

An appeal

- by -

Point Grey Cannabis Ltd.
("PGC")

- 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: Carol L. Roberts

FILE NO.: 2018A/76

DATE OF DECISION: August 14, 2018

DECISION

SUBMISSIONS

Yvette Bikus

on behalf of Point Grey Cannabis Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Point Grey Cannabis Ltd. (“PGC”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 29, 2018.
2. The delegate concluded that PGC had contravened the *ESA* in failing to pay Katharine Foran (“Ms. Foran”) wages, annual vacation pay, compensation for length of service, and interest in the total amount of \$2,358.78. The Director imposed four administrative penalties on PGC for contraventions of the *ESA* and the *Employment Standards Regulation* (the “*Regulation*”) in the total amount of \$2,000, for a total amount payable of \$4,358.78.
3. PGC appeals the Determination arguing that the Director failed to observe principles of natural justice in making the determination. PGC also says evidence has become available that was not available at the time the Determination was being made.
4. This decision is based on PGC’s written submissions, the section 112(5) “record” that was before the Director at the time the decision was made (the “Record”), the Determination and the Reasons for the Determination.

FACTS AND ARGUMENT

5. On August 23, 2017, Ms. Foran filed a complaint alleging that PGC had contravened the *ESA* in failing to pay her outstanding wages.
6. Although the complaint was to be resolved by way of a hearing before a delegate on November 30, 2017, neither party appeared at the hearing. The delegate then decided to investigate the complaint.
7. PGC is a company registered in British Columbia that operates a marijuana dispensary. Yvette Bikus (“Ms. Bikus”) is the only director and sole officer.
8. Ms. Foran contended that she was employed as PGC’s manager from May 26, 2016, until April 23, 2017. She said that she “ran the show,” managing the business, opening and closing the store, fulfilling front desk reception tasks, cleaning, distributing product, and was the “bud tender.” Ms. Foran also ordered items and administered the consignment program at the store.
9. As Ms. Bikus was applying to become a legal cannabis establishment, Ms. Foran completed surveys and communicated with representatives of the City of Vancouver, the Vancouver Police Department, and the Vancouver Fire Department respecting inspections and code issues. Although Ms. Bikus gave final

approval for all human resource decisions, Ms. Foran conducted all the interviews and provided Ms. Bikus with her feedback about current and potential employees. Ms. Bikus gave great weight to Ms. Foran's opinions and accepted her recommendations.

10. Ms. Foran was paid in cash and did not receive any wage statements. Ms. Foran alleged that her employment was terminated without notice and that she was not paid for work performed from April 1, 2017, until April 23, 2017. Ms. Foran provided the delegate with a copy of her calendar for this period with her hours noted on it. She claimed that she was owed wages for 153 hours of work.
11. The delegate made repeated attempts to contact PGC without success. On October 23, 2017, the delegate issued a Demand for Employer Records (the "Demand"). The Demand, along with a Notice of Complaint Hearing, were sent by registered mail to PGC's business location, PGC's registered and records office, as well as to Ms. Bikus' address. The Demand required that PGC provide employer records by November 9, 2017.
12. The delegate also sent a number of emails to PGC asking for its response to the complaint.
13. Although PGC provided no records in response to the Demand, it did submit a number of documents, including two emails from customers stating that they believed Ms. Foran was a volunteer.
14. On February 21, 2018, the delegate sent a preliminary findings letter to the parties detailing his findings to date and seeking a response. On February 27, 2018, Ms. Bikus sent the delegate an email disputing the findings, and on April 5, 2018, sent him an email containing a copy of a letter from a customer stating that he "knew" Ms. Foran was a volunteer.
15. The delegate found that Ms. Foran completed tasks for PGC that fell within the definition of "work" in the *ESA*. He also found that PGC's only evidence that Ms. Foran was "volunteering," or providing those tasks without remuneration, were letters from clients. The delegate noted that PGC did not dispute Ms. Foran's allegations that she was paid cash for some of the services she rendered. The delegate concluded that, in that circumstance, PGC's argument and evidence that Ms. Foran was a volunteer was irrelevant to her entitlement to wages.
16. The delegate determined that Ms. Foran was a manager, and thus not entitled to overtime wages.
17. Finally, the delegate determined that the only available evidence regarding Ms. Foran's hours of work was that provided by Ms. Foran herself. Upon a review of that evidence, the delegate found her record of hours to be both reliable and reasonable. Noting that PGC did not dispute Ms. Foran's allegation that her employment was terminated without notice or pay in lieu, the delegate also determined that Ms. Foran was entitled to one week of compensation for length of service.
18. The delegate imposed four administrative penalties for PGC's failure to comply with the *ESA*. Those penalties were for PGC's failure to pay Ms. Foran regular wages on an ongoing basis contrary to section 17 of the *ESA*, for PGC's failure to pay Ms. Foran all wages owing within 48 hours of terminating her employment contrary to section 18 of the *ESA*, for PGC's failure to provide Ms. Foran with a written wage statement contrary to section 27 of the *ESA*, and for PGC's failure to comply with the Demand for Employer Records, contrary to section 46 of the *Regulation*.

19. In its appeal submission, PGC submits that Ms. Foran was a volunteer and “had no given duties.” PGC says that the parties had an agreement that Ms. Foran was “to contribute to a non profit (sic) for anytime she put on as she was collecting welfare and unemployment.”
20. Attached to the appeal submission were copies of Vancouver Police Department Police Record checks for two individuals who were identified on the documents as volunteers with PGC.

ANALYSIS

21. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
22. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision of the Director. I conclude that PGC has not met that burden and dismiss the appeal.
23. Section 114 of the *ESA* provides that 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.

Failure to observe the principles of natural justice

24. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that PGC was denied natural justice.
25. The delegate notified PGC about the complaint and issued a Demand for Employer Records. The notice of the hearing as well as the Demand were sent by registered mail. Canada Post records confirm that PGC received the correspondence on October 24, 2017. The Record confirms that although PGC was

made aware of the complaint and the opportunity to appear at a complaint hearing, no one from PGC appeared at that hearing.

26. The delegate then communicated with PGC by email, seeking a response to the allegations. PGC made limited submissions. After reviewing the parties' evidence and submissions, the delegate provided PGC with his preliminary findings and offered PGC the opportunity to respond. PGC did so.
27. I find no basis for this ground of appeal.

New evidence

28. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (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.
29. PGC had full opportunity to submit documents in support of its position during the delegate's investigation. The material submitted on appeal, that is, the Police Record Checks, were created in 2017 and were thus available at the time of the investigation. Consequently, the documents do not meet the test for new evidence. Furthermore, the documents are identical or similar to documents submitted to the delegate during the investigation. As such, I infer the evidence has already been considered by the delegate.
30. I also find that the "new" evidence is not relevant to the main issue before the delegate; that is, whether or not Ms. Foran was a volunteer. Letters from "clients" attesting to Ms. Foran's status are irrelevant as there is no evidence about the basis for those opinions. In my view, this information, even if new, would not have led the delegate to a different conclusion on the material issues before him.
31. In my view, PGC's appeal is an attempt to re-argue the complaint before the Director. As the Tribunal has said on many occasions, an appeal is not an opportunity to re-argue a case that has been fully made before the delegate.

ORDER

32. Pursuant to section 115 of the *ESA*, I order that the Determination dated May 29, 2018, be confirmed in the amount of \$4,358.78 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal