



An appeal

- by -

Della Casa Hospitality Inc. carrying on business as Char 631 Modern Steakhouse
("Della Casa")

- 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: David B. Stevenson

FILE NO.: 2017A/141

DATE OF DECISION: January 22, 2018

DECISION

SUBMISSIONS

Roger Mpania

counsel for Della Casa Hospitality Inc. carrying on business
as Char 631 Modern Steakhouse

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Della Casa Hospitality Inc. carrying on business as Char 631 Modern Steakhouse (“Della Casa”) has filed an appeal of a Determination issued by Paul Grace, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on October 17, 2017.
2. The Determination found Della Casa had contravened Part 3, sections 17 and 18 of the *ESA* and section 46 of the *Employment Standards Regulation* (the “Regulation”) in respect of the employment of Steven Cheng (“Mr. Cheng”) and ordered Della Casa to pay Mr. Cheng wages and interest in the amount of \$1,067.29 and to pay administrative penalties in the amount of \$3,500.00. The total amount of the Determination is \$4,567.29.
3. This appeal is grounded in error of law and evidence coming available that was not available when the Determination was being made. Della Casa seeks to have the Determination varied and referred back to the Director.
4. In correspondence dated December 1, 2017, the Tribunal acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and that, following such review, all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director, a copy has been delivered to legal counsel for Della Casa and Mr. Cheng and an opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. 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 Determination, the appeal, the written submission filed with the appeal, any additional evidence allowed to be included with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Cheng will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. Della Casa operates a restaurant. Mr. Cheng was employed by Della Casa as a lounge supervisor from October 1, 2015, to November 15, 2016, when he voluntarily left his employment.
10. Mr. Cheng filed a complaint with the Employment Standards Branch alleging he had not been paid all wages owed to him. The Director investigated and conducted a complaint hearing, providing both parties with the opportunity to state their positions. During the complaint process, immediately following the complaint hearing, Della Casa paid to Mr. Cheng a portion of the wages he claimed were owed. The Director applied this payment in calculating the amount of wages owing in the Determination.
11. No representative attended the complaint hearing, although submissions were made to, and received by, the Director from Della Casa both before and after the complaint hearing.
12. The Director found Mr. Cheng was owed wages in the amount of \$1,067.29, an amount that included interest under section 88 of the *ESA*. The Director imposed three administrative penalties for contravening provisions of the of *ESA* and *Regulation*; two of the administrative penalties were in the amount of \$500.00 and one, for a second contravention of section 18 of the *ESA* within a three year period, was in the amount of \$2,500.00.
13. The amounts of the administrative penalties are mandated by the legislation: see section 29(1) of the *Regulation*.

ARGUMENT

14. Della Casa submits the Director erred in law in finding Della Casa contravened any section of the *ESA* and *Regulation* and consequently no administrative penalties are owing.

15. Della Casa submits the findings made by the Director failed to include consideration of the most important evidentiary element of the case – that Della Casa was planning to pay Mr. Cheng the balance of the monies he claimed were owed to him.
16. Della Casa also submits the failure to respond to the Demand for Employer Records (which was issued May 11, 2017) was the result of “office and record keeping changes”. The appeal, purportedly, includes the records which ought to have been submitted in response to the Demand for Employer Records. Della Casa seeks to have this material included in the appeal as evidence.
17. Della Casa says the evidence referred to above was not presented at the complaint hearing because “Della Casa was not able to attend”.

ANALYSIS

18. 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.
19. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principle bears on the analysis and result of this appeal.
20. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
21. I am not persuaded this appeal has any reasonable prospect of succeeding. In fact, and I cannot express this strongly enough, this appeal is completely devoid of any merit at all.
22. The undisputed facts speak to no other conclusion than Mr. Cheng was owed wages, that Della Casa had failed to pay them when they became owing, contravening section 17, had continued to withhold payment after Mr. Cheng terminated his employment, contravening section 18, and had failed to respond to the Demand for Employer Records, contravening section 46 of the *Regulation*.
23. The Tribunal has a discretion to accept evidence presented with an appeal that is not included in the record. Material presented with an appeal under section 112(1) (c) as “additional evidence” is tested against several considerations before the Tribunal will accept it: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.

24. Some of this proposed evidence cannot be considered as “evidence” at all. The Director cannot have “failed” to consider what Della Casa was “planning” to do when Della Casa never advised the Director of this “plan” and nowhere is there any indication that Della Casa had formulated such a plan. The logical question in response to this assertion is why, if Della Casa was not contesting the amount of wages owed to Mr. Cheng and was planning to pay him, it did not do so in the period between the filing of the complaint, April 24, 2017, and the issuance of the Determination, October 17, 2017. All appearances suggest this assertion is pure invention.
25. In any event, the supposed “evidence” included with the appeal does not meet any of the considerations for admission under section 112(1) (c): it is not “new” – to the extent it existed at all, it was reasonably available and could have been provided during the complaint process; the evidence is not relevant to any material issue arising from the complaint – it is, for example, irrelevant that Della Casa was “planning” to pay Mr. Cheng the unpaid portion of his wages, but whether it had; much of it is not credible, as there is nothing in the Determination or the record that suggests a substantial portion of the information submitted is reasonably capable of belief; and it is not probative – it is not capable of resulting in a different conclusion than what is found in the Determination:
26. The excuse for failing to provide the Employer Records, even if I accepted it as being reasonable and credible (which I do not), makes no difference to the finding in the Determination that Della Casa had contravened the *Regulation*. The legislation requires employer records to be accessible and able to be presented to the Director on demand.
27. Based on all of the above, I find this appeal is devoid of merit; it 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

28. Pursuant to section 115 of the *ESA*, I order the Determination dated October 17, 2017, be confirmed in the amount of \$4,567.29, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal