

Citation: The Silver Root Taproom Ltd. (Re)
2020 BCEST 50

An appeal

- by -

The Silver Root Taproom Ltd. carrying on business as Silver Root Taphouse

- 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.: 2020/022

DATE OF DECISION: May 25, 2020

DECISION

SUBMISSIONS

James Hertz	on behalf of The Silver Root Taproom Ltd. carrying on business as Silver Root Taphouse
Katherine Wedemire	on her own behalf
Sophie Vogel-Nakamura	on behalf of the Director of Employment Standards
Shannon Corregan	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), The Silver Root Taproom Ltd. carrying on business as Silver Root Taphouse, (the “Appellant” or the “Employer”), has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 29, 2019.
2. The Director determined that the Appellant had contravened sections 17, 30.3 and 58 of the *ESA* in failing to pay a former Employee wages, gratuities and vacation pay. The Director found that wages and interest were owed in the total amount of \$2,567.47. The Director imposed five \$500.00 administrative penalties on the Employer for contraventions of section 17, 18, 30.3, 46 and 58 of the *ESA*, for a total amount payable of \$5,067.47.
3. The statutory deadline for filing an appeal was January 6, 2020. On January 29, 2020, Mr. Hertz submitted an appeal. The appeal form is dated December 27, 2019. The grounds for appeal are that the Director erred in law in making the Determination.
4. Attached to the appeal was a copy of the Determination outlining the sections of the *ESA* which had been contravened, excerpts of relevant sections of the *ESA*, a Notice to Directors/Officers of the company, and a calculation sheet outlining the wages owed. In the body of the Determination, the delegate wrote as follows:

A person named in a Determination may make a written request for reasons for the Determination. Your request must be delivered to an office of the Employment Standards Branch by December 16, 2019. [Bold in original]
5. Mr. Hertz also asked that the Employment Standards Tribunal (the “Tribunal”) extend the time in which to file the appeal.
6. On February 7, 2020, the Tribunal wrote to the parties and asked that Mr. Hertz resubmit the appeal form with the correct name of the Appellant, that is, The Silver Root Taproom Ltd. carrying on business as Silver Root Taphouse, rather than in his personal name. The Tribunal further noted that section 112(2)(a)(i.1) of the *ESA* required the Appellant to provide the Tribunal with a copy of the Director’s written reasons for

the Determination, and noted that the Appellant had not done so. The Tribunal requested that the Appellant provide the Tribunal with a complete copy of the reasons for the Determination no later than 4:30 p.m. on March 9, 2020. The Tribunal informed Mr. Hertz that if he did not have a copy of the documents he could contact the delegate who issued the Determination. That day, Mr. Hertz emailed the Tribunal seeking an explanation of the correspondence. The Tribunal repeated its request, with references to Information sheets and the Tribunal website.

7. On March 4, 2020, Mr. Hertz submitted a second appeal form in the name of The Silver Root Taphouse Ltd., setting out the same reasons for the appeal. He did not attach any part of the Determination or any written reasons for the Determination.
8. On March 5, 2020, Mr. Hertz submitted a further email referencing sections of the *ESA* and commentary regarding the actions taken by both the Appellant and the Employee.
9. On March 18, 2020, the Tribunal wrote to Mr. Hertz again requesting that the Appellant provide the Tribunal with a complete copy of the written reasons for the Determination by no later than April 8, 2020 at 4:30 p.m. The Appellant provided no further documentation.
10. 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.
11. This decision is based on the section 112(5) “record” that was before the delegate at the time the Determination was made, the submissions of the Appellant, the Respondent, and the Director, and the Reasons for the Determination.

FACTS

12. The Appellant failed to submit a complete copy of the reasons for the delegate’s Determination, despite three requests that he do so.
13. I have gathered the following facts from the record submitted by the Director’s delegate:
 - Mr. Hertz incorporated Silver Root Taproom Ltd. on March 6, 2019. He was the sole director.
 - The company operated a restaurant called the Silver Root Taphouse in Nelson, British Columbia. I understand that the business ceased operation some time in the fall of 2019.
 - The Employee was employed as manager/front of house from March 18, 2019, until June 15, 2019. She claimed that she worked in excess of 40 hours per week to assist in the establishment of the business, banking 57 overtime hours.
 - Upon receipt of the complaint, the delegate made several attempts to contact the employer by telephone without success. The delegate sent the Appellant a Demand for Employer records along with a letter outlining the investigation. Those letters, sent by both regular mail and registered mail to the address identified in the corporate registry, were returned unclaimed. Emails to the Employer were sent to the email identified in the appeal documents.

- The delegate spoke to the Appellant's bookkeeper. The bookkeeper provided the delegate with some payroll information but informed the delegate that the documentation was incomplete as she also had not been paid.
- Based on all of the information provided, the delegate issued the Determination.

ISSUE

14. Should the appeal be dismissed under section 114 of the *ESA*?

ANALYSIS

15. 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, 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.
16. 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.
17. I dismiss the appeal under section 114 of the *ESA* for the following reasons.
18. Although the appeal was filed 23 days after the statutory appeal deadline, the Appellant provided no explanation why he did not file within the time period in which to do so.
19. Despite repeated requests by the Tribunal that the Appellant submit a complete appeal, the Tribunal has not received the delegate's reasons for the Determination. That may be because the Appellant did not ask the delegate to provide them, even though the Determination outlined how to request them, information which was communicated again to the Appellant by the Tribunal. In the absence of the delegate's reasons, I have no basis to assess the grounds of appeal, which are that the delegate erred in law in making the Determination.

20. The Appellant's appeal submissions include statements that the Employee was terminated within her probationary period; that she was not managing the restaurant "the way that [the Employer] wanted;" that because she was on contract she was not entitled to overtime; and that she was withholding information belonging to the Employer, including website development information. However, the Appellant acknowledged that the Employee was entitled to unpaid wages for one half week of work, tips and vacation pay. I infer that because the Appellant did not make these arguments to the delegate, the reasons for Determination would not have addressed them. On that basis I would have dismissed the appeal in any event as the submissions consist of arguments that ought to have been made to the delegate. As the Tribunal has said on many occasions, an appeal is not an opportunity to offer evidence or make submissions that ought to have been made to the delegate at first instance.
21. In his appeal submissions, the Appellant asserted that he had not been given the opportunity "to defend" himself, and that no one had contacted him to "resolve the situation."
22. The record refutes that assertion; the delegate's notes indicate that she made several unsuccessful attempts to contact him by telephone. None of her voice mail messages were returned. The record also demonstrates that the Director sent correspondence by both regular and registered mail to addresses listed in the corporate registry, and all were returned. Correspondence sent by email to the email address used by the Appellant on the appeal appears to have been delivered. The record demonstrates that the Director made many attempts to contact the Employer through a number of methods, all without success. I find that the Appellant was afforded an opportunity to respond to the allegations.
23. In the absence of any explanation for filing a late appeal as well as in the absence of any basis to assess the grounds for the appeal, I find that there is no reasonable prospect the appeal will succeed.
24. The appeal is dismissed.

ORDER

25. Pursuant to section 114 (1)(f) of the *ESA*, I deny the appeal. Pursuant to section 115 of the *ESA*, the Determination, dated November 29, 2019, is confirmed in the amount of \$5,067.47, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal