

An appeal

- by -

Liz Mitten Ryan carrying on business as Gateway 2 Ranch
("Ms. Mitten Ryan")

- 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.: 2019/8

DATE OF DECISION: March 25, 2019

DECISION

SUBMISSIONS

Liz Mitten Ryan on her own behalf carrying on business as Gateway 2 Ranch

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Liz Mitten Ryan carrying on business as Gateway 2 Ranch (“Ms. Mitten Ryan”) has filed an appeal of a Determination issued by Michael Thompson, a delegate of the Director of Employment Standards (the “Director”), on September 18, 2018.
2. The Determination found Ms. Mitten Ryan had contravened Part 3, section 21 of the *ESA* in respect of the employment of Alenna Kasner (“Ms. Kasner”) and ordered Ms. Mitten Ryan to pay Ms. Kasner wages in the amount of \$506.14, an amount that included wages and interest under section 88 of the *ESA*. The Director imposed an administrative penalty for a contravention of the *ESA* in the amount of \$500.00. The total amount of the Determination is \$1,006.14.
3. Ms. Mitten Ryan has appealed the Determination on the ground the Director erred in law in making the Determination. Ms. Mitten Ryan seeks to have the Determination cancelled.
4. The appeal was delivered to the Tribunal on January 30, 2019, more than three months after the time period for filing an appeal of the Determination had expired. Ms. Mitten Ryan has applied under section 109(1) (b) of the *ESA* for an extension of the appeal time period.
5. In correspondence dated February 1, 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 Ms. Mitten Ryan and Ms. Kasner. 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 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 period;*
- (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 Ms. Kasner 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 Ms. Mitten Ryan should be granted an extension of the statutory time period for filing an appeal, or if the appeal should be dismissed as untimely, and even if an extension of time is granted, 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. Ms. Mitten Ryan is a sole proprietor operating an equinistry retreat in Kamloops, BC, which is described in the record as a spiritual retreat with nature and horses, under the name Gateway 2 Ranch.
11. Ms. Kasner was employed by Ms. Mitten Ryan as what was essentially a ranch hand from April 2, 2018, to May 12, 2018. She resided on the retreat property.
12. When Ms. Kasner left her employment, Ms. Mitten Ryan did not pay her wages for her last pay period, claiming the cost of the damage to the residence in which Ms. Kasner resided exceeded the amount that was owed as wages.
13. Ms. Kasner filed a complaint alleging she was owed wages.
14. During the complaint process Ms. Mitten Ryan paid some of the wages claimed, retaining \$500.00, which she attributed to the cost of damage done to the residence by Ms. Kasner, cleaning required, and some missing items.
15. The Director conducted a complaint hearing by teleconference, receiving evidence and submissions from Ms. Mitten Ryan and from Ms. Kasner.

16. There was no dispute that Ms. Kasner had earned wages in her final pay period of approximately \$1,100.00 and that Ms. Mitten Ryan had withheld \$500.00 from that amount. The issue was whether Ms. Mitten Ryan was allowed to deduct the \$500.00 amount from wages owed for damage, cleaning and missing items relating to the residence occupied by Ms. Kasner during her employment.
17. The Director considered the evidence and arguments provided by the parties and found Ms. Mitten Ryan had contravened section 21 of the *ESA*.
18. While there was a term in the contract of employment which authorized Ms. Mitten Ryan to deduct \$350.00 from Ms. Kasner's first wage payment as a damage deposit, the Director found Ms. Mitten Ryan had not, for reasons explained in the Determination, done so and could not rely on that term to justify the \$500.00 withholding from wages. The Director found there was no other written assignment of wages that would have allowed Ms. Mitten Ryan to withhold \$500.00 from Ms. Kasner's wages.
19. As well, while Ms. Mitten Ryan claimed to have "advanced" Ms. Kasner \$600.00 in wages in April 2018, the evidence indicated this amount was part of her wages for April. There is nothing in the record indicating the amount was an advance on future wages or a loan which was repayable at some future time.
20. The statutory time period for an appeal under the *ESA* expired on October 26, 2018. This appeal was delivered to the Tribunal on January 30, 2019.
21. Ms. Mitten Ryan says the delay was attributable to her not having received the Determination until sometime in January as the address to which the Determination was sent is a mailbox service mainly used to receive bank statements and by employees to receive mail.

ARGUMENT

22. Ms. Mitten Ryan argues the Director made an error of law in making the Determination.
23. She says the Director erred in law by acting without evidence, acting on a view of the facts that could not reasonably be entertained, and adopting a method of assessment that was fundamentally wrong. She says that even if she owed Ms. Kasner \$500.00, that was offset by a \$600.00 advance on wages that was, it is submitted, never taken into account by the Director.
24. Ms. Mitten Ryan says the delay in filing the appeal was caused by the Determination being sent to a UPS mail box store address not frequently used by the business and the correspondence was misplaced for a time by the staff at the store. She asserts it was not received by her until sometime in January 2019.

ANALYSIS

25. 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.

26. 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.
27. 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.
28. In this case, the length of delay is significant. The explanation for the delay does not entirely explain the delay.
29. The Determination was made and issued on September 18, 2018, and delivered by registered mail. The tracking record for the Determination indicates it was delivered and accepted at the mail box address on September 20, 2018. It is somewhat concerning that while the record shows two addresses for Ms. Mitten Ryan and the business, the Determination was sent to only one of those addresses and it was not the address to which other correspondence from the Director – the Demand for Employer Records and the Notice of Rescheduled Complaint Hearing – had been sent. Objectively, this mitigates the delay to some extent, but the explanation provided in the appeal is insufficiently supported by enough detail or evidence to be considered a “reasonable and credible” explanation for a delay of over three months.
30. There is some indication that Ms. Mitten Ryan had, even before the Determination was issued, conveyed an intention to appeal if it was not favourable to her position, but there is no record that, upon receiving the Determination, she communicated with either the Director or the Tribunal that she had only recently received the Determination, intended to appeal, and required some time to do that.
31. There is nothing in the material that suggests Ms. Kasner would be prejudiced by the requested extension of the appeal period.
32. The last criterion requires a consideration of the *prima facie* strength of the case on appeal.
33. When considering the *prima facie* strength of the case presented by Ms. Mitten Ryan 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.

34. My conclusion on this criterion militates strongly against an extension of the appeal period.
35. This appeal is grounded in error of law. The appeal, however, does not show an error of law.
36. The finding by the Director that Ms. Mitten Ryan had contravened section 21 of the *ESA* was a conclusion of fact based on the evidence provided.
37. In this appeal, Ms. Mitten Ryan seeks to have the Tribunal alter that conclusion and find she was entitled to deduct the \$500.00 from Ms. Kasner's wages.
38. The basis upon which this result is sought is twofold: first, that the facts allowed her to withhold \$500.00 for damage to the residence occupied by Ms. Kasner; and second, even if that were not allowed, Ms. Kasner owed her \$600.00 representing the advance made to her in April.
39. 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.
40. Ms. Mitten Ryan submits the findings of fact that allowed the Director to reach the conclusion section 21 had been contravened was an error of law based on a mishandling of the facts.
41. In order to establish the Director committed an error of law in respect of factual findings and conclusions drawn from them, Ms. Mitten Ryan is required to show the factual findings reached by the Director, and the conclusions or inferences drawn from those findings, are inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the findings or conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant, supra*, at paras. 26 – 29. Ms. Mitten Ryan has not succeeded in meeting this burden.
42. There is nothing in the decision of the Director finding a contravention of section 21 on the facts that is elevated to an error of law. The finding a contravention of section 21 was a perfectly reasonable and logical conclusion based on the evidence.
43. The Director correctly noted section 21 prohibits an employer from making any deduction from an employee's wages except those permitted by statute or pursuant to a written assignment of wages made by the employee to meet a credit obligation.
44. The Director was made aware of the provisions in the employment contract that allowed Ms. Mitten Ryan to hold \$350.00 of the first salary payment as a damage deposit. The Director found this term, which had not been applied, did not support a subsequent withholding of the \$500.00 without a written wage assignment to that effect and found there was none.

45. The argument relating to the purported “advance” suffers from several defects. First, as the Director noted, a reclaiming of the “advance” was not the basis upon which Ms. Mitten Ryan withheld the \$500.00 amount. The withholding of this amount was for damage to the residence and matters associated to Ms. Kasner’s occupation of the residence. Second, the record does not support Ms. Mitten Ryan’s characterization of this amount being an “advance”. Rather, the evidence indicates this amount was an increase in Ms. Kasner’s monthly salary one month earlier than it would have occurred under the terms of the employment contract. Third, and in any event, if this amount was a “loan” as suggested by some of the documents provided by Ms. Mitten Ryan, it suffers from the same defect as the \$500.00 amount – there was no written assignment from wages of that amount by Ms. Kasner to Ms. Mitten Ryan.
46. In sum, I am not persuaded there is *prima facie* merit to this appeal.
47. The criteria required to be considered when addressing an extension of the appeal period to be granted weighs against granting the extension requested.
48. 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.
49. I deny the requested extension and find 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) (b) and (f) of the *ESA*.

ORDER

50. Pursuant to section 115 of the *ESA*, I order the Determination dated September 18, 2018, be confirmed in the amount of \$1,006.14, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal