

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Dale Richard Shortt  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Richard Grounds

**FILE No.:** 2024/001

**DATE OF DECISION:** May 28, 2024

## DECISION

### SUBMISSIONS

Dale Richard Shortt on his own behalf

### OVERVIEW

1. This is an appeal by Dale Richard Shortt (“Appellant”) of a determination issued by Carrie H. Manarin, a delegate (“Delegate”) of the Director of Employment Standards (“Director”), dated November 30, 2023 (“Determination”). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
2. In the Determination, the Delegate concluded that the Complainant, Michael Cowen, was owed wages by Dale Richard Shortt. The Delegate concluded that the Complainant was owed wages in the total amount of \$6,102.88 and interest in the amount of \$445.28. The Delegate imposed administrative penalties in the total amount of \$1,500.00 against Dale Richard Shortt.
3. Dale Richard Shortt appealed the Determination on the basis that evidence has become available that was not available at the time the Determination was being made.
4. Submissions were not requested from the parties.
5. I have considered the Determination, the reasons for the Determination, the appeal submissions, and the ESA section 112(5) record. For the following reasons, the Appellant’s appeal is dismissed, and the Determination is confirmed.

### ISSUE

6. The issue to be decided in this appeal is whether evidence has become available that was not available at the time the Determination was being made.

### FACTUAL BACKGROUND

7. The Appellant operates a winery and a real estate business in Nanaimo, British Columbia. The Complainant started residing on the Appellant’s winery property on approximately March 8, 2022. There was an agreement that the Complainant would receive free room and board if he performed welding and bookkeeping for the Appellant. The Appellant received a rent security deposit for the Complainant from the local social assistance office. At some point, the RCMP were called to remove the Complainant from the Appellant’s property. The Complainant stopped residing at the Appellant’s property on approximately September 23, 2022.
8. The Complainant submitted a complaint to the Employment Standards Branch on July 19, 2022, requesting wages for working for the Appellant. The Complainant’s complaint proceeded to an

investigation which was conducted by Sheri Bor, a delegate of the Director of Employment Standards (“Investigating Delegate”). The Investigating Delegate identified the following questions to be answered:

- Did the Complainant perform work for the [Appellant]?
- Is the Complainant owed regular wages and if so, in what amount?
- Is the Complainant owed overtime wages and if so, in what amount?
- Is the Complainant owed statutory holiday pay and if so, in what amount?
- Is the Complainant owed vacation pay and if so, in what amount?

9. The Investigating Delegate spoke with the Complainant and the Appellant and summarized their evidence in the Investigation Report. The Complainant’s evidence was that he lived on the Appellant’s winery property and worked for the Appellant doing various tasks but was never paid. The Complainant provided evidence about the days that he worked and about the various work duties that he performed.
10. The Appellant’s evidence was that he offered to let the Complainant stay on the winery property in exchange for performing work but that the Complainant never performed any work and had stolen wine from the winery. The Appellant advised the Investigating Delegate that he could provide witness statements and a copy of the police report where he requested the Complainant’s removal from his property.
11. On August 15, 2023, the Investigating Delegate sent the Investigation Report by email to the Appellant and to the Complainant. The Investigation Report was also sent to the Appellant by mail on August 21, 2023.
12. The Investigation Report included a list of documents obtained for the investigation including the Complainant’s Complaint form, photos of the Complainant’s accommodation and the Ministry of Social Development and Poverty Reduction Shelter Information Form submitted by the Appellant for the Complainant’s damage deposit.
13. The Investigating Delegate asked the Appellant and the Complainant if they had anything they would like to add to the Investigation Report and to let her know by September 4, 2023. The Investigating Delegate advised that after that time, the file would be moved forward to a decision maker.
14. In response to the Investigation Report, the Complainant provided additional information relating to MLS listings that he worked on for the Appellant, a Google review of the Appellant’s winery (from June 2022) where he described working there and not being paid and a witness who saw him working at the winery. The Investigating Delegate informed the Appellant of this additional information on August 16, 2023, via email.
15. At some point after the Investigation Report was mailed to the Appellant, the Appellant called the InfoLine and requested to speak with the Investigating Delegate. The Investigating Delegate telephoned the Appellant on September 7, 2023, and he answered but said that he was unavailable to speak with her. The Investigating Delegate telephoned the Appellant again on September 11, 2023, but it went to voicemail and the voicemail box was full. The Appellant did not provide any additional information to the Investigating Delegate.

## THE DETERMINATION

16. The Delegate, Carrie H. Manarin, completed the Determination based on “a review of all information on the file, which includes the investigation report issued on August 21, 2023 summarizing the information collected from the investigation.”
17. The Delegate identified the following three issues:
- Did the Complainant perform work for the Appellant?
  - If the Complainant performed work for the Appellant, what were his hours of work?
  - If the Complainant performed work for the Appellant, what was his rate of pay?
18. The Delegate noted that the Complainant had provided a response to the Investigation Report, which information was then disclosed to the Appellant, but the Appellant did not provide a response to the Investigation Report.
19. Based on the evidence contained in the Investigation Report, the Delegate concluded that the Complainant resided on the Appellant’s winery property March 9 to September 23, 2022, that the Complainant had performed work for the Appellant and that the Complainant was entitled to be compensated for the minimum 2 hours per day worked based on the minimum wage in effect at the time.
20. The Delegate articulated her reasons for her conclusions, including that the parties originally had an agreement for the Complainant to perform work for free room and board (but there was no assignment of wages for rent), that the Complainant did not pay rent (other than a security deposit), and that it did not “stand to reason” that the Appellant would allow the Complainant, a complete stranger and a homeless person living in Victoria, to live rent free for approximately 7 months if he was not performing work. The Delegate also noted that a witness had observed the Complainant working on the Appellant’s winery.
21. The Delegate referenced various sections of the *ESA* that applied to her analysis including related to the definition of “work” (section 1), the minimum wages payable where an employee reports for work (section 34), how wages are paid (section 20), the assignment of wages (section 22(4)), the minimum rate of pay (section 16) and related to the contraventions of the *ESA*.
22. The Delegate concluded that the Complainant was owed wages in the total amount of \$6,102.88 and interest in the amount of \$445.28.
23. The Delegate imposed administrative penalties in the total amount of \$1,500.00 against the Appellant for failing to pay the Complainant wages earned during the pay period within the required time (as required under section 17 of the *ESA*), failing to pay the Complainant wages within the required time after his resignation (as required under section 18 of the *ESA*), and failing to keep payroll records for the Complainant (as required under section 28 of the *ESA*).
24. The Delegate also concluded that the Appellant contravened section 36 of the *ESA* for failing to ensure the Complainant had 32 hours free from work each week or to pay overtime for the work during this 32-

hour period but found that this was subsumed in the section 17 contravention, so an administrative penalty was not imposed for the section 36 contravention.

25. The Determination was sent to the Appellant by email and also by regular mail. The Determination included appeal information advising that the latter deadline to appeal the Determination was January 8, 2024.

## **ARGUMENTS**

26. The Appellant submitted his appeal documents on January 8, 2024.
27. The Appellant submits that evidence has become available that was not available at the time the Determination was being made. In his written submissions, the Appellant repeated similar submissions that he had made to the Investigating Delegate including that the Complainant was not an employee and had never worked for him, he had received a damage deposit from the Complainant but never received rent, and he had requested the RCMP to remove the Complainant from the winery property.
28. The Appellant also submitted a written statement dated December 27, 2023, from a witness who was a family friend of the Appellant. The witness stated that the Complainant was not employed by the Appellant, the witness who had seen the Complainant working on the Appellant's property was mistaken, and the Complainant was a "nuisance tenant" who had to be removed by the RCMP.
29. The Appellant also submitted a photo of an RCMP card with a file number on it and an explanation that the police file related to the Complainant's removal from his property was available through an ATIP request but that there are delays with RCMP ATIP requests.
30. On April 10, 2024, the Appellant submitted additional statements for his appeal including: a statement dated April 9, 2024, from himself stating that the Complainant did not do certain work tasks for him; and a statement dated April 5, 2024, from a witness (identified by the Complainant to the Investigating Delegate but who could not be located to be interviewed at that time) who is a friend of the Appellant and also lived on the winery property, stating various personal opinions about the Complainant and that he saw the RCMP come and remove the Complainant from the Appellant's property.
31. Submissions were not requested from the parties or from the Director.

## **ANALYSIS**

32. The Appellant appeals the Determination on the basis that evidence has become available that was not available at the time the Determination was being made. The role of the Tribunal is to decide whether the appeal should be allowed or dismissed based on one of these grounds of appeal. It is not to re-weigh the evidence and decide the merits of the original complaint afresh.

### *New Evidence*

33. The Appellant has submitted on appeal the following "new evidence": a witness statement from a friend in support of the Appellant's evidence that the Complainant was not employed by the Appellant and a

photo of an RCMP file number with an explanation that the RCMP file was available through an ATIP request. The Appellant did not indicate that he had himself made an ATIP request for the police file. After the January 8, 2024, deadline to appeal, the Appellant submitted another witness statement in support of the Appellant's evidence that the Complainant was not employed by the Appellant.

34. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.*, BC EST # D171/03, where it stated (at page 3):

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This 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. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That 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.

35. The first stage of the test for admitting new evidence on appeal requires that 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. The Appellant has not provided any reasons why these witness statements could not have been discovered and presented prior to the Determination being made. The Appellant did not provide any confirmation that he himself had actually made an ATIP request for the police file related to the Complainant's removal.

36. The witness statements provided by the Appellant, ignoring the fact that the statements submitted in April 2024 were provided well after the deadline to submit appeal documents, are relevant in the sense that they generally refer to the witness's stated belief that the Complainant was not employed by the Appellant, but they also make various comments on the Complainant's character, which detract from their objectivity. The witness statements do not assert that the witnesses had complete observation of the Complainant such that he could not have worked on the property.

37. Even if the witness statements submitted by the Appellant are accepted on their face, they do not provide a compelling response to the Delegate's reasoning which was based on a preponderance of evidence. It is notable that the Delegate concluded that the Complainant worked the bare minimum amount of time

for the Appellant and not full-time, as originally claimed. In addition, the fact that the RCMP may have been called to remove the Complainant from the Appellant's wintery property does not directly contradict the Delegate's reasons.

38. The "new evidence" submitted by the Appellant is not highly probative and would not have obviously led the Director to reach a different conclusion about the Complainant's employment for the Appellant.
39. The "new evidence" submitted by the Appellant has not met the requirements of the test to be admitted on appeal. Accordingly, the "new evidence" will not be considered further.

### **ORDER**

40. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1)(a) of the *ESA*.

---

**Richard Grounds**  
**Member**  
**Employment Standards Tribunal**