

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Looks Unlimited Salon Ltd. carrying on business as Pink Lime Salon and Spa
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: Brandon Mewhort

FILE NO.: 2023/024

DATE OF DECISION: May 24, 2023

DECISION

SUBMISSIONS

Lea Paradis

on behalf of Looks Unlimited Salon Ltd.

OVERVIEW

1. This is an appeal by Looks Unlimited Salon Ltd. carrying on business as Pink Lime Salon and Spa (the “Appellant”) of a determination issued by Mathew Osborn, a delegate (the “Adjudicating Delegate”) of the Director of Employment Standards (the “Director”), dated February 17, 2023 (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 Maryam Azarang, a former employee of the Appellant (the “Employee”), was entitled to outstanding overtime wages and vacation pay, as well as compensation for length of service. The Adjudicating Delegate also imposed four administrative penalties.
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.

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 a complaint on January 17, 2021, alleging that the Appellant contravened the *ESA* by failing to pay overtime wages, annual vacation pay, and compensation for length of service. Another delegate of the Director (the “Investigating Delegate”) completed an investigation of the complaint and issued an investigation report on October 26, 2022.
7. The Employee was employed as a stylist with the Appellant, which operates a salon and spa in Vancouver, until she was terminated on December 30, 2020. The Adjudicating Delegate determined that the recovery period for the Employee’s complaint was from December 30, 2019, until December 30, 2020. The Appellant disputed the length of the recovery period during the investigation given the Employee ceased working for about 19 weeks from March to June 2020, due to the COVID-19 pandemic; however, the Appellant did not raise this issue on appeal.
8. The Adjudicating Delegate found that the Employee was entitled to \$64.97 in outstanding overtime wages and \$517.17 in outstanding vacation pay, as well as compensation for length of service in the amount of \$3,143.28, plus interest. In finding that the Employee was entitled to compensation for length of service, the Adjudicating Delegate considered whether she was terminated for cause. For example, the Adjudicating Delegate discussed the Employee’s alleged use of her phone at work and the associated

warnings issued by the Appellant, as well as the Employee's alleged insubordination. Based on the evidence before him, the Adjudicating Delegate determined that the Appellant did not have just cause for terminating the Employee's employment.

9. The Adjudicating Delegate also imposed four administrative penalties for contraventions of sections 17, 40, 58 and 63 of the *ESA* in the total amount of \$2,000.00.

ARGUMENTS

10. The Appellant's submission was provided by Lea Paradis, who is the Appellant's accountant and bookkeeper. Ms. Paradis also gave evidence on behalf of the Appellant to the Investigating Delegate during the investigation of the complaint.
11. When asked in the appeal form to select its grounds of appeal, the Appellant indicated that evidence has become available that was not available at the time the Determination was being made. In its two-page submission, the Appellant raises six points, particularly it: (1) disputes the Employee's start date; (2) disputes the amount of vacation pay owing; (3) disputes the amount of overtime wages owing; (4) disputes a statement made by the Adjudicating Delegate in the Determination that another employee was a manager; (5) explains the Appellant's policies regarding the use of phones by its employees and regarding contacting the Appellant's clients; and (6) discusses instances of the Employee's insubordination.
12. The Appellant's submission also enclosed:
 - a. a one-page handwritten note dated March 2, 2023, from another employee of the Appellant, which appears to be addressed to this Tribunal. The note states, among other things, that the Appellant is a good employer and the Employee spent too much time on her phone during work hours;
 - b. a four-page spreadsheet of the Employee's wage details from 2015 to 2020; and
 - c. an email from Joseph Jawhari (the Determination noted that Yousef Jawhari was formerly known as Joseph Jawhari and he is listed as the sole director and officer of the Appellant) to the Adjudicating Delegate dated February 28, 2023. The email essentially explains that the Employee used her phone excessively during work hours and that she was insubordinate, which led to her termination.

ANALYSIS

13. 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;
or
 - (c) evidence has become available that was not available at the time the determination was being made.

14. 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. 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. 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.

15. In this case, I find that the materials included with the Appellant's submission (i.e., the handwritten note, spreadsheet, and email) do not meet the test for fresh evidence, because, on their face, there is no indication that they – or the information contained in them – could not have been provided to the Investigative Delegate during the investigation of the complaint. In fact, much of the information contained in them was provided to the Investigative Delegate during the investigation. To the extent that it was not, the Appellant did not provide any reason why this information was not available during the investigation.

16. The Appellant's submission essentially reiterates arguments made during the investigation and asks me to come to different factual conclusions than the Adjudicative Delegate. However, this Tribunal's jurisdiction is limited to the grounds of appeal set out in section 112 of the *ESA*. As discussed 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."

17. In this case, I find that the Adjudicative Delegate's findings were supported by the evidence before him, and that the Appellant has failed to demonstrate a basis for the Tribunal to interfere with the Determination. I therefore dismiss the appeal under section 114(1)(f) of the *ESA* as there is no reasonable prospect it will succeed.

ORDER

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

Brandon Mewhort
Member
Employment Standards Tribunal