

An appeal

- by -

Nut Tree Products Inc. carrying on business as Nut Tree Café  
(“Nut Tree Café”)

- 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.:** 2016A/58

**DATE OF DECISION:** June 16, 2016

## DECISION

### SUBMISSIONS

Miro Sino on behalf of Nut Tree Products Inc. carrying on business as Nut Tree Cafe

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Nut Tree Products Inc. carrying on business as Nut Tree Café (“Nut Tree Café”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 23, 2016.
2. The Determination found Nut Tree Café had contravened Part 3, sections 21 and 27 and Part 7, section 58 of the *Act* in respect of the employment of Tabitha-Fay L. Leo (“Ms. Leo”) employment and ordered Nut Tree Café to pay Ms. Leo wages in the amount of \$128.25 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$1,628.25.
3. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination. Nut Tree Café seeks to have the Determination varied or cancelled.
4. A complete appeal was received by the Tribunal on May 6, 2015 – four days after the statutory time limit for filing an appeal expired. The Tribunal had received an incomplete form of appeal on May 3, 2016. Nut Tree Café seeks an extension of the appeal period.
5. In correspondence dated May 10, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Nut Tree Café. They have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. The Tribunal has decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material 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, for any of the reasons listed in the subsection, 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 any 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.*

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director and Ms. Leo will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the time limit for filing an appeal should be extended and if there is any reasonable prospect the appeal will succeed.

## ISSUE

9. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

## THE FACTS

10. Nut Tree Café is a restaurant operating in North Vancouver. Ms. Leo was employed at Nut Tree Café as a chef/manager from November 28, 2014, to January 8, 2015, with her primary responsibility being that of manager. She was hired to assist in setting up the restaurant.
11. Following the termination of her employment, Ms. Leo filed a complaint with the Director, alleging Nut Tree Café had failed to pay all regular wages, overtime wages and statutory holiday pay owing to her and had contravened the *Act* by requiring her to pay some of Nut Tree Café's business costs.
12. The Director conducted a complaint hearing. Ms. Leo and three other persons gave evidence relating to Ms. Leo's claims and Miro Sino ("Ms. Sino"), a director and officer of Nut Tree Café, and two other persons gave evidence for Nut Tree Café.
13. The Director found Ms. Leo was not owed any additional regular or overtime wages; that Nut Tree Café had, in contravention of section 21 of the *Act*, deducted amounts from Ms. Leo's wages that had already been paid; and had failed to pay annual vacation pay to Ms. Leo.
14. The Director awarded wages to Ms. Leo in the amount set out in the Determination and imposed three administrative penalties.
15. The time limit for filing an appeal was clearly marked in the Determination as May 2, 2016. An incomplete form of appeal, along with a request to extend the time for filing the appeal, was received by the Tribunal on May 3, 2016. On the same day, the Tribunal notified Nut Tree Café of deficiencies in their appeal. The deficiencies in the appeal were rectified and a complete form of appeal was delivered to the Tribunal on May 6, 2016.

## ARGUMENT

16. The general nature of the position taken by Nut Tree Café to the Determination is that it was wrong, harsh, unfair and unjust.
17. Nut Tree Café challenges each aspect of the Determination.

18. First, Nut Tree Café submits the Director erred in finding Ms. Leo was owed \$3.38 on the basis this amount was initially paid to Ms. Leo by Nut Tree Café, then subsequently deducted. Nut Tree Café says this amount was never paid because Ms. Leo had failed to provide a receipt showing this expense was ever incurred by her.
19. Second, Nut Tree Café submits the amount of \$25.73 was only paid to Ms. Leo on condition she provide a receipt showing she was entitled to be reimbursed for that amount and was deducted when the receipt was not provided.
20. Third, Nut Tree Café says the Director erred in finding vacation pay was owed. In the context of this argument, Nut Tree Café disputes the Director indicating in the Determination that Ms. Sino “acknowledged” not paying vacation pay and says Ms. Leo was paid more than the actual vacation pay amount as no deductions were taken from her wages. As well, Nut Tree Café submits being required to pay annual vacation had the result of making Ms. Leo’s hourly wage higher than what was agreed.
21. Nut Tree Café says the imposition of three administrative penalties was harsh and unjust, being “clearly disproportionate” to the amount of wages found owing.
22. Nut Tree Café says such penalties should not have been imposed when Ms. Leo was not owed any expense money or vacation pay.
23. Finally, Nut Tree Café objects to the value served by the entire process, the failure of the Director to consider the losses incurred by having employed Ms. Leo and submits the entire adjudication process was, among other descriptions, completely biased.
24. In support of an extension of the appeal time period, Nut Tree Café says the delay was occasioned by circumstances that made it difficult to assemble all of the appeal documents within the time required.

## ANALYSIS

25. The *Act* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *Act* allows an 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 the time limit 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.

26. 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 must be satisfied to grant an extension:
  - 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.

27. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.
28. In this case, I find the delay to be minimal and the explanation for that delay to be not unreasonable. There is evidence of an on-going *bona fide* intention by Nut Tree Café to appeal the Determination. The small amount of wages found owing in the Determination makes it likely Ms. Leo would not be *unduly* prejudiced by an extension of time.
29. I do not, however, find there is a strong *prima facie* case in favour of Nut Tree Café. I will note that when considering this criteria, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds.
30. 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 being made.*
31. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
32. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
33. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
34. Nut Tree Café has grounded this appeal in error of law and failure to observe principles of natural justice in making the Determination.
35. I shall first address the natural justice ground of appeal. There are two aspects of the appeal that might raise a consideration of this ground of appeal. The first would arise within the process itself and a review would consider whether Nut Tree Café was given a fair hearing by the Director; the second is somewhat related although more specific and arises from the allegation of bias against the Director.

36. In respect of the first, the Tribunal, in *Imperial Limousine Service Ltd.*, BC EST # D014/05, briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST #D050/96)

37. There are no different or additional concerns that arise in this case and I am not persuaded the Director failed to provide Nut Tree Café with the procedural rights captured within the above statement. The arguments of Nut Tree Café, while disputing findings made in the Determination, is devoid of any analysis that might identify natural justice or fair hearing concerns in the process applied by the Director to administer Ms. Leo's complaint.
38. In respect of the allegation of bias, there is an onus on Nut Tree Café to prove such an allegation on the evidence. The evidence must show a "real likelihood" or probability of bias. Mere suspicions, or impressions, are not enough. As the Tribunal has noted in *Dusty Investments Inc. d.b.a. Honda North, supra*, the evidence presented should allow for objective findings of fact that demonstrate a reasonable apprehension of bias. There is a presumption that the adjudicator acted impartially. Employment Standards Branch adjudicators take an oath of office, in which they swear they will discharge their duties as an adjudicator with independence and within common law principles of natural justice. This presumption is one of the reasons why the threshold for perceived judicial bias is high, and can only be displaced with cogent evidence.
39. As well, the Tribunal has adopted the view that allegations of bias must be considered in light of the fundamental nature of the statutory purposes of the *Act* and the complaint process within which the Director functions.
40. The burden on Nut Tree Café has not been met here. There is nothing in the appeal beyond a bald assertion of bias in the complaint and decision making process, unsupported by any objective evidence from which it can be found the Director was predisposed against Nut Tree Café in deciding Ms. Leo's complaint.
41. On its face, this ground of appeal is without merit.
42. Nut Tree Café has also grounded its appeal in error of law. The burden in this ground of appeal is also on Nut Tree Café to show such error.
43. On an assessment of the Determination, I find that burden has not been met.
44. The Tribunal has adopted the following 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.
45. Nut Tree Café does not raise any issue of interpretation or general law in this appeal. The allegation of “error of law” is grounded exclusively in differences with the Director’s findings of fact and conclusions drawn from those facts. I find no error of law shown in the findings or conclusions of fact.
46. The Tribunal noted in *Britco Structures Ltd., supra*, that the test for establishing findings of fact constitute an error of law 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 findings of fact made by the Director. The findings of fact in this case were reasonably and logically grounded in the evidence; they may not be disturbed by the Tribunal on appeal.
47. As with the natural justice ground of appeal, there is no merit in this ground of appeal.
48. Nut Tree Café says the imposition of three administrative penalties is harsh and unjust. The following provides a complete response to all of the arguments raised by Nut Tree Café in respect of the administrative penalties imposed. In *Marana Management Services Inc. operating as Brother’s Restaurant*, BC EST # D160/04, the Tribunal, after soliciting submissions on the legitimacy of imposing three penalties (relating to overtime pay, statutory holiday pay, and vacation pay) arising out of a single set of circumstances, summarized the applicable principles as follows:

As the Tribunal recently noted in *Summit Security Group Ltd.* (BC EST #D059/04, Reconsidered BC EST #D133/04), administrative penalties under the *Act* are part of a larger scheme to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the Act, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.

It does appear that the penalty assessment against Brother’s is excessive in light of the amounts owing to Mr. Joly, and thus, for essentially minor breaches, the cumulative penalties seem unfair. However, in *Douglas Mattson* (BC EST #DRD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgment about what is “fair” or “logical”. Further, in *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the Act provides for mandatory administrative penalties without any exceptions: “The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme.”

The Director states that only one administrative penalty will be imposed in respect of a single contravention, for concurrent violations, or several contraventions of the Act arising out of the same circumstances. This appears to be in accord with the “Keinapple [*sic*] principle” (*R. v. Keinapple*, [1975] 1 S.C.R. 729), which prohibits multiplicity of convictions in respect of the same factual incident or transaction.

The undisputed evidence is that Brother’s repeatedly breached several provisions of the Act with respect to overtime, statutory holiday pay and annual vacation pay. The Tribunal has concluded that the penalty scheme is in accordance with the purposes of the Act, and is not subject to fairness considerations, provided the penalties are not imposed for several contraventions arising out of the same circumstances. Although Brother’s claimed that the violations arose as a result of clerical errors and lack of attention to detail, the Tribunal notes that Mr. Joly’s final paycheck was not sent to Mr. Joly despite his parents’

repeated telephone calls until after Mr. Joly filed his complaint with the Employment Standards Branch. Brother's claim that the breaches were due to clerical errors or a lack of attention to detail rings hollow in light of this evidence.

49. The Tribunal upheld the imposition of three administrative penalties in *Marana Management Services Inc.* on the basis that since the employer had failed to pay overtime, statutory holiday pay and annual vacation pay over the course of several pay periods, it was not a situation of several contraventions of the *Act* arising out of the same circumstances.
50. The circumstances here are not dissimilar from those in *Marana Management Services Inc.* It is irrelevant that the wage liability resulting from the contraventions committed by Nut Tree Café were minor. The legislative provisions relating to administrative penalties make no distinction between minor and significant contraventions. The statutory preconditions for imposing the administrative penalties were met; the penalties are mandatory. The Tribunal may not ignore the clear language of the statute, making what was clearly intended by the legislature to be a mandatory administrative penalty scheme into a permissive scheme because the amounts found in the Determination to be owing are small.
51. Based on the above, the request for an extension of the time limited for appeal is denied. The appeal on its face is devoid of merit. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(b) of the *Act*.
52. Even if I were disposed to extend the appeal period, for the reasons I have set out above, I would find this appeal has no reasonable prospect of succeeding and would dismiss it under section 114(1)(f) of the *Act*.

## ORDER

53. Pursuant to section 115 of the *Act*, I order the Determination dated March 23, 2016, be confirmed in the amount of \$1,628.25 together with any interest that has accrued under section 88 of the *Act*.

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**David B. Stevenson**  
Member  
Employment Standards Tribunal