

An appeal

- by -

Nath Investment Group Ltd.
(“Nath”)

- 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: Carol L. Roberts

FILE No.: 2015A/179

DATE OF DECISION: February 12, 2016

DECISION

SUBMISSIONS

Yunal Nath

on behalf of Nath Investment Group Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Nath Investment Group Ltd. has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on June 18, 2015. In that Determination, the Director found that Nath Investment Group Ltd. (“Nath”) and 0998422 B.C. Ltd. (“0998422”) carrying on business as Ice Taphouse and Grill (collectively, the “Employer”) should be treated as one employer under section 95 of the *Act*, and that they were jointly and severally responsible for outstanding wage entitlements. The Director ordered the Employer to pay the amount of \$38,764.11, representing wages, annual vacation pay, compensation for length of service and interest. The delegate also imposed six administrative penalties for the contraventions, in the total amount of \$3,000. The deadline for filing an appeal of the Determination was 4:30 p.m. July 27, 2015.
2. Nath appeals the Determination contending that the delegate erred in law and failed to observe principles of natural justice in making the Determination.
3. Nath filed its appeal on December 21, 2015, and sought an extension of time in which to file the appeal.
4. This decision is based on Nath’s written submissions and the section 112(5) “record” that was before the delegate at the time the decision was made.

FACTS AND ARGUMENT

5. Six individuals filed complaints alleging the Employer had contravened the *Act* in failing to pay wages, annual vacation pay and compensation for length of service.
6. On May 28, 2015, a delegate of the Director wrote to Margaret Preston (“Ms. Preston”), a Director of 0998422, and Yunal Nath (“Mr. Nath”), a Director of Nath, informing them that an investigation into the complaint had disclosed information that the companies were associated for the purpose of carrying on a business as Ice Taphouse & Grill. The letter indicated that the Director could treat corporations or business entities as one employer under section 95 of the *Act*, and that a Determination could be issued making that finding. The letter further indicated that a preliminary finding had been made that the *Act* had been contravened and wages were owed in the amount of \$38,238.97. The letter stated that further administrative penalties would be imposed for each contravention, and that directors and officers were personally liable for up to two months wages owed to each employee.
7. The May 28, 2015, letter indicated that on March 6, 2015, a Notice of Complaint hearing scheduled for April 29, 2015, and Demand for Records, as well as a letter outlining possible consequences of non-responsiveness to the complaints was sent to 0998422 by registered mail. The letter outlined the history of notifying 0998422 and Ms. Preston of the complaints and issuing demands for Employer records in respect of those employees. The letter also noted that on May 22, 2015, a delegate of the Director left Mr. Nath a telephone message with her name and contact number to discuss the complaints. The letter requested that if Mr. Nath and Ms. Preston wished to respond to the preliminary findings they were to do so by June 8, 2015.

8. The letter was sent by registered mail to 0998422's registered and records office, Nath's registered office, Mr. Nath and Ms. Preston. Canada Post confirmed that the letter was successfully delivered to Mr. Nath on June 2, 2015.
9. On June 5, 2015, Mr. Nath telephoned the Employment Standards Branch. In a voice mail message he confirmed that he had received the letter and inquired into the complaint. In his message, Mr. Nath stated that the employees were "not his employees" and provided a contact telephone number. When a delegate attempted to return Mr. Nath's call, she received a message stating that his voice mailbox was full.

ARGUMENT

10. Mr. Nath contends that the Determination was "brought to [his] attention" on November 28, 2015. He says that the appeal is late "[d]ue to the wrong addressee listed on the delivered documents":

We received a phone call from our lawyer which brought this matter into understanding and was unresponsive prior to this date due to lack of physical documents pertaining to the matter, in order to complete the tribunal. [reproduced as written]

11. Nath contends that it had not employed the complainants nor "negotiated any business motives upon the opening, or prior to, the commencing date of the business". Mr. Nath also asserts that Nath did not have any association with Ice Taphouse & Grill or 0998422. Finally, Mr. Nath says that "[n]o employee, debts/assets and or accounts were assumed when Nath Investment Group Ltd. leased the space that was open for lease where Ice Taphouse engaged in business prior to".

ANALYSIS

12. Section 114(1) of the *Act* provides that 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, 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.
13. Section 112(3) of the *Act* provides that a party wishing to appeal a Determination must deliver that appeal to the Tribunal within 30 days of the date of the Determination, if the person was served by registered mail.
14. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.

15. The appeal was not filed within the applicable time limit. I find Nath's explanation for filing the appeal almost five months after the statutory time period for doing so to be unsatisfactory and lacking any detail. Mr. Nath does not say when his lawyer received the Determination or what physical documents were necessary in order to file the appeal in a timely manner. As Mr. Nath did not provide any documents with his appeal submission, it is unclear what physical documents were required.

16. Furthermore, I find no reasonable prospect the appeal will succeed.

Failure to observe the principles of natural justice

17. Although Nath contends that the Director failed to observe the principles of natural justice, there is nothing in the appeal documentation that refers to this ground of appeal.

18. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. The record confirms that Mr. Nath received, by registered mail, the results of the Director's preliminary assessment of the complaint. The record also indicates that Mr. Nath confirmed receipt of that letter in a subsequent telephone call to the delegate. Therefore, I find that Nath was aware of the allegations, as well as his potential liability for the wages owed to the complainants and had every opportunity to respond.

19. As I understand Nath's appeal submission, it is that the delegate erred in law in associating Nath with 0998422 under section 95 of the *Act*.

20. Under section 95, the Director may declare two or more corporations (or other entities) to be "associated" in which case all of the associated entities are treated as one person for purposes of the *Act* and, as such, are jointly and severally liable for unpaid wages that may be owed by any one of the associated entities.

21. Section 95 of the *Act* reads as follows:

Associated employers

95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination... or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

22. Nath provides no evidence to support its argument. Furthermore, the record contains ample evidence upon which the delegate could have made this decision.

23. The complainants were employed at Ice Taphouse & Grill for periods between July 2014 and March 2015. The complainants informed the delegate during a fact-finding session that the business, or part of it, had been sold and the new owner's name was "Yunal". The complainants also provided the delegate with a telephone number for "Yunal". That number was the same telephone number that Mr. Nath left at the Branch when he responded to the delegate's preliminary assessment letter.

24. Two of the complainants indicated that they attended a meeting in late February or early March 2015 at which Mr. Nath had been in attendance. At that meeting, the staff was informed that Mr. Nath would be taking over and “looking after back wages”. Two of the complainants indicated that they observed Mr. Nath at the restaurant’s office and that when they spoke to him about their wages, he said the wages were the problems of the previous management.
25. The record also contains a cheque issued by Nath on March 1, 2015, to one of the complainants in the amount of \$1,888.41. The cheque is identified as being for “Payroll Ice”. The complainant indicated that he attempted to cash the cheque for three days but was informed there were insufficient funds in the account.
26. In my view, there was sufficient evidence for the delegate to associate the companies. Further, Nath provided no contrary evidence even when given the opportunity to do so.
27. I find no grounds for Nath’s assertion that the delegate erred in law.
28. The appeal is dismissed.

ORDER

29. Pursuant to section 114(1) of the *Act*, I dismiss the appeal. Pursuant to section 115(1)(a) of the *Act*, I Order that the Determination, dated June 18, 2015, be confirmed in the amount of \$41,764.11 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal