

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Salt Spring Vineyard Limited

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/109

DATE OF DECISION: October 30, 2023

DECISION

SUBMISSIONS

Xuli Zhong

on behalf of Salt Spring Vineyard Limited

OVERVIEW

1. This is an appeal by Salt Spring Vineyard Limited (“Employer”) of a decision of a delegate of the Director of Employment Standards (“Director”) made June 14, 2023 (“Determination”).
2. On July 6, 2022, Daniel Boess (“Employee”) filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (“ESA”) in failing to pay him regular and overtime wages, compensation for length of service, and by requiring him to pay the Employer’s business costs.
3. A delegate of the Director (“Investigating delegate”) investigated the Employee’s allegations and on May 12, 2023, issued an Investigative report which was provided to the Employee and the Employer for response. A second delegate (“Adjudicating delegate”) reviewed the Investigation report, and the responses of the Employer and the Employee to the Investigative report, before issuing the Determination.
4. The Adjudicating delegate determined that the Employer had contravened section 21 in making unauthorized deductions from the Employee’s wages, as well as sections 17, 18, 40, 58 and 63 in failing to pay the Employee wages, overtime, annual vacation pay and compensation for length of service.
5. The Director determined that the Employee was entitled to the total amount of \$36,245.13, including accrued interest. The Director also imposed three \$500 administrative penalties for the Employer’s contravention of sections 17, 18 and 27 of the *ESA*, for a total amount payable of \$37,745.13.
6. The Employer appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination.
7. Section 114(1) 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 Employee or from the Director.
8. This decision is based on the *ESA* 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 vineyard on Salt Spring Island. Xuli Zhong is the sole director of the company.
11. The Employee was employed as a management consultant from October 15, 2021, to June 14, 2022. His duties included responsibility for vineyard work and the winemaking operation. He was to work 40 hours per week for six months of the year during the winemaking season.
12. The Employee worked for a total of five months and asserted that he was not fully compensated for the time worked. He complained that, due to staffing challenges between April and June 2022, he was unable to complete his duties within his agreed upon 40 hours per week. He also complained that he was often required to complete tasks not identified in his job description to keep the winery operating and issued invoices to the Employer identifying the overtime hours. The Employer did not pay him for the overtime hours.
13. In January 2022, the Employee wrote a report for the Employer and again identified the overtime hours for which he had not been paid.
14. On several occasions, the Employee was required to purchase fertilizer and gasoline for the Employer using his own funds. The Employee and the Employer agreed that these expenses would be reimbursed, but the Employer did not do so.
15. On June 6, 2022, the Employee received an email from the Employer requesting changes to the terms of his initial job offer, reducing his wages from \$70,000 for six months of work to \$70,000 for eight months of work. The Employee did not agree to these conditions and on June 8, 2022, received a letter of termination citing financial difficulties with the winery operation as the reason for the termination. The effective date of termination was June 15, 2022.
16. On June 12, 2022, the Employee requested payment for unpaid wages, vacation pay, overtime and expenses. Through their counsel, the Employer alleged that the Employee had breached his contract and made unreasonable demands, and that the Employer would be pursuing legal action against him for damages.
17. The Employer provided the Investigating delegate with the Employee's Offer Letter, several T4s, a Record of Employment and accounting of payroll details as well as copies of three cheques. The Employer also provided copies of journal entries from the winery's accounting system indicating that a supplier identified as Daniel Boess had an amount payable of \$782.70. There was no information provided that indicated this amount had been paid.
18. According to the Determination:
- On May 10, 2023, the manager of [the Employer] advised the investigating delegate that she was leaving the winery to attend to personal matters in China. She advised the investigating delegate that she could not provide further information with regards to the investigation and provided no alternate representative for [the Employer]. Additionally, [the Employer] forwarded the argument that the [Employee] owed funds to [the Employer] but did not elaborate on that argument or provide any supporting evidence. In response the investigating delegate advised the

manager that the investigation would continue and [the Employer] would have an opportunity to respond to the investigation report. No further response has been received from [the Employer].

19. The Adjudicating delegate found that the Employer did not pay the Employee for hours identified in an invoice the Employee sent in January 2022, and that the Employer did not dispute that the Employee worked those hours.
20. In the absence of any record of hours of work from the Employer, the Adjudicating delegate accepted the Employee's invoice of hours worked as the best evidence of the work he performed in January 2022.
21. The Adjudicating delegate found that the best evidence of the Employee's wages was the gross wages specified in the five wage statements provided by the Employer. Based on the undisputed statements of the Employee, along with the salary and hours of work information from the Job Offer and the Employee's invoices, the Adjudicating delegate determined that the Employee was entitled to an additional \$19,070.59 in regular wages.
22. The Adjudicating delegate noted that while the Employer alleged that the Employee owed money to the Employer, the Employer provided no explanation or supporting documents about what was owed or why. The Employer also provided no documentation which permitted the Employer to make any deductions from the Employee's wages. The Adjudicating delegate found that the Employer's assertion that the Employee owed it money to be without merit and that there was no basis to reduce the amount it owed the Employee.
23. The Adjudicating delegate considered the Employee's claim for overtime wages, and the provisions of the *ESA*, which exempted certain categories of employees from overtime. The Adjudicating delegate considered the Employee's duties and concluded that he did not fall within either the category of "manager" or "farm worker", both of which would fall within the exceptions as set out in the *Employment Standards Regulation ("Regulation")*.
24. The Adjudicating delegate found that while the Employee may have performed some supervisory or management duties, he "did not have sufficient authority to supervisor or direct human or other resources as his principal duties..." The Adjudicating delegate also found that while the Employee performed some duties that fell within the definition of farm worker, most of his duties fell outside that definition. The Adjudicating delegate also noted that, at no point during the Employee's employment or during the investigation, was he referred to or identified by the Employer as a manager or farm worker.
25. The Adjudicating delegate found that the Employee was entitled to overtime wages, and in the absence of any Employer records of the Employee's hours of work, accepted the Employee's invoices of hours of work to be the best evidence.
26. The Adjudicating delegate also considered the Employer's allegations, made through counsel's letter to the Employee on June 14, 2022, about the Employee's failure to perform his duties specified in the job offer as the basis for terminating his employment. The allegations included the Employee's failure to "advise on the prevention and control of the insect bite and other diseases that invade and damage the vineyard", his failure to "advise on the challenges faced by the vineyard and failing to provide any recommendations", his failure to "abide by the general duties of a consultant", and "[m]aking

unprofessional and non-business manner requests that salary and other expenses be paid in cash.” The June 14, 2022 letter also indicated that on June 12, 2022, the Employee had sent the Employer a letter with “unreasonable demands” and that the Employee had retained the company’s assets illegally.

27. The Adjudicating delegate was unable to determine how the Employer concluded that the Employee had retained assets illegally as of June 14, 2022 given that the Employer had terminated the Employee effective June 15, 2022. The Adjudicating delegate found that, while the June 14, 2022 letter did not indicate that the Employee had been terminated for cause, the allegations appeared to give rise to that argument.
28. The Adjudicating delegate found it “suspicious” that the Employer’s June 14, 2022 letter of termination was sent less than two weeks after sending the Employee an email contemplating employment through to December and less than six days after the Employer issued a working notice of termination without mentioning any of the issues identified in the June 14, 2022 letter.
29. After noting that the Employer had the burden of demonstrating just cause, the Adjudicating delegate considered the fact that the Employer had provided no evidence or factual basis to support the allegations, nor any explanation why the allegations were made immediately after the Employee had asserted his rights under the *ESA*. In the absence of any evidence, the Adjudicating delegate found that the Employer had not met the burden of demonstrating that the Employee had conducted himself in a manner inconsistent with his employment and that he was entitled to compensation for length of service.
30. The Adjudicating delegate found that the Employee was entitled to one weeks’ wages as compensation for length of service as well as vacation pay.
31. Finally, the Adjudicating delegate determined that the Employer had contravened section 21 of the *ESA* in requiring the Employee to pay its business costs and failing to reimburse him, based on the Employer’s records showing him as a supplier and no evidence the amount has been paid.

Argument

32. In the appeal submissions, Xuli Zhong states that she is writing “to address the complaint from Daniel Boss regarding the payment of **his wages (rate of pay)** and overtime salary for the period from January to June for the year 2022.” [emphasis included]
33. The Employer continues, saying that “We have obtained new evidence that unequivocally establishes that Daniel Boss did not perform any work during this period, and therefore, it is not reasonable for him to receive payment for that time.”
34. The Employer makes further assertions including that the Employee had no opportunity to work overtime during his period of employment and that he was never asked to work overtime. The Employer argues that the job offer states that the Employee’s term of employment is for one year over a 24 month period with an annual salary of \$70,000, which corresponds to a monthly salary of \$5,833.33 rather than \$11,666.67.

35. The Employer asks “we strongly urge you to reconsider your proposal to pay Daniel Boss’s wages and overtime salary for the period from January to June for the year 2022.”

ANALYSIS

36. Section 114(1) 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 or 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 that 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.

37. 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.

38. 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.

39. Acknowledging that English does not appear to be the Employer’s representative’s first language, as well as the fact that many appellants do not have any formal legal training, I have taken a liberal view of the Employer’s grounds of appeal (see *Triple S Transmission*, BC EST # D141/03).

Natural Justice

40. 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 an appellant considers just or fair.

41. 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 that the Employer had knowledge of and the opportunity to respond to the Employee’s allegations, and in fact, submitted a number of documents in response to the Director’s Demand for Employer Records. The record also discloses that the Investigating delegate spoke

with at least two individuals associated with the company, both of whom were able to communicate in English.

42. Additionally, I am satisfied that the Employer received the Investigating delegate's Investigation report and had the opportunity to respond to it.
43. I am unable to find that the Employer has demonstrated that it was denied natural justice and dismiss the appeal on this ground.

Error of Law

44. 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 (BC CA):
1. a misinterpretation or misapplication of a section of the Act [in Gemex, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.

45. The Employer's appeal is, in essence, simply a disagreement with the Adjudicating delegate's findings and conclusions, and an attempt to have the Tribunal substitute a different conclusion.

46. 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.

47. I am not persuaded that the Adjudicating delegate misinterpreted the *ESA* or *Regulation*, misapplied the law or acted without any evidence. I find that the Adjudicating delegate's conclusions were supportable based on the information before him.

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

New Evidence

49. 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.

50. Although the Employer has stated that “we have obtained new evidence” to support its claim that the Employee did not work overtime, the Employer neither includes that evidence nor indicates what that new evidence is.

51. In the absence of any evidence that meets the Tribunal’s test for new evidence, I find that there is no basis for this ground of appeal.

CONCLUSION

52. I find, pursuant to section 114(1)(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

ORDER

53. Pursuant to section 115(1) of the *ESA*, I confirm the Determination dated June 14, 2023, in the amount of \$37,745.13, plus whatever interest that may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal