

Citation: Coquitlam Nails Inc. and Thuy Hoang (Re)
2023 BCEST 85

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Coquitlam Nails Inc. and Thuy Hoang

- of a Determination issued by -

The Director of Employment Standards

PANEL: Richard Grounds

FILE No.: 2023/092

DATE OF DECISION: October 20, 2023

DECISION

SUBMISSIONS

Thuy Hoang on her own behalf and on behalf of Coquitlam Nails Inc.

OVERVIEW

1. This is an appeal by Coquitlam Nails Inc (“Employer”) brought by its former sole director, Thuy Hoang (“Ms. Hoang”) (collectively, “Appellant”) of a determination issued by Shane O’Grady, a delegate (“Delegate”) of the Director of Employment Standards (“Director”), dated May 16, 2023 (“Determination”). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* (“ESA”). I note that although Ms. Hoang has been recognized by the Tribunal as an appellant, her position is the same as the Employer’s on all aspects of the appeal. I also note in the Determination, the Director did not find Ms. Hoang personally liable for the amounts found owing in the Determination.
2. In the Determination, the Delegate concluded that Pegah Pazouki Ghouheh (“Complainant”) was an employee of the Employer and entitled to regular wages, overtime wages and vacation pay for the month of December 2021.
3. The Appellant submits that the Director failed to observe the principles of natural justice in making the Determination. The Determination was sent to both the Employer and Ms. Hoang by regular mail and email on May 16, 2023, and the deadline to submit an appeal if served via e-mail was June 9, 2023, and if served via mail was June 23, 2023. The Appellant submitted their appeal on June 22, 2023.
4. Submissions were not requested from the parties.
5. I have considered the Determination, the reasons for the Determination, the appeal submissions and the ESA section 115 record (“Director’s Record”). For the following reasons, the appeal is dismissed, and the Determination is confirmed.

ISSUES

6. The issue to be decided in this appeal is whether the Delegate failed to observe the principles of natural justice in making the Determination.

FACTUAL BACKGROUND

7. In December 2021, the Complainant started working in the Employer’s nail salon in Coquitlam, BC to train to become a nail technician. The Employer did not pay the Complainant because the Employer considered the Complainant was not working for the Employer or training but was simply observing until she started working as a nail technician in January 2022.

8. The Complainant's employment was terminated at the end of January. According to the Employer, this was because it found out the Complainant was using her husband's SIN to work more than 20 hours as a student and, according to the Complainant, she was terminated because she would not pay a security deposit to the Employer to continue employment.
9. On June 2, 2022, the Complainant made a complaint to the Employment Standards Branch for wages for the month of December 2021. Ms. Hoang was the sole director of the Employer in December 2021.
10. The Complainant's complaint proceeded to an investigation which was started by Jean Chen, a delegate of the Director, and completed by Lynn Muldoon, a delegate of the Director ("Investigating Delegate"). The Investigating Delegate spoke with the Complainant, the Employer and a receptionist employed by the Employer and obtained information from each of them. The Investigating Delegate received information from the Complainant including text messages and payroll information from the Employer.
11. On April 24, 2023, the Investigating Delegate sent an Investigation Report to the Complainant and to the Employer. The Investigation Report contained a summary of the information obtained for the investigation including the information from the Complainant, the Employer and the Employer's receptionist and a list of the documents obtained for the investigation. The Complainant provided a response to the investigation report.

THE DETERMINATION

12. The Delegate completed the Determination based on "a review of all information on the file, which includes the investigation report issued on March 9, 2023, summarizing the information collected from the investigation." The reference to March 9, 2023, appears to be an inadvertent reference to the date of the BC Registry Services Search and as noted above, the undated Investigation Report was sent to the parties on April 24, 2023.
13. The Delegate identified the three issues as: whether the Complainant was an employee of the Employer in December of 2021; whether the Complainant was entitled to outstanding wages, and if so, in what amount; and whether the Complainant was entitled to gratuities and, if so, in what amount. The Delegate summarized the information received from the Complainant and the Employer and then outlined his findings and analysis.
14. The Delegate found that the Complainant was "working, or at least being trained by the Employer, during December of 2021" and was, therefore, entitled to wages for that month. The Delegate calculated the Complainant worked a total of 99.5 hours in December 2021, and calculated the wages owed, including regular wages, overtime and vacation pay, based on minimum wage. The Delegate concluded that there was insufficient evidence to calculate if the Complainant was owed any gratuities.
15. The Delegate imposed penalties and interest for the following contraventions: failing to pay wages at least semi-monthly under section 17 of the *ESA*; failing to pay all outstanding wages within 48 hours of terminating the Complainant's employment under section 18 of the *ESA*; and failing to maintain a daily record of the Complainant's hours of work for December 2021 under section 28 of the *ESA*.

ARGUMENTS

16. The Appellant submitted on appeal “I will pay the wages because it’s my fault not having a writing agreement with [the Complainant]. But I found that the fines are unreasonable.” The Appellant asks that the penalties imposed be waived because Ms. Hoang was only a director of the Employer until the end of 2022 and is now a “stay at home mom of a newborn” and cannot afford to pay the fines.
17. The Appellant included on appeal payroll information for the Complainant for the month of January 2022, including email confirmation that Ms. Hoang received the employee payroll information from the Employer’s accountant on February 2, 2022. The Appellant also included duplicates of information already received for the investigation, including the Complainant’s pay statement, hours and tips, and a copy of the Complainant’s paycheque.
18. Regarding the penalty for not paying wages at least semi-monthly, the Appellant submitted that the Employer paid all employees monthly with the agreement of the employees and based on the suggestion from an accountant.
19. Regarding the penalty for not paying the Complainant all outstanding wages within 48 hours of termination, the Appellant submitted that the Employer always sends salary information for the accountant on the last day of the month and the accountant then calculates the paystubs and sends them back at which time the Employer writes pay cheques for all the employees.
20. Regarding the penalty for not maintaining a daily record of hours for the Complainant in December 2021, the Appellant submitted that the Complainant was under a training agreement for no pay in December 2021, so there was no need to record her hours of work.

ANALYSIS

21. The Appellant has appealed the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination. The role of the Tribunal is not to re-weigh the evidence and decide the merits of an original complaint. The Appellant disputes that the Complainant was an employee during the month of December 2021, and asks that the penalties be waived because they are unreasonable.

Failure to Observe the Principles of Natural Justice

22. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
23. The Appellant has not raised any obvious issues that involve the principles of natural justice. The Appellant was informed of the issues considered by the Delegate and was provided with an opportunity to provide information for the investigation. The Delegate provided detailed reasons where he considered the evidence from both parties which led to the conclusion that the Complainant was in training and an

employee with the Employer in the month of December 2021. In addition, the Delegate provided reasons why the penalties were imposed for each contravention of the *ESA*.

24. An objective review of the Delegate's reasons does not support that he was impartial or biased against the Appellant. In addition, the circumstances do not support that there was a reasonable apprehension of bias on the part of the Delegate against the Appellant.
25. The Appellant asks that the penalties imposed be waived, essentially on a compassionate basis because she is no longer a director of the Employer and is now unemployed. It should be noted that this is an appeal of a determination against the Employer and not a determination against Ms. Hoang as a director of the Employer. Accordingly, it is not necessary to determine Ms. Hoang's liability as a director of the Employer for the unpaid wages or penalties. The Tribunal does not have discretion to waive the penalties imposed by the Delegate and there is no basis to waive the penalties assessed against the Employer.
26. I am satisfied that the Delegate did not fail to observe the principles of natural justice in making the Determination.

ORDER

27. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1)(a) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal