

Citation: Khol Travel Corporation (Re)  
2019 BCEST 52

An appeal

- by -

Khol Travel Corporation  
("Khol")

- 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.:** 2019/36

**DATE OF DECISION:** June 5, 2019

## DECISION

### SUBMISSIONS

Xiao Ying Dong

on behalf of Khol Travel Corporation

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Khol Travel Corporation (“Khol”) has filed an appeal of a Determination (the “Determination”) issued by Sarah Vander Veen, a delegate of the Director of Employment Standards (the “Director”), on February 26, 2019.
2. The Determination found Khol had contravened Part 3, sections 17, 18, and 21 of the *ESA* in respect of the employment of Lin (Claudia) Wang (“Ms. Wang”) and ordered Khol to pay Ms. Wang wages in the amount of \$16,853.09, an amount that included regular wages, annual vacation pay, reimbursement of employer’s business costs, and interest under section 88 of the *ESA*. The Director imposed administrative penalties for the three contraventions of the *ESA* in the amount of \$1,500.00. The total amount of the Determination is \$18,353.09.
3. Khol has appealed the Determination on the ground the Director erred in law and that evidence has come available that was not available when the Determination was being made. Khol seeks to have the Determination cancelled.
4. The appeal was delivered to the Tribunal on April 5, 2019, the last day of the time period prescribed in section 112(3) of the *ESA* for filing an appeal of a Determination. The appeal was incomplete and Khol applied under section 109(1) (b) of the *ESA* for an extension of the appeal time period to complete the appeal. More particularly, the request asked for time to gather supporting documents for the appeal and to discuss the case with a lawyer.
5. In correspondence dated April 9, 2019, the Tribunal, among other things, acknowledged having received the appeal, and the request to extend the appeal period, 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 Khol and Ms. Wang. 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, my review of the material that was before the Director when the Determination was being made and any material that is accepted as new, or additional, evidence. 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 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 Ms. Wang 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 Khol should be granted an extension of the statutory time period for filing an appeal 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. Khol operates a travel service business.
11. Ms. Wang filed a complaint alleging Khol had contravened the *ESA* by failing to pay regular wages, including commissions, annual vacation pay, compensation for length of service, and by requiring her to pay some of Khol's business costs.
12. Ms. Wang commenced her employment with Khol on October 9, 2017. Her rate of pay, job title, and last day of work were in dispute.
13. The Director conducted a complaint hearing, receiving evidence from Ms. Xiao Ying Dong ("Ms. Dong"), on behalf of Khol, from Ms. Wang, and from one witness presented by Ms. Wang.
14. On the evidence and testimony presented, the Director made no finding on the job title held by Ms. Wang, accepting that she was employed by Khol in a position that involved, generally, creating and marketing travel packages. The Director found Ms. Wang's rate of pay was \$4,500.00 a month and 5% commission

on each tour sale she made and that she worked full time hours until March 11, 2018, when she terminated her employment.

15. The Director found Ms. Wang was entitled to wages in the amount calculated in the Determination and that she was entitled to be reimbursed for an amount incurred on behalf of Khol. The Director denied her claim for length of service compensation.
16. The statutory time period for an appeal under the *ESA* expired on April 5, 2019.
17. In the initial appeal filing, on April 5, 2019, Ms. Dong included a number of documents relating to medical issues from which she suffers. It appears these have been submitted for two purposes: to support her request for an extension of time; and to somehow excuse the failure of Khol to pay all of the wages earned by Ms. Wang and its failure to present its complete case during the complaint hearing conducted by the Director.
18. On April 25, 2019, Khol delivered a 42-page submission to the Tribunal. The submission comprises 5 pages of argument and 37 pages of “supporting documents”. These documents fall into two general categories: correspondence and communications; and Khol’s banking statements. Included in the first category of documents are Chinese to English translations of the job application resumé of Ms. Wang and *WeChat* conversations between Ms. Dong and Ms. Wang.

## **ARGUMENT**

19. In its appeal argument, Khol says the Director ignored evidence, alleging the Director did not take into account evidence that showed amounts paid to Ms. Wang included vacation pay.
20. Khol also disputes, and challenges, the finding of the Director on Ms. Wang’s rate of pay.
21. Khol says an extension of time was needed in order to obtain and translate documents that were located in China. Khol says the material was not provided earlier owing to the poor health of Ms. Dong and her unfamiliarity with the process.

## **ANALYSIS**

22. 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 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.

23. 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.
24. 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.
25. While this case involves a request to extend the appeal period which was made before the appeal period expired, the considerations are substantially the same.
26. In this case, the basis for the requested extension is somewhat perplexing. The record shows the complaint was filed with the Employment Standards Branch on September 10, 2018, Khol was notified of the complaint on September 27, 2018, and there was considerable discussion and exchange of information. Ms. Wang provided the Director with translations of some *WeChat* conversations, most of which were not considered relevant by the Director. There is no indication in the record that Khol represented to the Director that there were other *WeChat* conversations than those presented by Ms. Wang, that the *WeChat* conversations were in China and needed to be accessed there, and that the *WeChat* conversations might be relevant to the issues raised in the complaint.
27. I note the Determination was made and issued on February 26, 2019, meaning Khol had the Determination for close to five weeks and only advanced this appeal at the last minute. Overall, I do not find the explanation for requiring the extension of time to be a reasonable one and is not one that is particularly credible.
28. The factors addressing intention and prejudice do not weigh in either direction in this case.
29. When considering the *prima facie* strength of the case presented by Khol 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.
30. My conclusion on this criterion militates strongly against an extension of the appeal period, as I find the appeal lacks the merit necessary to warrant extending the statutory appeal period.
31. In respect of the merits of the appeal, Khol alleges the Director erred in law and that “new evidence” has come available.

32. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 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.*
33. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
34. 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 in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
35. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.
36. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on this facts, Khol is required to show the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13, at paras. 26 – 29.
37. There is nothing in this appeal which indicates Khol would succeed in meeting this burden.
38. In reality this ground of appeal does nothing more than challenge findings of fact made by the Director. The findings made were firmly supported in the evidence, were reasonable, and were well reasoned.

39. This appeal is also grounded in evidence coming available that was not available when the Determination was being made. This ground is commonly referred to as the “new, or additional, evidence” ground of appeal and is intended to address evidence that may bear on the merits of an appeal but which was not presented to the Director during the complaint process, was not considered by the Director, and is not included in the record.
40. The Tribunal has discretion to accept or refuse new, or additional, evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted.
41. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.
42. The proposed “evidence” included with the appeal does not meet the necessary considerations for admission under section 112(1) (c) in three respects. First, none of the material on which the appeal is grounded is “new”. All of the material which Khol seeks to include in the appeal existed prior to the issuance of the Determination.
43. Second, most of the material included as “support” for the appeal is not relevant to any material issue arising in the appeal.
44. Third, Khol has not demonstrated the material is capable of resulting in a different conclusion than is found in the Determination. In the calculations made by the Director of the wages owing, Khol was credited with wages that had been paid to Ms. Wang. The Determination indicates this amount was applied to regular wages. The calculation of wages owed would not have been different if the wages already paid were allocated to annual vacation pay, which would only have reduced the amount of regular wages paid to Ms. Wang and increased that amount accordingly.
45. Based on the foregoing, I find nothing in the appeal that demonstrates Khol has a strong *prima facie* case.
46. An extension of the appeal period is denied. Absent an extension of the appeal period, there is neither argument nor support for the grounds of appeal chosen. As indicated above, an appeal is an error correction process, with the burden of showing an error on one of the three statutory grounds of appeal being on the appellant.
47. Additionally, for the reasons given above, the appeal has no reasonable prospect of succeeding and, even if the appeal period was extended, would be dismissed on that basis. There is nothing in the appeal that remotely warrants finding there was any reviewable error in the Determination.

48. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to the appeal.
49. In sum, 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 February 26, 2019, be confirmed in the amount of \$18,353.09, together with any interest that has accrued under section 88 of the *ESA*.

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