

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Cafe Fresh Franchising Corp.
("Cafe Fresh")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE No.: 2023/005

DATE OF DECISION: May 15, 2023

DECISION

SUBMISSIONS

Jeffrey Parker

on behalf of Cafe Fresh Franchising Corp.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*ESA*”) by Cafe Fresh Franchising Corp. (“Cafe Fresh”) of a determination issued by Carrie Manarin, a delegate of the Director of Employment Standards (the “deciding Delegate”), on December 6, 2022 (the “Determination”).
2. The Determination found Cafe Fresh had contravened Part 3, sections 17, 18, 21, and 28, and Part 8, section 63, of the *ESA* in respect of the employment of Natasha Leclerc (“Ms. Leclerc”). The Determination ordered Cafe Fresh to pay Ms. Leclerc wages, including vacation pay, in the total amount of \$18,814.99, interest under section 88 of the *ESA* in the amount of \$1,024.87, and to pay administrative penalties in the amount of \$2,500.00. The total amount of the Determination is \$21,314.99.
3. On January 13, 2023, the Tribunal received an Appeal Form over the signature of Jeffrey Parker (“Mr. Parker”) which identified the Appellant as Cafe Fresh, Mr. Parker and Bea Parker. The latter two persons were, it seems, named in determinations issued under section 96 of the *ESA*, more commonly known as “Officer/Director Determinations”. The Appeal Form received was accompanied by a request for an extension of the appeal period, which stated the reason for the requested extension as follows:

My wife and I received three separate determinations, 1 against company and 1 each personally. This does not make any sense so I have placed calls to employment labour standards but they have called me back twice after waiting three days waiting on each call and they cannot answer any questions for clarity and keep passing me on. These are very simply questions but still waiting on someone for proper clarification.

Once I receive this clarification I will be contacting an attorney to guide me through the Appeal.
4. The Tribunal received another e-mail from Mr. Parker on the same date attaching a copy of the Determination issued against Cafe Fresh (the “corporate determination”).
5. On January 16, 2023, the Tribunal confirmed receipt of the two e-mails, noting the information provided suggested an intention to appeal three determinations, the “corporate determination” and the two issued against Mr. Parker and Bea Parker. The Tribunal indicated the information provided with the Appeal Form was incomplete and requested additional documents and information be provided by January 17, 2023.
6. Additional documents and information were received by the Tribunal for an appeal by Cafe Fresh, but no additional documents or information was provided for an appeal relating to the officer/director determinations.

7. On January 25, 2023, the Tribunal notified Mr. Parker that the requested extension was granted for the appeal filed on behalf of Cafe Fresh and a deadline of February 14, 2023, was given for submitting submissions and any supporting documents.
8. On the above date, the Tribunal received a submission on the appeal on behalf of Cafe Fresh from Mr. Parker. No additional supporting documents were provided.
9. In correspondence dated February 17, 2023, the Tribunal asked Cafe Fresh, represented by Mr. Parker, if the submission was to be considered only in respect of the appeal by Cafe Fresh or if the submission should also be considered for the officer/director determinations. The Tribunal requested it be advised on that question no later than February 22, 2023. No reply to that question has been provided by Cafe Fresh.
10. In correspondence dated March 7, 2023, the Tribunal, among other things, acknowledged having received the appeal from Cafe Fresh, 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 at that time.
11. The record has been provided to the Tribunal by the Director and a copy has been delivered to Cafe Fresh and to Ms. Leclerc. These parties have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from any party.
12. The Tribunal accepts the record is complete.
13. Cafe Fresh has appealed the Determination on the ground that the deciding Delegate failed to comply with principles of natural justice in making the Determination, although error of law is also raised in their appeal submission.
14. 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 and my review of the material that was before the Director when the Determination was being made. 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 the 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 that 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.

15. 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. Leclerc 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 there is any reasonable prospect the appeal can succeed.

ISSUE

16. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

17. Cafe Fresh operates a restaurant franchising business.

18. Ms. Leclerc was employed by Cafe Fresh from 2009. The deciding Delegate found she was terminated December 15, 2020.

19. Ms. Leclerc filed two complaints: one on July 8, 2020; and a second on June 8, 2022. The former was filed while she was still employed by Cafe Fresh and the latter after her dismissal. Her complaints alleged Cafe Fresh had contravened the *ESA* by failing to pay regular wages, annual vacation pay, and compensation for length of service. Ms. Leclerc also alleged Cafe Fresh had made unauthorized deductions from wages.

20. The second complaint was filed nearly 12 months after the period prescribed in section 74(3) of the *ESA*, which, in part, allows a former employee six months from the date of termination of employment to deliver a complaint to the Employment Standards Branch. Ms. Leclerc requested an extension of this period. The deciding Delegate, exercising the discretion provided in section 74(5) of the *ESA*, extended the statutory time limit, and accepted the second complaint. The reasons for exercising the discretion provided in section 74(5) is set out at pages R3-R4 of the Determination. It is worth noting that Cafe Fresh was given an opportunity to make a submission whether this discretion should be exercised in favour of extending the statutory time period to Ms. Leclerc, but made no submission on this matter.

21. There is no issue that Cafe Fresh was aware of all elements of the claims made by Ms. Leclerc, although it does object in this appeal to the deciding Delegate accepting the second complaint.

22. The Determination and the record indicate both Ms. Leclerc and Cafe Fresh were given full opportunity to present evidence and argument in support of their respective positions and to make submissions on the Investigation Report.

23. The deciding Delegate addressed four questions in the Determination relating to the claims made in the complaints:

1. was Ms. Leclerc owed regular wages;

2. was Ms. Leclerc entitled to recover unauthorized deductions;
3. was Ms. Leclerc owed outstanding vacation pay; and
4. was Ms. Leclerc owed compensation for length of service?

24. On the first question, the deciding Delegate found Ms. Leclerc was not owed regular wages. On the second question, the deciding Delegate found Ms. Leclerc was owed \$735.81 for unauthorized deductions. On the third question, the deciding Delegate found Ms. Leclerc was owed outstanding vacation pay. On the fourth question, the deciding Delegate found Ms. Leclerc was owed length of service compensation in the amount set out in the Determination.
25. The reasons for the deciding Delegate’s decisions on each of these questions is clearly expressed in the Determination.
26. Pursuant to provisions in the *ESA*, the deciding Delegate added concomitant vacation pay to the wages found owing, added interest under section 88, and imposed the mandatory administrative penalties for the contraventions of the *ESA* found to have been made by Cafe Fresh.

ARGUMENTS

27. As indicated above, although the ground of appeal chosen on the Appeal Form is failure to comply with the principles of natural justice, Cafe Fresh also argues in its appeal submission that the deciding Delegate erred in law in making the Determination.
28. Cafe Fresh has set out several arguments. A brief summary of each is as follows:
- Cafe Fresh submits the issuance of three Determinations – one against Cafe Fresh and one each against Mr. Parker and Bea Parker – is an error because that circumstance inaccurately requires payment of \$53,457.51 which is an amount well in excess of any amount found owing in the Determinations;
 - Cafe Fresh disagrees with the decision of the deciding Delegate to extend the time period for filing a complaint, arguing it was unreasonable for the deciding Delegate to do so;
 - Cafe Fresh disputes elements of findings made by the deciding Delegate relating to: a salary increase; annual vacation pay owed; and the claim for recovery of an unauthorized deduction;
 - Cafe Fresh says the imposition of interest on wages found owing should not have been added because of the length of time it took for the Employment Standards Branch to even start investigating the complaints and the resulting effect of the decision to accept the second complaint; and
 - Cafe Fresh says, in the circumstances, the imposition of the administrative penalties “makes no sense”.

29. Cafe Fresh makes additional submissions that, at their core, either dispute finding made by the deciding Delegate in the Determination or re-cast the facts that were before the deciding Delegate when the Determination was made.

ANALYSIS

30. This case represents another sad circumstance caused by the effects of the Covid-19 pandemic, for which neither the employer nor the employee bears any responsibility. There is no fair result here, but I must apply the requirements of the *ESA* to these circumstances regardless of the result. I empathize with both Cafe Fresh and Ms. Leclerc in this matter.

31. 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.

32. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

33. 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.

34. 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.

35. The first matter raised in the appeal submission is that there were three determinations issued on Ms. Leclerc’s complaints, which, on their face, require payment of a total amount well in excess of what the deciding Delegate found was owed by Cafe Fresh in the corporate determination.

36. Cafe Fresh has not shown there is any reviewable error relating to this matter. The Director of Employment Standards (the “Director”) has not sought to enforce any of the determinations issued on Ms. Leclerc’s complaints. It is premature to assert the Director is seeking more than the amount of wages found owing; the time to complain about whether the Director is seeking more than has been found owing is when actual enforcement is taking place. In any event, it is irrelevant to talk about the officer/director determinations when the only determination before me in this appeal is the corporate determination.
37. This appeal challenges the decision to extend the time period for filing a complaint and accept the second complaint made by Ms. Leclerc. The decision made involved the exercise of a statutory discretion. The relevant provision of the *ESA* states:
- 74 (5) On application, the director may extend the time to deliver a complaint under this section, including making an extension after the time to deliver has expired, if the director is satisfied that:
- (a) special circumstances exist or existed that preclude or precluded the delivering of a complaint within the applicable time period required under subsection (3) or (4), and
- (b) an injustice would otherwise result.
38. Cafe Fresh does not argue the deciding Delegate had no authority to extend the time period. Such authority is clearly expressed in the above provision. Rather, Cafe Fresh says the decision of the deciding Delegate to extend the time period was unreasonable. The appeal, logically viewed, seeks a variance of that discretionary decision and a dismissal of the second complaint.
39. The Tribunal has spoken extensively on the extent to which a discretionary decision of the Director, or a Director’s delegate (in this case the deciding Delegate), may be varied on appeal.
40. The Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, or a Director’s delegate, only doing so in exceptional and very limited circumstances, as noted in the following passage in the Tribunal’s decision in *Re: Jody L. Goudreau and Barbara E. Desmarais of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98:

The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context has been described as being:

...a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’. **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229.

41. In this case, the deciding Delegate made no mistake construing her authority under section 74 of the *ESA* and considered the following matters in deciding to accept the complaint:
- Ms. Leclerc filed her first complaint without knowing, or being capable of knowing, that it would take the Branch 18 months to begin investigating the complaint;
 - The length of time it took to commence an investigation of the first complaint was a special circumstance that precluded Ms. Leclerc from being aware she would need to file a second complaint; and
 - Not accepting the complaint would result in an injustice.
42. I find the deciding Delegate considered factors that were relevant to the question being considered and was made within the legal framework of the *ESA*.
43. There is nothing in the appeal that would convince me that the factors considered by the deciding Delegate were not inclusive of the matters required to be considered, and did not include consideration of irrelevant matters.
44. The Tribunal has also reflected on the excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR, where the Court made the following comments about the exercise of a statutory discretion:
- It is, as well, a clearly-established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. When the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.
45. Within the context of the above quote, I am unable to find there is any basis for interfering with the decision to extend the time period and accept the second complaint.
46. Cafe Fresh alleges the deciding Delegate breached the principles of natural justice.
47. A party alleging a failure to comply with principles of natural justice, as Cafe Fresh has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.
48. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must

be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST #D050/96.

49. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Cafe Fresh was provided with the opportunity required by principles of natural justice to present their position to both the investigating and the deciding Delegate. Cafe Fresh has provided no objectively acceptable evidence showing otherwise and, as a result, this ground of appeal is not established.
50. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made in a determination unless those factual findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03.
51. The test for establishing that findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.
52. To expand the above point, it is not sufficient for Cafe Fresh to simply assert a version of the facts if those assertions are not in accord with the findings of the deciding Delegate; in order to seek a change in the findings of fact made in the Determination, Cafe Fresh is required to show the findings of fact and the conclusions and inferences reached by the deciding Delegate 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.
53. On review of the Determination and the salient parts of the record, I find the findings and conclusions of fact made by the deciding Delegate are firmly supported by the evidence provided.
54. In sum, I am not persuaded the deciding Delegate committed an error of law on the facts and this aspect of the appeal is also rejected.
55. Finally, the provisions of the *ESA* requiring payment of interest on wages found owed in a determination and the imposition of administrative penalties are framed in mandatory language in the legislation: see sections 88 and 98 of the *ESA*, and section 29(1) of the *Employment Standards Regulation*. The Director was required to apply those provisions and the Tribunal has no authority to vary or cancel the effect of the statute.
56. For the above reasons, I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

57. Pursuant to section 115 of the *ESA*, I order the Determination dated December 6, 2022, be confirmed in the amount of \$21,314.99 together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal