Citation: Farside Inn Ltd. (Re)
2023 BCEST 23

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Farside Inn Ltd.
(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: Brandon Mewhort

FILE NO.: 2023/003

DATE OF DECISION: April 28, 2023

DECISION

SUBMISSION

Maureen Loucks and Phillip Cleland on behalf of Farside Inn Ltd.

OVERVIEW

1. This is an appeal by Farside Inn Ltd. (the "Appellant") of a determination issued by Mathew Osborn, a delegate of the Director of Employment Standards (the "Adjudicating Delegate"), dated December 16, 2022 (the "Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. In the Determination, the Adjudicating Delegate found that Deborah Webber, a former employee of the Appellant (the "Employee"), was not a "manager" as defined in the *Employment Standards Regulation* (the "*Regulation*"), and that she was entitled to outstanding regular wages, overtime wages and vacation pay, as well as compensation for length of service.

3. Section 114(1) of the *ESA* provides that any time after an appeal is filed, and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that, among other things, there is no reasonable prospect the appeal will succeed.

4. For the reasons discussed below, I dismiss this appeal pursuant to section 114(1) of the *ESA*, because there is no reasonable prospect it will succeed. I have assessed the appeal based on the Determination, the reasons for the Determination, the appeal, the Appellant's written submission, and my review of the material that was before the Director when the Determination was being made.

ISSUE

5. The issue is whether this appeal should be dismissed pursuant to section 114(1) of the *ESA*.

THE DETERMINATION

6. The Employee filed two complaints: one on September 5, 2020, alleging that the Appellant failed to pay overtime wages; and the other on February 27, 2021, making additional allegations that the Appellant failed to pay regular wages and compensation for length of service. Another delegate of the Director (the "Investigating Delegate") completed an investigation of the complaints and issued an investigation report on August 15, 2022. The Appellant provided a response to the investigation report, but the Employee did not.

7. The Appellant operates a pub and restaurant in Fairmont Hot Springs where the Employee worked for more than 10 years. The Employee was terminated in January 2021 when she was returning from medical leave. Both the Appellant and the Employee agreed that the Employee had duties as both a manager and server, but that she spent most of her time serving. The Employee's manager duties included ordering

inventory, scheduling of employees and hiring new employees. Those manager duties were performed either before her shift or during her downtime as a server.

8. The Adjudicating Delegate found that the Employee was not a "manager" as defined in the *Regulation*, because the Employee's "principal employment responsibilities were serving and bartending, not supervising or resources." Accordingly, the Adjudicating Delegate found the Employee was entitled to overtime wages as outlined in Part 4 of the *ESA*.

9. The Adjudicating Delegate also found that the Employee was entitled to regular wages, overtime wages and vacation pay, compensation for length of service, as well as interest, totalling $8,022.26.

10. The Adjudicating Delegate also imposed five mandatory administrative penalties because of contraventions of the *ESA*, particularly sections 17 (paydays), 33 (split shifts), 34 (minimum daily hours), 40 (overtime wages for employees not working under an averaging agreement) and 63 (liability resulting from length of service).

ARGUMENT

11. When asked in the appeal form to select its grounds of appeal, the Appellant indicated that the principles of natural justice were not observed in making the Determination. However, the Appellant did not raise any alleged failures to observe the principles of natural justice in its submission. Rather, the Appellant argues that the Adjudicating Delegate erred in his finding that the Employee was not a "manager" and therefore entitled to outstanding overtime wages. For example, the Appellant argues the Employee performed her role as manager during her shifts as a server, and that the Employee's wage rate was that of a manager.

12. The Appellant also indicated in its appeal form that evidence has become available that was not available at the time the Determination was being made. The Appellant attached to its appeal submission an email dated June 1, 2020, in which the Employee asked the Appellant to correct her Record of Employment to state that she was a manager rather than a server and to also correct her address.

13. The Appellant also appeals four of the administrative penalties imposed by the Adjudicating Delegate, particularly for the contraventions under sections 17, 33, 34 and 40 of the *ESA*. Regarding section 17, the Appellant argues that the Employee specifically requested an advance payment of $500 at the start of each month with the balance of her wages being paid at the end of each month. Regarding sections 33 and 34, the Appellant argues that the Employee was responsible for scheduling, and it was her decision to work the hours she did.

14. The Appellant does not appeal the Delegate's finding regarding compensation for length of service.

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. In my view, the Appellant's submissions only raise alleged errors of fact. Specifically, the Employer essentially argues that the Adjudicating Delegate erred in his finding of fact that the Employee was not a "manager" as defined in the *Regulation*.

17. As discussed by this Tribunal in *Taste of Hangzhou Catering Ltd. (Re)*, 2022 BCEST 34 ("*Hangzhou Catering*") at para 62, section 112(1) of the *ESA* does not provide for an appeal based on alleged 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 findings raise an error of law."

18. In *Hangzhou Catering*, this Tribunal then went on to explain how it is rare for a finding of fact to amount to an error of law (see para 63, citing *3 Sees Holdings Ltd. (Jonathan's Restaurant) (Re)*, BC EST # D041/13 at paras 26 to 29):

> The Tribunal has, time and again, said that the test for establishing 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". In this case, to establish the Director committed an error of law on the facts, THC would be required to show the findings of fact and the conclusions and inferences reached by the adjudicating delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable.

19. In this case, I find that the Adjudicating Delegate's conclusion regarding the Employee not being considered a "manager" was supported by evidence before the Adjudicating Delegate. For example, the Appellant itself provided evidence that the Employee was responsible for both manager duties and serving, and that the manager duties were performed either before her shift or during her downtime as a server (page 7 of 12 of the Investigating Delegate's case notes). Accordingly, I find that the errors of fact alleged by the Appellant do not raise errors of law.

20. Regarding the email attached to the Appellant's submission, this Tribunal set out the test for fresh evidence in *Davies et al.*, BC EST # D171/03, as follows (emphasis added):

> 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. <u>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</u>. 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.

21. I find that the email does not meet the test for fresh evidence, because, with the exercise of due diligence, it could have been provided to the Investigative Delegate during the investigation of the complaints. The Appellant has provided no reason why the email attached to its appeal submission was not available during the investigation. The email is dated June 1, 2020, so it should have been available during the investigation into the Employee's complaint, a report for which was issued on August 15, 2022.

22. Regarding the Appellant's appeal of the administrative penalties, as explained by this Tribunal in *537370 B.C. Ltd.*, BC EST # D011/06, the imposition of penalties for contraventions of the *ESA* are mandatory and that: "absent circumstances amounting to bad faith or abuse of process, the Tribunal may only cancel a penalty provided for in the *Act* and *Regulation* if it decides that the contravention which underlies it cannot be supported and must be set aside pursuant to one of the grounds of appeal referred to in Section 112 of the *Act*."

23. In this case, as discussed above, I have not set aside the contravention of the Appellant failing to pay overtime wages under section 40 of the *ESA*. Regarding the contraventions of sections 17 (paydays), 33 (split shifts) and 34 (minimum daily hours) of the *ESA*, the Appellant's submissions are similar to its submissions regarding section 40 in that they only raise alleged errors of fact and, in my view, those alleged errors of fact do not raise errors of law. Given that the Appellant does not allege bad faith or an abuse of process and given that I have not set aside any of the contraventions underlying the administrative penalties pursuant to one of the grounds of appeal under section 112 of the *ESA*, I dismiss this ground of appeal.

24. For the above reasons, I find that the Appellant has failed to demonstrate a basis for the Tribunal to interfere with the Determination and I dismiss the appeal under section 114(1)(f) of the *ESA* as there is no reasonable prospect it will succeed.

ORDER

25. I order that the Determination be confirmed pursuant to section 115(1) of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal