

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Christopher Green

- of a Determination issued by -

The Director of Employment Standards

PANEL: M. Diane Irvine

SUBMISSIONS: Christopher Green, on his own behalf
Jake Kislock, delegate of the Director of Employment Standards

FILE NUMBER: 2024/054

DATE OF DECISION: November 6, 2024

DECISION

OVERVIEW

1. This is an appeal by Christopher Green (“Employee”) of a determination dated May 14, 2024 (“Determination”), issued by a delegate of the Director of Employment Standards (“Director”).
2. The Employee filed a complaint under section 74 of the *Employment Standards Act (ESA)* alleging that his former employer, Skyline Scaffold Ltd. (“Employer”), contravened the *ESA* by failing to pay him wages for four hours on July 8, 2023. The Employee alleged that he was on call as a first aid attendant during those hours.
3. A delegate of the Director (“Investigating Delegate”) investigated the Employee’s allegations and on March 6, 2024, issued an Investigation Report which was provided to the Employee and the Employer for response. A second delegate (“Adjudicating Delegate”) reviewed the Investigation Report and the responses of the Employer and the Employee to the Investigation Report before issuing the Determination. The Adjudicating Delegate determined that the *ESA* had not been contravened and no wages were outstanding.
4. The Employee appeals on the basis that the Director erred in law in making the determination that the Employee had not been performing work.
5. I sought submissions from the parties on the merits of the appeal as I was unable to dispose of the matter on the basis of the materials initially filed.
6. The Tribunal received submissions on behalf of the Director and reply submissions on behalf of the Employee. The Employer’s representative, Margaret Siccama, advised the Tribunal that the Employer has no further submissions regarding the appeal.
7. Although I have reviewed all of the materials provided by the parties, I address only those portions necessary to reach my decision.
8. For the reasons that follow, I allow the appeal under section 112(1)(a) of the *ESA*, and I refer the matter back to the Director under section 115(1)(b) of the *ESA* for calculation of outstanding wages owed to the Employee.

PRELIMINARY MATTER

9. The Employee’s submissions refer to a decision by WorkSafeBC, and indicate that the outcome of this appeal impacts his claim for compensation he made to WorkSafeBC for an injury which occurred on the same day, for which he is seeking wages.
10. I wish to note at the outset that I have no jurisdiction with respect to WorkSafeBC claim decisions, which are made under a different enabling statute, nor am I bound by any decision made by a WorkSafeBC officer or adjudicator. As a result, I have not given any weight to submissions regarding WorkSafeBC or any finding that WorkSafeBC may have made.

ISSUES

The issues in this appeal are:

1. whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*; and
2. if so, whether the Director erred in law by determining that the Employee was not “on call” on July 8, 2023, and thus was not entitled to wages.

BACKGROUND FACTS

11. The Employee began work with the Employer on March 9, 2023, as a labourer. On June 10, 2023, he obtained his Occupational First Aid Level 1 certification and started acting as an Occupational First Aid officer for the Employer the following week.
12. The Employer organized an employer-sponsored event (“Event”) to occur on Saturday, July 8, 2023, and invited its employees, including the Employee. All parties agree that attendance at the Event was an optional unpaid event, and that the Employee could choose to attend or not. The Employer provided food and beverages for the event, including alcohol, and organized games. It also arranged for a shuttle bus to take employees home after the Event.
13. The Employer’s Occupational Health and Safety Manager, Margaret Siccama, told the Investigating Delegate that the Event started at about 10:00 am, and went until 2:00 pm or 3:00 pm. A poster for the Event indicated that the bus pick-ups to take employees to the Event would occur at 9:30 am, and pick up for drop off at employee’s homes would occur between 3:30 and 4:00 pm.
14. Ms. Siccama told the Investigating Delegate that she and another supervisor had been designated to be the Event’s first aid attendants, and had acted in that capacity at similar Employer-sponsored events for several years.
15. Both the Employer and Employee agree that soon after the Employee arrived at the Event in the morning, Ms. Siccama asked the Employee if he would act as a first aid attendant that day, and the Employee agreed.
16. During the investigation, the Employee reported that Ms. Siccama told him he would be unable to consume alcohol if he agreed to be first aid attendant, and that others at the event with first aid certification had been drinking or intended to do so and thus would be disqualified from acting as first aid attendant. The Employer denies that the Employee was ever directly asked to refrain from alcohol. However, Ms. Siccama did tell the Investigating Delegate that she asked the Employee to help with first aid because she heard he would be sober.
17. The Employee was injured while playing a game of capture the flag at approximately 11:00 am. Ms. Siccama provided him with first aid. The Employee did not participate in any further games during the Event due to his injuries, but remained on site.
18. Ms. Siccama left the event at approximately 1:00 pm. It is unknown when the other initially designated supervisor left the Event or if they had been drinking.

19. After Ms. Siccama’s departure, another participant, the brother of one of the other employees, became injured at the Event. He was directed to the Employee, who administered first aid. The Employee told the Investigating Delegate that he tried to make a record of this in the Employer’s electronic first aid tracking system, but was unable to create an entry as the injured participant was not an employee. There wasn’t a paper log available. He intended to ask the Employer’s primary first aid attendant on the following workday how to make an entry.
20. The Employee told the Investigating Delegate that at some point around 3:00 or 3:15 pm, he noticed the Event was winding down; the games and other activities had concluded, and many participants had already left. He had been experiencing increasing amounts of pain during the day and also had difficulty walking, so he decided to leave. He drove himself to an Urgent Care Centre. An ultrasound revealed that the Employee had torn his hamstring.
21. The Employee was unable to return to work due to his injury, and spent several months on medical leave. He did not return to work for the Employer.
22. Through his complaint, the Employee sought compensation for 4 hours of work completed on July 8, 2023, from 11:00 am to 3:00 pm on the basis that he was “on call” to perform duties as a first aid attendant during the Event.
23. The Employer’s position during the investigation was that the Employee was a volunteer, and that any first aid he chose to provide was as a volunteer and not an employee. The Employer told the Investigating Delegate that to perform first aid as a worker the Employee would: (i) have been scheduled for a shift in the workplace; (ii) ought to have completed a medical first aid report and a report of injury with respect to the injury he treated; (iii) had to let his supervisor know; and (iv) have had to start an investigative process so that a similar incident didn’t happen again. Because none of these steps happened, the Employer’s position was that first aid was provided on the Employee’s own accord, under the *Good Samaritan Act*.

THE DETERMINATION

24. In determining whether the Employee was owed wages for acting as a first aid attendant during the Event, the Adjudicating Delegate considered the *ESA*’s definition of “work” found in section 1, which explicitly contemplates being on call:

Definitions

1 (1) In this Act:

...

“**work**” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee’s residence.

25. In deciding the Employee had not been engaged in “work,” the Adjudicating Delegate considered the level of control and direction by the Employer over the Employee, noting that the Guide to the *ESA*

indicates that if employees are on call and must remain at a specific location, the employees must be paid wages because they are still under the employer's direction and not free to pursue their own interests.

26. The Adjudicating Delegate made the following observations and findings of fact:
- a. The Event was an optional event on a non-workday, that the Employee was not required to attend;
 - b. The Employee was not told or directed to provide first aid, he made an optional choice;
 - c. The Employee was volunteering, which is not akin to 'work' under the *ESA*;
 - d. The Employee did not raise the issue of payment around the time of the Event;
 - e. The Employee did not complete any record of his first aid activities, whether electronically or on paper, and he did have the opportunity to ask how to do so;
 - f. The Employee did not ask for payment at or near the time of the Event; and
 - g. The Employee was under no obligation to remain at the Event after he arrived. He was free to leave any time, "just as he did when he left before its conclusion to attend an urgent care facility for his own injury."

27. The Adjudicating Delegate concluded:

Ultimately, the [Employee]'s attendance at the Event was wholly voluntary and any actions he took with respect to first aid were of a voluntary nature. In addition, the [Employee] was not "on-call" within the definition of the Act as he was not required by the [Employer] to remain at a specific location. As such, I find that the [Employee] did not perform work on July 8, 2023.

ARGUMENTS

1. Employee's Submissions

28. The Employee appeals the Determination alleging that the Adjudicating Delegate erred in law in the following ways:
- a. by failing to fully consider and apply the criterion of the definitions of "Employee" and "Employer";
 - b. by applying a more onerous definition of "on call" than found in the *Employment Standards Regulation*;
 - c. by ignoring section 4 of the *ESA*, *Requirements of this Act cannot be waived*; and
 - d. in finding he performed no work for the Employer during the Event and so was not owed any wages.

Definition of "Employee" and "Employer"

29. The Employee submits that by acting as first aid attendant at the request of the Employer, he was performing a portion of his normal work duties. He submits it is not relevant if an employee is booked

beforehand or is hired “on the fly,” and that it is irrelevant that he had the choice to accept or decline the Employer’s offer to act as first aid attendant. Once he accepted, his status changed from “guest to employee.”

30. He further says the Employer has the onus of having controls over the workplace, such as instructing him not to ingest any intoxicants, and if the Employer set vague directions such as not explicitly setting an end time for his shift that is a failure on the Employer’s part. The Employee also notes that he was entitled to take a leave for injury, such as when he departed the Event.
31. The Employee submits that Adjudicating Delegate made findings of fact that were not supported by the evidence, or were based on incomplete evidence.

Definition of “On Call”

32. The Employee takes issue with the Adjudicating Delegate’s finding that he was not “on call,” submitting that “the Director’s definition of ‘must remain’ and ‘not free to pursue their own interests’ applied here is extremely and excessively onerous.” The Employee indicates that he remained on site “for as long as I best understood the requirements of first aid coverage were required,” as by the time he decided to leave for Urgent Care none of the official activities were continuing, a large number of participants had left, and he could not find a manager to get an official direction to terminate the day.
33. The Employee also takes issue with the Adjudicating Delegate using his decision to leave in order to seek medical attention for his own injuries as a sign that he was “free to leave the event.” He submits most people would agree that an injured worker should have the right to be able to leave work to attend to a potentially serious injury without having to forfeit wages earned that day until that point.

Requirements of the Act cannot be waived

34. The Employee points to section 4 of the *ESA*, which states:

Requirements of this Act cannot be waived

- 4** The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2), has no effect.

35. The Employee submits that the Adjudicating Delegate implied that the Employee had given up his right to request wages for work performed and had formally chosen to volunteer, though he acknowledges that the Adjudicating Delegate did not explicitly rely on this as a reason for the Determination. He submits it was wrong for the Adjudicating Delegate to focus on the Employee’s choice of the word “volunteering” in an email sent to Ms. Siccama on July 12, 2023. He submits that even if he had explicitly stated he wanted to volunteer to act as a first aid attendant for free, any such agreement would be void.

Finding of no work performed and no wages due

36. The Employee submits that employers must pay employees at least the agreed-upon rate of pay, and that if the Employer had been up front that he was expected to perform work for free on a day where he was otherwise invited to be a guest, he may have declined.

2. Director's Submissions

37. The Adjudicating Delegate made submissions on behalf of the Director, responding to each of the Employee's arguments.

Definition of "employer and employee"

38. The Adjudicating Delegate submits the definitions of "employer and "employee" were considered to the extent necessary, given that there was no dispute that the Employee was employed by the Employer.

Definition of "on call"

39. The Adjudicating Delegate argues the definition of "on call" was included on page R14 of the Determination, where it is clearly outlined that the "must remain" provision of on call work was not met given that this was an optional social event on a non-work date. He stated:

The Appellant's attendance and continued participation at the social event was entirely optional, and he was free to leave at any time, as he did before the conclusion of the event. As such, I submit that the definition of "on-call" was applied appropriately in the circumstances.

Requirements of the Act cannot be waived

40. The Adjudicating Delegate denies that the Employee's failure to raise the issue of payment at the time of the Event played a role in the Determination, stating instead that this was simply noted in relation to a "credibility assessment connected with the Appellant's motivation for filing this complaint," which was related to his WorkSafeBC claim.

Finding of no work performed and no wages due

41. The Adjudicating Delegate argues that the control and direction requirements in relation to the definition of work were not present in this case, and that he found that any first aid assistance the Employee provided to another Event participant was purely voluntary. He further argued that the lack of documentation completed by the Employee in relation to this first aid is further evidence that he was simply a volunteer and not acting in the capacity as an official first aid attendant.

ANALYSIS

42. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which states:

- 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.

43. 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.

44. The Employee bases his appeal on an error of law.

45. 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 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.

46. A disagreement with a finding of fact does not amount to an error in law unless the finding was not grounded in the evidence. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

47. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the delegate.

48. In this case, I find that the Adjudicating Delegate did make several errors of law, first in making findings of fact that are not supported by the evidence and then in misapplication or misinterpretation of the *ESA*. In particular, I find that the Adjudicating Delegate misapplied the definition of "on call" when he concluded the Employee was not engaged in "work," and also failed to apply section 4 of the *ESA* in finding the Employee volunteered his time.

49. In determining that the Employee was not "on call" and so was not engaged in "work," the Adjudicating Delegate relied on his finding that the Employee was free to leave any time, "just as he did when he left before its conclusion to attend an urgent care facility for his own injury." Based on

this finding, the Adjudicating Delegate concluded the Employer did not have control or direction over the Employee during the Event.

50. However, the finding that the Employee left the event early is in opposition to the evidence of both the Employee and the Employer's representative, Ms. Siccama. Ms. Siccama's evidence was that the Event was scheduled to end by 3:00 pm. A poster created by the Employer indicated that buses would begin taking employees home at 3:30 pm. The Employee states that he left the event at 3:00 pm or 3:15 pm, when the Event was winding down. The Employer did not assert the Employee left early. As such, there is no evidence that the Employee left before the Event's scheduled conclusion.
51. Even if the Employee had left early, he did so in order to go to an Urgent Care centre as he was in pain and had difficulty walking. The Employee had received first aid at the Event, but required further medical attention. As the Employee argues, it is reasonable for an injured employee who requires medical attention to leave work in order to seek it, whether they are actively working or are on call.
52. More generally, I am unable to accept that there was evidence on the record on which to base a conclusion that the Employer did not exert control over the Employee during the Event, and that the Employee would have been free to leave at any time, once he had agreed to act as first aid attendant for the Event. There is no evidence on the record that the Employer advised the Employee that he could leave the Event at any time, or that the Employee believed that this was so.
53. There is however evidence that the Employer *did* exert some degree of control over the Employee during the Event. For example, there is evidence that the Employer expected the Employee to refrain from alcohol if he were to be first aid attendant. While the Employer indicates it never "directly asked" the Employee not to drink, there is evidence that it was important to Ms. Siccama that the Employee was sober when she asked him to act as first aid attendant, and that the Employee was aware of that. The Employee believed he was the only employee with a first aid designation present who had not and would not be drinking, and that those who had been drinking would be disqualified from acting in that capacity. Further, the Employee remained at the Event despite his own serious injury, delaying seeking medical attention, until the Event was over.
54. I find the Adjudicating Delegate erred in law when he found the Employee was simply volunteering, and not working as an on call first aid attendant during the Event. In my view, the Adjudicating Delegate was overly focused on the fact that attendance at the Event was voluntary, that the Employee chose whether to attend, and that the Employee also had the choice to agree to act as first aid attendant. Those factors are irrelevant. What matters is whether the Employer asked the Employee to perform work after he arrived, and whether the Employee began to engage in work once he agreed to the Employer's request. The answer to both questions is "yes." Even if the Employer and Employee had made a mutual agreement that the Employee was volunteering to provide first aid attendant services during the Event, however, section 4 of the *ESA* provides that that minimum requirements of the *ESA* and its regulations cannot be waived by agreement between an employer and an employee.

CONCLUSION

55. Applying the definitions of “work” and “on call” set out by the Adjudicating Delegate, I find that the Employee was on call from the time he agreed to the Employer’s request that he act as a first aid attendant until either the end of the event or when the Employee left, whichever was first.

ORDER

56. Pursuant to section 112(1)(a) of the *ESA*, I allow this appeal.
57. Pursuant to section 115(1)(b) of the *ESA*, I refer this matter back to the Director for calculation of outstanding wages.

/S/ M. Diane Irvine

M. Diane Irvine
Member
Employment Standards Tribunal