

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Crystal Wilson  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Brandon Mewhort

**FILE NO.:** 2023/121

**DATE OF DECISION:** November 14, 2023

## DECISION

### SUBMISSIONS

Crystal Wilson on her own behalf

### OVERVIEW

1. This is an appeal by Crystal Wilson (“Appellant”) of a determination issued by Sarah Vander Veen, a delegate of the Director of Employment Standards (“Adjudicating Delegate”), dated July 20, 2023 (“Determination”). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
2. In the Determination, the Adjudicating Delegate found that the Appellant was not an employee of Lookout Housing and Health Society (“Respondent”), and she was therefore not entitled to any outstanding wages, statutory holiday pay or vacation pay.
3. Section 114(1) of the *ESA* provides that 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, among other things, there is no reasonable prospect the appeal will succeed.
4. For the reasons discussed below, I dismiss this appeal pursuant to section 114(1) of the *ESA*, because there is no reasonable prospect it will succeed.

### ISSUES

5. The issue is whether this appeal should be dismissed pursuant to section 114(1) of the *ESA*.

### THE DETERMINATION

6. The Appellant was a resident of the Respondent, which is a non-profit charitable organization in Vancouver. In a complaint filed on March 3, 2021, the Appellant alleged she was owed wages for cleaning she performed in the common areas of the building in which she lived between December 24, 2018, and September 7, 2020, when she stopped cleaning the common areas because she was never paid for it. The Respondent stated that any cleaning the Appellant did was done on a volunteer basis and she was not an “employee” as that term is defined in the *ESA*.
7. Two other delegates of the Director (“Investigating Delegates”) completed an investigation of the Appellant’s complaint, and a report was issued on February 14, 2023 (“Investigation Report”). Both parties provided responses to the Investigation Report. The Investigation Report and responses were considered by the Adjudicating Delegate in making her determination.
8. In her analysis of whether the Appellant was an “employee” of the Respondent, the Adjudicating Delegate considered the relevant definitions in the *ESA*, the purposes of the *ESA*, and guidance regarding that issue from this Tribunal. The Adjudicating Delegate then considered the evidence provided by the parties and explained why she preferred the evidence that she did. After weighing the evidence and giving regard to the factors to be considered in determining the nature of the relationship, the Adjudicating Delegate

determined the Appellant was a volunteer rather than an employee of the Respondent for the purposes of the *ESA*. Accordingly, the Adjudicating Delegate took no further action regarding the Appellant's complaint.

## ARGUMENTS

9. When asked in the appeal form to select her grounds of appeal, the Appellant indicated that the Director failed to observe the principles of natural justice in making the Determination. However, the Appellant has not raised any alleged failures of the Director to observe the principles of natural justice in her submission accompanying her appeal form.
10. Rather, in her submission, the Appellant essentially takes issue with the weight given by the Adjudicating Delegate to certain evidence and inferences that, in her view, should have been drawn from it – e.g., the Appellant's assertion that she was told she would be paid, the Appellant's notebook in which she kept track of her hours, whether cleaning supplies were provided by the Respondent, and a locker fee that she claimed would be deducted from her wages. The Appellant has also stated that an individual ("BM"), identified in the Determination as a former employee of the Respondent, should be contacted, but she does not explain why that person should be contacted or why they were not interviewed during the investigation.

## ANALYSIS

11. 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.
12. An appellant has the burden to demonstrate a basis for the Tribunal to interfere with a determination: see *Tejinder Dhaliwal (Re)*, 2021 BCEST 34 at para 13.
13. Despite indicating in her appeal form that the Director failed to observe the principles of natural justice in making the Determination, the Appellant did not raise any issues regarding procedural fairness in her submission. On my review of the record, it appears the Appellant was given an opportunity to know the case against her and to present her evidence, and she was heard by an independent decision maker. The Appellant suggests that BM should be contacted but, as noted above, she does not explain why that person should be contacted or why they were not interviewed during the investigation. I note that the Investigating Delegates not only interviewed the Appellant during the investigation, but also at least six other witnesses who gave oral statements on the Appellant's behalf.
14. As also mentioned above, the Appellant had the opportunity to, and did, provide a response to the investigation report, which was considered by the Adjudicating Delegate in making her determination.
15. The question of whether a person is an "employee", as that term is defined in the *ESA*, is a question of mixed fact and law, which is given deference by this Tribunal: see *3 Sees Holdings Ltd.*, BC EST # D041/13

at paras 26 to 28 (“3 Sees”); see also *Michael L. Hook (RE)*, 2019 BCEST 120 at para 31. As this Tribunal stated in *3 Sees* at para 28

The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, *supra*).

16. As this Tribunal has recently stated, a decision-maker’s finding on a question of mixed fact and law should not be set aside on appeal unless it is tainted by a “palpable and overriding error”: *Cultus Lake Waterpark Ltd. (Re)*, 2023 BCEST 54 at para 21, citing *Housen v Nikolaisen*, 2002 SCC 33.
17. In this case, I find the Adjudicating Delegate’s determination that the Appellant was not an “employee”, as defined in section 1 of the *ESA*, to be reasonable and supported by evidence that was before her – e.g., there was little evidence that the Respondent exercised direction and control over the Appellant’s cleaning, other residents were performing similar cleaning on a voluntary basis, and the nature of the Respondent’s enterprise was that many residents participated in community-building activities such as cleaning of the common areas.
18. Accordingly, I find that the Appellant has failed to demonstrate a basis for the Tribunal to interfere with the Determination, and I dismiss the appeal under section 114(1)(f) of the *ESA* as there is no reasonable prospect it will succeed.

## **ORDER**

19. I order that the Determination be confirmed pursuant to section 115(1) of the *ESA*.

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**Brandon Mewhort**  
**Member**  
**Employment Standards Tribunal**