



Citation: Finale Entertainment Inc. (Re)  
2021 BCEST 99

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Finale Entertainment Inc., carrying on business as  
Levels Nightclub  
(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.:** 2021/041

**DATE OF DECISION:** December 16, 2021

## DECISION

### SUBMISSIONS

Yuntongfei Huo	on behalf of Finale Entertainment Inc., carrying on business as Levels Nightclub
Anita Atwal	counsel for Stephen Brooks
Dawn Rowan	delegate of the Director of Employment Standards

### OVERVIEW

1. Finale Entertainment Inc., carrying on business as Levels Nightclub (the "Employer"), appeals a determination issued by Arun Mohan, a delegate ("Delegate Mohan") of the Director of Employment Standards (the "Director"), on April 6, 2021 (the "Determination").
2. The Determination followed an investigation of a complaint (the "Complaint") delivered by Stephen Brooks (the "Complainant"), a former employee of the Employer, pursuant to section 74 of the *Employment Standards Act* (the "ESA") alleging that the Employer had contravened the statute when it failed to pay him the wages and benefits promised in his employment contract.
3. Delegate Mohan concluded that the Employer had contravened sections 17, 18 and 58 of the *ESA*. The Determination ordered the Employer to pay the Complainant \$6,765.27 for wages, \$4,746.92 in vacation pay, and \$411.26 for interest. It also required the Employer to pay \$1,500.00 in mandatory administrative penalties, due to contraventions of sections 17 and 18 of the *ESA*, and section 46 of the *Employment Standards Regulation* (the "*Regulation*"). The total found to be owed was, therefore, \$13,423.45.
4. The Employer appeals two of the penalties imposed by the Director on the ground that the Director failed to observe the principles of natural justice in making the Determination.
5. I have before me the Employer's Appeal Form, its submission in support of it, submissions of the Complainant and Dawn Rowan, a delegate ("Delegate Rowan") of the Director, and the record the Director was required to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. I also have the Determination and Delegate Mohan's Reasons for the Determination (the "Reasons").

### ISSUE

6. Has the Employer established a basis on which the Determination should be varied or cancelled, or referred back to the Director?

## THE DETERMINATION

7. The Complaint arose from the Complainant's employment as general manager of the Employer's nightclub establishment (the "Club") from November 1, 2017, until December 21, 2019, when his employment was terminated for cause.
8. During his employment the Complainant paid sums out of his own pocket to purchase equipment and inventory necessary for the operation of the Club. The Employer also failed to pay significant portions of the Complainant's wages.
9. On December 12, 2019, the Complainant removed much of the operating equipment and alcohol inventory from the Club's premises. He notified the Employer he would return what he had taken when the monies he alleged were owed to him were paid.
10. On December 18, 2019, representatives of the Employer delivered a \$50,000.00 bank draft to the Complainant (the "Draft"). The representatives of the Employer who provided information to Delegate Mohan regarding this payment told Delegate Mohan that it was made to settle with the Complainant all his claims for wages as well as his out-of-pocket expenses.
11. The Complainant understood the Draft to be the reimbursement of but a part of the \$72,350.11 sum he alleged he was owed in respect of the expenses he had incurred on behalf of the Club, and not for any unpaid wages. He said he was told by the representatives of the Employer at the December 18 meeting that the balance of the sum owed to him for expenses would be paid to him on December 20, 2019. The Complainant then promised to return all the equipment and inventory to the Club when that further payment was made.
12. By the end of December 20, 2019, the Complainant had returned all the equipment and inventory to the Club. On the same day he received a personal cheque for \$22,350.11 (the "Cheque") from another representative of the Employer.
13. The Complainant asserted that the Draft and the Cheque (together, the "Payments") were reimbursement to him for the expenses he had incurred on behalf of the Club. He told Delegate Mohan that he had provided a list and detailed Excel spreadsheet to the Employer setting out the expenses he had incurred on its behalf. The expenses he noted amounted to \$72,350.11, the exact sum he later received in the form of the Payments when he returned the equipment and inventory to the Club.
14. The representatives of the Employer who provided information to Delegate Mohan regarding the Payments either stated they were unaware of the Cheque, or they could not recall what it was for.
15. Delegate Mohan determined that no compensation for length of service was owed to the Complainant pursuant to section 63 of the *ESA* because the Employer acted lawfully when it dismissed the Complainant for just cause due to his removal of the equipment and inventory from the Club.
16. A further issue Delegate Mohan considered was the Employer's argument that the Complainant was not entitled to wages prior to May 31, 2019, because the Club did not open until that date. Delegate Mohan found that the evidence did not support the Employer's contention. Instead, the evidence established

that the Complainant had performed the duties to be expected of a general manager of a nightclub that was preparing to open from the date in November 2017 when the Complainant was first hired. Delegate Mohan's finding on this point is not challenged in the Employer's appeal.

17. The principal focus of Delegate Mohan's analysis in his Reasons related to the Employer's submission that all the financial issues raised by the Complainant, including his claims for wages and expenses, were settled by verbal agreement and the delivery of the Draft to the Complainant at the meeting of the parties on December 18, 2019. The Complainant argued, by contrast, that the Draft, and the Cheque he later received, were paid to settle the matter of his outstanding expenses alone, and not his claim for unpaid wages.
18. Despite statements from representatives of the Employer that the Draft was provided to settle all the Complainant's claims for wages and expenses, Delegate Mohan noted that the Draft contained no wording that identified its purposes, no documents were prepared that evidenced a settlement on this basis had been reached, and the termination letter delivered to the Complainant made no reference to the purpose for the delivery of the Draft, or that any such settlement had occurred.
19. As for the Complainant's contention that the Draft and the Cheque were provided to settle his claims for unreimbursed expenses only, Delegate Mohan acknowledged the Complainant had delivered an Excel spreadsheet to the Employer itemizing his alleged expenses in an amount that matched exactly the \$72,350.11 sum the Complainant received from the Employer in the form of the Payments. However, Delegate Mohan observed that the Complainant had neglected to provide any receipts or other evidence establishing what his alleged expenses were for, and he had submitted no documentary material that revealed the purpose behind the Payments he later received. It was also telling for Delegate Mohan that the representatives of the Employer either said they had no knowledge the Cheque had also been paid, or they could not recall what it was for.
20. Delegate Mohan concluded that no binding settlement of any aspect of the Complainant's claims was reached by the parties. Delegate Mohan said this in his Reasons (R17):

As there is no clear evidence regarding the purpose of the bank draft and personal cheque, I find that both were provided for services rendered to the Employer. The Complainant admits that the draft was provided by a co-owner of the nightclub, Mr. Zhang, whereas the cheque was provided to him by Ms. Jiang, the daughter of the co-owners and one of the signing authorities on the cheque (the other being Mrs. Jiang). The Complainant also stated that it was not provided for personal reasons, outside the course of his employment.

As a result, I find that the bank draft and the personal cheque were not provided to settle the dispute or any component of it, be it wages, expenses, or both. Instead, since they were provided for services rendered to the Employer, both amounts will [*sic. be*] treated as wages....
21. Delegate Mohan determined that the Complainant's lawful claim for wages was \$79,115.38, a figure that was not disputed by the Employer.
22. Having found that the Payments totalling \$72,350.11 were wages, Delegate Mohan determined that they should be deducted from the \$79,115.38 figure, leaving the sum of wages owed at \$6,765.27.

## ARGUMENT

23. The Employer submits that the Complainant verbally agreed to settle all owed wages, expenses, and benefits prior to the termination of his employment. It says the Complainant took payments from the Employer, in return for which the Employer agreed that it would not pursue any remedies against the Complainant for the "theft, financial and reputational damages" for which it alleges the Complainant was responsible. For these reasons, the Employer argues that it was an error for Delegate Mohan to order that the Employer pay a penalty of \$500.00 because it failed to pay the Complainant outstanding wages within 48 hours of the termination, as required by section 18 of the *ESA*.
24. The Employer submits further that since the Complainant was the general manager of the Club, it was his responsibility to keep proper employee records for the Employer. The Employer argues that Delegate Mohan should not have imposed a \$500.00 penalty pursuant to section 46 of the *Regulation* based on the Employer's failure to produce all the employee records the Delegate sought pursuant to a lawful demand, because the Complainant "failed to do his job properly or he chose not to present records to the Employer."
25. The Complainant's submission contends that the Employer's appeal discloses no particulars that might support a conclusion Delegate Mohan failed to observe the principles of natural justice. It argues that the bare assertion of such a failure, without more, is insufficient.
26. The Complainant asserts that the Employer's appeal challenges Delegate Mohan's finding of fact that no settlement of the Complainant's claims was made as alleged by the Employer. The Complainant states that the Appellant has merely reiterated the position it adopted, unsuccessfully, during Delegate Mohan's investigation, but it disputes Delegate Mohan's conclusions. The Complainant argues that this is not a valid basis for an appeal. It submits, in addition, that the issuance of the Determination means that the appeal must fail due to the application of the legal principle of issue estoppel.
27. Regarding Delegate Mohan's finding that the Employer contravened section 46 of the *Regulation*, the Complainant submits that the Employer's attempt to blame the Complainant for the failure to respond appropriately to Delegate Mohan's demand for records is misdirected, as it is the Employer's obligation under the statute to ensure that proper employee records are kept.
28. The Director submits that the Employer has mis-stated the correct ground for the appeal. The Director says that the Employer's argument alleges an error of law, in substance, and not a failure to observe the principles of natural justice.
29. The Director argues that Delegate Mohan did not err. The Director says Delegate Mohan found as a fact that no settlement of all financial issues between the Employer and the Complainant had been made, and since Delegate Mohan found, in addition, that the Complainant was owed wages, the penalty for the Employer's contravention of section 18 was warranted and, indeed, section 98 of the *ESA* required that it be imposed.
30. The Director says that since the Employer did not produce all the records properly sought by Delegate Mohan pursuant to a lawful demand, a further penalty pursuant to section 46 of the *Regulation* was also made mandatory.

## ANALYSIS

31. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.
32. Subsection 115(1) of the *ESA* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
  - (b) refer the matter back to the director.
33. The ground of appeal on which the Employer relies is that Delegate Mohan failed to observe the principles of natural justice.
34. 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 a delegate of the Director was unfair. Two principal components of fairness are that a party must be informed of the case that is alleged against it, and it must be offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.
35. The submissions of the Employer reveal no plausible basis on which the Determination ought to be disturbed on natural justice grounds. The unfairness the Employer alleges does not relate to the procedures followed by Delegate Mohan in his investigation, or to any perceived bias. Rather, the Employer disputes the validity of findings of fact Delegate Mohan made to support the orders in the Determination. The Employer argues those findings were incorrect. In substance, therefore, the Employer's submission is that Delegate Mohan committed errors of law.
36. For the Tribunal to decide that Delegate Mohan's findings of fact were made in error and, therefore, he erred in law, it must be shown that the findings were irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* (1998), 62 BCLR (3d) 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

37. The Employer did not challenge the Determination on the ground that Delegate Mohan committed errors of law under subsection 112(1)(a) of the *ESA*. Nevertheless, its failure to tick the appropriate box on its appeal form is not fatal. The Tribunal will look to the substance of an appeal, and not its mere form (see *Triple S Transmission Inc. (o/a Superior Transmissions)* BC EST # D141/03).
38. That being said, the Employer has failed to persuade me that it has met the burden on it to establish that Delegate Mohan's findings of fact it questions were irrational, perverse, or inexplicable. It disagrees with them, to be sure, but that is insufficient. There was, in my opinion, probative evidence before Delegate Mohan sufficient to warrant a conclusion that no enforceable settlement of all the financial issues in dispute between the Complainant and the Employer had been agreed to, at any time. Absent a finding of such a settlement, it was entirely appropriate that Delegate Mohan imposed an administrative penalty because the Employer failed to pay the Complainant the outstanding wages Delegate Mohan determined were owed to him, in a timely way, or at all, following the Complainant's termination.
39. Regarding the Employer's claim that no penalty pursuant to section 46 of the *Regulation* should have been imposed in this instance, because it was the Complainant's duty as general manager of the Club to keep proper records, section 28 of the *ESA* makes it plain that it is an employer's obligation to keep the required records. Employers may not avoid this obligation by purporting to delegate their statutory duty to employee designates.
40. In the circumstances, I do not feel it necessary to comment on the Complainant's arguments relating to issue estoppel.

## **ORDER**

41. The Employer's appeal is dismissed.

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