

An appeal

- by -

0696591 BC Ltd. carrying on business as Powell River Apartments
(“PRA”)

- 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: Carol L. Roberts

FILE No.: 2016A/65

DATE OF DECISION: July 15, 2016

DECISION

SUBMISSIONS

Tod English on behalf of 0696591 BC Ltd. carrying on business as Powell River Apartments

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 0696591 BC Ltd. carrying on business as Powell River Apartments (“PRA”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on April 6, 2016. In that Determination, the Director found that PRA had contravened sections 18, 58 and 63 of the *Act* in failing to pay Terrance Daigneault (“Mr. Daigneault”) wages. The Director ordered PRA to pay the amount of \$11,212.43 representing wages, annual vacation pay, compensation for length of service and interest. The delegate also imposed five administrative penalties for the contraventions, in the total amount of \$2,500. The deadline for filing an appeal of the Determination was 4:30 p.m. on May 16, 2016.
2. PRA appeals the Determination, contending that the delegate miscalculated the amount owing to Mr. Daigneault. PRA argues that Mr. Daigneault received or “stole” amounts in excess of the amount determined owing and that those amounts ought to be deducted from the award.
3. PRA filed its appeal on May 16, 2016, and sought an extension of time in which to submit supporting documents. The Tribunal granted PRA’s application and on June 7, 2016, PRA submitted further material, including a revised appeal document. PRA alleges that the delegate failed to observe principles of natural justice in making the Determination, and says that new evidence had become available that was not available at the time the Determination was made.
4. This decision is based on PRA’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. PRA operates a residential apartment complex in Powell River, British Columbia. Mr. Daigneault was a tenant who, beginning in 2013, performed some renovation work in the complex. That work led to additional work, and Mr. Daigneault ultimately became the “resident manager”. Mr. Daigneault was paid for the work and was also provided with an apartment unit.
6. In July 2014, Mr. Daigneault and Mr. English had a dispute over unpaid wages and the employment relationship ended two or three weeks later.
7. Mr. Daigneault filed a complaint on January 20, 2015, and on August 21, 2015, the delegate conducted a hearing. Mr. Daigneault appeared on his own behalf, Tod English (“Mr. English”), PRA’s sole director, appeared for PRA.
8. The delegate found that Mr. Daigneault met the definition of resident manager under section 1 of the *Employment Standard Regulation*, and that Mr. Daigneault’s employment was terminated. PRA does not dispute

the delegate's conclusions regarding Mr. Daigneault's entitlement to vacation pay, compensation for length of service, interest or penalties.

9. The delegate determined that the last day of Mr. Daigneault's employment was August 5, 2014, and as such, the period in which he was able to recovery wages was from February 6, 2014, to August 5, 2014.
10. Shortly after the end of Mr. Daigneault's employment, Mr. English alleged that Mr. Daigneault stole between \$9,000 and \$12,000 in rent money that he collected during the last few days of his employment. At the hearing, Mr. Daigneault admitted that he retained \$3,200 of the rent money without authorization. He denied that he took \$9,000 to \$12,000, as Mr. English alleged.
11. The delegate found PRA's March 28, 2014 "reconciliation document" acknowledging an \$8,000 debt owed to Mr. Daigneault as of February 1, 2014, as the best evidence of the financial position of the parties at the start of the recovery period. The delegate reviewed payments made to Mr. Daigneault in the total amount of \$24,000 between February 1 and June 25, 2014, and determined that \$8,000 of that amount represented wage arrears. The delegate determined that Mr. Daigneault had been paid \$16,000 for the recovery period. Although the delegate noted that Mr. Daigneault acknowledged retaining \$3,200 in addition to the wages without PRA's consent, he found that the *Act* did not permit PRA to offset that amount from wages owed.
12. The delegate determined that Mr. Daigneault was paid \$4,000 per month, part of which was paid by way of the provision of an apartment unit valued at \$800 per month. The delegate found that PRA was "regularly and significantly delinquent" compensating Mr. Daigneault for his work and that the money paid to Mr. Daigneault was not properly identified as payment for renovations or building management nor did it identify any particular pay period. The delegate calculated Mr. Daigneault's outstanding wages based on his monthly salary less amounts paid to him, for total wages in the amount of \$8,000.
13. PRA argues that Mr. Daigneault was paid \$24,000 over the period of his employment, received an apartment unit valued at \$800 per month and a second one for \$850 per month for a five month period. In addition to that, PRA says that Mr. Daigneault retained \$4,617 cash between February and June, an additional \$3,200 in July and stole an additional \$9,000. PRA says that the delegate failed to properly consider the evidence before him and miscalculated Mr. Daigneault's wage entitlement

ANALYSIS

14. Section 114 of the *Act* 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.

15. Section 112(3)(a) of the *Act* provides that a party wishing to appeal a Determination must deliver that appeal to the Tribunal within 30 days of the date of the Determination, if the person was served by registered mail.
16. Section 112(1) of the *Act* 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.
17. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that PRA has not met that burden.
18. PRA's written submissions are, in essence, an assertion that the delegate's conclusion is wrong.
19. In *J.C. Creations Ltd.* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned." I have considered the appeal under each of the statutory grounds of appeal.

Failure to observe the principles of natural justice

20. Although PRA contends that the Director failed to observe the principles of natural justice, there is nothing in the appeal documentation that refers to this ground of appeal. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
21. I am satisfied that PRA knew the case it had to meet and a full opportunity to present all relevant evidence. There is no assertion, or evidence, that the delegate was biased. In short, I find no merit to this ground of appeal.

Error of Law

22. The Tribunal as 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.

23. Calculation errors constitute factual errors rather than legal errors unless an appellant can establish that there was no evidence to support the calculations. In my view, there was ample evidence before the delegate to support his wage determination. PRA does not dispute that it failed to maintain employer records as prescribed by the *Act*. The delegate assessed the oral and documentary evidence of the parties and relied on the employer's documents as the basis for his starting point for calculating Mr. Daigneault's wages. There was insufficient evidence to conclude that Mr. Daigneault had "stolen" money from PRA in the amount asserted by Mr. English. Although Mr. Daigneault conceded that he improperly retained a lesser amount, the delegate found no basis to offset that amount from the outstanding wages. I find no error of law in that conclusion (see section 21 of the *Act*).
24. I also find that the delegate's conclusions were reasonable based on the evidence before him; in other words, there was a rational basis for the calculations made by the delegate and I decline to interfere with his conclusion.

New Evidence

25. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (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 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.
26. The material PRA submits on appeal was not only before the delegate at the hearing but was also considered in his analysis.
27. As the Tribunal has said on many occasions, an appeal is not an opportunity to re-argue a case that has been fully made before the delegate.
28. The appeal is dismissed.

ORDER

29. Pursuant to section 114(1) of the *Act*, I deny the appeal. Pursuant to section 115 of the *Act*, I order that the Determination, dated April 6, 2016, be confirmed in the amount of \$13,712.43 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal