

Citation: Green Mountain E Trading Limited (Re)  
2018 BCEST 99

An appeal

- by -

Green Mountain E Trading Limited  
("Green Mountain")

- 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:** Maia Tsurumi

**FILE NO.:** 2018A/89

**DATE OF DECISION:** October 1, 2018

## DECISION

### SUBMISSIONS

Zhe Yu

on behalf of Green Mountain E Trading Limited

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Green Mountain E Trading Limited (“Green Mountain”) has filed an appeal of a determination (“Determination”) issued by Micah Carmody, a delegate (“Delegate”) of the Director of Employment Standards (the “Director”), on July 20, 2018. In the Determination, the Delegate found that Green Mountain contravened sections 58 and 63 of the *ESA*.
2. Green Mountain appeals the Determination on the grounds that the Delegate erred in law. Green Mountain seeks to have the Determination varied.
3. I have decided that this appeal is appropriate for consideration under section 114 of the *ESA*. Under section 114, the Tribunal has the discretion to dismiss all or part of an appeal, without hearing, for any of the following reasons:
  - 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.
4. This decision is based on the submissions made by Green Mountain with its Appeal Form, the sub-section 112(5) record (the “Record”), and the Reasons for the Determination.

### ISSUE

5. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

### ARGUMENT

6. Green Mountain asks the Tribunal to vary the Determination because of an error of law. First, according to Green Mountain, the Complainant’s salary was \$3,000 per month from July 1, 2017, onwards, and

thus, the calculation of two weeks compensation for length of service pursuant to section 63 of the *ESA* should be based on this amount. Second, Green Mountain says that it should not have to pay accrued interest under section 88 of the *ESA* because the Complainant's cheque was available for her to pick-up at the Green Mountain office at any time. Finally, Green Mountain disputes the \$1,000 administrative penalty because it received no training or assistance from any government entity in how to comply with the employment standards regime.

## **THE FACTS AND ANALYSIS**

### Background

7. Green Mountain is a British Columbia incorporated company that markets fitness and nutritional supplements. The complainant, Jo Ann Aird (the "Complainant"), worked for Green Mountain from May 1, 2016, until July 10, 2017. On December 27, 2017, she filed a complaint alleging that Green Mountain contravened the *ESA* by failing to pay her annual vacation pay and compensation for length of service.
8. On May 1, 2016, the Complainant began working for Green Mountain in the area of public relations and marketing at a monthly salary of \$4,500 per month. From December 1, 2016, Green Mountain increased the Complainant's salary to \$5,000 per month. At some point during her time with Green Mountain, she was also instructed to do sales in addition to public relations and marketing.
9. The Complainant's employment was terminated on July 10, 2017. For July 1 – 10, 2017, she was paid gross wages of \$1,500. At the hearing, the Complainant confirmed that she was properly paid for all hours worked.
10. The Delegate heard the complaint on April 23, 2018. Both Green Mountain and the Complainant represented themselves.

### Issues Before the Delegate

11. The issues before the Delegate were: (1) how much vacation pay did Green Mountain owe the Complainant; and (2) did Green Mountain owe the Complainant compensation for length of service?

### Evidence and Submissions at the Hearing

12. Regarding both issues, the Delegate had to determine whether the Complainant started her employment with Green Mountain on May 1 or June 1, 2016, and whether she was an employee throughout the time she worked for Green Mountain. He also had to determine her salary during her time at Green Mountain.
13. The Complainant testified that her employment with Green Mountain began on May 1, 2016. She primarily worked from home, but she attended meetings at Green Mountain's office every Monday. According to her, Green Mountain's sole director, Mr. Yu, fired her on July 10, 2017, without written or verbal working notice. She says that she performed her work up until her employment was terminated.

14. The Complainant claimed annual vacation pay of approximately \$2,890. She submitted bank records showing the net amount of cheques she deposited and electronic funds transfers she received from Green Mountain. The first deposit was on June 10, 2016, for \$3,487.00, which she said represented net wages of her \$4,500 per month salary for May 2016.
15. At the Complainant's request, Green Mountain paid her gross wages for a period of time in 2016, as a "contractor".
16. Green Mountain agreed with the Complainant that it never paid her annual vacation pay and that she did not take a vacation during her time with Green Mountain. Green Mountain also agreed that there was no written notice of termination and that her employment ended on July 10, 2017.
17. Green Mountain submitted the Complainant's Record of Employment and payroll remittances for the June 1, 2016, pay period forward. However, at the hearing, its representative, Mr. Yu, admitted that he was not certain about the exact date when the Complainant's employment started and said that it was possible that his assistant made a clerical error in completing the Record of Employment.
18. Mr. Yu testified that he told the Complainant that in May or June 2017, she could work until the end of June and receive her June salary plus \$2,000. However, she had to prove that she was working and because she did not do so, he only paid her \$1,500 instead of \$2,000. The Delegate asked Mr. Yu whether Green Mountain was asserting that it had terminated the Complainant with cause and Mr. Yu said it was not. Rather, in his view, the amount Green Mountain paid the Complainant for July should "count" as compensation for length of service because she did not do a good job.

#### Delegate's Findings and Analysis

19. After considering the evidence and section 58 of the *ESA*, the Delegate first concluded that the Complainant was entitled to annual vacation pay of 4% on her total wages earned within 48 hours of termination of her employment. Both parties agreed that she had not taken a vacation.
20. The Delegate then turned to the question of what those wages were.
21. The Delegate first addressed Green Mountain's submission that the Complainant was "*treated as a contractor*" for a period of time in 2016. He found that the Complainant was an employee from May 1, 2016, to July 10, 2017.
22. The Delegate correctly noted that the presence or absence of statutory deductions on a wage statement does not determine whether a person is an employee for the purposes of the *ESA*. Green Mountain's compliance with the Complainant's questionable request to not withhold statutory deductions for a period of time did not change the fundamental nature of the relationship as that of employer and employee. The *ESA* definition of employee includes a person an employer allows to perform work normally performed by an employee. The Complainant was performing the same work before and after the period when she was allegedly a contractor. This work was being done on the same terms and conditions of employment.

23. Turning to the question of when the Complainant began her employment, the Delegate noted that the Complainant's banking records and Green Mountain's records were difficult to reconcile and the only document resembling a written employment contract was undated and unhelpful. However, on a balance of probabilities, he concluded that she started work at Green Mountain on May 1, 2016. The Delegate preferred the Complainant's bank records that indicated that she deposited a cheque for \$3,487 on June 10, 2016. It was unlikely that Green Mountain would pay wages for the entire month of June on June 10, 2016. This conclusion was also supported by the Complainant's banking records for July 2017, which showed her depositing funds on July 11, 2017, for June's wages and depositing \$1,500 on July 27, 2017, for the July work.
24. Thus, in the result, vacation pay was owed on all wages earned from May 1, 2016, to July 10, 2017. This amounted to \$2,720. Also, Green Mountain's violation of section 58 of the *ESA* resulted in a mandatory administrative penalty of \$500.
25. The second issue was whether Green Mountain owed the Complainant compensation for length of service. Section 63 of the *ESA* requires written working notice or compensation in lieu of notice after terminating an employee of at least three months' service. As Green Mountain acknowledged that it did not provide written notice and that the Complainant worked until July 10, 2017, the Delegate found that it contravened section 63 of the *ESA*.
26. The Complainant was employed for more than one year, but less than two, so she was entitled to two weeks' notice (wages). Her monthly salary on termination was \$5,000, so two weeks' notice was calculated as \$2,307.70, with an additional annual vacation amount of \$92.31. Also, Green Mountain's violation of section 63 of the *ESA* resulted in a mandatory administrative penalty of \$500.
27. Finally, the Delegate held that the Complainant was owed interest on all outstanding wages pursuant to section 88 of the *ESA*.

### Analysis

28. Sub-section 112(1) of the *ESA* provides that a person may appeal a 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.
29. Green Mountain submits that the Delegate erred in law and thus the Determination should be varied.
30. I have considered whether there is any basis for the Tribunal to interfere with the Determination. For the reasons that follow, I conclude that there is no basis and thus this appeal has no reasonable prospect of success and I dismiss it under sub-section 114(1)(f) of the *ESA*.

31. An appeal is not another opportunity to argue the merits of the claim to another decision-maker. The Legislature has expressly limited the grounds of appeal to those set out in sub-section 112(1). The burden is on the appellant to persuade the Tribunal that there was an error in the Determination under one of the statutory grounds.
32. There is nothing in the Determination, the Reasons for Determination, or the Record that indicates the Delegate failed to observe principles of natural justice in making his Determination. Green Mountain also does not suggest that there is any evidence available now that was not available at the time the Determination was being made. That leaves the question of whether there was an error of law.
33. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:
- a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
  - b. a misapplication by the decision-maker of an applicable principle of general law;
  - c. where a decision-maker acts without any evidence;
  - d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and
  - e. where the decision-maker is wrong in principle.
34. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.
35. Thus, the Tribunal has no authority to consider appeals that seek to have the Tribunal reach a different factual conclusion than was made by the Director (or Delegate) unless these findings raise an error of law as defined in *Gemex Developments Corp.*: see *Britco Structures Ltd.*, BC EST # D260/03.
36. I am entirely satisfied that the Delegate did not make an error of law.
37. The Record and the Reasons for Determination indicate the Delegate correctly applied the *ESA*. Also, the Delegate did not err in applying any general principal of law applicable to the Determination and he was not otherwise wrong in principle.
38. There was sufficient evidence on which the Delegate could, and did, make his findings. Green Mountain does not point to any existing evidence that would allow me to conclude otherwise. Rather, on appeal, Green Mountain submits, without evidence, that Green Mountain unilaterally changed the Complainant's salary to \$3,000 per month for July 2017. Thus, she was only owed two weeks' compensation based on \$3,000 per month and not \$5,000 per month.
39. Based on my review of the Determination, the Reasons for the Determination, and the Record, Green Mountain did not make this argument before the Delegate. Even if I am wrong on this conclusion, it would not make any difference to the outcome of this appeal. At the hearing, Green Mountain conceded that the Complainant worked until July 10, 2017. There was no evidence before the Delegate

on which he could conclude that the Complainant was ever anything other than an employee of Green Mountain through to July 10, 2017.

40. The *ESA*'s requirement for accrued interest under section 88 requires interest at the prescribed rate on the amount owed from either the date when employment ended, or, the date when a complaint was made to the Director. Here, the applicable date was after employment ended on July 10, 2017, and interest is owed from July 11, 2017, to the date of payment. There is no basis in law on which to say that interest does not accrue because the Complainant could have attended at Green Mountain's office to pick-up a cheque.
41. Finally, Green Mountain disputes the mandatory administrative penalties for its two contraventions of the *ESA*. There is no error of law in this regard. The facts of this case, the *ESA* and the *Employment Standards Regulation* (the "*Regulation*") required the imposition of the minimum mandatory penalty of \$500 for Green Mountain's contravention of sections 58 and 63: *ESA*, sub-section 98(1) and *Regulation*, sub-section 29(1).
42. Based on the above, I find that this appeal has no reasonable prospect of succeeding and the appeal is dismissed pursuant to sub-section 114(1)(f) of the *ESA*.

## **ORDER**

43. Pursuant to section 115 of the *ESA*, I order the Determination, dated July 20, 2018, be confirmed in the amount of \$6,283.64, together with any interest that has accrued under section 88 of the *ESA*.

---

**Maia Tsurumi**  
**Member**  
**Employment Standards Tribunal**