

An appeal

- by -

Szado Fishing Ltd.  
(“Szado”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2014A/105

**DATE OF DECISION:** April 8, 2015

## DECISION

### SUBMISSIONS

Jan Szado on behalf of Szado Fishing Ltd.  
Brenda Sillito on behalf of the Director of Employment Standards

### OVERVIEW

1. On January 15, 2015, the Tribunal issued a decision, BC EST # D009/15, in respect of an appeal filed by Szado Fishing Ltd (“Szado”) from a Determination issued by the Director of Employment Standards (the “Director”) on July 11, 2014.
2. Applying section 114(1) of the *Employment Standards Act* (the “Act”), that decision dismissed all but one matter raised in the appeal. That matter had to do with the acknowledgement by the complainants, Tevita Burekama and Nikasio Leweni, that they had received cash advances from Szado during their employment. The Determination contained no consideration of whether these advances should be considered “wages” paid to the complainants and factored into the final calculation of the wages owed to each of them. Based on a concern that the failure to specifically address the nature of the advances made in the Determination might be an error of law, that aspect of the appeal was not dismissed and the parties were asked for submissions. The pertinent part of the appeal decision states, at para. 41:

Section 114 of the *Act* allows me to dismiss “*all or part of the appeal*” for any of the reasons listed. I dismiss all of this appeal except that relating to the advances made as I find no merit to any of it. In respect of the advances, I seek submissions from the complainants and the Director. From the complainants, I wish to be advised of the amount of these advances and that information should include confirmation by Western Union of the 4 transactions identified in the appeal submission by Szado – 82880335 and 55768151 – and from the Director, I wish to be advised whether these advances should or should not have been considered wages, and in either case, why.

3. The Director has filed a submission as requested. The complainants have made no submission.

### ISSUE

4. The issue in this aspect of the appeal is whether the Director erred in law on the question of whether advances made to the complainants during their employment should have been considered wages.

### THE FACTS

5. The facts relating to this issue are set out in BC EST # D009/15 in para. 21:

The Determination indicates Mr. Szado provided little in the way of personal and business expense records or records showing cash advances were made by Szado to the complainants before and during their term of employment, although the complainants acknowledged being paid “a small advance they sent home to Fiji”.

6. The record provided by the Director under section 112(5) of the *Act* contains the following information on this issue:

- Szado alleged he had paid advances to the complainants, \$800.00 to Mr. Burekama and \$900.00 to Mr. Leweni; and
  - The complainants acknowledged they had received advances from Szado; Mr. Leweni had received two advances, for \$150.00 and \$250.00, and Mr. Burekama had received one advance of \$50.00.
7. In the complainants' letter to the Director dated November 5, 2013, responding to the Director's request for the details of their complaints, they say, among other things:
- . . . there were on two occasions when Mr. Nikasio Leweni requested him [Mr. Szado] for some advance payment so that he could send money home to his wife and family. . . . I also requested and received an advance payment of \$50 on one occasion.
8. The above comments refer to advances made during their term of employment.
9. In its appeal, Szado says the complainants were sent money, "as an advance", by Szado in "four separate transactions" and the numbers of these transactions were provided in the appeal.
10. As indicated above, the Determination contains no analysis or conclusion about the nature, or total amount, of the advances made to the complainants during their employment.

## **ARGUMENT**

11. The submission of the Director on this issue takes the position the advances were not considered to be wages; that the Director looked at whether the advances met the definition of wages in the *Act* and found they did not.
12. The Director submits that while Szado submitted a hand written list of money that had been paid out by Szado for each of the complainants, which included "advances", Szado did not indicate what the advances were for or when they were paid. The list did not indicate the amounts were advances on wages. The Director says the advances were grouped with other items "one would consider to be personal expenses" and had requested further information to determine if the advances were part of travel or wages or bonuses, but was not provided with any further information. The Director submits it was found that Szado did not provide the evidence required to establish the advances met the definition of wages in the *Act*.
13. The Director also says the complainants, while acknowledging receipt of advances, did not provide any details around these advances, although they did agree to pay the amounts of these advances.
14. Mr. Szado, in response to the submission of the Director, disagrees with the explanation provided, asserting the indication that Szado did not provide documents when requested by the Director is "ridiculous". Mr. Szado suggests the Director, although confirming Szado had "all the bills", showed no interest in seeing them. Mr. Szado argues the crew gets advances for their personal use and that money is deducted at the end from their wages. He says the fact that wages was listed with other expenses was nothing more than being a concise way of listing the expenses incurred by Szado for the complainants and that the bills for each item could have been viewed separately by the Director if requested.

## ANALYSIS

15. 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 (B.C.C.A.):
  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.
16. It is also an error of law to fail to provide reasons for the Determination: see *Michael Bishop, a Director or Officer of Mosaic Technologies Corporation*, BC EST # D120/04 (applying *R. v. Sheppard*, 2002 SCC 26, 162 C.C.C. (3d) 298).
17. The term “wages” is broadly and non-exhaustively defined in s. (1) of the *Act* to include, among other things, “salaries, commissions or money, paid or payable by an employer to an employee for work” and “money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency”.
18. The difficulty I have with the position of the Director is that the assertion made that the advances were “looked at” and not considered to be wages is not borne out in the Determination. There is no indication in the Determination that any assessment or analysis was made of the advances. Even the submission made by the Director in response to my request to address this matter does not provide any foundation or rationale for the position taken. It does no more than provided the bald statement that the advances were not wages.
19. After giving fair assessment to the Determination, the material in the section 112(5) “record” and the submission of the Director, I find the Director committed two errors of law: first by acting without any evidence; and second by failing to provide reasons. In her submission, the Director says she “looked” at whether the advances met the definition of wages in the *Act* and found they did not.
20. I agree with the Director that the evidence required to determine whether the advances met the definition of wages in the *Act* was not provided. There was definitely a paucity of evidence relating to the advances. That does not, however, support the position of the Director, since neither was there evidence presented that the advances were *not* wages.
21. The only reference in the Determination or in the section 112(5) “record” to advances is the assertion by Szado that advances were paid and the acknowledgement by the complainants that advances were received. The information provided by the parties demanded further investigation and assessment, yet there is nothing in the material that represents a finding on what the advances represented. No consideration was given to the purpose of the advances in the context of the definition of wages in the *Act*. By simply reaching the result that the advances were not wages, the Director acted without any evidence. The circumstances of this case is not one where the reasons for the Determination can be read “as a whole”, in the context of the evidence and the arguments by the parties and found to be sufficient. There is just no logical connection between the facts and the Determination.

22. In result, the appeal succeeds on this point. The Determination is cancelled and referred back to the Director. I will note, for clarification, that the Determination is being cancelled on the matter addressed in this decision. Its cancellation does not “open the door” to the other matters raised in the appeal. Those matters were dismissed in BC EST # D009/15. As a final comment, in my view a proper investigation of this matter will require the Director to acquire the details of the advances, including the records of the Western Union transactions. The Director has authority to acquire that information under section 85 of the *Act*.

### **ORDER**

23. Pursuant to section 115 of the *Act*, I order the Determination dated July 11, 2014, be cancelled and the matter referred back to the Director.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**