

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

0927509 B.C. Ltd., coba Jasper Way Inn

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE No.: 2023/162

DATE OF DECISION: March 20, 2024

DECISION

SUBMISSIONS

Christopher Drinovz and Alejandra Henao counsel for 0927509 B.C. Ltd., coba Jasper Way Inn
Shannon Corregan delegate of the Director of Employment Standards

OVERVIEW

1. 0927509 B.C. Ltd., coba Jasper Way Inn (“Employer”) appeals a Determination issued by a delegate of the Director of Employment Standards (“Director”) on September 28, 2023, pursuant to section 112 of the *Employment Standards Act* (“ESA”).
2. Shyla Miller (“Employee”) filed a complaint with the Director alleging that the Employer had contravened the *ESA* by failing to pay her minimum wage, overtime wages and statutory holiday pay.
3. A delegate of the Director (“Investigating delegate”) investigated the Employee’s complaint and issued an Investigation Report (“Report”). The Report was provided to the parties for response on July 4, 2023. A second delegate (“Adjudicating delegate”) reviewed the information produced during the investigation, 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 16, 28, 36, 40 and 46 of the *ESA* in failing to pay the Employee wages, overtime wages, and statutory holiday pay, and failed to maintain Employer records as required under the *ESA*. The Director determined that the Employee was entitled to wages, statutory holiday pay, annual vacation pay plus accrued interest in the total amount of \$53,960.50.
5. The Director also imposed five \$500.00 administrative penalties for the contraventions of the *ESA* for a total amount owing of \$56,460.50.
6. The Employer filed their Appeal Form setting out their grounds of appeal and a copy of the Determination and Reasons for the Determination prior to the expiry of the appeal period. The Employer requested the Tribunal grant it additional time to provide their reasons and argument for appeal as well as their supporting documents. The Tribunal granted the Employer the extension of time to provide their reasons and argument and supporting documents.
7. The Employer selected all three grounds of appeal on the Appeal Form. However, in their reasons and arguments, the Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
8. 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 and the record, I found it unnecessary to seek submissions from the Employee or the Director.

9. This decision is based on the section 112(5) record (“record”) that was before the Adjudicating delegate at the time the Determination was made, the appeal submission and the Reasons for the Determination.

FACTS

10. The Employer operates a motel in Clearwater, British Columbia. Although the Employee’s first day of employment was in dispute, it was agreed it was some time in May 2020. Her employment was terminated on April 17, 2021, with an effective date of April 24, 2021.
11. The Employee began working for the Employer some time in May 2020 at which time the business was owned by her father and his partner. The business was sold to Bahadar Dhillon and his wife with a closing date of July 3, 2020. Mr. Dhillon is the sole director and officer of 0927509 B.C. Ltd.
12. The Dhillons began paying the Employee as an employee effective July 4, 2020. The Adjudicating delegate determined that the Employee’s employment was continuous and uninterrupted by the disposition of the business under section 97 of the *ESA*, but for the purposes of determining whether the Employee was entitled to wages, had regard only to the period beginning June 30, 2020.

Was the Employee a Manager?

13. The Adjudicating delegate determined that, although the Employee’s job title was that of a manager, there was no evidence that her principal employment duties consisted of supervising or directing human or other resources, or that she was employed in an executive capacity. Consequently, the Adjudicating delegate determined that the Employee was not a manager as defined in the *Employment Standards Regulation* (“*Regulation*”). The Adjudicating delegate noted that although the Employer argued that the Employee had the authority to hire contractors, purchase supplies, negotiate bookings with long term guests and hire employees, no evidence was submitted to support this argument. The Adjudicating delegate noted that, even if she accepted that the Employee hired one other employee or purchased some supplies, there was insufficient evidence to establish that the Employee’s principal employment duties were those of a managerial nature.
14. The parties did not have a written employment agreement. Although Mr. Dhillon initially informed the Investigating delegate that the parties did not have a written job description, he later produced an email exchange dated July 21, 2020, which he asserted outlined her job duties.
15. The Employee denied the authenticity of the email, asserting that she had never seen it prior to the investigation. She stated that she would never have agreed to the job duties in any event, as there were too many for one person to perform. The Employee noted that her alleged response agreeing to the duties came from an email account for the business to which Mr. Dhillon also had access, and that her personal email address in the email exchange was misspelled.
16. The Adjudicating delegate found the Employee’s version of events to be more credible and determined that the email exchange was not genuine. However, she noted that, even if the email was genuine, it would not have been sufficient to establish that the Employee was a manager. The Adjudicating delegate found that the Employee’s principal employment duties consisted of operating the motel front desk and

housekeeping, and that while she may have occasionally purchased supplies or arranged for some contractors and services, those duties were sufficiently infrequent to classify her as a manager.

Wages

17. The Adjudicating delegate noted that the Employee's claim for wages was made difficult by the Employer's failure to maintain records as required by section 28 of the *ESA*. She considered the parties' submissions and other records in arriving at her determination about what seemed most likely in the circumstances.
18. The Employee's evidence was that she worked from 9:00 a.m. to 9:30 p.m., seven days per week unless Mr. Dhillon was available to cover for her. The Employee described her tasks and provided the Investigating delegate with a detailed breakdown of the various tasks she was to perform and the frequency with which she was to perform them. The Employer's position was that the Employee was only at the business for about six hours per day and that she was frequently away for several days and nights each week. Mr. Dhillon also asserted that the Employee took six to eight days off each month.
19. The Adjudicating delegate noted that the only supporting documents relating to the Employee's hours of work were the Employee's handwritten list of housekeeping and laundry tasks from November 2020 to February 2021, a computer-generated spreadsheet of bookings from July 2020 to April 2021, and a daily occupancy report from November 2020 to March 2021. The Adjudicating delegate noted that neither of the latter two documents assisted her in determining who made bookings or who was responsible for housekeeping or laundry. The Adjudicating delegate considered that the spreadsheets demonstrated that the motel was almost fully booked from the summer to mid-October, that it was busy from mid-October to December, that bookings slowed down until approximately March 2021, after which it became busy again. The Adjudicating delegate noted that there were very few nights in which there were no guests, approximately half were long-term bookings, and that many of the short-term bookings were for a single night, which would increase the laundry workload.
20. The Adjudicating delegate also noted that the parties disputed whether the Dhillons worked at the motel. The Adjudicating delegate did not accept Mr. Dhillon's evidence that he, his wife, and another employee handled the laundry, housekeeping, yard work, beach rentals, office work, and repairs. She noted that not only was his evidence internally inconsistent, but she had also already determined that his credibility had been negatively impacted by him submitting false information. She also noted the absence of any information confirming Mr. Dhillon's evidence such as email exchanges with the Employee relating to her requests to take time off or arranging someone to cover for her.
21. The Adjudicating delegate determined that the Employee worked from 9:00 a.m. to 9:30 p.m., seven days per week, that she did not take lunch breaks, and that she did not work on several specific days due to injury, illness, or days off, all of which were identified by the Employee herself. The Adjudicating delegate determined that the Employee had not been paid the minimum wage for all hours worked contrary to section 16 of the *ESA*, and that she did not receive at least 32 consecutive hours free from work or paid an increased rate of pay for work performed during the 32-hour period, contrary to section 36 of the *ESA*. The Adjudicating delegate further determined that, as the Employee was not a manager, she was entitled to overtime pay for which she had not been paid.

22. Finally, the Adjudicating delegate found that the Employee was also entitled to statutory holiday pay for the nine statutory holidays she had worked.
23. The Adjudicating delegate found insufficient evidence to determine whether the Employee was entitled to additional pay for extra rooms cleaned.
24. The parties agreed that the Employee was to be paid wages of \$2,000.00 per month plus vacation pay. The Employer took the position that because the Employee received free lodging with utilities, cable and internet, the value of her compensation was actually \$4,970.00 per month.
25. The Adjudicating delegate noted that section 20 of the *ESA* required an employer to pay all wages in Canadian currency, and that the Employer was not permitted to pay wages in the form of benefits, favours, or credits, and although an employer could deduct rent from an employee's wages, section 22 required that such an agreement be in writing. The Adjudicating delegate determined that as the Employee's benefits were not paid in the form of Canadian currency, they could not be considered wages paid, and that there was no written agreement between the parties for the Employer to deduct any rent from the Employee's wages.

ARGUMENT

26. The Employer contends that the Adjudicating delegate
- failed to observe the principles of natural justice and erred in law in finding that Mr. Dhillon submitted falsified evidence without giving Mr. Dhillon an opportunity to respond;
 - erred in law in her interpretation of section 22 of the *ESA* by concluding that the value of the accommodation was not part of the Employee's wages;
 - erred in law in finding that the Employee was not a manager as defined in the *Regulation*; and
 - erred in law in determining the number of hours the Employee worked.
27. Although the Employer indicated on the Appeal Form that their appeal is also grounded on new evidence, the Employer did not provide any such evidence to the Tribunal.

ANALYSIS

28. Section 114 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; and
- h) one or more of the requirements of section 112(2) have not been met.

29. 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.

30. 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 CanLII 6466 (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.

31. The Employer contends that the Adjudicating delegate denied him natural justice in not giving him the opportunity to respond to her conclusion that he had submitted falsified information, specifically, the email exchange of July 21, 2020. The Adjudicating delegate’s determination on that point is as follows:

... Mr. Dhillon initially advised the Delegate that there was no written job description for [the Employee] but he later produced an email exchange between himself and [the Employee] dated July 21, 2020, outlining her job description.

[The Employer] submitted this email exchange in evidence. Typically, when an email is saved, it is saved in a format that reproduces the email’s visual characteristics. The email before me appears instead to have been copied and pasted into a word processing document. All other emails submitted by the parties in this investigation have an autogenerated Microsoft Outlook header and time and date stamp; the July 21, 2020 email exchange is missing this hallmark of authenticity.

[The Employee] disputes the authenticity of the email exchange. She takes the position that she had never seen it before this investigation. Her alleged response came from the info@jasperwayinn.com email address, to which Mr. Dhillon had access, and her personal email address ... is misspelled ... She would not have agreed to the list of the duties set out in the email as it was too much for a single person. She also noted that some topics in the email (deep cleaning

and receiving extra pay for cleaning more than three rooms in a day) were topics that the parties did not discuss until October 2020, several months after this email was allegedly sent.

The evidence shows that [the Employee] used the info@jasperwayinn.com email address to conduct business and communicate with Mr. Dhillon. The fact that her alleged reply came from that address is not in and of itself concerning. However, I find it significant that the July 21, 2020 email exchange lacks the header and date and time stamps that the other emails have. I do not accept the July 21, 2020 email exchange as genuine. I find it more likely than not that Mr. Dhillon submitted falsified evidence to the [Investigating] Delegate. I find that Mr. Dhillon's credibility is harmed as a result. To the extent that his testimony conflicts with [the Employee's], I prefer [the Employee's] version of events.

32. The Employer argues that it was an error for the Adjudicating delegate to find that the July 21, 2020, email was not authentic simply because it did not contain a header with a date and time stamp. In my view, the Adjudicating delegate's finding on this point was well founded and based on a number of factors in addition to the absence of a header with a date and time stamp. The Adjudicating delegate also considered the fact that Mr. Dhillon initially informed the Investigating delegate that the parties did not have a written job description and only later did he produce the July 21, 2020, email. The record discloses that, in a conversation with the Investigating delegate, Mr. Dhillon stated that he did not have a record of the Employee's hours. According to the Investigating delegate's notes, Mr. Dhillon explained that he did not have a record of her hours because "the deal was accommodation + flat rate. Verbal agreement only. He says he bought the motel from EE's parents. Made agreement for her employment with her brother, then met with her to confirm details. No record of agreement, didn't know about ESA, no records of hours worked...". While I accept this reflects the Investigating delegate's notes of the conversation he had with Mr. Dhillon rather than a verbatim transcript, in my view, if the parties had a written employment agreement, Mr. Dhillon would have informed the Investigating delegate of that. In fact, the notes appear to indicate that Mr. Dhillon stated twice that the parties had no written agreement.
33. The Adjudicating delegate also considered the Employee's assertion that she had never before seen the email, and that the email contained an incorrect address for her personal email account. Credibility assessments are within the purview of the Adjudicating delegate, and I find no basis to interfere with her conclusion on this issue. I find that her decision was reasonable based on the information before her.
34. The Employer further submits that the Adjudicating delegate failed to observe the principles of natural justice in not affording Mr. Dhillon the opportunity to respond to the allegation that the email was not genuine. I find no basis for this argument. 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.
35. The record discloses that the Employer was provided with a copy of the Investigation report on July 4, 2023, and given an opportunity to respond to it. The Report noted that the Employee disputed the authenticity of the July 21, 2020, email. Mr. Dhillon's response to the Employee's position was "She did receive description of her duties/responsibilities in our first meeting in person and via email description of employment manager agreement." I am satisfied that the Employer was given the opportunity to respond to the Employee's position. I do not accept that the Adjudicating delegate was obliged to notify the Employer that she was considering finding his evidence to lack authenticity before making the finding she did. Natural justice requires the decision maker to afford the parties the opportunity to respond to evidence, not conclusions based on that evidence.

36. The fact the Employer disagrees with the Adjudicating delegate's analysis and findings does not constitute a denial of natural justice. I find no basis for this ground of appeal.
37. The Employer submits that the July 21, 2020, email constitutes evidence of a valid assignment of wages under section 22 of the *ESA*. The Employer further argues that, based on the Employee's own submissions, the Employee understood that her wages were \$2,000 per month plus accommodation, and that the value of the accommodation would be reflected on her T4 as part of her income. The Employer contends that the July 21, 2020, email together with the Employee's submissions demonstrates a valid assignment of wages for rent.
38. Given my conclusion that there is no basis to disturb the Adjudicating delegate's determination that the July 21, 2020, email was not genuine, I need not address this argument, and confirm the Adjudicating delegate's conclusion on this point.
39. The Employer also argues that section 22(4)(c) of the *ESA* provides an exception to the prohibition on withholding wages. The Employer relies on the Tribunal's decision in *Sophie Investments Inc.*, BC EST # D527/97 ("*Sophie Investments*"), in which the Tribunal considered an appeal by an employer which deducted the market value of a rental unit from the employee's wages. I find this case to be of no assistance to the Employer's argument since, as the Employer notes, the parties in *Sophie Investments* had a written agreement regarding the amount of the employee's monthly compensation. The Tribunal's conclusion was that, although the written agreement of the parties was not clearly expressed, it was sufficient to conclude that the parties had a 'meeting of the minds' that rent would be deducted from wages. As I accept the Adjudicating delegate's conclusion that the parties had no written agreement, there is no basis to interfere with her conclusion.
40. The Employer further contends that the Adjudicating delegate erred in failing to consider the "scale of the business" in determining that the Employee was not a manager.
41. The *Regulation* defines "manager" as "(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity."
42. The leading Tribunal decisions on the interpretation of "manager" are *Common Ground Publishing Corp.* (BC EST # D433/00), and *Whitehall Bureau of Canada Limited* (BC EST # D026/10). The cases underscore the principal that the burden of establishing that a person is excluded from the protection of the *ESA*, or any part of it, rests with the person asserting in (in this case, the Employer) and there must be clear evidence justifying that conclusion.
43. In *Common Ground Publishing Corp.*, the Tribunal relied on Black's Law Dictionary, which defined executive capacity to mean "duties ...[that] relate to active participation in control, supervision, and management of business." There was no evidence before the Director that the Employee was an active participant in the control, supervision, or management of the Employer's business. There was no documentary evidence that the Employee was involved in hiring, firing, or granting leaves from work for employees, and while she may have been responsible for organizing one other employee, that was not part of her primary duties. Furthermore, the Adjudicating delegate determined that although the Employee may have had some management or supervisory responsibilities, they did not form her principal

duties. I find no basis to interfere with the Adjudicating delegate's conclusion on this issue, as I am not persuaded she acted on a view of the facts that cannot be entertained.

44. Finally, the Employer contends that the Adjudicating delegate erred in her calculation of the Employee's wages and hours worked.
45. The Employer argues that the Adjudicating delegate's conclusion that the Employee "worked 87.5 hours per week to manage a small motel with limited guests during COVID is absurd and inexplicable."
46. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law only if they were based on no evidence, or a view of the facts which could not reasonably be entertained.
47. The Employer provides no evidence to demonstrate that the Adjudicating delegate's findings of fact are based on no evidence, or a view of the facts that cannot be entertained. The sole basis for the Employer's argument seems to be that the Adjudicating delegate did not consider the Employee's own statements that she would take a break and stop working to eat dinner at 8:00 p.m., as articulated in the Investigation Report.
48. I find that the Adjudicating delegate considered the scope of the Employee's duties, including her assertion that she was required to be at the motel between 9:00 a.m. and 9:30 p.m. daily. The Adjudicating delegate considered the Employee's evidence that once her office work was completed, she was required to assist with room cleaning or laundry duties and that the front office doorbell was connected to her personal cell phone so she could take calls from anywhere on the property. The Adjudicating delegate also considered the fact that COVID protocols entailed more work for the Employee, not less; and considered the number of motel, tent and RV campsites bookings for certain periods. The Adjudicating delegate also noted the absence of any employer records in arriving at her conclusion. Finally, the Adjudicating delegate considered the Employer's evidence, in which Mr. Dhillon allegedly (in the July 21, 2020, email) informed the Employee that her job was to operate the motel office, check in guests, reservations, housekeeping, laundry, yard work and repairs, contacting contractors, and beach rentals. The Adjudicating delegate noted that the duties identified in the email conflicted with Mr. Dhillon's testimony that he and a housekeeper handled the laundry, housekeeping, yard work, beach rentals, office work and repairs.
49. While I may not have arrived at the same conclusion as the Adjudicating delegate, I find that her decision was supportable on the information before her and decline to interfere with it. I am not persuaded the Employer has demonstrated an error of law.
50. In conclusion, I find that the Adjudicating delegate's decision was rationally based on the facts before her, and I find no basis to interfere with the Determination.
51. I find, pursuant to section 114(1)(f), that there is no reasonable prospect that the appeal will succeed.
52. I dismiss the appeal.

ORDER

- ^{53.} Pursuant to section 114 (1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115(1) of the *ESA*, the Determination dated September 28, 2023, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal