

Citation: Mohamad Daud Rasul Dad (Re)
2018 BCEST 66

An appeal

- by -

Mohamad Daud Rasul Dad
("Mr. Rasul Dad")

- 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: Shafik Bhalloo

FILE NO.: 2018A/46

DATE OF DECISION: July 9, 2018

DECISION

SUBMISSIONS

Najia Rahmdel

on behalf of Mohamad Daud Rasul Dad

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Mohamad Daud Rasul Dad (“Mr. Rasul Dad”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 28, 2018 (the “Determination”).
2. The deadline for filing an appeal of the Determination was 4:30 p.m. on May 6, 2018. The Tribunal received Mr. Rasul Dad’s Appeal Form on May 8, 2018, requesting an extension of time to file the appeal pursuant to section 109(1)(b) of the *ESA*. The Appeal Form did not specify the grounds of appeal and remedy sought by Mr. Rasul Dad. Accompanying the appeal form is a short written submission of Mr. Rasul Dad in support of his application for an extension of time to appeal. He states he needs an extension of time to appeal because he “did not find an agent or Lawyer to fill up and help me with the appeal”.
3. The Determination concluded that the wages in dispute in Mr. Rasul Dad’s Complaint fell outside of the recovery period defined in section 80 of the *ESA* and, therefore, no further action would be taken by the Director.
4. In correspondence dated May 10, 2018, the Tribunal sent Mr. Rasul Dad’s appeal and request to extend the appeal period to his former employer, 489972 BC Ltd. carrying on business as The Meat Shop & Deli (“The Meat Shop”), and the Director for informational purposes only. The Tribunal informed The Meat Shop and the Director that no submissions were being requested from them at this time. In the same letter, the Tribunal requested Mr. Rasul Dad to provide the Tribunal with his grounds of appeal, what he would like the Tribunal to do about the Determination, and written reasons and argument supporting each ground of appeal by 4:30 p.m. on May 25, 2018.
5. In the same letter, the Tribunal also requested the Director to provide the section 112(5) “record” (the “Record”) to the Tribunal.
6. On May 17, 2018, the Director sent the Record to the Tribunal.
7. On May 22, 2018, Mr. Rasul Dad submitted a further Appeal Form and written submissions prepared by his wife, Najia Rahmdel (“Ms. Rahmdel”), on his behalf. In this Appeal Form, Mr. Rasul Dad checked off the natural justice ground of appeal and is seeking the Tribunal to vary the Determination.
8. On May 23, 2018, the Tribunal disclosed the Record to Mr. Rasul Dad and The Meat Shop and afforded both parties an opportunity to object to its completeness. However, no objections were received from either party by the deadline of June 6, 2018. Therefore, I find the Record, as produced by the Director, to be complete.

9. On June 14, 2018, the Tribunal informed the parties that the appeal would be decided by a Tribunal panel. I have decided this appeal is an appropriate case for consideration under section 114 of the *ESA*. Therefore, at this stage, I will assess the appeal based on the Determination, the Appeal Form and accompanying submissions of Ms. Rahmdel, the Reasons for the Determination (the “Reasons”), and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal without a hearing of any kind for any of the reasons listed in that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite The Meat Shop and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. Mr. Rasul Dad will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

10. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *ESA*.

THE FACTS AND THE REASONS

11. The Meat Shop is a company incorporated on February 6, 1995, under the laws of British Columbia and operates a bakery and deli.
12. Mr. Rasul Dad was employed as a baker with The Meat Shop from January 5, 2009, to February 15, 2017. His rate of pay was \$15.00.
13. On June 23, 2017, within the time period allowed under the *ESA*, Mr. Rasul Dad filed a complaint under section 74 of the *ESA* alleging that that The Meat Shop contravened the *ESA* by failing to pay him regular wages, overtime, statutory holiday pay, vacation pay, and compensation for length of service (the “Complaint”).
14. Mr. Rasul Dad informed the Employment Standards Branch that he was not comfortable with the English language and authorized his wife to represent him and give direction on his behalf for the purposes of the Complaint.
15. The delegate of the Director conducted his investigation of the Complaint. Mr. Rasul Dad informed the delegate that The Meat Shop owed him wages with respect to the entire period of his employment.
16. The delegate reviewed the evidence of the parties and advised them that, under the *ESA*, Mr. Rasul Dad was able to recover wages which became payable during the six-month period prior to the termination of his employment. The delegate also advised the parties that with respect to the recovery period, Mr. Rasul Dad was owed wages in the amount of \$13,957.91.
17. The delegate notes in the Reasons that Mr. Rasul Dad agreed that he was owed \$13,957.91 with respect to earnings that became payable during the six-month recovery. The Meat Shop also agreed, and provided voluntary payments to him totaling \$13,957.91.

18. However, with respect to his claim to wages which became payable prior to the recovery period, the delegate states Mr. Rasul Dad did not relinquish his claim. Therefore, the sole question that the delegate sought to decide in the investigation was whether Mr. Rasul Dad can recover wages which became payable prior to the recovery period.
19. In deciding that the *ESA* did not apply to the recovery of any wages still owed by The Meat Shop to Mr. Rasul Dad, the delegate reasoned as follows:

Section 80 of the Act sets out the maximum time for which an employer can be required to pay wages in a determination. Specifically, it indicates that the amount of wages an employer may be required by to pay an employee under the Act is limited to the amount that became payable in the period beginning six months before the termination of the employment.

As Mr. Rasul Dad's last day of work was February 15, 2017, the applicable six-month recovery period commenced August 16, 2016. I have determined that any wages which became payable to Mr. Rasul Dad prior to August 16, 2016 are not recoverable pursuant to section 80 of the Act.

SUBMISSIONS OF MR. RASUL DAD

20. While Ms. Rahmdel's written submissions on behalf of Mr. Rasul Dad indicate some language or communication challenges, it is clear that she is asking the Tribunal to "reconsider the decision and make it fair".
21. She states that Mr. Rasul Dad did not agree he was owed \$13,957.91 because he was owed more than that amount. She states that he did "not indicated [sic] that he would not relinquish any claim to wages which became payable prior to the recovery period." This submission appears to be in error as I believe Ms. Rahmdel is trying to say precisely the opposite. That is, she is likely trying to say that Mr. Rasul Dad did not agree to relinquish or give up his claim for wages that became payable before the six-month recovery period.
22. She states that Mr. Rasul Dad wants the entire amount he is owed and the Branch should have issued The Meat Shop a "penalty for disobeying the law and using an employee who does not know about the work law and his rights". She submits that The Meat Shop has taken advantage of Mr. Rasul Dad.
23. She also submits that section 80 of the *ESA*, by limiting the recovery period for wages to the amount that became payable in the period beginning six months before the termination of employment, is unfair. She reiterates that Mr. Rasul Dad wants all wages owing from The Meat Shop.

ANALYSIS

24. The grounds of appeal under the *ESA* are statutorily limited to those found in section 112(1):

Appeal of director's determination

- 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.

25. The Tribunal has repeatedly stated that 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 on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

26. The grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact, and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

27. Having delineated some broad principles applicable to appeals, Mr. Rasul Dad's appeal is based on the sole ground that the Director breached the principles of natural justice in making the Determination.

28. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker. (*Re 607730 B.C. Ltd. operating as English Inn & Resort*, BC EST # D055/05)

29. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST #D050/96)

30. Having reviewed the Determination including particularly the Record and the submissions of Ms. Rahmdel, I do not find Mr. Rasul Dad has discharged the burden to persuade the Tribunal that there is an error in the Determination on the natural justice ground. I find that he has merely checked off the "natural justice" ground of appeal in the Appeal Form without more.

31. Having said this, I find that there is sufficient evidence in the Record and the Reasons showing that the delegate of the Director afforded Mr. Rasul Dad all of the necessary procedural rights contemplated within the meaning of natural justice in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd. operating as English Inn & Resort*, *supra*. Therefore, I dismiss the natural justice ground of appeal.

32. I note that the substance of Ms. Rahmdel's argument is that the Director should have awarded Mr. Rasul Dad the full amount of wages he earned throughout his period of employment with The Meat Shop regardless of the wage recovery period in section 80 of the *ESA*. While I sympathize with Mr. Rasul

Dad's situation, the provisions of section 80 of the *ESA* are very clear in identifying the limit on amount of wages an employer may be required by a determination to pay an employee. The applicable provision in section 80 in this case is subsection (a) which limits the employer's liability in the case of a complaint to six months before the earlier of the date of the complaint or the termination of the employment. It is not disputed that Mr. Rasul Dad's last day of work was February 15, 2017. Therefore, the applicable six-month recovery period commenced August 16, 2016. I find the delegate correctly decided that any wages which became payable to Mr. Rasul Dad prior to August 16, 2016, are not recoverable pursuant to section 80 of the *ESA*.

33. I note that the requirements of section 80 of the *ESA* are mandatory and neither the Director nor the Tribunal have any discretion to avoid the mandatory requirements of this section. While Mr. Rasul Dad and Ms. Rahmdel may find the section unfair, it is for the legislature and not this Tribunal to consider any changes or amendments to the legislation.
34. Based on the above, I find the appeal is without any merit and it has no reasonable prospect of succeeding. In the result, I dismiss it under section 114(1) (b) and (f) of the *ESA*.

ORDER

35. Pursuant to section 115 of the *ESA*, I order the Determination dated March 28, 2018, be confirmed.

Shafik Bhalloo
Panel
Employment Standards Tribunal