

An appeal

- by -

Sandra Taylor and Wayne Taylor carrying on business as California Dreams Hair
Studio

(“California Dreams”)

- of a Determination issued - 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.: 2013A/25

DATE OF DECISION: June 11, 2013

DECISION

SUBMISSIONS

Wayne Taylor

on his own behalf and on behalf of Sandra Taylor carrying on business as California Dreams Hair Studio

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Sandra Taylor (“Ms. Taylor”) and Wayne Taylor (“Mr. Taylor”) carrying on business as California Dreams Hair Studio (“California Dreams”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 13, 2013.
2. The Determination found that California Dreams had contravened Part 8, section 63 of the *Act* in respect of the employment of Samantha Lambert (“Ms. Lambert”) and ordered California Dreams to pay wages to Ms. Lambert in the amount of \$205.57 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$705.57.
3. California Dreams has filed an appeal of the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. The Tribunal has discretion, under section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*, to choose the type of hearing for deciding an appeal and has decided the matters raised in this appeal can be decided from the Determination, the written submission filed by California Dreams, and the section 112(5) “record” filed by the Director.
5. The appeal was filed late, and California Dreams has requested the Tribunal extend the time period for filing an appeal. In correspondence dated May 2, 2013, the Tribunal 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.
6. Consistent with this notice, I have reviewed the appeal, the section 112(5) “record” and the submission filed by California Dreams.

ISSUE

7. There are two issues to be considered at this stage of the proceedings: first, whether the Tribunal should extend the appeal period; and second, whether, in any event, there is any reasonable prospect the appeal can succeed.

THE FACTS

8. The facts relating to the issue of the timeliness of the appeal are as follows:
 1. The Determination was issued on March 13, 2013;
 2. The time limited for filing an appeal expired on April 22, 2013;

3. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;
 4. The web site address and the telephone number of the Tribunal are also clearly expressed in the Determination; and
 5. The appeal was not delivered to the Tribunal until May 2, 2013.
9. The facts relating to the merits of the appeal are as follows:
1. Ms. Lambert filed a complaint alleging California Dreams had failed to pay all wages owing to her upon termination of her employment, including length of service compensation;
 2. The only aspect of the claims made by Ms. Lambert not resolved through the Director's mediation process was the claim for length of service compensation;
 3. The Director conducted a complaint hearing on that issue;
 4. In the complaint hearing, California Dreams asserted Ms. Lambert quit her employment, while Ms. Lambert says she was fired;
 5. California Dreams did not allege cause, although it was asserted that Ms. Lambert was frequently late and was "on probation" at the time her employment terminated;
 6. The Director received evidence from the parties, which included evidence from Mr. Taylor, Ms. Taylor, and Michelle McLauchlan (by telephone) on behalf of California Dreams and from Ms. Lambert and Ingrid McKellar on behalf of the complainant. The Director was also provided a notarized statement by California Dreams from Nicole Hawley, which the Director found did not outweigh the oral testimony given at the hearing by Ms. Lambert;
 7. The Director analyzed the evidence, made findings on the evidence and provided reasons for those findings; and
 8. The Director found California Dreams had failed to demonstrate Ms. Lambert was not entitled to length of service compensation and on that basis awarded her wages under section 63 of the *Act* equivalent one weeks' wages.

ARGUMENT

10. In respect of the late filing of the appeal, California Dreams submits they didn't realize an appeal had to be submitted to both the Director and the Tribunal.
11. On the issue relating to the merits of the appeal, California Dreams recites elements of the evidence that was provided to the Director at the complaint hearing, adding some new, but not particularly relevant, facts to the file. While not specifically expressed as such, California Dreams appears to object to the Director making findings on the evidence that went against the assertions made and evidence provided by them at the complaint hearing. The submission of California Dreams reasserts their position that Ms. Lambert was not fired, but rather quit her employment.

ANALYSIS

12. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: see section 2(d). The *Act* allows the 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 time limits for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with the 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.

13. 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 should be satisfied to grant an extension:
 1. There is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
 2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 3. The respondent 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.
14. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97.
15. Other than to provide an explanation for the delay, California Dreams has not attempted to demonstrate the existence of other relevant criteria. While the delay in this case is not significant, for the appellant to say, in effect, they failed to read the very clear and distinct instructions in the Determination for filing an appeal is not a good or sufficient reason for filing late.
16. In any event, one of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. The presumptive merits of an appeal also stand as a consideration on which an appeal may be dismissed under section 114(1) of the *Act*, 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 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.

17. When considering the relative merits of an appeal, the Tribunal considers the basis for the appeal and applies that to the statutory grounds of appeal and to well established principles which operate in the context of appeals generally and, more particularly, to the particular issues raised by the appeal.
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 made.
19. 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 that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director. In this context an error of law, the Tribunal has adopted the 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.
20. Applying the above definition to this appeal, I find no error of law has been shown. Specifically, California Dreams has not shown any error of law relating to the findings of fact made by the Director in the Determination. On any analysis of the Determination, it is apparent the Director considered and weighed all the evidence provided by or on behalf of the parties. The Director was entitled to decide to accept or not accept the evidence received from the parties at the complaint hearing and, if accepted, decide what weight would be given to that evidence. The reasons for the choices made by the Director were provided in the Determination. Those reasons are rational and relevant and do not show an error of law; as such, they cannot form the basis for an appeal under section 112 of the *Act* on error of law.
21. California Dreams has also alleged the Director failed to observe principles of natural justice in making the Determination. In the context of the complaint process conducted in this case, the notion of “natural justice” required the Director to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way; see *Imperial Limousine Service Ltd.*, BC EST # D014/05. That requirement substantially echoes what is set out in section 77 of the *Act*.

22. The basis for the “natural justice” ground is not specifically identified or argued in the appeal submission. I can see nothing in the appeal that raises any concern that the Director failed to accord the parties the required procedural rights. The only possible basis for raising this ground of appeal seems to be to the same disagreement expressed by California Dreams under the “error of law” ground relating to the findings made by the Director on the evidence provided. However, as long as the process exhibits the required elements of procedural fairness, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long, as indicated earlier, reasons are provided for the choices made and those reasons are based on relevant considerations, which I find they were in this case. In deciding the merits of the complaint, the Director has to make some choices between the competing positions of the parties. The choices were made in this case and the reasons for those choices were explained in the Determination. California Dreams may not like the choices made, but that does not provide a basis for finding a failure to observe principles of natural justice.
23. In reality, the sum and substance of this appeal is simply to request the Tribunal interfere with findings and conclusions of fact made by the Director without there being any error of law or natural justice concern in respect of those facts being demonstrated in the appeal. As indicated above, the authority of the Tribunal in respect of appeals challenging findings of fact or seeking to have the Tribunal re-visit and alter findings of fact is limited. There is no statutory basis made out in this appeal for the Tribunal to revisit the Determination and I find the appeal as a whole shows no *prima facie* case and lacks any presumptive merit.
24. The absence of any *prima facie* case or presumptive merit to the appeal militates strongly against allowing an extension of the statutory time period. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
25. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Determination dated March 13, 2013, be confirmed in the amount of \$705.57, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal