

An appeal

- by -

Turbo Enterprises Ltd. carrying out business as Pearl Castle Cafe
(“Turbo Enterprises”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2014A/151

DATE OF DECISION: January 15, 2015

DECISION

SUBMISSIONS

Yingchen Wang on behalf of Turbo Enterprises Ltd. carrying out business as Pearl Castle Cafe

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Turbo Enterprises Ltd. carrying out business as Pearl Castle Cafe (“Turbo Enterprises”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 1, 2014.
2. The Determination found that Turbo Enterprises had contravened Part 3, sections 17 and 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Haolong Tan (“Mr. Tan”) and ordered Turbo Enterprises to pay wages to Mr. Tan in the amount of \$2,139.45 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$3,639.45¹.
3. Turbo Enterprises has filed this appeal on the grounds that the Director failed to observe principles of natural justice in making the Determination and that evidence has become available that was not available when the Determination was being made. Turbo Enterprises seeks to have the Determination varied or cancelled. The Appeal Form was signed on behalf of Turbo Enterprises by Yingchen Wang, the manager for Turbo Enterprises. The appeal submission was signed by all of the owners of Turbo Enterprises.
4. On November 14, 2014, the Tribunal notified the parties that an appeal had been received from Turbo Enterprises, requested production of the section 112(5) “record” (the “record”) from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
5. The “record” was provided by the Director to the Tribunal and a copy was sent to Turbo Enterprises, who was advised of their right to object to the completeness of the “record”.
6. There has been no objection and, accordingly, the Tribunal accepts it as complete.
7. Consistent with the December 29, 2014, notice, I have reviewed the appeal, including the attachments submitted by Turbo Enterprises with the appeal submission as “new” or additional evidence, and the “record”.
8. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal, my review of the “record” that was before the Director when the Determination was being made and any additional material that may be allowed and considered. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

¹ There is a typographical error in the Determination, where the Total Amount Payable is incorrectly stated as \$2,639.45 rather than \$3,639.45. This error is corrected under section 123 of the *Act*.

- 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 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.*

9. I am deciding whether the appeal has any reasonable prospect of success or should be dismissed under section 114(1) of the *Act*. If satisfied the appeal should not be dismissed, Mr. Tan will, and the Director may, be invited to file further submissions. On the other hand, if it is found appropriate that the appeal not be allowed to proceed, it will be dismissed under section 114(1) of the *Act*.

ISSUE

10. The issue being considered at this stage of the proceeding is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

11. Turbo Enterprises operates a restaurant. Mr. Tan was employed as a chef from February 1, 2014, to April 10, 2014, at a rate of \$12.00 an hour. Following Mr. Tan terminating his employment, he filed a complaint under the *Act*, alleging Turbo Enterprises had not paid him wages for the period March 1, 2014, to April 14, 2014.
12. There was an unsuccessful attempt to mediate a resolution to the complaint.
13. The Director conducted a complaint hearing on September 25, 2014. No representative of Turbo Enterprises attended the complaint hearing. The Determination outlines the efforts to ensure Turbo Enterprises was notified of the hearing date and was provided with relevant information regarding Mr. Tan's complaint and the complaint hearing process. The "record" shows, and the Determination indicates, a Notice of Complaint Hearing and a Demand for Employer Records were sent on July 14, 2014, by registered mail to Turbo Enterprises at their operating address and were delivered to that address on July 17, 2014. The Determination also outlines an attempt by the Director on September 11, 2014, to contact Qi Tao, a director and officer of Turbo Enterprises, by telephone concerning the hearing and the failure of Turbo Enterprises to respond to the Demand for Employer Records.
14. The Determination also records a discussion on September 12, 2014, between the Director and Yi Zhao, another director and officer of Turbo Enterprises, during which Mr. Zhao was advised that, if not resolved before September 25, 2014, the complaint hearing would proceed as scheduled. Following that discussion, the Director sent Mr. Yao an e-mail with attachments containing a cover letter, Mr. Tan's records and Mr. Tan's complaint. These documents were also sent by regular mail to Turbo Enterprises at their operating address.

15. At the complaint hearing Mr. Tan gave evidence. As noted above, Turbo Enterprises did not attend.
16. The Director accepted Mr. Tan's evidence and found he had not been paid wages in accordance with the *Act*. Accordingly, the Director awarded Mr. Tan wages in the amount shown in the Determination and imposed administrative penalties on Turbo Enterprises.

ARGUMENT

17. In its appeal submission, Turbo Enterprises lists several reasons for filing an appeal.
18. First, Turbo Enterprises says the Director erred in finding Mr. Tan was employed at a rate of \$12.00 an hour, asserting their records show his hourly rate was \$10.25. In support of this assertion, Turbo Enterprises has filed an "anonymous" payroll record (not Mr. Tan's payroll record) allegedly showing another person employed as a chef at the café was earning \$10.25 an hour.
19. Next, Turbo Enterprises challenges the Director accepting Mr. Tan's evidence that he had no breaks during his shift as he had to be available at all times for customer orders, contending Mr. Tan, as all other employees, received a 30 minute break.
20. Third, Turbo Enterprises says there were reasons for not paying Mr. Tan his wages for March.
21. Fourth, Turbo Enterprises says Mr. Tan breached several agreements by quitting his employment. Turbo Enterprises submits Mr. Tan "didn't take responsibility as an employee, which led to this situation." In the circumstances, Turbo Enterprises says it is unfair to impose penalties and interest.
22. Their argument demands Mr. Tan provide his SIN card and complete the company's "New Hire Personal Information Confirmation Form" at which time, it says, his wages will be recalculated and paid.
23. Turbo Enterprises submits the Director was told the owners were very busy and had no time to attend a hearing or talk with the Director. The appeal submission attaches "all the records and evidence" from Turbo Enterprises and says that, after checking, Turbo Enterprises found Mr. Tan is owed wages for 104.5 hours of work, payable at a rate of \$10.25 an hour.

ANALYSIS

24. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
25. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, 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.*

26. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112 of the *Act*. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.
27. This appeal is grounded in a claim that the Director failed to observe principles of natural justice in making the Determination, although Turbo Enterprises has done nothing in the appeal submission to show facts supporting this ground. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:
- 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 *BWT Business World Incorporated*, BC EST #D050/96)
28. It is clear from the “record” that Turbo Enterprises was afforded the procedural rights contemplated by the above statement, which, I note, are also statutorily protected by section 77 of the *Act*.
29. There is no merit whatsoever to this ground of appeal.
30. Turbo Enterprises also relies on evidence becoming available that was not available when the Determination was being made.
31. The Tribunal is given discretion to accept or refuse new or additional evidence. When considering this ground of appeal, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including 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. New or additional 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 *Act*.
32. There are three reasons for finding there is no basis for allowing or considering the documents that are attached to the appeal filed by Turbo Enterprises.
33. First, it is apparent that all of this evidence existed at the time the Determination was being made. If Turbo Enterprises believes this evidence is important, it should have been provided to the Director during the complaint process. I also observe some of the evidence it seeks to attach to this appeal is material that was required to be provided in response to the Demand for Employer Records, with which Turbo Enterprises failed or refused to comply.

34. Second, the facts sought to be provided in the additional evidence represented with the appeal are, on their face, neither credible nor probative.
35. Third, to allow this “new” evidence to be considered, or indeed to allow this appeal to proceed at all, would require the Tribunal to ignore the long established principle enunciated in cases such as *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, which states that barring special circumstances parties may not fail or refuse to cooperate in the complaint process and later seek to file an appeal of the Determination when they disagree with it. In this case Turbo Enterprises failed to respond to the Demand for Records and failed to attend the complaint hearing. Their failure to respond to the Demand and their failure to attend the complaint hearing compels a finding that they may not now seek to challenge the Determination using arguments and evidence that could have been made had they decided to participate in the process.
36. This ground of appeal also has no merit whatsoever.
37. At its root, this appeal simply expresses disagreement with findings of fact made by the Director and conclusions reached from those findings and seeks to alter them. As indicated above, the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation.
38. Turbo Enterprises challenges several findings of fact made by the Director in the Determination but does not rely on error of law as a ground of appeal. The response to these challenges is that there is no basis for them for at least two reasons. First, as indicated above, the Tribunal has no authority to consider an appeal based simply on a dispute with findings of fact. Second, it was entirely reasonable and appropriate for the Director to rely on the evidence provided by Mr. Tan. An analysis of the findings in this case show there is nothing perverse or inexplicable in the findings made; they are rational and firmly grounded in the evidence provided by Mr. Tan, accepted and recorded in the “record”. In result, the findings made in the Determination stand unaffected by anything in the appeal.
39. Looked at in its entirety this appeal is, on its face, frivolous and borders on abuse of process.
40. Turbo Enterprises has also challenged the imposition by the Director of three administrative penalties. This argument has no merit. Administrative penalties are mandatory where the Director makes a Determination and imposes a requirement: see section 98. The contraventions in this case were clear and discrete, relating to separate and distinct obligations under the *Act*. The Director was required to impose a penalty in respect of each of the contraventions found to have occurred: see *537370 B.C. Ltd. operating as Ponderosa Motor Hotel*, BC EST # D011/06 at paras. 15-16.
41. Turbo Enterprises seeks to have the interest added to the wages found owing cancelled. There is no basis for this submission, either. Like section 98, section 88 of the *Act* imposes a mandatory requirement for the payment of interest on wages or another amount found owing under the *Act* to an employee.
42. In sum, an assessment of this appeal shows it has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

43. I dismiss the appeal and confirm the Determination.

ORDER

44. Pursuant to section 115 of the *Act*, I order the Determination dated October 1, 2014, be confirmed in the amount of \$3,639.45, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal