

An appeal

- by -

Harmony Enterprises Ltd. carrying on business as The Pantry Restaurant  
(“Harmony Enterprises”)

- 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.:** 2017A/89

**DATE OF DECISION:** August 28, 2017

## DECISION

### SUBMISSIONS

Davinder Singh Sandhar

on behalf of Harmony Enterprises Ltd. carrying on business  
as The Pantry Restaurant

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Harmony Enterprises Ltd. carrying on business as The Pantry Restaurant (“Harmony Enterprises”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 19, 2017.
2. The Determination found Harmony Enterprises had contravened Part 8, section 63 of the *Act* in respect of the employment of thirteen former employees (collectively, “the complainants”) and ordered Harmony Enterprises to pay the complainants wages in the amount of \$29,063.11 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$29,563.11.
3. This appeal is grounded in an allegation the Director failed to observe principles of natural justice in making the Determination. Harmony Enterprises seeks to have the Determination cancelled.
4. In correspondence dated July 6, 2017, the Tribunal acknowledged having received the appeal and, among other things, notified the parties 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.
5. The record has been requested by the Tribunal and provided by the Director; a copy has been delivered to Harmony Enterprises, and an opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. I have 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 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director and the complainants 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 there is any reasonable prospect the appeal will succeed.

## ISSUE

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

## THE FACTS

9. Harmony Enterprises operated a Pantry Restaurant in Surrey, BC as a franchisee under a franchise agreement. On December 27, 2016, the restaurant was taken over and closed at the direction of the franchisor.
10. The complainants were employed at the restaurant and all were found to have been terminated, without cause, notice or compensation in lieu of notice, as a result of the closure.
11. The restaurant was closed for twenty days before re-opening under a new franchisee. By January 25, 2017, the new franchisee was employing all of the complainants.
12. The Director applied section 66 of the *Act*, finding a condition of each complainant's employment with Harmony Enterprises had been substantially altered by the closure of the restaurant on December 27, 2016, and the complainants' subsequent loss of work and wages.
13. The Director considered whether section 65(1)(d) of the *Act* relieved Harmony Enterprises from its liability for length of service compensation to each of the complainants and found it did not. The Director also considered whether section 65(1)(f) of the *Act* might relieve Harmony Enterprises of its obligation to pay length of service compensation and, for two reasons, found it did not: first, the offer of employment with the new franchisee was not made before the complainants were terminated; and second, the offer of employment was not made by their employer, Harmony Enterprises, but by the new franchisee.
14. The Director found the each of the complainants was entitled, in varying amounts, to length of service compensation, concomitant vacation pay and interest.

## ARGUMENT

15. Harmony Enterprises makes the same argument in this appeal that appears to have been made to the Director: that the termination of the franchisee agreement was unexpected and the new franchisee hired all of the persons who had lost their employment with Harmony Enterprises when the restaurant was closed. Harmony Enterprises feels these two factors should relieve it from liability for length of service compensation to the complainants.
16. Harmony Enterprises also submits it was not its intention to close the restaurant and the suddenness of the closure made it unable to give any notice of termination to any the complainants. Harmony Enterprises

asserts the franchise was taken away by the franchisor, and the restaurant closed, on a mistaken impression by the franchisor that Harmony Enterprises was in default of its obligations under the franchise agreement.

## ANALYSIS

17. 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.*

18. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

19. 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.

20. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

21. I am not persuaded this appeal has any reasonable prospect of succeeding.

22. While the appeal raises natural justice arguments, Harmony Enterprises has provided no objectively acceptable evidence showing it was denied the procedural protections reflected in section 77 of the *Act* and in the natural justice concerns that typically operate in the context of the complaint process. These concerns have been briefly summarized by the Tribunal in an oft-quoted excerpt from *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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)

23. The material in the file shows Harmony Enterprises knew the claim being made by the complainants and was given full opportunity to present its position. While I feel some sympathy for the situation in which Mr. Sandhar, the owner and director of Harmony Enterprises, has found himself, the submissions made in this appeal, and to the Director during the complaint investigation, do not allow Harmony Enterprises to avoid the provisions in the *Act* that led the Director to find it was liable to the complainants for length of service compensation resulting from their loss of employment with Harmony Enterprises when the restaurant was closed.

24. I will also note, for completeness, that I agree completely with the Director that in the circumstances neither section 65(1)(d) or (f) apply to relieve Harmony Enterprises of its statutory liability to the complainants under section 63 of the *Act*.
25. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. 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)(f) of the *Act*.

### **ORDER**

26. Pursuant to section 115 of the *Act*, I order the Determination dated May 19, 2017, be confirmed in the amount of \$29,563.11, together with any interest that has accrued under section 88 of the *Act*.

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**David Stevenson**  
**Member**  
**Employment Standards Tribunal**