage" and when he sells his assets Ms. Hanslit will be his "priority". In his April 8, 2016, email to the delegate, he stated that "as soon as I come into money I shall pay Charmaine right away!" In his subsequent email of April 28, 2016, in response to the delegate's email of April 21, 2016, setting out what wages she thought Ms. Hanslit was owed, Mr. Levesque did not disagree with the delegate's calculations except to point out, with respect to the calculation of termination pay, that he did not have knowledge that "the third party had illegally closed the doors to the restaurant". In the circumstances, I find that the delegate properly relied on the representations of Mr. Levesque and the evidence of Ms. Hanslit in making the Determination. I do not find that there is any basis for me to set aside the Determination or vary it.
45. In conclusion, I find that Mr. Levesque has not shown, on a balance of probabilities, any reviewable error in the Determination and I dismiss Mr. Levesque's appeal pursuant to section 114(1)(f) and (h) of the *Act*.

**ORDER**

46. Pursuant to section 115 of the *Act*, I confirm that Determination made on April 29, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

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