

An appeal

- by -

G & G Public House.  
carrying on business as Jack's Public House  
("JPH")

- 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:** Shafik Bhalloo

**FILE No.:** 2016A/46

**DATE OF DECISION:** May 20, 2016

## DECISION

### SUBMISSIONS

Mathew Dhillon

on behalf of G & G Public House Ltd. carrying on  
business as Jack's Public House

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), G & G Public House Ltd. carrying on business as Jack's Public House (“JPH”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 22, 2016 (the “Determination”).
2. The Determination found that JPH had contravened Part 7, section 58 (vacation) and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Melisse Kelly (“Ms. Kelly”) and ordered JPH to pay wages to Ms. Kelly in the amount of \$327.23 inclusive of accrued interest. The Determination also levied administrative penalties against JPH in the amount of \$500.00 each for breach of section 63 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The total amount of the Determination is \$1,327.23.
3. This appeal is grounded in an assertion that new evidence has become available that was not available at the time the Determination was being made. JPH seeks the Tribunal to vary the Determination.
4. The deadline to file the appeal of the Determination was March 31, 2016. The Tribunal received JPH's appeal on April 1, 2016, but it did not include a copy of the Director's written reasons for the Determination, which is a statutory requirement for inclusion with an appeal (see subsection 112(2)(a)(i.1) of the *Act*).
5. On April 5, 2016, the Tribunal informed JPH that the appeal was incomplete and requested JPH to provide a copy of the Director's written reasons for the Determination by April 19, 2016. However, JPH failed to meet the deadline and failed to provide the Director's written reasons at all.
6. The April 5, 2016, correspondence of the Tribunal also included a request to the Director to produce the section 112(5) “record” (the “Record”) and notified the other parties, among other things, that no submissions were being sought from them pending a review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed.
7. The Record was provided by the Director to the Tribunal on April 6, 2016. A copy of the same was delivered to JPH on April 20, 2016, and the latter was given the opportunity to object to its completeness. JPH has not objected to the completeness of the Record and the Tribunal accepts it as complete.
8. On April 18, 2016, the Tribunal received additional written submissions on the merits of the appeal from Mathew Dhillon (“Mr. Dhillon”) on behalf of JPH.
9. On May 9, 2016, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. Consistent with the notice contained in the correspondence from the Tribunal dated April 5, 2016, and May 9, 2016, I have reviewed the appeal, the appeal submissions and the Record. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on

the Determination, the Appeal Form and accompanying written submissions of JPH and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in section 114(1). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite Ms. Kelly and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. JPH will then be given an opportunity to make a final reply to those submissions, if any.

## ISSUE

10. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

## THE FACTS

11. As there are no reasons for the Determination, I am largely left to rely upon the Record to determine the facts and the steps leading to the Determination.
12. The Record shows that Ms. Kelly filed her complaint against JPH on May 21, 2015, and then followed up that complaint with an amended complaint on May 29, 2015. In the amended complaint (the “Complaint”), she indicates that she was employed as a server at JPH’s pub between September 15, 2013 and March 15, 2015. She worked twice a week for 18 months and when the “new manager began working” the latter took away her shifts and gave them to another server. She was not given notice of this change and it took her approximately 5 weeks to find alternative employment with similar shifts. She seeks 2 weeks termination notice for her length of service as she claims she was fired from her employment with JPH.
13. On May 21 2015, a delegate of the Director conducted a B.C. Online: Registrar of Companies – Corporation Search that indicates that JPH was incorporated on August 19, 2013, with Mathew Gurvinder Dhillon (“Mr. Dhillon”) as one of its directors and officers.
14. The Record contains some few written notes of the delegate which indicate, among other things, the delegate’s attempts to contact the owner or manager of JPH on July 14 and 21, 2015. On both occasions, the delegate left messages with employees. After the July 21 call, however, the delegate received a return call on the same date from Mr. Dhillon who was angry that the delegate attempted to contact JPH at work. The notes provide that Mr. Dhillon felt the matter was personal and private but now JPH’s cook knows about it. The notes also indicate that Mr. Dhillon indicated that he needed to consult with a lawyer and until then he was not prepared to speak with the delegate about the Complaint. Mr. Dhillon repeated his position that he needed to speak with a lawyer when the delegate asked him if he was able to attend a telephone mediation meeting on August 6, 7 or 11 to try to resolve Ms. Kelly’s complaint against JPH. The delegate also notes that Mr. Dhillon indicated that he was going to be away until September and therefore he would not be able to deal with the matter in the interim and, in any event, he needed to talk to a lawyer.
15. Subsequently, on September 24, 2015, the delegate’s notes indicate that she left a message for the employer to call her but she did not receive a response.
16. On October 29, 2015, the delegate sent a letter to JPH enclosing a copy of the Complaint. In the same correspondence she advised JPH that since her attempt in setting mediation between the parties to resolve the Complaint had failed, the matter would be proceeding to a hearing. The delegate also enclosed a copy of the Notice of Complaint Hearing scheduling the hearing on December 4, 2015 (the “Hearing”). Further, the

delegate also enclosed a Demand for Employer Records requiring JPH to disclose any and all payroll records relating to wages, hours of work and conditions of employment of Ms. Kelly as well as any and all documents relating to the termination of Ms. Kelly's employment, including any and all documents JPH was relying on to establish just cause to terminate Ms. Kelly and a copy of the Record of Employment. These documents were to be produced to the Employment Standards Branch by November 16, 2015, but nothing in the Record indicates that JPH complied with this demand.

17. There is also no indication in the Record whether the Hearing was attended by Mr. Dhillon or any representative of JPH.

### **SUBMISSIONS OF JPH**

18. Accompanying the Appeal Form of JPH is written submissions of Mr. Dhillon on the merits of the appeal and JPH's application for an extension of time to file its appeal.

19. With respect to the submissions on the merits of the appeal, Mr. Dhillon sets out three reasons for the appeal which I delineate verbatim below:

First – Reason when barb [sic] from ur [sic] office called the pub & told a [sic] employer [sic] about the case,a [sic] lot of them talked about it & I lost 5 good staff members .....

Second – Never have I received anything about me talking to anybody about this case

Thrid [sic] – I called the [sic] Mrs>Kelly [sic] just to say if ur [sic] husband is talking for you please send me a letter, [sic] he can talk for you ...

I don't mind paying her put [sic] I will not pay the \$500.00 twice because I should be suing you guys for what has happen [sic] here in my business.

20. With respect to the extension application, Mr. Dhillon submits that he erred by faxing the appeal to a wrong fax number in Prince George and that is why JPH was late in filing its appeal.

21. In Mr. Dhillon's subsequent written submissions on April 18, 2016, he states that JPH did not fire Ms. Kelly but simply "put her on call" and attaches a string of emails dated March 12, 2015, between Ms. Kelly and Naomi Ferster ("Ms. Ferster"), JPH's manager. These emails show Ms. Kelly querying why the work schedule at JPH showed that she was off on Friday, March 20, 2015, and Ms. Ferster's response that there were "lots of you ladies available for Fridays" and therefore she would be "rotating ladies off on Friday nights".

22. There is also a subsequent email from Ms. Ferster dated March 22, 2015, to various employees of JPH, including Ms. Kelly, advising that the work schedule may be "upsetting for some of you and I understand why, but due to availability I have had to make some drastic changes." She also indicates in the email that "[t]he part-time people who do not see themselves on the schedule are now going to be on call". She concludes the email by stating that she understands if this change "does not work" for the employees and if they "feel it may be time to try something different."

### **ANALYSIS**

23. Section 112(1) of the *Act* states that a person served with a determination may appeal the determination on three grounds, including that "evidence has become available that was not available at the time the determination was being made"- the ground of appeal invoked by JPH in this case.

24. Section 112(2) of the *Act* sets out the requirements for filing an appeal:
- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) *must*, within the appeal period established under subsection (3),
    - (a) deliver to the office of the tribunal
      - (i) a written request specifying the grounds on which the appeal is based under subsection (1),
        - (i.1) *a copy of the director's written reasons for the determination*, and
        - (ii) payment of the appeal fee, if any, prescribed by regulation, and
      - (b) deliver a copy of the request under paragraph (a)(i) to the director. [emphasis added]
25. The use of the word “must” in section 112(2) indicates that the requirements of subsection (2) are mandatory, that is, an appeal must both specify the grounds on which the appeal is based *and* include a copy of the director’s written reasons for the determination. These materials are required to be delivered to the Tribunal before the end of the appeal period – “30 days after the date of service of the determination if the person was served by registered mail” (see section 112(3) of the *Act*).
26. As indicated previously, JPH filed its appeal on April 1, 2016, one day after the expiry period for filing its appeal. While JPH has requested an extension of time to appeal (which application I need not decide here), it has failed to include a copy of the Director’s written reasons for the Determination with its late appeal and also failed to comply with the Tribunal’s deadline to provide the same by April 19, 2016.
27. Having said this, I note that the Determination provides, at page 2, in bold, that “[a] person named in a **Determination may make a written request for reasons for the Determination**” and that request “must be delivered to an office of the Employment Standards Branch **within seven days of being served** with this Determination.” The Determination also states that “[y]ou are deemed to be served eight days after the Determination is mailed, so **your request must be delivered by March 8, 2016.**” I find it probable that the failure of JPH to comply with the Tribunal’s request on April 5, 2016, to provide the Director’s reasons by April 19 is due to its failure to request them within the time limit specified in the Determination – March 8. At the time the Tribunal requested the Director’s reasons (April 5), JPH was almost a month past the expiry date for requesting the reasons from the Branch and it would appear JPH decided not to request them (as there is no evidence in the record before me of any effort on the part of JPH to obtain the Director’s written reasons).
28. Independent of the issue of the late appeal which I am not deciding here, I find that JPH’s failure to include a copy of the Director’s written reasons for the Determination means that JPH’s appeal has not been perfected. Pursuant to section 114(1)(h) of the *Act*, the Tribunal has discretion to dismiss an appeal where the appellant has failed to meet one or more of the requirements of section 112(2) of the *Act*. JPH, by failing to submit the Director’s reasons for the Determination, has failed to meet the requirements of section 112(2)(a)(i.1) of the *Act*. Therefore, I dismiss JPH’s appeal.
29. In the alternative, if I am wrong in dismissing JPH’s appeal under section 114(1)(h) of the *Act*, I also find that JPH’s appeal has no reasonable prospect of succeeding pursuant to section 114(1)(f) of the *Act*. As indicated above, JPH invokes the “new evidence” ground of appeal in section 112(1)(c) of the *Act*.

30. The governing test for allowing new evidence on appeals is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In *Re: Merilus*, the Tribunal indicated that for new evidence to be considered in the appeal, it must satisfy the following four conditions which are conjunctive:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) the evidence must be relevant to a material issue arising from the complaint;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
31. In this case, the initial written submissions of Mr. Dhillon on the merits of the complaint (set out in paragraph 19 above) do not appear to invoke any of the grounds of appeal in section 112(1) of the *Act*. In these submissions, while Mr. Dhillon states he does not mind paying Ms. Kelly the amount awarded to her in the Determination, he is disputing the two administrative penalties of \$500.00 each levied against JPH. These penalties were imposed on JPH pursuant to section 29(1) of the *Regulation* pursuant for its contraventions of section 63 of the *Act* and section 46 of the *Regulation*. Mr. Dhillon disputes these penalties because the delegate of the Director telephoned JPH's business place when attempting to contact the employer and allegedly "talked about" the complaint to employees of JPH and JPH "lost 5 good staff members". I do not find this argument compelling or persuasive as to cause me to interfere with the Director's Determination for the following reasons. The monetary administrative penalties set out in section 29(1) of the *Regulation* for persons who have contravened requirements of the *Act* are not discretionary. The Tribunal has confirmed in several decisions that once a contravention of the *Act* has been found in a Determination, the imposition of an administrative penalty is mandatory (see *Virtu@lly Canadian Inc. operating as Virtually Canadian Inc.*, BC EST # D087/04, *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04, and *Kimberly Dawn Kopchuk*, BC EST # D049/05). In the result, I do not find any basis for this Tribunal to interfere with the two mandatory penalties levied against JPH.
32. With respect to Mr. Dhillon's brief submissions of April 18, 2016, and accompanying emails of Ms. Ferster dated March 22, 2015, to all employees regarding the change in scheduling of employees and Ms. Ferster's email exchanges of March 12, 2015, with Ms. Kelly, I find none of this evidence is "new evidence" under the qualifying test set out in *Re: Merilus, supra*, case. I find that Mr. Dhillon's submission that Ms. Kelly was not fired should have and could have been presented at the Hearing. An appeal is not a venue for making submissions that JPH could and should have made at the Hearing.
33. As for the emails dated March 12 and March 22, 2015, referred to above that Mr. Dhillon now presents in the appeal, these emails date earlier than the Complaint of Ms. Kelly and the date of the Determination. These emails could, with the exercise of due diligence on JPH's part, have been discovered and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made. Therefore, I find that the emails as well as Mr. Dhillon's short submission fails the first condition of the test for adducing new evidence for appeal set out in *Re: Merilus*.
34. I also find these emails, including Mr. Dhillon's submissions, fail the fourth condition of the test for adducing new evidence on appeal; that is, they do not contain evidence of high potential probative value, in the sense that, if believed, the evidence could, on its own or when considered with other evidence, have led the Director to a different conclusion on the issue of whether or not Ms. Kelly's employment was terminated. In

the case of the email, I think it is arguable that the contents provide a basis for a finding under section 66 that JPH substantially altered Ms. Kelly's condition of employment. However, I need not make that determination here.

35. In conclusion, I find that JPH has not shown, on a balance of probabilities, any reviewable error in the Determination. Pursuant to section 114(1)(f) and (h) of the *Act*, I dismiss JPH's appeal of the Determination.

### **ORDER**

36. Pursuant to section 115 of the *Act*, I confirm the Determination made on February 22, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**