

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Meda Holdings Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2022/214

DATE OF DECISION: February 23, 2023

DECISION

SUBMISSIONS

Eliza Au

on behalf of Meda Holdings Ltd.

OVERVIEW

1. This is an appeal by Meda Holdings Ltd. carrying on business as Fleurs D'épargne (the "Employer") of a decision of a delegate of the Director of Employment Standards (the "Director") made November 28, 2022 (the "Determination").
2. On March 17, 2022, Katrina Zhang (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 regular and overtime wages, statutory holiday pay and compensation for length of service.
3. A delegate of the Director (the "investigating delegate") investigated the Employee's allegations and on June 27, 2022, issued an Investigation Report which was provided to the Employee and the Employer for a response. A second delegate (the "adjudicative delegate") reviewed the Investigation Report, the responses of the Employer and the Employee to the Investigative report as well as additional responses to the supplemental information before issuing the Determination.
4. The Director determined that the Employer had contravened Section 21 of the *ESA* in making unauthorized deductions from the Employee's wages, and in failing to pay the Employee statutory holiday pay and annual vacation pay. The Director also determined that the Employer had failed to deliver payroll records in response to a Demand for Employer Records, contrary to Section 46 of the *Employment Standards Regulation* (the "Regulation").
5. The Director determined that the Employee was entitled to the total amount of \$3,616.97, including accrued interest. The Director also imposed four \$500 administrative penalties for the Employer's contravention of Sections 21, 27 and 45 of the *ESA* and Section 46 of the *Regulation*, for a total amount payable of \$5,616.97.
6. The Employer appeals the Determination on all three statutory grounds of appeal – that is, that the Director erred in law, 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.
7. 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 found it was not necessary to seek submissions from the Director or the Employee.
8. 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, and the Determination.

ISSUE

9. Whether the Employer has established grounds for interfering with the Director's decision.

BACKGROUND AND ARGUMENT

10. The Employer operates a flower store in Burnaby, British Columbia at which the Employee was employed from January 1, 2020, until January 31, 2022. Ms. Au became the sole director of the Employer on or about May 1, 2020.
11. At issue before the Director was:
- whether the Employee was a manager (and therefore exempt from the overtime provisions of the *ESA*);
 - whether the Employee was entitled to wages for her final two weeks of work;
 - whether the Employee was entitled to statutory holiday pay; and
 - whether the Employee was entitled to compensation for length of service.
12. The Director found that although the Employee may have performed some management duties, her primary duties were as a sales associate. In doing so, the Director found that the Employee's daily duties consisted primarily of:
- serving customers, opening and closing the store, cleaning the store, making flowers for online orders, booking courier pick-up, responding to email requests, placing orders for shipment, making fresh flower bouquets, answering phones, receiving orders, counting inventory, and occasionally purchasing inventory. (p. R3)
13. The adjudicative delegate found the Employer's evidence relating to the Employee's role and duties was "inconsistent and is unreliable" and preferred the evidence of the Employee. In finding that the Employee was not a manager, he noted that the Employee did not direct or schedule the work of other employees, had no authority to hire and fire and did not perform any human resources tasks, and was herself directed by Ms. Au to perform tasks such as ordering product or arranging waste collection.
14. The adjudicative delegate determined that the Employee was not a manager, finding that she had "little, if any, independent authority or discretion." As a result, the adjudicative delegate found that the Employee was entitled to overtime and statutory holiday pay.
15. The adjudicative delegate preferred the evidence of the Employee regarding her hours of work during the final pay period over that of the Employer. The adjudicative delegate noted that on January 16, 2022, the Employee sent her employer a record of the hours she worked between January 1 and 15, 2022, and the Employee was paid in full for those hours. On January 31, 2022, the Employee sent the Employer a record of the hours she worked between January 16 and 31, 2022. The Employer disputed those hours, claiming, firstly, that the Employee did not work during this period, then subsequently claiming that the Employee did not work all of the days she claimed. Finally, during the response to the Investigation Report, the Employer provided a different explanation regarding the hours the Employee worked. At no time did the Employer submit any evidence to corroborate any of the hours she claimed the Employee worked.

Further, the adjudicative delegate noted that the Employer responded to the Employee's January 31, 2022 text regarding her hours of work with a "Thanks," and that at no time did she challenge the Employee's account of those hours until the Employee's complaint was filed.

16. The adjudicative delegate further noted that the Employee's text messages supported the accuracy of her asserted hours of work in that they were contemporaneously created, while the Employer's recollection of the Employee's hours was created several months later, during the investigation.
17. The adjudicative delegate also noted that the Employer acknowledged failing to pay the Employee her wages for the period January 16-31, 2022, as a result of an alleged debt the Employee owed the Employer related to bookkeeping and accounting costs. The adjudicative delegate determined that the costs of a bookkeeper and accountant were a cost of doing business and could not be borne by an employee. The adjudicative delegate concluded that the Employer withheld \$2,116.92 in wages from the Employee, including regular wages, overtime wages and vacation pay, for the pay period January 16-31, 2022, contrary to Section 21 of the *ESA*.
18. The adjudicative delegate found that the Employer failed to deliver payroll records containing the Employee's daily hours of work as required under Section 28 of the *ESA*. After determining that the Employee's wage statements represented the best evidence of her hours worked, the adjudicative delegate concluded that the Employee was entitled to statutory holiday pay in the amount of \$1,344.90 and that the Employee was paid as required under the *ESA*. However, the adjudicative delegate determined that the Employee was entitled to vacation pay on the wages in the amount of \$53.80.
19. The adjudicative delegate determined that the Employee quit her employment, and as a result, was not entitled to compensation for length of service.

Argument

20. The Employer disputes the Director's finding that the Employee was not a manager. Ms. Au asserts that the Director made incorrect factual findings and sets out her version of the facts regarding the structure of her company including the multiple store locations and described her "business model." Ms. Au contends that the Employee was the "sole manager responsible for hiring, firing, scheduling making finance decisions, and making decisions for the store."
21. The Employer also contends that the Director erred in including a number of statutory holidays in the calculations as the Employee did not work those days or had already been paid for them.
22. Finally, the Employer also disputes the Director's findings of the hours worked by the Employee for the period January 16-31, 2022.

ANALYSIS

23. Section 114 of the *ESA* provides that at 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 any of the following apply:

- (a) the appeal is not within the jurisdiction of the tribunal;
- (b) the appeal was not filed within the applicable time limit;
- (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
- (d) the appeal was made in bad faith or filed for an improper purpose or motive;
- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
- (f) there is no reasonable prospect the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of Section 112 (2) have not been met.

24. 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.

25. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination. I am not persuaded that the Employer has met that burden.

26. Ms. Au has not explained why she believes the adjudicative delegate's decision was in error, how she was denied natural justice or what new evidence is available. On a review of the record and the Determination, I find no basis to interfere with the decision. The Employer's appeal is, in essence, simply a disagreement with the adjudicative delegate's findings and conclusions.

27. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. (see *Triple S Transmission*, (BC EST #D141/03)). I have addressed the Employer's arguments under each ground of appeal.

Error of Law

28. 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.

29. It appears that the Employer disputes the Director's factual findings based on her submission which alleges that the Determination contains incorrect facts. I note that while error of law is a ground of appeal, error of fact is not. Only errors of fact which rise to the level of constituting errors of law give rise to a ground of appeal (*Rose Miller, Notary Public*, BC EST # D062/07 at para. 48):

In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

30. It is not for the Tribunal to reconsider the evidence and substitute different findings of fact for those made by the Director unless those factual findings are not supported by the evidentiary record.

Was the Employee a manager?

31. The *Regulation* defines manager as “a person whose principal employment duties consist of supervising and directing, or both supervising and directing, human or other resources” or “a person employed in an executive capacity.”
32. The Tribunal has interpreted the definition narrowly in keeping with the remedial purposes of the *ESA*. (see *Director of Employment Standards* (BC EST RD #479/97) (*Amelia Street Bistro*) and *North Delta Real Hot Yoga Ltd. (Bikram Yoga Delta)* BC EST #D026/12)
33. The contract of employment identified the Employee as a “Sales Associate”. Although the Employer contended that the Employee was hired as a sales associate and was later “promoted to manager,” there is no evidence of that promotion even though the Employer was invited on several occasions to provide such evidence. In fact, the record indicates that as late as September through December 2021, the Employee was identified in the schedule as “Sales Associate.”
34. The fact that the Employee was paid a higher wage than other employees, that she worked full time, or that she may have performed tasks that the Employer viewed as “managerial” does not make the Employee a manager for the purposes of the *ESA*. I find that the adjudicative delegate considered all of the evidence and arguments in arriving at his conclusion.
35. In her appeal submissions, Ms. Au repeats many of the arguments she made before the Director, all of which were considered by the adjudicative delegate. The Employer has not persuaded me that the Director's decision was irrational or based on a view of the facts that could not be entertained.

Did the Director improperly calculate the Employee's statutory holiday pay entitlement?

36. The record discloses that although the Employer failed to submit the Employee's daily records of hours, the parties agreed the Employee did not work on any statutory holidays except for Victoria Day and Remembrance Day. Because the Employer did not submit records of the Employee's daily hours of work, the adjudicative delegate determined the Employee's hours based on the best available evidence, which was the Employee's wage statements, the hour logs submitted by the Employer, as well as the Employee's records and schedules.
37. The adjudicative delegate calculated the Employee's average day pay for each of the statutory holidays based on these records. I am not persuaded by the Employer's submission that the Director's calculation was in error.

Did the Director improperly calculate the Employee's hours of work for the wage period January 16-31, 2022?

38. The record shows that the Employer was given many opportunities to dispute the Employee's assertion that she worked 84 hours during her last pay period. The adjudicative delegate noted that the Employer acknowledged the Employee's log of hours and in fact paid her for those hours before later cancelling the payment because, she asserted, the Employee owed her for personal goods and additional payroll services. The adjudicative delegate noted that although the Employer provided a summary report of the total hours worked and wages owed for the period of the Employee's employment, the records did not comply with the requirements of the *ESA* in that they did not provide any breakdown of daily hours or wages paid for each pay period. The adjudicative delegate preferred the evidence of the Employee as to her hours of work and concluded that she was entitled to wages for 84 hours.
39. While the Employer disputes this conclusion, she largely repeats the argument made before the Director and provides no evidence in support of her argument that the Director's finding was unsupported by the evidence.

40. I find no basis for this ground of appeal.

Natural Justice

41. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. It does not mean that the Director's delegate must arrive at a conclusion the appellant considers just and fair.
42. There is nothing in the submissions that speaks to this ground of appeal. Having reviewed the record, I am unable to find that the Employer was denied the opportunity to know the allegations and respond fully to them. The record demonstrates, and Ms. Au acknowledges, that she had many conversations with the investigative delegate and submitted a significant number of documents. Additionally, Ms. Au was provided with the investigative delegate's initial report and made submissions in response to it. Those responses were considered by the adjudicative delegate before he made the Determination.

43. I am unable to find that the Employer has demonstrated that it was denied natural justice and dismiss the appeal on this ground.

New Evidence

44. In *Re Merilus Technologies* (BC EST #D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- 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 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.

45. Although the Employer included this as a ground of appeal, she did not identify what the new and relevant evidence is and I am unable to discern any basis for it. Apart from adding supplementary information which she suggests supports her assertion that the adjudicative delegate erred in his factual findings, the appeal submission does not appear to contain any new information.

46. However, even if the submissions contain information that was not previously provided to the Director, none of the information meets the Tribunal's test for new evidence. It was all available to the Employer during the investigation stage of the process and ought to have been provided during the investigative process, or in response to the Investigation Report.

47. Consequently, I find that there is no basis for this ground of appeal.

CONCLUSION

48. I find, pursuant to Section 114(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

ORDER

49. Pursuant to Section 115 of the *ESA*, I confirm the Determination dated November 28, 2022.

Carol L. Roberts
Member
Employment Standards Tribunal