

An appeal

- by -

555924 B.C. Ltd. carrying on business as Kelly O'Bryan's Restaurant and  
The Celt Family Restaurant  
("555924")

- 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)

**PANEL:** David B. Stevenson

**FILE NO.:** 2018A/55

**DATE OF DECISION:** August 7, 2018

## DECISION

### SUBMISSIONS

Veronica Johnson

on behalf of 555924 B.C. Ltd. carrying on business as  
Kelly O’Bryan’s Restaurant and The Celt Family  
Restaurant

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), 555924 B.C. Ltd. carrying on business as Kelly O’Bryan’s Restaurant and The Celt Family Restaurant (“555924”) has filed an appeal of a Determination issued by Jo-Ann Spencer, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), on April 18, 2018 (the “Determination”).
2. The Determination found 555924 had contravened Part 8, section 63 in respect of the employment of seven former employees (collectively referred to as “the Complainants”) and ordered 555924 to pay the Complainants’ wages and interest totalling the amount of \$7,329.77 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$7,829.77.
3. This appeal is grounded in all of the available grounds of appeal set out in section 112 of the *ESA*: error of law, failure to observe principles of natural justice in making the Determination, and evidence coming available that was not available when the Determination was being made. 555924 seeks to have the Determination cancelled.
4. In correspondence dated May 31, 2018, the Tribunal acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director, and notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal
5. The record has been provided to the Tribunal by the Director, a copy has been delivered to the representative for 555924 and to the individual Complainants (two of the complainants did not have current contact information on file and therefore did not receive the record), 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 any 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 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 the Complainants 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. 555924 operated a restaurant business in Prince George. The Complainants were employed in the business in various capacities. The business ceased operation on January 27, 2018. A complaint was filed with the Director by one of the Complainants alleging 555924 had not paid all wages owed. During the investigation of that complaint it became apparent there were more individuals who were, potentially, owed wages. The Director, acting under section 76(2) of the *ESA*, conducted an investigation of whether any wages were owed to individuals affected by the closure of the business.
10. During the process, 555924 provided the Complainants with their final paycheques, which left only a claim by two of the Complainants for additional wages for work performed after the business ceased operating and consideration of compensation for length of service for all of the Complainants to be decided. The claim for additional regular wages claimed by two of the Complainants was, on the evidence, not accepted by the Director.
11. The Director found each of the Complainants was owed compensation for length of service in the amounts set out in the Summary Sheets attached to the Determination.

## ARGUMENT

12. The singular argument made in this appeal is that 555924 cannot be held liable under the *ESA* for compensation for length of service because it was insolvent as of January 27, 2018. A substantial number of documents are attached to the appeal and appeal submission as evidence of the business being insolvent. Most of these documents are not included in the record.

## ANALYSIS

13. 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.*

14. 555924 alleges an error of law has been made by the Director. The contention in that position, relative to 555924, appears to be that the business cannot be held liable for unpaid wages – in this case, compensation for length of service – because it was insolvent as at January 27, 2018. There is nothing in the appeal submission that supports that contention as a matter of law under the *ESA*.

15. There is, in fact nothing in the *ESA* that absolves an employer, in this case, 555924, of its statutory liability for unpaid wages in a bankruptcy, receivership, or insolvency – although in proceedings governed by the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the “*BIA*”), wage claims are not generally pursued by the Director because those claims become part of the *BIA* proceedings and are addressed under the distribution scheme provided for in that legislation: see the comments in *ICON Laser Eye Centers Inc. and others*, BC EST # D649/01 at pages 6 – 7. There are no *BIA* proceedings involved in this case.

16. The Director made no error of law in imposing liability for length of service compensation on 555924, and this ground of appeal is dismissed.

17. 555924 has also provided nothing in the appeal that would indicate it was denied the procedural protections accorded by section 77 of the *ESA* or principles of natural justice. 555924 was accorded the procedural rights required by the *ESA* and principles of natural justice.

18. The second ground of appeal is dismissed.

19. 555924 has submitted a considerable amount of material that falls within the ground of appeal set out in section 112(1)(c). This ground is commonly referred to as the “new, or additional, evidence” ground of appeal and is intended to address evidence that may bear on the merits of an appeal, but which was

not presented to the Director during the complaint process, was not considered by the Director, and is not included in the record.

20. The Tribunal has discretion to accept new or additional material presented with an appeal as evidence. 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.
21. The proposed “evidence” included with the appeal does not meet the necessary considerations for admission under section 112(1)(c) in two respects: first, it is not “new” – all of the material appears to have been reasonably available at the time the Determination was being made and could have been provided during the complaint process; and second, based on my findings on the other two grounds of appeal, the evidence is not relevant to any material issue arising from the Complaints’ entitlement under the *ESA*.
22. I find 555924 has not demonstrated the material provided with the appeal should be accepted.
23. This ground of appeal is also dismissed.
24. Based on all of the above, 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**

25. Pursuant to section 115 of the *ESA*, I order the Determination dated April 18, 2018, be confirmed in the amount of \$7,829.77, together with any interest that has accrued under section 88 of the *ESA*.

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