Citation: CLM Café Ltd. (Re)
2024 BCEST 64

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

CLM Café Ltd. carrying on business as Liberte Café and Restaurant
("Employer")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2024/042

DATE OF DECISION: July 24, 2024

DECISION

SUBMISSIONS

Siu Cheong Tsang	on behalf of CLM Café Ltd. carrying on business as Liberte Café and Restaurant

OVERVIEW

1. This is an appeal by CLM Café Ltd. carrying on business as Liberte Café and Restaurant ("Employer") of a decision of a delegate of the Director of Employment Standards ("Director") issued on April 11, 2024 ("Determination").

2. On October 6, 2022, Kayoko Aikawa ("Employee") filed a complaint under section 74 of the *Employment Standards Act* ("*ESA*") with the Director alleging that the Employer had contravened the *ESA* by failing to pay her regular wages and overtime wages for all hours worked ("Complaint").

3. In investigating the Complaint and making the Determination, the Director followed a two-step process. One delegate of the Director ("investigative delegate") corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report ("Investigation Report") summarizing the results of the investigation which was sent to the parties for review and comment. Upon receiving the responses to the Investigative Report and the replies to those responses, the matter was sent to a second delegate ("adjudicative delegate") who assumed responsibility for reviewing the responses and any replies and issuing the Determination pursuant to section 81 of the *ESA*.

4. The Determination found that the Employer violated Part 3, section 18 (payment of all wages owing); Part 4, section 40 (overtime wages); and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of the Employee.

5. The Determination ordered the Employer to pay wages to the Employee in the total amount of $1,695.87 including accrued interest.

6. The Determination also levied two administrative penalties of $500 each against the Employer for contravention of sections 28 (payroll records) and 40 (overtime wages) of the *ESA*.

7. In the Appeal Form, the Employer has checked off two grounds of appeal; namely, the Director failed to observe the principles of natural justice in making the Determination and evidence has become available that was not available at the time the Determination was being made.

8. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I find it is unnecessary to seek submissions on the merits from the Employee or the Director.

9. My decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions of the Employer, the Determination, and the Reasons for the Determination ("Reasons").

ISSUE

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

THE DETERMINATION AND THE REASONS

Background

11. According to a BC Registry Services Searches conducted online on March 22, 2024, with a currency date of December 21, 2023, the Employer was incorporated in British Columbia on June 12, 2020. Siu Cheong Tsang ("Mr. Tsang") is listed as its sole director and officer.

12. The Employer operates a café and restaurant in Vancouver, British Columbia.

13. The Employee was employed with the Employer from August 22, 2022, to April 16, 2023. The Employee's rate of pay, when first hired, was $19.00 per hour. At the time of the termination of her employment, the Employee's rate of pay had increased to $21.00 per hour.

14. As indicated by the adjudicative delegate in the Reasons, there were two issues before her:

    (i) Did the definition of "Manager" apply to the Employee?

    (ii) Was the Employee owed any wages, and if so, how much?

15. With respect to the first issue, whether the definition of "manager" under the *Employment Standards Regulation ("Regulation")* applied to the Employee, the adjudicative delegate thoroughly examined the nature and scope of the Employee's duties. She noted the Employee asserted that after three months of employment as a cook, she was promoted to assistant manager, supported by a wage increase, a name tag that said, "assistant manager," and text messages from co-workers. Despite this promotion, her duties primarily involved cooking, prepping, and cleaning, with additional tasks such as checking inventory, supervising staff, and deciding on food preparation. The Employee estimated that a substantial portion of her time was still spent cooking and prepping, which were not characteristic managerial responsibilities, according to the adjudicative delegate.

16. The Employer contested the evidence of the Employee, claiming the Employee was promoted to a senior cook, not an assistant manager, and that her wage increase was due to the end of her probationary period. The Employer stated that there were no additional duties as a senior cook versus a cook, and that the Employee never received the necessary training for the assistant manager position.

17. The adjudicative delegate then went on to consider the definition of "manager" under the *Regulation* noting that "manager" is defined as "a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or a person employed in an executive capacity." Job titles alone do not determine managerial status; the actual duties

performed are crucial. The adjudicative delegate found that the Employee's primary responsibilities remained non-managerial, focusing on cooking and prepping. Supervisory tasks were a minor part of her role, insufficient to classify her as a manager. The adjudicative delegate stated, "the proportionality of supervising in relation to the Complainant's other responsibilities indicates the Complainant's 'principal' employment responsibilities."

18. Furthermore, the adjudicative delegate concluded that the Employee did not exercise significant independent authority, a hallmark of managerial positions. The Employee required the Employer's approval for schedule changes and had no control over hiring, firing, or purchasing decisions. The adjudicative delegate noted, "[h]ad she been a manager, she ought to have been able to make decisions, not just recommendations." The adjudicative delegate also addressed the name tag evidence, stating, "even if I were to accept that the 'assistant manager' name was the Complainant's, and even if other co-workers did refer to her as an 'assistant manager,' one's title is not determinative of one's status as a manager." The adjudicative delegate considered the Employee's knowledge of secret sauce recipes, exclusive to managers, but found that to be insufficient on its own. According to the adjudicative delegate, the overall characterization of the Employee's duties indicated that she was an employee rather than a manager. Consequently, the delegate determined that the definition of "manager" under the *Regulation* did not apply to the Employee.

19. With respect to the second issue, specifically whether the Employee was owed wages and, if so, how much, the adjudicative delegate found in favor of the Employee. The adjudicative delegate observed that the Employee testified that she often started work 15 to 30 minutes before her scheduled shifts and stayed 15 minutes to an hour afterward to complete necessary tasks. The Employer, however, argued that any time worked outside scheduled shifts was unauthorized and therefore unpaid. The Employer had a clock-in/clock-out system but only compensated employees for their scheduled hours, capping overtime at 30 minutes per pay period as per employment agreements. The Employer also asserted that non-busy times were sufficient for employees to complete their tasks, suggesting the Employee's time management was inefficient.

20. The adjudicative delegate next considered section 35 of the *ESA* noting that it places the responsibility on employers to control employees' work hours to avoid paying overtime. The adjudicative delegate noted that if an employer allows an employee to work beyond scheduled hours, they must pay for those hours, including overtime. In this case, although the Employer verbally instructed the Employee not to work extra hours, they failed to enforce this directive effectively. The adjudicative delegate found that the Employer did not implement adequate measures to prevent the Employee from working additional hours. Consequently, the Employer was liable to pay the Employee for all regular and overtime hours worked, irrespective of whether these hours were approved.

21. The Employer claimed an averaging agreement was in place, limiting overtime to weekly rather than daily calculations. However, the adjudicative delegate found this agreement invalid under section 37 of the *ESA*. The averaging agreement lacked essential elements such as signatures from both parties and specific details about the work schedule and applicable weeks. Therefore, the averaging agreement could not be used to average the Employee's hours of work.

22. Due to a fire, the Employer lost records of the Employee's daily hours and instead provided recent work schedules. The Employee, however, maintained a personal record of her hours throughout her employment, which the adjudicative delegate deemed the most accurate representation of her hours

worked. According to these records, the Employee worked 1,234.05 regular hours, 60.28 daily overtime hours, and 9.06 weekly overtime hours. After accounting for wages already paid, the adjudicative delegate determined that the Employee was owed $1,527.60 in outstanding wages, which included $285.47 in regular wages, $956.74 in daily overtime, and $285.39 in weekly overtime. Additionally, under section 58 of the *ES*A, the Employee was entitled to 4% vacation pay on these wages, amounting to $61.10.

23. The adjudicative delegate imposed two mandatory penalties of $500 each for violations of sections 28 and 40 of the *ESA*. More specifically, section 28 of the *ESA* requires employers to maintain payroll records for each employee for four years, including the number of hours worked each day. The Employer admitted to no longer having these records for the Employee, leading to a contravention of section 28 on April 16, 2023, the Employee's last working day. As a result, the adjudicative delegate imposed a $500 penalty on the Employer.

24. Additionally, the Employer violated the overtime provisions of section 40 of the *ESA* on an ongoing basis. The contravention date was noted as April 18, 2023, as overtime wages were due within 48 hours after the Employee's last working day on April 16, 2023. Consequently, the adjudicative delegate imposed another $500 penalty on the Employer for this violation.

25. Regarding interest, the adjudicative delegate determined that the Employee is entitled to accrued interest of $107.17 pursuant to section 88 of the ESA.

EMPLOYER'S SUBMISSIONS

26. In his written submissions in support of the Appeal, Mr. Tsang, the Employer's director, disputes the adjudicative delegate's Reasons for the Determination, claiming they contained incorrect information. He states that while the Reasons stated the Employer no longer had records of the Employee's daily hours due to a fire, it was the printed staff schedule from Kitchen Manager, Doruk Sahinoz ("Mr. Sahinoz"), that was lost in the fire at Mr. Sahinoz's home. The clock-in and clock-out records from the Employer's point of sale ("POS") system were still available. Mr. Tsang submitted the POS records in the appeal, asserting they matched the Employee's records of hours worked, confirming that the Employee did arrive early and leave late occasionally.

27. Mr. Tsang cited the Employment Standards website, noting that a "30-minute unpaid meal break must be provided [by employers to employees] when an employee works more than five hours in a row." Based on the Employee's clock-in/clock-out schedule, Mr. Tsang calculated that the Employee worked a total of 1,216.99 hours from August 22, 2022, to April 16, 2023, including a 30-minute unpaid meal break. However, he contended that the Employee's pay stubs showed she was paid for 1,264 hours because she failed to clock out during her meal breaks, resulting in payment for those breaks. He claimed this led to the Employee being overpaid for 46.6 hours, totaling $954.56, rather than being underpaid $1,588.70 as set out in the Determination. This argument was also presented by the Employer during the investigation of the Employee's complaint. Mr. Tsang then stated the Employer was "expecting reimbursement" from the Employee for the "overpaid amounts."

ANALYSIS

28. Having reviewed the Determination, the section 112(5) record, and Mr. Tsang's submissions on behalf of the Employer, I find the appeal should not be allowed to proceed; it should be dismissed under section 114(1) of the *ESA*. My reasons follow.

29. Section 112(1) of the ESA 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.

30. As previously indicated, the Employer appeals the Determination on two grounds for appeal: the Director failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was being made. I will review each ground under separate headings below.

(i) Natural justice

31. In *Imperial Limousine Service Ltd.,* BC EST # D014/05, the Tribunal explained the principles of natural Justice as follows:

> 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 *B.W.I. Business World Incorporated,* BC EST #D050/96).

32. The burden of proving a failure to comply with the principles of natural justice lies with the party making the allegation. In this case, the Employer failed to meet this burden, as it merely checked off the natural justice ground of appeal without providing any supporting evidence. Despite this, I reviewed the section 112(5) record and Mr. Tsang's submissions and found no evidence of a violation of the Employer's natural justice rights by either the investigative delegate or the adjudicative delegate. The Employer was afforded ample opportunity to participate in the investigation and respond to the Employee's evidence. The exchanges between the investigative delegate and Mr. Tsang further support that the Employer had sufficient opportunity to present its evidence and arguments. There is no indication that the adjudicative delegate strayed in any way that would violate the Employer's natural justice rights in making the Determination.

33. This case primarily concerns the Employer disputing the adjudicative delegate's findings of fact, specifically that the Employer owes the Employee outstanding wages of $1,527.60 and failed to keep certain payroll records and contravened the overtime provisions of the *ESA*. The grounds of appeal do not allow for appeals based solely on factual errors. Under section 112 of the *ESA*, the Tribunal cannot

consider appeals seeking different factual conclusions unless these findings raise an error of law, as seen in *Britco Structures Ltd.*, BC EST # D260/03. The standard for establishing that findings of fact constitute an error of law is stringent. The Employer must demonstrate that the adjudicative delegate's findings were inadequately supported or wholly unsupported by the evidentiary record, making the conclusions perverse or inexplicable, as discussed in *3 Sees Holdings Ltd.* carrying on business as Jonathan's Restaurant, BC EST # D041/13, at paras. 26-29.

34. In this case, the Employer failed to produce a record of daily hours worked during the investigation of the Complaint. Consequently, it was within the adjudicative delegate's discretion to prefer the Employee's personal record of hours as the best representation of the hours worked each day. This preference was instrumental in determining the outstanding wages owed to the Employee. Therefore, there is no basis to interfere with the adjudicative delegate's findings in the Determination based on the natural justice ground of appeal.

35. Overall, the Employer's appeal is more a disagreement with the adjudicative delegate's factual findings rather than a legitimate claim of a natural justice violation. The evidentiary record supports the adjudicative delegate's conclusions, and there is no indication of procedural unfairness in this case and therefore, I dismiss the natural justice ground of appeal.

(ii) New Evidence

36. Finally, with respect to the "new evidence" ground of appeal, the Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations. More particularly, in *Davies and others (Merilus Technologies Inc.)*, 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 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.

37. The requirements above are conjunctive and the Tribunal will rarely accept evidence on appeal that does not satisfy all the requirements.

38. It is also noteworthy that the new evidence ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

39. In the present case, as previously indicated, Mr. Tsang contends that the Reasons erroneously state that the Employer no longer had records of the Employee's daily hours due to a fire. He clarifies that it was the printed staff schedule from Kitchen Manager Mr. Sahinoz that was lost in the fire at Mr. Sahinoz's home. Mr. Tsang asserts that the Employer still possesses the clock-in and clock-out records from the Employer's POS system. He submits these POS records in the appeal, requesting the Tribunal to consider them as new evidence. Mr. Tsang argues that, based on these records, the Employee has been overpaid because she received paid meal breaks due to not clocking out during those breaks.

40. I find that the proposed "new evidence" – the clock-in and clock-out records from the Employer's POS system – does not satisfy the first requirement in *Davies, supra*, because it is evidence that existed and was available during the investigation of the Complaint and before the Determination was made and could have, with the exercise of due diligence, been presented to the investigative delegate during the investigation or to the adjudicative delegate before the Determination. As a result, I find the evidence in question does not qualify as "new evidence" and the appeal also fails on the "new evidence" ground of appeal.

41. I also wish to observe that a review of the record produced by the Director in the appeal shows that the Employer had many opportunities to produce the evidence it now seeks to produce in the appeal. The Tribunal has said on many occasions that an employer cannot lie in the weeds, fail to properly participate in an investigation, and seek to adduce evidence on appeal which should have been presented to the investigative delegate during the investigation: *Tri-West Tractor*, BCEST # D268/96. The Employer does not explain why it did not adduce the evidence in question during the investigation of the Complaint when it had numerous opportunities to do so, including when invited by the investigating delegate to provide its response to the Investigation Report.

42. While I find that the Employer's new evidence ground of appeal fails based on the first criteria in the *Davies* test *and* I am not required to consider the other elements of the test, I also find the Employer's proposed new evidence lacks 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. More specifically, Mr. Tsang says that while the purported "new evidence" matches the Employee's records of hours worked, confirming that the Employee did arrive early and leave late occasionally, she failed to clock out during her meal breaks, resulting in payment for those breaks and ultimately overpayment for 46.6 hours totaling $954.56, rather than underpayment of $1,588.70 as decided in the Determination. Notwithstanding the fact that the adjudicative delegate was not able to test the veracity of the Employer's proposed new evidence because the Employer did not present it during the investigation of the Complaint or before the Determination was made, the central premise of Mr. Tsang's argument that the meal breaks were unpaid is questionable at the very least against the Employee's unequivocal evidence, during the investigation, that the Employer expected her to be on-call during her 30-minute meal breaks and that her meal breaks were paid and the language in the Employment Contract of the Employee with the Employer that provided: "**Break time**: (FOH) 5hrs or more shift has with 30 minutes break with pay (will be interrupted, expect to help out without being asked). Must stay inside the vicinity and if intended to have break outside the restaurant must clock out."

43. In the result, I find the proposed new evidence lacking high potential probative value. I find there is no cogent basis to interfere with the Appeal on the new evidence ground of appeal.

ORDER

44. Pursuant to subsection 114(1)(f) of the *ESA*, there is no reasonable prospect that this appeal will succeed and therefore, it is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination dated April 11, 2024, is confirmed as issued.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal