Citation: 312892 B.C. Limited (Re)
2023 BCEST 86

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

312892 B.C. Limited
("Employer")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/084

DATE OF DECISION: October 20, 2023

DECISION

SUBMISSIONS

Soo In Kim	on behalf of 312892 B.C. Limited carrying on business as Deli City Café & Catering, Deli City Café & Catering Co., Deli City, and /or Deli City & Bru

OVERVIEW

1. This is an appeal by 312892 B.C. Limited carrying on business as Deli City Café & Catering, Deli City Café & Catering Co., Deli City, and /or Deli City & Bru ("Employer") of a decision of a delegate of the Director of Employment Standards ("Director") issued on May 10, 2023 ("Determination").

2. On December 2, 2021, Tia Bleackley ("Employee") filed a complaint under section 74 of the *Employment Standards Act* ("*ESA*") with the Director alleging that the Employer had contravened the *ESA* by failing to pay her gratuities ("First Complaint or "Complaint"). Subsequently, on September 22, 2022, the Employee filed a second complaint ("Second Complaint") claiming the Employer failed to pay her wages for work she performed for one day on May 24, 2022. During the investigation of the First Complaint, the Employee withdrew her claim for gratuities and stated that she did not receive statutory holiday. This was her only outstanding issue in the First Complaint. The Second Complaint for unpaid wages was resolved and this appeal does not concern that complaint.

3. In investigating the First Complaint and making the Determination, the Director followed a two-step process. One delegate of the Director ("investigative delegate") corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report ("Investigation Report") summarizing the results of the investigation which was sent to the parties for review and comment. Upon receiving the responses to the Investigative Report and the replies to those responses, the matter was sent to a second delegate ("adjudicative delegate") who assumed responsibility for reviewing the responses and replies and issuing the Determination pursuant to section 81 of the *ESA*.

4. The Determination found that the Employer violated Part 5, section 45 (statutory holiday pay) and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of the Employee.

5. The Determination ordered the Employer to pay wages to the Employee in the total amount of $1,559.22 including accrued interest.

6. The Determination also levied two administrative penalties of $500 each against the Employer for contravention of section 45 of the *ESA* and section 46 (production of record) of the *Employment Standards Regulation* ("*Regulation*").

7. The Employer has checked off a single ground of appeal in the Appeal Form, namely, the Director failed to observe the principles of natural justice in making the Determination.

8. 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 find it is unnecessary to seek submissions on the merits from the Employee or from the Director.

9. My decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions of the Employer, the Determination, and the Reasons for the Determination ("Reasons").

ISSUE

10. 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 DETERMINATION AND THE REASONS

Background

11. According to a BC Registry Services Searches conducted online on January 13 and July 14, 2022, the Employer was incorporated in British Columbia on August 5, 1986. Soo In Kim ("Mr. Kim") and Eun Jeong Lee are listed as its directors.

12. The Employer operates a restaurant/cafe and catering business in Kelowna, British Columbia.

13. The Employee worked as a cook and front house staff member for the Employer from June 1, 2020, to November 16, 2021. The Employee also worked for the Employer for one day on May 24, 2022.

14. During the investigation, as previously indicated, the Employee withdrew her claim for gratuities and claimed the Employer failed to pay her statutory holiday pay during the first period of her employment.

15. After the investigative delegate issued the Investigation Report on October 27, 2022, the Employee confirmed that she had been paid for the day worked on May 24, 2022, and was no longer seeking wages under the Second Complaint.

16. As indicated by the adjudicative delegate in the Reasons, the sole issue before him was whether the Employee was owed statutory holiday pay in her first period of employment, and if so, for what amount?

17. In deciding this issue, the adjudicative delegate considered the evidence of both parties as summarized in the Investigation Report together with all submitted documents and responses to the Investigation Report.

18. Before summarizing the evidence of the parties in the Reasons, the adjudicative delegate discusses the Demand for Employer Records ("Demand") the investigative delegate issued pursuant to section 85(1)(f) of the *ESA* to the Employer. The Employer was required to deliver payroll records to the Employment Standards Branch on or before July 26, 2022. The Employer was informed that a penalty would be issued pursuant to section 29(1) of the *Regulation* if the records specified in the Demand were not produced.

19. In response to the Demand, the Employer submitted incomplete records. On July 25, 2022, the investigative delegate, in written correspondence, clarified the requirements of section 28 of the *ESA* to the Employer. On September 28, 2022, the investigative delegate specifically requested the Employer to

produce any documents showing "evidence that [the Employee] was paid statutory holiday pay between November 17, 2020, and November 16, 2021."

20. On September 30, 2022, the Employer submitted further evidence, but it still did not submit all the documents specified in the Demand.

21. The adjudicative delegate noted that section 28 of the *ESA* requires an employer to keep certain payroll records and establishes the period the records must be kept. In the present case, the adjudicative delegate found the Employer to have violated this section because it failed to produce a daily record of hours the Employee worked and provided incomplete records of wages paid to the Employee.

22. Having dealt with the matter of the Demand, the adjudicative delegate next discusses the recovery period in the Complaint noting that section 80 of the *ESA* limits the recovery of wages to one year from the end of employment. As the First Complaint was filed after the first period of employment which ended on November 16, 2021, the adjudicative delegate determined the wage recovery period was November 16, 2020, to November 16, 2021 ("Recovery Period").

23. The adjudicative delegate next considered the Employee's statutory holiday pay. He noted that section 44 of the *ESA* identifies when an employee is eligible for statutory holiday pay. If an employee has worked or earned wages for the last 15 of the 30 calendar days preceding the statutory holiday, the employer must comply with section 45 and/or 46 of the *ESA*.

24. The adjudicative delegate also noted that section 45 of the *ESA* requires that an employee who is given a day off on a statutory holiday must be paid an amount equal to at least an average day's pay determined by the formula: total wages paid or payable to the employee in the 30 calendar day period preceding the statutory holiday less any amounts for overtime divided by the number of days the employee worked or earned wages within that 30 calendar day period.

25. He further noted, an employee who works on a statutory holiday must also be paid for that day at 1.5 times the employee's regular wage rate for the time worked up to 12 hours and double their regular wage rate thereafter plus an average day's pay.

26. In the present case, he accepted the Employee's statement that she never worked on a statutory holiday. He also observed that there is insufficient evidence to determine if the Employer has complied with sections 44 and 45 of the *ESA* given the absence of a record of daily hours worked and wages paid since the Employer did not produce either despite the Demand.

27. Having said this, the adjudicative delegate next went on to acknowledge that the wage statements submitted by the Employer show an indication of wages paid for statutory holiday pay, however, these statements show the wages were "banked" in the "YTD column" and none of the statements include the statutory holiday wages in the gross total indicated as paid. Accordingly, the adjudicative delegate said he could not accept the statements in question as evidence of wages paid in accordance with section 45 of the *ESA*. He rejected the Employer's argument that the Employee always received the same salary each pay period and therefore received an average day's pay for the statutory holidays as sufficient evidence to show the Employer had complied with the material sections of the *ESA*.

28. The adjudicative delegate then noted that both parties agreed that the Employee's normal schedule of work was 8 hours per day, 5 days per week. He accepted this as the best evidence of the daily hours of work by the Employee during the Recovery Period. Based on this normal schedule and the consistent wages listed on the Record of Employment ("ROE") supplied by the Employer, the adjudicative delegate concluded that the Employee worked 15 days in the 30 days leading up to each statutory holiday in the Recovery Period and is, therefore, entitled to an average days' pay.

29. In calculating the amount of statutory holiday pay the Employee was owed, the adjudicative delegate observed that the *ESA* defines a regular wage as an hourly wage, or if an employee is paid a monthly wage, then the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work. In the present case, the parties agreed that the Employee was paid semi-monthly and, according to the adjudicative delegate, the ROE was the best available evidence of wages paid to the Employee and for calculating the wage rates during the Recovery Period. He then went on to determine the Employee's wage rate was $16.62 per hour during the period November 16, 2020, to May 31, 2021. From June 1, 2021, to November 17, 2021, the Employee's wages increased, and her wage rate was $18.69. Based on these rates, and the evidence that the Employee typically worked 8 hours per day, the adjudicative delegate found that the Employee was entitled to 8 hours for an average days' pay for each statutory holiday. For the 10 statutory holidays during the Recovery Period, the adjudicative delegate applied the relevant wage rates and concluded that the Employee was entitled to a total of $1,412.40 for statutory holiday pay.

30. The adjudicative delegate also observed that section 58 of the *ESA* requires an employer to pay annual vacation pay of 4% to an employee who has been employed for at least five days and 6% after 5 consecutive years of employment and vacation pay is payable on all wages, including statutory holiday pay. In the present case, he determined that the Employee was entitled to $56.50 for vacation pay on these wages.

31. The adjudicative delegate also levied two mandatory administrative penalties under the *Regulation* against the Employer for breaches of section 45 of the *ESA* and section 46 of the *Regulation*.

32. He also ordered the Employer to pay accrued interest of $90.32 on all amounts owing to the Employee pursuant to section 88 of the *ESA*.

EMPLOYER'S SUBMISSIONS

33. In the Appeal Form, as indicated previously, the sole ground of appeal the Employer checked off is that the Director failed to observe the principles of natural justice in making the Determination.

34. In his written submissions filed on behalf of the Employer, Mr. Kim says that he is appealing the Determination for two reasons. First, because the Employee's hourly wage rate was "paid in the form of Salary based fixed payment ***which already included Statutory Holiday Pay in it.***" He states that this arrangement "***was proposed by Deli City Café & Catering and accepted by the [Employee]*** at earlier stage of her employment." Second, he states he is appealing the penalties in the Determination because "the decision was made without reasonable consideration of the information and documents" the Employer submitted. He contends that the Determination was made "without good understanding [of] the Salary based fixed payment which [the Employer] proposed and the [Employee] happily accepted at the earlier stage of her employment."

35. In the balance of the written submissions, Mr. Kim tries to reinforce the above two points repeatedly. I have carefully read Mr. Kim's submissions and do not find it is necessary to reiterate those submissions verbatim here. However, I note that Mr. Kim's first point was previously communicated by the Employer to the investigative delegate during the investigation of the Complaint and the adjudicative delegate also considered it in making the Determination.

36. With respect to his second point, and particularly the administrative penalties, Mr. Kim states that on July 18, 2022, the Employer answered all questions and requests of the investigative delegate set out in the latter's email of July 7, 2022. He also says that in response to the investigative delegate's Demand, the Employer sent the Employee's ROE on July 25, 2022, which contained the Employee's wage and hours worked.

37. Mr. Kim also points out that in response to the investigative delegate's email of July 25, 2022, requesting a detailed breakdown of the Employee's payroll information, on July 29, the Employer sent her an email explaining that it was ***"huge work"*** and asked the investigative delegate ***"to locate the specific months"*** the Employee claims not to have received statutory holiday pay. Mr. Kim also told the investigative delegate that the Employee herself can login on the payroll company's website and obtain the information the investigative delegate is requesting.

38. On September 30, 2022, in response to the investigative delegate's email of September 28, 2020 [sic], asking the Employer for any evidence that the Employee was paid statutory holiday pay between November 17, 2020, and November 16, 2021, Mr. Kim says the Employer responded to the investigative delegate that the Employee received "***salary based wage***" that "***already include[d] her statutory holidays.***" He says this meant the Employee received the same amount of wages in each pay period and he included a sampling of some "***payrolls for several months … as an example.***"

39. On October 10, 2022, in response to the investigative delegate's request for *all* wage statements for the period November 17, 2020, and November 16, 2021, (*and not just a sampling*), Mr. Kim emailed the investigative delegate and explained to her that the payroll company's system did not allow for the Employer to "***pull out individual person's payment statement***" and that is why the Employer "***pulled out the whole combined wage statement*** of ***all employees*** for several payment terms as an example" and redacted others' information with black ink, leaving only the Employee's information for a few payment periods as an example. He attaches the same documents in the appeal together with his October 10 email (which documents are also contained in the Record). He further adds that he informed the investigating delegate that "***this process took much time and effort"*** and if the investigating delegate is insisting the Employer to produce 24 months of wage statements within 2 business days, then that is unreasonable. He adds, at that time, the Employer reminded the investigating delegate of its earlier suggestion to obtain the payroll information from the Employee herself as she could login to the payroll company's website and get her own information and if she has forgotten her password, she could obtain a "tentative password" (temporary) from the payroll company.

40. On October 27, 2022, in response to the Investigation Report, Mr. Kim says that the Employer informed the investigative delegate that "it found the email where it offered the [Employee] salary based fixed wage and she accepted it." He says the Employer offered to forward the email to the investigative delegate, but the latter did not respond. Mr. Kim attaches the emails in question. I have reviewed them both. The email dated June 10, 2020, from Mr. Kim to the Employee and purports to memorialize his

discussion with the Employee "the other day" and sets out "the description of the job", the Employer's expectations of her and the wage payment terms. As concerns the latter point, Mr. Kim says in the email:

> …
> 2. Work hours & Payment of wage
> -40 flexible hours per week
> -Salary based payment
> ·Total $2,880.00 / Month
> ·1st Payment: $1,440 (wage during 1st-15th) to be deposited on the 20th of each month
> ·2nd payment: $1,440.00 (wage during 16th-31st) to be deposited on the 5th of each month

41. The Email from the employee in response to Mr. Kim's reads as follows:

> I am happy to accept your offer…I enjoy working with you both….Thank you both for being so kind…helpful…and just amazing ppl…together we will grow this amazing Deli…
> Kind regards …and respect…Tia

42. Mr. Kim concludes his submissions stating that the Employer "submitted answers and documentations" to "the best of its capability" and "[f]or those unrealistic and unreasonable information request[s] from Employment Standards, [the Employer] suggested alternative methodology" to obtain information. He also contends that the Employer evidently submitted sufficient information because the adjudicative delegate used the Employee's ROE to determine the amount of statutory holiday pay.

ANALYSIS

43. Having reviewed the Determination, the section 112(5) record, and Mr. Kim's submissions on behalf of the Employer, I find the appeal should not be allowed to proceed; it should be dismissed under section 114(1) of the *ESA*. My reasons follow.

44. 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.

45. As previously indicated, the Employer appeals the Determination on the sole ground in section 112(1)(b) of the *ESA*, namely, that the Director failed to observe the principles of natural justice in making the Determination. This ground of appeal is commonly referred to as the "natural justice" ground of appeal.

46. In *Imperial Limousine Service Ltd.,* BC EST # D014/05, the Tribunal explained 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 to respond to the evidence and arguments presented by an adverse party.(see *B.W.I. Business World Incorporated* BC EST #D050/96).

47. The onus is on the party alleging a failure to comply with the principles of natural justice to adduce some evidence in support of the allegation. In the present case, the Employer has failed to discharge its burden. The Employer appears to have checked off the natural justice ground of appeal in the Appeal Form but presented no evidentiary basis to substantiate this ground of appeal. Notwithstanding, I have reviewed the section 112(5) record of the Director and Mr. Kim's submissions and I find there is nothing in the record or the submissions that would support a finding of an infringement of the Employer's natural justice rights by either the investigative delegate during the investigation of the Complaint or by the adjudicative delegate in making the Determination. To the contrary, there is substantial evidence that the Employer was afforded ample opportunity to participate in the investigation of the Complaint and to respond to the evidence of the Employee in the Investigation Report. I also find that the exchanges between the investigative delegate and the Employer's representative, Mr. Kim, in the investigation amply support my conclusion that the Employer had sufficient opportunity to present its evidence and arguments. I also find that there is no evidence of the adjudicative delegate straying in any way and violating the Employer's natural justice rights in making the Determination. Not agreeing with the Employer's argument or conclusion when there is ample evidence supporting an alternative conclusion reached by the adjudicative delegate does not breach of natural justice make.

48. Having said this, I find this to be a case of the Employer disputing the adjudicative delegate's findings of fact on the material issues in the Determination, namely, that the Employer owes the Employee statutory holiday pay for the Recovery Period and the Employer failed to comply with the Director's Demand. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the adjudicative delegate unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the adjudicative delegate committed an error of law on the facts, the Employer is required to show the findings of fact and the conclusions reached by the adjudicative 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: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26-29.

49. In the present case, the Employer failed to produce a record of daily hours worked and wages paid. Further, based on the sampling of wage statements ("Statements") submitted by the Employer showing the wages for statutory holiday pay were "banked" in the "YTD column" and none of the Statements included the statutory holiday wages in the gross total as paid, it was open for the adjudicative delegate to reject the Statements as evidence of wages paid in accordance with section 45 of the *ESA*.

50. It was also open for the adjudicative delegate to *reject* the Employers argument that the Employee received the same salary each pay period and therefore received an average day's pay for the statutory holidays as sufficient evidence that the Employer complied with section 44 and 45 of the *ESA*. I also note that the email exchanges between Mr. Kim and the Employee on June 10, 2020 (set out in part in paragraphs 40 and 41 above), is not determinative about whether the Employee was paid statutory holiday pay during the Recovery Period, whether or not the parties agreed to "salary based fixed wage." For all the above reasons, it was open for the adjudicative delegate to conclude as he did and order the

Employer to pay the Employee statutory holiday pay for the Recovery Period and levy an administrative penalty against the Employer for breach of section 45 of the *ESA.*

51. I also find on the evidence it was open to the adjudicative delegate to levy an administrative penalty for violation of section 46 of the *Regulation*. On July 15, 2022, the investigative delegate issued a Demand pursuant to section 85 of the *ESA* requiring the Employer to produce the Employee's employment records by no later than 4:00 p.m. on July 26, 2022. Under section by 28 of the *ESA*, the Employer was required to keep records of the Employee's wages paid and hours worked. However, the Employer contravened section 46 of the *Regulation* by failing to comply with the Demand and did not provide the Employer's specific hours and days worked and a breakdown of wages paid. The ROE the Employer provided to the investigating delegate did not satisfy the Demand nor did the Employer's suggestion that the Employee could obtain payroll information by logging in on her account on the payroll company's site. I note the obligation to keep and provide payroll records pursuant to sections 28 and 85(1)(f) of the *ESA* respectively is that of the Employer and not the Employee.

52. I find the findings of the adjudicative delegate on the material issues in the Complaint are sufficiently grounded in the evidence and have not been shown by the Employer to be unreasonable, perverse, or inexplicable. I find there is nothing in the appeal that indicates the Employer would succeed in meeting the burden of showing that the findings are an error of law.

53. In summary, I find that the Employer has not met the burden of showing there is any reviewable error in the Determination. This is simply a case of the Employer rearguing its entire case in the appeal. It is not only improper for an appellant to rehash and re-argue its case in an appeal, but it is also contrary to the spirit and intent of the *ESA* to allow such as it is inconsistent with and defeats the statutory purpose of providing fair and efficient procedures for resolving disputes delineated in section 2(d) of the *ESA.*

54. In the result, I find that there is no basis for this Tribunal to interfere with the Determination under the natural justice or any other ground of appeal.

ORDER

55. Pursuant to subsections 114(1)(f) of the *ESA*, this appeal is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination dated May 10, 2023, is confirmed as issued together with whatever further interest that has accrued, under section 88 of the *ESA*, since the date of issuance.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal