Citation: Cultus Lake Waterpark Ltd. (Re)
2023 BCEST 54

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Cultus Lake Waterpark Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/022

DATE OF DECISION: July 12, 2023

DECISION

SUBMISSIONS

Andrew Steunenberg	on behalf of Cultus Lake Waterpark Ltd.
Tara MacCarron	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Cultus Lake Waterpark Ltd. ("appellant") under section 112(1)(b) of the *Employment Standards Act* ("*ESA*"). The appeal concerns a determination that was issued on February 6, 2023 ("Determination"), by Tara MacCarron, a delegate of the Director of Employment Standards ("delegate").

2. I should note that the submission filed in this appeal on behalf of the Director of Employment Standards relates solely to the completeness of the section 112(5) record and, in that regard, I am satisfied that the complete record is before me in this appeal.

3. By way of the Determination, the delegate ordered the appellant to pay 10 of its former employees (the "complainants") a total sum of $3,715.17 on account of unpaid overtime pay, concomitant vacation pay, and section 88 interest. The individual complainants' unpaid wage awards range from less than $45 to about $1,200 – six of the awards are less than $250.

4. Further, and also by way of the Determination, the delegate levied a single $500 monetary penalty against the appellant based on its contravention of section 40 of the *ESA* (the overtime pay provision). Accordingly, the appellant's total liability under the Determination is $4,215.17.

5. Although in its Appeal Form the appellant identified the ground of appeal as being the delegate's failure to observe the principles of natural justice in making the Determination, a review of the appellant's written submission suggests that the appellant is also, if not principally, asserting that the delegate erred in law (section 112(1)(a) of the *ESA*). Accordingly, I will also address this latter ground of appeal (see *Triple S Transmission Inc.*, BC EST # D141/03, 2003 CanLII 89310).

6. The appellant says that the three complainants who held the job title of "supervisor" were "managers" as defined in section 1(1) of the *Employment Standards Regulation* ("*Regulation*") and, as such, should not have been awarded any overtime pay since they were excluded from Part 4 of the *ESA* (Hours of Work and Overtime) by section 34(f) of the *Regulation*.

7. In my view, this appeal has no reasonable prospect of succeeding and, as such, must be dismissed under section 114(1)(f) of the *ESA*.

THE DETERMINATION

8. The delegate issued her "Reasons for the Determination" ("delegate's reasons") concurrently with the Determination. These reasons indicate that the appellant operates a seasonal outdoor waterpark in Cultus Lake. The complainants worked in different positions during the period from June to September 2021.

9. The appellant says that it informed each of the complainants, when they were initially hired, that their employment was subject to an averaging agreement (see section 37 of the *ESA*) and/or that they were hired as "managers" (see section 34(f) of the *Regulation*) and that, in either case, they were thus not entitled to any overtime pay.

10. As of the end of their employment, three of the 10 complainants held positions described as a "supervisor" and two held positions described as a "crew trainer". As noted in the delegate's reasons (at page R3):

> Those in the positions of either a Crew Trainer or Supervisor were not paid overtime, as the Employer had them sign documents stating they met the duties and responsibilities of a manager under the definition provided in the Employment Standards Regulation (the Regulation) and, therefore, were exempt from the overtime requirements under the Act. Despite this, the Complainants claimed their roles did not meet the duties or level of responsibility to fall within the purview of a manager position.

11. The other complainants held various positions including "parking lot attendant" and "food services attendant". There is no present dispute regarding the overtime pay awards made to these complainants.

12. The delegate rejected the appellant's argument that some employees were not entitled to overtime pay since the "averaging agreements" they signed failed to comply with the strict provisions of section 37 of the *ESA* and, accordingly, were invalid (delegate's reasons, page R6).

13. Insofar as the appellant's argument regarding the "manager" overtime pay exemption was concerned, the delegate noted the appellant's position as follows: "It is ultimately those with the title of "Supervisor" who the [appellant] steadily argued were not owed overtime wages" (page R7). The delegate rejected that position, holding (at pages R7-R8):

> While I acknowledge the Complainants may have possessed some ability and authority to "supervise" and/or "direct" other employees and resources, I am not persuaded by the [appellant's] argument that this qualifies Supervisors as managers. In reality, it appears Supervisors "supervised" and "directed", only subject to the approval of a higher authority. As confirmed by the [appellant], HR [the appellant's human resources department] played an important role in providing the final say on things (such as hiring and firing), and Supervisors were not party to the making of key decisions relating to the pricing and selection of products sold. Supervisors did not have the authority to act without first obtaining management's approval, and they appear to have had little room to exercise independent judgment, absent following the standards and policies already established by the [appellant]. While Supervisors may have had the ability to conduct employee training, it should be noted they are providing the training already established by the [appellant]. While Supervisors may have had the ability to enforce company policies with both employees and the public, it was the [appellant] who established these policies in the first place. Additionally, while Supervisors assessed performance issues, it was the [appellant] who ultimately determined what, if any, disciplinary action should be taken.

> As presented by the Complainants, Supervisors also possessed a sizeable number of non-supervisory related duties, such as cooking pizzas, slicing onions, cleaning onion and tomato slicer's [*sic*], running the laundry, opening and closing the shutters, checking vending machines for signs of vandalism, restocking vending machines, taking empty bottles and cans to the bottle depot, and counting, rotating and stocking supplies. This was confirmed by the [appellant], who stated Supervisors (along with other management roles) were not exempt from carrying out non-supervisory tasks. Unlike what the [appellant] has claimed, I am not satisfied these non-supervisory tasks were incidental to, rather than the primary focus of, their role as Supervisors. Should Supervisors be denied overtime wages as a result of their role as a manager, it should be clear and decisive that managers are what they were. [*sic*] Per the evidence provided, I am not satisfied the [appellant] has fulfilled this burden of showing they were managers.

FINDINGS AND ANALYSIS

14. As noted at the outset of these reasons, the appellant's appeal of the Determination is limited to the overtime pay award issued to three of the complainants who held a "supervisor" job title. These three individuals, collectively, were awarded about $2,500. Their individual hourly wages, earned during the summer of 2021, were $17.20, $17.70, and $18.20, compared to the then prevailing $15.20 minimum hourly wage.

15. The appellant says that the delegate failed to observe the principles of natural justice in making the Determination. However, my review of the section 112(5) record shows that throughout the entire investigation and adjudication of this matter, the appellant was afforded a full and fair opportunity to present its evidence and argument, and to respond to the evidence given by the complainants. I am satisfied that the appellant was afforded a reasonable opportunity to respond, consistent with section 77 of the *ESA*.

16. The central thrust of the appellant's submission on appeal is that the delegate erred in law (although the appellant did not use this term) in her interpretation and application of the "manager" exclusion set out in section 1(1) of the *Regulation*. The appellant asserts that the three complainants who had "supervisor" job titles "…knew prior to the onset of their employment as Supervisors that their principle [*sic*] responsibility was to supervise and/or direct human or other resources, and they regularly and primarily carried out these responsibilities." The appellant maintains that the delegate applied "a very different definition of "manager" than is written in the Act [*sic*]; and which the Complainants observed in their tenure in seasons prior to promotion, which they agreed to, and for which they received higher pay commensurate with such duties." Finally, the appellant says: "The standard in the Determination was not reasonable and realistic to execute nor apply in this circumstance." [*sic*]

17. A "manager" is defined in section 1(1) of the *Regulation* as follows:

> "manager" means (a) a person whose <u>principal employment responsibilities</u> consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity; (my <u>underlining</u>)

18. The appellant does not argue that the three supervisors held executive positions, and thus this appeal turns on a consideration of their "principal employment responsibilities". The appellant does not seriously challenge the evidence recounted in the delegate's reasons; rather, its challenge appears to be focused

on the proper inferences to be drawn from the evidence. The duties of the supervisors were set out in the delegate's reasons as follows (page R3):

> The duties of the Crew Trainer position included cooking pizzas; slicing onions; cleaning onion and tomato slicer's [*sic*]; supervising the opening and closing tasks, including running the laundry; opening and closing the shutters; checking vending machines for signs of vandalism; restocking vending machines; taking empty bottles and cans to the bottle depot; stocking supplies; sending employees on break; cashing employees in and out of the Point of Sales (POS) system; assigning duties to front liners, like doing the dishes or checking the patio; and training and repositioning front liners.
>
> The duties of Supervisors included all the same ones of Crew Trainers, in addition to taking care of deliveries; rotating stock; counting stock; giving out weekly and bi-weekly in-services; and completing daily performance-related notes in duo-tangs.

19. According to the appellant, the supervisors exercised some managerial functions such as employee training and scheduling, conducting staff meetings, undertaking safety checks, authorizing overtime, management of inventory, and completing customer refunds (delegate's reasons, page R4). However, they did not have hiring/firing authority, no authority over employee discipline, and had no control over product pricing or selection (pages R7-R8). The supervisors had a significant number of non-supervisory tasks such as food preparation, cooking pizzas, cleaning, running the laundry, checking and restocking vending machines, taking empty bottles and cans to the bottle depot, and counting, rotating and stocking supplies (page R8).

20. The Tribunal has repeatedly stressed that the *ESA* establishes minimum standards of employment, and that regulatory provisions eliminating those minimum standards for particular classes of employees should not be enforced unless it is clear and obvious that the exclusion applies (see *ESA*, section 2(a) and the Supreme Court of Canada's decision in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 36). The regulatory definition of "manager" requires an examination of the employee's "principal responsibilities". In this case, the delegate held that the supervisors' "non-supervisory" tasks, such as food preparation, cooking, and servicing vending machines, constituted the "primary focus" of their jobs.

21. The question of whether an employee is a "manager" is one of mixed fact and law in the sense that the decision-maker must apply a legal standard (in this case, the regulatory definition) to a particular set of facts. On appeal, a decision-maker's finding on a question of mixed fact and law should not be set aside unless it is tainted by a "palpable and overriding error" (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). I am satisfied that the delegate clearly applied the correct legal standard. Her finding that the supervisors were not "managers" was credibly supported by the (largely uncontested) evidence before her. The delegate did not make a "palpable and overriding error" in determining that the "manager" exclusion did not apply with respect to the three "supervisors".

ORDER

22. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal