

An appeal

- by -

Ming & Sing Chinese Express Panorama Ltd.
(“Ming & Sing”)

- 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.: 2017A/30

DATE OF DECISION: April 24, 2017

DECISION

SUBMISSIONS

Ritu Mahil

counsel for Ming & Sing Chinese Express Panorama Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Ming & Sing Chinese Express Panorama Ltd. (“Ming & Sing”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 31, 2017.
2. The Determination found Ming & Sing had contravened Part 3, sections 17 and 18 and Part 4, section 40 of the *Act* in respect of the employment of thirteen former employees (collectively, “the complainants”) and ordered Ming & Sing to pay the complainants wages in the amount of \$11,097.35 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$12,597.35.
3. This appeal is grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. Ming & Sing seeks to have the Determination cancelled.
4. The Appeal Form was accompanied by a request to extend the time period for filing an appeal.
5. In correspondence dated March 15, 2017, the Tribunal acknowledged having received an appeal, requested Ming & Sing to provide written reasons and argument for the grounds of appeal, together with any supporting documents, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The record has been provided to the Tribunal by the Director. A copy has been delivered to legal counsel for Ming & Sing and an opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
7. No written reasons and argument for the appeal have been received by the Tribunal.
8. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. 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) of the *Act*, 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 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. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the complainants 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 will succeed.

ISSUE

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

THE FACTS

11. Ming & Sing operated a restaurant business. The business shut down as of October 17, 2016.
12. Two of the complainants filed complaints that Ming & Sing had contravened the *Act* by failing to pay regular and overtime wages, statutory holiday pay and compensation for length of service. As a result of a Demand for Employer Records and a review of the records produced, it was revealed that other former employees of Ming & Sing were owed wages. There was a period for which Ming & Sing was unable to provide records and for that period, the Director accepted information provided by a complainant.
13. A calculation of the wages owed to these employees was made and a preliminary assessment of the wages owed to each of the complainants was provided to Ming & Sing in December 2016 for their consideration and response.
14. A date was provided for a response to the preliminary assessment. Ming & Sing requested an extension and it was provided by the Director. A second extension was requested and a further, brief, extension was granted by the Director. On January 6, 2017, Peter Ly, one of the directors and officers of Ming & Sing responded, indicating only that neither he nor the business could pay the outstanding wages.
15. The Director found each of the complainants was owed wages. Some of the complainants were owed statutory holiday pay and complainants who were employed as of October 17, 2016, and had been employed for more than three consecutive months at the business were owed compensation for length of service. The Director awarded employees concomitant annual vacation pay and interest on the wage amounts found owing to them.
16. The Director found Ming & Sing had contravened sections 17, 18 and 40 of the *Act* and imposed administrative penalties for those contraventions.

ARGUMENT

17. Ming & Sing has made no argument on the appeal that might show there is an error in the Determination on one of the statutory grounds.

ANALYSIS

18. 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.*
19. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
20. 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.
21. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
22. The grounds of appeal listed above 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 Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
23. The onus is on the appellant, Ming & Sing, to demonstrate that a ground of appeal they have identified on the Appeal Form is made out.
24. The Appeal Form asks an appellant to provide a detailed submission on why the appeal should be allowed. It is not for the Tribunal to divine what matters of fact and law an appellant might have in mind when a particular ground of appeal is identified. An appellant must take care to set them out in sufficient detail to make clear the substantive basis for selecting a particular ground of appeal. It is only when the context is explained in this manner that it becomes possible for the Tribunal to properly consider, and decide, a ground of appeal.
25. This means an appellant must marshal and present all the arguments and facts on which they intend to rely either with the appeal or, if requested by the appellant, within a period allowed by the Tribunal. This is consistent with a purpose of the legislative scheme set out in section 2 of the *Act*, which is to provide fair and efficient procedures for resolving the disputes which arise under it. In the absence of unusual circumstances, the timelines for filing appeals, and providing submissions, will be strictly enforced.
26. Ming & Sing was given a period beyond the statutory appeal period to provide written reasons, argument and any supporting documents for the grounds of appeal chosen. They neither met the deadline for filing a submission nor have they provided any submission on the appeal after that deadline.
27. In the absence of any argument, the Tribunal is unable to assess the merits of the grounds of appeal chosen and, as a result, Ming & Sing has not met the burden of demonstrating there is any error in the Determination on the chosen grounds of appeal.

28. For the above reasons, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

29. Pursuant to section 115 of the *Act*, I order the Determination dated January 31, 2017, be confirmed in the amount of \$12,597.35, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal