



Citation: Andrew (Andy) Mollica (Re)
2018 BCEST 25

An appeal

- by -

Andrew (Andy) Mollica
("Mr. Mollica")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Marnee Pearce

FILE NO.: 2017A/139

DATE OF DECISION: March 19, 2018

DECISION

SUBMISSIONS

Andrew (Andy) Mollica

on his own behalf as a Director and Officer of Anducci's Restaurant (Hastings) Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Andrew (Andy) Mollica (“Mr. Mollica”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 17, 2017 (the “Determination”).
2. In the Determination, the Director found that Mr. Mollica was a director and officer of Anducci's Restaurant (Hastings) Ltd. (“Anducci's Restaurant”) at the time wages were owed by Anducci's Restaurant to four of its former employees. Accordingly, pursuant to section 79 of the *ESA*, the delegate found Mr. Mollica to be personally responsible for \$7,351.10, representing not more than two months' unpaid wages, plus interest.
3. Mr. Mollica appealed the Determination and requests that it be referred back to the Director. He does not provide any grounds for the appeal but did write that he does not believe the staff listed in the Determination were employed by Anducci's Restaurant and he disagreed with the amount claimed and awarded.
4. In correspondence dated November 28, 2017, the Tribunal requested that Mr. Mollica indicate his grounds for appeal and provide the Tribunal with written reasons and argument for the appeal. No further material was forthcoming from Mr. Mollica by the December 27, 2017, statutory appeal deadline.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was mailed to Mr. Mollica and the individual respondents on January 29, 2018, allowing the opportunity to object to its completeness. No objection has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
6. Section 114 of the *ESA* and Rule 22 of the Tribunal's *Rules of Practice and Procedure* provides that this Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (provided to the Tribunal as part of the record), the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record.

8. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect that the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

ISSUE

9. The issue to be considered at this stage is whether the appeal should be dismissed under section 114(1) of the *ESA*.

THE FACTS

10. An investigation was conducted into the four employee's allegations of unpaid wages by Anducci's Restaurant, and the Director issued a determination (the "corporate determination") against Anducci's Restaurant on April 8, 2009, finding that wages and interest were owed to the complainants.
11. The unpaid wages varied in amount claimed according to the individual employee but covered the period January 1, 2008, through August 24, 2008.
12. The corporate determination of April 8, 2009, which included notice to the directors and officers explaining their personal liability under the *ESA*, concluded that the total amount of wages owed to the four complainants was \$5,955.23 including interest accrued to that date of \$180.79. Administrative penalties were owed in the amount of \$1,500.00.
13. Anducci's Restaurant appealed the corporate determination, which was confirmed by the Employment Standards Tribunal (the "Tribunal") on July 22, 2009. [*Andy Mollica as agent for Anducci's Restaurant (Coquitlam) Ltd. and Anducci's Restaurant (Hastings) Ltd. carrying on business as "Anducci's", BC EST # D078/09*].
14. On October 7, 2008, the delegate conducted a BC Online: Registrar of Companies-Corporation search, finding that Anducci's Restaurant was incorporated on July 12, 2006. Mr. Mollica was listed as the sole

director and officer. A further search conducted on October 28, 2008, found that Mr. Mollica was still listed as the sole director and officer.

15. The above corporate searches of Anducci's Restaurant confirmed that Mr. Mollica was a director and officer between January 1, 2008, and August 24, 2008, when the four complainants' wages were earned or should have been paid.
16. To date, Anducci's Restaurant has not paid the corporate determination amount.
17. As a result, the delegate issued the Determination finding Mr. Mollica personally liable for up to two months' unpaid wages owing to the four complainants, including vacation pay, totalling \$5,774.44 with accrued interest of \$1,576.66 for a combined amount of \$7,351.10 owed to the employees.
18. As there was insufficient evidence to indicate Mr. Mollica authorized, permitted, or acquiesced in contravention of the *ESA*, he was found not liable for the administrative penalties levied against Anducci's Restaurant in the April 8, 2009, corporate determination.

SUBMISSIONS OF MR. MOLLICA

19. Mr. Mollica's appeal form was received by the Tribunal on November 23, 2017. Mr. Mollica did not select a ground for his appeal, although he requested a remedy – that the matter be referred back to the Director.
20. A brief letter from Mr. Mollica was attached to his appeal form, and he noted that he was surprised to have received the Determination given the time that has passed. He has little recollection of the issue, realizes he was a director of Anducci's Restaurant, but was unaware any employee issue was still outstanding. He wrote that he doesn't believe the complainants were ever employed by Anducci's Restaurant and disagreed with the amount of the Determination.
21. Mr. Mollica asked for advice on his next steps.
22. This advice was provided by way of a letter from the Tribunal dated November 28, 2017. The Tribunal wrote that Mr. Mollica had not indicated his grounds for appeal or provided supporting written reasons and argument for the appeal. As the statutory deadline for his appeal was December 27, 2017, Mr. Mollica was requested to provide the Tribunal with the necessary information by the December 27, 2017, deadline.
23. The Tribunal wrote that should no additional information be forthcoming, the Tribunal would proceed with its usual appeal process based on the incomplete documents received on November 23, 2017.
24. No additional appeal documentation was provided by Mr. Mollica.
25. Mr. Mollica has made no argument on the appeal that might show there is an error in the Determination on one of the statutory grounds.

ANALYSIS

26. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, 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 being made.
27. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.
28. Accordingly, the onus is on Mr. Mollica to tell the Tribunal the ground of appeal he has identified, and to do so by completing the appeal form which provides the option of selecting the ground of appeal that the appellant believes applies to errors he has identified and is seeking to correct.
29. The Appeal form asks an appellant to provide a detailed submission on why the appeal should be allowed. It is not for the Tribunal to guess what matters of fact and law an appellant might have in mind, and in this case, what ground of appeal would apply. After determining the ground for appeal, the appellant must take care to set out sufficient detail to make clear the substantive basis for selecting that particular ground of appeal. It is only when the ground of appeal is selected, and the context is explained that it becomes possible for the Tribunal to properly consider, and decide, a ground of appeal.
30. This means an appellant must gather and present all the arguments and facts which they intend to rely on for the appeal. This is consistent with the purpose of the legislative scheme set out in section 2 of the *ESA*, which is to provide fair and efficient procedures for resolving disputes which arise under it. In the absence of unusual circumstances, the timelines for filing appeals, and providing submissions, will be strictly enforced.
31. Mr. Mollica was given notice that his appeal was incomplete on November 28, 2017; the letter from the Tribunal also advised him of what was required to complete the appeal. As the statutory deadline for filing his appeal submissions was not until December 27, 2017, he had a month to complete his appeal submission to include both the grounds of his appeal and provide written reasons and argument in support of those grounds.
32. No additional information was submitted by Mr. Mollica, and his appeal documentation remains incomplete.
33. In the absence of any ground for appeal or supporting argument, the Tribunal is unable to assess the merits of an appeal request. Mr. Mollica has not met the burden of demonstrating there is an error in the Determination.

34. I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

35. Pursuant to section 115 of the *ESA*, I order the Determination dated November 17, 2017, be confirmed in the amount of \$7,351.10, together with any interest that has accrued under section 88 of the *ESA*.

Marnee Pearce
Member
Employment Standards Tribunal