



Citation: Kendall Jefferson Treadway (Re)  
2019 BCEST 18

An appeal

- by -

Kendall Jefferson Treadway carrying on business as Jeffer's Fryzz  
("Mr. Treadway")

- 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/128

**DATE OF DECISION:** February 20, 2019

## DECISION

### SUBMISSIONS

Kendall Jefferson Treadway on his own behalf, carrying on business as Jeffer's Fryzz

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "ESA"), Kendall Jefferson Treadway carrying on business as Jeffer's Fryzz ("Mr. Treadway") has filed an appeal of a Determination (the "Determination") issued by Jennifer L. Sencar, a delegate of the Director of Employment Standards (the "Director"), on November 19, 2018.
2. The Determination found Mr. Treadway had contravened Part 8, section 63 of the *ESA* and section 46 of the *Employment Standards Regulation* (the "Regulation") in respect of the employment of Brandon Hanover ("Mr. Hanover") and ordered Mr. Treadway to pay Mr. Hanover wages in the amount of \$321.62, an amount that included compensation for length of service and interest under section 88 of the *ESA*. The Director imposed administrative penalties for contraventions of the *ESA* and the *Regulation* in the amount of \$1,000.00. The total amount of the Determination is \$1,321.62.
3. Mr. Treadway has appealed the Determination on the ground the Director erred in law and failed to observe principles of natural justice in making the Determination. Mr. Treadway seeks to have the Determination varied or cancelled.
4. The appeal was delivered to the Tribunal on December 28, 2018, one day after the time period for filing an appeal of the Determination had expired. Mr. Treadway has applied under section 109(1)(b) of the *ESA* for an extension of the appeal time period.
5. In correspondence dated January 2, 2019, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the "record") from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Treadway and Mr. Hanover. Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. 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, 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 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.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Hanover 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 Mr. Treadway should be granted an extension of the statutory time period for filing an appeal, or if the appeal should be dismissed as untimely, and whether there is any reasonable prospect the appeal can succeed.

### **ISSUE**

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

### **THE FACTS**

10. Mr. Treadway operates a food truck in Penticton, BC, as a sole proprietor under the name Jeffer's Fryzz. Mr. Hanover was employed by Mr. Treadway as a cook from January 1, 2018, to May 8, 2018, at a rate of \$16.00 an hour.
11. Mr. Hanover filed a complaint alleging he was owed compensation for length of service.
12. The Director conducted a complaint hearing by telephone, receiving evidence and submissions from Mr. Treadway and from Mr. Hanover.
13. The Director considered the evidence and arguments provided by the parties, found Mr. Treadway had terminated Mr. Hanover and that Mr. Hanover was entitled to compensation for length of service in the amount set out in the Determination.
14. The statutory time period for an appeal under the *ESA* expired on December 27, 2018.

## ARGUMENT

15. Mr. Treadway has alleged the Director made an error of law and failed to observe principles of natural justice in making the Determination.
16. He disputes the conclusion of the Director that he “fire[d], or let go or prematurely release” Mr. Hanover. He characterizes the discussion which led to him telling Mr. Hanover he did not need to finish working through the notice period provided by Mr. Hanover as being a generous gesture which allowed Mr. Hanover to work full-time at another job he had acquired and to avoid “taxing” his body by working out the final shifts of the notice period.
17. Mr. Treadway says the delay in filing the appeal was caused by his not receiving the Determination until a week before Christmas and not having the time to put the appeal together.

## ANALYSIS

18. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
19. 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:
  1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
  2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
  3. The responding party and the Director have been made aware of the intention;
  4. The respondent party will not be unduly prejudiced by the granting of an extension; and
  5. There is a strong *prima facie* case in favour of the appellant.
20. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.
21. In this case, the length of delay is minimal and the explanation for the delay is not entirely unreasonable.

22. The Determination was made and issued on November 19, 2018, and delivered by registered mail. The tracking record for the Determination, however, indicates several delays in processing the delivery which were attributable to incorrect addressing and the labour dispute being experienced at Canada Post in November and December 2018. This factor weighs in favour of granting an extension.
23. There is no indication during the appeal period that Mr. Treadway had formed any intention to appeal the Determination.
24. There is nothing in the material that suggests Mr. Hanover would be prejudiced by the requested extension of the appeal period.
25. The last criterion requires a consideration of the *prima facie* strength of the case on appeal.
26. When considering the *prima facie* strength of the case presented by Mr. Treadway in this appeal in a request for an extension of the time period for filing an appeal, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds.
27. My conclusion on this criterion militates strongly against an extension of the appeal period.
28. This appeal is grounded in error of law and breach of principles of natural justice. The appeal, however, shows neither an error of law nor a breach of natural justice.
29. The finding by the Director that Mr. Hanover was terminated in circumstances that entitled him to length of service compensation was a finding of fact based on the evidence provided. In this appeal, Mr. Treadway seeks to have the Tribunal alter that finding of fact and conclude his decision to not allow Mr. Hanover to finish the remaining shifts for which he was scheduled was not a termination of his employment entitling him to compensation for length of service.
30. The grounds of appeal listed in section 112 of the *ESA* 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.
31. There is nothing in the decision of the Director finding Mr. Hanover was terminated from his employment with Mr. Treadway in circumstances that entitled him to compensation for length of service that is elevated to an error of law. The finding that Mr. Hanover was terminated was a perfectly reasonable and logical conclusion based on the evidence.
32. As well, the appeal does not show any natural justice issue. The natural justice concerns that operate in this case have been briefly summarized by the Tribunal in an oft-quoted excerpt from *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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 to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

33. Mr. Treadway was provided with the procedural rights described in the above excerpt. There is no foundation for contending there was a denial of natural justice. The burden on Mr. Treadway to show a breach of the principles of natural justice have not been met.
34. The criteria required to be considered when addressing an extension of the appeal period to be granted, while fairly evenly balanced, weigh against granting the extension requested.
35. I reach this conclusion from my assessment of the merits of the appeal, which also leads me to find, for the same reasons as stated above, that the appeal has no reasonable prospect of succeeding. Even if I were inclined to extend the appeal period, I would nevertheless dismiss the appeal on that basis.
36. I make no firm decision on the requested extension, but find the purposes and objects of the *ESA* are not served by requiring the other parties to respond to it and choose to dismiss the appeal under section 114(1)(f) of the *ESA*.

#### **ORDER**

37. Pursuant to section 115 of the *ESA*, I order the Determination dated November 19, 2018, be confirmed in the amount of \$1,321.62, together with any interest that has accrued under section 88 of the *ESA*.

---

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