Citation: Freshslice Holdings Ltd. (Re)
2023 BCEST 41

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Freshslice Holdings Ltd.
("Freshslice")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2023/039

DATE OF DECISION: June 13, 2023

DECISION

SUBMISSIONS

Armin Safari — on behalf of Freshslice Holdings Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by Freshslice Holdings Ltd. ("Freshslice") of a determination issued by John Dafoe, a delegate (the "deciding Delegate") of the Director of Employment Standards (the "Director"), on December 21, 2022 (the "Determination").

2. The Determination found Freshslice had contravened Part 4, section 40, Part 5, section 46, and Part 7, section 58 of the *ESA* in respect of the employment and termination of Behrooz Rabiei ("Mr. Rabiei") and ordered Freshslice to pay Mr. Rabiei the amount of $8,783.04, an amount that included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of $1,500.00. The total amount of the Determination is $10,283.04.

3. Freshslice filed an Appeal Form with the Tribunal that was received on March 31, 2023, indicating the appeal was grounded on an allegation the Director erred in law and that evidence had come available that was not available when the Determination was being made. Submitted with the Appeal Form were six documents comprising 53 pages.

4. The statutory appeal period expired on January 30, 2023. The Appeal Form was received by the Tribunal just a day more than two months after the appeal period expired.

5. The Appeal Form contained a request for an extension of the appeal deadline to April 6, 2023. No reasons were provided for the requested extension with the Appeal Form. Following a request from the Tribunal, Freshslice provided the following reasons for the requested extension in correspondence dated April 5, 2023:

> We've been able to search out new documents that have come to light that prove Behrooz Rabiei was a manager. We got access to his old emails through our IT department that prove he was a manager through approving budgets and overseeing direct reports.

6. In correspondence dated April 6, 2023, the Tribunal, among other things, acknowledged having received an appeal, requested the section 112(5) record (the "record") from the Director and notified the other parties that submissions on the request for an extension of the appeal period and on the merits of the appeal were not being sought at that time.

7. The record has been provided to the Tribunal by the Director and a copy has been delivered to each of the parties. Both have been provided with the opportunity to object to the completeness of the record.

8. Neither of the parties has raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.

9. 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 submissions filed on the appeal, my review of the material that was before the Director when the Determination was being made, and any additional material allowed to be added to and considered in the appeal. 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 any 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.*

10. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Rabiei 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 the appeal should be dismissed for the failure to file the appeal in the time allowed in section 112 of the *ESA* and whether, in any event, there is any reasonable prospect the appeal will succeed.

ISSUE

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

THE DETERMINATION

12. Freshslice operates a restaurant business in Burnaby, BC.

13. Mr. Rabiei was employed as an IT and Marketing Manager from March 13, 2013 to January 23, 2021. At the time his employment ended, his rate of pay was $60,000.00 a year. Following his termination, Mr. Rabiei filed a complaint alleging Freshslice had contravened the *ESA* by failing to pay overtime wages, statutory holiday pay, and compensation for length of service. The claim for compensation for length of service under the *ESA* was not pursued. Mr. Rabiei filed a Civil Court action relating to his termination. An issue relating to Mr. Rabiei's entitlement to annual vacation pay arose during the investigation.

14. The complaint was investigated by a delegate of the Director (the "investigating Delegate"), who produced an Investigation Report that was provided to Freshslice and Mr. Rabiei. The Determination notes each party was provided the opportunity to review the Investigation Report and respond to it. Neither party provided a response to it.

15. The deciding Delegate found each party had the opportunity to review the evidence collected during the investigation and the arguments submitted by the other party, to respond, and to provide any clarification.

16. The deciding Delegate identified three issues:

1. Was Mr. Rabiei a "manager" within the meaning of the *ESA*;
2. If Mr. Rabiei was not a "manager", was he entitled to overtime and statutory holiday pay; and
3. Did Freshslice owe Mr. Rabiei annual vacation pay?

17. On the first issue, the deciding Delegate found Mr. Rabiei was not a manager of Freshslice within the meaning of that term in the *ESA*. In reaching this finding, the deciding Delegate noted that the person who had represented Freshslice throughout the investigation had not provided any response to Mr. Rabiei's position that he was not a manager. The position of Mr. Rabiei is set out in the Investigating Report as follows:

> He [Mr. Rabiei] advises that his position of marketing manager was in title only. He did not direct or control anyone or any resources. He was given tasks to complete and any actions had to be approved by the Director of Marketing . . .

18. The deciding Delegate reviewed the evidence provided by Mr. Rabiei and concluded that the evidence did not indicate his principal employment duties consisted of supervising or directing human or other resources and, accordingly, that he was not a manager under the *ESA*.

19. On the second issue. the deciding Delegate found that Mr. Rabiei was entitled to overtime wages and statutory holiday pay, that Freshslice had not paid Mr. Rabiei any amounts for those entitlements, and they were owed in the amounts set out in the Determination.

20. On the third issue, the deciding Delegate found Freshslice had not paid Mr. Rabiei all annual vacation pay to which he was entitled, based on total earnings during his annual vacation pay period, and a further amount for annual vacation pay was owed in the amounts set out in the Determination.

21. Based on the conclusions reached, the deciding Delegate found Freshslice had contravened sections 40, 46, and 58 of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

Error of Law

22. Freshslice disagrees with the finding of the deciding Delegate, that Mr. Rabiei's principal duties did not consist of supervising and directing human and other resources. Freshslice submits Mr. Rabiei:

> . . . was a Marketing Manager whose main responsibilities consisted of supervising and directing several Marketing team members and street team members. His duties included ensuring company policies are followed, altering work processes, training employees, and committing or authorizing the use of company resources.
>
> Behrooz was also responsible for managing the Marketing budget and working in an executive capacity. He made decisions regarding what products should be purchased, what services should be provided, from whom should supplies be purchased, and at what price products should be sold.

23. Freshslice has grounded the above assertions on material that it has attached and submitted with the Appeal Form, described as:

> . . . position agreements for employees who directly reported to Behrooz (proving he was a manager) and invoices for marketing and social media services signed off by Behrooz (proving he approved budgets for purchases/services).

New Evidence

24. Freshslice has also grounded its appeal on evidence becoming available that was not available when the Determination was being made. This ground of appeal is commonly referred to as the "new evidence" ground of appeal. While not specifically identified as such in the appeal submission, it is apparent the material submitted with the appeal submission is intended by Freshslice to fall within the "new evidence" ground.

25. Even if that is not their intention, I am unable to treat this material as being presented as anything other than "new evidence". As I shall indicate in my analysis of this appeal, evidence that was available but not provided to the Director before the Determination is made, may not simply be submitted for consideration in an appeal. Whether such material will be considered in an appeal is a matter of discretion which is exercised applying well established principles.

26. In addition to the above-described material, there is a nebulous reference in the appeal submission to a pending civil action Freshslice says it has brought against Mr. Rabiei. The relevance of that information on any aspect of this appeal is not explained, nor is it apparent.

ANALYSIS

27. 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.*

28. 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.

Requested Extension of the Appeal Period

29. I shall first address the request by Freshslice for an extension of the statutory appeal period, as a refusal of that request effectively disposes of this appeal.

30. The *ESA* imposes a deadline on appeals to ensure they are dealt with promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST #D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

> Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

31. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST #D099/96. The following criteria must be satisfied to grant an extension:

1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The responding party and the Director have been made aware of the intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension; and
5. There is a strong *prima facie* case in favour of the appellant.

32. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST #D132/97.

33. I find Freshslice has satisfied none of the criteria that would operate in favour of granting an extension of the appeal period.

34. Freshslice has not provided a reasonable or credible explanation for a delay of two months to file an appeal.

35. The April 5 correspondence does not address the delay or provide an explanation for it. Freshslice's explanation here appears to be that, at some point after the Determination was issued and served upon them, it searched out information which it could use to make this appeal. However, this is not a reasonable basis on which to seek an extension of time to file an appeal. It is a bootstrap rationale that depends entirely on whether this panel accepts the "new documents that have come to light" can properly be characterized as "new evidence" and that it is appropriate to include and consider them in the appeal.

36. As I will address later in these reasons, any material sought to be introduced as new evidence must meet the Tribunal's strict test for the admission of new evidence on appeal and it is not apparent, at first blush, that Freshslice has met the test.

37. The facts do not allow for a conclusion that Freshslice had an ongoing and *bona fide* intention to appeal the Determination.

38. No party was made aware that Freshslice had any intention to seek an appeal of the Determination.

39. There is always a prejudice to the beneficiary of a Determination where the Tribunal grants an extension. The longer the delay, the greater the prejudice. The delay here is excessive.

40. I find there is no *prima facie* case in favour of Freshslice in the appeal. I point out here that except to the extent necessary to determine whether there is a strong *prima facie* case that might succeed, the Tribunal does not consider the merits of an appeal when deciding whether to extend the appeal period. This is not dissimilar to making a finding under section 114(1)(f), that an appeal has no reasonable prospect of succeeding.

41. I will assess the two grounds of appeal chosen by Freshslice to support the above conclusion.

New Evidence

42. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations: whether such evidence was reasonably available and could have been provided during the complaint process; whether the evidence is relevant to a material issue arising from the complaint; whether it is credible, in the sense that it be reasonably capable of belief; and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03.

43. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

44. For the reasons stated below, I do not find the documents provided satisfy the conditions for allowing them as "new evidence".

45. The documents that have been submitted with the appeal submission are not "new". All of this material, according to the dates on the documents, existed at the time Mr. Rabiei's complaint was being investigated. Based on the information provided in the April 5 correspondence, Freshslice was able to "search out" the documents and access Mr. Rabiei's "old emails through the IT department" for the purposes of an appeal. No explanation is given nor has any information been provided that would indicate the material was not reasonably available and could not have been submitted during the investigation of the complaint.

46. None of this material was provided by Freshslice during complaint investigation, even though the position of Mr. Rabiei – that he was not a "manager" within the meaning of the *ESA* – was communicated to the representative for Freshslice, a discussion with him on the manager issue is recorded in the workflow sheet included in the record, and Mr. Rabiei's position is expressed in the Investigation Report. The only written response found in the record from Freshslice on Mr. Rabiei's complaint is found in an e-mail from Freshslice's representative to the investigating Delegate on June2, 2022, stating, simply: "We disagree with the [claim] of . . . Mr. Rabiei most vigorously." It has not gone unnoticed that the person representing Freshslice during the investigation is the same person Mr. Rabiei identified as the Director of Marketing and who Mr. Rabiei said made all of the decisions, approved his work, and exercised all of the real managerial authority. While this person opposed Mr. Rabiei's claims, he did not, in any of the discussions and communications with the investigating Delegate, contend Mr. Rabiei was a manager within the meaning of that term in the *ESA*.

47. If Freshslice considered these documents to be relevant and probative to whether Mr. Rabiei was a manager within the meaning of the *ESA*, it was under some obligation to submit that material to the investigating Delegate in a way that would have allowed Mr. Rabiei to respond.

48. I do not find the material, absent some comparative analysis between that material and the evidence that led the deciding Delegate to conclude Mr. Rabiei was not a manager, to be particularly probative on this issue. The material provided, and the submissions made by Freshslice relative to it, only attempt to do what the deciding Delegate stated in the Determination should not be done, which is to attempt to use titles to determine Mr. Rabiei's status under the *ESA*, rather than focussing on the actual duties performed by him. Simply stating Mr. Rabiei, on paper, is a manager is not determinative where the evidence does not show his principal employment duties bring him within the definition of manager in the *Employment Standards Regulation*.

49. In sum, Freshslice has failed to satisfy the burden on it to demonstrate there is new evidence which should be accepted in the appeal and I exercise my discretion to not accept the documents submitted with the appeal under this ground of appeal.

50. Based on my decision to refuse to accept the documents provided as new evidence, the ground of appeal alleging error of law evaporates. Without reference to the material submitted with the appeal submission, there is no basis for an argument that such material should have led to a different conclusion than was made in the Determination.

51. The appeal must be addressed and decided on the facts found in the Determination unless those findings raise an error of law.

Error of Law

52. An error of law may arise from a misinterpretation or misapplication of the *ESA* or the general law, through an error on the facts – acting without evidence or on a view of the facts that cannot reasonably be entertained – or by adopting a method of assessment that is wrong in principle.

53. There is no suggestion in the submission filed by Freshslice that the deciding Delegate misinterpreted or misapplied the *ESA* or the general law and my assessment of the reasons provided by the deciding Delegate in the Determination confirm that the correct law and principles relating to whether an individual is a manager within the meaning of the *ESA* were applied.

54. While Freshslice disagrees with the conclusion reached by the deciding Delegate on whether Mr. Rabiei was a manager within the meaning of the *ESA*, the argument made by them does nothing more than challenge findings of fact. This characterization of their argument is supported by two aspects of the appeal submission: first, that Freshslice, in baldly stating Mr. Rabiei was a manager, proffers a set of facts that do not accord with the factual findings made in the Determination; and second, that Freshslice has submitted material upon which it seeks to alter the factual findings made by the deciding Delegate.

55. It is well established that 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 by the deciding Delegate unless, as indicated above, the factual findings raise an error of law, either because the deciding Delegate acted without any evidence or acted on a view of the evidence that cannot reasonably be entertained: see *Britco Structures Ltd.*, BC EST #D260/03.

56. A finding of fact is only reviewable by the Tribunal as an error of law on the facts in limited circumstances. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the deciding Delegate committed an error of law on the facts, Freshslice is required to show the findings of fact and the conclusions 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.

57. Based on my assessment of the facts in the record and as found in the Determination, Freshslice has not met the test. The conclusions of the deciding Delegate were adequately supported on the material before him; there is no basis for alleging, or finding, that the deciding Delegate made an error on the facts.

58. To summarize, the grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the deciding Delegate unless such findings raise an error of law. Findings of fact made by the deciding Delegate require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.

59. The appeal provides no other basis for challenging the Determination.

60. I find Freshslice has not shown there is a strong *prima facie* case.

61. As none of the criteria that would operate in favour of extending the statutory appeal period are found in the facts of this case, I decline the requested extension of time.

62. The above conclusion is sufficient to dispose of this appeal.

63. Even if I had been inclined to extend the statutory appeal period, I would still dismiss this appeal as, for the same reasons as I have found Freshslice has shown no strong *prima facie* case in their favour, I find there is no merit to the appeal and no reasonable likelihood it would succeed.

64. For all of the above reasons, this appeal is dismissed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it.

ORDER

65. Pursuant to section 115(1) of the *ESA*, I order the Determination dated December 21, 2022 be confirmed in the amount of $10,283.04, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal