



Citation: Bito Plumbing & Heating Ltd. (Re)
2018 BCEST 81

An appeal

- by -

Bito Plumbing & Heating Ltd.
("Bito" 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/75

DATE OF DECISION: August 14, 2018

DECISION

SUBMISSIONS

Chi Hang Ip

on behalf of Bito Plumbing & Heating Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Bito Plumbing & Heating Ltd. (“Bito” or the “Company”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 1, 2018 (the “Determination”).
2. The Determination found that Bito contravened Part 3, sections 18 (wages), 21 (business expenses), and 27 (wage statements); Part 4, section 40 (overtime); Part 7, section 58 (vacation pay) of the *ESA*, and Part 8, section 46 (production of records) of the *Employment Standards Regulation* (the “Regulation”), in respect of the employment of Hanchao Xu (“Mr. Xu”). The Determination ordered Bito to pay Mr. Xu wages in the total amount of \$4,606.78 inclusive of accrued interest. The Determination also levied three (3) administrative penalties against Bito totaling \$1,500 for breaches of sections 18 and 27 of the *ESA*, and section 46 of the *Regulation*. The total amount of the Determination is \$6,106.78.
3. Bito appeals the Determination on the sole ground that the Director erred in law in making the Determination.
4. On July 9, 2018, the Tribunal corresponded with the parties advising them that it had received Bito’s appeal. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) “record” (the “Record”) and notified the Director and Mr. Xu that no submissions were being sought from them on the merits of the appeal at this stage.
5. The Record was provided by the Director to the Tribunal on July 12, 2018. A copy of the same was sent by the Tribunal to Bito and Mr. Xu on July 16, 2018, and both parties were provided an opportunity to object to its completeness.
6. Neither Bito nor Mr. Xu objected to the completeness of the Record. In the circumstances, the Tribunal accepts the Record as complete.
7. On August 1, 2018, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed, and that following the review, all or part of the appeal may be dismissed under section 114(1) of the *ESA*. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from Mr. Xu and the Director on the merits of the appeal.
8. In this case, I will make my decision whether there is any reasonable prospect that the appeal will succeed based on my review of Bito’s submissions, the section 112(5) Record, and the Reasons for the Determination (the “Reasons”).

ISSUE

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

THE FACTS AND REASONS FOR THE DETERMINATION

10. Bito operates a plumbing, heating, and construction business. According to a BC Online: Registrar of Companies - Corporation Search (the “Corporate Search”) conducted by a delegate of the Director on January 8, 2018, Bito was incorporated on December 22, 2016, as Babito Plumbing & Heating Ltd. On June 25, 2017, the Company changed its name to Bito Plumbing & Heating Ltd. The Corporate Search also shows Chi Hang Ip (“Ms. Ip”) as the sole director of the Company. There is no officer recorded in the Corporate Search.
11. Mr. Xu worked as a carpenter with Bito from August 1 to August 31, 2017. On January 5, 2018, Mr. Xu filed a complaint under section 74 of the *ESA* alleging that Bito contravened the *ESA* by failing to pay his wages, including overtime, and by requiring him to pay its business expenses (the “Complaint”).
12. On May 9, 2018, a delegate of the Director conducted a hearing of the Complaint (the “Hearing”). The Hearing was attended by Mr. Xu on his own behalf and by Ms. Ip and Babito Lornzo (Mr. Lornzo”) on behalf of Bito. Mr. Lornzo is the General Manager of Bito and Ms. Ip the owner. The latter did not testify at the Hearing but Mr. Lornzo did.
13. In the Reasons, the delegate notes that he considered two issues at the Hearing, namely: (1) Was Mr. Xu an employee of Bito and, (2) if so, does Bito owe Mr. Xu wages? In concluding in the affirmative on both questions, the delegate meticulously sets out his reasons at pages 8 to 11 inclusive of the Reasons. As Bito’s appeal does not challenge the conclusions of the delegate that Mr. Xu was an employee of Bito and Bito owes him wages in the total amount of \$4,606.78, I do not find it necessary to review the evidence of the parties and the delegate’s reasons for his conclusions here.

SUBMISSIONS OF BITO

14. Bito has checked of the “error of law” ground of appeal in its Appeal Form.
15. In the accompanying written submissions, Bito’s owner and director, Ms. Ip, states:

I am Chi Hang Ip, the owner and president of Bito Plumbing & Heating Ltd.

I am writing to appeal the Determination.

Mr. Hanchao Xu (Xu) was not interviewed or hired by me. You sent the letter to *my company* [italics mine] and I have no business or contacts whatsoever (sic) with this person.

In Xu’s statement, he only mentioned Babito Lornzo and Babito Plumbing and he never mentioned about my name. Xu needs to deal with his matter directly with Babito Lornzo and Babito Plumbing. Please do not send any letter *to my company* [italics mine].

ANALYSIS

16. Section 112(1) of the *ESA* provides that a person may appeal the determination on 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.
17. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1) above.
18. 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.
19. As indicated above, the Company's appeal is based on the "error of law" ground of appeal in section 112(1)(a) of the *ESA*.
20. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA), the BC Court of Appeal defined error of law inclusively as follows:
1. a misinterpretation and or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of a 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.
21. Having carefully reviewed the appeal submissions of Ms. Ip on behalf of Bito, I find the submissions are misguided and do not establish, in the least, any basis to find an error of law in the Determination as defined in *Gemex Developments Corp.*, *supra*. To the contrary, I find that the delegate's conclusions on both questions – status of Mr. Xu as an employee of Bito and wages Bito was found to be owing to Mr Xu – were made on the evidence before him and they were rationally supported by that evidence.
22. Having said this, I note that while Ms. Ip does not want Bito to receive any correspondence relating to the Complaint or the Determination and she wants Mr. Xu to deal with "his matter directly with Mr. Lornzo and Babito Plumbing" (because Mr. Xu may not have mentioned Ms. Ip's name at the Hearing), Mr. Xu's Complaint was indeed against Bito. The Determination found that he was an employee of Bito and Bito owed him wages. It is immaterial to this Determination that Mr. Xu's dealings were not with

Ms. Ip (the director, owner, and president of Bito) and only with Bito's General Manager, Mr. Lornzo. This does not somehow shield Bito from its employment liability to Mr. Xu.

23. It is also curious that Ms. Ip, in her written submissions, appears to be distinguishing her "[C]ompany" from "Babito Plumbing" as if they are two separate legal entities. The Corporate Search shows and the delegate notes in the Reasons that Bito was incorporated on December 22, 2016, as Babito Plumbing & Heating Ltd. On June 25, 2017, the Company changed its name to Bito Plumbing & Heating Ltd. It is the same company but with a name change. Moreover, Mr. Xu was employed by the Company after its name change to Bito. I find absolutely no merit in Ms. Ip's submissions.
24. Based on all of the above, I find that this appeal has no prospect of succeeding and the purposes and object of the *ESA* are not served by requiring the parties to respond to it. In the result, I dismiss Bito's appeal of the Determination pursuant to section 114(1)(f) *ESA*.

ORDER

25. Pursuant to section 115 of the *ESA*, I confirm the Determination made on June 1, 2018, together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal