

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

HTJ Holdings Inc.
(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: Richard Grounds

FILE NO.: 2020/134

DATE OF DECISION: January 14, 2021

DECISION

SUBMISSIONS

Krishna Lakshmanan

on behalf of HTJ Holdings Inc.

OVERVIEW

1. This is an appeal by HTJ Holdings Inc. carrying on business as Smitty's Restaurant, and/or carrying on business as Roadhouse Pub (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "ESA") regarding a Determination issued on August 11, 2020, by May Lee, a delegate of the Director of Employment Standards (the "Delegate"). The Delegate determined that the Appellant owed Ms. Dawn Kluge (the "Complainant") wages and interest in the amount of \$4,824.07. The Delegate imposed mandatory administrative penalties in the amount of \$1,500.00.
2. The Appellant appealed the Determination on the basis that the Delegate erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.
3. For the reasons that follow, the Appellant's appeal is dismissed, and the Determination is confirmed.

ISSUE

4. The issues are whether the Delegate erred in law or failed to observe the principles of natural justice in making the determination and whether or not evidence has become available that was not available at the time the Determination was being made.

ARGUMENT

5. The Determination was issued on August 11, 2020. The Delegate determined that the Appellant owed the Complainant wages for minimum daily hours worked, compensation for length of service, vacation pay and interest. The Delegate also determined that the Appellant owed the complainant compensation for business costs deducted from the Complainant's pay.
6. The Appellant submits that although Krishna Lakshmanan is a Director of HTJ Holdings Inc, the actual license owner for Smitty's Family Restaurant is Hirinand Jagwani. The Appellant submits that Mr. Lakshmanan initially purchased the assets only from HTJ Holdings Inc. and then later, for convenience the shares were transferred to him.
7. The Appellant submits that Mr. Lakshmanan never knew or hired the Complainant and had been told by the previous owners that the Complainant tried to turn employees against management. The Appellant submits that Mr. Lakshmanan paid the Complainant \$250 on a "sympathetic basis" after she was responsible for a stolen cash drop. The Appellant submits that Mr. Lakshmanan later reviewed video surveillance which showed that the Complainant had stolen the cash drop when she pretended to wipe a table and rolled it into her wiping cloth.

8. The Appellant submits that the Complainant manipulated a document which is proven by comparing handwritten notes from the Appellant's management receipt book, included with the appeal submissions, and a sticky note in the documents submitted by the Complainant to the Delegate (contained at page 17 of the Director's Record). The handwritten notes appear to relate to re-payments made by the Complainant for the stolen cash drop. The handwritten note in the management receipt book contains the words "Jay Paid - \$100" but the Complainant's sticky note does not. The name "Jay" refers to Krishna Lakshmanan. The Appellant submits that the Complainant's actions amount to fraudulent activity rendering her entire complaint "null and void".
9. Submissions on the merits of the appeal were not requested from the parties.

THE FACTS AND ANALYSIS

Background Facts

10. The Appellant operated Smitty's Restaurant and the adjoining Roadhouse Pub in Duncan, British Columbia. On July 18, 2019, the Complainant filed a complaint under section 74 of the *ESA* for failing to pay wages including wages for her last day of work when she was told to go home at the start of her shift, annual vacation pay, compensation for length of service and for an unauthorized deduction. The Complainant had earlier mailed her complaint documents to the Employment Standards Branch in April 2019, but they were not received.
11. The complaint proceeded to an investigation and the Delegate spoke with both the Complainant and Mr. Lakshmanan. The Delegate completed a Determination dated August 11, 2020.

The Determination

12. The Delegate reviewed the Appellant's corporate history including that Krishna Lakshmanan was listed as the Appellant's sole director as of December 19, 2018. The Delegate concluded that the Complainant had been continuously employed in various roles at Smitty's Restaurant and the Roadhouse Pub from February 2009 through various changes in corporate ownership including by the Appellant starting in 2012.
13. The Delegate concluded that the Complainant was entitled to a minimum 2 hours of wages for her last day of work on March 26, 2019, when she was sent home after the cook had called in sick. The Delegate accepted the Complainant's evidence that Mr. Lakshmanan terminated her employment and that she had not quit so she was owed 8 weeks compensation for length of service. The Delegate concluded that the Complainant was owed vacation pay and was owed money for the amounts deducted from her paycheques for the stolen cash drop. The Delegate imposed mandatory administrative penalties for the contraventions and awarded interest for the amounts owing to the Complainant.

ANALYSIS

14. 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.
15. The Appellant relies on all three grounds to appeal the Determination. The Appellant submits that it is not the actual licence owner for Smitty's Restaurant and that its director, Mr. Lakshmanan, did not know or hire the Complainant. The Appellant submits that the Complainant was involved in the theft of a cash drop and engaged in fraudulent activity by manipulating a document.
16. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.
17. The Delegate relied on clear and unambiguous evidence to conclude that the Appellant was the Complainant's employer. The fact that the Appellant did not itself hold the Smitty's franchise license does not alter the reality that the Appellant was operating a restaurant that employed the Complainant up to her last day of work on March 26, 2019. The Delegate considered the available evidence and concluded that the Complainant did not quit but had her employment terminated by the Appellant. The Delegate followed established principles to conclude that the Complainant was owed wages and compensation for business costs. There is no reasonable basis to conclude that the Delegate erred in law in reaching these conclusions.
18. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
19. The Appellant was provided with notice of the complaint and an opportunity to respond to the complaint. There is no evidence to support that the Delegate was not an impartial decision maker or was biased. There is no reasonable basis to conclude that the Delegate failed to observe the principles of natural justice in making the Determination.
20. The Appellant has raised on appeal that review of a video recording showed that the Complainant was responsible for the stolen cash drop. In addition, the Appellant has submitted that the Complainant

fabricated a handwritten document relating to re-payments of the missing cash and has provided with the appeal a note from a management receipt book.

21. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.*, BC EST # D171/03, where it stated (at page 3):

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (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.

22. The first stage of the test for admitting new evidence on appeal requires that 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. The video recording that purports to show the Complainant wiping the cash drop into a bucket was discoverable by the Appellant with the exercise of due diligence and could have been presented to the Delegate of the Director for the investigation but was not.

23. In addition, the handwriting on the management receipt book (which differed from the Complainant's handwritten note submitted with her complaint because it did not include a \$100 repayment of the stolen cash drop by Mr. Lakshmanan) was also discoverable with the exercise of due diligence and could have been presented to the Delegate of the Director for the investigation but was not. Accordingly, the first stage of the test for admitting new evidence has not been met and it is not necessary to consider the other stages of the test.

24. There is no reasonable basis to conclude that the Delegate erred in law or failed to observe the principles of natural justice in making the Determination. In addition, the test to admit new evidence on appeal has not been met.

ORDER

25. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal