Citation: Canada Pet Health Technology Inc. (Re)
2024 BCEST 44

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Canada Pet Health Technology Inc. (dissolved)

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Ryan Goldvine

**FILE NO.:** 2024/024

**DATE OF DECISION:** May 23, 2024

# DECISION

## SUBMISSIONS

Walter Schredl — on behalf of Canada Pet Health Technology Inc.

## OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* ("*ESA*") by Walter Schredl, on behalf of Canada Pet Health Technology Inc. ("Appellant"), of a determination made by Mathew Osborn, a delegate ("Delegate") of the Director of Employment Standards ("Director"), on January 16, 2024.

2. The Determination awarded Charity Tonkin ("Complainant") $2,692.82 as compensation for length of service ("CLOS"), along with interest, and imposed a mandatory administrative penalty of $500.00. The Appellant is appealing the Determination on the bases that the Director erred in law in making the Determination and that evidence has become available that was not available at the time the Determination was being made.

3. I have concluded that this case is appropriate to consider under section 114(1) of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed with the appeal, and my review of the material that was before the Director when the Determination was being made ("Record"). 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.

4. For the reasons that follow, I dismiss the appeal under section 114(1)(f) as having no reasonable prospect of success.

## ISSUE

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

## THE DETERMINATION

6. The Appellant employed the Complainant as a communications manager until December 21, 2022. Though her employment initially commenced with another employer before transitioning to work for the Appellant, the Delegate determined it was not necessary to assess whether the two entities were associated employers.

7. The Appellant notified the Complainant through electronic means on December 21, 2022, that she was being laid off, effective immediately, due to the closure of both businesses the Complainant worked for. It was undisputed that the Complainant's employment was terminated without cause, and without notice or compensation for length of service.

8. The Delegate concluded that the Complainant was owed two weeks' CLOS, and calculated her average weekly wages to be $1,346.41. In addition, the Delegate concluded the Complainant was owed vacation pay on this amount equating to $161.57.

9. The Delegate also imposed an administrative penalty of $500.00 for the Appellant's failure to pay CLOS contrary to section 63 of the *ESA* and awarded interest pursuant to section 88.

10. In advance of the issuance of the Determination, an investigation report ("Investigation Report") was sent to the parties on August 28, 2023, and the parties were given until September 11, 2023, to provide any response. While the Complainant provided further information in response, it appears no further information was provided by or on behalf of the Appellant.

## ARGUMENT

11. As noted above, the Appellant appeals on the bases that the Director erred in law, and that new evidence has become available that was not available at the time the Determination was being made.

12. Mr. Schredl, who filed the present appeal on behalf of the Appellant, indicates that he was in a motor vehicle accident in June 2022, and has been unable to work in any capacity since that time. Based in part on this, he claims he advised the individual investigating the Complaint ("Investigating Delegate") that he did not want to be involved in the investigation of the Complaint and suggested that any documents or information should be sought from the law office involved in the dissolution of the Appellant.

13. The Appellant says the Director erred in law by failing or refusing to specify or request any evidence related to or supporting the receivership status of the Appellant. The Appellant says that because the receivership was initiated by the parent company based in the United States, the manner in which the Investigating Delegate sought to verify the Appellant's solvency was flawed.

14. Further as well to the allegation the Investigating Delegate failed to request documents from the law office involved in the dissolution, the Appellant says certain documents were not available at the time the Determination was being made. The Appellant identifies the following documents as relevant to this appeal:

a. Desk Memo, December 17, 2022

i. Demonstrating the effective date of receivership

b. Canada Receivership Requirements

i. Supporting the fact that receivership as defined by the Canada Revenue Agency took effect December 17, 2022

c. RCMW Memo June 3, 2022, WS Leave

i. Demonstrating the fact that Mr. Schredl was on leave as of that date

d. TJ Jesky Law Memorandum December 21, 2022, Cease Operations

i. Demonstrates that the receiver made the sole decision to terminate all employees, including the Complainant

15. In summary, the Appellant says the Director made the Determination without any evidence, and says the above documents would have led the Director to a different conclusion.

**ANALYSIS**

16. 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.

17. 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.

18. The Appellant is appealing on the basis that the Director erred in law in reaching the Determination, and on the basis that new evidence has become available that was not available at the time the Determination was made. Though related, I will deal with each of these in turn.

**Error of law**

19. The Tribunal has recognized the following ways in which an "error of law" may be found to have occurred, as 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.) (*Gemex*):

a. a misinterpretation or misapplication of a section of the Act [in *Gemex,* the legislation was the *Assessment Act*];

b. a misapplication of an applicable principle of general law;

c. acting without any evidence;

d. acting on a view of the facts which could not reasonably be entertained; and

e. adopting a method of assessment which is wrong in principle.

20. While the Appellant asserts that the Investigating Delegate did not specify or request any evidence related to or supporting the company being in receivership, it is clear on the Record that the Investigating Delegate did, in fact, speak to, and request any relevant documents from, the law firm identified as responsible for the dissolution of the companies.

21. Further, it is evident on the face of the Record that both Mr. Schredl and the law firm were provided with the Investigation Report and given an opportunity to respond. Neither provided any response to the Investigation Report.

22. This notwithstanding, I am not persuaded that the Director acted without evidence. The Determination was issued based on all of the information available, which included the undisputed facts that the Complainant's employment was terminated without cause, and without notice or payment of CLOS.

23. Further to this, the Appellant has not provided a basis upon which the insolvency proceedings would have any impact on the obligation under section 63 to pay CLOS upon terminating the Complainant's employment without cause.

24. For these reasons, I am not persuaded the Director erred in law in finding that the Complainant was entitled to CLOS.

**New Evidence**

25. The appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al. (re Merilus Technologies),* BC EST # D171/03. The test requires that:

(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. I note that in the matter before me, the Investigating Delegate conducted the investigation into the Complaint and issued the Investigation Report to the parties. The Investigation Report was issued on August 28, 2023, and the parties were given an opportunity to respond to any of the information set out therein.

27. As noted above, the Appellant provided a number of documents with the Appeal as "new evidence." While I accept that these documents were not before the Delegate when the Determination was issued, I am not persuaded that these documents could not have been presented during the investigation, or in any event prior to the Determination being issued.

28. The documents provided are dated June 3, December 17 and 21, 2022, along with an undated excerpt from the website of the Canada Revenue Agency. While the Appellant appears to suggest that more specific requests by the Investigating Delegate would have resulted in the disclosure of these documents earlier, it is incumbent on a party responding to a complaint to provide any documents relevant to that complaint, or their defence to it.

29. Further, while the Appellant suggests that these documents would have "definitively led the director to a different conclusion," the Appellant has not persuaded me that these documents are relevant to a material issue arising from the Complaint. I appreciate the Appellant may believe that insolvency does or should absolve it of liability for CLOS; however, no legal basis has been provided to support this conclusion.

30. Specifically, as already noted above, the Appellant has not provided a basis upon which the insolvency proceedings would have any impact on the obligation under section 63 to pay CLOS upon terminating the Complainant's employment without cause.

31. For these reasons, I am not prepared to admit the documents presented as new evidence, but in any event would not have been persuaded that they would have changed the outcome of the Determination.

## CONCLUSION AND ORDER

32. Based on all of the foregoing, I dismiss the appeal under section 114(1)(f) of the *ESA* as having no reasonable prospect of success.

33. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination dated January 16, 2024, together with any further interest that has accrued since the date of issuance.

**Ryan Goldvine**
**Member**
**Employment Standards Tribunal**