

An appeal

- by -

0947584 B.C. Ltd. carrying on business as Under the Bridge
(“Under the Bridge”)

- 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.: 2013A/34

DATE OF DECISION: July 16, 2013

DECISION

SUBMISSIONS

Justin Eveline

on behalf of 0947584 B.C. Ltd. carrying on business as
Under the Bridge

OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) 0947584 B.C. Ltd. carrying on business as Under the Bridge (“Under the Bridge”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on March 28, 2013. In that Determination, the Director ordered Under the Bridge to pay its former employees, Sharlynn K. A. Morrison and Chelsey K. Prior, \$1,658.76 in wages, overtime, vacation pay, compensation for length of service and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for Under the Bridge’s contravention of sections 18 and 46 of the *Act*, for a total amount payable of \$2,658.76. The date for appealing the Determination was 4:30 p.m. May 6, 2013.
2. On May 30, 2013, Under the Bridge filed an appeal of the Determination, contending that the delegate failed to comply with principles of natural justice in making the Determination. The Tribunal disclosed the appeal submission to the Director and a redacted copy to each of the complainants. Although Mr. Eveline initially disagreed with the contents of the record, he subsequently confirmed, in a telephone conversation with Tribunal staff that he did not object to the completeness of the record.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based on Under the Bridge’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under Section 114 (1), the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

5. Briefly, the facts and argument before the delegate are as follows.
6. Chris Meakings operated a family restaurant in the Ashcroft River Inn in Ashcroft, B.C., at which both Ms. Morrison and Ms. Prior were employed. The restaurant experienced financial difficulties in July 2012 and closed for several weeks. On or about August 1, 2012, Justin Eveline assumed the operation of the restaurant under the name Under the Bridge, and operated the business until January 23, 2013.
7. Ms. Morrison and Ms. Prior (the “Complainants”) said that they worked for Under the Bridge; Ms. Morrison as a kitchen manager, Ms. Prior as a server, for periods in January 2013. Both filed complaints with the Employment Standards Branch alleging that Under the Bridge had failed to pay them their wages from January 15 to 24, 2013.

8. Ms. Prior alleged that she worked regular shifts as a server from April 8, 2012, until her employment was terminated on January 24, 2013. She said that the restaurant was shut down for two weeks in July 2012 due to financial difficulties. The restaurant re-opened in August under Mr. Eveline's control. When Ms. Prior showed up for her January 23, 2013, scheduled shift, Mr. Eveline was not present, and he never returned to the restaurant. When she attempted to contact him, she discovered that he had changed his phone number, address, and had blocked her from his Facebook account. When Ms. Prior had no further communication from Mr. Eveline, she believed that he had abandoned the restaurant and she did not return to work.
9. Ms. Morrison said that she was employed by Under the Bridge from January 15 to 23, 2013. She said that although she was hired as a Kitchen Manager, she did not supervise or direct any employees or resources. Rather, she said, her duties were cooking and serving. She did not have a regular schedule. She said that her employment ended when Mr. Eveline abandoned the business on January 23, 2013.
10. The delegate issued a Demand for Employer Records on February 20, 2013. Those records were to be provided no later than March 7, 2013. Although Mr. Eveline acknowledged receipt of the Demand, he provided no records. Mr. Eveline advised the delegate that Under the Bridge employed Ms. Prior but not Ms. Morrison. He asserted that Ms. Prior and Ms. Morrison were not entitled to wages from January 15 until January 24, 2013, because they did not perform any work. He also contended that Ms. Prior's employment had been terminated for "just cause".
11. The delegate interviewed two employees of the Ashcroft River Inn: Starla Dixon and Anita Dick. Ms. Dixon, who has been employed by the Inn for approximately five years, advised the delegate that she had observed both Ms. Prior and Ms. Morrison working at the restaurant until it ceased to operate. She said that Ms. Prior worked five days a week, with Sunday and Monday off. Ms. Dixon was unsure of Ms. Morrison's schedule as she had only begun working. Ms. Dixon told the delegate that Mr. Eveline abandoned the business.
12. Ms. Dick, the general manager of the Inn, also said that Mr. Eveline abandoned the restaurant on or about January 24, 2013. She also observed Ms. Morrison working in the restaurant in January 2013 until it closed.
13. The delegate relied on the evidence of Ms. Dick and Ms. Dixon to resolve the issues in dispute. He found both to be independent and reliable witnesses who had personally observed Ms. Prior and Ms. Morrison at the restaurant. Based on all the evidence, the delegate determined that the restaurant closed on January 24, 2013, and that both Ms. Prior and Ms. Morrison worked at the restaurant between January 15 and 24, 2013.
14. In the absence of Under the Bridge's failure to supply payroll records, the delegate considered Ms. Prior's and Ms. Morrison's oral evidence as the best evidence of their hours of work.
15. The delegate found that Ms. Morrison was not a manager as defined in section 1(1) of the *Employment Standards Regulation* (the "Regulation") and was thus entitled to overtime wages, and calculated her wages and vacation pay based on her oral evidence about her hours of work.
16. The delegate determined that Ms. Prior was entitled to wages, vacation pay and compensation for length of service. He found no evidence to support Under the Bridge's contention that Ms. Prior's employment was terminated for cause.

Argument

17. Mr. Eveline said that he did not receive a copy of the Determination until May 30, 2013, and requested an extension of time in which to file his appeal.

18. Mr. Eveline says that the delegate did not make appropriate efforts to obtain his evidence before issuing the Determination. He said that he was “completely unaware” of what was happening until a bailiff appeared at his door on May 29, 2013. Mr. Eveline said that he spoke with the delegate at the beginning of February 2013 at which time the delegate asked him to submit all the payroll records to his office and told him that he would contact him again if he required any further information. Mr. Eveline says that he did not hear from the delegate again.
19. Mr. Eveline asserts that Ms. Prior was fired for “theft” and “causing a seen” in the restaurant and that although Ms. Morrison did some casual work for “cash”, she was never an employee. Mr. Eveline further argues that Ms. Prior and Ms. Morrison are seeking wages from January 16 to 24, 2013, even though the business was closed at this time.
20. Mr. Eveline included Ms. Prior’s payroll records with Under the Bridge’s appeal submissions. These records were identical to those contained in the record.

ANALYSIS

21. Section 114 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 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.
22. Having reviewed the Section 112 record and Under the Bridge’s submissions, I dismiss the appeal.
23. 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 made.
24. Section 112(2) provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
25. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.

26. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
27. The appeal, dated May 30, 2013, was received by the Tribunal the same day, 24 days after the deadline for filing an appeal. Mr. Eveline says he became aware of the appeal on May 29, 2013, after the bailiff appeared at his door.
28. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (i). there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - (ii). there has been a genuine, ongoing *bona fide* intention to appeal the determination;
 - (iii). the respondent party as well as the director has been made aware of this intention;
 - (iv). the respondent party will not be unduly prejudiced by the granting of an extension; and
 - (v). there is a strong *prima facie* case in favour of the appellant.
29. These criteria are not exhaustive.
30. I am not persuaded Mr. Eveline has a reasonable and credible explanation for his failure to request an appeal within the statutory time limit. I note that the address on Mr. Eveline's appeal submission is the same address as all of the correspondence sent by the Director, and which were returned as "unclaimed". I also note that Mr. Eveline's email address is the same as the one used by the Director in all email correspondence.
31. Similarly, I find no genuine, ongoing *bona fide* intention to appeal the Determination.
32. For the reasons that follow, I also find that Under the Bridge has not established a strong *prima facie* case on appeal.
33. Under the Bridge's ground of appeal is that the Director failed to observe the principles of natural justice in making the Determination.
34. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
35. Mr. Eveline asserts that the delegate did not use "due diligence" in his attempts to contact him.
36. The record confirms that on January 31, 2012, the Director of Employment Standards sent Under the Bridge information on the complaints and requested Mr. Eveline's participation in a mediation in an effort to resolve them. The letter indicated that if Mr. Eveline did not respond by February 15, 2013, the Director would determine the complaints by way of investigation.
37. On February 21, 2013, the Director issued a Demand for Employer Records, including all payroll records relating to wage, hours of work and conditions of employment, as well as "any and all documents" relating to the termination of any employee. Those records were to be produced by March 7, 2013. The Demand letter stated "failure to produce these records as required will result in a Determination being issued" and outlined the penalty provisions of the *Regulation* for any contraventions. The Demand was sent by registered mail to

an Ashcroft address as well as the Maple Ridge address used by Under the Bridge in the appeal submission. It was also sent by regular mail and by email. Although the Demand letters were returned to the Director as unclaimed, Mr. Eveline acknowledged receipt of the correspondence sent by email. Mr. Eveline acknowledges speaking to the delegate by telephone at the beginning of February 2013.

38. On March 12, 2013, the delegate wrote to Mr. Eveline to inform him of the progress of the investigation. The letter outlined Ms. Prior's and Ms. Morrison's allegations in greater detail and contained Mr. Eveline's responses as well as the statements of the witnesses. The letter noted that the delegate had received no response to the Demand letter. The delegate outlined the statements Mr. Eveline had made to him by telephone on February 20, 2013, as well as Mr. Eveline's assurances that he would have payroll records and other evidence to him by March 7, 2013. The delegate noted that no information had been provided.
39. The delegate's March 12, 2013, letter informed Mr. Eveline that he had a final opportunity to respond to the complaints and advised him to submit whatever information he had no later than March 15, 2013. The delegate also advised Mr. Eveline that if wages were determined to be outstanding and the Director could not recover any assets from Under the Bridge, the Director would pursue outstanding wages from any Under the Bridge's directors or officers. The delegate advised Mr. Eveline that a corporate search indicated that he was the sole director of Under the Bridge from August 9, 2012, until February 13, 2013, and to provide any contrary evidence to the Director.
40. I am not persuaded that Under the Bridge has met its burden of demonstrating that the Director failed to comply with natural justice. The record confirms the delegate's communications with Mr. Eveline at various stages of the complaint investigation. Those communications clearly informed Mr. Eveline of the deadlines by which he was to provide the information and the consequences of his failure to do so. The March 12, 2013, letter set out all of the information that Under the Bridge had provided to that point. That letter also set out the deadline for the provision of any further information as well as the consequences of being found in contravention of the *Act* and *Regulation*. Mr. Eveline did not respond further.
41. I find no basis for the appeal on this ground.
42. Accordingly, I dismiss the appeal.

ORDER

43. Pursuant to Section 115 of the *Act* the Determination, dated March 28, 2013, is confirmed in the amount of \$2,658.76, 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