

An appeal

- by -

Vice Pacific Holdings Inc.
("VPH" or the "Company")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Shafik Bhalloo

FILE NO.: 2018A/32

DATE OF DECISION: May 15, 2018

DECISION

SUBMISSIONS

Joseph Lagadyn

on behalf of Vice Pacific Holdings Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Vice Pacific Holdings Inc. (“VPH” or the “Company”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 9, 2018 (the “Determination”).
2. The deadline for filing an appeal of the Determination was 4:30 p.m. on March 19, 2018. The Tribunal received the Company’s Appeal Form dated March 6, 2018, on March 20, 2018, requesting an extension of time to file the Company’s appeal pursuant to section 109(1)(b) of the *ESA*. The Appeal Form also accompanied short written submissions of the Company’s sole director and officer, Joseph Lagadyn (“Mr. Lagadyn”).
3. The Determination concluded that VPH contravened Part 3, section 18 (wages); Part 4, section 40 (overtime); Part 7, section 58 (vacation pay) and Part 8, section 63 (compensation for length of service) of the *ESA* in respect of the employment of Pedro Leyva Parra (“Mr. Parra”), and ordered VPH to pay Mr. Parra wages in the amount of \$3,474.03 including accrued interest. The Determination also levied an administrative penalty under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00 for breach of section 18 of the *ESA*. The total amount of the Determination is \$3,974.03.
4. In its Appeal Form, VPH has checked off all three grounds of appeal, namely, the delegate erred in law and breached the principles of natural justice in making the Determination, and new evidence has become available that was not available at the time the Determination was being made. VPH is seeking the Tribunal to cancel the Determination.
5. In correspondence dated March 27, 2018, the Tribunal sent the Company’s appeal and request to extend the appeal period to the other parties for informational purposes only. The Tribunal informed Mr. Parra and the Director that no submissions were being requested from them at that 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 the Company to provide its written reasons and argument for the appeal as well as any supporting documents no later than 4:00 p.m. on April 27, 2018. The Company did not comply with this request. As at the time of writing this decision, the Company has yet to provide the requested materials.
6. On April 11, 2018, the Director sent the Record to the Tribunal.
7. On April 13, 2018, the Tribunal disclosed the Record to VPH and Mr. Parra and afforded both parties an opportunity to object to its completeness. However, no objections were received from either party by the deadline of April 27, 2018. Therefore, I find the Record, as produced by the Director, to be complete.

8. On May 2, 2018, the Tribunal informed the parties that the appeal would be decided by a Tribunal Member. I have decided this appeal is an appropriate case for consideration under section 114 of the *ESA*. Therefore, at this stage, I will assess the appeal based on the Determination, the Appeal Form and accompanying submissions of Mr. Lagadyn, the Reasons for the Determination (the “Reasons”), and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *ESA*, 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 Mr. Parra 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. VPH will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *ESA*.

THE FACTS AND THE REASONS

10. VPH is a company incorporated under the laws of British Columbia and operates a shipping and printing company.
11. A BC Online: Registrar of Companies — Corporation Search conducted by the delegate on June 5, 2017, indicates that it was incorporated on June 22, 2012.
12. Mr. Lagadyn is listed as the Company’s sole director and officer.
13. VPH employed Mr. Parra as an accountant from March 29, 2016, to April 2017. It should be noted that there is no evidence in this case that would raise any issue of the applicability of the *ESA* to Mr. Parra pursuant to section 31(b) of the *Regulation*.
14. On June 5, 2017, Mr. Parra filed a complaint under section 74 of the *ESA* against VPH alleging that VPH contravened the *ESA* by failing to pay him regular and overtime wages, annual vacation pay, statutory holiday pay and compensation for length of service (the “Complaint”).
15. The delegate of the Director conducted a hearing of the Complaint on August 2, 2017 (the “Hearing”). While Mr. Lagadyn attended the Hearing in person on behalf of the Company, Mr. Parra attended on his own behalf by telephone.
16. The two issues the delegate considered at the Hearing are whether VPH had just cause to terminate Mr. Parra’s employment and did it owe any wages to Mr. Parra. The delegate summarized the evidence of the parties on both these questions, in some detail, in the Reasons. I do not find it necessary to reiterate the delegate’s summary of the evidence verbatim below, but I will briefly review the delegate’s conclusions and her reasons for the same below.

17. With respect to the question of whether or not the Company had cause to terminate Mr. Parra's employment, the delegate set out the law governing termination of an employee's employment under section 63 of the *ESA* and explained the burden of proof is on the employer to prove, on a balance of probabilities, that it has just cause to terminate the employee, if the employer is relying upon cause to terminate the employee.
18. The delegate then went on to note that VPH asserted that it had just cause to terminate Mr. Parra's employment for several reasons including poor performance, tardiness, drinking alcohol at work, personal use of the Company's funds, granting himself unauthorized raises, and working and paying himself for unauthorized overtime.
19. The delegate also noted that while some of this conduct, if proven, could amount to minor misconduct, some of it could amount to such serious, deliberate, and intentional misconduct that a single act could constitute just cause. However, the delegate was quick to point out that the degree of misconduct that forms the basis of just cause depends on the facts in each case and the key question is whether an employee acted in a manner that was inconsistent with the continuation of his employment. The delegate further noted that the onus is on the employer to demonstrate that it established a reasonable standard of performance and communicated that standard to the employee; that it provided the employee with sufficient time and a reasonable opportunity to meet the standard; that the employer warned the employee that failure to meet the standard would result in termination; and that despite this, the employee did not meet the standard.
20. In this case, the delegate found that Mr. Lagadyn's uncontested evidence is that he never warned Mr. Parra that his employment would be terminated if he failed to improve his behaviour or improve the standard of his job performance. Failure to establish such a warning, according to the delegate, was fatal to the Company's claim that it had cause to terminate Mr. Parra's employment. In the result, the delegate found that VPH failed to prove, on a balance of probabilities, that it had just cause to terminate Mr. Parra's employment for minor misconduct. In the circumstances, the delegate found it unnecessary to determine the merits of the Company's allegations of various lapses on the part of Mr. Parra.
21. The delegate also found that the Company failed to establish, on the balance of probabilities, its allegations of after acquired cause – that is, that only after terminating Mr. Parra's employment on April 13, 2017, it discovered that Mr. Parra used the Company's funds for personal use, gave himself unauthorized raises, and worked and payed himself for unauthorized overtime. In the result, the delegate concluded that the Company failed to prove cause for the termination of Mr. Parra's employment and owed him compensation for length of service under the *ESA*.
22. In determining the amount of compensation for length of service VPH owed to Mr. Parra, the delegate noted that the Company's termination letter of April 13, 2017, to Mr. Parra indicates that he would receive a combination of two weeks' working notice and payment in lieu. However, it is undisputed that Mr. Parra was not afforded the opportunity to perform work for the Company after April 13, 2017, (and the Company did not pay him for any work performed after March 31, 2017). Therefore, according to the delegate, VPH failed to provide Mr. Parra working notice or payment in lieu of notice after the notice of termination of his employment was issued on April 13, 2017.

23. Since it is undisputed that Mr. Parra was employed by VPH for more than one year but less than three years, the delegate concluded that he is owed two weeks' compensation for length of service in accordance with section 63 of the *ESA*. The delegate determined that the two week's payment totalled \$1,552.50, which she ordered VPH to pay Mr. Parra.
24. With respect to the second question, whether VPH owed Mr. Parra any wages, the delegate observed that there is no dispute that Mr. Parra worked 66.66 regular hours in his final pay period ending April 15, 2017, for which VPH had not paid him wages. While the parties disputed whether Mr. Parra worked the additional hours (both regular and overtime) indicated on Mr. Parra's time sheets for the said pay period, or whether those hours were authorized, the delegate concluded that VPH failed to establish on a balance of probabilities that Mr. Parra's overtime was unauthorized. The delegate also added that VPH failed to adduce any evidence to contest the validity of Mr. Parra's time sheets for his final pay period. Based on Mr. Parra's timesheets, the delegate concluded that VPH owed him wages for 67.83 of regular hours and 2.92 of overtime hours. The two amounts totaled \$1,356.60 and \$87.60 respectively.
25. With respect to Mr. Parra's claim that he was owed statutory holiday pay for Good Friday which fell on April 14, 2017, the delegate noted that Mr. Parra's employment was terminated on April 13, 2017. Therefore, he was not entitled to statutory holiday pay for Good Friday as he was no longer employed on April 14, 2017. As for all other statutory holidays within the last six months of his employment, the delegate found that Mr. Parra was properly compensated and the Company did not owe him any monies.
26. The delegate also awarded Mr. Parra annual vacation pay of \$397.26 pursuant to section 58 of the *ESA* after taking into consideration past payments and vacation pay owing on the regular and overtime wages awarded.
27. The delegate also awarded interest on all amounts owing to Mr. Parra pursuant to section 88 of the *ESA*.
28. The delegate also levied an administrative penalty of \$500.00 against the Company, under section 29 of the *Regulation*, for its failure to pay all wages owing to Mr. Parra within 48 hours of the termination of his employment contrary to section 18 of the *ESA*.

SUBMISSIONS OF VPH

29. While VPH did not provide the Tribunal with "its written reasons and argument for the appeal as well as any supporting documents ... by April 27, 2018" as requested in the Tribunal's letter of March 27, 2018, the Appeal Form of VPH did accompany some brief submissions of Mr. Lagadyn. In these submission, Mr. Lagadyn states:
- a. VPH has commenced civil litigation against Mr. Parra in the Provincial (Small Claims) Court for breach of contract and fiduciary obligations in his position as an accountant.
 - b. Mr. Parra has been sent notification to contact VPH "regarding the procedures moving forward in the Civil Suit", but VPH has not yet made contact with him.
 - c. VPH will be using the services of the Sheriff's office to serve its claim on Mr. Parra.

- d. “During the course (sic) of the trial there will be several instances and proof of misconduct, breach of contract and breach of Fiduciary Duties that will ultimately contradict the findings of [the delegate].”
- e. The timing of the hearing in the Provincial Court will depend on “where and when the Sheriff can find [Mr. Parra].”
- f. It is anticipated that the hearing in the Provincial Court will take a day or two, and “once the facts have been concluded”, the judge will make his or her decision and the Company will then send the decision to the Tribunal to “re-examine the ‘Determination’ and correct [the] initial findings”.
- g. VPH has suffered “gross injustice” and “the merits of the findings are not complete” because the delegate “did not have the complete picture in front of her at the time [she made the Determination]”.
- h. The Company’s “Defence will show beyond a reasonable doubt that Mr. [Parra] failed on most if not all accounts to perform his duties of his Work Permit”. Therefore, the Company is entitled to “financial compensation” for Mr. Parra’s breaches.
- i. “I trust the Director and the Tribunal will see fit to grant the Appeal and allow Justice to take its course (sic) and ultimately see the true picture of this deceitfully (sic) individual and dissolve the claim accordingly.”

ANALYSIS

^{30.} The grounds of appeal under the *ESA* are statutorily limited to those found in section 112(1):

Appeal of director’s determination

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 repeatedly stated that 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 on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

^{32.} The grounds of appeal listed in section 112(1) 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.

33. Having delineated some broad principles applicable to appeals, in this case, as previously noted, VPH appeals on all three grounds, namely, that the Director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made. I will review each ground separately below starting with the natural justice ground of appeal.

Natural justice

34. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05).
35. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

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 respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST #D050/96.

36. Having reviewed the Determination including particularly the Record and the submissions of Mr. Lagadyn, I do not find the Company has discharged its burden to persuade the Tribunal that there is an error in the Determination on the natural justice ground. I find that the Company has merely checked off the “natural justice” ground of appeal in the Appeal Form without providing any argument or evidence supporting the natural justice ground of appeal.
37. Having said this, I find that there is sufficient evidence in the Record and the Reasons showing that the delegate of the Director afforded the Company all of the procedural rights contemplated within the meaning of natural justice decisions in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, *supra*. Therefore, I dismiss the natural justice ground of appeal.

Error of law

38. With respect to the “error of law” ground of appeal, the Tribunal has adopted the following definition of error of law delineated in 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. As with the natural justice ground of appeal, the Company has merely checked of the “error of law” ground of appeal in the Appeal Form but has not submitted any supporting evidence for this ground of appeal, although it was afforded the opportunity to do so. I find that there is no evidentiary basis for me to interfere with the Determination on the error of law ground of appeal, and I dismiss the error of law ground of appeal.

New evidence

40. With respect to the “new evidence” ground of appeal in section 112(1)(c) of the *ESA*, it should be noted that the admission of “new evidence” is discretionary. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four (4) conjunctive requirements which must be met before new evidence will be considered on appeal. These requirements are as follows:

- (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 led the Director to a different conclusion on the material issue.

41. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the investigation stage or before the Determination is made (see *607470 B.C. Ltd. carrying on business as Michael Allen Painting*, BC EST # D096/07; *Kaiser Stables Ltd.*, BC EST # D058/97).

42. In this appeal, the Company has not submitted any “new evidence”. Mr. Lagadyn states that VPH has commenced a proceeding in the Provincial Court, and he feels confident that after the court renders its decision and the Tribunal reviews it, the Tribunal will be persuaded to grant the Company’s appeal. It appears that the Company may be seeking a suspension of the Determination until the Provincial Court proceeding is completed, whenever that may occur. I do not find there is any evidentiary basis in Mr. Lagadyn’s submissions upon which the Company can advance the “new evidence” ground of appeal and, therefore, I dismiss this ground of appeal as well.

43. As for the Provincial Court proceeding against Mr. Parra, the Tribunal has held in past cases that an employer may commence a court action in the Provincial Court against an employee, but this action is entirely separate and apart from the *ESA*, and an employee’s entitlements under the *ESA* cannot be deferred or eliminated by the Tribunal because of some other proceeding (see *New Pacific Limousine Service Inc.*, BC EST # D054/96).

44. I also note that section 2 of the *ESA* provides that that one of the purposes of the *ESA* is to provide for efficient procedures for resolving disputes between employers and employees. An order from the Tribunal that earned wages should be withheld from an employee for an indefinite period pending the outcome of another proceeding (which may or may not result in an order or judgment) would defeat this purpose of the *ESA*.
45. Consistent with the Tribunal's decision in *New Pacific Limousine Service Inc.*, *supra*, I find that in the absence of any clear and express language in the *ESA* or the *Regulation* allowing the Tribunal the power to withhold earned wages pending some other proceeding, the Tribunal should not make any order that will delay wages owed to Mr. Parra pending the outcome of the Company's court action.
46. In the result, I am satisfied that VPH's appeal has no presumptive merit and shows no prospect of succeeding. Therefore, I dismiss the appeal under section 114(1)(f) of the *ESA*.

ORDER

47. Pursuant to section 115 of the *ESA*, I order the Determination dated February 9, 2018, be confirmed together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal