

Citation: Pacific Coastal Public Tap House Ltd.,
Michelle Cote, and Brent Wallin (Re)
2021 BCEST 33

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Pacific Coastal Public Tap House Ltd. carrying on business as Westwind Pub

- and -

Michelle Cote

- and -

Brent Wallin

- of Determinations 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: Maia Tsurumi

FILE NOS.: 2020/154, 2020/155 and 2020/156

DATE OF DECISION: April 21, 2021

DECISION

SUBMISSIONS

Michelle Cote	on her own behalf and on behalf of Pacific Coastal Public Tap House Ltd. carrying on business as Westwind Pub and Brent Wallin
Jennifer R. Redekop	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Pacific Coastal Public Tap House Ltd. carrying on business as Westwind Pub (“Pacific Coastal”), Michelle Cote and Brent Wallin have filed appeals of determinations issued by Theresa Robertson, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on July 14, 2020. The Delegate determined Pacific Coastal was liable to Daniel Brown, Melissa Howard, Khol Reid, and Codi Scheffers (the “Complainants”) for: (1) \$1,773.20 in wages; (2) \$1,779.68 in compensation for length of service; and (3) \$30.66 in accrued interest (the “Corporate Determination”). The Delegate imposed administrative penalties of \$1,000.00 for contraventions of sections 18 (payment of wages upon termination) and 63 (compensation for length of service) of the *ESA*.
2. The Delegate also determined that Michelle Cote and Brent Wallin were, as directors of Pacific Coastal, personally liable for the Corporate Determination (the “Directors’ Determinations”).
3. Pacific Coastal appeals the Corporate Determination on the grounds that the Delegate failed to observe principles of natural justice. Ms. Cote and Mr. Wallin (the “Pacific Coastal Directors”) appeal the Directors’ Determinations on the grounds that the Delegate failed to observe principles of natural justice and there is evidence that has become available that was not available at the time the Directors’ Determinations were being made.
4. Pacific Coastal and the Pacific Coastal Directors also ask for extensions to the statutory appeal periods from August 21, 2020 to December 31, 2020.
5. For the reasons set out below, I decline to grant the extensions of time to file the appeals pursuant to sub-section 109(1)(b) of the *ESA*.
6. My decision is based on submissions in the Appeal Forms, written submissions from the Director (the “Director’s Submissions”), written submissions made by Pacific Coastal and the Pacific Coastal Directors (the “Appellants’ Submissions”), the sub-section 112(5) record (the “Record”), the reasons for the Corporate Determination (the “Corporate Reasons”), and the two sets of reasons for the Directors’ Determinations (the “Directors’ Reasons”).

ISSUE

7. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether an extension of the statutory appeal period should be granted, and if granted, whether these appeals should be allowed or dismissed pursuant to sub-section 114(1) of the *ESA*.

THE DETERMINATIONS

Background

8. Pacific Coastal operated the Westwind Pub in Port Alberni, British Columbia. On March 17, 2020, the Westwind Pub closed because of the Provincial Public Health Order issued in response to the Covid-19 pandemic. The Complainants were employed in various positions when the Westwind Pub was closed.
9. The Complainants filed individual complaints (the “Complaints”) with the Employment Standards Branch (the “Branch”), alleging Pacific Coastal owed them wages and compensation for length of service.

Issues Before the Delegate

10. The issues before the Delegate in the Corporate Determination were whether the Complainants were owed:
 - a. wages; and/or
 - b. compensation for length of service.
11. The issue before the Delegate in the Directors’ Determinations were whether the Pacific Coastal Directors were personally liable for the Corporate Determination.

The Delegate’s Decisions

Corporate Determination

12. On July 14, 2020, the Delegate issued the Corporate Determination, concluding the Complainants were owed:
 - a. \$1,773.20 in wages;
 - b. \$1,779.68 as compensation for length of service; and
 - c. \$30.66 in interest under section 88 of the *ESA*.
13. The Complainants provided evidence about their positions, periods of employment, records of hours, wage rates, and when they last worked at the Westwind Pub. The pay period the Complainants said they were owed wages for was March 1 to 17 or 18, 2020.
14. There was no dispute from Pacific Coastal about the Complainants’ evidence. However, Pacific Coastal said it was unable to pay the Complainants because of the forced shutdown of the business. It further said it was unfair it had to pay wages, and particularly compensation for length of service, when Pacific

Coastal had lost its business because of the Covid-19 pandemic. According to Pacific Coastal, it had lost most of its payroll records because of the business closure and so could not provide any evidence about the amount of wages owed.

15. On March 27, 2020, the Westwind Pub's landlord permanently locked Pacific Coastal out of its premises because of a dispute about unpaid rent. Pacific Coastal told the Delegate it owed one month's rent but the landlord locked it out of the premises for personal reasons. The Delegate contacted the bailiff company, Consolidated Civil Enforcement, which acted on behalf of the landlord, to determine the nature of the lockout. The bailiff company told the Delegate that when the landlord hired it on March 16, 2020, the landlord told it that Pacific Coastal was two months behind in rent and as a result, the bailiff company locked Pacific Coastal out of the premises.
16. Pacific Coastal told the Delegate it would not be re-opening the Westwind Pub.
17. Because Pacific Coastal could not provide a record of hours of wages owed, but did not deny that wages were owed, the Delegate reviewed the Complainants' information and found it sufficient to calculate the wages owing to each Complainant. The Delegate concluded on this evidence that the Complainants were collectively owed \$1,773.20 in wages and she set out the specific amounts owed to each on Summary Sheets included at the end of the Corporate Reasons.
18. Turning to compensation for length of service, the Delegate noted that any terminated employee who has worked for more than three months is owed compensation under section 63 of the *ESA*. Employees who have worked more than three months but less than a year, are entitled to one week's wages and employees who have worked at least a year but less than three years, are entitled to two weeks' wages.
19. Pacific Coastal argued it should not have to pay compensation for length of service because the Covid-19 pandemic caused it to close its business. Section 65(1)(d) of the *ESA* states that section 63 does not apply if an employment contract is impossible to perform because of an unforeseen event or circumstance other than receivership, action under section 427 of the *Bank Act*, SC 1991, c. 46, or a proceeding under an insolvency Act.
20. The Delegate agreed with Pacific Coastal that the pandemic was an unforeseen circumstance that led to the initial closure of its business. However, the Delegate concluded that the failure to re-open the Westwind Pub was not because of the pandemic. Rather, it was because of Pacific Coastal's failure to pay rent and its dispute with its landlord, which were not unforeseen circumstances. The Delegate therefore concluded Pacific Coastal was liable for compensation for length of service, which was collectively, \$1,779.68.
21. The Delegate applied mandatory administrative penalties of \$500.00 for contraventions of each of sections 18 and 63, for a total of \$1,000.00. Section 18 requires employers to pay employees all outstanding wages within 48 hours after employment is terminated.

Directors' Determinations

22. The Delegate's BC Registry Services search found Pacific Coastal was incorporated in British Columbia and the Pacific Coastal Directors were listed as directors when the Complainants' wages and compensation for length of service were owing.
23. Under sub-section 96(1) of the *ESA*, the Pacific Coastal Directors were personally liable for up to two months' unpaid wages for each Complainant. The wages claimed were for the Complainants' last two weeks of employment and the maximum compensation for length of service owed to any individual Complainant was no more than two weeks' wages. Therefore, the Delegate concluded the maximum amount of wages owing to any one Complainant was the equivalent of four weeks' wages, which was less than two months' wages.
24. Under sub-section 98(2) of the *ESA*, if a corporation contravenes a requirement of the *ESA* or the *Employment Standards Regulation*, its directors or officers are personally liable to pay the penalty if they authorized, permitted, or acquiesced in the contravention. The Delegate found the Pacific Coastal Directors did not authorize, permit, or acquiesce in Pacific Coastal's contraventions and so they were not liable for the \$1,000.00 in administrative penalties imposed on the company.
25. On July 14, 2020, the Delegate issued the Directors' Determinations, concluding, under section 79 of the *ESA*, that the Pacific Coastal Directors were each personally liable for Pacific Coastal's liability to its employees. This was \$3,552.88, plus interest, for a total of \$3,583.54.

ARGUMENT

26. Regarding the appeal deadline extension request made under section 109(1)(b) of the *ESA*, Pacific Coastal and the Pacific Coastal Directors (the "Appellants") submit that the Branch's Collections Department told Michelle Cote that the Appellants had until November 10, 2020, to file appeals.
27. The Director made submissions about the Appellants' request for extensions. In brief, the Director submits that:
 - a. the Corporate and Directors' Determinations were sent by registered mail to the Appellants at Pacific Coastal's business address, the registered and records office listed on the Corporate Registry, and the Pacific Coastal Directors' personal addresses. The Determinations had information that the appeal deadlines were August 21, 2020 and the Appellants have not said why they could not meet the appeal deadlines;
 - b. there has been a long delay between August 21, 2020 and when the appeals were filed;
 - c. there is no evidence the Appellants intended to appeal the Determinations or that the Complainants and the Branch were made aware of any such intention;
 - d. the respondents have been owed wages for almost a year; and
 - e. there is no strong case that the Appellants will succeed on the merits of the appeal if extensions are granted.

28. The Appellants' reply submissions state the Appellants' intention to appeal was made clear to the Branch on October 19, 2020, when they e-mailed the Branch's Collections Department.
29. About the outcome of the Corporate and Directors' Determinations, the Appellants say the Delegate failed to observe principles of natural justice and there is evidence that has become available that was not available when the Determinations were made. The Appellants further say:
- a. they do not object to paying any wages owing, but they have calculated the amounts owing for each of the Complainants and these amounts are less than what the Delegate concluded were owing;
 - b. they feel strongly against having to pay severance pay because it was not Pacific Coastal's choice to close its business;
 - c. when the business closed, the Appellants were left penniless;
 - d. before the Delegate issued her Determinations, she gave the Appellants a timeline for paying the wages owing, but because the Appellants did not pay within this timeline, they were further penalized by having to pay severance pay;
 - e. the Branch froze the Pacific Coastal Directors' bank account for almost a month and then garnished \$2,000.00 and made them promise to pay monthly installments after that, which left them without any way to feed their family; and
 - f. they feel bullied and harassed by the Branch.
30. The Appellants did not submit any new evidence in support of their claim about how much they owe in wages.
31. The Directors' Submissions regarding the substance of the appeals are as follows:
- a. the Appellants have not explained why they say they were denied procedural fairness;
 - b. the Record indicates information was provided to the Appellants about the Complaints and about the investigation process;
 - c. the Record indicates the Appellants knew the case against them and had opportunities to present their responses;
 - d. the Appellants have not submitted any new evidence, except to say they have recalculated the wages owing and come up with different amounts than the Delegate;
 - e. during the investigation, Ms. Cote did not dispute the unpaid wages for the last two weeks of the Complainants' employment and she told the Delegate she was unable to calculate the amounts owing because most of the records had likely been destroyed; and
 - f. the Appellants have not made any submissions about why the Pacific Coastal Directors should not be personally liable.

ANALYSIS

32. The Appellants request extensions of time for filing appeals from August 21, 2020 to December 31, 2020 under section 109(1)(b) of the *ESA*. I dismiss their requests. My reasons are as follows.
33. As held by the Tribunal in *Liisa Tia Anneli Niemisto*, BC EST # D099/96, extensions of time should not be granted as a matter of course. While the Legislature has established tight time frames for filing an appeal from a Determination, the time periods established are not that unusual: *Liisa Tia Anneli Niemisto, supra*, at p. 3.
34. The Tribunal has criteria that guide it in determining whether or not to extend the time period for appeals from decisions of the Director. These criteria are set out in the *Niemisto* decision. Appellants seeking time extensions for an appeal from a determination should satisfy the Tribunal that:
- 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.
- Niemisto* at p. 3; see also *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2013 BCSC 1499 at paras. 28 and 57
35. These criteria are not an exhaustive list. There may be other factors that ought to be considered. Further, in my view, not all of the above factors may be applicable in determining whether an extension should be granted or not, depending on the circumstances of each case.
36. The Appellants have not given a reasonable and credible explanation for their failure to request an appeal of the Determinations within the statutory time limit. The record before me shows the Determinations were each delivered by registered mail to the registered and records office noted on the Corporate Registry and to the directors' personal addresses. The appeal deadline for the Corporate Determination and for each of the Director Determinations was August 21, 2020. This date was set out in the Corporate Determination and in the Directors' Determinations. The appeal deadline for the Corporate Determination was also expressly noted in each of the Reasons for the Director Determinations. The Appellants have not explained why they did not file their appeals by the deadline.
37. Based on the Director's Submissions, I conclude that while the Appellants may have misunderstood the Branch's Collections Department's communications about the appeal deadlines, the Collections Department did not tell them they had until November 10, 2020 to file their appeals. Even if the Appellants were given misinformation about the appeal deadline by the Branch on October 8, 2020 or thereafter, the Appellants knew from July 14, 2020, that the deadline to appeal was August 21, 2020 and they did not deliver appeals until November 10, 2020.

38. Based on the same facts about the Appellants' failure to provide a reasonable and credible explanation for their failure to file appeals within the statutory time limit, I find the Appellants have not established a genuine and ongoing *bona fide* intention to appeal the Determinations and that the Complainants and Director were not made aware of any such intention. Telling the Collections' Department in October 2020, about two months after the appeal deadline, that they intended to appeal is not sufficient to indicate the Director and Complainants were made aware of an intention to appeal.
39. I make no finding about undue prejudice, but I note that the Complainants have now been owed wages for about a year, which is a significant period of time.
40. Finally, I conclude the Appellants do not have a strong *prima facie* case.
41. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure parties know the case against them, are given an opportunity to reply to the case against them and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.
42. There is nothing in the Corporate Reasons, the Directors' Reasons, the Record, the Appeal Forms, or the Appeal Submissions indicating the Delegate breached any principle of natural justice in making her Determination. The Appellants knew the case they had to meet and they were given opportunities to provide their version of events and otherwise make submissions.
43. The Appellants' arguments about the merits of their appeals relate to their financial situation, their disagreement with the Delegate's conclusion that they should have to pay severance, their allegations about being bullied and harassed by the Branch's Collections Department, and their recalculation of the amounts owing to the Complainants. With the possible exception of the recalculation of the unpaid wages, none of these arguments are grounds on which to appeal the Corporate or Directors' Determinations. About the alleged recalculation of wages, the Appellants have not provided any new evidence about how they arrived at different amounts from the Delegate. They merely make the bare assertion that they owe lesser amounts.

ORDER

44. Pursuant to section 109(1)(b) of the *ESA*, I decline to extend the time for filing the appeals. Pursuant to section 115(1)(a) of the *ESA*, the Determinations dated July 14, 2020, are confirmed.

Maia Tsurumi
Member
Employment Standards Tribunal