

Citation: Little Farmers' Petting Zoo Society (Re)
2023 BCEST 44

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Little Farmers' Petting Zoo Society
("Society")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo

FILE NO.: 2023/051

DATE OF DECISION: June 20, 2023

DECISION

SUBMISSIONS

Dennis Alan Threatful

on behalf of Little Farmers' Petting Zoo Society

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Little Farmers’ Petting Zoo Society (the “Society”) appeals a determination issued by a delegate (the “adjudicating delegate”) of the Director of Employment Standards (the “Director”) on March 23, 2023 (the “Determination”).
2. The Determination found that the Society violated Part 3, section 18 (wages) and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Nash Domenichelli (“Mr. Domenichelli”).
3. The Determination ordered the Society to pay Mr. Domenichelli wages in the total amount of \$1,023.26 consisting of regular wages, vacation pay and accrued interest.
4. The Determination also levied an administrative penalty of \$500 against the Society for contravention of section 18 of the *ESA*.
5. On April 17, 2023, the Society appealed the Determination on all of the available grounds of appeal under section 112(1)(a), (b), and (c) of the *ESA*, namely: The Director erred in law and failed to observe the principles of natural justice in making the Determination and evidence has become available that was not available at the time the Determination was being made.
6. On April 21, 2023, the Tribunal corresponded with the parties advising them that it had received the Society’s appeal. The Tribunal also informed Mr. Domenichelli and the Director that, at this time, no submissions were being sought from them on the merits of the appeal.
7. In the same correspondence, the Tribunal requested the Director to provide the section 112(5) record that was before the Director at the time the Determination was made (the “record”).
8. On May 3, 2023, the Director delivered the record to the Tribunal. On May 15, 2023, the Tribunal sent a copy of the same to Mr. Domenichelli and the Society and afforded each an opportunity to object to its completeness by 4:00 p.m. on May 29, 2023.
9. The Tribunal did not receive any response from the Society or Mr. Domenichelli. As none of the parties objected to the completeness of the record, on June 9, 2023, the Tribunal informed the parties that the appeal had been assigned to a panel, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. The parties were also advised that if all or part of the appeal was not dismissed, the Tribunal would seek submissions from the other parties on the merits of the appeal.
10. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based solely on the written submissions of the Society, the record, and the Reasons for the Determination (the “Reasons”). Under section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any reasons listed in the subsection. If satisfied the appeal or

part of it should not be dismissed, the Director and Mr. Domenichelli will be invited to file submissions. On the other hand, if the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed.

ISSUE

11. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed, or dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

Background

12. A BC Registry Services Search conducted online on March 13, 2023, with a currency date of December 7, 2022, indicates the Society was incorporated in British Columbia on July 16, 2003 under the *Societies Act*. Dennis A. Threatful (“Mr. Threatful”) and three others are listed as the Society’s Directors.
13. The Society operates a zoo in Kamloops, British Columbia.
14. On August 24, 2022, Mr. Domenichelli filed a complaint under section 74 of the *ESA* alleging that the Society failed to pay him regular wages for the 40 hours he worked between July 18, 2022, and July 22, 2022 (the “Complaint”). The Society disputed the Complaint contending that it never hired Mr. Domenichelli.
15. A delegate of the Director (the “investigating delegate”) completed an investigation into the Complaint and prepared the “investigation report” dated February 13, 2023. Subsequently, the adjudicating delegate conducted a review of all information in the file, including the investigation report, and issued the Determination.
16. In the Reasons, the adjudicating delegate delineates the following questions he considered in making the Determination:
 - a) Was Mr. Domenichelli performing work for the Society?
 - b) Was Mr. Domenichelli owed regular wages?
17. In deciding these questions, the adjudicating delegate considered the evidence of both parties which is summarized in the Reasons.
18. In the case of Mr. Domenichelli, the investigating delegate notes that he adduced the following evidence and arguments:
 - The job posting of the Society for a full-time employee for a fixed term of 8 weeks’ employment to update the web page of the Society’s zoo for a rate of pay of \$21.60 per hour.
 - He was not paid any wages for the work he did.
 - He had an interview with Mr. Threatful, the executive director of the Society, on July 10, 2022, at which interview the latter asked him provide a “sample demo” of the Zoo’s website (the “Sample”).

- He spent approximately four hours working on the Sample between July 12, 2022, and July 14, 2022, which he delivered to Mr. Threatful by text message on July 15, 2022.
- A link to a video that was two or three minutes long that was on a public hosting site containing the Sample showing Mr. Domenichelli navigating a webpage and adding and removing pictures of animals from that webpage using a database tool.
- The video was uploaded to the webpage in July 2022 (the website does not provide a specific date) and the video is titled “petting-zoo -15 July 2022”.
- On July 16, 2022, Mr. Threatful telephoned him and hired him for the posted position.
- On July 18, 2022, he began working for the Society. He worked eight hours per day, onsite at the Society’s Zoo, from July 18, 2022, to July 22, 2022, inclusive, totaling 40 hours of work.
- His role was to create a main web page for the Society, with a navigation index to individual pages for each animal at the zoo, with pictures and videos of that animal.
- He made use of the Sample as the starting point for the work he performed for the Society between July 18 and 22, 2022.
- He provided the investigating delegate with a link to a website containing ‘commits’, which contains a list of the work he performed while working for the Society, itemized by date. This website is accessible, and the adjudicating delegate was able to visit it and click on items and see each item showing several pages of computer code. Some of the titles of these items include “drag or drop file”, “animal navigation back and forward”, “production build” and “animals page showing all pictures as thumbnails”, for example.
- While on site at the Society’s zoo, he was sometimes required to perform other (i.e., non-website-related) work, such as moving plywood.

^{19.} In the case of the Society, the investigating delegate notes that Mr. Threatful provided the following evidence and arguments:

- The position Mr. Domenichelli interviewed for was created due to a prospective grant available from Service Canada for businesses to hire students (the “program”).
- Mr. Domenichelli was told that he would have to qualify to participate in the program.
- An email to Service Canada dated September 16, 2022, in which Mr. Threatful states the Society was unable to find a suitable candidate for the Web Developer position.
- The Society never hired Mr. Domenichelli because the latter was unable to create the Sample, which the Society requested as part of the interview process.
- The Sample is not work but it was to serve as an indicator of whether Mr. Domenichelli could perform the work required by the Society.
- Mr. Domenichelli was told that the qualification would consist of producing a simple framework of the petting zoo website. This framework consists of an input page, display page and a menu page. The input page is a user inputting the data into a database. Clicking on the menu page displays the information entered into the database.

- Mr. Domenichelli said he could produce this demo framework and then work on the rest of the website as required.
- Mr. Domenichelli failed to provide a standalone demo that could be uploaded to the zoo web site.
- Mr. Domenichelli’s video evidence confirms that the demo he is showing is in fact loaded on an offsite data base that would be of no use to the zoo.
- The video of the Sample was not what was requested of Mr. Domenichelli by the Society and should not serve as proof that Mr. Domenichelli performed work.
- Mr. Domenichelli did not provide the code for the Sample to the Society.
- Mr. Domenichelli’s “demo” was not loaded onto the Society’s zoo web page because Mr. Domenichelli did not provide a working demo.
- He (Mr. Threatful) allowed Mr. Domenichelli to try again, during July 18, 2022 to July 22, 2022, to produce a standalone demo that could be uploaded to the zoo’s website, after he failed to produce a standalone demo the first time.
- He (Mr. Threatful) reiterated to Mr. Domenichelli that he could not be hired unless he proved that he had the required skills.
- There were never any changes made to the Society’s website because Mr. Domenichelli never had access to the website and, any changes would have required his (Mr. Threatful’s) authorization which the latter never provided.
- Mr. Domenichelli had no reason to use a public, web-based platform to store his work; he could and should have stored his work on his own personal computer or on a computer at the zoo.
- According to a third-party web developer he (Mr. Threatful) contacted, a qualified student should have been able to create the Sample, as requested, within eight hours.
- Mr. Domenichelli did not spend the time he claims working on the Sample, and his claim amounts to fraud and time theft.

20. Having summarized the evidence of the parties in the Reasons, the adjudicating delegate next considers the definitions of “employee”, “employer” and “work” in the *ESA* and identifies that a fundamental question in this case is whether Mr. Domenichelli is performing work for the Society. He then explains the test to be applied for answering this question:

A person who performs an evaluation or test, such as a word processing test, given to prospective employees as part of an interview process, is not considered an employee and the test is not work. A person, however, who performs work for the employer’s benefit while being evaluated for a job must be paid, even if the work performed does not result in an offer of continuing employment.

In my view, the correct test (based on the definitions above) is whether the work that is allegedly performed is for the employer’s benefit and at the direction of the employer, not if the work ends up being of quantifiable benefit to an employer.

21. In concluding that Mr. Domenichelli indeed performed work for the Society, the adjudicating delegate reasons as follows:

I am satisfied, based on the evidence of the parties, and Mr. Threatful's descriptions of the Sample in particular, that the Complainant's coding, had Mr. Threatful deemed it acceptable, was intended to be used on the Respondent's website. To be clear, I find what the Complainant did at the Respondent's direction, from the close of the interview onwards, to have been work, as it was intended to be used for the Respondent's benefit.

I understand Mr. Threatful's argument that the work was not satisfactory, and that he was not able to use the Complainant's work on the Respondent's website. As this work was, more likely than not, performed for the Respondent's prospective benefit, and at the Respondent's direction, however, it qualifies as work performed for an employer, and is compensable.

22. The adjudicating delegate next considers the question of how much work was performed by Mr. Domenichelli. He notes that Mr. Threatful consulted with a web developer as to what was required of Mr. Domenichelli and contends that the latter should not have taken more than eight hours to complete all that was required of him and therefore, he was clearly not spending the time alleged on the Sample or on his work generally.

23. In stark contrast to Mr. Threatful's evidence and argument, the adjudicating delegate notes that Mr. Domenichelli says that he spent 40 hours working at the Society's place of business and 4 hours creating the Sample. In preferring Mr. Domenichelli's evidence and finding that the latter performed 44 hours of work for the Society, the adjudicating delegate reasons as follows:

As described above, the four hours of work requested as a 'demo' by the Respondent (the Sample) was intended to be used on the Respondent's website. It was intended, in other words, to be used for the Respondent's benefit. There is enough evidence that the Complainant performed this work that I find it more likely than not that the Complainant's four-hour estimate is more likely than not to be accurate.

I am satisfied that the 'commits', i.e., the dated entries of code on the 'github' website were created on the dates listed; I think it unlikely that the Complainant falsified these records or the dates. As such, I am satisfied that the Complainant performed at least some work each day.

Furthermore, I accept that it is more likely than not that the Complainant attended at the Respondent's place of work on July 18, 2022, through July 22, 2022. The Complainant provided some details as to the time he spent there. I do not understand that the Respondent denies that the Complainant attended at the zoo on those days, but to allege that this time formed a part of the interview process. Even if I am incorrect in this, I find Mr. Threatful's reference to the fact that the Complainant could have saved his work onto the Respondent's computers to indicate that the Complainant was onsite.

In considering the work product of the Complainant that is in evidence, along with my finding that the Complainant was at the Respondent's workplace during the period July 18, 2022, through July 22, 2022, I prefer the Complainant's evidence as to the amount of work performed over the evidence of the Respondent. I find the Complainant completed 44 hours of work (inclusive of the time spent working on the Sample) for which he is owed regular wages.

24. Having concluded that Mr. Domenichelli is owed wages for 44 hours of work with the Society, the adjudicating delegate applied the hourly rate of \$21.60 specified in the job posting to calculate the total

amount of \$950.40 in regular wages owing to Mr. Domenichelli and \$38.02 in vacation pay. He also awarded Mr. Domenichelli interest of \$34.84 on both amounts pursuant to section 88 of the *ESA*.

25. The adjudicating delegate also levied an administrative penalty of \$500 against the Society for a breach of section 18 of the *ESA* for failing to pay Mr. Domenichelli all wages earned within 48 hours after the termination of his employment.

SUBMISSIONS OF THE SOCIETY

26. In his written submission, Mr. Threatful states the Society is appealing the Determination “on points of law, the interpretation and natural justice”. I do not find it necessary to reiterate verbatim Mr. Threatful’s submissions in this part, but I have read them very closely. It is clear to me that his appeal submissions largely reiterate the evidence and arguments the Society submitted to the investigating delegate during the investigation of Mr. Domenichelli’s complaint and which the adjudicating delegate considered in making the Determination. It is also evident that Mr. Threatful is primarily disputing the adjudicating delegate’s finding of facts.
27. More specifically, Mr. Threatful does not agree with the adjudicating delegate’s finding that the Sample Mr. Domenichelli prepared was intended to be used for the Society’s website. He contends that it was a test “to produce a standalone data framework”; it would “not work or be used or intended to be used on an existing site”; and it would be of no value to the Society or its zoo. He also says that Mr. Domenichelli failed to produce a picture menu driven application on a locally hosted database. He states that Mr. Domenichelli was aware of the Society’s requirements for the test and “the test framework had to be presented on a stick as a program that can be installed on any computer and then tested to see if the program actually works” so that the Society would “retain control of the code” and “the hosting options”. However, Mr. Domenichelli failed to carry out the Society’s instructions despite being given additional or multiple opportunities. He also states he contacted a professional programmer to find out “if the requirements [of the Society in this project] were too limiting or above what should be expected of a four-year graduate student” and he was advised that they were not.
28. Mr. Threatful also sets out the Society’s five-part “standard hiring protocols” and submits that Mr. Domenichelli did not make it past the Society’s second protocol, namely, “[a]ssessing candidate’s abilities and suitability for position”. Therefore, he was not hired or employed by the Society, he contends.
29. In rebuttal to Mr. Domenichelli’s evidence that, while on site at the zoo, he sometimes performed other work such as move plywood, Mr. Threatful says that Mr. Domenichelli was asked “as a courtesy to all concerned”, if he would like to help those people carrying sheets of plywood and walking past him. This was a task that only took “10 to 15 minutes to complete”.
30. With respect to the adjudicating delegate’s finding that Mr. Domenichelli’s rate of pay was \$21.60 per hour, Mr. Threatful says that while the Society “intended to hire a successful candidate and negotiate the rate of pay for the six-week contract” based on their qualifications, the website on which the posting was posted did not allow the Society to insert “a wage range of \$17.60 – 21.60”. He says that “[i]t would be generally assumed that if your qualifications are less than desired, a person ‘might’ be able to negotiate working at a lower rate until they gain[ed] the necessary skills to attract a higher wage”. He states the Society has, previously, negotiated a lower wage rate with less qualified employees. However, in this case, he says that Mr. Domenichelli was never offered employment, even at the lower rate.

31. Mr. Threatful also submits, in the alternative, if the Society is unsuccessful in its appeal on other grounds, then it “applies for a relief under natural justice” from the “fine” (penalty). In support of this plea, he submits that the Society intended to hire a qualified candidate and afforded Mr. Domenichelli “every opportunity to pass the requirements of hire”. If the Society was required to pay for trials, then it “would not have extended extra trials” to Mr. Domenichelli. Further, if the Society is required to “pay for the interview process” then it would not have negotiated the highest rate.
32. Mr. Threatful concludes his submissions stating that the Society will amend its policy and add the following to it regardless of the outcome of this appeal:
- 2c All interview candidates will view the hiring policy and sign an interview agreement that they understand and agree that they are not considered hired until the hiring policy is completed in its entirety.
- 3a An employment contract will be signed by all employees regarding wage rates, and other employment articles unique to the zoo.

ANALYSIS

33. The grounds of appeal under the *ESA* are set out in section 112(1):
- Appeal of director's determination**
- 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.
34. The Tribunal has consistently held that 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, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).
35. Section 112(1) does 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 findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03.
36. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.
37. Having delineated some of the relevant principles applicable to appeals, as previously noted, the Society has checked off all three grounds of appeal – “error of law”, “natural justice” and “new evidence” - under section 112(1)(a), (b) and (c) in the Appeal Form.

38. I will discuss each ground of appeal under separate headings below starting with the error of law ground of appeal.

a. Error of law

39. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco, supra*, in which the Tribunal 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)*, [1988] 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.

40. As indicated under the heading “Submissions of the Society” above, the Society’s appeal primarily challenges findings of fact by the adjudicating delegate. More particularly, he is challenging the finding that what Mr. Domenichelli did, from or after the close of his interview with Mr. Threatful, was work intended to be used by the Society, although Mr. Threatful found it unsatisfactory. As indicated above, an appeal that challenges findings of fact must demonstrate those findings raise an error of law. I find the Society has not discharged this burden. I am not at all persuaded by Mr. Threatful’s submissions that the adjudicating delegate made any error of law in the Determination within the meaning of “error of law” in *Gemex, supra*. I find that the Determination is grounded in findings of fact made by the adjudicating delegate based on the evidence and information provided by Mr. Domenichelli which the adjudicating delegate preferred over Mr. Threatful’s.

41. The Society has not shown, and cannot show, any reviewable error has been made in respect of those findings of fact. As indicated above, the statutory grounds of appeal in section 112 of the *ESA* do not authorize the Tribunal to consider appeals that challenge findings of fact unless those findings are shown to be an error of law and the Society has not done that here. The findings and the conclusions of the Director are rationally grounded in the evidence provided. Therefore, I find the error of law ground of appeal has no merit.

b. Natural Justice

42. The often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explains that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

43. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to

be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST # D050/96).

44. I find nothing in the submissions of Mr. Threatful or the record that remotely suggests an infringement of the Society's natural justice rights in the investigation or adjudication of the complaint or in the appeal of the Determination. The onus is on the party alleging a failure to comply with principles of natural justice to provide some evidence in support of that allegation and, in this case, the Society has failed to do so.
45. It is evident from Mr. Threatful's submissions invoking the "natural justice" ground of appeal (summarized at paragraph 31 above), that he may have misconstrued the scope of the principles of natural justice. As indicated in *English Inn & Resort, supra*, and *Imperial Limousine Service Ltd., supra*, natural justice rights are procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. The Society's alleged intention to hire a qualified candidate; its alleged efforts to afford Mr. Domenichelli "every opportunity to pass the requirements of hire"; and its alleged intention not to pay the highest hourly rate had it known that it was required to "pay for the interview process", even if all true, would not give rise, under the natural justice ground of appeal, to a relief from the penalty levied or any award made in the Determination.
46. I find there is no basis to interfere with the Determination under the natural justice ground of appeal.

c. New evidence

47. In *Davies and others (Merilus Technologies Inc., (BC EST # D171/03))*, the Tribunal delineated the following four conjunctive considerations for admitting new evidence on appeal:
- i. whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing;
 - ii. the evidence must be relevant to a material issue in the appeal;
 - iii. the evidence must be credible in the sense that it is reasonably capable of belief; and
 - iv. the evidence must have high 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 a material issue.
48. New Evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.
49. Having said this, I find the Society has not presented any evidence that would meet any of the elements in *Davies and others, supra*, let alone all four requirements needed to admit evidence on appeal. I find this ground of appeal without merit as well.

50. At its core, I find the Society's appeal is of a type that has consistently been rejected by the Tribunal. It is one where, subsequent to an unfavourable determination, the dissatisfied party submits an appeal to reargue the case before a different panel in the hopes that the new panel will give it a more favourable hearing. An appeal is an error correction process and not a process to allow a dissatisfied party to take the proverbial "second kick at the can" which is what the Society is doing here.
51. In sum, I am satisfied the Society's appeal has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it. In the result, I dismiss the appeal under section 114(1)(f) of the *ESA*.

ORDER

52. Pursuant to section 115(1) of *ESA*, I confirm the Determination made on March 23, 2023, against Little Farmers' Petting Zoo Society together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal