Citation: Gateway Casinos & Entertainment Limited (Re)
2023 BCEST 16

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Gateway Casinos & Entertainment Limited

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Carol L. Roberts

**FILE NO.:** 2022/202

**DATE OF DECISION:** March 22, 2023

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Ryan Copeland | counsel for Gateway Casinos & Entertainment Limited |
| Michael Thompson | delegate of the Director of Employment Standards |

## OVERVIEW

1. This is an appeal by Gateway Casinos & Entertainment Limited (the "Employer") of a decision of a delegate of the Director of Employment Standards (the "Director") made on November 3, 2022 (the "Determination").

2. On March 11, 2022, Jessica Kristjanson (the "Employee") filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (the *"ESA"*) in failing to pay her wages for attending on-site rapid COVID-19 testing under the Employer's COVID-19 vaccination policy (the "Policy").

3. The Director's delegate determined that the Employee's attendance at testing fell within the *ESA*'s definition of "work" and that the Employer had contravened section 17 of the *ESA* in failing to pay the Employee's wages. The Director's delegate nevertheless determined that the Employee was not entitled to minimum daily pay. The Director's delegate found the Employee was entitled to wages, annual vacation pay on those wages, and accrued interest in the total amount of $169.43. The Director's delegate also imposed a $500 administrative penalty for the Employer's contravention of section 17 of the *ESA*.

4. The Employer appeals the Determination on the grounds that the Director erred in law and that the Director failed to observe the principles of natural justice in making the Determination. The Employer seeks to have the Determination varied and a cancellation of the administrative penalties. The Employer is not seeking the repayment of any money paid to the Employee as a result of the Determination.

5. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I sought submissions from the Director and the Employee. Although the Director made submissions, the Employee did not.

6. This decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions, the Determination, the Director's reply submission, and the Employer's final reply.

## ISSUE

7. Whether the Employer has established grounds for interfering with the Determination.

**BACKGROUND AND ARGUMENT**

8. The facts are undisputed.

9. The Employer operates a casino and restaurant in Langley, British Columbia. The Employee was employed as a server in the restaurant. On September 24, 2021, the Employer implemented the Policy which required all its employees to be either fully vaccinated or to wear a face mask while on company property and obtain a weekly rapid COVID-19 test. Unless granted an exemption by the Employer, an employee who did not comply with the Policy would be placed on unpaid leave. The Employer provided its employees the option of attending rapid testing on Gateway's premises at the Employer's expense on specified days or obtaining third-party tests off site at the employee's expense.

10. Employees who opted for testing were required to show proof of a negative test result no more than seven days prior to working their shift. The Policy expressly stated that employees would not be compensated for the time required to obtain a rapid test or its results.

11. The Employee chose to wear a mask and obtain weekly testing. The Employer's Policy was in effect from September 24, 2021, to April 8, 2022. During this period, the Employee attended the Employer's premises each Monday on 21 occasions. She did not work any shifts at the restaurant on the days she attended for testing.

12. At issue before the Director was whether the Employee was performing work when she attended the Employer's premises to obtain a rapid test.

13. The Director's delegate determined that the Employee's attendance at weekly testing fell within the *ESA's* definition of work:

> According to the email sent by gateway [sic] notifying its staff of the vaccine policy, implementation of the vaccine policy was a requirement imposed by the government of BC as a condition of Gateway operating its casino. If Gateway's staff did not obtain either vaccination or rapid tests, Gateway could not operate its business. The Complainant presumably would not have obtained rapid tests had she not been directed to do so by Gateway as a condition of continuing to work; the Complainant obtained rapid tests because her employer directed her to do so. As her obtaining the test (in combination with her colleagues' obtaining tests or vaccinations) allowed Gateway to engage in business, the Complainant was, I find, performing a service for Gateway when she did so. I find that obtaining the rapid test constituted work as defined by section 1 of the Act.

14. The Director's delegate noted the Employer's contention that the Employee was not required to obtain rapid testing on its premises and could have chosen either to be vaccinated or to obtain testing by a third party but found neither argument changed his view that obtaining testing constituted work:

> I find that the [Employee] made the choice to obtain rapid testing on Mondays, days that she did not work. They could, as outlined by Gateway, have obtained tests on days they worked, or have attended third parties on days they worked as well. I find that the [Employee] did attend work to attend rapid testing, but not as directed by Gateway.

15. The Director's delegate determined that although the Employee made the choice to obtain rapid testing on days she did not work, she was not entitled to minimum daily pay as she was not directed by the Employer to report to work on Mondays, the days she attended for testing. The Director's delegate determined the Employee was entitled to 30 minutes each Monday the Policy was in effect, which amounted to 10.5 hours over the 21 days.

Argument

16. The Employer contends that the Director erred in law in finding that the Employer contravened Section 1 of the *ESA* in failing to pay the Employee wages for time spent rapid-testing for COVID-19.

17. The Employer argues that the Employee's decision to pursue the option of rapid testing and masking was neither directed by the Employer nor did it relate to the performance of her employment duties. The Employer says that in fact, the Employee was not required to attend the Employer's facilities at any specific time or at all for the purpose of testing. Rather, the Employer argues, the Employee chose not to provide her vaccination status to the Employer and elected to participate in the Employer's complimentary weekly testing.

18. The Employer relies on *Hirshfelder (Re)* (BC EST #D024/03) which found that work for an employer would only be captured under the *ESA* if it was performed according to the employer's directions or demanded or allowed by an employer.

19. The Employer contends that the Director's delegate erred in concluding that rapid testing was a condition for continuing to work, as it allowed the Employer to engage in business. The Employer submits that there was no government requirement to have staff who were vaccinated or regularly tested for COVID-19. Rather, the Employer says, it decided to implement the Policy as a safety measure to ensure employees were fit for work and did not pose a risk to others.

20. The Employer further contends that the Director's delegate erred in finding that the Employee was "performing a service" for the Employer by testing for COVID-19. The Employer argues that an operational necessity, such as having a driver's licence, may be a job requirement but the time spent to obtain such a qualification, permit or licence, for example, is not considered work, particularly if that qualification, permit or licence is portable.

21. The Employer argues that the Director's delegate erred in refusing to consider several labour arbitral decisions (*Re Fraser Valley Milk Producers Co-Operative Association (Dairyland Foods) and International Association of Machinists, District Lodge 250* (1989), 9 L.A.C. (4th) 376 (Munroe) and *Vancouver (City) Fire and Rescue Services v. Vancouver Fire Fighters' Union, Local 18 (Drivers' license Medical Exams Grievance* [2016] B.C.C.A.A.A. No 21) on the basis that they were irrelevant to the proper interpretation of the *ESA*. The Employer argues that labour arbitrators have exclusive jurisdiction over all disputes under a collective agreement, including employment standards, unless the legislation states otherwise (*Weber v. Ontario Hydro*, [1995] 2 SCR 929) and that while the ESA has limited exclusions for union employees, the exclusions do not include the definition of "work."

22. Finally, the Employer argues that the Director failed to comply with the principles of natural justice in incorrectly finding that the parties had agreed on the number of times the Employee attended on-site COVID-19 testing.

23. The Director's delegate acknowledged that his finding that the Employer was required by the government to have its staff vaccinated or tested in order to operate was not based on any evidence. The Director's delegate conceded that the Employer chose to implement a vaccination and testing regime independent of any requirement by government or public health authorities to do so.

24. The Director's delegate submits however, that this error only serves to strengthen his conclusion that because the Employer independently chose to have its staff vaccinated or tested, it should bear any employee costs associated with ensuring compliance.

## ANALYSIS

25. 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.

26. For the reasons that follow, I find that the Director's delegate erred in his interpretation of the *ESA.* Given this finding, I have not addressed the argument that the Director failed to observe the principles of natural justice.

Error of Law

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.):

a) a misinterpretation or misapplication of a section of the Act;

b) a misapplication of an applicable principle of general law;

c) acting without any evidence;

d) acting on a view of the facts which could not reasonably be entertained; and

e) adopting a method of assessment which is wrong in principle.

28. The Director's delegate has acknowledged making a factual finding without an evidentiary basis to do so.

29. Section 1 of the *ESA* defines work as "the labour or services an employee performs for an employer…". It further specifies that "an employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence."

30. I find that the Director erred in finding that the Employee's attendance for rapid testing constituted "work" as defined in the ESA. Although the *ESA* is to be given a large and liberal interpretation, I find that it cannot be read as expansively as the Director argues.

31. In *Hirschfelder* (BC EST # D024/03) the Tribunal held that:

> There is not work "for" an employer unless it is performed because of instructions by the employer, or somehow demanded or allowed by an employer. …If is that the employee was 'on the job' during lunch periods, it may be that there was labour or service which was of benefit to the employer but it was purely for reason of a personal interest of the employee that the labour or services were performed… (Reproduced as written) [p. 5]

32. The Employee's continued work was conditional on meeting the terms of the Policy which provided multiple options for compliance. Although the Employer directed the Employee to comply with the Policy, the Employer did not direct the Employee's means of compliance. Furthermore, when the Employee elected to participate in rapid testing rather than receiving a vaccine, the Policy did not limit the manner, timing, or location of that testing solely to testing at the Employer's designated facility. Rather, the Employee had the option to take third-party rapid testing at a facility of her choice. As such, I find that the Employee's time spent obtaining a rapid test was not directed by the Employer. The Employer did not direct the Employee's choice to undergo testing rather than have a vaccine, and to take those tests at times she was not otherwise scheduled to work.

33. The labour arbitration awards referred to by the Employer are not binding on the Director or the Tribunal. While the *ESA*'s minimum standards do apply to collective agreements, as set out in section 3 of the *ESA*, these agreements are also the product of collective bargaining. As stated in *Vancouver (City) Fire and Rescue Services, supra*, labour arbitrators may consider the language of collective agreements when determining whether an activity is "work":

> …whether an activity constitutes "work" has been held to be a function of the language of the collective agreement, the practise of the parties, whether the requirement was a condition of employment at the time, what is the consequence of not fulfilling the requirement, whether a requirement was externally imposed, whether it is a general qualification or a specific skill, whether there was a benefit to the employer (which is generally the case) and whether there was a benefit outside of work to the employee of having the qualification. In other words, in any given case, there is no single indicator that can be used to determine the outcome and the entire context of the dispute must be assessed.

34. In summary, I find the Tribunal's decision in *Hirschfelder* to be persuasive and conclude that the time spent by the Employee undertaking rapid testing did not fall within the *ESA* definition of "work" and is therefore not compensable.

35. Consequently, I conclude that the Director's delegate erred in law in finding that the Employee's attendance for rapid testing constituted "work" as defined in the *ESA*. I allow the appeal.

**ORDER**

36. Pursuant to section 115 of the *ESA*, I cancel the Determination dated November 3, 2022.

**Carol L. Roberts**
**Member**
**Employment Standards Tribunal**