

An appeal

- by -

0957080 B.C. Ltd. c/o Hudson's Landing Pub

- 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: Carol L. Roberts

FILE NO.: 2017A/146

DATE OF DECISION: May 1, 2018

DECISION

SUBMISSIONS

Christopher McHardy	counsel for 0957080 B.C. Ltd. cobra Hudson's Landing Pub
Mary Walsh	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "ESA"), 0957080 B.C. Ltd. cobra Hudson's Landing Pub ("957") has filed an appeal of a Determination (the "Corporate Determination") issued by Helen Gregg, a delegate ("Delegate Gregg") of the Director of Employment Standards (the "Director"), on May 5, 2017.
2. In the Corporate Determination, the Director found that 957 had contravened the *ESA* in failing to pay six employees, namely Bob Arthur, Allan Flores, Natasha Purcer, Brandi-Lynn Robins-Gutcher, and Sasha Yellowbird, wages. The Director determined that the employees were entitled to wages and interest in the total amount of \$14,296.48. The Director also imposed three administrative penalties in the total amount of \$1,500, for a total amount payable of \$15,796.48.
3. 957 appeals the Corporate Determination contending that the Director erred in law and failed to observe principles of natural justice in making the determination. 957 also says evidence has become available that was not available at the time the Corporate Determination was being made.
4. After receiving the appeal, I sought submissions from the Director on what basis the Director associated 957 with 1065528 B.C. LTD. carrying on business as Hudson's Landing Pub ("1065528 B.C. Ltd."), and how and when the Corporate Determination was served on 957.
5. This decision is based on the written submissions of the parties and the section 112(5) "record" that was before the Director at the time the decision was made (the "Record").

FACTS AND ARGUMENT

6. Six employees of Hudson's Landing Pub filed complaints alleging that their employer had contravened the *ESA* in failing to pay regular and overtime wages, vacation pay and compensation for length of service.
7. The Record shows that during the preliminary stages of the investigation of the complaints, Emma Riminchan, a delegate of the Director ("Delegate Riminchan") sought responses to the complaints from 957 and 1065528 B.C. Ltd as well as the respective directors of 957 and 1065528 B.C. Ltd. Although the director of 1065528 B.C. Ltd. responded to the request for responses, Delegate Riminchan received no response from 957's directors.

8. The Record also shows that on March 27, 2018, Delegate Gregg provided both 957 and 1065528 B.C. Ltd. with preliminary findings regarding the six complaints and provided both with the opportunity to provide the Director with any objections they may have with respect to the preliminary findings.
9. On May 5, 2017, after completing the investigation of the complaints, Delegate Gregg issued the Corporate Determination against 957 and 1065528 B.C. Ltd. Delegate Gregg determined that 957 and 1065528 B.C. Ltd. were associated companies pursuant to section 95 of the *ESA* and that the employees were entitled to wages and interest.
10. The record shows the Corporate Determination was sent by registered mail to 957's Registered and Records office as well as to 957's officers and directors. The appeal period for the Corporate Determination expired June 12, 2017. The Corporate Determination was not appealed by the statutory deadline of June 12, 2017.
11. 957 appeals the Corporate Determination, contending that the Director erred in associating 957 with 1065528 B.C. Ltd. 957 also asserts that there was no relationship between 957 and the persons engaged in the business operating Hudson's Landing Pub, that there was no common control or direction of 957 and Hudson's Landing Pub, and that there was no association or relationship between 957 and Hudson's Landing Pub except for an arm's length lease agreement between 957 and 1065528 B.C. Ltd. 957 also argues that, despite being in possession of the lease agreement and being aware of 957 and Hudson's Landing Pub's positions that they were not associated, the Director took no steps to request further information or evidence from 957.
12. In response to my request for submissions on how and when the Corporate Determination was served, Mary Walsh, a delegate ("Delegate Walsh") of the Director of Employment Standards, provided a response on behalf of the Director. Delegate Walsh submits that the Corporate Determination was successfully delivered to 957's business address and is deemed served to 957's Registered and Records office and to 957's directors.

ANALYSIS

13. Section 112(1) of the *ESA* 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;
 - evidence has become available that was not available at the time the determination was being made.
14. Section 114 of the *ESA* provides that 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.

Failure to observe the principles of natural justice

15. 957 contends that the Director failed to observe the principles of natural justice in failing to make reasonable efforts to give 957 an opportunity to respond to the allegations. It argues that, based on this failure, the Director unilaterally and without any evidence, associated 957 with 1065528 B.C. Ltd.
16. The Record discloses that corporate records searches of 957 were conducted on October 28 and December 1, 2016.
17. On December 15, 2016, Delegate Riminchan notified 957 that she was investigating the complaints of the six individuals and offered 957 the opportunity to respond. Delegate Riminchan's correspondence also included a notice to 1065528 B.C. Ltd., which was indicated to be carrying on business as Hudson's Landing Pub. Although the sole shareholder and director of 1065528 B.C. Ltd. advised the delegate that 957 was not responsible for wage claims, no corporate representatives of 957 responded to the delegate's letter.
18. On April 5, 2017, Delegate Gregg notified 1065528 B.C. Ltd.'s director that if the Director found 957 and 1065528 B. C. Ltd. to be associated under s. 95 of the *ESA*, both companies could be jointly and severally liable for outstanding wages. While 1065528 B.C. Ltd.'s director informed Delegate Gregg that it was responsible for the outstanding wage claims, no corporate representative of 957 responded to Delegate Gregg.
19. The record indicates that the May 5, 2017 Corporate Determination was sent to the address for 957's Registered and Records office as well as to the residential address of 957's directors. The Corporate Determination was successfully delivered to all of the addresses, contrary to 957's assertion that it never received the Corporate Determination. I find no basis for 957's argument that the delegate failed to observe the principles of natural justice. 957's directors clearly had knowledge of the delegate's decision to associate 957 with 1065528 B.C. Ltd. The deadline for filing the appeal of the Corporate Determination was June 12, 2017. No efforts to appeal the Corporate Determination were made until December 29, 2017, after the directors were each also found personally liable for the outstanding wages through a Director Determination.
20. One of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of *ESA* (section 2(d)). Section 109(1)(b) provides the Tribunal with discretion to extend the time limits for filing an appeal. Extensions are granted only when there are compelling reasons to do so and the burden is on the appellant to show that the time period should be extended. (see *Metty M. Tang*, BC EST # D211/96)

21. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto* (BC EST # D099/96). The following criteria must be satisfied to grant an extension:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.
22. I find no compelling reasons to grant 957's application to extend the time in which to file an appeal of the Corporate Determination. The appeal was made over six months after the time period for doing so expired. The record confirms that 957 and its directors received the Corporate Determination in May 2017 and on May 10, 2017, 957's accountant confirmed that he received a copy. 957 took no steps to appeal the Corporate Determination within the statutory time limit. There is no satisfactory explanation for 957's failure to request an appeal of the Corporate Determination in a timely fashion apart from an assertion that they did not receive it. The record confirms otherwise.
23. Furthermore, although 957 has submitted evidence regarding the relationship between 957 and 1065528 B.C. Ltd. on appeal as "new evidence," that evidence was available during the investigation and it ought to have been provided to the Director's delegate at that time. Having failed to do so, 957 is precluded from submitting that evidence on this appeal.
24. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision of the Director. I conclude that 957 has not met that burden and dismiss the appeal.

ORDER

25. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated May 5, 2017, be confirmed in the amount of \$15,796.48 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal