Citation: Robert Grosz (Re)
2020 BCEST 91

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Robert Grosz
(the "Appellant")

- 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.:** 2020/024

**DATE OF DECISION:** July 24, 2020

# DECISION

## SUBMISSIONS

Robert Grosz — on his own behalf

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Robert Grosz (the "Appellant") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on January 17, 2020 (the "Determination").

2. In that Determination, the Director found that the Appellant's employment was excluded under the *ESA* and that no further action would be taken.

3. The date for filing an appeal of the Determination was February 20, 2020. The Appellant filed his appeal on February 10, 2020, contending that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant also said that new evidence has become available that was not available at the time the Determination was made.

4. The Appellant sought an extension of time in which to file the appeal. Given that the appeal was filed within the statutory time period, I understand his application was for an extension of time to submit documents in support of his appeal.

5. On February 12, 2020, the Tribunal's Registrar requested that the Director provide the Tribunal with the section 112(5) record. In a letter dated the same day, the Registrar requested that the Appellant provide written reasons and argument in support of his appeal no later than March 31, 2020. In response to a request for clarification of that correspondence, the Registrar wrote that the March 31, 2020 deadline was not an extension to the statutory appeal period but a deadline to provide written reasons and argument in support of the appeal and any additional documents to the Tribunal.

6. In a further e-mail of the same day, the Appellant requested an extension of three weeks from the date of the receipt of the section 112(5) record. The Appellant also asked the Registrar whether he could submit "additional evidence establishing [certain] facts in the form of a *de novo* procedure before the Tribunal…". The Registrar referred the Appellant to the statutory grounds of appeal and provided him with information on the Tribunal's process.

7. The Director submitted the record to the Tribunal on March 4, 2020.

8. On March 30, 2020, the Appellant sought an extension of time to provide his submission to the Tribunal for medical reasons. The Registrar agreed to extend the time in which the Appellant could provide his written reasons and argument for appeal as well as any additional documents to May 1, 2020.

9. On May 4, 2020, the Registrar wrote to the Appellant noting that no submissions had been received by the deadline of May 1, 2020. The Registrar provided the record to the parties and asked that they make any submissions about the completeness of that record by May 26, 2020.

10. On July 7, 2020, having received no submissions regarding the completeness of the record, the appeal was assigned to me for a decision.

11. On July 13, 2020, the Appellant sought an additional extension of time "generally" due to medical issues.

12. Section 114 of the *ESA* provides that the Employment Standards Tribunal (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.

13. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the Appellant's submissions, and the Reasons for the Determination.

**FACTS**

14. The Appellant worked as a paralegal for Mark R. Epstein Law Corporation carrying on business as Epstein Law (the "Employer") from July 3, 2018, until December 14, 2018.

15. The Appellant was hired pursuant to an employment program that was sponsored, in part, by the Government of British Columbia and administered by the Options Community Services Society ("Options") in Surrey. The parties entered into a Wage Subsidy Work Experience Agreement (the "Agreement") under which the Employer agreed to give the Appellant training and work experience. The Employer was responsible for paying the Appellant's wages in full, and after submitting the Appellant's time sheets to Options, the Employer was reimbursed for one half of those wages. The agreement provided that the Appellant would work 7 hours per day, 5 days per week, and be paid $27.47 per hour for the duration of the agreement, which was 24 weeks.

16. On January 10, 2019, the Appellant filed a complaint with the Director alleging that the Employer contravened the *ESA* in failing to pay regular and overtime wages, and by denying him employee extended benefits. The Employer argued that the Appellant was excluded from the provisions of the *ESA* pursuant to section 32(3)(a) of the *Employment Standards Regulation* (the "*Regulation*"). The Appellant argued, in response, that the overtime hours he worked were not part of the Agreement but were instead based on a separate, oral agreement he had with the Employer. The Employer denied the existence of any separate agreement.

17. At issue before the delegate were whether the Appellant was excluded from the *ESA*, and whether or not there was a separate oral agreement between the parties for overtime wages.

18. The Director found that the Appellant was participating in a time-limited government program through Options that provided on-site training or work experience with the Employer and operated under the *Employment and Assistance Act* ("*EAA*") and was thus excluded from the *ESA* by operation of the *Regulation*.

19. The Director found no evidence that the Employer gave the Appellant his prior written or oral approval to change the terms of the Agreement. The delegate also found no evidence of a separate oral employment agreement regarding additional hours to those set out in the Agreement.

20. Most of the Appellant's submissions on appeal focused on his request for an extension of time in which to file the appeal. In addressing the factors set out by the Tribunal in *Niemisto* (BC EST # D099/96) regarding extensions of time to the statutory time limit, the Appellant contended that he had a strong *prima facie* case on appeal.

21. In support of his assertion that he has a strong *prima facie* case, the Appellant argued, in essence, that the Determination is unfair. He contends that because the Employer "gamed the wage subsidy program" to fill a short-term need, its evidence should not be found credible.

22. The Appellant also asserts that because only the Employer received the benefits of the wage subsidy and of his unpaid work, that the Employer was "absolved" by the Director of the protections afforded to employees. He contended that, based on this summary, he would be able to establish his grounds of appeal.

## ARGUMENT AND ANALYSIS

23. 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.

24. 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.

25. Although the Appellant filed his appeal form within the statutory time limit, he has not provided any basis for his grounds of appeal despite several requests from the Registrar that he do so. Although the

Tribunal's Registrar granted several extensions of time for the Appellant to perfect his appeal, the Appellant has not met any of those deadlines. I find that the Appellant has not satisfied section 114(e).

26. The Appellant is a law school graduate and is, or ought to be aware, of the requirement for establishing grounds of appeal. The only reasons provided by the Appellant in support of the grounds of appeal are referenced in his initial request for an extension of time. In those submissions, the Appellant suggested that he had not been afforded protections of the *ESA*. The Appellant has not identified how the Director erred in law in concluding that he was excluded from the minimum standards of the *ESA*.

27. 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.

28. Having reviewed the record, I find no error in the Director's conclusion that the Appellant fell into the categories of employees who were excluded from the minimum standards of the *ESA.*

29. Section 32 of the *Regulation* identifies categories of employees who are excluded from the minimum standards of the *ESA*. Section 32(3) provides as follows:

> (3) The Act does not apply to a person receiving
>
> (a) income assistance or supplements under the *Employment and Assistance Act*, or
>
> (b) disability assistance or supplements under the *Employment and Assistance for Persons with Disabilities Act*,
>
> ….
>
> while the person is participating in a time-limited government program that provides on-site training or work experience and is operated under an Act referred to in paragraph (a) or (b).

30. The record confirms that the Appellant was participating in a time-limited government program that provided on-site training or work experience. The record also confirms that the Options program operated under contract to the Ministry of Social Development and Poverty Reduction and funded pursuant to section 7 of the *Employment and Assistance Act*. Consequently, I find no basis for this ground of appeal.

*Failure to observe the principles of natural justice*

31. 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.

32. The Determination indicates that the Appellant appeared at a mediation with the Employer which was unsuccessful. The Director's delegate then determined that the issue of whether the Appellant was excluded from the *ESA* would be decided based on written submissions. The Appellant sought, and was granted, numerous extensions of time to submit evidence between June and September 2019. Ultimately, a further extension was denied as the Appellant indicated he was not certain when he would be able to obtain information from the Ministry of Social Development and Poverty Reduction (SDPR). The delegate found that the Appellant took no steps to obtain the information he asserted was necessary to determine the exclusion issue for two months after being asked to provide written submissions. The delegate also found, in any event, that it was not necessary to obtain a response from the SDPR regarding the source of funding for the Wage Subsidy Program, as the information provided by SDPR and Options to the Employer was both reliable and adequately addressed the exclusion issue.

33. I am not persuaded that the Director failed to observe the principles of natural justice.

*New Evidence*

34. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high 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. The Appellant has not identified what the new evidence is, apart from suggesting that he has a claim in "*quantum meruit*" for additional hours he worked over the 35 hours per week and that he has extensive documents evidencing the hours he worked. The Appellant states that although he has extensive documents, "virtually none of these documents are in the Record aside from my log of hours worked because it never occurred to me that I might be considered untruthful."

36. There is nothing in the Appellant's submissions to date that suggest that this evidence was not available at the time the Director was investigating his complaint. Having not provided this information during the complaint process, the Appellant cannot submit it on appeal. In any event, the issue before the delegate was not whether the Appellant worked the hours he asserts; it was whether the parties had an oral agreement, separate from the Wage Subsidy Work Experience Agreement, regarding any overtime hours.

37. The delegate found that there was no evidence the Employer knew the Appellant worked extra hours, or authorized him to work additional hours or different days than those set out in the Agreement. The delegate also found that the Employer wrote to the Appellant confirming his hours of work and requiring him to send him a daily record of his work hours to ensure he was complying with the schedule. I find no reviewable error in the delegate's conclusion that there was no separate oral agreement in addition to the Wage Subsidy Work Experience Agreement.

38. Furthermore, although the Appellant suggests he wants to submit additional material to establish certain facts as a hearing *de novo,* appeals are error correction procedures, based on the section 112 record.

39. I find, pursuant to section 114(f) of the *ESA,* that there is no reasonable prospect that the appeal will succeed.

40. The Appellant sought a further extension of time after the matter was assigned to me to decide, and two months after the Registrar's deadline for perfecting his appeal.

41. I note that the appeal was filed approximately six months ago, and the Appellant has been afforded many opportunities to perfect the appeal by providing submissions in support of the grounds of appeal. While I appreciate the Appellant may be facing medical issues, I find no basis to grant that further extension in the circumstances. In addition to the reasons given for dismissing the appeal under section 114, I find that a further extension will not serve the purposes of the *ESA*.

42. I dismiss the appeal.

**ORDER**

43. Pursuant to section 114 (1)(e) and (f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination dated January 17, 2020, is confirmed.

**Carol L. Roberts**
**Member**
**Employment Standards Tribunal**