



An appeal

- by -

Mauryabistro Ltd. carrying on business as Maurya Bistro
(“Maurya Bistro”)

- 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.: 2014A/123

DATE OF DECISION: November 28, 2014

DECISION

SUBMISSIONS

Dharampal Sharma

on behalf of Mauryabistro Ltd. carrying on business as
Maurya Bistro

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Mauryabistro Ltd. carrying on business as Maurya Bistro (“Maurya Bistro”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 6, 2014.
2. The Determination found that Maurya Bistro had contravened Part 3, sections 17 and 18, Part 4, section 40, Part 5, sections 45 and 46 of the *Act* and Part 8, section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Ravindra Prasad Raturi (“Mr. Raturi”) and ordered Maurya Bistro to pay wages to Mr. Raturi in the amount of \$26,730.56 and to pay administrative penalties in the amount of \$3,000.00. The total amount of the Determination is \$29,730.56.
3. Maurya Bistro has filed an appeal of the Determination, relying on each of the grounds set out in section 112(1) of the *Act*: error of law; failure by the Director to observe principles of natural justice in making the Determination; and evidence becoming available that was not available when the Determination was being made.
4. A form of appeal was received by the Tribunal from Maurya Bistro on September 15, 2014, the final day of the appeal period. The filing was incomplete. It was delivered to the Tribunal by Dharampal Sharma (“Mr. Sharma”), the sole director of Maurya Bistro. In correspondence dated September 18, 2014, the Tribunal notified Mr. Sharma that under Rule 18(3) of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”), the appeal was incomplete and, as a result, late. The correspondence told Mr. Sharma what was needed to meet the requirements in the *Rules* for completing the filing of the appeal. He was given until 4:00 pm on September 25, 2014, to satisfy the requirements for an appeal. On that date, Maurya Bistro delivered an Appeal Form, appeal submission and several attachments to the Tribunal.
5. On October 1, 2014, the Tribunal acknowledged to the parties that an appeal had been received from Maurya Bistro, requested production of the section 112(5) “record” from the Director and notified the parties, among other things, that no submissions were being sought from them pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
6. The section 112(5) “record” was provided by the Director to the Tribunal and a copy was sent to Maurya Bistro. A deadline of November 3, 2014, was set for any objection by Maurya Bistro to the completeness of the section 112(5) “record”. In correspondence delivered to the Tribunal November 3, 2014, Maurya Bistro submitted what was identified as a list of objections to the completeness of the record. In reality the correspondence does not address the completeness of the record at all. Rather the opportunity provided to rectify any perceived omissions from the section 112(5) “record” was taken as an opportunity for Maurya Bistro to supplement its appeal submission and provide assertions of fact and documents that were not provided to the Director during the complaint process nor provided with the initial appeal submission. I do not find anything in this correspondence to be responsive to the opportunity given and, based on the absence of any relevant response, I find the section 112(5) “record” to be complete.

7. Accordingly, and consistent with the October 1, 2014, notice, I have reviewed the appeal, including the reasons for appeal submitted by Maurya Bistro, its submissions relating to the lateness of the appeal and the section 112(5) “record”.
8. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114 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 subsection 114(1), which states:

- 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 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 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.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Raturi will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

10. The issues at this stage of the appeal are whether the Tribunal should extend the time period provided in the *Act* for filing an appeal and, in any event, whether there is any reasonable prospect the appeal will succeed.

THE FACTS

11. The following findings of fact have been gleaned from the Determination.
12. Mr. Raturi was employed by Maurya Bistro as a cook from July 15, 2013, until March 27, 2014, at a rate of \$17.50 an hour. He complained to the Director that Maurya Bistro had failed to pay regular wages, overtime wages, statutory holiday pay and annual vacation pay.
13. The Determination sets out efforts to communicate with Maurya Bistro about Mr. Raturi’s complaint. On May 28, 2014, Mr. Sharma was contacted by telephone by the Director. He was notified of the allegations being made by Mr. Sharma and educated on an employer’s and director’s obligations under the *Act*. An unsuccessful attempt was made to arrange mediation. The Determination indicates Mr. Sharma was unresponsive to attempts to contact him about attempting mediation.
14. On June 6, 2014, a letter was sent to Maurya Bistro by registered mail notifying them of the complaint and outlining the claims being made by Mr. Raturi. The letter notified Maurya Bistro that a complaint hearing had

been scheduled. The letter contained a Notice of Complaint Hearing and a Demand for Employer Records, along with the applicable Employment Standards Branch *Factsheets*. The registered mail sent to the business address was returned to the Branch office. The Hearing Notice and the Demand was sent out again by regular mail to Maurya Bistro's business address, the director's addresses and to the registered and records office for Maurya Bistro.

15. On July 8, 2014, the Director phoned Maurya Bistro, as the payroll records had not been received. A message was left for Mr. Sharma and the Hearing Notice and Demand was sent again by regular mail to Maurya Bistro's business address and to the address recorded for Mr. Sharma in the corporate registry. On July 11, 2014, Mr. Sharma returned the call to the Branch and left a message. Mr. Sharma was called again, a message left for him, but he did not return that call.
16. On July 14, 2014, the records submitted by Mr. Raturi to support his claim were sent to the business address of Maurya Bistro and to the address listed for Mr. Sharma in the corporate registry.
17. The complaint hearing scheduled for July 31, 2014, commenced at 9:30 am. There was no one present at that time to represent Maurya Bistro. An unsuccessful attempt was made to contact Mr. Sharma by telephone. The complaint hearing commenced at 10:00 am and proceeded in the absence of a representative for Maurya Bistro. At 12:30 pm on July 31, 2014, Mr. Sharma arrived at the Branch office where the complaint hearing was scheduled, saying he was ready to proceed. He told the receptionist he thought he could attend the Branch at any time between 9:30 am and 4:30 pm. He was told the hearing had started at 9:30 am and was now completed.
18. There is a hand-written letter from Mr. Sharma in the section 112(5) "record" dated July 31, 2014, and dated stamped by the Branch the same day, stating there was a "delay" in getting the hearing notice, that Maurya Bistro is no longer in business and the Branch should update its record. No other information was provided by Maurya Bistro with that letter.
19. The Director found that Mr. Sharma was aware of the subject matter of the complaint, was aware of the complaint hearing and chose not to participate in it.
20. Mr. Raturi appeared at the complaint hearing and gave evidence, which was accepted by the Director as being both the best evidence available and "reasonable". Based on that evidence, the Director found the recovery period, calculated under section 80 of the *Act*, was from September 28, 2013, to March 27, 2014, and that regular wages, overtime pay, statutory holiday pay and annual vacation pay were earned and payable during that period. The Determination reflects those findings and provides reasons for them.

ARGUMENT

21. The argument made by Maurya Bistro is spread through several documents over a ten day period in September and in November, 2014. I shall summarize the elements of the appeal.
22. On September 15, 2014, the Tribunal received correspondence from Maurya Bistro indicating it was appealing the Determination. The correspondence indicated Maurya Bistro was no longer in operation and Mr. Sharma had stopped visiting the location of the business; he had received "just one letter" from the Branch, dated July 11, 2014.; he had attended the complaint hearing but "was informed the judicator [sic] had already made determination."; he had left a handwritten note "informing the concerned person" of his presence. The correspondence states he requested the reasons for the Determination on August 19, 2014 but had not yet received them. Notwithstanding, Maurya Bistro submits the Director has made an "error of law

by not explaining the difference between daily overtime and weekly overtime”. The letter goes on to state Mr. Raturi never worked any overtime and “was not able to provide any evidence or pay-slip showing he was paid overtime”. The correspondence also says the Director erred in calculating statutory holiday and annual vacation pay as Mr. Raturi “only worked for 7 months and in that period he was not working for more than 1 month with Mauryabistro Ltd.”.

23. The correspondence says Maurya Bistro has “all the evidence” showing no wages were owed to Mr. Raturi.
24. Another document included with the correspondence received September 15, 2014, was a letter dated September 9, 2014, with the subject heading “REASONS FOR DETERMINATION ER# 161-535”. That letter is directed to the Director and appears to be a request for reasons for the Determination. The letter says the Determination was “one-sided” and “against principal [sic] justice”. The letter contends Maurya Bistro was not given an opportunity of being heard, wishes to appeal and requires the reasons.
25. In an e-mail received by the Tribunal on September 16, 2014, Mr. Sharma, on behalf of Maurya Bistro, says he had only received the reasons for the Determination by e-mail on September 15, 2014, and was asking for an extension of time to file an appeal.
26. In a submission to the Tribunal dated September 25, 2014, Maurya Bistro provides the grounds for the appeal, which include the following points:
 - Maurya Bistro was not provided with any reasoning when the Determination was issued;
 - the Director “violated the fundamentals of administration law” by not providing reasoning for the Determination until the last day of the appeal period;
 - Maurya Bistro disputes the finding that Mr. Sharma did not respond promptly to the messages left by the Director, submitting the “only official letter [Mr. Sharma] received was on 31 July 2014”;
 - The notice of hearing did not provide any official time for the complaint hearing;
 - the Director breached section 77 of the *Act*;
 - the Director made an error of law and fact by not inquiring about the amount of cash Mr. Raturi borrowed from Maurya Bistro; and
 - the Director erred in law in calculating overtime.
27. This submission includes documents that were not provided to the Director during the complaint process: a time log sheet, a statement by an accountant showing regular payments plus statutory holiday pay and cheques paid to Mr. Raturi.
28. On November 3, 2014, the Tribunal received a further submission from Maurya Bistro, that purported to be objections to the completeness of the record, but which are, in reality, further submissions on this appeal. The submission reiterates several points made in earlier correspondence and contains several additional arguments and allegations of fact. In this submission, Maurya Bistro accuses Mr. Raturi of mischief, *mala fides* and perjury, alleges bias by the Director in the Determination and makes several factual assertions which, says Mr. Sharma, can be verified by affidavit, though none is provided. More documents are attached.

ANALYSIS

29. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.

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. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

32. Before addressing the relative merits of the appeal, I will consider Maurya Bistro's request to extend the appeal period, applying the circumstances of this case to the principles and factors used by the Tribunal in considering such requests.

33. The *Act* imposes an appeal deadline, and the other deadlines relating to the efficient handling of appeals, to ensure appeals are dealt with promptly: see section 2(d). The *Act* allows the 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 time limits 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.

34. 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 should 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 as 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.

35. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97.
36. Although the delay in this case is not lengthy and appears on its face to have resulted from the reasons not being delivered to Maurya Bistro until the last day of the appeal period, those facts do not determine the outcome of the request. I must consider all of the criteria identified above, as well as any unique criteria that have been identified in the request.
37. Considering the criteria, it does appear that Maurya Bistro expressed an intention to appeal the Determination before the appeal period had expired and notified the Director of that intention.
38. A consideration of prejudice is typically neutral, although in this case, I note Maurya Bistro has apparently ceased doing business. This supports the need for a quick resolution and denying an extension of time.
39. In the circumstances, I make no finding that the explanation for the delay in this case is reasonable or credible. On the one hand, Maurya Bistro is quite correct in submitting that receipt of the reasons on the last day of the appeal period made a delay in filing inevitable. On the other, I am not satisfied Maurya Bistro was particularly diligent in seeking reasons. I have not failed to notice that every step taken by Maurya Bistro in this case has been left until the last possible day, if there is a response at all.
40. One of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I also note that the presumptive merits of an appeal stand as a distinct consideration on which an appeal may be dismissed under section 114(1) of the *Act*, which is set out above.
41. When considering the relative merits of an appeal, or the *prima facie* strength of the case on appeal, the Tribunal considers the basis for the appeal and applies that to the statutory grounds of appeal and to well established principles which operate in the context of appeals generally and, more particularly, to the issues raised by the appeal. On that basis, I will now consider the relative merits of this appeal and its prospects for succeeding.
42. This appeal alleges the Director erred in law in finding there was daily and weekly overtime and in calculating overtime earned and payable. I disagree.
43. Generally, 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.
44. The error of law argument raises considerations of whether the Director misinterpreted or misapplied the overtime provisions of the *Act* and whether the Director erred in law in making findings of fact. In respect of

the latter consideration, the *Act* does not provide for an appeal based simply on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis 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 they are without any rational foundation.

45. On the matter of overtime, the *Act* specifically contemplates both daily and weekly overtime: see section 35. Based on the circumstances, which showed Mr. Raturi regularly working in excess of eight hours in a day and in excess of forty hours in a week, the Director was entirely correct to find Mr. Raturi entitled to be paid for both the daily and the weekly overtime worked. There is no error of law shown in the Director's findings on daily and weekly overtime entitlement.
46. In respect of the overtime calculations made by the Director, these are findings of fact based on the evidence provided at the complaint hearing, accepted by the Director and applied to the provisions of the *Act*. The burden is on Maurya Bistro in this appeal to show the Director's findings of fact raise an error of law and this burden has not been met.
47. The arguments that allege the Director committed an error of law have not been established and this ground of appeal is not shown to have any merit.
48. Maurya Bistro alleges the Director failed to observe principles of natural justice in making the Determination. This allegation includes the contention the Director denied Maurya Bistro the opportunity to be heard and conducted a "one-sided" and "biased" proceeding.
49. There is simply no basis for alleging bias. The Tribunal has required that allegations of bias, because of the nature of such allegations, should not be found except on the clearest of evidence; they should not be made speculatively. The onus of demonstrating bias, or reasonable apprehension of bias, lies with the person who is alleging its existence: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. There is not a single assertion of fact provided in this appeal to support the bias allegation, let alone the kind of "clear and cogent" evidence required to establish this allegation.
50. I give the same response to the accusations of mischief, *mala fides* and perjury levelled at Mr. Raturi. There is not a speck of evidence provided to support these very serious accusations.
51. The other aspect of the natural justice ground of appeal raises a "fair hearing" argument. Maurya Bistro says it was not given an opportunity to be heard. The facts set out in the Determination do not support this argument. Based on those facts, I agree with the finding of the Director, that Maurya Bistro was given the opportunity required by section 77 of the *Act*, and by considerations of the principles of natural justice that operate in this context, to participate in the process and to provide its evidence and argument to the Director. I do not accept for a moment that it was reasonable for Mr. Sharma to show up at 12:30 pm on the day of the complaint hearing and expect to be heard. As I have earlier mentioned, it has not gone unnoticed that Maurya Bistro failed to respond to a Demand for Employer Records and there is nothing indicating Mr. Sharma attended the Branch office on July 31, 2014, actually prepared to participate in the complaint hearing, as opposed to simply making an appearance for the purpose of setting up an argument.
52. This ground of appeal is not shown to have any merit.

53. In response to the third ground of appeal, commonly described as the “new evidence” ground of appeal, the Tribunal has established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. All of the foregoing conditions must be satisfied before “new evidence” will be admitted into an appeal. In my view, the “new evidence” sought to be introduced in this appeal was reasonably capable of being provided during the complaint process and is not *shown* to be credible or probative. In short, it does not satisfy several of the conditions necessary to be allowed and considered as “new evidence” under that ground of appeal.
54. The “new” evidence provided with this appeal is not accepted and this ground of appeal has no merit and is rejected.
55. As a final point, I find that to allow this appeal to proceed at all would require the Tribunal to ignore the long established principle enunciated in cases such as *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, which states that barring special circumstances parties may not fail or refuse to cooperate in the complaint process and later seek to file an appeal of the Determination when they disagree with it. In this case Maurya Bistro failed to respond to the Demand for Employer Records and failed to attend the complaint hearing. Their failure to respond to the Demand and their failure to attend the complaint hearing compels a finding that they may not now seek to challenge the Determination using arguments and evidence that could have been made had they decided to participate in the process.
56. In sum, I would not allow an extension of the appeal period, relying on the total absence of any merit to the appeal.
57. For the same reasons I find there is no reasonable, indeed there is no possible, prospect this appeal will succeed.
58. It would be inconsistent with the purposes and objectives of the *Act* to require the other parties to the Determination to respond to an appeal that has no likelihood of succeeding.
59. The appeal is dismissed.

ORDER

60. Pursuant to section 115 of the *Act*, I order the Determination dated August 6, 2014, be confirmed in the amount of \$29,730.56, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal