

An appeal

- by -

Independent Quality Home Care Ltd.  
(“IQHC”)

- 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.:** 2015A/94

**DATE OF DECISION:** October 16, 2015

## DECISION

### SUBMISSIONS

Tracey Clausen	on behalf of Independent Quality Home Care Ltd.
Cris Gensaya	on her own behalf
Sukh Kaila	on behalf of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Independent Quality Home Care Ltd. (“IQHC”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 26, 2015. In that Determination, the Director found that IQHC had contravened sections 18, 40, 58 and 63 of the *Act* in failing to pay Cris Gensaya (“Ms. Gensaya”) \$9,151.17, representing regular and overtime wages, annual vacation pay, compensation for length of service and interest. The Director also imposed four administrative penalties in the total amount of \$2,000 for the contraventions, for a total amount owing of \$11,151.17.
2. IQHC appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination. IQHC also says that 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 the parties, 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. Ms. Gensaya was employed in a number of capacities for IQHC, a home care business, from November 19, 2005, until July 2, 2013. On July 31, 2013, Ms. Gensaya filed a complaint alleging that IQHC contravened the *Act* by failing to pay her compensation for length of service. IQHC took the position that Ms. Gensaya’s employment had been terminated for cause, specifically because Ms. Gensaya had been paying herself additional wages without the Employer’s consent.
5. At the hearing before the delegate, IQHC’s owner/operator, Tracey Clausen (“Ms. Clausen”), contended that Ms. Gensaya had paid herself additional wages in the amount of \$1,186. On July 3, 2013, IQHC sent Ms. Gensaya a letter terminating her employment for paying herself a sum that was not approved after being told not to do so, which constituted a breach of trust.
6. IQHC submitted documents in support of its position that Ms. Gensaya had overpaid herself. At the hearing, Ms. Clausen advanced reasons for terminating Ms. Gensaya’s employment, including allegations that Ms. Gensaya had obtained loans from co-workers and giving preferential treatment to those co-workers, for paying her daughter, also an IQHC employee, wages for days she was not scheduled for work, for making unauthorized mileage claims and for various invoice discrepancies. IQHC stated that these grounds were discovered during a post-termination investigation.

7. IQHC contended that Ms. Gensaya's last day of work was June 15, 2013, and that she was paid in full for all work performed.
8. Ms. Gensaya contended that she was wrongfully accused of fraudulent activity and disputed IQHC's allegations. She said that she performed a number of tasks for IQHC including team leader, care-aide, payroll and human resources, and that the payment was for performing additional tasks. Ms. Gensaya also claimed wages for work performed between June 16 and July 2, 2013, and submitted a handwritten diary that recorded her hours of work. Ms. Gensaya also submitted written statements from other employees, only one of whom appeared at the hearing. Although that witness, Eufemia Paner, could not testify to the total number of hours Ms. Gensaya worked, she confirmed that Ms. Gensaya did work on June 19 and 20, 2013.
9. The delegate determined that the sole reason for the termination of Ms. Gensaya's employment was that set out in the July 3, 2013, termination letter, which was that Ms. Gensaya was paying herself additional wages. He concluded that the other reasons for the termination advanced at the hearing were not the reasons Ms. Gensaya was terminated on July 3, 2013. The delegate also found no evidence to support the additional allegations.
10. After reviewing IQHC's evidence in support of its assertion that Ms. Gensaya was overpaying herself and considering the number of hours Ms. Gensaya worked and the overtime rates, the delegate concluded that IQHC owed Ms. Gensaya overtime wages in the amount of \$1,903.89. The delegate found that IQHC had not demonstrated any basis to terminate Ms. Gensaya's employment.
11. The delegate also determined that Ms. Gensaya had worked during the period June 16 - July 2, 2013, based on Ms. Gensaya's own documents, which consisted of an hour-by-hour record of the care she provided on June 19 and 20, 2013. The delegate found the document, which was detailed and said to be kept contemporaneously, to be the best evidence, and which was supported by payroll records and employee statements. However, the delegate was only able to conclude that Ms. Gensaya worked eight hours over this period in the absence of any other comprehensive record of her hours of work. The delegate found that Ms. Gensaya was entitled to wages.

#### *Argument*

12. IQHC asks that "the contraventions be reconsidered" as the hearing "precluded evidence that would allow the rules of natural justice to favoured our case" [reproduced as written] and sought a new hearing. IQHC submits that Ms. Gensaya's termination was based on fraudulent activity "including several factors uncovered in the final two weeks of employment."
13. Specifically, IQHC alleged that the delegate considered an invoice submitted by Ms. Gensaya that was not introduced into evidence "possibly" for the delegate's use in determining Ms. Gensaya's wages owing.
14. Attached to IQHC's appeal submission are numerous documents that IQHC contends support its termination of Ms. Gensaya for cause.
15. IQHC's submission consists largely of what appears to be information and arguments that were made at the hearing before the delegate.
16. The delegate submits that IQHC's allegations that he relied on information that was not properly part of the record are unfounded. He says that Ms. Clausen's reference to an unspecified invoice is not reflected in the

record, the completeness of which was not challenged by IQHC, and which was not considered in arriving at the Determination.

17. Ms. Gensaya's submission repeats some of the evidence in the Determination and, in effect, seeks to have the Determination upheld.

## ANALYSIS

18. 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.

19. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that IQHC has not met that burden.

### *Failure to observe the principles of natural justice*

20. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that IQHC was denied natural justice.

21. The Director's delegate submitted the record before him at the time of hearing Ms. Gensaya's complaint. The delegate says, and I accept, that all submissions in the record were disclosed to the parties prior to the issuance of the Determination. At no time did IQHC dispute the completeness of the record.

22. IQHC now argues that the delegate ought not have relied on certain, unspecified, documents. IQHC has provided no evidence that the delegate relied on documents that do not form part of the record. I find no basis for this ground of appeal.

### *New Evidence*

23. 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.

24. IQHC had full opportunity to submit documents in support of its position at the hearing before the delegate. All of the material submitted on appeal was available at the time of the hearing and does not meet the test for

new evidence. In my view, IQHC's appeal is an attempt to re-argue its position at the hearing. 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.

*Error of law*

25. I understand IQHC to say that the delegate erred in not properly considering information obtained during Ms. Gensaya's final two weeks of employment and which was not referred to in the termination letter. IQHC says that it should be able to rely on this information to establish just cause to terminate her employment. As noted by the Tribunal in *Wendy Benoit and Ed Benoit operating as Academy of Learning* (BC EST # D138/00), section 63 of the *Act* does not permit an employer to allege just cause for dismissal that is different from the reasons set out at the time the employee was dismissed. The Tribunal noted that length of service compensation is a statutory benefit earned through employment and is intended to give an employee a brief period which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. The Tribunal distinguished compensation for length of service from common law damages for wrongful dismissal in which information acquired after the breach can have a bearing on the respective rights of the parties under the contract.
26. I find no basis to conclude that the delegate erred in law.
27. I conclude that IQHC has not met the burden of establishing any of the statutory grounds of appeal.
28. The appeal is dismissed.

**ORDER**

29. Pursuant to section 115 of the *Act*, I Order that the Determination, dated May 26, 2015, be confirmed in the amount of \$11,151.17 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**