

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Dhaliwal Banquet Hall Ltd.
(the “Employer”)

- 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.: 2020/097

DATE OF DECISION: November 18, 2020

DECISION

SUBMISSIONS

Kuljit Dhaliwal

on behalf of Dhaliwal Banquet Hall Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Dhaliwal Banquet Hall Ltd. (the “Employer”) filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 3, 2020.
2. The Director found that the Employer had contravened sections 21, 40 and 58 of the *ESA* in failing to pay a former Employee wages. The Director determined that the Employer owed overtime wages, annual vacation pay, business costs and interest in the total amount of \$4,475.30. The Director imposed three \$500 administrative penalties for the contraventions, for a total amount payable of \$5,975.30.
3. The Employer contends that the Director failed to observe the principles of natural justice in making the Determination.
4. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the Employer or the Director.
5. This Decision is based on the section 112(5) “record” that was before the delegate at the time the Determination was made, the Employer’s submissions and the Reasons for the Determination.

FACTS

6. Hannah Rita Ratnam was employed as a marketing and sales manager at the Employer’s catering business in Surrey, B.C. from March 3, 2019, until May 10, 2019. On June 3, 2019, the Employee filed a complaint alleging that the Employer had contravened the *ESA* in failing to pay her commission wages, regular and overtime wages and business costs.
7. The Director’s delegate conducted a hearing over a period of four days - January 17, 29, 31 and February 28, 2020. A brief summary of the evidence and the Delegate’s decision is as follows.
8. On March 3, 2019, one of the Employer’s two directors, Kuljit Dhaliwal, met with the Employee to discuss terms and conditions of her employment.
9. In support of her complaint, the Employee submitted an unsigned employment contract setting out her gross wages and commission rate. The contract provided that the Employer would pay the Employee’s laptop, gas, phone and car maintenance expenses but contained no provisions for parking expenses or overtime wages.

10. The Employer denied ever seeing the agreement and denied that the parties had any agreement to pay the Employee any commissions, or to pay her vehicle, parking and gas expenses.
11. The parties understood the Employee would work eight hours per day, five days per week. The Employer did not maintain a record of the Employee's hours of work or manage her work because the Employer did not believe there was any requirement to record the hours of work of a salaried employee. The Employee submitted a record of her overtime hours based on her call logs and emails after her employment ended.
12. The Employee contended that the parties had a second, separate agreement for the Employee to provide cooking services. Although the Employee contended that she was to be paid \$20 per hour for this work, the Employer denied that there was any agreement to pay the Employee this amount. Mr. Dhaliwal's evidence was that the Employee was compensated for her cooking services through her regular salary.
13. The Employee worked on the Employer's website, advertised the Employer's business at events and created promotional materials. The Employee's regular hours were from 1:00 p.m. to 9:00 p.m. She said that she often worked overtime to complete her work tasks, and regularly updated Mr. Dhaliwal on her work activities.
14. Mr. Dhaliwal testified that he generally did not know what tasks the Employee was working on except when she required a cheque for marketing tasks. Mr. Dhaliwal said that the Employee never told him that she was working over 40 hours per week and that he never asked her to work overtime. Although Mr. Dhaliwal received emails from the Employee, he did not note the time they were sent, and thus was not aware she was working overtime hours. Mr. Dhaliwal also said that the Employee never gave him a record of her hours of work while she was an employee. Mr. Dhaliwal acknowledged that the Employee spent two to three hours on a Sunday training staff, and one weekend at another event. He said that she took a weekday off in lieu of this work.
15. There was no dispute that the Employee was never paid commissions, and that she never asked about outstanding commissions or reimbursement for expenses during the term of her employment.
16. The Employee also said that she did not track her kilometers nor submit her receipts for gas or parking expenses during her employment because she was instructed to keep them and submit them later.
17. In May 2019, the Employee said that she gave the Employer an invoice for her gas and car maintenance expenses as well as wages for cooking services. She said that Mr. Dhaliwal became upset, tore up the invoice and told her to "get out of his office" because she was asking for money in addition to the salary she was being paid. Mr. Dhaliwal said that he denied the Employee's request for payment for these expenses and additional wages because the Employer was already paying her wages for work.
18. The delegate heard from two witnesses on behalf of the Employer - the company's general manager and the office administrator. The general manager testified that the Employee was tasked with bringing business to the Employer and had the freedom to do what she wanted regarding marketing promotions. The Employee worked from home, and the general manager observed that the Employee sent work-related emails after regular work hours. The Employee never told the general manager she was working overtime hours, and the general manager never requested that she work overtime.

19. The office administrator communicated requests for funds from the Employee to Mr. Dhaliwal, who decided whether to approve the funds or not. The office administrator did not track the Employee's hours, and the Employee did not report them to her. She also did not oversee the Employee's work. The office administrator testified that the Employee never requested any commissions from the Employer and the Employer did not instruct her to add any commission wages to the Employee's wages.

Determination

20. The delegate found that although there was a contract of employment between the parties, there was insufficient evidence to conclude that there was an enforceable contract for commission wages. The delegate found no commissions owing to the Employee.
21. The delegate concluded that the Employee was not a manager, as defined in the *Employment Standards Regulation* and that she was entitled to overtime wages under section 40 of the *ESA*. In the absence of any records maintained by the Employer, the delegate preferred the records created by the Employee, even if they were not maintained contemporaneously. She concluded that the records were reliable, as they were based on text messages, call logs and emails which did contemporaneously record her activities. The delegate found that, based on these records, the Employer was aware that the Employee was performing work outside of her regular work hours. The delegate found that although the Employee worked these hours without notifying the Employer, the Employer had the responsibility to keep track of hours worked and pay the Employee accordingly. She also noted that while the Employer could have instructed the Employee to work strictly during regular working hours, he did not give her that instruction.
22. The delegate found that the Employee was entitled to be paid for 123.14 overtime hours, plus 22 hours of overtime for time spent cooking on the weekend.
23. Based on Mr. Dhaliwal's acknowledgement that the Employee was to travel by car to perform sales and marketing duties, the delegate determined that the Employee was entitled to gas expenses under section 21 of the *ESA*. Noting, however, that the Employee also used her vehicle for personal use and did not track the kilometers driven for business purposes, the delegate determined that the Employer owed the Employee 80% of her total gas expenses as well as her parking costs. The delegate was not persuaded that the Employer was responsible for the Employee's car maintenance costs, or her meal and gift card expenses.

ARGUMENT AND ANALYSIS

24. 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 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.

25. 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.

26. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that the Appellant has done so in this case.

27. An appeal is not an opportunity to re-argue a case or to make a “counter claim” against an employee. Although the Employer’s ground of appeal is that the delegate failed to observe the principles of natural justice, in substance, the appeal is simply a disagreement with the result:

We have been provided with a decision owing \$5975.30 but we would counter appeal that [the Employee] who provided her overtime hours in the form of the excel sheet attached below, We would like to ask her about what she did in the regular hours that she was paid for. She provided in her overtime hours that she worked and texted employees at different times outside her work schedule but most of the texts and emails that she did not even replied at that very time. So she was texting for her own convenience and nobody asked her to...

Looking at all the details she provided, we would like a detailed work schedule from her and we can provide with any proofs further required for this appeal. [reproduced as written]

28. In addition to the appeal submissions, the Employer submitted a significant amount of documentation in support of the appeal.

29. 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.

30. There is no evidence that the Employer was denied natural justice. The record discloses that the parties participated in a mediation on November 8, 2019. Although mediations are conducted on a confidential basis and there is no record of the discussions, I infer that the Employer was made fully aware of the issues in dispute during this process. The Director’s ‘Notice of Mediation Session’ indicated that the parties were to “bring any documents that will help resolve the issues in dispute, such as payroll records or pay stubs, calendars, time sheets, letters etc.”

31. The mediation was unsuccessful, and the delegate conducted a hearing over four days. The delegate provided the parties with a series of “Factsheets” on issues such as the Complaint Hearing, Commission Sales and Enforcement Measures.

32. I am satisfied that the Employer was well aware of the details of the complaint and was given full opportunity to respond. I find no basis for this ground of appeal.
33. In its appeal submission, the Employer appears to suggest that the delegate erred in finding that the Employee was entitled to overtime wages. Section 28(1)(d) of the *ESA* requires an employer to maintain a record of the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis. The Employer conceded that it failed to do so. The delegate correctly found that the Employer was responsible for directing the hours the Employee was to work. There appears to have been no dispute that the Employer did not do so. The delegate determined that, in the absence of any proper records, the Employee's records of her hours of work were reliable. The Employer has presented no evidence on appeal to persuade me that the delegate's findings were in error.
34. Finally, the Employer submits a significant amount of new evidence on appeal. 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.
35. Given that the complaint hearing took place over four non-consecutive days in early 2020, the Employer had sufficient time to gather the evidence he includes with his appeal and present it to the delegate. I find that the information submitted on appeal was available at the time of the hearing and ought to have been presented to the delegate during that time. Furthermore, I am not persuaded that this evidence, if considered, would have led the delegate to a different conclusion.
36. I find that the additional material does not meet the Tribunal's test for new evidence and would dismiss the appeal on this ground.
37. I find, pursuant to section 114(f), that there is no reasonable prospect that the appeal will succeed.

ORDER

38. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated June 3, 2020, is confirmed in the amount of \$5,975.30, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal