

An appeal

- by -

0993683 B.C. Ltd. carrying on business as Bear Mountain Liquor  
(“BML”)

- 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.:** 2016A/73

**DATE OF DECISION:** July 21, 2016

## DECISION

### SUBMISSIONS

Steven Bedell on behalf of 0993683 B.C. Ltd. carrying on business as Bear Mountain Liquor

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), 0993683 B.C. Ltd. carrying on business as Bear Mountain Liquor (“BML”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 2, 2016
2. The Determination found BML had contravened Part 4, section 34, Part 7, section 58, and Part 8, section 63 of the *Act* in respect of the employment of Ashley Lineham (“Ms. Lineham”) and ordered BML to pay Ms. Lineham wages in the amount of \$1,118.25 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$2,118.25.
3. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination. BML seeks to have the Determination varied or cancelled.
4. In correspondence dated June 10, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to BML. It has been provided with the opportunity to object to its completeness and has indicated in correspondence to the Tribunal on June 29, 2016, that there is no objection to the completeness of the record. Accordingly, the Tribunal accepts it as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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;*

(b) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director and Ms. Lineham will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

## **ISSUE**

8. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

## **THE FACTS**

9. BML operates a beer and wine store in Dawson Creek, BC. Ms. Lineham was employed by BML as a clerk and assistant manager from March 18, 2014, to January 26, 2016, at a rate of \$17.50 an hour.
10. Ms. Lineham filed a complaint with the Director alleging BML had contravened the *Act* by failing to pay minimum daily pay for January 25, 2016, and compensation for length of service.
11. BML contested both claims, arguing Ms. Lineham was not entitled to minimum daily pay because she was late for work and did not start work, but was immediately suspended and sent home. BML asserted Ms. Lineham was not entitled to compensation for length of service because she quit her employment on January 26, 2016.
12. The Director conducted a complaint hearing, at which Ms. Lineham gave evidence on her own behalf and Steven Bedell and Galia Bedell (“Mr. Bedell” and “Ms. Bedell”, respectively), the owners, directors and officers of BML, gave evidence on behalf of the employer. Based on the evidence, which is summarized in the reasons for Determination, the Director found Ms. Lineham was entitled to two hour’s wages for January 25, 2016, as she had reported for work that day and was not otherwise disentitled to minimum daily pay. The Director found Ms. Lineham had not quit her employment and was in the circumstances entitled to compensation for length of service in the amount prescribed by the *Act*.
13. The Director imposed two administrative penalties totalling \$1,000.00.

## **ARGUMENT**

14. BML raises two challenges to the Determination.
15. First, BML disputes the finding that Ms. Lineham did not quit her job, submitting the words used and the conduct of Ms. Lineham in the meeting of January 26, 2016, where she was given a suspension letter, indicated an intention on her part to quit. In support of this challenge, BML relies on evidence that Ms. Lineham turned in her keys, petty cash and float to Ms. Bedell, stating as she did that she “doesn’t even want to be in the building anymore”. I will note the Director made no finding that Ms. Lineham uttered the words attributed to her in the previous sentence. BML submits that based on Ms. Lineham’s actions and words, it was reasonable for BML to conclude she had quit and that ought to have been the finding of the Director. Presumably, although not specifically asserted in the appeal submission, BML’s position must be that the Director’s finding to the contrary was not correct or reasonable.

16. Second, BML submits the penalty for contravening section 34 of the *Act*, which was a first offense and involved a dollar amount of \$35.00, was “excessive” and unfair.

## ANALYSIS

17. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal 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.*

18. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

19. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

20. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

21. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

22. BML has grounded this appeal in error of law and failure to observe principles of natural justice in making the Determination.

23. I shall first address the natural justice ground of appeal.

24. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWT Business World Incorporated*, BC EST #D050/96)

25. It is clear that BML was afforded the procedural rights captured within the above statement.

26. There are no different or additional natural justice concerns that might arise in this case. The arguments of BML, while disputing findings made in the Determination, is devoid of any analysis that might identify

natural justice or fair hearing concerns in the process applied by the Director to administer Ms. Lineham's complaint.

27. Natural justice does not require the Director to accept the evidence and assertions that each party advances in support of their position. Nor does it prohibit the Director from reaching a conclusion on all of the evidence that might be inconsistent with the position of one of the parties, so long as reasons are provided for that conclusion and it is based on relevant considerations, which I find to be the case here.
28. On its face this ground of appeal is without merit.
29. BML has also grounded its appeal in error of law. The burden in this ground of appeal is also on BML to show such error.
30. On an assessment of the Determination, I find that burden has not been met.
31. 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.
32. BML does not raise any issue of interpretation or general law in this appeal. The allegation of "error of law" is grounded exclusively in an apparent disagreement with findings made by the Director and conclusions based on the facts drawn from those facts.
33. BML relies on the evidence that Ms. Lineham, nearing the end of the January 26, 2016, meeting, went to her car, retrieved and turned over to Ms. Bedell her keys, petty cash and float. There was no dispute that occurred, but simply stating that act, ignores the actual finding made by the Director relating to it, which was that before going to her car, "Mr. Bedell asked Ms. Lineham to leave at the business any items belonging to the store". There was the additional evidence, from Mr. Bedell, that he told Ms. Lineham at that meeting to "remove the business's security apps from her phone", which she did at that meeting and showed him she had done so.
34. The Director found the conduct of Mr. Bedell at the January 26 meeting to be consistent with an employer terminating an employee. Ms. Lineham had given evidence that Mr. Bedell had told her in that meeting she was "done" and "fired". More significantly, the Director found BML had not met the evidentiary burden of showing Ms. Lineham had quit.
35. The Tribunal noted in the *Britco Structures Ltd., supra*, that the test for establishing findings of fact constitute an error of law is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.

36. I find no error of law shown in the findings or conclusions of fact. The findings of fact and conclusions based on those findings were reasonably and logically grounded in the evidence; they may not be disturbed by the Tribunal on appeal.
37. As with the natural justice ground of appeal, there is no merit in this ground of appeal.
38. BML says the imposition of an administrative penalty for the section 34 contravention is excessive and unfair. The following excerpt from *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04, at pages 5 – 6, provides a complete response to the arguments raised by BML in respect of the administrative penalty imposed:
- As the Tribunal recently noted in *Summit Security Group Ltd.* (BC EST #D059/04, Reconsidered BC EST #D133/04), administrative penalties under the *Act* are part of a larger scheme to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the Act, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.
- It does appear that the penalty assessment against Brother's is excessive in light of the amounts owing to Mr. Joly, and thus, for essentially minor breaches, the cumulative penalties seem unfair. However, in *Douglas Mattson* (BC EST #DRD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgment about what is "fair" or "logical". Further, in *Acton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the Act provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme."
39. The circumstances here are not dissimilar from those in *Marana Management Services Inc.*; it is irrelevant that the wage liability resulting from the section 34 contravention was minor. The legislative provisions relating to administrative penalties make no distinction between minor and significant contraventions. The statutory preconditions for imposing that administrative penalty were met; the penalty was mandatory. The Tribunal may not ignore the clear language of the statute, making what was clearly intended by the legislature to be a mandatory administrative penalty scheme into a permissive scheme because the amounts found in the Determination to be owing are small.
40. There is no statutory basis for this aspect of the appeal.
41. In sum, the entirety of the appeal on its face is devoid of merit. I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

**ORDER**

42. Pursuant to section 115 of the *Act*, I order the Determination dated May 2, 2016, be confirmed in the amount of \$2,118.25 together with any interest that has accrued under section 88 of the *Act*.

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