

Citation: Four A's Restaurant (Nanaimo) Ltd. (Re)
2020 BCEST 127

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Four A's Restaurant (Nanaimo) Ltd.
carrying on business as Ricky's All Day Grill
(the "Appellant")

- 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: Richard Grounds

FILE NO.: 2020/108

DATE OF DECISION: November 10, 2020

DECISION

SUBMISSIONS

Jim Mercier

on behalf of Four A's Restaurant (Nanaimo) Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), this is an appeal by Four A's Restaurant (Nanaimo) Ltd. carrying on business as Ricky's All Day Grill (the “Appellant”) regarding a Determination issued on June 11, 2020, by Sarah Beth Hutchison, a delegate of the Director of Employment Standards (the “Delegate”). The Delegate determined that the Appellant owed Ms. Mariko Brown (the “Complainant”) wages in the amount of \$56.80.
2. The Appellant appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination. The Appellant failed to file the appeal within the statutory time limit and has requested to extend the statutory appeal period.
3. For the reasons that follow, the Appellant's request for an extension of time to file the appeal is denied.

ISSUE

4. The issue is whether or not to grant an extension of time to the statutory time limit for the Appellant to appeal the Determination.

ARGUMENT

5. The Determination was issued on June 11, 2020, and the statutory time limit expired on July 20, 2020. The Appellant attempted to file its appeal on July 19, 2020, but the appeal was not received until July 23, 2020.
6. The Appellant submits that the Delegate failed to observe the principles of natural justice in making the Determination by imposing a \$500 monetary fine when the Appellant offered to resolve the claim during mediation, but the Complainant did not accept the offer.
7. The Appellant's Appeal Form requests to extend the statutory appeal period to August 20, 2020. The Appellant did not make any submissions in support of its request to extend the statutory appeal period.
8. Submissions on the merits of the appeal were not requested from the parties.

THE FACTS AND ANALYSIS

FACTUAL ANALYSIS

Background Facts

9. The Appellant operates a Ricky's franchise restaurant in Nanaimo, British Columbia. James Daryl Mercier ("Mr. Mercier") is the sole director and officer of the Appellant. The Complainant previously worked for Mr. Mercier when he owned another restaurant. On August 11, 2019, the Complainant met with Mr. Mercier to inform him of her intention to leave her employment with the Appellant to pursue other interests. On August 21, 2020, the Complainant met with Mr. Mercier and did not return to her employment. The Appellant and the Complainant dispute whether the Complainant quit her employment or was terminated from her employment by Mr. Mercier.
10. On September 5, 2019, the Complainant filed a complaint under section 74 of the *ESA* for failing to pay wages including regular wages, annual vacation pay, statutory holiday pay, unauthorized deductions and compensation for length of service.
11. The complaint proceeded to mediation but was not resolved. The complaint proceeded to an adjudication hearing on December 4 and 17, 2019.

The Determination

12. On June 11, 2020, the Delegate completed the Determination and concluded that: the Complainant was owed regular wages in the amount of \$51.97, vacation pay of \$3.23, and interest of \$1.60; the Complainant was a manager and excluded from statutory holiday pay; and the Complainant quit her employment and was not entitled to compensation for length of service. The Delegate imposed an administrative penalty of \$500 for failing to pay the Complainant all of the wages owed to her upon the termination of her employment.

Appeal of Determination

13. The statutory deadline to appeal the Determination expired at 4:30 p.m. on July 20, 2020. On July 19, 2020, at 4:58 p.m., the Appellant attempted to file its appeal by e-mail with a link to a .pdf document. On July 20, 2020, the Tribunal contacted the Appellant by telephone and left a message requesting Mr. Mercier contact the Tribunal. The Tribunal also sent the Appellant an e-mail on July 20, 2020, at 1:44 p.m. after it did not hear back from the Appellant. In its e-mail, the Tribunal advised the Appellant that its appeal needed to be filed in PDF, Microsoft Word, or JPG format by 4:30 p.m. on the statutory appeal deadline.
14. On July 21, 2020, the Appellant responded to the Tribunal's e-mail and advised that the appeal package would be sent by mail. The Appellant's appeal was received by the Tribunal on July 23, 2020. The Appellant requested an extension to the statutory appeal deadline to August 20, 2020, but did not provide any reasons.

ANALYSIS

15. The Determination was issued on June 11, 2020, and the statutory deadline to appeal was July 20, 2020. The Appellant attempted to file its appeal by e-mail on July 19, 2020, but it did not attach its appeal submissions to the e-mail and instead provided a link to download the appeal submissions. The Tribunal is unable to open internet links and it informed the Appellant by e-mail on July 20, 2020, of this fact and that it would have to file the appeal submissions in PDF, Microsoft, or JPG format by 4:30 p.m. on the statutory appeal deadline. At that time, the Appellant still had time to file its appeal before the statutory appeal deadline. The Tribunal's e-mail to the Appellant advised that further information including how to file an appeal and how to request an extension of the appeal period could be found on the Tribunal's website.
16. The Tribunal's website includes documents titled "How to Prepare and File an Appeal" and "How to Request an Extension to the Appeal Period". In regards to filing an appeal, the Tribunal's instructional document states that the "Tribunal will not access internet links" and that appeal submissions filed by email must be sent in a format supported by the software used by the Tribunal (.PDF, .JPEG, .PNG, .MOV, .GIF, and .DOC). The instructions also advise that appeals may be filed by fax, ordinary mail, and by hand or courier. The instructions confirm that it is the party's responsibility to confirm that the Tribunal has received the appeal. In regard to requesting an extension to the appeal period, the Tribunal's instructional document advises appellants of the factors considered by the Tribunal in granting extensions to appeal.
17. The Appellant did not file its appeal until July 23, 2020, and requested an extension of the statutory appeal period to August 20, 2020. The Appellant essentially submits that it was unfair to have to pay a \$500 fine when it offered to resolve the matter by paying the Complainant at the mediation stage. The Appellant did not provide any reasons why the extension to the statutory appeal period should be granted.
18. Section 114(1)(b) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal if the appeal was not filed within the applicable time limit. There is no automatic right to an extension of the time limit to appeal. In *Niemisto*, BC EST # D099/96, the Tribunal identified the following non-exhaustive criteria to consider when deciding whether to extend an appeal period:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.
19. These criteria were applied by the court in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2013 BCSC 1499, when reviewing a decision by the Tribunal not to extend an appeal period where the Appellant was unable to file an appeal due to having surgery. Each of these criteria will be considered below.

Reasonable and credible explanation for the failure to request an appeal within the statutory time limit

20. The Appellant did not provide any reasons for why it did not file its request for an appeal within the statutory time limit. Although the Appellant attempted to file its appeal before the statutory appeal deadline on July 20, 2020, it did not conform to a required format and its appeal was not received until July 23, 2020. In addition to the instructions contained on the Tribunal's website, the Tribunal informed the Appellant of the defect in its filing before the statutory appeal deadline.

There has been a genuine, and on-going bona fide intention to appeal the Determination;

21. There is no evidence whether or not the Appellant had a genuine and on-going intention to appeal the Determination.

The respondent party, as well as the Director, has been made aware of this intention

22. There is no evidence that the respondent party or the Director was made aware of the Appellant's intention to appeal.

The respondent party will not be unduly prejudiced by the granting of an extension

23. The issue relating to the request for an extension of time is not substantively related to the merits of the Determination, i.e., whether or not the Complainant was owed wages. Accordingly, I am satisfied that the respondent party would not be unduly prejudiced by the granting of an extension.

There is a strong prima facie case in favour of the appellant.

24. The Appellant appeals the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination. The Appellant does not dispute the Delegate's findings about the wages owed to the Complainant but, instead, disputes that it should have to pay the administrative penalty of \$500 imposed by the Delegate. The Appellant takes the position that it is unfair that the Complainant did not accept the Appellant's offer of settlement at the mediation stage and, if she had, there would be no penalty.

25. Mediation proceedings are conducted on a without prejudice basis and there is no requirement that both parties agree to a settlement. The Mediation Factsheet provided to the parties by the Employment Standards Branch (found at pages 8 and 9 of the Director's Record) confirm this fact and that the matter would proceed to a hearing or investigation if the parties could not reach an agreement. Although the Appellant frames the issue as involving \$59, the Complainant was claiming approximately \$11,800 in her original complaint form which was the framework in which the Delegate completed the Determination.

26. Section 98(1) of the *ESA* provides that where a determination imposes a requirement under section 79 (in this case for the Appellant to pay wages to the Complainant), a monetary penalty prescribed by the regulations is to be imposed. Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") provides that the minimum administrative penalty to be imposed is \$500.

27. The Appellant effectively submits that the Delegate should have exercised discretion not to impose the administrative penalty. The wording of the *ESA* and the *Regulation* does not empower the Delegate to impose administrative penalties on a discretionary basis. They are mandatory in nature and there is no authority invested in the Tribunal to override the mandatory nature of the administrative penalties. Accordingly, the Appellant does not have a strong *prima facie* case and the appeal would fail on the merits.
28. Given the evidence, there is no reasonable basis to find that the Delegate failed to observe the principles of natural justice in making the Determination.
29. I have considered the above relevant factors to determine whether or not an extension to the statutory time limit for the Appellant to appeal the Determination should be granted. Given the factors discussed above, I am not satisfied that an extension should be granted.

ORDER

30. The Appellant's request to extend the time period for requesting an appeal is denied.

Richard Grounds
Member
Employment Standards Tribunal