Citation: 1119458 B.C. Ltd. (Re)
2023 BCEST 45

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

1119458 B.C. 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.: 2023/033

DATE OF DECISION: June 23, 2023

DECISION

SUBMISSION

Gulsah Suicmez — on behalf of 1119458 BC Ltd.

OVERVIEW

1. This is an appeal by 1119458 B.C. Ltd., carrying on business as La Ruota Pizzeria (the "Appellant"), of a determination issued by Amanda Curtis, a delegate (the "Adjudicating Delegate") of the Director of Employment Standards (the "Director"), dated January 27, 2023 (the "Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. 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, the appeal was not filed within the applicable time limit or there is no reasonable prospect the appeal will succeed.

3. For the reasons discussed below, I dismiss the appeal pursuant to section 114(1) of the *ESA*, because it was not filed within the applicable time limit and, in any event, there is no reasonable prospect that it will succeed. I have assessed the appeal based on the Determination, the reasons for the Determination, the appeal, the written submission of the Appellant, and my review of the material that was before the Director when the Determination was being made.

ISSUE

4. Whether the appeal should be dismissed pursuant to section 114(1) of the *ESA*.

THE DETERMINATION

5. The Appellant operates a pizzeria in Vancouver, British Columbia. Matthew Keller (the "Employee") applied in person to work as a cashier for the Appellant. A manager of the Appellant's advised the Employee that he would be required to complete "volunteer shifts" as part of the hiring and evaluation process.

6. The Employee completed three three-hour "volunteer shifts" on June 23, 25 and 26, 2020, during which he shadowed other employees, was trained on how to use the cash register, and assisted customers. The Employee alleged he was not paid for these shifts. The Employee also alleged that, during one of his shifts, he paid $10 in cash to the Appellant for his work uniform and that he was not paid to maintain or launder his uniform. Once these "volunteer shifts" were completed, the Employee continued to work for the Appellant until he resigned on May 30, 2021.

7. To determine whether the Employee was owed wages, the Adjudicating Delegate first considered whether the Employee was an "employee" as defined in section 1 of the *ESA*. The Adjudicating Delegate found that the Employee was, in fact, an "employee", because the Appellant allowed him to perform tasks

normally performed by other employees and he was trained for the benefit of the Appellant's business. The Adjudicating Delegate also found that the tasks the Employee performed were "work" as defined in section 1 of the *ESA*, regardless of whether the Employee was performing those tasks as part of an evaluation process. The Adjudicating Delegate concluded that the Employee was owed wages for nine hours worked, totalling $131.40, plus $5.26 in outstanding vacation pay.

8. Regarding the Employee's uniform, the Adjudicating Delegate preferred the Employee's evidence that he paid the Appellant $10 in cash for his uniform, and it was agreed by both parties that the Appellant did not pay the Employee for the maintenance and laundering of his uniform. The Adjudicating Delegate determined that the Appellant owed the Employee $10 for his uniform and $25 for the maintenance and laundering of his uniform, which the Adjudicating Delegate considered to be a reasonable amount for the length of his employment.

9. The Adjudicating Delegate also imposed four administrative penalties on the Appellant for its various breaches of the *ESA*, totaling $2,000.00.

ARGUMENT

Request to Extend the Appeal Period

10. The statutory deadline for appealing the Determination was March 6, 2023. In its covering email and appeal form, which were filed with the Tribunal on March 21, 2023, the Appellant requested that the appeal period be extended until April 6, 2023. The only reason given for the extension request was that the Adjudicating Delegate did not get in touch with the Appellant after she requested the Employee's payroll information in mid-2022 and then, all of a sudden, the Appellant received the Determination.

11. On March 23, 2023, the Appellant provided further reasons for its extension request. The Appellant's representative, Gulsah Suicmez, who is a director and manager of the Appellant, stated that she had been dealing with "unfortunate circumstances" and she did not realize how quickly the time had passed. Ms. Suicmez states that she had intended to file the appeal on time, but her accountant also left which left a "mess".

Merits of the Appeal

12. When asked in the appeal form to select its grounds of appeal, the Appellant indicated that the Director failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made. However, the Appellant did not raise any alleged failures to observe the principles of natural justice in its submission, nor did it identify any evidence that has become available that was not available at the time the Determination was being made.

13. Rather, the Appellant essentially argues that the Adjudicating Delegate made errors of law or fact. Specifically, the Appellant argues:

    a. The *ESA* does not require employers to pay candidates during an orientation period and the Appellant clearly communicated this to the Employee before his "volunteer shifts". The

Employee's presence during those shifts did "not add any additional work force but extra effort and time for the shift supervisor to answer [the Employee's] questions." The Employee did not perform similar tasks performed by other employees during his "volunteer shifts" and his "training" started after he was hired.

b. The Appellant did not receive $10 from the Employee for his uniform, as found by the Adjudicating Delegate. Also, the *ESA* does not require employers to provide laundering or uniform maintenance allowances.

ANALYSIS

Request to Extend the Appeal Period

14. This Tribunal has criteria to determine whether an appeal period should be extended, which are set out in the *Niemisto* decision (BC EST # D099/96). Those criteria are as follows:

a. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

b. there has been a genuine and on-going *bona fide* intention to appeal the Determination;

c. the respondent party, as well the Director, must have been made aware of this intention;

d. the respondent party will not be unduly prejudiced by the granting of an extension; and

e. there is a strong *prima facie* case in favour of the appellant.

15. In *Metty M. Tang*, BC EST #D211/96, this Tribunal held that: "…extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended." See also, for example, *Newton Whalley Hi Way Taxi Ltd. (Re)*, 2023 BCEST 37 at para. 32, which discusses that principle.

16. In this case, I am not satisfied the Appellant has provided a reasonable or credible explanation for its delay. Ms. Suicmez does not provide any reasons for the Appellant's delay other than a vague reference to "unfortunate circumstances" and the simple fact that her accountant left. I am also not satisfied there is a strong *prima facie* case in favour of the Appellant. To the contrary, as discussed below, I find there is no reasonable prospect that the appeal will succeed. In my view, there is no compelling reason to extend the appeal period.

17. I therefore decline the Appellant's request to extend the appeal period and I dismiss the appeal pursuant to section 114(1)(b) of the *ESA*, because it was not filed within the applicable time limit.

Merits of the Appeal

18. As discussed above, the Appellant argues that the *ESA* does not require employers to pay candidates during an orientation period. In my view, the Adjudicating Delegate properly addressed this issue by considering whether the Employee was an "employee" as defined in section 1 of the *ESA* during his shifts on June 23, 25 and 26, 2020. The definition of "employee" in section 1 includes: "a person being trained by an employer for the employer's business" and "a person an employer allows, directly or indirectly, to

perform work normally performed by an employee". The Adjudicating Delegate determined – as a finding of fact or, at most, a finding of mixed law and fact – that the Employee did meet that definition and was therefore owed outstanding wages.

19. As discussed by this Tribunal in *Taste of Hangzhou Catering Ltd. (Re)*, 2022 BCEST 34 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." This Tribunal then explained 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.

20. This Tribunal has also held that determinations by a delegate on questions of mixed law and fact are given deference: *Michael L. Hook*, 2019 BCEST 120 at para. 31.

21. In this case, I find that the Adjudicating Delegate's conclusion that the Employee was an "employee" as defined in section 1 of the *ESA* was reasonable and supported by evidence that was before the Adjudicating Delegate – e.g., the parties agreed that the Employee performed tasks, was trained on the cash register and assisted customers.

22. Regarding the Appellant's argument that it did not receive $10 from the Employee for his uniform, this is a finding of fact that, in my view, was also supported by evidence that was before the Adjudicating Delegate. There was conflicting evidence on this point, but the Adjudicating Delegate provided reasons for why she preferred the Employee's evidence in that regard – e.g., Ms. Suicmez did not explicitly dispute that $10 in cash was paid by the Employee for his uniform and only disputed that $10 was not deducted from the Employee's wages.

23. Accordingly, in my view, the errors alleged by the Appellant – i.e., the Employee was not an "employee" as defined in section 1 of the *ESA* and the Appellant did not receive $10 from the Employee for his uniform – do not rise to errors of law and may not be appealed under section 112(1) of the *ESA*.

24. Regarding the Appellant's argument that the *ESA* does not specifically require employers to provide laundering or uniform maintenance allowances, the *ESA* does, in fact, have such a requirement. Section 25 of the *ESA* explicitly requires employers that require their employees to wear special clothing to provide the special clothing to their employees, and to either clean and maintain that special clothing or reimburse the employees for the costs incurred to do so.

25. Accordingly, even if I had exercised my discretion to extend the appeal period as requested, the Appellant has failed to demonstrate a basis for the Tribunal to interfere with the Determination and I would dismiss the appeal pursuant to section 114(1)(f) of the *ESA* as there is no reasonable prospect that it will succeed.

ORDER

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

Brandon Mewhort
Member
Employment Standards Tribunal