

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Krishna Lakshmanan
("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.: 2020/135

DATE OF DECISION: January 14, 2021

DECISION

SUBMISSIONS

Krishna Lakshmanan on his own behalf

OVERVIEW

1. This is an appeal by Krishna Lakshmanan (the “Appellant”), a director of HTJ Holdings Inc. carrying on business as Smitty’s Restaurant, and/or carrying on business as Roadhouse Pub, pursuant to section 112 of the *Employment Standards Act* (the “ESA”) regarding a determination issued on August 11, 2020 (the “Determination”), by May Lee, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”). The Delegate determined that the Appellant, in his capacity as a director, owed Ms. Dawn Kluge (the “Complainant”) two months’ wages in the amount of \$3,275.70 and interest in the amount \$161.11. The Delegate did not impose any administrative penalties.
2. The Appellant appealed the Determination on the basis that the Director 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. The Appellant’s submissions are the same as the submissions raised in the appeal of the corporate Determination, also issued on August 11, 2020 (the “Corporate Determination”). In Tribunal decision 2021 BCEST 7, decided the same date as this appeal decision, I dismissed the appeal and confirmed the Corporate Determination relating to HTJ Holdings Inc. carrying on business as Smitty’s Restaurant, and/or carrying on business as Roadhouse Pub (the “Employer”).
3. For the reasons that follow, the Appellant’s appeal is dismissed, and I confirm that that the Appellant is liable as a director for two months’ wages plus interest as decided in the Determination.

ISSUE

4. The issue is whether or not the Appellant is liable as a director for two months’ wages plus interest as decided in the Determination.

ARGUMENT

5. The Determination was issued on August 11, 2020. The Delegate determined that the Appellant was a director at the time the wages owed were earned or should have been paid and was personally liable to pay up to two months’ unpaid wages to the Complainant.
6. The Appellant submits that although he is a director of HTJ Holdings Inc, the actual license owner for Smitty’s Family Restaurant is Hirinand Jagwani. The Appellant submits that he 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 he 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

he paid the Complainant \$250 on a “sympathetic basis” after she was responsible for a stolen cash drop. The Appellant submits that he 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 Employer’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 for the Corporate Determination). The handwritten notes appear to relate to repayments 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 the Appellant. 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. HTJ Holdings Inc. operated Smitty’s Restaurant and adjoining Roadhouse Pub in Duncan, British Columbia. The Appellant is the sole director of HTJ Holdings Inc. as of December 19, 2018. On July 18, 2019, the Complainant filed a complaint under section 74 of the *ESA* against the Employer 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 compensation for an unauthorized deduction.
11. The Delegate completed a Corporate Determination and determined that the Complainant was owed wages for minimum daily hours worked (for her last day of work when she was sent home at the start of her shift), compensation for length of service (after her employment was terminated on March 26, 2019), vacation pay and interest. The Delegate also determined that the Employer owed the Complainant compensation for business costs deducted from the Complainant’s pay (for repayments for a stolen cash drop). On the same date as the Corporate Determination, the Delegate issued the Determination finding that the Appellant was liable in his capacity as a director of HTJ Holdings Inc.

The Determination

12. The Delegate reviewed the Employer’s corporate history including that Krishna Lakshmanan was listed as the Employer’s sole director as of December 19, 2018. The Delegate conducted the BC Registry Services Search on October 8, 2019, and the search results had a currency date of July 26, 2019. The Delegate concluded that the Appellant was a director between December 19, 2018, and March 26, 2019, when the Complainant’s wages were earned or should have been paid. The Delegate stated that the Determination was being sent because the business was closed, and assets may have disappeared.
13. The Delegate referenced section 96(1) of the *ESA* which provides that a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to two months’ unpaid wages for each employee. The Delegate acknowledged the Appellant’s evidence that the former owners had since taken over the business and that the Appellant

was now “free from the business”. The Delegate did not rely on this to exempt the Appellant’s liability as a director.

14. The Delegate calculated the Complainant’s average weekly wage and the amount of two months wages plus vacation pay. The amount of two months’ wages was \$3,275.70 which the Delegate noted was less than the amount of wages owing in the Corporate Determination, which was \$4,597.91. The Delegate concluded that the Appellant was personally liable as a director for the amount of \$3,275.70 plus \$161.11 of interest. The Delegate did not impose any administrative penalties.

ANALYSIS

15. 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.
16. The Appellant relies on all three grounds to appeal the Determination. The Appellant submits that he is not the actual licence owner for Smitty’s Restaurant and that he did not know or hire the Complainant. The Appellant submits new evidence to support that the Complainant was involved in the theft of a cash drop and engaged in fraudulent activity by manipulating a document.
17. The Appellant’s grounds of appeal were dealt with in Tribunal decision 2021 BCEST 7 which was the Employer’s appeal of the Corporate Determination. In that decision, I dismissed the appeal of the Corporate Determination and concluded that there was no reasonable basis to conclude that the Delegate erred in law or failed to observe the principles of natural justice in making the Corporate Determination. In addition, I concluded that the new evidence raised did not meet the test for admitting new evidence because it could have been discovered and presented to the Director during the investigation of the complaint and prior to the Corporate Determination being made.
18. The issue for this appeal relates to whether or not the Appellant is liable in his capacity as a director of HTJ Holdings Inc. for up to two months’ wages owed to the Complainant. Section 96(1) of the *ESA* provides that “a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.”
19. Section 96(2)(a) provides that a director is not personally liable for termination pay if the corporation is in receivership or subject to an action under section 427 of the *Bank Act* or a proceeding under an insolvency Act. Section 96(2)(c) provides that a director is not personally liable for vacation pay that became payable after the director ceased to hold office.
20. The Appellant became a director of HTJ Holdings Inc. on December 19, 2018, and remained a director on the last day of the Complainant’s employment on March 26, 2019. As I noted in my decision dealing with the appeal of the Corporate Determination, 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 Appellant was a director of HTJ

Holdings Inc. for the entirety of the two months before the Complainant's employment was terminated on March 26, 2019.

21. The wages owed to the Complainant in the Corporate Determination included minimum wages for her last day worked (2 hours at \$12.65), compensation for length of service (\$2,852.56, or 8 weeks at her average weekly pay of \$356.57 which was based on her record of employment), vacation pay (in the total amount of \$1,404.40 for accrued vacation pay and vacation pay on the minimum wages and compensation for length of service) and compensation for business costs (for \$315.65 deducted from the Complainant's wages for a stolen cash drop). The total amount of wages owed to the Complainant in the Corporate Determination, not including interest, was \$4,597.91.
22. The Delegate calculated the amount of two months' wages for the Complainant as follows:

Two months' wages is \$3,275.70, calculated as follows:

 - Average weekly wage rate calculated over last eight weeks of work: \$356.57
 - \$356.57 per week x 52 weeks / 12 months x 2 months = \$3,090.28
 - \$3,090.28 + 6% vacation pay of \$185.42 = \$3,275.70
23. The Appellant has not made any submissions that the Delegate erred in calculating the wages owed to the Complainant, either in the Corporate Determination or in this Determination. There is no obvious error in the Delegate's calculations of the amounts owing to the Complainant.
24. The Delegate noted in the Determination that the business was closed. Although there is an exemption for director's liability in certain circumstances, for example where a business is in receivership, there is no exemption simply because a business has stopped operating. Accordingly, I am satisfied that the exemptions in the *ESA* are not available to the Appellant.
25. 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.
26. The Delegate applied the applicable provision of the *ESA* to the circumstances and reached a conclusion based on the evidence. There is no reasonable basis to conclude that the Delegate erred in law in finding that the Appellant was personally liable as a director for two months' wages owed to the Complainant.
27. 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.

28. 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 finding that the Appellant was personally liable as a director for two months' wages owed to the Complainant.
29. 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. This ground of appeal was dealt with in the Corporate Determination where I decided that the first stage of the test for admitting new evidence on appeal was not met because the evidence 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. This ground of appeal does not reasonably relate to whether or not the Appellant is liable as a director of the Employer.
30. 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 that the Appellant is personally liable for two months' wages owed to the Complainant. In addition, the new evidence on appeal does not relate to the Appellant's personal liability as a director and, in any event, the test to admit new evidence has not been met.

ORDER

31. The Appellant's appeal is dismissed and the Determination that the Appellant is personally liable for two months' wages plus interest owed to the Complainant is confirmed under section 115(1) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal