

Citation: G.S. Kang & Sons Investments Ltd. (Re)
2020 BCEST 52

An appeal

- by -

G.S. Kang & Sons Investments Ltd.

- 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.: 2020/010

DATE OF DECISION: May 27, 2020

DECISION

SUBMISSIONS

Conor Muldoon

counsel for G.S. Kang & Sons Investment Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), G.S. Kang & Sons Investment Ltd. (the “Appellant”) has filed an appeal of a determination issued by Dan Armstrong, a delegate of the Director of Employment Standards (the “Delegate”) on September 24, 2019 (the “Determination”).
2. The Appellant appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made. The Appellant failed to file the appeal within the statutory time limit and has requested the Tribunal 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 September 24, 2019, and the statutory time limit for filing an appeal expired on November 1, 2019. The Appellant filed its appeal on January 14, 2020, and requested the Tribunal extend the statutory appeal period to February 29, 2020. The Appellant submitted that the Determination was mailed to an address purported to be for G.S. Kang but that this is for a unit in the apartment building that he owns but which is occupied by someone else. The Appellant submitted that although the Determination was sent to its Registered and Records Office address, this address is not closely monitored, and it did not come to Mr. Kang’s attention.
6. The Appellant submitted that the Determination should have been sent to its legal counsel who represented the employer for the adjudication and investigation. The Appellant submitted that its legal counsel had expressed in an email communication with the Delegate prior to the issuance of the Determination of its *bona fide* intention to appeal the Determination. The Appellant submitted that there was no indication that any significant hardship would result from granting the extension.
7. The Appellant submitted that there was a strong *prima facie* case in favour of the Appellant because the Delegate demonstrated a reasonable apprehension of bias by rejecting Mr. Kang’s argument that it was unfair to enforce the change in law (that increased the period of recovery from 6 to 12 months) because of an unanticipated delay due to a medical condition.

8. The Appellant submitted that evidence would become available that was not available at the time that the Determination was made. In particular, the Appellant submitted that its records had been seized in an unrelated legal proceeding and hoped that they would become available for use in its appeal.
9. Submissions on the merits of the appeal were not requested from the parties.

THE FACTS AND ANALYSIS

Background Facts

10. The Appellant operates a 19-suite apartment rental building in North Vancouver, British Columbia. Gurcharn Sing Kang is the sole director and an officer of the company. The Appellant hired Deirdre Murray (the “Complainant”) as a resident caretaker from November 15, 2011, to June 30, 2018. The Complainant lived in the rental building and was paid through a deduction from her rent. The Appellant terminated the Complainant’s employment on June 30, 2018, for failing to maintain the buildings and grounds.
11. On November 30, 2018, the Complainant filed a complaint under section 74 of the *ESA* for failing to pay wages including regular wages, overtime, annual vacation pay, statutory holiday pay, and compensation for length of service.
12. The complaint was originally scheduled to proceed by way of an adjudication hearing on June 7, 2019. On March 26, 2019, the Delegate issued a Demand for Employer Records to the employer, but Mr. Kang suffered a medical condition and was not able to provide any documents. On April 26, 2019, legal counsel for the employer informed the Delegate that Mr. Kang was not able to “deal with any legal issue at the moment”. On May 22, 2019, the Delegate requested that the employer submit documents for the adjudication hearing as soon as possible. The adjudication hearing did not proceed as scheduled.
13. On June 13, 2019, an articulated student with legal counsel for the employer advised the Delegate that Mr. Kang disputed claims made by the Complainant, including that she performed light maintenance and that she did not adequately perform duties to water and mow the lawn, or to clear snow from the sidewalk and steps. Mr. Kang denied that the Complainant was available to tenants 24 hours per day and 7 days a week and that the claim for overtime was unfounded.
14. On June 14, 2019, legal counsel for the employer provided the first offer to settle the complaint to the Delegate who then communicated the offer to the Complainant. Subsequent offers to settle were communicated between the parties. On June 21, 2019, the Delegate informed legal counsel for the employer of his preliminary assessment of the wage calculations owed to the Complainant (\$10,577.17) as well as the applicable penalties (\$3,500).
15. On August 13, 2019, legal counsel for the employer advised the Delegate by email that they were at an “impasse regarding negotiation” and stated:

From our perspective, it is concerning that an adjournment requested on the basis of an unforeseen and unavoidable medical emergency has resulted in our client potentially being responsible for a significantly greater amount of money due to the simultaneous change in law. I recognize that changes in the law can be unforeseen and unavoidable, as well, however it seems unreasonable, and quite frankly, inequitable for our client to bear such financial hardship effectively as a result of poor timing due to a serious medical issue.

16. Legal counsel for the employer also questioned the Delegate about “what are the avenues of appeal” if the “ultimate result significantly and unfairly disadvantages them”.
17. The Delegate replied by email on August 14, 2019, and stated:

The change in law you are referring to is an increase in the period of time for which employees may recover wages for which they are legally entitled. Suffice to say, your client’s claim that it is unfair that he should have to bear the burden of paying wages earned by [the Complainant] is not compelling.
18. The Delegate also informed legal counsel for the employer that determinations may be appealed to the Employment Standards Tribunal and that determinations include instructions for doing this as well as the relevant appeal period.
19. On August 15, 2019, the parties exchanged offers through the Delegate but did not reach a settlement. On August 30, 2019, the Delegate informed legal counsel for the employer that he anticipated issuing his decision the following week and that this would include administrative penalties. The Delegate requested that the employer provide any additional information for him to consider by 4:00 pm on September 11, 2019.
20. On September 11, 2019, legal counsel for the employer advised the Delegate that the employer was not able to produce documents because they were seized in another non-employment related matter. Legal counsel confirmed that they were not able to provide any further information.

The Determination

21. On September 24, 2019, the Delegate completed the Determination and concluded that: the Complainant was entitled to the minimum wage for a caretaker as set out in section 17 of the *Employment Standards Regulation* (the “*Regulation*”); the Complainant was entitled to 6 weeks of compensation for length of service; the Complainant was owed vacation pay based on the applicable percentage of total wages earned; and the Complainant was entitled to interest.
22. The Delegate concluded that the Complainant was owed \$6,472.10 for wages (the difference between what she was paid and the minimum required by *Regulation*), \$1,586.98 for vacation pay (based on the amount owed in the applicable recovery period) and \$1,757.58 for compensation for length of service (based on 6 weeks of wages multiplied by the weekly wage earnings during the last 8 weeks of employment). The Delegate did not make any finding that the Complainant was entitled to statutory holiday pay or overtime.
23. The Determination was mailed to an address for the Appellant at the apartment rental building. This address was provided by the Complainant in her complaint form and was used by the Delegate to send letters to the Appellant during the adjudication and investigation process. In addition, the Determination was sent to the Appellant at its Registered and Records Office and also to Mr. Kang in his capacity as a director. The letter sent to Mr. Kang as a director was sent to the address listed with BC Registry Services, which is the same as the Registered and Records Office.

Appeal of Determination

24. The statutory deadline to appeal the Determination expired on November 1, 2019. On November 29, 2019, legal counsel for the employer contacted the Delegate to ask about the status of the Determination. On December 2, 2019, the Delegate sent legal counsel for the employer a copy of the Determination. The Appellant filed its appeal on January 14, 2020.

ANALYSIS

25. The Determination was issued on September 24, 2019. The Appellant filed its appeal outside the statutory deadline to appeal the Determination and has requested an extension of time to the appeal period. The deadline to appeal was provided in the Determination which stated that an appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on November 1, 2019. The Determination was sent by Registered Mail to an address at the apartment rental building believed to be for Mr. Kang, to the Registered and Records Office of the company and also to the mailing address for Mr. Kang in his capacity as a Director.
26. 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.
27. 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

28. The Appellant submitted that it did not file an appeal within the statutory time limit because it did not receive a copy of the Determination until after its legal counsel inquired about the status of the Determination on November 29, 2019. The Appellant explained that the address believed to be for Mr. Kang at the apartment rental building is for someone else and that the Registered and Records Office for the company, where the other two copies of the Determination were sent, was not closely monitored so it did not come to Mr. Kang's attention.
29. I note that the address at the apartment rental building used for Mr. Kang was in fact used for correspondence sent from the Delegate to Mr. Kang during the adjudication and investigation process. It

was also included in letters sent to legal counsel for the employer when the Delegate emailed correspondence to Mr. Kang through his legal counsel. No issue was raised with the address at that time. It is unfortunate that the Determination was not also sent to legal counsel for the Appellant, but it was properly sent to the Registered and Records Office for the Appellant and to Mr. Kang in his capacity as a Director.

30. The fact that the Determination did not come to Mr. Kang's attention because his corporate address is "not closely monitored" is something that was completely within Mr. Kang's control. The fact that the Appellant had been advised on August 30, 2019, by the Delegate that he anticipated issuing his Determination the following week should have prompted Mr. Kang to more closely monitor his corporate address. It is also worth noting that once legal counsel for the Appellant received the Determination, the Appellant did not file its appeal for a further 6 weeks.

31. The Appellant's explanation for not appealing the Determination is not reasonable in the sense of being used to support an exercise of discretion to extend the time limit.

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

32. The Appellant submitted that its legal counsel had expressed in an email communication with the Delegate prior to the issuance of the Determination of its *bona fide* intention to appeal the Determination. This communication was on August 13, 2019, when legal counsel for the employer advised the Delegate by email that they were at an "impasse regarding negotiation" and asked about the "avenues of appeal" if the "ultimate result significantly and unfairly disadvantages them". The Delegate invited the employer to provide further information by September 11, 2019.

33. This communication is some evidence that the Appellant indicated that it might appeal if the outcome was not in its favour. Such a position is not unexpected for an employer involved in proceedings under the *ESA*. Legal counsel for the employer confirmed on September 11, 2019, that the employer had no further information for the Delegate to consider but gave no indication at that time that the Determination would be appealed. In addition, the Appellant waited a further 6 weeks after receiving the Determination (outside the statutory time limit to appeal) before filing an appeal with a request to extend the time limit to appeal.

34. It is difficult to conclude that one question about avenues of appeal in the event of an unsatisfactory outcome amounts to a genuine and on-going *bona fide* intention to appeal the Determination.

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

35. The email communication where legal counsel for the employer questioned the "avenues of appeal" was with the Delegate. There is no evidence that the respondent party was made aware of the comment.

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

36. 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

37. The issue before the Delegate related to whether or not the Complainant was owed wages as a resident caretaker. The Delegate determined that the Complainant was owed wages based on the minimum prescribed wages for resident caretakers, vacation pay and compensation for length of service.
38. The Appellant submitted that the Delegate demonstrated a reasonable apprehension of bias by rejecting Mr. Kang's argument that it was unfair to enforce the change in law (that increased the period of recovery from 6 to 12 months) because of an unanticipated delay due to a medical condition. The Appellant essentially submitted that the process being delayed due to Mr. Kang's medical condition should not be held against him but instead should have encouraged that the matter be settled through negotiation. The Appellant submitted that rather than consider the Appellant's argument, the Delegate concluded that the Complainant was owed wages prior to the issuance of the Determination.
39. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
40. The difficulty with the Appellant's submission is that it is based on a remedy that was not reasonably available to the Delegate, i.e. to ignore the law. Mr. Kang had no control over his medical condition but, once it delayed the process and the law changed, the Delegate had no control over the application of the law. The Delegate did reach a preliminary conclusion about the amounts owed to the Complainant which he first communicated to the parties on June 21, 2019. Undoubtedly, this information would have influenced the willingness of the Complainant to accept an offer that was not in line with the expected outcome, but this is not itself evidence of bias.
41. The Delegate invited the Appellant to provide further information, but it was not able to do so because its records were seized in an unrelated matter. There is no indication what matter these records were seized for and whether or not copies of the records could have been obtained. Regardless of this, it is important to note that the Delegate only found that the Complainant was entitled to wages based on the minimum requirements in the *Regulation*. Accordingly, the Appellant's dispute about the work duties performed by the Complainant are of little relevance because the Delegate made no findings related to the work duties performed by the Complainant or the overtime she claimed to have worked.
42. At no point did the Appellant argue that the Complainant was not a resident caretaker. In addition, the Appellant did not make any argument before the Delegate or on appeal that the Complainant was not entitled to vacation pay or compensation for length of service. Effectively, the Appellant's primary submission is based on the fact that it would have been fair for the matter to be settled through negotiation at a lower amount than in the Determination. The Appellant was given the option to settle the matter for approximately the amount of wages owed in the Determination and to avoid the administrative penalties of \$3,500 but the Appellant chose not to do so.
43. 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.

44. The Appellant submitted that evidence would become available that was not available at the time that the Determination was made. In particular, the Appellant submitted that its records had been seized in an unrelated legal proceeding and hoped that they would become available for use in its appeal. There is no indication what information might be in the records that would impact on the conclusion that the Complainant was a resident caretaker. As noted above, the Appellant has not argued that the Complainant was not a resident caretaker.

45. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.*, BC EST # D171/03, where it stated (at page 3):

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

46. The first stage of the test for admitting new evidence on appeal requires that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. It is unclear why the Appellant could not access copies of the records for the proceedings under the *ESA*. There is no evidence that the Appellant requested a copy of the records from the body that seized the records and was denied.

47. The second, third and fourth stages of the test for admitting new evidence are all difficult to assess because the Appellant has not argued that the Complainant was not a resident caretaker and it is unclear what possible information could be in the records that would negate such a finding by the Delegate.

48. Given the evidence and the factors noted, I am not satisfied that there is a strong *prima facie* case in favour of the Appellant.

49. 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

50. The Appellant's request to extend the time period for requesting an appeal is denied. Pursuant to section 115(1) of the ESA, the Determination is confirmed.

Richard Grounds
Member
Employment Standards Tribunal