

An appeal

- by -

Gary Hogan on behalf of 0666683 B.C. Ltd.
carrying on business as Hogan's Restaurant & Lounge
(the "Employer")

- 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.: 2011A/110

DATE OF DECISION: October 20, 2011

DECISION

SUBMISSIONS

Gary Hogan	on behalf of 0666683 B.C. Ltd. carrying on business as Hogan's Restaurant & Lounge
Matt Wells	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

INTRODUCTION

1. On July 7, 2011, a delegate of the Director of Employment Standards (the "delegate") issued a determination against 0666683 B.C. Ltd. carrying on business as "Hogan's Restaurant & Lounge" (the "Employer") pursuant to section 79 of the *Employment Standards Act* (the "*Act*") ordering the Employer to pay \$3,817.24 on account of unpaid wages and interest owed to four former employees (the "Determination"). In addition, and also by way of the Determination, the delegate levied three separate \$500 monetary penalties (see *Act*, section 98). Thus, the total amount payable under the Determination is \$5,317.24.
2. On August 15, 2011, Mr. Gary Hogan, who I understand is the Employer's principal shareholder and also an officer and director, filed an appeal on behalf of the Employer. Although the stated ground of appeal is that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)), Mr. Hogan's written submission appended to the Appeal Form does not particularize any sort of natural justice breach.

THE EMPLOYER'S POSITION

3. The delegate's various efforts to ensure that the Employer was apprised of the nature of the complaints filed against it, and her continuing efforts to seek a substantive response from the Employer, are set out at page R3 of her "Reasons for the Determination" (the "delegate's reasons") appended to the Determination. In short, the delegate made several attempts to obtain the Employer's "side of the story" but the Employer was simply unwilling to deal with the matter. The Employer does not take issue with anything set out in the Determination in this latter regard. I am fully satisfied that the delegate met the requirements of section 77 of the *Act* in this case. Accordingly, on the face of the material before me, there is no substantive allegation that the delegate breached the principles of natural justice and, even if there were such an allegation before me, the record shows that the delegate fully complied with the principles of natural justice in making the Determination.
4. The Employer's written submission appended to its Appeal Form outlines the background facts relating to the failure of the Employer's fine dining establishment that was situated in Port Moody. Briefly, the Employer appears to have leased a facility that was plagued by various structural and maintenance issues that adversely affected normal business operations and, presumably, the restaurant's cash flows. Ultimately, the business was closed down when the landlord took distraint proceedings. The four complainants were not paid for their final pay period and did not receive either written notice of termination, or payment of compensation for length of service, under section 63 of the *Act*. These claims form the basis of the Determination.

5. The Employer's submission explains that Mr. Hogan and his family have been adversely affected by the business failure and "we simply did not have the money to pay everyone". Having now reviewed the payroll records, Mr. Hogan says that he agrees with the unpaid wage claims relating to all employees save Mr. Wells which claim, he believes, is overstated by 5.75 working hours.
6. Mr. Hogan says that he "does not quite understand" the basis of the section 63 claim but also says: "For the most part, we are in agreement with the calculations contained in the Determination" (other than in relation to Mr. Wells). Finally, the Employer asks for a dispensation so that it might make "3 equal payments over the next 3 months" regarding the unpaid wage claims and that the three \$500 monetary penalties be "reversed" since the Employer never filed for bankruptcy and is not attempting to "run away from its obligations".

FINDINGS

7. As noted above, there is nothing in the material before me that would support, even on a *prima facie* basis, the allegation that the delegate breached the principles of natural justice in this case. The Employer says that it generally agrees with the delegate's calculations relating to the complainants' unpaid wage claims save for Mr. Wells. Mr. Wells, for his part, maintains that he actually worked 30.75 hours during his final pay period rather than the 25 hours asserted by Mr. Hogan, but also says that he would "take the concession if it pleases all parties involved". Since the delegate calculated Mr. Wells' claim based on the only (and seemingly credible) evidence available, I am not persuaded that this aspect of the Determination should be varied. The delegate did not err in law in relying on Mr. Wells' personal records and the Employer's present assertion that Mr. Wells' record is inaccurate does not meet the test for the admission of "new evidence" set out in *Davies et al.* (BC EST # D171/03). If Mr. Wells now wishes to abandon some portion of his claim, I will leave that to the delegate to sort out as part of her enforcement proceedings.
8. The section 63 claim for compensation for length of service is based on the Employer's failure to provide appropriate *written* notice of termination to each employee. Since there is no evidence of written notice ever having been given, the employees are entitled to section 63 compensation. The individual amount payable under section 63 is based on the employee's average earnings during the last 8 weeks of their employment (see section 63(4)) and there is no evidence before me that the delegate incorrectly calculated the employees' individual entitlements.
9. As for the monetary penalties, these are mandatory once the *Act* contraventions are proven and the Tribunal has no jurisdiction to waive them based on any sort of "hardship" circumstances. The Employer's offer to make instalment payments is one that the delegate may consider but, once again, the Tribunal has no jurisdiction to order any sort of "payment schedule" since the collection of monies due under a determination is within the statutory authority of the Director of Employment Standards and not the Tribunal.

ORDER

10. Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of \$5,317.24 together with whatever additional interest that may have accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal