Citation: Save-A-Lot Holdings Corp. (Re)
2020 BCEST 140

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Save-A-Lot Holdings Corp.
("Save-A-Lot")

- 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.: 2020/130

DATE OF DECISION: December 8, 2020

DECISION

SUBMISSIONS

Nerissa Yan	counsel for Save-A-Lot Holdings Corp.
Jesse Dunning	counsel for Alexandrea Christensen, Rebecca Christensen, and Tommy Christensen Jr.

OVERVIEW

1. Save-A-Lot Holdings Corp. ("Save-A-Lot") has filed an appeal under section 112 of the *Employment Standards Act* (the *"ESA"*) of a Determination issued by Sarah Vander Veen, a delegate of the Director of Employment Standards (the "Director"), on July 28, 2020.

2. The Determination found Save-A-Lot had contravened Part 3, sections 18 and 28, Part 7, section 58, and Part 8, section 63 of the *ESA* in respect of the employment of Alexandrea Christensen ("Alexandrea"), Rebecca Christensen ("Rebecca"), and Tommy Christensen Jr. ("Tom Jr.") (collectively, the "Complainants"), and ordered Save-A-Lot to pay the Complainants wages in the amount of $34,895.99, an amount that also included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of $2,000.00. The total amount of the Determination is $36,895.99.

3. This appeal is grounded in an alleged error of law and a failure by the Director to observe principles of natural justice in making the Determination. Save-A-Lot seeks to have the Tribunal allow the appeal and vary or cancel the Determination.

4. In correspondence dated September 11, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the "record") from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal, and advised that following such review all or part of the appeal might be dismissed.

5. The record has been provided to the Tribunal by the Director. A copy has been delivered to counsel for Save-A-Lot and to counsel for the Complainants. An opportunity has been provided to those parties to object to its completeness. Counsel for Save-A-Lot and counsel for the Complainants have acknowledged the completeness of the record. Accordingly, the Tribunal accepts the record as being complete.

6. 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 submissions filed on 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the Complainants 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 will succeed.

ISSUE

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

THE FACTS

9. Save-A-Lot operates an automotive sales, repair, and cleaning business in Aldergrove, BC. The Determination indicates Save-A-Lot was incorporated in the province on July 9, 2015. Currently, Bing Zhao ("Mr. Zhao") is listed as the sole director.

10. The Director found the Complainants worked at the business starting January 1, 2016. The Director found Rebecca ceased working at the business on May 13, 2018; and Alexandrea and Tom Jr. ceased working at the business on July 3, 2018.

11. A central issue in the complaint process, and in this appeal, is whether the Complainants were employees of Save-A-Lot under the *ESA*. The Director found each Complainant was an employee under the *ESA*.

12. Alexandrea and Tom Jr. worked in various capacities during their employment and, at the time their employment ceased, each was being paid $3,500.00 bi-weekly. Rebecca was being paid $3,750.00 bi-weekly when her employment ended.

13. The Director found Alexandrea, during her employment performed work assisting in the company's car lot as needed and directed until January 1, 2018, and from that date until her employment ended, she was performing financing work. The Director found Tom Jr. posted information about vehicles for sale by the business on the Company's Facebook, Twitter, and Instagram pages, answered inquiries on these forums from interested persons, answered telephone calls at the business, and prepared "binders" for vehicles. The Director found Rebecca ran the cantina attached to the company's worksite, providing complimentary food to customers and staff.

14. The Director found, from the evidence provided, that the Complainants' work was performed for Save-A-Lot and brought them within the definition of "employee" in the *ESA*.

15. During the Complainants' employment, Save-A-Lot had four directors: Mr. Zhao, Tom Constantin Christensen ("Tom Sr.'"), Nikolaos Kontogiannis, and Hongyu Li. Tom Sr. was Save-A-Lot's general manager during the Complainants' employment and was responsible for the day-to-day operations of the business. Alexandrea and Tom Jr. are Tom Sr.'s children and Rebecca is his wife. The other three directors had made capital investments in the business and had little to do with day-to-day operations.

16. Following their ceasing to be employed by the business, the Complainants filed complaints with the Director claiming Save-A-Lot had contravened the *ESA* by failing to pay regular and overtime wages, annual and statutory holiday pay, and length of service compensation.

17. The Director denied the Complainants' claims for overtime wages, rejecting their assertions that their hours of work exceeded 8 hours in a day or 40 hours in a week.

18. The Director found each of the Complainants was entitled to length of service compensation and vacation pay and that Alexandrea and Tom Jr. were owed regular wages. The amounts owed were calculated on the salaries paid to each Complainant, which was confirmed in the material provided by the Complainants and by the records provided by Save-A-Lot.

19. The Director rejected the contention of Save-A-Lot that there were overpayments to the Complainants which should be deducted from any amounts found owing, referring to the statutory prohibition against such deductions in section 21(1) of the *ESA*.

ARGUMENT

20. Save-A-Lot submits the Director made several errors of law in making the Determination.

21. Save-A-Lot contends the Director committed "palpable and overriding finding factual errors" in finding the Complainants were "employees" of Save-A-Lot and entitled to any wages and, even if the Complainants were employees, the Director erred in finding the Complainants were entitled to length of service compensation and vacation pay or that Alexandrea and Tom Jr. were owed regular wages.

22. The appeal submission contains an extensive summary of what Save-A-Lot contends is the evidence provided to the Director on each of the above matters.

23. Save-A-Lot argues that, based on all the evidence, much of which was contradictory, the Director could not reasonably have found the Complainants were employees of Save-A-Lot and such finding was an error of law on the facts.

24. Save-A-Lot submits, if Alexandrea, Tom Jr., and Rebecca were employees, the Director nevertheless acted on a view of the facts that could not reasonably be entertained in deciding they were terminated without notice, pay in lieu or cause and were therefore entitled to length of service compensation.

25. The same argument is raised in respect of the contention that the Director erred in finding Alexandrea and Tom Jr. were entitled to regular wages for work performed between June 25 and July 3, 2018, and that all of the Complainants were entitled to vacation pay. Save-A-Lot also characterizes the latter finding as "problematic and perverse", reiterating it was based on the wrong conclusion the Complainants were employees of Save-A-Lot.

26. Save-A-Lot says, if the Complainants were entitled to vacation pay, the Director erred in calculating the amount to which each was entitled. Save-A-Lot argues under section 80 of the *ESA*, the Complainants would "be barred from collecting vacation pay that had accumulated prior to 12 months before the date of the complaint or termination of the employment, whichever is earlier".

27. Save-A-Lot says the Director erred in exercising discretion by declining to defer an investigation and a decision on the complaints until after a decision in the civil trial brought by Save-A-Lot against Tom Sr. and the Complainants and by conducting an investigation of the complaints rather than an oral hearing.

28. Finally, Save-A-Lot submits the Director breached principles of natural justice by failing to reconcile inconsistencies in the evidence of Tom Jr. and Rebecca and by failing to conduct an oral hearing in circumstances where the credibility of the Complainants was an issue.

ANALYSIS

29. 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.*

30. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

31. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

32. The grounds of appeal listed above 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.

33. Save-A-Lot has raised the error of law and natural justice grounds of appeal.

34. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

35. I shall first address the natural justice ground of appeal. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

36. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Save-A-Lot was provided with the opportunity required by principles of natural justice to present their position to the Director. Save-A-Lot has provided no objectively acceptable evidence showing otherwise.

37. It is not a breach of principles of natural justice to make findings on the evidence that do not accord with the position of one of the parties in the complaint process.

38. As for the process used by the Director, the Tribunal has summarized the operating principles in *Gaspar and others*, 2018 BCEST 48:

> The Director has discretion over how a complaint will be addressed. There is no entitlement for any party to an oral hearing before the Director. Whether one, or both, parties would prefer to have an oral hearing is not particularly relevant. The question is whether the refusal to conduct an oral hearing, in the circumstances of the particular case, amounted to a breach of the principles of natural justice. …
>
> The Tribunal will only compel an oral hearing where the case involves a serious question of credibility on one or more key issues, or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly. The concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the evidence and issues. (paragraphs 50 – 52)

39. The decision of the Director about the complaint process is not *per se* open to challenge on natural justice grounds. There may well be a failure to observe principles of natural justice within the complaint process selected by the Director, but that would be substantially different than there being a breach arising directly from the process chosen, and would have to be established on objective evidence: see *Jennifer Oster*, BC EST # D120/08, *Emmanuel's House of Dosas Inc.*, BC EST # D006/11, and *Metasoft Systems Inc.*, BC EST # D022/12.

40. The central question of fact in the complaints and the key issue, or as characterized by Save-A-Lot in its submission, the foundational issue, was whether the Complainants were employees under the *ESA*.

41. One of the concerns I have with the appeal submission is that it never addresses that issue on its own, but rather conflates the evidence on the employment status of the Complainants with the evidence relating to the overtime claims made by the Complainants. The two are, however, quite separate – the number of hours a person who falls within the definition of employee works is irrelevant to their status under the *ESA*. I shall therefore address the findings of the Director on that basis and focus in the first instance on the evidence which led the Director to the conclusion the Complainants were employees of Save-A-Lot under the *ESA*.

42. The evidence gathering process is described in the Determination: Alexandrea, Rebecca, and Tom Jr. were interviewed under oath; other persons whose names were provided by the Complainants were either interviewed under oath or provided written statements. Documents were provided by the Complainants, which included wage statements from Save-A-Lot. Persons who provided information on behalf of Save-A-Lot were interviewed in person under oath or by teleconference.

43. It is helpful, at this point, to briefly summarize the applicable provisions and principles that apply to the question of whether a person is an employee under the *ESA*. Because the *ESA* is remedial and benefits conferring legislation, it is to be given broad and liberal interpretation, as are definitions contained within legislation itself.

44. The definition of "employee" in section 1 of the *ESA*, broadly defines the term "employee" to include, *inter alia*, a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee". An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee". "Work" is defined as "the labour or services an employee performs for an employer". The overriding test is found in those definitions and is whether the complainant "performed work normally performed by an employee" or "performed work for another". See *Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05) and *Web Reflex Internet Inc.*, BC EST # D026/05.

45. The Director clearly and correctly explained that determining whether a person is an employee for the purposes of the *ESA* is guided by the definitions of "employer" and "employee" found in section 1, that the *ESA* is remedial legislation, and that the substantive nature of the relationship must be examined. In the context of the provisions in the *ESA*, the Director found the Complainants work brought them within the statutory definition of "employee".

46. The Director found, on the evidence, which in this regard was substantial and substantially unchallenged, that the Complainants performed "work" for Save-A-Lot, at the direction of Save-A-Lot, which was responsible for their employment, there was control and direction by Save-A-Lot, the "work" was work normally performed by an employee, and each of the Complainants were paid wages for the work performed for Save-A-Lot.

47. While I don't disagree with the submission of Save-A-Lot that there was inconsistent and contradictory evidence around some aspects of the employment of the Complainants – the days and hours worked by

each, their specific duties, and how much work each actually did – that evidentiary problem did not encumber a conclusion on the key issue. An example of this point is found in the appeal submission, at para. 73, referring to evidence provided by Mr. Zhao to the Director (see record, page 327): where it states; "Tom Sr. told the Other Directors that Tom Jr. had been hired to do computer work and would be paid a very basic wage, which is why the Other Directors did not ultimately object". That is a clear statement of an understanding by Mr. Zhao that Tom Jr. was being employed by Save-A-Lot. It is equally clear from the statement that the issue for Mr. Zhao is the wage rate at which Tom Jr. was employed, not the fact of employment.

48. There is similar evidence relating to the employment of Alexandrea – where many of the persons providing information to the Director, including those whose names were submitted by Save-A-Lot, confirmed Alexandrea was performing work for Save-A-Lot. While the finding of the Director on Rebecca is more problematic, the concerns do not stem from the evidence of the facts that led the Director to find Rebecca was an employee of Save-A-Lot under the *ESA*.

49. To summarize: on the key issue of employment status, there were no evidentiary or credibility concerns that compelled, as a matter of natural justice, an oral hearing on that issue. There is no basis for my finding the complaint process used by the Director unfairly interfered with the opportunity for Save-A-Lot to present its evidence and be heard on the issue of the status of the Complainants under the *ESA*.

50. On the issues involving the wage claims – regular wages, vacation pay, and length of service compensation – I am not persuaded an oral hearing was the only way of ensuring each party could state its case fairly. I shall address the arguments on these claims below.

51. Save-A-Lot argues the Director breached rules of natural justice by failing to reconcile internally inconsistent evidence. This argument is related to the one I have considered above.

52. I am not persuaded Save-A-Lot has shown any breach of principles of natural justice in how the Director addressed and applied the evidence presented. In assessing this argument, I note that the reasons in the Determination must be read as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they were delivered: *R. v. R.E.M.*, 2008 SCC 51, at paragraph 15. Every finding and conclusion need not be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned.

53. Applying this approach, I find Save-A-Lot has not established that the Director breached the principles of natural justice by failing to expound on every inconsistency or controverted fact in the Determination. The Determination is lengthy and detailed and addresses the arguments and evidence submitted by the parties. I find no breach of procedural fairness in this regard.

54. There is simply no factual or legal basis for the natural justice ground of appeal; it has no merit, no reasonable likelihood it will succeed, and it is dismissed.

55. Save-A-Lot argues the Director made errors 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.

56. In this context, I reiterate that the statutory grounds of appeal do not provide for an appeal based on errors of fact, *simpliciter*, 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.

57. Save-A-Lot says the Director erred in law by acting on a view of the facts that could not reasonably be entertained and by exercising discretion in a way that is "wrong in principle and amounts to injustice".

58. I shall first address the argument relating to the decision of the Director not to defer an investigation of, and a decision on, the complaints.

59. The thrust of Save-A-Lot's argument under this ground of appeal is that the Director, who has discretionary powers in section 76(3) of the *ESA*, ought to have exercised that discretion to defer an investigation of the complaints until civil proceedings involving it, Tom Sr., and the Complainants, which are scheduled to commence in the summer of 2021, was concluded. More specifically, this aspect of the appeal challenges an exercise of discretion granted to the Director under the *ESA*.

60. The Tribunal has spoken extensively on the extent to which a discretionary decision of the Director may be varied on appeal.

61. The Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, only doing so in exceptional and very limited circumstances, as noted in the following passage in the Tribunal's decision in *Re: Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.* (BC EST # D066/98):

> The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > …a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229.

62. The Tribunal has also reflected on the excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR, where the Court made the following comments about the exercise of a statutory discretion:

> It is, as well, a clearly-established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

63. In this case, the Director considered the request from Save-A-Lot to defer investigation of the complaints and declined to do so because the claims made in the complaints were statutory entitlements over which the Director has sole jurisdiction.

64. Part of the burden on Save-A-Lot in challenging the discretionary decision is to establish the Director acted "unreasonably" in the sense described above. There is no suggestion the Director did not have the authority to proceed with the investigation of the complaints, acted in bad faith, failed to consider matters that were relevant or considered matters that were irrelevant in making the decision. The Director was quite correct in stating the claims made in the complaints were statutory entitlements over which the Director has sole jurisdiction: see *Macaraeg v. E Care Contact Centres Ltd.*, 2008 BCCA 182.

65. I find Save-A-Lot has not shown the Director acted "unreasonably" in declining the request to defer investigation of the complaints until sometime after the summer of 2021.

66. As an aside, I am not certain the Director could correctly have chosen not to investigate as clearly there was no proceeding in one of the forums listed in section 76(3)(f) relating to the subject matter of the complaints nor did any of the other reasons for the Director exercising discretion under section 76(3) exist.

67. The other error of law arguments attack findings and conclusions of fact made by the Director. The test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

68. To expand the above point, in order to establish the Director committed an error of law on the facts, Save-A-Lot is required to show the findings of fact and the conclusions and inferences 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.

69. Considering the above test against each of the arguments raised, I do not find Save-A-Lot has demonstrated the Director has made any error of law on the facts.

70. As I have noted above, the appeal submission has not addressed the challenge to the Director's decision concerning the status of the Complainants under the *ESA* in the context of the definition of "employee" in the *ESA*, which must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the *ESA*. The Supreme Court of Canada made the following

statement in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the *ESA*:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

71. I find there was sufficient evidence in all of the information provided to the Director to support the conclusion reached on the status of the Complainants.

72. I also find there was sufficient evidence to support the Director's findings on the overtime claims made by the Complainants, the regular wage claims made by Alexandrea and Tom Jr., the vacation pay claims and length of service compensation claims.

73. The evidence, referred to in the Determination and found on the record, does not show the findings on the above matters were "perverse or inexplicable" and were, as a consequence, errors of law.

74. I do not accept the argument by Save-A-Lot that the Director committed an error by failing to provide "adequate" reasons for accepting evidence which Save-A-Lot characterizes as "contradictory" and "inconsistent".

75. The analysis of each of the claims in the Determination shows the Director was alert to all of the evidence from the various sources, information and documents provided by the parties and witnesses, some of which was accepted, while some was not.

76. I find the analysis of and the reasons provided for each claim by each Complainant adequately identified the basis upon which the Director accepted or rejected those claims. Some of the arguments made by Save-A-Lot misinterpret the findings made and their effect under the *ESA*. For example, the Director found none of the Complainants had met the onus on them of showing each had worked overtime hours and dismissed those claims, but noted nothing turned on their actual hours of work. Simply put, this is because the evidence showed each was being paid a bi-weekly salary, not an hourly rate. Another example relates to the claims for length of service compensation, where the Tribunal has consistently affirmed the burden of showing an employee has quit their employment, and lost the benefit of length of service compensation, is on the employer. Such a finding is not based on supposition but on cogent evidence. It is wrong in principle to suggest, as Save-A-Lot has done, that the claims should have been denied because the Complainants had not shown they *did not* quit.

77. The argument submitting the vacation pay calculations are wrong suffers from the same defect. The statutory framework for calculating vacation pay is expressed on page R23 of the Determination:

> Under the Act, an employee can recover vacation pay that remained payable during the last 12 months of his or her employment. For the Complainants, this includes any vacation pay they earned but were not paid since the beginning of their employment.

78. To put the above statement into different words, the statutory obligation set out in section 58(3) of the *ESA* is that *all* vacation pay earned, but not yet paid at the time of termination of employment, is wages

owing at the time of termination and must be paid. Logically, those amounts fell within the recovery period for each Complainant.

79. The error of law ground of appeal is dismissed.

80. Based on all of the above, I find Save-A-Lot has not shown a reasonable prospect their appeal will succeed this appeal and it is dismissed.

ORDER

81. Pursuant to section 114(1)(f) of the *ESA*, I order the Determination dated July 28, 2020, be confirmed in the amount of $36,895.99, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal