

Citation: 0957080 B.C. Ltd. (Re)
2018 BCEST 45

An appeal

- by -

0957080 B.C. Ltd. coba as 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/149

DATE OF DECISION: May 1, 2018

DECISION

SUBMISSIONS

Christopher McHardy	counsel for 0957080 B.C. Ltd. cobar 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. cobar 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 September 27, 2017.
2. In the Corporate Determination, the Director found that 957 had contravened the ESA in failing to pay two employees, namely Christian Aquilizan and Devereaux Coward, wages. The Director determined that the employees were entitled to wages and interest in the total amount of \$4,426.58. The Director also imposed three administrative penalties in the total amount of \$1,500, for a total amount payable of \$7,926.58.
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 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 were served on 957.
5. This decision is based on the written submissions of the parties, the section 112(5) "record" that was before the Director at the time the decision was made (the "Record") and the Reasons for the Determination.

FACTS AND ARGUMENT

6. Two 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. On September 27, 2017, after investigating the complaints, Delegate Gregg issued a Determination against 957 (the "Corporate Determination"). 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. During the investigation, Delegate Gregg sought responses to the complaints from 957 and 1065528 B.C. Ltd. as well as from 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 Gregg received no response from 957's directors.

8. 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 November 6, 2017. The Corporate Determination was not appealed by the statutory deadline.
9. 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.
10. 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

11. 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.
12. 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, 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.

Failure to observe the principles of natural justice

13. 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.
14. The Record discloses that corporate records searches of 957 were conducted on October 28, 2016, November 15, 2016, December 1, 2016, and February 2, 2017. Although the corporate search conducted on November 15, 2017, indicates the address for 957's Registered and Records office had changed, the mailing address for the directors remained the same.
15. On September 13, 2017, Delegate Gregg notified 957 that she was investigating the complaints of the two individuals. She also informed 957 that she had made preliminary findings that wages were owed, that 957 was associated with 1065528 B.C. Ltd., and that the directors of 957 could be held responsible for the outstanding wages. Delegate Gregg offered 957 the opportunity to respond. Delegate Gregg's correspondence included notice to 1065528 B.C. Ltd., which was also indicated to be carrying on business as Hudson's Landing Pub. Delegate Gregg also issued a Demand for Employer Records.
16. The Record before me shows that the correspondence was sent to 957's business and to its Registered and Records office and is deemed to have been served. Although the sole shareholder and director of 1065528 B.C. Ltd. advised Delegate Gregg that 957 was not responsible for wage claims, no corporate representatives of 957 responded to Delegate Gregg's letter.
17. Contrary to 957's assertions that it never received the Corporate Determination, the record before me also shows the Corporate Determination was successfully delivered to 957 at its business address.
18. I find no basis for 957's argument that the Director failed to observe the principles of natural justice. 957 and its directors clearly had knowledge of Delegate Gregg's decision to associate 957 with 1065528 B.C. Ltd. The deadline for filing the appeal of the Corporate Determination was November 6, 2017. No efforts to appeal the Corporate Determination were made until December 29, 2017, after the directors of 957 were also found personally liable for the outstanding wages through a Director Determination.
19. 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)
20. 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 (employer or employee) as well as 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.

21. 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 one month after the time period for doing so expired. There is no satisfactory explanation for 957's failure to request an appeal of the Determination in a timely fashion apart from an assertion that it did not receive it. The record before me confirms otherwise.
22. 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.
23. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that 957 has not met that burden and dismiss the appeal.

ORDER

24. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated September 27, 2017, be confirmed in the amount of \$7,926.58 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