

An appeal

- by -

Three Voices of Healing Society  
(“TVHS”)

- 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/67

**DATE OF DECISION:** July 28, 2016

## DECISION

### SUBMISSIONS

Karen LeClair

on behalf of Three Voices of Healing Society

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Three Voices of Healing Society (“TVHS”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on April 21, 2016. In that Determination, the Director found that TVHS had contravened sections 42, 58 and 63 of the *Act* in failing to pay Gerard H. Gregoire (“Mr. Gregoire”), Lydia V. Gregoire (“Ms. Gregoire”) and Gladys R. Sam (“Ms. Sam”) (collectively, the “employees”) \$15,552.28, representing overtime wages, annual vacation pay compensation for length of service and interest. The Director also imposed administrative penalties in the total amount of \$1,000 for the contraventions, for a total amount owing of \$16,552.28.
2. TVHS appeals the Determination and says that new evidence has become available that was not available at the time the Determination was being made.
3. This decision is based on the submissions of TVHS, 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

4. TVHS is a BC registered society which operated an addictions treatment centre in Invermere, British Columbia. TVHS’s funding was discontinued and the treatment centre closed at the end of December 2016. On December 17, 2016, TVHS notified the employees in writing that their employment would end on December 31, 2016, and that they would be paid until that date. However, Mr. Gregoire and Ms. Sam said that their employment was terminated immediately and that they did not receive their final wages. Ms. Gregoire was on medical leave when TVHS closed its doors and did not receive a letter of termination.
5. The delegate investigated the employees’ complaints.
6. Karen LeClair (“Ms. LeClair”), a director of TVHS, informed the delegate that TVHS was withholding the employees’ wages pending a criminal investigation. The delegate advised Ms. LeClair that withholding wages pending a criminal investigation was a contravention of section 21 of the *Act*. He provided TVHS with details of the complaints and supporting documentation and invited them to respond by March 4, 2016. The delegate also issued a Demand for Employer Records, notifying TVHS that he would be making a decision based on the information provided by that date. The delegate sent the letter by registered mail to TVHS as well as to its Registered and Records office. Both letters were returned unclaimed. The delegate also sent copies of the letter by regular mail to all society directors and by e-mail to Ms. LeClair. The delegate received no response.
7. The delegate determined that TVHS had knowledge of the complaints and was given a full opportunity to respond to the complaints. He noted that TVHS did not deny the employees were owed wages, but stated it was withholding those wages because of a criminal investigation. The delegate noted that section 21 of the

*Act* prohibited the withholding of wages for any purpose and that, in failing to pay all wages owing within 48 hours of the date of termination, TVHS had contravened section 18 of the *Act*.

8. The delegate also noted that TVHS had failed to provide any employment records according to the Demand, contravening section 46 of the *Employment Standards Regulation*.
9. The delegate determined that the employees were entitled to wages as noted above.

#### *Argument*

10. TVHS contends that Ms. Gregoire last worked at TVHS on November 26, 2015, and did not return to work. In support of her submission, Ms. LeClair attached copies of what she stated were texts Ms. Gregoire sent to TVHS in December 2015 and she also made reference to a letter Ms. Gregoire sent to FNHA (“First Nations Health Authority”) in September 2015. Ms. LeClair’s appeal also contains responses to specific allegations made by Ms. Gregoire in that letter.
11. Ms. LeClair contends that TVHS conducted a lengthy investigation into certain actions taken by Ms. Sam and Mr. Gregoire which I infer relate to the criminal investigation noted by the delegate. Ms. LeClair states that “[n]o compensation for length of service is owed due to termination with cause” and that “[n]o further wages are owed.”

### **ANALYSIS**

12. 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 made.
13. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that TVHS has not met that burden and dismiss the appeal for the following reasons.

#### New Evidence

14. 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.
15. TVHS had full opportunity to submit documents in support of its position to the delegate during the investigation. The delegate issued demands for documents and offered significant opportunity to TVHS to

respond to the allegations. The material TVHS submits on appeal was not only clearly available during the investigation, it ought to have been produced at that time. It does not meet the test for new evidence.

16. As the Tribunal has said on many occasions, an appeal is not an opportunity to submit evidence that should have been submitted during the investigation.
17. Having reviewed the material, I am not persuaded that the delegate erred in law in making the decision. TVHS does not dispute that it owes wages to two of the employees. The delegate informed TVHS that it had no authority under the *Act* to withhold wages pending a criminal investigation. I find no error of law in this conclusion.
18. The appeal is dismissed.

### **ORDER**

19. Pursuant to section 115 of the *Act*, I deny the appeal. I Order that the Determination, dated April 21, 2016, be confirmed in the amount of \$16,552.28 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**