Employment Standards TRIBUNAL

An appeal

- by -

Bistro Aubergine Inc.
("Bistro Aubergine")

- 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

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2004A/105

DATE OF DECISION: September 9, 2004

British Columbia

DECISION

SUBMISSIONS

Fred Edrissi	on behalf of the Bistro Aubergine
Daniel Barnes	on his own behalf
Judy Reekie	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Bistro Aubergine Inc. (“Bistro Aubergine”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) in respect of a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on May 25, 2004 in favour of one Daniel Barnes (“Barnes”).

Having made a finding in the Determination that Bistro Aubergine had contravened Sections 17 and 58 of the Act, the Delegate ordered Bistro Aubergine to pay $729.98 in respect of wages, holiday pay, and interest. In addition, the Delegate imposed administrative penalties of $1,000.00. The total amount owed by Bistro Aubergine as a result of the Determination, therefore, was $1,729.98.

Bistro Aubergine appealed the Determination, by way of completed Appeal Form and an attached statement, dated June 23, 2004.

Thereafter, the Tribunal received the record which was before the Delegate, as well as written submissions from the Delegate and Barnes concerning the issues raised in the appeal, copies of which material were forwarded by the Tribunal to Bistro Aubergine on July 19, 2004, together with an invitation to make a final response by August 3, 2004. No further response was received by the Tribunal from Bistro Aubergine.

On August 5, 2004, the Tribunal informed the interested parties that the appeal would be determined on the basis of the written submissions received.

ISSUES TO BE DECIDED

The following are the issues to be decided on this appeal:

- Whether Bistro Aubergine was denied a fair opportunity to be heard as a result of the conduct of Barnes at the hearing before the Delegate.
- Whether the Delegate erred in law in preferring the evidence of Barnes and a witness called on his behalf, one Joshua Caplan (“Caplan”), to that tendered by Fred Edrissi (“Edrissi”), the representative of Bistro Aubergine who attended at the hearing before the Delegate.
- Whether the Delegate erred in law in finding that Barnes was entitled to be paid the minimum wage of $8.00 per hour for his time worked at Bistro Aubergine.

- Whether the Delegate erred in law in declining to consider evidence tendered by Bistro Aubergine after the hearing, but before the Determination was issued, in support of its contention that Barnes had accidentally been paid for a day he had not worked.
- Whether the Delegate erred in law in imposing administrative penalties of $1,000.00.

DISCUSSION

I will deal with the issues listed, in order.

Was Bistro Aubergine denied a fair opportunity to be heard as a result of the conduct of Barnes at the hearing before the Delegate?

Edrissi, on behalf of Bistro Aubergine, characterizes this issue in the following manner:

> During the hearing Mr. Barnes chose to be very disrespectful when I addressed my statement. Mr. Barnes interrupted me and disturbed the hearing with rude comments, laughing, making faces and drumming with his fingers on the table while I was trying to speak. I addressed my concerns regarding his behaviour and asked the Director (sic) to reprimand Mr. Barnes. The Director did not interfere or reprimand Mr. Barnes. I addressed my concern that the Director made the impression not being in control of the situation and offered to adjourn the meeting to another day. I felt that I was not given a fair chance to give my statement.

Barnes disputes that Edrissi was denied a fair opportunity to present his case at the hearing, stating that "Fred probably spoke the most".

The Delegate's position is that both parties had to be reminded to be respectful of the other's right to give testimony without being interrupted, that both parties were given full opportunity to give testimony and cross-examine each other as well as the witness, Caplan, and that prior to the conclusion of the hearing all parties were asked if they had anything to add before closing. The Delegate also affirms that Edrissi made no request for an adjournment.

It is fundamental to the proper conduct of proceedings under the Act that affected parties be given a fair opportunity to respond to the substance of the matters raised against them in a complaint. Section 77 of the Act expressly incorporates this obligation. It reads:

> 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Moreover, Section 112(1)(b) of the Act establishes as a specific ground of appeal a failure on the part of the Director to observe the principles of natural justice in making a determination.

In *Cardinal v. Director of Kent Institution* *(1985) 2 SCR 643 at 661* the Supreme Court of Canada had occasion to comment on the importance of a fair hearing, as follows:

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a hearing invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

At the same time, one must remember that the rules of natural justice are flexible – they are not cast in granite. This is so because a particular application of them which would be appropriate in one case, may be entirely unworkable in another. As stated by Lord Morris of Borth-y-Gest in *Wiseman v. Borneman (1969) 3 All ER 275 at 278*:

> We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them...The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only 'fair play in action'.

In this instance, I am not persuaded that the hearing before the Delegate was conducted in such an atmosphere that it rendered the process fundamentally unfair to Bistro Aubergine. Proceedings under the Act are often adversarial, and emotions at hearings can sometimes run high. What is more important is the answer to the question whether the particular dynamics of this hearing actually denied Edrissi a "fair chance" to present his case on behalf of Bistro Aubergine.

There is no reference in the Bistro Aubergine submissions to specific evidence or arguments going to the merits which Bistro Aubergine was unable to present owing to the manner in which the hearing was conducted. Edrissi simply makes the bald statement that he felt he was not given a fair chance to make his statement. A bare assertion that a party has been denied a fair hearing, without more, is insufficient to support an assertion that a Delegate failed to observe the principles of natural justice (see *Dusty Investments Inc. dba Honda North BC EST #D043/99*).

It follows that this ground of appeal must fail.

Did the Delegate err in law in preferring the evidence of Barnes and Caplan to that tendered by Edrissi?

In its written submissions Bistro Aubergine refers to several instances in which it claims the Delegate fell into error when she decided to prefer the evidence of Barnes, and the witness Caplan, to that tendered by Edrissi. Bistro Aubergine claims that much of the evidence given by Barnes was untrue. In the case of Caplan, Bistro Aubergine suggests that his evidence lacked credibility because he is a personal friend of Barnes and his family.

This ground of appeal must also fail.

It is trite to say that an appeal under the Act is not a rehearing. It is the responsibility of the Delegate to find the facts and to draw evidentiary conclusions from those facts. Indeed, the jurisdiction of the Tribunal is limited to hearing appeals which are based on one or more of the three grounds referred to in Section 112 of the Act, namely:

> 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 being made.

What Bistro Aubergine suggests I do under this appeal heading is reassess the evidence that was before the Delegate, and make different findings of fact than those set out in the Determination. This I am unable to do unless Bistro Aubergine can show that the Delegate made an error of law when finding the facts which formed the basis for the Determination.

In order to demonstrate an error of law when it comes to findings of fact, Bistro Aubergine must show what has come to be known as "palpable and overriding error". By "palpable" is meant readily perceived or plainly seen. "Overriding" connotes an error that affects the decision made. Another way of describing the test is to say that the factual conclusions, or inferences drawn from factual conclusions, set out in the Determination are wholly, or inadequately, supported by the evidentiary record. The burden of proving an error of law on a question of fact is a heavy one. The Tribunal is not entitled to interfere with findings of facts merely because it may take a different view of the evidence (see *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital (1994) 87 BCLR 2d 1; Housen v. Nikolaisen 2002 SCC 33*).

Here, I am unconvinced that the Delegate made any errors of fact that were palpable and overriding. The relevant facts the Delegate found which formed the basis for the Determination were that Barnes was not paid for 40 hours of work that he actually performed, and that he was only paid $6.50 per hour in respect of the hours he did, in fact, work. The Delegate made those findings of fact based on the oral testimony of Barnes, supported by Caplan. Bistro Aubergine questioned the accuracy of that testimony, and in particular the *bona fides* of Caplan as a supporting witness, at least insofar as it related to the 40 hours of unpaid work Barnes said he performed, but provided no evidence from witnesses, or other documentary evidence, to contradict it. In my view, the Delegate's conclusions of fact cannot be said to have been wholly or inadequately supported by the evidence before her.

Did the Delegate err in law in finding that Barnes was entitled to be paid the minimum wage of $8.00 per hour for his time worked at Bistro Aubergine?

In the Determination, the Delegate decided that the Act required Bistro Aubergine to pay Barnes at least minimum wage for all the hours he worked, with no deduction for hours in which Barnes was receiving orientation or training.

Edrissi's written submissions on behalf of Bistro Aubergine indicate that it is the policy of Bistro Aubergine to arrange an orientation day for a new employee, if the employee is willing to "volunteer". The employee is paid for the orientation day only if the employee decides to work for Bistro Aubergine.

The Delegate was correct in deciding that Barnes should be paid at least minimum wage for all hours worked, and that training for the purpose of Bistro Aubergine's business is deemed to be "work" under the Act.

I refer to the definition of "employee" in Section 1 of the Act. It is said to include "a person being trained by an employer for the employer's business". The word "work" is defined in the same Section to mean "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere".

The authorities establish that training constitutes "work" for the purposes of the Act so long as the employee is subject to the employer's direct or indirect supervision and control during the course of his training (see *Re Surrey (City) BC EST #D077/98,* reconsidered *BC EST #D433/98*, and *Re Alexander (c.o.b. Peregrine Consulting) BC EST #D574/97*, reconsidered *BC EST #D095/98*). Where an orientation

day is "arranged" by the employer, as here, it cannot be considered to be "voluntary". Accordingly, in my view, Barnes was entitled to be paid for attending the orientation day.

Another conclusion of the Delegate under this head disputed by Bistro Aubergine was the determination that Barnes was entitled to payment at the rate of $8.00 per hour, rather than $6.50 per hour, plus meals, which was the rate at which Bistro Aubergine asserted Barnes had agreed to be paid.

There are two issues raised with respect to this point. The first relates to the enforceability of the alleged agreement with Barnes that he would be paid $6.50 per hour, plus meals, and not the stipulated minimum wage of $8.00 per hour. Put simply, there is no merit in the submission of Bistro Aubergine that Barnes should be paid $6.50 per hour because he agreed to that rate. Bistro Aubergine cannot enforce an agreement with Barnes to pay him less than the stipulated minimum wage, even if it could be said that Barnes had agreed to such an arrangement. The reason is that Section 4 of the Act provides that the requirements of the Act and the regulations are minimum requirements and an agreement to waive any of them has no effect.

The other issue under this head relates to the submission of Bistro Aubergine that Barnes should not be paid $8.00 per hour because Bistro Aubergine had agreed to hire him as an "apprentice". By this I take Bistro Aubergine to mean that since Barnes was inexperienced as a waiter, he should not have been paid at the rate of $8.00 per hour. The legislative provision relating to this issue is Section 15(2) of the *Employment Standards Regulation*, the applicable portion of which provides that the minimum wage will be $6.00 per hour (not $6.50 per hour) for an employee who

a) has no paid employment experience before November 15, 2001, and

b) has 500 or fewer hours of cumulative paid employment experience with one or more employers.

Edrissi submits that when he interviewed Barnes for the position of waiter, Barnes did not mention any previous employment. Nor does it appear that Edrissi asked Barnes about his previous work history. Accordingly, Edrissi, and therefore Bistro Aubergine, were unaware that Barnes had in fact worked sufficient hours with a previous employer to warrant his being paid $8.00 per hour.

The wording of Section 15 of the *Regulation* makes it clear that an employee is entitled to payment at the minimum rate of $8.00 per hour if he has paid employment experience before November 15, 2001, or he has more than 500 hours of cumulative paid employment experience with one or more employers. This is so whether the employer is aware that the employee has satisfied those requirements or not.

I decide, therefore, that Bistro Aubergine's being unaware of Barnes' previous work history is of no moment when it comes to determining whether Barnes had satisfied the requirements necessary for him to be entitled to be paid at the rate of $8.00 per hour.

Barnes tendered evidence demonstrating previous employment which satisfied the requirements of Section 15 of the *Regulation*. I see no reason why the Delegate should not have relied on that evidence.

It follows that Bistro Aubergine's appeal on this ground must also fail.

Did the Delegate err in law in declining to consider evidence tendered by Bistro Aubergine after the hearing, but before the Determination was issued, in support of its contention that Barnes had accidentally been paid for a day he had not worked?

Edrissi submits that he "mentioned" at the hearing that Barnes had accidentally been paid for a day he did not work, due to his attending an appointment with his physician. Caplan, he submits, worked in Barnes' place. He also says that Bistro Aubergine paid Caplan for his day's work, but Barnes has not reimbursed anyone in respect of the alleged overpayment.

After the hearing concluded, but before the Delegate issued her Determination, Edrissi forwarded to her a document, apparently signed by Caplan, but unsworn, which suggested that Barnes had been paid for a day on which he had not, in fact, worked.

Edrissi complains that the Delegate "completely ignored" this incident.

In her submissions on this appeal, the Delegate says that there was no reference made at the hearing to Barnes' having being overpaid. She also says that while Edrissi did "submit something" on this issue days after the hearing, she did not "accept" this submission after the hearing had been completed.

It appears that the reason why the Delegate did not give consideration to the Caplan statement received after the hearing was that at the end of the hearing she asked both parties to make one specific final submission prior to her adjourning the proceedings in order that she might make her decision, and, I infer, Edrissi made no submission at that time relating to an overpayment, or to further material needing to be filed in order to prove the allegation.

Further, while the Delegate asked both parties to provide further documents after the conclusion of the hearing, the documents requested were specific, and limited in their scope. Barnes was asked to submit a copy of his record of employment from his previous employer, to verify that he had worked the minimum number of hours to satisfy Section 15 of the *Regulation*, and Edrissi was asked to submit payroll records for Caplan, for the purpose of confirming the oral testimony from Caplan that he had worked during the 40 hour period that Barnes, and Caplan, claimed Barnes had worked under Caplan's supervision, in respect of which period Barnes asserted he had not been paid.

Barnes' written submissions on this appeal make no reference to the issue of overpayment.

I am troubled by the decision of the Delegate to decline to consider the statement of Caplan tendered after the conclusion of the hearing, because it appears to relate to one aspect of the very issue the Delegate was meant to decide, namely, the amount owed by Bistro Aubergine to Barnes in respect of its contraventions of the Act. Nevertheless, in the circumstances of this particular case I have decided that the Delegate did not commit a breach of the rules of natural justice in refusing to consider the statement.

My reasons for reaching this conclusion are as follows:

- While a Delegate conducting a hearing acts in a quasi-judicial capacity, she is nevertheless entitled to control her own procedures. This is consistent with one of the stated purposes of the Act, set out in Section 2(d), which is "to provide fair and *efficient* procedures for resolving disputes over the application and interpretation of this Act" (emphasis added). So long as a party has a fair opportunity to present its case, the Delegate is entitled to call a halt to the proceedings and, in general, control the manner, and the extent to which, parties are permitted to lead further evidence.

- Here, the Delegate gave the parties full opportunity to present evidence and argument at the hearing. The record indicates that both parties were given the opportunity to give testimony and cross-examine each other, as well as the witness, Caplan. The hearing continued until both Edrissi and Barnes advised the Delegate that they had completed their examinations and cross-examinations. Before closing the hearing the Delegate asked the parties if they had anything to add, from which I infer that the hearing did not end until each party indicated they had nothing further to say.
- At the conclusion of the hearing the Delegate gave instructions to the parties concerning specific documents she wished them to submit, none of which related to an issue of overpayment. It was made clear that it would only be with respect to those specific documents, and the issues to which they related, that the Delegate would entertain further arguments. If, therefore, Bistro Aubergine intended to lead further evidence relating to the issue of overpayment, one would have expected it to have advised the Delegate of that fact before the hearing concluded, or alternatively, when Bistro Aubergine did submit the Caplan statement after the hearing concluded, an accompanying submission explaining why Caplan's evidence on the matter was not available to Bistro Aubergine at the time of the hearing.
- In fact, the evidence of Caplan on the issue of overpayment was available to Bistro Aubergine at the hearing. Both Barnes and Caplan gave testimony at the hearing, and Bistro Aubergine had full opportunity to cross-examine them concerning the issue at that time. There is no evidence that Edrissi did so. It appears from the record that Edrissi assumed Caplan was in league with Barnes, because he was Barnes' witness. But this was no reason for Edrissi to refrain from asking Caplan, or for that matter Barnes, questions on the issue of overpayment.
- Edrissi's written submissions on this appeal state that he "mentioned" the issue of overpayment at the hearing. The Delegate denies this occurred, but even if it can be said Edrissi did refer to it, I remain unconvinced that the Delegate erred in failing to give effect to Edrissi's bald statement that an overpayment occurred, when that statement was tendered without any documentary evidence to give it credence, and in circumstances where it was unsupported by any cross-examination of Barnes or Caplan on the matter when they were in the hearing room and available to give assistance to resolve the issue.

The decision by the Delegate to decline to consider the statement of Caplan tendered after the hearing was concluded was an exercise of discretion. Appellate tribunals will generally not interfere with an exercise of discretion unless the person making the decision has misdirected herself or if the decision is so clearly wrong as to amount to an injustice (see *Elsom v. Elsom (1989) SCJ No.48 at paragraphs 15-16*).

In my view, there is no miscarriage of justice in this case resulting from the Delegate's decision to decline to consider Caplan's statement tendered after the hearing concluded.

Accordingly, the appeal of Bistro Aubergine under this heading must also fail.

Did the Delegate err in law in imposing administrative penalties of $1,000.00?

Section 29 of the *Employment Standards Regulation* requires that a person who contravenes a provision of the Act, or the *Regulation*, as found by the Director in a determination made under the Act, must pay the administrative penalties stipulated.

Edrissi submits that at the hearing Bistro Aubergine agreed to pay "the difference as well as vacation pay", and since it acted in good faith and "not against the law", the administrative penalties imposed by the Delegate in the Determination should be waived. At the same time, he challenges the Delegate's findings that Barnes worked 40 hours for which he was not paid, and that Bistro Aubergine was obligated

to pay Barnes $8.00 per hour, rather than the $6.50 per hour plus meals that Bistro Aubergine said Barnes had agreed to accept.

In her submissions, the Delegate says that there was no offer from Bistro Aubergine at the hearing to pay the difference as well as vacation pay. Moreover, the Delegate asserts that at the commencement of the hearing she offered to adjourn the proceedings to have a mediator attend and attempt to assist the parties to reach a settlement, but Edrissi declined.

Barnes makes no mention of an offer to settle in his submission.

In my view, even as late as at the hearing itself Bistro Aubergine was fully aware of the option to seek a resolution through mediation, which could have avoided the making of a finding in a determination that Bistro Aubergine had violated the Act. It did not avail itself of that opportunity. Instead, the record amply demonstrates that it participated in the hearing, tendered evidence, and made arguments in support of the contention that it had not contravened the Act. It thereby took the risk that it would fail to persuade the Delegate that no contraventions had occurred.

The Delegate's having decided thereafter in her Determination that Bistro Aubergine had contravened the Act in respect of a failure to pay wages, and vacation pay, the imposition of the administrative penalties was entirely lawful, and indeed mandatory.

As this Tribunal has recently stated in *Summit Security BC EST # D059/04*:

> ...administrative penalties generated through provisions of the Employment Standards Regulation are part of a larger scheme designed to regulate employment relationships in the non-union sector. Such penalties are generally consistent with the purposes of the Act, including ensuring employees receive at least basic standards of compensation and conditions of employment and encouraging open communication between employers and their employees. The design of the administrative penalty scheme under Section 29 of the Employment Standards Regulation, which provides mandatory penalties where a contravention is found by the Director in a Determination issued under the Act, meets the statutory purpose providing fair and efficient procedures for the settlement of disputes over the appliction and interpretation of the Act.

I find no merit in this ground of appeal.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination dated May 25, 2004 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal