

An appeal

- by -

Monireh Saleh Zadehmoghadami aka Monire Saleh and Farshid Tarari aka  
Eddie Tarari operating as E-Hot Wired Computers  
(“EWC”)

- 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:** Carol L. Roberts

**FILE No.:** 2005A/174

**DATE OF DECISION:** November 8, 2005

## DECISION

### SUBMISSIONS

- b. findlay, Q.C. on behalf of Farshid Tarari
- Lynn Egan on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Farshid Tarari operating, together with his spouse, Monireh Zadehmoghadami aka Monire Saleh, as E-Hot Wired Computers ("EWC"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued August 17, 2005.
2. Paul Dragebo worked as a café supervisor for EWC, an internet café business, from September 3, 2004 until January 30, 2005. Mr. Dragebo filed a complaint alleging that EWC had required him to pay its business costs, and had failed to pay him statutory holiday and annual vacation pay.
3. The Director's delegate held a hearing into Mr. Dragebo's complaint on June 28, 2005. Mr. Dragebo appeared on his own behalf, and Mr. Tarari appeared on behalf of EWC.
4. The delegate determined that EWC had contravened Sections 18, 21, 27, 40, 45 and 46 and 58 of the *Act* in failing to pay Mr. Dragebo's wages. She concluded that Mr. Dragebo was entitled to unpaid wages, overtime wages, statutory holiday pay and vacation pay in the total amount, with interest, of \$747.81. The delegate also determined that EWC had failed to produce accurate payroll records contrary to section 46 of the *Employment Standards Regulation* (the "*Regulation*"). The delegate imposed administrative penalties in the total amount of \$4,000 on EWC for the contraventions, pursuant to section 29(1) of the *Regulation*.
5. EWC contends that the delegate erred in law in assessing the penalty, and failed to afford EWC a fair hearing. Counsel seeks to have the matter referred back to the Director for a new hearing before another delegate. Alternatively, counsel seeks to have the penalty assessment reduced to \$500.
6. Having reviewed the Determination, the appeal documents and the record, I am satisfied that this matter can be decided based on the written submissions of the parties.

### ISSUES

7. At issue is whether the delegate
  - a.) erred in law in assessing individual penalties for each infraction and;
  - b.) failed to observe the principles of natural justice in demonstrating bias against the employer, and failing to give any, or proper consideration to his evidence, thus denying him an opportunity to be heard.

## THE FACTS AND ARGUMENTS

8. The facts and argument relevant to this appeal as set out by the delegate are as follows.
9. Mr. Dragebo alleged that any shortages on the photocopying meter reading were charged back to the employees working, and that his paycheque for the November 1 -15, 2004 pay period was short by \$133.36. Attached to the cheque was a cash register receipt for the shortage, a handwritten note itemizing the cost per copy and another note advising Mr. Dragebo to speak to Mr. Tarari if he had any questions. Mr. Dragebo testified that he had made an error in charging a customer for a large copy job, resulting in a \$133.36 loss to EWC. Mr. Tarari acknowledged that his practise was to recover shortages from wages, and contended that this practise was no different than if he made employees pay directly.
10. Mr. Dragebo also alleged that his final paycheque did not represent all wages owing for his final pay period. Mr. Tarari did not deny this allegation, claiming that Mr. Dragebo had been stealing throughout his employment.
11. The January 16 -31, 2005 time sheet indicated that Mr. Dragebo had worked 58 hours. Attached to the sheet was a note written by Mr. Tarari that indicated Mr. Dragebo “was \$10 short on Jan. 23”.
12. Mr. Dragebo alleged he had not been paid statutory holiday pay. Mr. Tarari took no position on Mr. Dragebo’s claim.
13. Mr. Tarari’s evidence was that all starting employees were paid \$8.25 per hour, but that he and Mr. Dragebo agreed that his wage rate of \$9.00 per hour would include annual vacation pay. Therefore, he asserted that Mr. Dragebo was paid \$8.64 per hour, with .36 paid as vacation pay. Mr. Dragebo disputed Mr. Tarari’s evidence in this respect, and said that he expected to be paid \$9.00 per hour plus vacation pay. The delegate found no documents evidencing either an agreement that the hourly wage included vacation pay, or any amounts paid as vacation pay.
14. The parties agreed at the hearing that no overtime wages had been paid, and Mr. Tarari conceded that overtime wages were owed.
15. Mr. Dragebo submitted documents he said were issued with pay statements for each cheque, with the exception of the final pay period. The documents displayed gross and net wages paid, along with deductions for income tax, C.P.P. and E.I.
16. In response to a Demand for Employer Records issued by the Director on May 13, 2005, EWC submitted computer generated documents showing Mr. Dragebo’s rate of pay at \$9.00 per hour, the number of hours in each pay period for which wages were paid, the gross wages paid, the deductions and the net wages. Mr. Tarari also submitted some incomplete time sheets. However, together with the time sheets submitted by Mr. Dragebo, the delegate determined that she had a complete record of daily hours worked.
17. Mr. Tarari argued that the time sheets did not accurately reflect Mr. Dragebo’s hours of work.
18. The delegate accepted the records as the best evidence of Mr. Dragebo’s hours of work, concluding that they were credible and consistent with the total hours used to calculate the gross wages indicated on Mr. Tarari’s payroll records. The delegate noted that the records submitted as payroll records did not reflect

the \$133.36 deduction referred to above, nor did it reflect the correct wages for the hours of work for the final pay period.

19. The delegate found that the difference in wages for the November 1 – 15, 2004 pay period was consistent with the amount Mr. Dragebo claims was withheld as a business cost. The delegate found EWC in contravention of section 21 of the *Act*, and imposed an administrative penalty for this contravention.
20. The delegate also determined that EWC deducted business costs from Mr. Dragebo's final pay, and failed to pay him his full wage entitlement for his final pay period, in contravention of section 18 of the *Act*. She imposed another administrative penalty in respect of this contravention.
21. After a review of the records, the delegate determined that EWC had contravened section 46 of the *Act* in failing to pay Mr. Dragebo statutory holiday pay, and section 58 in failing to pay vacation pay. She imposed two additional penalties in respect of these contraventions.
22. In addition, the delegate found that Mr. Dragebo had not been paid overtime wages for three days during the period of his employment, and imposed a further administrative penalty in respect of this contravention.
23. Finally, the delegate found that EWC had not maintained records that complied with section 27 of the *Act*, as the payroll records, while they appeared to conform to federal requirements, did not contain the employer's name and address, the hours worked by the employee nor the rate of pay.
24. She also found that the statements for the period November 1- 15, 2004 and January 16, 2005 were inaccurate, as they failed to show all deductions from wages and indicated wages attributed to statutory holiday pay that was in fact not paid, contrary to section 46 of the *Regulation*. These two contraventions attracted further administrative penalties.
25. Although counsel for EWC submitted an appeal form which set out the grounds of appeal, there was little else accompanying the appeal form. It is clear that EWC disputes the amount of the penalty assessment, and suggests that Mr. Tarari was not given a fair hearing. However, there is nothing in the documentation that supports the appellant's position. For example, it does not set out how the delegate's penalty assessment is an error of law. It also does not say how Mr. Tarari was denied a fair hearing.
26. The delegate submitted the record before her at the hearing, and submits that the Tribunal has no basis to reduce the administrative penalty to \$500. She also contended that the allegation that Mr. Tarari was denied a fair hearing is not supported by any evidence. She asks that the appeal be dismissed and the Determination confirmed.

## **ANALYSIS AND DECISION**

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

the director erred in law

the director failed to observe the principles of natural justice in making the determination; or

evidence has become available that was not available at the time the determination was being made

28. The burden of establishing the grounds for an appeal rests with an Appellant. EWC must provide persuasive and compelling evidence that there were errors of law in the Determination as alleged, or a denial of natural justice. EWC has provided neither.

### ***Error of law***

29. Administrative penalties have been considered in a number of Tribunal decisions, including *Maranara Management Services Ltd. operating as Brother's Restaurant* (BC EST #D160/04) and *Kimberly Dawn Kopchuk* (BC EST #D049/05). Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by *Regulation*. In *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme." I have no basis to reduce the amount of the administrative penalties imposed by the delegate.

### ***Denial of Natural justice***

30. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.
31. Although EWC contends that Mr. Tarari was not given a fair hearing by failing to give any, or proper consideration to Mr. Tarari's evidence, there is no evidence this was the case. Mr. Tarari knew about Mr. Dragebo's complaint, appeared at the hearing, submitted documents and was given an opportunity to present his case and respond to Mr. Dragebo's allegations. There is nothing in the record that suggests he was not heard. The delegate set out his arguments, considered them in her analysis, and rejected them.
32. The appeal form also contends that the delegate was biased against Mr. Tarari.
33. An allegation of bias against a decision maker is serious and should not be made speculatively:

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))

34. There is nothing in the record, and nothing in any documentation submitted by counsel that would lead me to conclude that the delegate was biased.
35. The appeal is denied.

**ORDER**

- <sup>36.</sup> I Order, pursuant to Section 115 of the *Act*, that the Determination, dated August 17, 2005, be confirmed, together with any interest that might have accrued since the date of issuance.

---

**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**