

An appeal

- by -

Cucina Manila Restaurants Inc.
("Cucina")

- 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/57

DATE OF DECISION: June 10, 2016

DECISION

SUBMISSIONS

Liberty Vibar

on behalf of Cucina Manila Restaurants Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Cucina Manila Restaurants Inc. (“Cucina”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 7, 2016 (the “Determination”).
2. The deadline for filing an appeal of the Determination was April 14, 2016. The Tribunal received Cucina’s Appeal Form seven (7) days late, on April 21, 2016. The appeal included the written submissions of one of Cucina’s directors, Liberty Vibar (“Ms. Vibar”), on the merits of the appeal and Cucina’s request for an extension of time to file its appeal. The appeal did not include a copy of the Director’s written Reasons for the Determination (the “Reasons”), which is a statutory requirement for inclusion with an appeal (see subsection 112(2)(a)(i.1) of the *Act*).
3. The Determination concluded that Cucina contravened Part 3, section 18 (wages); Part 4, section 40 (overtime); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act*, and ordered Cucina to pay Delford Avila (“Mr. Avila”), Wilfredo Bagang (“Mr. Bagang”), Roshir L. Cabanayan (“Ms. Cabanayan”), Teodoro De Leon (“Mr. De Leon”), Eduard S. Libunao (“Mr. Libunao”), Jesus Viloría (“Mr. Viloría”) and Lasalette Viray (“Ms. Viray”) (collectively, the “Complainants”) wages in the amount of \$42,495.12 and to pay administrative penalties under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,500.00 for breaches of sections 17, 18 and 46 of the *Act*. The total amount of the Determination is \$44,995.12.
4. Cucina’s late appeal disputes wages, including overtime wages, awarded to the Complainants.
5. The sole ground of Cucina’s appeal is that evidence has become available that was not available at the time the Determination was being made. Cucina seeks the Employment Standards Tribunal (the “Tribunal”) to change or vary the Determination.
6. In correspondence, dated April 25, 2016, the Tribunal sent Cucina’s appeal to the Complainants and to the Director for informational purposes only. The Tribunal advised the Complainants and the Director that no submissions were being requested from them at this time. In the same letter, the Tribunal requested the Director to provide the section 112(5) “record” (the “Record”) to the Tribunal. The Tribunal also requested Cucina to provide the Reasons no later than May 9, 2016.
7. On April 28, 2016, Ms. Vibar, by email, requested the Tribunal to obtain the Reasons directly from the Employment Standards Branch (the “Branch”) as Cucina was unable to obtain them. Ms. Vibar attached a letter of same date from the Branch advising Cucina that the latter’s request for the Reasons was denied as it was out of time. The Branch indicates that Cucina’s request should have been made by March 22, 2016, as indicated on page two (2) of the Determination. The Branch also observes in its letter that Cucina’s request for the Reasons is made after the appeal period expired on April 14, 2016.
8. On May 2, 2016, the Director sent the Record to the Tribunal.

9. On May 3, 2016, the Tribunal disclosed the Record to Cucina, and afforded the latter an opportunity to object to its completeness. However, no objection as to its completeness was received from Cucina and, therefore, the Tribunal considers the Record as complete.
10. On May 17, 2016, the Tribunal received further written submissions from Ms. Vibar on the merits of the appeal together with some supporting documents.
11. I have decided 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 Appeal Form, all written submissions of Ms. Vibar 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 discretion to dismiss all or part of an appeal without a hearing of any kind for any of the reasons listed in that subsection. 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 the Complainants 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. Cucina will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

12. 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

13. As Cucina failed to submit the Reasons with its appeal and the Director has rejected Cucina's request for the Reasons as being out of time, I am left to rely upon the Record to determine the facts and the steps leading to the Determination.
14. Pursuant to section 74 of the *Act*, the Complainants filed their complaints between December 15, 2015, and January 26, 2016, alleging variously that Cucina contravened the *Act* by failing to pay them regular wages, overtime wages and statutory holiday pay (the "Complaints").
15. On December 16, 2015, a delegate of the Director conducted a B.C. Online: Registrar of Companies – Corporation Search that indicates that Cucina was incorporated on December 12, 2008, with Ms. Vibar as one of its directors.
16. The Record shows that Cucina was represented by legal counsel at the start of the delegate's investigation into the Complaints and the delegate, between January 6 and 20, 2016, sent all of the Complaints to counsel. On January 20, 2016, the delegate also sent counsel the Demand for Employer Records (the "Demand") of all employees of Cucina for the period May 1, 2015, to January 21, 2016. Counsel responded with a letter dated January 25, 2016, advising the delegate that she no longer represented Cucina. On the same date, in response to the delegate's request, counsel supplied relevant contact information for Cucina to allow the delegate to deal with Cucina directly.
17. On January 28, 2016, the delegate sent a letter to Cucina informing the latter of the Demand sent to their former counsel previously with the February 4, 2016, deadline for production of the requested employer records. The letter also requested a representative of Cucina to contact the delegate by February 4, failing which a determination would be issued against Cucina.

18. On the same date as the delegate's correspondence, January 28, 2016, Ms. Vibar contacted the delegate and requested an extension of time to respond to the Demand and advised that Cucina will have its new legal counsel contact the delegate. In the circumstances, the delegate provided Cucina an extension of time to respond to the Demand to February 11, 2016.
19. On February 15, 2016, the delegate sent an email to Ms. Vibar advising the latter that Cucina's new counsel had not contacted her. The delegate also noted that she had not heard from Ms. Vibar since Cucina was granted the extension. The delegate further noted that Ms. Vibar did not provide her with a telephone number with which she could contact Ms. Vibar.
20. On March 4, 2016, the delegate sent Ms. Vibar an email acknowledging the latter's voicemail message left the same morning. The delegate notes she returned Ms. Vibar's call at the telephone number provided by Ms. Vibar but to no avail as there was no room left for her to leave a message for Ms. Vibar. The delegate also notes in the email that the determination against Cucina had been prepared and will be issued on Monday, March 7, 2016, and afforded Cucina a further opportunity to produce evidence and submit its documents by the day's end:

You were originally given a deadline of February 4, 2016 to respond to the claims. The deadline was extended to February 11, 2016 at your request. I did not hear from you or receive any documents from you. I gave you another opportunity to respond by February 22, 2016. Again, I have not heard from you nor have I received any submissions from you disputing the claim. I will be in the office until 4:20 p.m. this afternoon. If you have any evidence that disputes the claims against Cucina Manila Restaurants Inc. which were provided to you through your previous lawyer, Michelle Randall, on January 6, 2016, January 13, 2016, and again to you directly on February 15, 2016, please submit the documents to me before the end of business day.

21. The Record shows there was no response from Ms. Vibar or Cucina to the delegate's March 4, 2016, email and the delegate issued the Determination on March 7, 2016.
22. The delegate's notes, contained in the Record, also show that on March 8, 2016, one day after the Determination was issued, Ms. Vibar met with the delegate who explained to her "the "appeal process and dates". The delegate's notes also indicate subsequent email contacts received from Ms. Vibar wherein the latter appears to have provided the delegate with "evidence" and submitted what she believed the Complainants were owed. These emails and "evidence" do not form part of the Record as they were not before the delegate when the Determination was made. The delegate's notes also indicate that she repeatedly informed Ms. Vibar of the appeal process.

SUBMISSIONS OF CUCINA

23. Attached to Cucina's late appeal are two sets of written submissions. The first is a single page submission by Ms. Vibar in support of Cucina's request for an extension of time to file its appeal. The second is Ms. Vibar's submissions on the merits of the appeal. While I have reviewed both submissions in their entirety, I do not find it necessary to delineate the submissions in support of Cucina's request for an extension of time to file the appeal, as I am able to dispose of the appeal under section 114(1) of the *Act*, based on my review of the merits of the appeal.
24. With respect to the merits of the appeal, in the Appeal Form, Ms. Vibar has checked off the "new evidence" ground of appeal. In her supporting written submissions made on April 21, 2016, Ms. Vibar states:

- 1) Original time sheets took [sic] away by Lasalette Viray.

- 2) They work more than 8 hours [sic] where people are applying to avoid overtime.
- 3) Inaccuracy of recording [sic] paid to employees.
- 4) How come they stayed to [sic] Cucina more than 2 or 3 months [sic] no pay.
- 5) The day I come [sic] back from Manila everybody is quitting [sic] they don't even give me a chance at least a week to replace them. [sic]

25. On May 17, 2016, Ms. Vibar made further written submissions on the merits of the appeal and attached summaries of some of the records of hours worked (“Work Records”) by some of the Complainants. The Work Records appear to contain some handwritten notes, presumably Ms. Vibar’s, noting all instances where she believes the employees were paid in full. It should be noted that the Work Records are not accompanied with any corroborating evidence of payment to employees in the form of, for example, copies of pay stubs or paycheques.

26. I do not find it necessary to delve into the Work Records any further for the reasons I have set out in the Analysis part of this decision. I do, however, set out the six (6) points or arguments Ms. Vibar advances in a single page accompanying the Work Records, verbatim, as follows:

Reasons:

- 1) Original time sheets were taken away by Lasalette Viray.
- 2) Lasalette Viray and Roshir – they worked more than 8 hrs. a day which they are not supposed to work more than 8 hrs. if they hire new/old workers. [sic]
- 3) Inaccuracy of recording [sic] payment to Employees.
- 4) If they are unpaid how they stayed in Cucina more than 2 or 3 mos no pay. [sic]
- 5) For Delford – I have some evidence of inaccurate recording of payment received.
- 6) Time sheets just written before owner came [sic] Manila.

ANALYSIS

27. Cucina appeals the Determination on the ground set out in section 112(1)(c) of the *Act*, namely, “evidence has become available that was not available at the time the determination was being made.”

28. 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].

29. The requirements in subsection 112(2)(a) are mandatory as the legislature prefaces them with the word “must”, therefore, the appellant is required to both specify the grounds upon which the appeal is based *and*

include a copy of the director's reasons for the determination. These materials have 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" (section 112(3)(a) of the *Act*).

30. In this case, as previously indicated, Cucina filed its appeal on April 21, 2016, seven (7) days after the expiry of the appeal period. While Cucina has requested an extension of time to appeal (an application I need not decide here), it has failed to include in its appeal a copy of the Reasons. When asked by the Tribunal to provide the Reasons by May 9, 2016, Cucina informed the Tribunal that it was unable to comply with the Tribunal's request and forwarded to the Tribunal the Director's letter of April 28, 2016, in which the Director denied Cucina's request for the Reasons because it was out of time to make the request.
31. I note, at page 2 of the Determination, it states "**[a] person named in a determination may make a written request for the 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 22, 2016. [boldface in original]**" Therefore, at the time Cucina filed its late appeal on April 21 2016, it was already out of time for requesting the Reasons by almost one (1) month. Therefore, I find that it was within the Director's authority to refuse Cucina's request for the Reasons. I note that Cucina, in the circumstances, asks the Tribunal to directly obtain the Reasons from the Tribunal but it is not the Tribunal's obligation to request the Reasons from the Director; it is the appellant's obligation.
32. Having said this, while the issue of Cucina's late appeal is pending, Cucina's failure to provide the Reasons with its appeal means that Cucina's appeal has not been perfected. Section 114(1)(h) of the *Act* affords the Tribunal the discretion to dismiss an appeal where the appellant has failed to meet one or more requirements of section 112(2) of the *Act*. In failing to provide the Reasons with its appeal, I find that Cucina has failed to meet the requirements of section 112(2)(a)(i.1) of the *Act*. Therefore, I dismiss Cucina's appeal.
33. In the alternative, I also find that Cucina's appeal has no reasonable prospect of succeeding pursuant to section 114(1)(f) of the *Act* for the reasons set out below.
34. As indicated previously, Cucina relies on the "new evidence" ground of appeal in section 112(1)(c) of the *Act*. The test for admitting new evidence on appeal is set out in the Tribunal's decision in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In the latter case, the Tribunal indicated that for evidence to qualify as "new evidence" in the appeal, it must satisfy the following conjunctive requirements:
- (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 lead the Director to a different conclusion on a material issue.
35. The evidence Cucina seeks to introduce as new evidence in the appeal is set out at paragraphs 24 to 26 above. None of this evidence meets the first criterion in the Tribunal's decision in *Re: Merilus Technologies Inc.*, *supra*. All of the evidence and arguments that Cucina seeks to introduce in the appeal could have, with the exercise

of due diligence, been discovered and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made.

36. At paragraph 20 of this Decision, I have quoted a passage from the delegate's email of March 4, 2016, to Ms. Vibar which delineates, in some detail, numerous attempts by the delegate to obtain Cucina's evidence in response to the Complaints. However, neither Cucina nor its director, Ms. Vibar, responded to the delegate's attempts. Only after the Determination was made, Ms. Vibar contacted the Delegate to present evidence. As indicated by the Tribunal in *Tri-West Tractor Ltd.* (BC EST # D268/96), the purpose of section 112 of the *Act* is not to provide a dissatisfied appellant a complete re-examination of the complaint or to use the appeal procedure "to make the case that should have and could have been given to the delegate in the investigative process". I find this case squarely falls within the spirit and letter of the language quoted from *Tri-West Tractor Ltd.*, *supra*. Cucina could have adduced all of its appeal evidence and arguments, in the first instance, in the investigative stage before the Determination was made. Instead, Cucina chose to sit idly only to appear from the weeds as it were after a negative determination was made against it.
37. I also find that neither set of Cucina's submissions, made on April 21 and May 17, 2016, could be viewed as having high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have lead the Director to a different conclusion on the material issues of outstanding wages, overtime pay, statutory holiday pay, vacation pay, and compensation for length of service. In the result, Cucina's appeal also fails on the new evidence ground of appeal.
38. In conclusion, I find Cucina has failed to establish, on a balance of probabilities, any reviewable error in the Determination. Pursuant to section 114(1)(f) and (h) of the *Act*, I dismiss Cucina's appeal of the Determination.

ORDER

39. Pursuant to section 115 of the *Act*, I confirm the Determination, made on March 7, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal