

Citation: A Taste of Punjab Restaurant Ltd. (Re)
2019 BCEST 54

An appeal

- by -

A Taste of Punjab Restaurant Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Allison Tremblay

FILE NO.: 2019/22

DATE OF DECISION: June 12, 2019

DECISION

SUBMISSIONS

Hardeep Soorma

on behalf of A Taste of Punjab Restaurant Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), A Taste of Punjab Restaurant Ltd. (the “Company”) has filed an appeal of the January 31, 2019, determination (the “Determination”) of Elaine Ullrich, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”). In the Determination, the Delegate found that the Company contravened sections 18 (wages), 21 (deductions), 40 (overtime), 45 (statutory holiday pay), and 46 (work on a statutory holiday) of the *ESA* with respect to its employee, Rajpal Lal, and ordered it to pay \$4,528.97 in wages and interest and \$2,500 in administrative penalties under section 29(1) of the *Employment Standards Regulation* (the “Regulation”).
2. The Company seeks to vary the Determination based on an alleged breach of natural justice. The Company alleges that the Delegate failed to properly consider the evidence and asks that the Tribunal reconsider the evidence.
3. The Tribunal received the Company’s written request for an appeal on March 12, 2019. The Company included an incomplete copy of the Delegate’s Determination. The bottom of the second page of the Determination was cut off and did not include the deadline to file an appeal calculated by the Delegate. The Company’s March 12, 2019, submission did not include a copy of the written Reasons for the Determination (the “Reasons”).
4. The Company delivered the Reasons to the Tribunal on March 26, 2019, following the Tribunal’s request for a copy. The Company did not provide a complete copy of the Determination despite the Tribunal making several requests.
5. The Director provided the section 112(5) Record (the “Record”) to the Tribunal. The parties received copies of the Record and were given an opportunity to make submissions on the Record’s completeness. The Tribunal received no objection to the Record’s completeness. Accordingly, I accept the Record as complete.
6. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed:
 - 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:
...
 - (b) the appeal was not filed within the applicable time limit;

...

(h) one or more of the requirements of section 112 (2) have not been met.

7. I am satisfied that I am able to determine this appeal under section 114(1) on the basis of the material before me, namely, the incomplete Determination, the Reasons, the appeal form, submissions filed by Hardeep Soorma (“Mr. Soorma”), and the Record provided by the Director.

ISSUE

8. Should the Tribunal accept the appeal even though it was filed after the expiry of the appeal period?

THE FACTS AND ANALYSIS

9. On March 12, 2019, the Tribunal received the Company’s incomplete appeal by email. In the covering email, the Company explained that the Reasons were too large to attach to the email, and so the Company would send the Reasons by mail.
10. On March 18, 2019, the Tribunal contacted the Company’s representative, Mr. Soorma, to inquire about the whereabouts of the Reasons and to advise the Company that it would need to file a request to extend the appeal period. Mr. Soorma advised that he would mail the Reasons as soon as possible.
11. The Tribunal received the Reasons by email on March 26, 2019, along with the Company’s request for an extension to the appeal period. The Company’s representative said he had been unable to file the appeal by the deadline because he was out of town without access to a printer and was unaware that the filing deadline was 4:30 p.m. He observed he filed the appeal before midnight on March 11, 2019.
12. Section 112(2) of the *ESA* requires appellants to provide a copy of the Reasons to the Tribunal within the appeal period. Further, Rule 18(3) of the Tribunal’s *Rules of Practice and Procedure* requires appellants to provide the Tribunal with a complete copy of the Determination and the Reasons within the appeal period.
13. As the Company did not provide the portion of the Determination that includes the Delegate’s calculation of the Appeal deadline, I must calculate the deadline myself. The Record shows that the Employment Standards Branch sent the Determination to the parties by registered mail on January 31, 2019. Pursuant to section 122(2) of the *ESA*, service is deemed to have occurred eight days later, on February 8, 2019. Pursuant to section 112(3)(a) of the *ESA*, the appeal deadline is 30 days after service of the Determination: 4:30 p.m. on March 11, 2019.
14. In *Niemisto* (BC EST # D099/96), the Tribunal set out the test for whether a late-filed appeal should be accepted. The party seeking the extension must demonstrate that:
- a. there is a reasonable and credible explanation for the failure to meet the statutory deadline for filing;
 - b. the party had a genuine, ongoing, *bona fide* intention to appeal;
 - c. the responding party and Director were made aware of the intention;

- d. the responding party will not face undue prejudice by the extension; and
 - e. there is a strong *prima facie* case in favour of the appellant.
15. The Company has failed to demonstrate it has met the above criteria.
16. I am not satisfied by the Company's explanation for its failure to meet the statutory deadline. It is not reasonable that Mr. Soorma was unaware of the 4:30 p.m. deadline. It is the Employment Standards Branch's practice to include on the Determination both the date and time by which an appeal must be filed. Because the Company did not include a complete copy of the Determination to the Tribunal, I cannot confirm that usual practice was followed here; however, there is no reason to believe the Branch would have departed from its template in this case. Further, I draw an adverse inference from the Company's failure to provide a complete copy of the Determination that would have included the appeal deadline information.
17. Further, I am not satisfied that the Company has a genuine, ongoing, *bona fide* intention to appeal. The Company said it could not email the Reasons due to size and so would send them by mail; however, by March 18, 2019, it still had not done so. The Company ultimately sent the Reasons by email over a week later. I am not satisfied that these are the actions of a party that has an ongoing genuine intention to pursue an appeal.
18. Finally, the Company indicates its appeal was on natural justice grounds but in its submission seeks only to review the Delegate's factual findings. The Tribunal does not have jurisdiction to review findings of fact alone: *Britco Structures Ltd.*, BC EST # D260/03. I am not satisfied there is a strong *prima facie* case in favour of the appellant.
19. Having determined that the Company has failed to meet the criteria for an extension to the appeal period, the appeal was filed late contrary to section 112(2) of the *ESA*. Accordingly, I dismiss the appeal pursuant to section 114(1)(b) of the *ESA*.

ORDER

20. Pursuant to section 115 of the *ESA*, I confirm the Determination together with any interest that has accrued under section 88 of the *ESA*.

Allison Tremblay
Member
Employment Standards Tribunal