Employment Standards TRIBUNAL

Citation: Alchemy Brewing Ltd. (Re)
2023 BCEST 11

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Alchemy Brewing Ltd.
("Alchemy")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2022/209

DATE OF DECISION: March 15, 2023

DECISION

SUBMISSIONS

Nicola Nielsen — counsel for Alchemy Brewing Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by Alchemy Brewing Ltd. ("Alchemy") of a determination issued by Michael Thompson, a delegate of the Director of Employment Standards (the "deciding Delegate"), on November 3, 2022 (the "Determination").

2. The Determination found Alchemy had contravened section 18 of the *ESA* in respect of the employment of Michael Swann ("Mr. Swann"). The Determination ordered Alchemy to pay Mr. Swann wages in the total amount of $9,804.41, an amount that included concomitant vacation pay and interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $10,304.41.

3. Alchemy has appealed the Determination alleging the Director erred in law in making the Determination.

4. In correspondence dated December 29, 2022, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the "record") from the Director, invited the parties to file any submissions on personal information or circumstances disclosure and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Alchemy, in care of their legal counsel of record, and to Mr. Swann. Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from either Alchemy or Mr. Swann.

6. The Tribunal accepts the record is complete.

7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 or 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.

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Swann will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

10. Alchemy operates a brewpub in Kamloops, BC.

11. Mr. Swann was employed as a chef from December 10, 2018 to April 10, 2021, when he terminated his employment. Following the termination of his employment, Mr. Swann filed a complaint under the *ESA* alleging Alchemy had failed to pay his final wages, commissions, and annual vacation pay. The parties resolved the matters of final wages and vacation pay. The matter of commissions was not resolved and was investigated by a delegate of the Director (the "investigating Delegate") and decided by the deciding Delegate.

12. Mr. Swann claimed that under the terms of his employment agreement, he was owed 2% commissions on food sales. Alchemy did not dispute Mr. Swann was entitled to receive 2% of food sales but took the position that term was intended to represent his share of pooled gratuities, and he had received that amount.

13. The deciding Delegate found a job offer that had been e-mailed to Mr. Swann on August 31, 2018, setting out the compensation package being offered to him (and which was accepted by him) represented an agreement on the terms of compensation. Included in the offer was "2% Food Sales".

14. The deciding Delegate found there was no ambiguity in the terms of the August 31 e-mail and the reference to 2% Food Sales in the terms of compensation should be read as being as a discreet element of Mr. Swann's compensation separate from any other payment he might be paid. The deciding Delegate did not accept the position of Alchemy that the reference to 2% of food sales was intended to refer to Mr. Swann's portion of the gratuities pool.

15. The deciding Delegate set out reasons for that decision.

16. First, if Alchemy's intention was for the 2% to be a share of gratuities, it could easily have ensured the offer of employment was clear on that point. The deciding Delegate found there was "no mention of a share of gratuities, only a guaranteed 2% of food sales". The deciding Delegate noted that, as well as not being mentioned in the job offer, there was no mention in any other contemporaneous documents of gratuities or Mr. Swann sharing in gratuities.

17. Second, Alchemy paid Mr. Swann 2% of food sales independently of gratuities in December 2019. The deciding Delegate found it unlikely that Alchemy would have paid Mr. Swann an amount representing almost 23% of his base salary in December 2019 if there was a genuine belief he was not entitled to it. While Alchemy expressed dissatisfaction with Mr. Swann's terms of compensation at the time of this payment, there was no further discussion or agreement between the parties to change those terms; Alchemy simply seemed to have decided after December 2019 that they would not pay any more commissions on food sales.

18. The Determination also refences other elements affecting the decision: that under the *ESA*, gratuities do not fall within the definition of wages; that to read additional terms into an employment agreement in a way that would reduce Mr. Swann's wage would be inappropriate; and, if the deciding Delegate had found an ambiguity in the terms of the compensation for Mr. Swann, that ambiguity, in the circumstances, would be "read against" Alchemy.

19. In result, the deciding Delegate found Mr. Swann was entitled to a discreet amount representing 2% of food sales, which was calculated on information provided by Alchemy, and found Alchemy had contravened section 18 of the *ESA*.

ARGUMENTS

20. Alchemy argues the deciding Delegate erred in law in two ways: by assessing the evidence based on a wrong legal principle; and by inferring that Alchemy's payment of 2% of food sales in 2019 was confirmation of his entitlement to that compensation.

21. Expanding on the first argument, Alchemy says the proper approach to contract interpretation is "a practical, common-sense approach focused on the intent of the parties and the scope of their understanding", and takes into account industry-specific knowledge. The decision of the Supreme Court of Canada ("SCC"), *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, is cited in support of this argument. Alchemy submits the "industry standard" is that kitchen staff receive a fixed portion of front-of-house serving staff gratuities for distribution and the inclusion of reference to 2% food sales in setting out Mr. Swann's compensation package does nothing more than confirm that practice would be applied to his employment.

22. Additionally, Alchemy says the inclusion of reference to a "bonus" plan ought to have logically led the deciding Delegate to a conclusion that a second "bonus" – in the form of 2% of food sales – was not intended.

23. On the second argument, Alchemy also says the deciding Delegate erred in law by using conduct after the fact – the payment by Alchemy of 2% of food sales for 2019 – to interpret the intention of the parties at the time the contract was made.

ANALYSIS

24. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> *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.*

25. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

26. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

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. It is well established that the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's factual findings raise an error of law, either because the Director acted without any evidence or acted on a view of the evidence that cannot reasonably be entertained: see *Britco Structures Ltd.*, BC EST #D260/03.

29. The Tribunal has recently had cause to iterate the broad principles that apply to an interpretation of the terms of an employment contract under the *ESA*: see *Francesco Aquilini, Paolo Aquilini, Roberto Aquilini et al and Certain Employees*, 2020 BCEST 90. The following summary is found at para. 110:

> In *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, the Supreme Court of Canada ("SCC") recognized that "[h]istorically, determining the legal rights and obligations of the parties under a written contract was considered a question of law" (para. 43). However, the SCC also acknowledged that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" and, accordingly, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." The SCC also cautioned that "[c]onsideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para. 47). *The SCC concluded that the historical approach should now be abandoned in favour of an approach that treats the interpretation of a contract as a question of mixed fact and law: "…the historical approach should be abandoned [since] contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix"* (para. 50). The proper test for reviewing a question of mixed fact and law is whether the decision-maker made a "palpable and overriding error" unless the decision maker made a discrete and extricable legal error, in which case the "correctness" standard applies (*Housen*, *supra*, at para. 36). (emphasis added)

30. The above is consistent with the interpretive approach which Alchemy says should be followed in this case. I agree the interpretive exercise ought to consider the surrounding circumstances of a contract, or the "factual matrix" as it is described, at the outset. This exercise is one of mixed fact and law.

31. Where I part with Alchemy's argument, however, is in their assertion that, "it is established law that courts interpret contractual terms in accordance with the industry-specific knowledge". In my view, as a statement of law, that assertion is overly broad and incorrect. Such knowledge might be proffered as evidence by one or both of the parties, and if accepted by the decision maker, would form part of the "factual matrix", but there is no legal principle that requires any particular effect be accorded to such evidence.

32. Such evidence, where it is accepted, simply becomes part of the "factual matrix", which, in the words of the SCC in *Sattva*, consists "only of objective evidence of the background facts at the time of the execution of the contract (…), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (para. 58).

33. I reiterate at this point the finding of the deciding Delegate that there was no mention of a share of gratuities in the job offer or in any other contemporaneous documents.

34. While the argument being made by Alchemy expresses their disagreement with the "factual matrix", it does not raise a "discreet and extricable" error of law. Rather, and more accurately, it challenges the "factual matrix", arguing the deciding Delegate failed to apply what it asserted during the complaint

investigation was "industry-specific knowledge" of an "industry standard" for distribution of gratuities among kitchen staff.

35. This argument necessarily engages an analysis of whether the deciding Delegate made an error in handling the facts sufficient to raise an error of law and, although without specifically stating it, infers the deciding Delegate either failed to consider, and apply, what was submitted by Alchemy to be the "industry standard" when interpreting the employment agreement, or, alternatively, failed to give it sufficient weight.

36. As expressed above, the grounds of appeal do not provide for an appeal based on errors of fact and the test for establishing that findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

37. The arguments made in this appeal were made by Alchemy during the complaint process.

38. The deciding Delegate referred to these arguments in the Determination, finding there was nothing in the compensation package or in any contemporaneous document that mentioned gratuities, which indicates to me that any argument from Alchemy that Mr. Swann knew or ought to have known "2% Food Sales" was actually 2% of gratuities on food sales was not borne out on the objective evidence of the facts known to the parties contemporaneously with the agreement on the terms of Mr. Swann's compensation.

39. My assessment of the material contained in the record confirms the above finding of the deciding Delegate was adequately supported on the objective evidence before him, and was not perverse or inexplicable.

40. I also agree with the deciding Delegate that if an "industry standard" for sharing gratuities with kitchen staff – which is described in the appeal submission as management collecting a fixed portion of gratuities from food sales from the front-of-house serving staff and redistributing the resulting amount to the back-of house kitchen staff – was being expressed by Alchemy in setting out Mr. Swann's terms of compensation, it could have, and should have, been made clear.

41. It is clear that the deciding Delegate found the "industry standard" being advanced by Alchemy did not factor into, or weigh against, his interpretation of the employment agreement.

42. The weight to be ascribed to the evidence is a matter of fact, not of law: see *Beamriders Sound & Video*, BC EST #D028/06. I agree with the conclusion of the deciding Delegate, and find the evidence before the deciding Delegate did not warrant finding an alleged "industry practice" weighed against the clear meaning of 2% Food Sales in the offer of employment.

43. I am not persuaded by the argument of Alchemy that the inclusion of reference to a "bonus" plan ought to have logically led the deciding Delegate to a conclusion that a second "bonus" – in the form of 2% of food sales – could not have been intended. Once more, that argument is no more than challenging a finding of fact made by the deciding Delegate. The finding made in the Determination was that the 2% Food Sales was payment of a commission – which is included in the definition of "wages" in section 1(1). The deciding Delegate never referred at any time to the 2% Food Sales as a "bonus".

44. I find the deciding Delegate applied the available background facts to the issue described in the Determination and did not make a "palpable and overriding error" in doing so; this argument is denied.

45. In answer to the "subsequent conduct" evidence argument, I note again that the deciding Delegate found the terms of employment offer were not ambiguous. I make this point because, based on the comments of the Court in *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 (CanLII), which is cited and relied on by Alchemy in making this argument, such evidence should be admitted only if the contract remains ambiguous after considering its text and its factual matrix. On this basis, the deciding Delegate's analysis of the "subsequent conduct" of the parties was unnecessary. The discussion of "subsequent conduct" is only relevant in the event the deciding Delegate was wrong on his view that the terms of the job offer were not ambiguous.

46. Secondly, and in any event, Alchemy has supported this aspect of their argument on the incorrect assertion that, "the courts are clear that you cannot use conduct after the fact to interpret a contract".

47. That assertion is directly contrary to the result in the *Shewchuk* case, which is captured in the following excerpt from para. 48 of the Court's decision, which states:

> Despite its dangers, evidence of subsequent conduct can be useful in resolving ambiguities. It may help to show the meaning the parties gave to the words of their contract after its execution, and this may support an inference concerning their intentions at the time they made their agreement: see *Montreal Trust Co.*, at p. 108; *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396 (CanLII), 239 O.A.C. 137, at para. 55*; Whiteside v. Celestica International Inc.*, 2014 ONCA 420 (CanLII), 321 O.A.C. 132, at para. 58; and *Sobocynski v. Beauchamp*, 2015 ONCA 282 (CanLII), 125 O.R. (3d) 241, at para. 60 leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 243. [emphasis in original]

48. There are other elements to the Court's decision that reflect on the use of "subsequent conduct" evidence that do not add to the discussion in the circumstances of this case and need not be explored here.

49. It suffices to say that if the deciding Delegate had found the terms of Mr. Swann's employment agreement were ambiguous, he committed no error of law by considering '"subsequent conduct" evidence; his analysis of that evidence was not, however, necessary to the conclusion he reached.

50. As well, I do not find the inclusion of a consideration of subsequent conduct indicates there was an error of law in the Determination and the argument on this point is denied.

51. In sum, I am not persuaded the deciding Delegate committed a 'palpable and overriding error' in interpreting the terms of Mr. Swann's employment.

52. I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

53. Pursuant to section 115 of the *ESA*, I order the Determination dated November 3, 2022 be confirmed in the amount of $10,304.41, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal