

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Glentana Development Corp.

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Carol L. Roberts

**FILE NO.:** 2023/102

**DATE OF DECISION:** January 29, 2024

## DECISION

### SUBMISSIONS

Faizel Kathrada on behalf of Glentana Development Corp.

### OVERVIEW

1. This is an appeal by Glentana Development Corp. (“Employer”) of a decision of a delegate of the Director of Employment Standards (“Director”) made on June 9, 2023 (“Determination”).
2. On September 9, 2020, an employee (“Employee”) filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (“ESA”) by misrepresenting the conditions of his employment, failing to pay regular wages, requiring him to pay for the Employer’s business costs, and not paying vacation pay.
3. A delegate of the Director (“Investigating delegate”) investigated the Employee’s complaint and on October 3, 2022, issued an Investigation Report (“Report”). The Report was provided to the parties for response. A second delegate (“Adjudicating delegate”) reviewed the Report and the responses of the parties to that Report before issuing the Determination.
4. The Adjudicating delegate determined that the Employer had contravened sections 45/46, 21 and 58 of the *ESA* in failing to pay the Employee statutory holiday and vacation pay and in requiring the Employee to pay the Employer’s business costs.
5. The Director found that the Employee was entitled to the total amount of \$5,102.20 including accrued interest. The Director also imposed two \$500.00 administrative penalties for the Employer’s contraventions of the *ESA*, for a total amount payable of \$6,102.20.
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. The statutory deadline for filing the appeal was July 3, 2023. The appeal was filed on July 4, 2023, and the Employer sought an extension of time in which to file the appeal to July 15, 2023. The Tribunal granted the Employer an extension of time in which to file supporting documents and submissions to July 15, 2023.
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 submission, I found it unnecessary to seek submissions from the Director and the Employee.
9. This decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submission, and the Determination.

## ISSUES

10. Whether the Employer has established a basis for extending the statutory period in which to file the appeal, and
11. Whether the Employer has established grounds for interfering with the Director's decision.

## BACKGROUND AND ARGUMENT

12. The Employer operates a property development and construction business in Victoria, British Columbia. The parties agree that the Employee was employed initially as a First Aid Specialist and then promoted to Site Superintendent. There was no written employment agreement between the parties, and the parties disagreed about the Employee's first and last day of work as well as his rate of pay. However, the record indicates that the Employee worked for the Employer between approximately March 28, 2020, until approximately May 31, 2020.
13. The issues before the Director were a) whether the Employer had misrepresented the conditions of employment; b) whether the Employee was entitled to regular wages; c) whether the Employer paid the Employee's business costs, and d) whether the Employee was owed vacation pay.
14. Given that the Employer's appeal relates only to the third issue, I will summarize the Determination on that issue only.

### Business costs

15. The Employee contended that, because the Employer was encountering financial issues, it required him to make purchases in an approximate amount of \$50,000.00 on his personal credit card. The Adjudicating delegate noted that section 21 of the *ESA* provided that an employer was not permitted to require an employee to pay for an employer's business costs and if business costs were unlawfully paid by an employee, they were recoverable as wages.
16. The Employer submitted that it had a corporate credit card it could have given the Employee had he asked for it. The Employer also contended that the Employee only submitted receipts to the Employer and did not attach the expense forms, and that any receipts submitted for expenses incurred on the Employer's behalf had been reimbursed.
17. In support of his contention, the Employee submitted expense forms and receipts for three separate time periods. For the second period (which the Adjudicating delegate identified as "Expense Two"), the Employee identified a receipt for the purchase of an iPad Pro for himself and one for another employee. The Adjudicating delegate determined that an iPad could fall into either a personal tool or a business cost category. The Adjudicating delegate found that it was reasonable for the Employee to purchase and use the iPad for business purposes given that his duties included managing staff and overseeing the construction project. The Adjudicating delegate determined that:

...the Employer indirectly required the [Employee] to purchase the said tools to allow for the [Employee's] performance of his duties. Given that the technological expenses were used for the Employer's benefit as a means for the [Employee] to manage the project site and there is no

evidence to support the [Employee'] personal use or that he did not return the technological tools, I also find that the Employer is the party who principally benefitted from the said expenses. (Determination, p. R10-11)

18. The Employee also claimed reimbursement for an iPad, charger, keyboard, and mouse for another employee who assisted the Employee overseeing the construction project. According to the Employee, those expenses were necessary for the employee to perform his job. The Adjudicating delegate noted that the Employer did not deny that the employee required those tools, asserting only that the second employee already had an iPad. The Adjudicating delegate noted that the Employer was not able to produce the employee as a witness despite his evidence being important to support its assertions and the Investigating delegate was also unable to contact him.
19. The Adjudicating delegate determined that both the Employer and the Employee submitted equally probable evidence and that:
- Given the equal likelihood of both scenarios, I find that the [Employee's] claim should not fail merely because the Employer failed to provide proper accounting records and could not produce [the other employee] as a witness, despite being in contact with him throughout the investigation. ...The Act is also a remedial piece of legislation that encourages decision makers to ensure employees' wage claims are not defeated in situation where a decision maker is presented with equal evidence from both sides. For these reasons, and because it would best accord with the legislative objectives set out in section 2 of the Act, I find that the additional technological tools purchased under Expense Two are also business costs. (Determination, p. R11)
20. With respect to the Employee's receipts for the first two time periods, the Adjudicating delegate noted that the Employer did not provide any additional information or evidence to support its position that it paid the Employee for the expenses itemized for the first two periods.

## ANALYSIS

21. 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, 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.

22. 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.

#### Extension of time

23. The Employer has not provided any reason for not filing the appeal within the statutory time period. It was filed one day after the statutory time limit.
24. Section 109 of the *ESA* gives the Tribunal discretion to extend the time limits for filing an appeal. The Tribunal has consistently stated that extensions should only be granted where there are compelling reasons to do so.
25. In *Niemisto (Re)* (BC EST # D099/96), the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  - iii) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been aware of this intention;
  - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - v) there is a strong *prima facie* case in favour of the appellant.

These criteria are not exhaustive.

26. In the absence of any explanation for why the appeal was not filed in a timely manner, I would dismiss the appeal on this ground alone. However, I have also considered the merits of the appeal.
27. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination.
28. The Employer contended that the Adjudicating delegate erred in finding that the Employer had not reimbursed the Employee for the purchase of an iPad Pro or any accessories for that device. Attached to the submission was a screenshot of undated text message communication between Faizel Kathrada (“Mr. Kathrada”), one of the Employer’s directors, and a different employee. Mr. Kathrada states:
- We have and still claim that [the Employee] did not purchase an ipad or any of the accessories for it that he claimed. Nor do he purchase any other items other than receipts which he provided to us and we reimbursed him for.
29. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. (*Triple S Transmission Inc.*

(*Re*), BC EST # D141/03). I have addressed what I understand to be the Employer's arguments under the natural justice ground of appeal.

### Natural Justice

30. 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.
31. There is nothing in the Employer's submissions that relates to this ground of appeal. The appeal submission appears to argue that the Adjudicating delegate was wrong to have decided that the Employer required the Employee to purchase equipment and failed to reimburse him for that.
32. The record discloses that the Employer was afforded the opportunity to present documents and make submissions in response to the complaint, as well as to respond to the Employee's documents. The Employer was also provided with the Report and offered the opportunity to respond to it. The Employer acknowledged receipt of the Report and had no response.
33. The Employer submitted what might be considered new evidence on appeal, including a statement that the Investigating delegate asked the Employer to provide during the investigation of the complaint. As this statement was not produced during the course of the investigation, the Employer is precluded from now submitting that information on appeal. (see the Tribunal's test for admitting new evidence on appeal in *Re Merilus Technologies*, BC EST # D171/03).
34. I find no basis for an appeal on this ground.

### **CONCLUSION**

35. The Employer has provided no reason why the appeal was not filed within the statutory time period. I also find that there is no reasonable prospect that the appeal will succeed. Consequently, I dismiss the appeal under section 114(1) of the *ESA*.

### **ORDER**

36. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination dated June 9, 2023, together with whatever interest may have accrued since the date of issuance.

---

**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**