

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Van Vapes Inc.  
(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:** Robert E. Groves

**FILE No.:** 2021/022

**DATE OF DECISION:** May 19, 2021

## DECISION

### SUBMISSIONS

Salah Nuwara on behalf of Van Vapes Inc. carrying on business as Royal Vapes

### OVERVIEW

1. This is an appeal by Van Vapes Inc. carrying on business as Royal Vapes (the "Employer"). The Employer challenges a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated January 22, 2021.
2. The Determination followed the investigation of a complaint (the "Complaint") by Marc Ibrahim (the "Complainant"), a former employee of the Employer, alleging that the Employer had contravened the *Employment Standards Act* (the "ESA") when it failed to pay him commission wages, overtime wages, and statutory holiday pay. A claim that the Employer had made unauthorized deductions from the Complainant's wages was abandoned during the Delegate's investigation.
3. The Determination ordered that the Employer pay wages and interest totalling \$3,231.77. The Delegate also imposed \$4,500.00 in administrative penalties. The total found to be owed was \$7,731.77.
4. The Employer appeals on the ground that the Delegate failed to observe the principles of natural justice in making the Determination, contrary to section 112(1)(b) of the *ESA*.
5. I have before me the Employer's Appeal Form, its submission in support of it, and the record the Director was required to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. Included within these materials are the Determination and the Delegate's Reasons.
6. Section 114(1) of the *ESA* stipulates that the Tribunal may dismiss all or part of an appeal, at any time after an appeal is filed and without a hearing, if any of a listed number of criteria is satisfied. In this instance, I am persuaded that it is appropriate to consider the criterion established in section 114(1)(f). That section permits the Tribunal to dismiss an appeal if it determines there is no reasonable prospect that the appeal will succeed.

### ISSUE(S)

7. Should the appeal be permitted to proceed, or should the Tribunal exercise its discretion pursuant to section 114(1)(f) of the *ESA* and dismiss the appeal because there is no reasonable prospect that it will succeed?

### THE DETERMINATION

8. The Delegate's Reasons reveal the following salient facts.

9. The Employer sells vaping products. It employed the Complainant as a sales representative from April to October in 2019. The Complainant filed his Complaint with the Director within days of the loss of his employment.
10. The Delegate issued a preliminary assessment (the "Assessment") of the Complaint by letter emailed to the parties and dated November 30, 2020.
11. The Assessment set out the issues arising from the Complaint, the information regarding the matters in dispute provided to the Delegate by the parties to that date in the investigation, the relevant provisions of the *ESA* that appeared to be engaged by the Complaint, the Delegate's preliminary findings that wages were owed, and a caution that different amounts and entitlements might be found to apply if the Delegate was later obliged to issue a determination in respect of the Complaint. The Assessment also made specific reference to the fact that if a formal determination was issued the Employer would be assessed at least \$4,000.00 in mandatory administrative penalties. The Assessment advised further that if either of the parties disagreed with the findings set out in the Assessment, the delivery of it to them constituted a final opportunity to provide to the Delegate all written arguments and evidence in support of a different result no later than 4:30 pm on December 14, 2020.
12. On December 14, 2020, Salah Ahmad Nuwara ("Mr. Nuwara"), the sole director of the Employer, left messages with the Delegate requesting two weeks' extension to deliver a response to the Assessment.
13. The Delegate spoke to Mr. Nuwara the following day. Mr. Nuwara provided further oral evidence which the Delegate addressed in her Reasons. As for the request for an extension, Mr. Nuwara stated that he needed the extra time in order to present other evidence from a witness to the effect that the Complainant had acknowledged at the time he was hired he would provide work as an independent contractor. Mr. Nuwara also said he wished to tender video evidence showing a single instance where the Complainant had allowed an unauthorized person behind the service counter at the Employer's store, although no illegal activity was alleged. Mr. Nuwara said he needed the extension period for health reasons.
14. The Delegate declined to grant the extension sought by the Employer. The Reasons state that the Delegate found the evidence was "not sufficiently relevant to or probative of the issues in dispute." That said, the Delegate did, in fact, address the substance of the evidence in her Reasons, as if it had been tendered, but found on the whole of the evidence relating to his work that the Complainant was, indeed, an employee of the Employer, and that a single instance of a non-employee being allowed behind the service counter, without more, could not justify a dismissal for cause, especially as there was no evidence a warning or any other disciplinary penalty in respect of the matter had ever been issued by the Employer.

## **ARGUMENT(S)**

15. The Employer's appeal is grounded on the assertion that the Delegate failed to observe the principles of natural justice when she declined to grant the two weeks' extension Mr. Nuwara requested.
16. The Employer contends that when Mr. Nuwara spoke with the Delegate on December 15, 2020, he explained to her that he had been ill – most likely with COVID-19 – and so he needed the extension "to sort things out with evidence I may have and read things over and proceeded [*sic*] with the payment."

17. The Employer states that the Delegate pressed Mr. Nuwara to discuss the evidence he might possess, which he felt uncomfortable in doing because he "was in a bad state to speak". However, Mr. Nuwara did provide "a bit of information on the matter" to the Delegate. The Employer says that the Delegate responded by stating that the information was irrelevant, and that the Employer "should wait for her decision", at which point the Delegate terminated the call.
18. The Employer argues that the denial of the extension was unjust. It states that Mr. Nuwara tested positive for COVID-19 on December 15, 2020, and that he spent several weeks thereafter in quarantine, during which time he had an ambulance visit, on December 23, due to the toll the virus had taken on his health.
19. For these reasons, the Employer argues that the Determination should be varied by reducing the amount owed to \$3,061.41, which was the amount the Delegate stated in the Assessment her investigation to that point had indicated the Employer owed. That sum contained no component representing administrative penalties that might be assessed if a determination were to be issued thereafter.

## ANALYSIS

20. A challenge to a determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was unfair. Two principal components of fairness are that a party must be informed of the substantive elements of the case a party opposite is making against it, and it must be offered an opportunity to be heard in reply. A third component is that the decision-maker must be impartial.
21. The requirement for fairness is also mandated in section 77 of the *ESA*, which reads:
- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.
22. In the circumstances presented here, I am not persuaded the Delegate failed to make reasonable efforts to give the Employer an opportunity to be heard when she declined to grant the Employer the requested extension on December 15, 2020.
23. The Delegate's declining to grant the extension was an exercise of discretion with which the Tribunal will be loath to interfere unless it can be said that the Delegate misdirected herself or made a decision that was so clearly wrong that it amounted to an injustice (see *Bistro Aubergine*, BC EST # D163/04).
24. In my view, the Delegate did neither. It is clear the Employer had sufficient time to marshal the evidence it sought to tender to the Delegate in response to the Assessment within the fourteen days the Delegate stipulated, as Mr. Nuwara communicated the message that he wished to speak to the Delegate about it when he tried to connect with her on December 14, 2020, and he discussed the substance of it with the Delegate during their call the next day. Moreover, as I indicated earlier, the Delegate considered the probative value of the evidence in her Reasons that accompanied her Determination, and the Employer has alleged no error of law on the part of the Delegate regarding the way she addressed the Employer's submissions relating to that evidence.
25. The Employer has offered no other information from which an inference might be drawn that the granting of the extension requested would have resulted in it delivering other evidence that might have assisted

the Delegate in determining whether the findings she had made in the Assessment should be revised or reconsidered.

26. Mr. Nuwara's illness, while unfortunate, does not appear to have prevented the Employer from preparing a response to the Assessment, and communicating the substance of it to the Delegate on December 15, 2020, in a way that the Delegate was prepared to accept as being timely.
27. The suggestion in the Employer's submission on appeal that it was inclined to pay the \$3,061.41 the Delegate identified it owed to the Complainant in the Assessment, and thereby avoid paying penalties if a determination was issued, is troubling. I note, however, that the email Mr. Nuwara sent to the Delegate on December 14, 2020, made no reference to the possibility of such a payment. Instead, it stated that Mr. Nuwara wished to discuss "evidence and witnesses to the complaint" by way of reply to the Assessment.
28. I observe further that the Delegate's notes, reproduced in the record materials delivered to the Tribunal by the Director for the purposes of the appeal, contain a summary of a telephone discussion the Delegate had with Mr. Nuwara a few days after the Determination was issued, during which Mr. Nuwara stated that "he wanted to pay the amount set out in the prelim before the decision was rendered but he was unable to because he had COVID". The notes go on to say that the Delegate replied he had no recollection Mr. Nuwara ever said he wished to make such a payment. On these facts, it cannot be said the Employer has established it communicated an intention to the Delegate to pay the sum identified in the Assessment at any time before the Determination was issued.
29. Furthermore, I am not persuaded that the Employer was prevented from paying the sum set out in the Assessment before the Determination was issued, had it wished to do so, because Mr. Nuwara tested positive for COVID-19. The Determination was issued approximately six weeks after the Delegate forwarded the Assessment to the parties. The Employer has tendered no compelling medical evidence demonstrating that health concerns afflicting Mr. Nuwara meant no such payment could have been made. I note, too, that the Employer's appeal submission contains a Public Health Clearance issued by Vancouver Coastal Health, dated December 21, 2020, stating that Mr. Nuwara was no longer considered to be infectious, and that he could cease isolation and resume his routine activities, including work. That left a month during which such a payment could have been made before the Determination was issued. Even assuming Mr. Nuwara required two further weeks at the end of December 2020, to "be in a stabilized condition", as it was put in the Employer's appeal submission, the Employer has offered no convincing explanation why the payment could not have been made at any time in January 2021 before the Determination was issued.
30. I have decided, pursuant to section 114(1)(f) of the *ESA*, there is no reasonable prospect the Employer's appeal will succeed.

**ORDER**

31. The appeal is dismissed. Pursuant to section 115 of the ESA, I order that the Determination dated January 22, 2021, be confirmed.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**