



An appeal

- by -

Dan Joe Levesque carrying on business as Granby River Roadhouse  
("Granby")

- 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.:** 2016A/42

**DATE OF DECISION:** May 3, 2016

## DECISION

### SUBMISSIONS

Daniel Brown-Levesque on his own behalf, carrying on business as Granby River Roadhouse

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Dan Joe Levesque (“Mr. Levesque”) carrying on business as Granby River Roadhouse (“Granby”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on January 26, 2016.
2. On July 29, 2015, James Teskey (“Mr. Teskey”) filed a complaint with the Director alleging that Granby contravened the *Act* in failing to pay him regular wages.
3. Following a hearing, a delegate of the Director concluded that Granby had contravened section 18 of the *Act* in failing to pay Mr. Teskey wages, and determined that Mr. Teskey was entitled to wages and accrued interest in the amount of \$609.45. The delegate also imposed two administrative penalties in the total amount of \$1,000 for Granby’s contraventions of the *Act*, for a total of \$1,609.45.
4. Granby contends that the Director failed to observe the principles of natural justice in making the Determination. Granby also seeks an extension of time in which to file the appeal.
5. 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.
6. This decision is based on the submissions of Granby, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

### FACTS AND ARGUMENT

7. A delegate of the Director held a hearing into Mr. Teskey’s complaint on October 22, 2015. Mr. Levesque appeared on behalf of Granby, and called three witnesses. Mr. Teskey represented himself, and called four witnesses.
8. Mr. Teskey worked for Granby, initially performing repairs and maintenance at the property, and thereafter as a cook. He alleged that Granby had failed to pay wages earned from April 18, 2015, until June 7, 2015. Mr. Levesque contended that Mr. Teskey was paid cash for all work performed and that no further wages were owed.
9. At the hearing, the delegate heard evidence from Mr. Teskey and Mr. Levesque, as well as their witnesses, about the number of hours Mr. Teskey worked as well as his rate of pay. The delegate found, and it appears there is no dispute to this finding, that Mr. Teskey was paid \$14 per hour for both periods of employment.
10. After considering all of the evidence, the delegate found that Mr. Levesque failed to maintain a daily record of hours worked, contrary to section 28 of the *Act*. In the absence of reliable records, the delegate preferred

Mr. Levesque's evidence and concluded that Mr. Teskey worked five days for 10 hours per day during the renovation period.

11. The delegate also concluded that Mr. Teskey worked a total of 12 hours as a cook on June 6 and 7, 2015. Although Mr. Levesque contended that Mr. Teskey was paid in cash for that work, the delegate determined, in the absence of any supporting evidence, that Mr. Teskey was entitled to outstanding wages as noted above.
12. In his appeal, Mr. Levesque argues as follows:
  - Mr. Teskey's evidence was not internally consistent or correct, and was unreliable;
  - Mr. Levesque's evidence was clear and forthright;
  - One of Mr. Teskey's witnesses worked only one shift for 6 hours with Mr. Teskey.

## ANALYSIS

13. 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 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 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.
14. The statutory deadline for filing an appeal was March 4, 2016. On March 4, 2016, Granby submitted its appeal to the Employment Standards Branch. Upon being advised that the appeal was filed incorrectly, Mr. Levesque sent the appeal to the Tribunal on March 21, 2016.
15. Section 109(1)(b) of the *Act* provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
16. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are 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 and on-going *bona fide* intention to appeal the Determination;
  - iii) the respondent party (*i.e.*, the employer or employee), as well the Director must have 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.

17. These criteria are not exhaustive.
18. I am satisfied that Granby had a genuine intention to file the appeal within the statutory time period and has a reasonable and credible explanation for its failure to request an appeal within the statutory time limit. However, I dismiss the appeal under section 114 of the *Act* for the following reasons.
19. 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.
20. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Granby has not met that burden and dismiss the appeal.

*Failure to observe the principles of natural justice*

21. Although Granby alleges a failure to comply with principles of natural justice as the ground of appeal, the appeal submissions are, in essence, an assertion that the delegate's conclusion is wrong.
22. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. 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. Natural justice does not mean that the delegate accepts one party's notion of "fairness."
23. I am satisfied that Granby had a fair hearing. There is no suggestion that Granby did not have full opportunity to present its case and to respond to the evidence presented by Mr. Teskey. I find no merit to this ground of appeal.
24. I understand Granby's argument to be that the Determination is wrong; that the delegate erred in his findings of credibility and gave inappropriate weight to Mr. Teskey's evidence.
25. Having reviewed the Determination, the submissions and the record, I find the appeal submissions consist of nothing more than a repetition of the position Granby advanced, or submissions it ought to have advanced, before the delegate.
26. Although Granby has not suggested that the delegate erred in law, I would find no basis to arrive at such a conclusion on the evidence in any event. In my view, the delegate properly considered the evidence and arguments before him and concluded that Mr. Teskey was entitled to wages. I find his conclusions to be well-founded and have no basis to interfere with them.
27. Furthermore, the assessment of the credibility and reliability of the witnesses is solely within the purview of the delegate. The delegate, in fact, preferred Mr. Levesque's evidence to Mr. Teskey's on some issues, finding against Granby where there was an absence of employer records which were required to be maintained under the *Act*.
28. The appeal is dismissed.

**ORDER**

29. Pursuant to section 114 of the *Act*, I deny the appeal. Pursuant to section 115 of the *Act*, I Order that the Determination, dated January 26, 2016, be confirmed in the amount of \$1,609.45 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**