

An appeal

- by -

3 P Enterprises Ltd. carrying on business as Munchies on Robson  
("3 P")

- 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.:** 2011A/123

**DATE OF DECISION:** November 2, 2011

## DECISION

### SUBMISSIONS

Khosrow Baripour	on behalf of 3 P Enterprises Ltd. carrying on business as Munchies on Robson
Amanda Clark Welder	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 3 P Enterprises Ltd. carrying on business as Munchies on Robson (“3 P”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 3, 2011.
2. The Determination was made in respect of a complaint filed by Nasser Aziznia Fard (“Aziznia Fard”), who alleged 3 P had contravened the *Act* by failing to pay overtime wages, annual vacation pay and statutory holiday pay.
3. The Determination found that 3 P had contravened Part 3, sections 16, 17 and 18, Part 4, section 40, Part 5, section 46 and Part 7, section 58 of the *Act* and ordered 3 P to pay Aziznia Fard an amount of \$9,634.35, an amount which included wages and interest.
4. The Director also imposed administrative penalties on 3 P under Section 29(1) of the Regulation in the amount of \$2,500.00.
5. The total amount of the Determination is \$12,134.35.
6. In this appeal, 3 P says evidence has come available that was not available at the time the Determination was being made and seeks to have the Determination cancelled.
7. Khosrow Baripour, representing 3 P, has indicated he wishes to attend a meeting at the Tribunal to present its case. 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, or as described in Mr. Baripour’s request, a “meeting” (see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*). The Tribunal has discretion whether to hold an oral hearing and such hearings are rare. The burden is on the party seeking an oral hearing to show it is necessary. We have decided no oral hearing will be held in this case. The issues involved in this appeal can be decided from the 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 issue in this appeal is whether 3 P has shown there is any basis for concluding the Director erred in making the Determination.

## THE FACTS

9. The Determination sets out the following facts.
10. 3 P operated a restaurant in Vancouver, BC. Aziznia Fard worked at the restaurant from July or August 2009 until March 15, 2010, as a chef. He filed his complaint on July 29, 2010.
11. In November 2010, the Director delivered a letter to the business address of 3 P, to its registered and records office and to the address of its sole director, Mr. Baripour, advising of the complaint filed by Aziznia Fard and offering 3 P an opportunity to respond to the allegations made in the complaint. The letter also contained a Demand for Employer Records for Aziznia Fard. The Director received a response to the letter from Bob Marzbani, who identified himself as the accountant for 3 P. Mr. Marzbani indicated he was responding on behalf of 3 P, who had given him instructions “to fully cooperate” with the Director. He told the Director the company had been sold. The Director requested details of the sale, including the names and contact information for the new owners. That information was not provided.
12. Mr. Marzbani said the company was disputing the claim and that written submissions and employment records would be provided once he had an opportunity to sort through the time cards and calendar for the complainant’s hours of work.
13. 3 P did not provide the documents required to be produced by the Demand for Employer Records. An administrative penalty was imposed for this failing.
14. The Director spoke with Mr. Baripour’s wife in February 2011. She told the Director that Mr. Baripour was out of the country until March 22, 2011, and that the business had not sold.
15. On July 14, 2011, the Director sent a copy of the preliminary findings on the complaint to the business address of 3 P, to its registered and records office, to Mr. Marzbani and to Mr. Baripour. The correspondence requested payment of the amount found owing in the preliminary findings, indicated that failure to pay would result in a Determination being issued, with administrative penalties, and provided contact information if there were any questions.
16. Aziznia Fard provided the Director with evidence of his employment and of payments he received during his employment. He also presented two witnesses to assist in confirming his claim of hours of work. 3 P did not present any argument or evidence against Aziznia Fard’s claim.
17. The Director accepted that Aziznia Fard was required by 3 P to work 11 hours a day, Monday to Friday, and 10 hours a day on Saturday and Sunday – a total of 75 hours a week. The Director found 3 P had failed to pay Aziznia Fard minimum wage and made calculations regarding his wage rate during the claim period. The Director found he was entitled to regular and overtime wages.
18. The Director found Aziznia Fard was also entitled to statutory vacation for four statutory holidays and to annual vacation pay.
19. In sum, the Director found Aziznia Fard had earned wages in the amount of \$24,284.53 during the statutory claim period and had been paid \$15,000.00 by 3 P during that time. The Director found unpaid wages owing in the amount of \$9,284.53. Interest and administrative penalties were added to that amount to reach the amount of the Determination.

## ARGUMENT

20. In this appeal, 3 P alleges Aziznia Fard's rate of pay was set at \$8.00 an hour for 2009 and \$9.00 an hour for 2010, with a ceiling of \$4,000.00 a month that was inclusive of overtime, statutory holiday pay and annual vacation pay. The appeal also alleges that Aziznia Fard asked that his pay cheques be divided in half, with one half being paid to him and the other half to his son. 3 P claims Aziznia Fard was actually paid wages in the amount of \$33,000.00 in the period from September 3, 2009, to March 18, 2010. They have submitted a considerable number of documents to support the appeal.
21. The Director has filed a response to the appeal that includes the section 112(5) "record" and a submission. In the submission, the Director says the material provided by 3 P with the appeal does not meet the conditions set by the Tribunal for allowing new evidence on an appeal. The Director contends the evidence which 3 P seeks to introduce in the appeal was available during the complaint process. The Director notes the material on file indicates Mr. Marzbani acknowledged in late November 2010 that there was payroll information for Aziznia Fard, but it was never provided, that a demand for records was ignored by 3 P and, as late as July 14, 2011 (when the preliminary findings were issued), that 3 P had a final opportunity to provide their response and evidence to the wage claims being made by Aziznia Fard.
22. The Director says, as well, the additional evidence provided with the appeal does not meet the conditions of relevance and probative value, asserting there is no basis for concluding the cheques issued to Aziznia Fard's son should be considered to be wages paid to Aziznia Fard and no indication the calculation sheets submitted by 3 P contain information that was kept contemporaneously to the periods covered by them.
23. The Director also says 3 P has challenged findings made by the Director in the Determination without providing any supporting evidence for the challenges.
24. In its final reply, 3 P claims that, because of the personal circumstances of Mr. Baripour, the information relating to Aziznia Fard's claim was not available until after the Determination was made. 3 P says Mr. Baripour was not in the country when the complaint was being investigated and his return coincided with the issuance of the Determination. No evidence has been provided to support that assertion.

## ANALYSIS

25. 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.*
26. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied.
27. The Tribunal has established 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.

28. An appeal to the Tribunal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds.
29. While it is not specifically identified in the appeal, 3 P has challenged findings of fact made by the Director in the Determination. 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 error of law must be apparent on the face of the Determination and the material on file or arise out of evidence that is allowed under section 112(1)(c).
30. 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.
31. This appeal is grounded in “new evidence”. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be 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. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made: *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
32. I find the additional evidence should not be allowed. The “record” shows 3 P had more than enough opportunity to present its position and its supporting documents to the Director: a Demand for Employer Records was issued on November 16, 2010; Mr. Marzbani, who was 3 P’s accountant, advised the Director he had been “instructed” on the matter and assured the Director in late November 2010 that 3 P would “fully cooperate” with the investigation; extensions of time for document production were granted; several additional communications were sent by the Director – some of which were sent to and on the face of the “record” accepted by Mr. Baripour – reiterating the demand; the Director spoke with Mr. Baripour’s wife in February 2011, who said that while he was out of the country at that time, he was returning in March 2011; and a copy of the preliminary findings were sent to Mr. Baripour in July 2011. All of these events occurred without Mr. Marzbani, Mr. Baripour or any other person associated with 3 P or Mr. Baripour advising the Director of either the unavailability of the documents being demanded or of Mr. Baripour’s personal

circumstances. It bears noting that the investigation of Aziznia Fard's claim took nearly a year and 3 P had notice of the claim and more than eight months to respond to the Demand and to state its position.

33. In the circumstances, it is insufficient for 3 P to baldly assert the failure to comply with the Demand and the numerous requests from the Director were attributable to "personal circumstances". No evidence has been provided supporting that assertion.
34. It is apparent the material sought to be submitted with the appeal was available at the time the Determination was being made and could have been provided to the Director during the complaint process. On that basis it will not be considered. As well, I am not satisfied the material is sufficiently credible to be accepted and considered.
35. In addition to the above, one final point should be made. Having substantially failed or refused to participate in the complaint process and ignored the Director's efforts to have 3 P's records produced, to allow 3 P to enter and argue "new" evidence at this stage would be inconsistent with the objects and purposes of the *Act* and fly in the face of the long standing approach by the Tribunal to such attempts in similar circumstances; see expressed *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97.
36. Due to the failure of 3 P to persuade the Tribunal there is "new evidence" that ought to be admitted and considered in the appeal, this appeal will be decided on the facts and analysis in the Determination considered with the material found in the section 112(5) "record". On that basis, 3 P has failed to meet the burden of showing any error in either the findings of fact made or the conclusion reached in the Determination.
37. I find 3 P has not met the burden of persuading the Tribunal there is any error in the Determination. The appeal is dismissed.

## **ORDER**

38. Pursuant to Section 115, I order the Determination dated August 3, 2011, be confirmed in the amount of \$12,134.35, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**