

Citation: Bull River Adventures Ltd., Bull River Outfitters (2007) Ltd.,
Bear Lake Guides and Outfitters Ltd. (Re)
2019 BCEST 89

An appeal

- by -

Bull River Adventures Ltd., Bull River Outfitters (2007) Ltd., Bear Lake Guides
and Outfitters Ltd.

("Bull River and Bear Lake")

- 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: David B. Stevenson

FILE NO.: 2019/44

DATE OF DECISION: August 21, 2019

DECISION

SUBMISSIONS

Erin Bowman

counsel for Bull River Adventures Ltd., Bull River Outfitters (2007) Ltd., Bear Lake Guides and Outfitters Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Bull River Adventures Ltd., Bull River Outfitters (2007) Ltd., Bear Lake Guides and Outfitters Ltd. (collectively, “Bull River and Bear Lake”) has filed an appeal of a determination (the “Determination”) issued by Jennifer Sencar, a delegate of the Director of Employment Standards (the “Director”), on March 29, 2019.
2. The Determination found Bull River and Bear Lake had contravened Part 3, sections 17, 18, and 28, and Part 5, section 46 of the *ESA* in respect of the employment of Jonathon Blair (“Blair”) and ordered Bull River and Bear Lake to pay Blair wages in the amount of \$12,781.27, an amount that included wages and interest under section 88 of the *ESA*. The Director imposed administrative penalties for contraventions of the *ESA* in the amount of \$2000.00. The total amount of the Determination is \$14,781.27
3. Bull River and Bear Lake has appealed the Determination on the ground the Director erred in law and failed to observe principles of natural justice in making the Determination. Bull River and Bear Lake seeks to have the Determination varied, cancelled, and/or referred back to the Director for a new hearing before another delegate of the Director.
4. In correspondence dated May 13, 2019, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Bull River and Bear Lake and Blair. Both have been provided with the opportunity to object to its completeness.
6. Counsel for Bull River and Bear Lake has expressed some concerns about the size and organization of the record and the clarity of some of the material in it. She has also expressed a concern that some of the material included in the record was not disclosed to Bull River and Bear Lake during the complaint process. The Director has provided an explanation concerning that material and the explanation seems to have met the concern expressed. The size of the record and the clarity of some of the documents are not matters over which the Tribunal has much control, and while some of the material in the record is not very clear, it has not hampered an assessment of this appeal.
7. The Tribunal accepts the record as being complete.

8. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. 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, and my review of the material that was before the Director when the Determination was being made. 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 any 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 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.

9. 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 Blair 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 there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS

11. Bull River and Bear Lake operates hunting and adventure camps in two main areas of the province. Blair was employed by Bull River and Bear Lake for five hunting seasons as a guide. For the 2016 and 2017 hunting seasons, he also held the position of co-manager.
12. Blair filed a complaint with the Employment Standards Branch following the 2017 season alleging Bull River and Bear Lake had failed to pay him all wages owed.
13. The Director conducted a complaint hearing by teleconference, receiving evidence and submissions from Blair, Bull River and Bear Lake, through Vincent Cocciolo (“Mr. Cocciolo”), an owner and sole director of

Bull River and Bear Lake, and several witnesses presented to support the parties' respective claims and responses.

14. The Director considered the evidence and arguments provided by the parties and, in a fairly lengthy Determination, found Bull River and Bear Lake had contravened several provisions of the *ESA* and owed Blair wages.

ARGUMENT

15. Bull River and Bear Lake argues the Director erred in law and failed to observe principles of natural justice in making the Determination.
16. Bull River and Bear Lake says the Director committed the following errors of law:
- a. finding a \$2,000.00 email transfer to Blair constituted a year-end bonus;
 - b. finding Blair was entitled to a base salary and guiding bonuses (or guiding increases);
 - c. finding Bull River and Bear Lake did not make semi-monthly payments; and
 - d. finding Blair was entitled to statutory holiday pay from June 2017 to October 2017.
17. Bull River and Bear Lake says the errors of law arose from a failure by the Director to correctly apply the general law, acting without evidence, acting on a view of the facts that could not be reasonably entertained, and adopting a method of assessment that was wrong in principle.
18. Bull River and Bear Lake submits the Director breached natural justice principles and procedural fairness by failing to provide adequate reasons for the findings relating to the \$2,000.00 bonus and for the wage calculations for May, June, September, and October 2017.
19. Bull River and Bear Lake seeks to have the matter returned to the Director for a new oral hearing before a different delegate or, alternatively, to the Director with directions.

ANALYSIS

20. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, 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.

Error of Law

21. The appeal asserts error of law. 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.
22. Bull River and Bear Lake says the Director erred by misapplying a principle of general law, arguing the Director failed to consider the plain language of the employment agreement in deciding Blair was entitled to a monthly salary, a guide bonus, and an additional \$100 a day for each guiding day on which he performed co-manager functions. The disagreement here is with the interpretation placed by the Director on the terms of the employment contract. There is also an aspect of this argument that goes to findings of fact.
23. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
24. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on this facts, Bull River and Bear Lake is required to show the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan’s Restaurant*, BC EST # D041/13, at paras. 26 – 29.
25. I find all of the matters which counsel for Bull River and Bear Lake says amount to errors of law are adequately supported on the law and on the evidence.
26. On the matter of the \$2,000.00, there was evidence provided from Jacob Blair, who was presented as a witness by Bull River and Bear Lake, that “Mr. Cocciolo sent the Complainant \$2,000.00, and told Jacob Blair that \$1,500.00 was for his year-end bonus and \$500.00 was for September’s salary. Once Mr. Cocciolo found the quad was damaged, he told Jacob Blair the \$1,500.00 bonus was no longer valid and to record the \$2,000.00 as an advance on wages.” (see: Determination R15 and R30)
27. The argument made by Bull River and Bear Lake here does nothing more than challenge the Director’s decision to accept that evidence in deciding how to characterize the \$2,000.00 email transfer to Blair.

28. The above evidence also speaks to the matter of the “guiding bonus (or guiding increases)”. It was not unreasonable for the Director to conclude Blair was entitled to the guiding bonus since Jacob Blair was, on the evidence, instructed to pay it to him.
29. On the matter of the increase in salary for co-managing and guiding, the Determination sets out a summary of evidence from Mr. Cocciolo indicating Blair “was hired as co-manager” in May and June and that Mr. Cocciolo “created the list of tasks that needed to be completed”. He testified that in May and June, Blair was responsible to direct staff on the tasks that needed to be completed and fill out Statutory Guide Declarations. Mr. Cocciolo says Blair “managed Ms. Irwin and made sure the tasks got completed.” (see: Determination R25)
30. The finding by the Director that Blair was entitled to \$100.00 additional pay for each guiding day that he co-managed and guided is a reasonable, and logical, interpretation of the terms of employment for the co-manager position: see record, page 183 – 184. I can find no misapplication of a general principle of law in the Director’s interpretation, which reasonably flows from a fair reading of the terms of employment for Blair as co-manager and the evidence.
31. It is unrealistic to suggest, as Bull River and Bear Lake does in this appeal, that Blair, hired as co-manager for the season, ceased to be co-manager on each guiding day and consequently not entitled to the additional pay offered in the co-manager position unless he showed he was performing “co-manager duties” in addition to guiding on those days. In any event, the list of co-manager duties – which includes camp preparation, trail systems, scheduling, managing clients, completing paperwork and, most significantly, *guiding clients* when needed – makes it virtually impossible that Blair did not perform some or all of those duties on each guiding day. To make this point more obvious, a “guiding day” required Blair to guide clients.
32. The argument relating to “semi-monthly payments” to Blair is somewhat misplaced. The Director found Bull River and Bear Lake had contravened section 17 of the *ESA*. That finding was soundly and correctly based on the evidence applied to the requirements of the statute. The concession by Bull River and Bear Lake that payroll was done once a month and paid on the 15th of the following month is a clear violation of the payday requirements set out in the *ESA*. The evidence that Blair was not paid “all wages earned”, as required by section 17, is also a rational conclusion based on the evidence provided to the Director.
33. Bull River and Bear Lake have not shown the Director’s calculations of wages and statutory holiday pay entitlement amount to errors of law.
34. The error alleged in the former is predicated on the submission, which I have not accepted, that the Director incorrectly calculated Blair’s wage entitlement by wrongly increasing his base wage by the co-manager “guiding bonus”. The Director found Blair was entitled to the \$100.00 “guiding bonus”, a finding I have found was reasonably and logically grounded in the description of the terms of the co-manager position and the pay associated with that position.
35. The error alleged in the latter is similarly grounded on a contention I have not found to be a reviewable error. Simply put, the statutory holiday pay entitlement was calculated on wages paid as required by section 45 of the *ESA*. The answer to the argument that the Director ignored a term in Blair’s employment contract that allowed statutory holiday pay to be paid on each pay cheque is simple: Bull River and Bear

Lake provided no payroll information showing Blair had been paid statutory holiday pay on any pay cheque.

36. In sum, I find Bull River and Bear Lake have not shown the Director made an error of law in the Determination.

Natural Justice and Procedural Fairness

37. I find Bull River and Bear Lake has not met the burden of showing a failure by the Director to observe principles of natural justice and procedural fairness in making the Determination, which Bull River and Bear Lake says arises from a failure to provide adequate reasons for some of the findings made.

38. The reasoning on the allocation of the \$2,000.00 email transfer to Blair is perfectly logical, being expressly based on the evidence of Jacob Blair, who as indicated earlier, was presented as a witness by and for Bull River and Bear Lake: see Determination R30. The relevant part of the Determination states:

I accept the evidence of Jacob Blair and I find that the \$2,000.00 was for a \$500.00 shortage of wages payable in September and the \$1,500.00 year-end bonus.

39. Similarly, the reasoning relating to the calculation of wages is not “deficient”. Bull River and Bear Lake may not agree with the reasoning, but that does not render it “deficient”. All the relevant components of the wage calculation are identified in the Determination: the employment contract, evidence of work done, a discussion of respective arguments on wage entitlement, including findings on those arguments, Blair’s record of hours, including a discussion of, and findings on, contentious areas of that record, and an analysis of the applicable provisions of the *ESA*.

40. Having reviewed the reasons provided in the Determination, I find they satisfy the considerations that generally accompany such review and are adequate. The reasons are sufficient to allow for a meaningful appeal – as evidenced by the fact of this appeal; they meet the parties’ “functional need to know” why the decision was made; and they indicate the Director understood and considered all the relevant factual and legal issues that needed to be considered.

41. In sum, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it.

42. The appeal is dismissed under section 114(1) of the *ESA*.

ORDER

43. Pursuant to section 115 of the *ESA*, I order the Determination dated March 29, 2019, be confirmed in the amount of \$14,781.27, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal