Citation: Cactus Flower Restaurants Ltd. (Re)
2024 BCEST 7

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Cactus Flower Restaurants Ltd. carrying on business as Sol Grill Room & Lounge
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Brandon Mewhort

FILE NO.: 2023/134

DATE OF DECISION: January 25, 2024

DECISION

SUBMISSION

Bridget Wilson — on behalf of Cactus Flower Restaurants Ltd.

OVERVIEW

1. This is an appeal by Cactus Flower Restaurants Ltd., carrying on business as Sol Grill Room & Lounge ("Appellant"), of a determination issued by Reena Sharma, a delegate of the Director of Employment Standards ("Delegate"), dated July 28, 2023 ("Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. In the Determination, the Delegate found that a former employee of the Appellant ("Employee") did not meet the definition of a manager under the *Employment Standards Regulation* ("*Regulation*"), and that he was owed outstanding regular wages, overtime wages and vacation pay. The Delegate also imposed administrative penalties on the Appellant in the amount of $1,500.00.

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.

ISSUE

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

THE DETERMINATION

6. The Appellant operates a restaurant in Osoyoos, British Columbia, where the Employee worked from March 14, 2021, to October 11, 2021. On October 22, 2021, the Employee filed a complaint under section 74 of the *ESA* alleging the Appellant failed to pay him all his wages.

7. The Employee began his employment as a guest services agent for the Appellant's hotel business, but after only two days, on March 16, 2021, he transferred to the restaurant side of the business where he became a supervisor; his rate of pay was $16.00 per hour. On April 1, 2021, the Employee was given the position of restaurant manager, and his rate of pay was $45,000.00 per year. On July 1, 2021, he received a raise to $52,000.00 per year. He was paid a set amount of wages each pay period regardless of the number of hours worked.

8. In the Determination, the Delegate found the Employee did not meet the definition of a manager under the *Regulation*, because his principal duties did not consist of supervising or directing human or other

resources. The finding that the Employee was not a manager was not disputed by the Appellant in this appeal.

9. The Delegate then found that the Employee was owed outstanding wages and, to calculate those wages, she determined the Employee's regular wage based on his annual salary and normal hours of work in accordance with the definition of "regular wage" in section 1 of the *ESA*. The Delegate determined that, based on a normal work week of at least 40 hours, the Employee's regular wage was $21.63 per hour from April 1, 2021, to June 30, 3021, and his regular wage was $25.00 per hour from July 1, 2021, to October 15, 2021.

10. The Delegate calculated the Employee's outstanding wages based on his regular wages and his hours worked. The parties provided a record of daily hours and wage statements during the investigation, which were undisputed. The Delegate determined the Employee was owed a total of $10,690.90, including regular wages, overtime wages, vacation pay and interest.

ARGUMENT

11. When asked in the appeal form to select its grounds of appeal, the Appellant indicated that evidence has become available that was not available at the time the Determination was being made. In its submission, the Appellant provides three documents, as well as brief arguments regarding them:

a. **Regular wages**: The Appellant submits recalculations of the wages owed to the Employee using minimum wage as opposed to the regular wages determined by the Delegate in the Determination. The Appellant argues that the Employee's salary was not based on 40 hours of work a week, but the hours required to accommodate the restaurant's workload each day. The Appellant also submits that the Employee received "extra pay" (i.e., tips) that was improperly paid.

b. **Restaurant hours**: The Appellant submits a spreadsheet showing, from March 16 to October 8, 2021, the hours the restaurant was open, the Employee's "punched" hours, the Employee's "extra pay" (i.e., tips) and the restaurant's revenue. The Appellant says that the hours submitted by the Employee were higher than the number of hours the restaurant was open.

c. **Restaurant revenue**: The Appellant submits a document summarizing the restaurant's revenue by month during the Employee's employment with the Appellant. The Appellant submits there was no reason for extended hours because business was slow due to the COVID-19 pandemic and wildfires in the area.

ANALYSIS

12. Section 112(1) of the *ESA* provides that a person may appeal a determination on one or more of 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.

13. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with a determination: see *Tejinder Dhaliwal (Re)*, 2021 BCEST 34 at para 13.

14. This Tribunal set out the test for new evidence in *Davies et al.*, BC EST # D171/03, as follows (emphasis added):

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> 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 potential 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.

15. In this case, I find that the documents included with the Appellant's submission regarding the restaurant's hours and revenue do not meet the test for fresh evidence, because, on their face, there is no indication that they – or any information contained in them – could not have been provided during the investigation of the complaint. Moreover, I do not consider those documents to have high potential probative value, because they are only indirectly related to the issue of the Employee's hours. Notably, and as discussed above, the parties provided a record of daily hours and wage statements during the investigation, which provide direct evidence for the Employee's hours, and they were undisputed by the Appellant. In fact, the recalculations of the wages owed to the Employee submitted by the Appellant use the same hours of work used by the Delegate in the Determination.

16. In making its submission regarding the Employee's regular wages, the Appellant does not appear to be introducing new evidence, but rather arguing the Delegate made an error of law in how she determined the Employee's regular wages. The Appellant argues the Employee's regular wages should have been calculated using minimum wage, but it does not provide any reasons for its argument.

17. The determination of the Employee's regular wages, as defined in section 1 of 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*).

18. 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": see *Cultus Lake Waterpark Ltd. (Re)*, 2023 BCEST 54 at para 21, citing *Housen v Nikolaisen*, 2002 SCC 33.

19. In this case, the Appellant agreed during the investigation that the Employee normally worked at minimum 40 hours a week – e.g., see page 13 of the record, which describes a conversation with a representative of the Appellant who confirmed that the Employee usually worked split shifts from 6:45 a.m. to 12:00 p.m. and 4:30 pm to 9:00 p.m., six to seven days per week. Section 35 of the *ESA* provides that an employer must pay an employee overtime wages if the employer requires, or directly or indirectly allows, the employee to work more than eight hours a day or 40 hours a week.

20. As a result, the Delegate calculated the Employee's regular wages by dividing his yearly wage (i.e., $45,000.00 per year and then $52,000.00 per year) by the product of 52 times Employee's normal weekly hours of work (i.e., 40 hours per week). I find this calculation to be reasonable and supported by evidence that was before the Delegate, and the Appellant has not provided any basis for why the Employee's regular wages should be equal to minimum wage.

21. 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

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

Brandon Mewhort
Member
Employment Standards Tribunal