

Citation: Qualicum Breeze Beach Resort Ltd.
2025 BCEST 17

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Qualicum Breeze Beach Resort Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

SUBMISSIONS: Carolyn Graeme, on behalf of Qualicum Breeze Beach Resort Ltd.

FILE NUMBER: 2024/059

DATE OF DECISION: February 3, 2025

DECISION

OVERVIEW

1. The matter before me involves a determination issued by the Director of Employment Standards (the “**Director**”) on May 21, 2024 (the “**Determination**”), in which two complainants (the “**Complainants**”) were found to be employees under the Employment Standards Act (“**ESA**”), rather than volunteers. The Director ordered Qualicum Breeze Beach Resort Ltd. (“**Qualicum Breeze**”) to pay wages and vacation pay to the Complainants and imposed mandatory administrative penalties for breaches of the *ESA*.
2. By way of background, the Complainants initially connected with Qualicum Breeze through a website called “Workaway.”
3. The Complainants reached an agreement with Qualicum Breeze through the Workaway platform and stayed with Qualicum Breeze for a period of time, performing certain work in exchange for room and board. The Complainants ended their stay with Qualicum Breeze and filed the complaints alleging they should have been paid for the work they were required to do.
4. In addition to determining that the Complainants were employees under the *ESA*, the Delegate of the Director concluded that they performed work that should have attracted wages. Further, in response to Qualicum Breeze’s assertion that any wages should be offset by the value of the accommodation provided, the Delegate noted that such a setoff, while permitted under section 22 of the *ESA*, requires an agreement in writing, which was not present on the facts.
5. Qualicum Breeze appeals on the bases that the Director erred in law and failed to observe the principles of natural justice in reaching the Determination and on the basis of new evidence that was not available at the time the Determination was made (the “**Appeal**”).
6. Qualicum Breeze disputes many of the assertions made by the Complainants and says the conclusions reached by the Director were made in the absence of key supporting evidence from the Complainants. In addition, Qualicum Breeze says the delegate investigating the complaints (the “**Investigator**”) assisted the Complainants, but did not offer the same assistance to Qualicum Breeze.
7. In addition, although Qualicum Breeze indicated their intention to appeal in advance of the statutory deadline for filing the Appeal, the required supporting documents were not provided until July 22, 2024. Qualicum Breeze indicated the basis for requiring an extension to the statutory appeal period was to find and retain free legal assistance. Qualicum Breeze also provides numerous documents, some of which were provided previously, in support of the Appeal and says had these documents been available to the Director, different conclusions would have been reached.
8. The issues before me in this Appeal are as follows:
 - a. Should I exercise my discretion to extend the statutory appeal period for the reasons given by Qualicum Breeze;

- b. Did the Director fail to observe the principles of natural justice as a result of alleged assistance provided to the Complainants, that was not provided to Qualicum Breeze;
- c. Did the Director err in law in concluding the Complainants were employees under the *ESA* notwithstanding their apparent agreement to the contrary, and on the basis of conflicting evidence with respect to the nature and extent of the work provided, and the exchange of that work for free accommodation;
- d. Has Qualicum Breeze provided new evidence, that could not have been presented prior to the Determination being made, and that could have led the Director to a different conclusion on material issues.

9. Though Qualicum Breeze provided numerous documents with the Appeal, it was not clear which documents were alleged to be new evidence, nor why those documents could not have been provided earlier. Accordingly, I sought further submissions from Qualicum Breeze on this issue.

10. I have concluded that this case is appropriate to consider under section 114 of the *ESA*. Accordingly, at this stage, I am assessing the Appeal based solely on the Determination, the reasons for Determination, the written submissions filed with the Appeal and in response to my inquiry, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), 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 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 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;
 - (h) one or more of the requirements of section 112 (2) have not been met.

11. For the reasons that follow, I dismiss the Appeal under section 114(1)(b), as having not been filed within the applicable time limit, but in any event would nevertheless have dismissed the Appeal under section 114(1)(f) as having no reasonable prospect of success.

Timeliness

12. As noted above, Qualicum Breeze sought additional time to provide their completed appeal in order to obtain free legal assistance to support them with the process. Qualicum Breeze provided further information within the time limit for filing the Appeal that included an outline of the reasons for the Appeal, and the reason for requesting an extension. The Appeal had not yet included a complete copy of the Determination or related reasons.
13. On July 22, 2024, Qualicum Breeze provided emails including numerous additional submissions and documents, at which time the Tribunal determined the Appeal was complete.
14. The *ESA* imposes a deadline on appeals to ensure they are dealt with promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:
- Section 109 (1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
15. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.
16. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Wright (Advanced Carpet Cleaning)*, BC EST # D132/97.
17. Although Qualicum Breeze made timely efforts to demonstrate a genuine, ongoing intention to appeal, I am not persuaded that the desire, or hope, of obtaining additional assistance in preparing an appeal constitutes “compelling reasons” to extend the statutory appeal deadline.

18. This notwithstanding, in addition to “compelling reasons,” there must also be a strong case in favour of Qualicum Breeze, which I am not convinced Qualicum Breeze has established, for the reasons that follow.
19. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:
- 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.
20. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
21. 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 that there is an error in the determination under one of the statutory grounds.
22. For the reasons that follow, I find the thrust of Qualicum Breeze’s arguments with respect to all aspects of the Appeal essentially seek to reargue the merits of their response to the complaints and do not uncover any basis for interfering with the Determination.

New Evidence

23. In response to my inquiry regarding whether or to what extent the documents provided with the Appeal were not before the Director at the time the Determination was being made, and the reasons why those could not have been provided earlier, Qualicum Breeze indicated, generally, that, in part, some documents were not available “due to consequences of the fire,” which she indicated occurred November 20, 2023, and her “inability to open” certain documents.
24. This Tribunal has established guidance for this ground of appeal in *Davies et al.* BC EST # D171/03. The Tribunal has said “[t]his ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made.”
25. The Tribunal has established that the test “is a relatively strict one and must meet four conditions”:
- (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 potential 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. Qualicum Breeze did not identify which documents were not available, or otherwise could not be opened, prior to their discovery and submission with the Appeal. Among the evidence provided, however, appears to be further testimony provided by another individual who stayed with Qualicum Breeze on an arrangement like that of the Complainants, whereby some work was performed, and room and board was provided in exchange. Much of this testimony also appears to seek to contradict the evidence provided by the Complainants, or otherwise characterize Qualicum Breeze in a positive light.
27. Similarly, Qualicum Breeze provided further documents which appear to reflect testimony from other individuals who had arrangements similar to that of the Complainants, describing their experiences. Qualicum Breeze also included numerous photographs with the Appeal, with little or any related description of why those might support her submissions.
28. For the most part, Qualicum Breeze's submissions in response to my inquiry about the new evidence submitted, reiterate their view that the Complainants had agreed to an arrangement whereby they would not be paid, and should be held to that agreement, and that the evidence of others should be sufficient to rebut any allegations of mistreatment or overly stringent demands by Qualicum Breeze.
29. I note, first, that I am not persuaded that the fire which occurred in November 2023 could have had a continuing impact on Qualicum Breeze's ability to provide documents or other evidence as late as April 2024, when further clarification was being sought, or before May 21, 2024, the date of the Determination.
30. Further, for the reasons discussed below, I am not persuaded that the evidence of others who had arrangements with Qualicum Breeze similar to those of the Complainants could not have been obtained prior to the Determination being made. Apart from what appears to be late efforts to obtain further testimony from one individual, there is no indication before me that the evidence of others was being sought or could not have been obtained earlier.
31. Accordingly, I am not persuaded that there is any basis for me to consider the new evidence submitted with the Appeal any further.

Errors in law

32. 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 CanLII 6466 (BC CA), [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.

33. The most succinct outline of Qualicum Breeze's submissions was provided by email on June 28, 2024.

34. In essence, Qualicum Breeze alleges the following deficiencies in the Determination and the complaints more generally:

- a. The Complainants received room and board in exchange for what Qualicum Breeze says was minimal effort supporting Qualicum Breeze around the house, and only occasionally in relation to the business;
- b. That had the Complainants clearly indicated they wanted to be paid for any work, Qualicum Breeze would have asked them to leave;
- c. That the Complainants had a camperized vehicle and did not need room and board, and could have left at any time;
- d. That the Complainants' records relating to hours of work provided little or no detail about the work performed, and are unverifiable;
- e. Another "volunteer" disputes the claims made by the Complainants;
- f. Although the Complainants offered to settle the complaints, and that offer was accepted, the Complainants reneged after being asked for information necessary to process the payment.

35. I infer from Qualicum Breeze's submissions, and those of their legal counsel during the investigation, that in their view the Delegate misinterpreted or misapplied the *ESA* in concluding that the Complainants were employees rather than volunteers.

36. To this end, I note that a significant portion of the Determination is devoted to reviewing the Tribunal's jurisprudence in this regard and assessing the evidence in light of the various factors used to determine whether an individual is an employee or a volunteer. While Qualicum Breeze places significant weight on the initial agreement by the Complainants that they would not be paid, many factors go into such an assessment, given the provision in section 4 of the *ESA* that any agreement to waive or circumvent the requirements of the *ESA* is unenforceable and of no effect.

37. The Delegate reviewed the information provided by both parties and applied that to the various factors set out in the Tribunal's jurisprudence, and concluded, on balance, that the Complainants met the definition of employee, and the tasks performed met the definition of work.

38. Qualicum Breeze also seeks to rely on evidence from other individuals similarly situated to the Complainants, both to refute any disparaging comments made by the Complainants, and, presumably, to support a finding that since these others considered themselves volunteers, the same should apply to the Complainants.

39. To the extent the Complainants took issue with how they were treated by Qualicum Breeze, I am not persuaded the Delegate relied on any such assertions in determining whether the Complainants met

the definition of employee under the *ESA*. Nor, by virtue of section 4 referred to above, is it relevant that other individuals considered themselves to be volunteers, and/or did not complain that they should have been paid. Without exploring the nature and extent of the relationships of these other individuals to Qualicum Breeze, it may very well be that had they filed similar complaints, the Director would have reached similar conclusions.

40. For these reasons, I am not persuaded the Delegate misinterpreted or misapplied the *ESA* in concluding the Complainants were employees performing work as defined by the *ESA*.
41. Given the relatively extensive investigation conducted in this case, it also cannot be said any of the conclusions reached were made without evidence, nor does Qualicum Breeze point to any aspects that would fit such a description.
42. For the most part, instead, I infer that Qualicum Breeze is saying the Delegate's conclusions were reached on a view of the facts that could not be reasonably entertained.
43. To this end, as noted above, the focus on Qualicum Breeze's submissions are on the fact that the arrangement with the Complainants that they would be unpaid was clearly communicated to them in advance and that the Complainants accepted the arrangement on this basis. This was not disputed, and, as noted above, such evidence is only one factor of several considered by the Delegate.
44. While Qualicum Breeze says the records of hours worked and tasks performed lacked detail, or were otherwise unverifiable, the Delegate noted that during the investigation Qualicum Breeze did not dispute the Complainants' report of their hours worked, nor did they provide evidence of the hours they believed the Complainants to have worked. In addition, after the Investigation Report was issued, Qualicum Breeze was specifically asked about the Complainants' hours of work and provided nothing further in response.
45. To this end, Qualicum Breeze also claims the Complainants could have left at any time; however, the fact is that they did not leave earlier and continued to perform work for Qualicum Breeze.
46. In the absence of any dispute by Qualicum Breeze as to the hours or days worked by the Complainants in response to their assertions, I am unable to conclude the Delegate acted on a view of the facts that could not be reasonably entertained.
47. Finally, It is clear on the materials before me that the Complainants offered to settle the complaints, and Qualicum Breeze agreed to the amount asked-for. That said, Qualicum Breeze, represented by legal counsel, placed a condition on the settlement, that certain personal information be provided first. The Complainants rejected that condition and withdrew their offer. To the extent that Qualicum Breeze seeks to rely on a 'reneged on' settlement as the basis for the Appeal, I am not persuaded this has any bearing on the issues before me.
48. For all of these reasons, I am not persuaded the Delegate erred in law in reaching the Determination.

Natural Justice

49. As noted above, Qualicum Breeze says the Investigator unfairly offered assistance to the Complainants and not to Qualicum Breeze. In advancing this assertion, Qualicum Breeze relies on correspondence from one of the Complainants to the Investigator thanking her for her assistance. Specifically, Qualicum Breeze also says that when they were first notified of the complaints, the resort property had experienced a fire, which impacted their ability to respond in a timely fashion, and that this fact was ignored by the Investigator.
50. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- 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 *BWI Business World Incorporated* BC EST #D050/96)
51. As long as the appropriate process elements have been followed, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination.
52. In the matter before me, I also note that the allegation of unfairness is made against the Investigator, and not the Delegate who issued the Determination.
53. At the conclusion of the investigation, during which Qualicum Breeze was represented by legal counsel, the Investigator issued an investigation report to the parties and provided them with an opportunity to respond. The parties responded to the Investigation Report, and provided further information subsequently, in response to a further request for clarification.
54. In reaching the Determination, the Delegate reviewed the information on file, including the Investigation Report, along with all of the information provided in response and reply by the parties. While Qualicum Breeze makes the vague allegation of unfairness relating to the conduct of the investigation, it is unclear how any such alleged unfairness impacted their ability to respond to the evidence and arguments provided by the Complainants. To the extent that Qualicum Breeze's allegation could support a finding of bias in favour of the Complainants, I note the allegation does not point to any alleged manifestation of bias in the Investigation Report, nor does the allegation extend to the Delegate who issued the Determination.
55. Accordingly, I am not persuaded Qualicum Breeze has provided any basis on which to conclude that the Director failed to observe the principles of natural justice in reaching the Determination.

GENERAL SUMMARY AND CONCLUSION

56. Based on all of the foregoing, although an outline of Qualicum Breeze's appeal submissions was provided within the statutory time frame for filing an appeal, the Appeal was not complete until over three weeks later. I am not persuaded either that Qualicum Breeze's desire to try and retain free legal assistance constitutes a compelling reason for extending the deadline, nor, for the reasons herein, that the Appeal discloses a strong case for overturning the Determination.
57. For these reasons, I would dismiss the Appeal under section 114(1)(b) as not having been filed within the applicable time limit.
58. Had I exercised my discretion to extend the time limit for filing, I would nevertheless have dismissed the Appeal on the basis that there was no reasonable prospect of success.
59. I was not persuaded that the documents provided late with the Appeal could not have been discovered and presented to the Director prior to the Determination being made, and, accordingly, would not have considered those documents as part of the Appeal.
60. Further, based on all of the foregoing, I was not persuaded that there is a reasonable prospect of Qualicum Breeze demonstrating either that the Director erred in law in reaching the Determination, or that the Director failed to observe the principles of natural justice in reaching the Determination.
61. Accordingly, I dismiss the Appeal.

ORDER

62. I order that the Determination be confirmed pursuant to section 115(1) of the *ESA*.

/S/ Ryan Goldvine

Ryan Goldvine
Member
Employment Standards Tribunal