Employment Standards TRIBUNAL

An appeal

- by -

0788104 B.C. Ltd. carrying on business as The Local
("The Local")

- 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/109

DATE OF DECISION: October 28, 2016

DECISION

SUBMISSIONS

Nav Parhar	counsel for 0788104 B.C. Ltd. carrying on business as The Local

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), 0788104 B.C. Ltd. carrying on business as The Local ("The Local") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 4, 2016.

2. The Determination was the product of an audit conducted by the Director under section 76(2) of the *Act* which investigated terms and conditions of employment of eighty-three employees and former employees of The Local for compliance with the requirements of the *Act*. The audit period was February 1, 2015, to July 31, 2015.

3. The Determination found The Local had contravened Part 3, sections 16 and 28, Part 4, sections 36 and 40 and Part 5, sections 45 and 46 of the *Act* in respect of the persons who were found by the audit to be owed wages and ordered The Local to pay wages to those persons in the amount of $22,998.03 and to pay administrative penalties in the amount of $3,000.00. The total amount of the Determination is $25,998.03.

4. This appeal alleges the Director erred in law in respect of the findings on three persons: Curtis Cook ("Mr. Cook"), Justin Hardiman ("Mr. Hardiman") and Chance Wilke ("Mr. Wilke").

5. A form of appeal was filed with the Tribunal on August 10, 2016, which substantially met all of the requirements laid out in the Appeal Form but provided only a summary overview of the reasons for the appeal and did not attach any supporting documents. In the submission filed with the Appeal Form, The Local requested an extension of the appeal period of two to four weeks to "crystallize its appeal package" with supporting evidence, described in the submission as evidence of payment to Mr. Cook and affidavit evidence from Mr. Hardiman.

6. The statutory appeal period expired on August 11, 2016. Additional material, in the form of a more detailed submission of the reasons for the appeal of the findings made in the Determination on Mr. Cook and Mr. Wilke and two affidavits, was received by the Tribunal on September 14, 2016. One of the affidavits was sworn by Mr. Hardiman; the other by Jeremey Petzing ("Mr. Petzing"), the owner of The Local. Both were sworn on September 14, 2016.

7. In correspondence dated August 17, 2016, the Tribunal acknowledged receipt of the Appeal Form and notified all of 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.

8. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and a copy was delivered to The Local, through its legal counsel, on September 6, 2016. The Local has 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.

9. 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, my review of the material that was before the Director when the Determination was being made and any other material allowed by the Tribunal to be added to the record. Under section 114(1), 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 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 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.

10. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and the affected persons 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 appeal period should be extended to allow the additional argument and evidence provided to the Tribunal on September 14, 2016, and whether there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS

12. On August 4, 2015, the Director notified The Local that an investigation under section 76(2) of the *Act* was being commenced. An investigation of the payroll records of eighty-three employees and former employees of The Local was conducted. The audit looked at compliance with the *Act* over a period from February 1, 2015, to July 31, 2015. The Director found sixty-six of the persons whose employment with The Local was investigated were owed wages in the total amount set out in the Determination. The calculations for each of the sixty-six persons are set out in appendices attached to the Determination.

13. Of the persons listed in the Determination, the appeal, as it was filed in August 2016, has raised a question about the wage calculation for three of them: Mr. Cook, Mr. Hardiman, and Mr. Wilke.

14. Mr. Cook was employed at The Local as a cook from March 16, 2015, to October 11, 2015, at a starting wage of $14.50 an hour, increasing April 15, 2015, to $15.50 an hour. The Director found Mr. Cook was entitled to wages in the amount of $825.97, comprising overtime wages in the amount of $349.63, statutory holiday

pay in the amount of $425.14, concomitant annual vacation pay in the amount of $30.99 and interest in the amount of $20.21.

15. The Director found Mr. Hardiman was entitled to wages in the amount of $4,704.46. It is not necessary to expand on the facts relating to this finding as, notwithstanding the contents of the appeal as it was filed in August 2016, the Determination relating to Mr. Hardiman was not challenged in the September 2016 submission and appears to have been abandoned.

16. Mr. Wilke was employed at The Local as soux-chef from the beginning of January 2015 to March 14, 2016, at a salary commencing at $1,750 semi-monthly, increasing May 15, 2015, to $2,083.33 semi-monthly. The Director found he was entitled to wages in the amount of $3,450.87, comprising overtime wages in the amount of $1,239.60, statutory holiday pay, including premium pay for working statutory holidays, in the amount of $1,985.82, concomitant annual vacation pay in the amount of $129.02 and interest in the amount of $84.48.

17. The Local kept no record of the hours worked by Mr. Wilke. A reconstruction of his hours of work was performed by the Director from evidence provided by The Local, Mr. Wilke, and Mr. Hardiman.

18. The evidence of The Local, provided through documents and by Mr. Petzing, indicated the payroll records for days and hours of work for Mr. Wilke, showing 5.7 hours a day, seven days a week, were inaccurate and that, while the actual hours could not be determined, actual days and hours of work fluctuated depending on the season and, to a lesser extent, the day of the week.

19. The evidence of Mr. Wilke confirmed his hours fluctuated depending on the season: indicating during the winter months – the slowest season – he thought he worked about 8 to10 hours a shift, five days a week; during the period from mid February to about the beginning of May, he thought he worked 10 hours a shift, five days a week; and in the busy season – from May to the end of September, he worked 14 or 15 hour shifts, five days a week. He said he typically took Mondays and Tuesdays off, but was certain he worked the Victoria Day and BC Day statutory holidays, each of which fell on a Monday, for which he said he would have taken a different day off. He thought he and Mr. Hardiman worked the same number of hours. He rarely worked more than five days a week, doing so only when a shift needed to be covered.

20. Mr. Hardiman confirmed the fluctuation of hours. He indicated that from October to the end of March – the slow period – he usually worked nine hours a day, five days a week and in the summer, he usually worked 50 to 55 hours a week, and on occasion 60 hours a week, five days a week. Mr. Hardiman typically took Tuesday and Wednesday off.

21. Based on the evidence presented, the Director concluded Mr. Wilke's wage calculations could be based on his working 9 hour shifts, with two days off, in the months of January, February and March and 10 hour shifts, with two days off, from April 1 to August 15.

22. The Director based the calculation of wages owed to Mr. Hardiman on substantially the same daily hours of work. There are three differences in the wage calculation between Mr. Wilke and Mr. Hardiman: in the period March 16 – 31, 2015, Mr. Hardiman is credited with nine more hours of work than Mr. Wilke; in the period June 1 – 15, that difference is 10 hours and in the period April 1 – 15, Mr. Hardiman took one week off and was found to have worked 50 hours in that period.

23. On August 10, 2016, the Tribunal received an Appeal Form and a "Preliminary Argument in Support of Appeal". As indicated above, the selected ground of appeal was that the Director erred in law. The appeal

was incomplete in that it did not include written reasons and argument supporting the appeal or attach any supporting documents. Further, on receipt and review of the September 14, 2016, submission, it is apparent that the appeal is invoking the ground of appeal set out in section 112(1)(c) of the *Act*.

ARGUMENT

24. The Local submits the wage calculation for Mr. Cook is wrong as Mr. Cook was paid out all amounts owed to him and the Director failed take the payment, or payments, into account. The appeal submission contends Mr. Cook was given a total amount of "close to $1500.00". The affidavit of Mr. Petzing avers that "toward the end of his employment" Mr. Cook said he felt entitled to overtime and holiday pay (as he did not eat at The Local) and Mr. Petzing agreed, giving him two cheques to cover those entitlements "for the entire term of his employment". The affidavit attaches a copy of one cancelled cheque, dated July 24, 2015, in the amount of $577.35, that Mr. Petzing says was given to Mr. Cook. He says he "believe[s]" a copy of the cheque was given to the Director during the investigation.

25. Mr. Hardiman also speaks to this in his affidavit, saying:

> I distinctly recall discussions between me, Curtis [Mr. Cook] and Jeremy [Mr. Petzing], prior to Curtis' last day of employment, where he told Jeremy and I that he didn't ever eat or drink on shift at The Local and he felt that he was entitled to overtime and holiday pay. Jeremy agreed with him and gave him two cheques to cover those entitlements for the entire term of his employment. I distinctly recall personally handing both of the cheques to Curtis myself.

26. In the submission filed with the Tribunal on August 10, 2016, The Local asserted the Director erred in law in calculating the wages owed to Mr. Hardiman. Nothing in that submission, however, supports or speaks to that assertion and nothing in the material filed with the Tribunal on September 14, 2016, comments at all on there being any error in the wage calculation for Mr. Hardiman.

27. The Local argues the Director erred in law in calculating the wages owed to Mr. Wilke by "misapprehend[ing] or incorrectly apply[ing] the evidence" relating to his hours of work. The basic contention, found in the affidavits of both Mr. Petzing and Mr. Hardiman, is that the Director ought not to have based the calculation of hours worked by Mr. Wilke on the same number of hours as the wage calculation of Mr. Hardiman because, according to Mr. Hardiman, Mr. Wilke "worked 30-60 minutes less than [him] on most days throughout his tenure".

ANALYSIS

28. The Local seeks an extension of the time period for filing an appeal contained in section 112(2) of the *Act*. The issue here, however, is not the timeliness *per se* of the appeal but rather the completeness of the appeal and the sufficiency of the appeal documentation. This is not simply a play on words. An Appeal Form was submitted on August 10, 2016, one day before the end of appeal period. In that sense, there was a timely appeal. The question is whether the Appeal Form and the contents of the appeal submission filed in support of the appeal complied with the requirements of the *Act* and Tribunal's *Rules of Practice and Procedure* (the "*Rules*") in terms of its content and, if not, whether the Tribunal should permit the appeal to proceed nonetheless.

29. The initial filing did not comply with the Rules, which requires written reasons and argument for the appeal to be provided and any supporting documents to be attached. As well, both the initial filing and the

September 14, 2016, submission do not comply with the *Act* as neither raises the ground of appeal found in section 112(1) (c) nor addresses the requirements and criteria of that ground of appeal.

30. The question is whether the Tribunal should extend the time limits for an appeal to allow that ground to be incorporated into the appeal along with the assertions of fact and documents associated with it.

31. The September 14, 2016, submission was delivered to the Tribunal more than a month after the expiry of the statutory appeal period. Such delay is unacceptable and is inconsistent with the purpose for placing time limits and procedural requirements in the appeal process, which is twofold. First, having time limits meets the statutory purpose of ensuring a fair and expeditious determination of disputes arising under the *Act*. Second, a clear and enforced time limit ensures a closure on the matters in dispute, preventing "open-ended" claims and responses which would ultimately result in an unmanageable review process.

32. Having said that, I appreciate that there is a sensitive balance to be struck between the interest of ensuring that the process of adjudication moves quickly and with finality and the interest of ensuring that appellants are not effectively denied access to the process by an overly technical application of the rules. In *Stohlstrom*, BC EST # D453/98, the Tribunal adopted a relatively informal approach to the sufficiency of an appeal, looking at whether the information contained in the appeal was sufficiently "adequate" to provide a reasonably good understanding of the basis upon which the Determination was being challenged.

33. I intend to approach the appeal and the request for an extension with a view to the above considerations, but will reserve my final comments on the effect of this approach to a later point in this decision.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. The arguments on this ground of appeal rely on the Tribunal accepting evidence that was not, based on a review of the record, provided to the Director during the investigation. While Mr. Petzing says he "believes" the cheque concerning a payment to Mr. Cook was provided to the Director and that he "thought" he made clear to the Director during the investigation that Mr. Wilke did not work as much as Mr. Hardiman, those assertions are not borne out by a review of the material and submissions provided by The Local during the investigation.

40. As noted above, The Local has not grounded its appeal on section 112(1)(c) in the Appeal Form and its "preliminary argument" nor has it identified and argued that ground in its September 14, 2016, submission. The appeal, however, relies on evidence, in documentary and affidavit form, that is not found in the record and does not appear to have been provided to the Director during the investigation.

41. The Tribunal has frequently been called upon to address this ground of appeal, commonly referred to as the "new evidence" ground of appeal. In doing so, the Tribunal has noted the admission of evidence under this ground is discretionary and has taken a relatively strict approach to the exercise of this discretion.

42. The Tribunal tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether 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. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.

43. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

44. The Local seeks to change the Determination and bears the burden of showing the "new" evidence should be accepted and should produce the result sought. If it is unable to satisfy the Tribunal this evidence should be accepted and that it should compel a variance in the Determination, this appeal cannot succeed.

45. I am not persuaded to exercise my discretion to accept the evidence included in the affidavits of Mr. Petzing and Mr. Hardiman. I find it should not be accepted or considered in this appeal.

46. There are several reasons for this finding. First, the most obvious reason is that the evidence sought to be included with this appeal is not "new"; it existed at the time the Determination was being made and with some diligence could have been provided to the Director.

47. Second, I do not find this evidence to be sufficiently credible to satisfy the burden of establishing the facts for which it is advanced. I am disturbed by the fact the cheque attached to the affidavit of Mr. Petzing is dated July 24, 2015, yet both Mr. Petzing and Mr. Hardiman aver that the discussions which led to Mr. Cook being given two cheques (including, apparently, the one dated July 24) took place "toward the end of [Mr. Cook's] employment", which was October 11, 2015. Based on the duration of Mr. Cook's employment – March 16 to October 11, 2015 – a reference to July 24 being "toward the end of his employment" seems odd. Mr. Hardiman's affidavit is even more particular about the timing of the two cheques given to Mr. Cook, placing that event as occurring "prior to [his] last day of employment". While the statement does not indicate how much prior to Mr. Cook's last day of employment, the context of the statements made by Mr. Hardiman and Mr. Petzing would strongly suggest a time quite close to the last day of Mr. Cook's employment.

48. The cheque attached to Mr. Petzing's affidavit has no reference line on it. It does not correspond to any amounts that show what Mr. Cook was paid in the July 1 to July 31, 2015, payroll period.

49. I take a similar view of the evidence included in Mr. Petzing's affidavit concerning hours worked by Mr. Wilke. The Determination indicates Mr. Petzing had no idea what hours were actually worked by Mr. Wilke during the review period: see extract below. In the face of that evidence, it is difficult to accept that Mr. Petzing can say, with the degree of certainty required, that Mr. Hardiman "consistently worked longer days" than Mr. Wilke. It is also inconsistent with the statement in the Determination that Mr. Petzing "thought" he told the Director Mr. Wilke did not work as much as Mr. Hardiman.

50. Third, I do not find the assertions made concerning the hours worked by Mr. Wilke relative to the hours worked by Mr. Hardiman to be particularly probative. The hours of work used by the Director to calculate Mr. Wilke's, and Mr. Hardiman's, wage entitlements were not exact. That was acknowledged by the Director and is clear from the wage calculation summary for each of these employees. The hours worked calculation was based on the "best evidence" available. In this context, it is interesting to note the recital by the Director of the evidence provided by Mr. Petzing concerning the hours worked by Mr. Hardiman, Mr. Wilke and one other employee:

> He [Mr. Petzing] did not know what hours these individuals likely worked during the six months under review and advised there was no way of finding out what they worked. They may have worked three days a week or they may have worked seven days a week. There were weeks when they may have worked 40 hours a week and others when they may have worked 58 hours a week. They may have worked 75-80 hours a pay period in the slower season and 105 hours a pay period in the busy season. The number of hours worked each day could vary between two hours and ten hours.

51. None of the evidence provided to the Director during the investigation suggested Mr. Hardiman worked more hours than other "back of the house" employees. It may be that had that information been provided to the Director, and accepted, the finding of hours worked by Mr. Hardiman would have been greater. It does not mean the finding of hours worked by Mr. Wilke would have been less. Based on the information provided, it was open to the Director to reach several different conclusions relative to the hours worked by Mr. Wilke. The conclusion reached was one which was based on the evidence and was reasonable.

52. Overall, the somewhat vague and incomplete evidence sought to be added to the record of this case does not satisfy the criteria for admitting new evidence.

53. My conclusion on the "new" evidence filed leaves only the allegation the Director made an error of law in calculating the wage entitlements for Mr. Cook and Mr. Wilke. Support for such an allegation must be found in the record. I find there is no evidence in the record that supports or justifies a conclusion that the Director erred in law in making the calculations of wages owed to Mr. Cook and Mr. Wilke. The findings made in respect of Mr. Hardiman's wage entitlement have not, in the final analysis, been challenged.

54. The Local has not met the burden of showing an error of law in the Determination; there is no reasonable prospect of the appeal succeeding. The appeal is dismissed on that basis. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

55. I return briefly to the matter of the request for an extension of time. From my conclusions on the merits of the appeal generally, I would not have granted an extension of time. An important criterion when considering to allow substantive elements of an appeal to be added after the expiry of the appeal period is the strength of the case on appeal. The appeal is not strong or persuasive. Even adopting a less "technical" approach to the sufficiency of this appeal, applying the appropriate principles to its elements, an extension of time would add nothing to its merits.

ORDER

56. Pursuant to section 115 of the *Act*, I order the Determination dated July 4, 2016, be confirmed in the amount of $25,998.03, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal