Citation: Forbidden Spirits Distilling Corp.
2025 BCEST 28

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Forbidden Spirits Distilling Corp.
("appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Kenneth Wm. Thornicroft
SUBMISSIONS:	Blair Wilson, on behalf of Forbidden Spirits Distilling Corp.
FILE NUMBER:	2024/135
DATE OF DECISION:	March 6, 2025

DECISION

OVERVIEW

1. Forbidden Spirits Distilling Corp. (the "appellant") appeals a Determination that was issued by Dawn Sissons, a delegate of the Director of Employment Standards (the "delegate"), on September 19, 2024, pursuant to section 79 of the *Employment Standards Act* ("*ESA*"). The delegate also issued her "Reasons for the Determination" (the "delegate's reasons") on September 19, 2024.

2. The appellant operates a distillery, and a former employee (the "complainant") worked for the appellant as, initially, an executive assistant and then as its Director of Operations. At the time of her dismissal on June 15, 2022, the complainant was earning a $90,000 annual salary.

3. By way of the Determination, the appellant was ordered to pay the complainant $60,513.33 on account of unpaid wages and section 88 interest. The delegate also levied three separate $500 monetary penalties against the appellant based on its contraventions of sections 17, 18, and 28 of the *ESA*. Thus, the appellant's total liability under the Determination is $62,013.33.

4. The appellant filed two separate appeal forms. In the first, filed on October 28, 2024 (the last day of the statutory appeal period), the appellant indicated that its appeal was based on section 112(1)(a) of the *ESA*, the "error of law" ground of appeal. The appellant did not provide any particulars regarding its "error of law" ground. Rather, the appellant sought additional time to perfect its appeal and an extension of the appeal period (see section 109(1)(b) of the *ESA*). The appellant stated that it needed additional time to retrieve digital records which it maintained would support its ground of appeal.

5. In the second appeal form, filed on November 28, 2024, the appellant indicated that its appeal was based on two other grounds, namely, that the Director of Employment Standards failed to observe the principles of natural justice in making the Determination (section 112(1)(b)), and that it now had evidence that was not available when the Determination was being made (section 112(1)(c)). The appellant attached a detailed memorandum to its appeal form setting out its evidence and argument supporting the two indicated grounds of appeal.

6. With respect to the appellant's written reasons and evidence supporting its appeal, although the memorandum notionally addresses only the "natural justice" and "new evidence" grounds of appeal, the memorandum also raises arguments that are more properly characterized as alleged errors of law. That being the case, and consistent with the Tribunal's decision in *Triple S Transmission Inc.*, BC EST # D141/03, I have considered the appellant's submissions in light of all three statutory grounds of appeal.

7. I find that this appeal is untimely, and, in my view, it would not be appropriate to extend the appeal period. Further, and in any event, this appeal is not meritorious. My reasons for reaching those conclusions now follow.

THE INVESTIGATION AND DETERMINATION

8. On December 15, 2022, the complainant filed an unpaid wage complaint with the Employment Standards Branch (the "ESB") seeking unpaid "overtime" wages. In due course, an ESB officer was assigned to investigate the complaint. The officer communicated with both the complainant and the appellant and obtained their evidence and argument with respect to the matters in dispute.

9. On May 10, 2024, the ESB officer issued an "Investigation Report" (the "Report") in which the officer summarized the evidence submitted by the parties (including several witnesses' evidence) and their respective positions. Although the parties' evidence was in conflict regarding several issues, the officer did not make any findings of fact. The relevant documents were appended to the Report.

10. Both parties were invited to respond to the Report and apparently did so (see delegate's reasons, page R3). However, the parties' responses to the Report do not appear to have been included in the section 112(5) record. In any event, the file was transferred to the delegate for purposes of issuing a determination, which she did on September 19, 2024.

11. In issuing the Determination and her reasons, the delegate did not conduct any further inquiries of the parties but, rather, relied on the Report and the other material contained in the ESB's complaint file. The delegate addressed the complainant's claim for unpaid "overtime" wages and her "bonus" claim, and whether any section 98 monetary penalties should be levied. As noted above, the delegate determined that the complainant had a valid unpaid wage claim and awarded her $60,513.33 (including section 88 interest) on this account. The delegate also levied three separate $500 monetary penalties.

12. With respect to the complainant's unpaid wage claim, the parties acknowledged that the complainant was a "manager" as defined in section 1(1) of the *Employment Standards Regulation* (the "*ESR*") and, as such, not entitled to statutory overtime pay (see *ESR*, section 34(f)). However, the delegate also correctly noted that even if an employee *is* a "manager," they are still entitled to be paid for all hours worked. Accordingly, where a managerial employee works more hours in a pay period than they are contracted to perform, they are entitled to be paid their "regular wage," on a straight-time basis, for all "additional" hours worked (see *Colonial Countertops Ltd.*, 2024 BCEST 69).

13. The delegate rejected the complainant's unpaid "bonus" claim, determining that the bonus was not recoverable under the *ESA* because the bonus was not, on its face, intended to reflect a payment "related to hours of work, production or efficiency" (see *ESA*, section 1(1) definition of "wages"). The complainant did not appeal this latter finding.

14. As for the matter of monetary penalties, the delegate determined that the appellant contravened section 17 (failing to pay all wages earned in a pay period), section 18 (failure to pay all earned wages on termination), and section 28 (failure to maintain required payroll records). As previously noted, the delegate levied three separate $500 penalties for these contraventions.

THE APPLICATION FOR AN EXTENSION OF THE APPEAL PERIOD

15. The statutory deadline for appealing the Determination to the Tribunal expired at 4:30 PM on October 28, 2024. Although the appellant filed an appeal form on October 28, 2024, the appellant did not provide any reasons to support its appeal along with its appeal form. The appellant's supporting reasons and documents were later filed as attachments to the appellant's second appeal form, filed on November 28, 2024.

16. In support of its October 28, 2024, application to extend the appeal period, the appellant asserted the following:

> I am writing and asking for an extension to file my Company's appeal of a determination as we have experienced a computer and software breakdown of the digital copy of our records – the records of which include older emails that have been lost or have taken considerable time for us to find them and access them and download them that date back to June 15, 2021 to June 15, 2022. There is also a significant amount of records that are handmade that we are trying to confirm with our email and accounting system that have been raised during this process and relied upon by the appellant that we need more time to find and access and determine that they are important and relevant and what is irrelevant, all the while dealing with an older computer system.
>
> We have had every intention to file today but given the process of finding old emails that may no longer be available to us and that has taken considerably longer than the 20 work days we initially thought.

17. In its November 28, 2024, memorandum appended to its second appeal form, the appellant asserted that it "requested and was granted an Extension to the Appeal deadline" (my underlining). In fact, a Tribunal Registry Administrator, in an electronic communication to the appellant dated October 29, 2024, advised that while the appellant was given until November 28, 2024, to provide its reasons for appeal and other supporting documents, this dispensation was expressly "not an extension to the statutory appeal period."

18. I will address the appellant's application to extend the appeal period, below.

THE APPELLANT'S REASONS FOR APPEAL

Alleged Errors of Law/Natural Justice Breaches

19. The alleged errors of law, some of which have been advanced as breaches of natural justice, generally fall into the following categories:

- the delegate "assess[ed] the claim without evidence to substantiate the Complainant's allegations" and failed to properly weigh the appellant's evidence;
- relying on the complainant's evidence which was never properly corroborated or assessed. In particular, the appellant "takes issue with the [complainant's] daily planner and spreadsheet being accepted as evidence of hours worked";

- awarding the complainant wages representing additional hours worked beyond her contracted allotment (87 hours per semi-monthly pay period) despite the fact that neither the appellant's chief financial officer nor its controller ever "received any timesheets or correspondence indicating excess hours were worked, or that any correspondence outlining extra hours were being accrued for payment at a later date." Further, the appellant says that "there was also no evidence of any written correspondence from [the complainant] to indicate she had been approved to work extra hours in which she would not otherwise recover through adjustment of her working hours."
- levying monetary penalties in the absence of a proper evidentiary foundation.

20. More generally, the appellant asserts that it paid the complainant all her earned wages, and that the complainant failed to provide sufficient evidence to support her claim for hours worked beyond the hours recorded in her wage statements. Further, the appellant says that even if the complainant did work additional hours, the appellant never authorized her to do so.

21. Regarding section 18, and flowing from the foregoing assertions, the appellant says that it paid the complainant all her earned wages within 48 hours following her termination. The appellant additionally argues that since it never received an unpaid wage claim from the complainant at the time it paid her final wages, "it is not possible to have contravened Section 18 of the [*ESA*]." The appellant also notes that the delegate's reasons refer to an employee other than the complainant (see page R9). However, this incorrect reference is almost certainly a typographical error and, in any event, not consequential. At page 12 of the ESB officer's report (page 65 of the section 112(5) record), the officer stated that the parties agreed the appellant terminated the complainant, giving her the requisite written notice under the *ESA*. Accordingly, there was no issue regarding the complainant's entitlement to section 63 compensation for length of service. However, if the appellant failed to pay the complainant all her earned wages within 48 hours following her termination, that failure would amount to a contravention of section 18.

22. By way of a general defence to its liability for monetary penalties, the appellant says that no monetary penalties should have been levied, since it was always acting in "good faith." The appellant also says that the delegate should not have added any interest to the complainant's unpaid wage award. I will now briefly address these two matters. First, monetary penalties are mandatory in the face of a proven contravention of the *ESA*. Even if an employer was acting in "good faith," that is not a defence to the imposition of a monetary penalty where a contravention has been proven (see *K. Girn Enterprises Inc.*, BC EST # D077/05). Second, the payment of interest on unpaid wage awards is mandated by section 88 of the *ESA*. Thus, the appellant's arguments regarding its "good faith" and the inclusion of section 88 interest in the monetary order are not meritorious.

23. With respect to the $500 monetary penalty levied against the appellant for failing to keep all the payroll records mandated by section 28, the appellant says that the complainant was supposed to keep her own payroll records and failed to do so.

24. Th appellant's argument regarding section 28 is misconceived, since section 28 requires an *employer* to keep certain enumerated payroll records.

New Evidence

25. The appellant described its "new evidence" as follows:

> Since the Determination was being made, records supporting the Employers came [*sic*] were made available through work performed by an independent IT consultant who searched the companies' records, including the Employers [*sic*] Exchange Email System. The records and correspondence uncovered, support the Employers [*sic*] position and refute claims made by [the complainant] and the Director in the Determination.

26. The documents submitted as new evidence include copies of emails dated August 26, 2020 (two communications); August 26, 2020 (two communications); January 26 and January 28, 2021; April 7, 2021, June 11, 2022 (two communications); June 13, 2022 (apparently, several emails in a single thread); and an invoice dated June 30, 2022.

27. The appellant says that these documents demonstrate that the complainant was aware that employees were not supposed to work overtime hours without prior authorization.

FINDINGS AND ANALYSIS

The Application to extend the appeal period

28. I find that the appellant's application for an extension of the appeal period must be refused because, principally, I find this appeal to be without merit (see below), and additionally, because the appellant has not provided a satisfactory explanation for its failure to file a timely appeal (also discussed in greater detail, below, where I address the appellant's "new evidence" ground of appeal).

29. In *Niemisto*, BC EST # D099/96, the Tribunal enumerated the factors that should be weighed when assessing a section 109(1)(b) application to extend an appeal period. These factors include: i) whether the applicant has a reasonable and credible explanation for failing to file a timely appeal; ii) whether the applicant can demonstrate it had a genuine and on-going *bona fide* intention to appeal the determination; iii) whether the applicant advised both the respondent and the Director of Employment Standards of its intention to appeal; iv) will any party be unduly prejudiced by an extension order?; and v) does the applicant have a credible *prima facie* case? As noted above, I find the appellant's case to lack merit, and the appellant has not provided an adequate explanation for its failure to file a timely appeal. Further, there is no evidence before me demonstrating that the second and third *Niemisto* factors were met.

30. Even if I were satisfied that the appeal period should be extended, I find that this appeal is without merit and thus, in any event, must be dismissed.

The new evidence ground of appeal

31. Turning first to the appellant's "new evidence," I note that the prior "unavailability" of this evidence is offered as the explanation for the appellant's failure to file a timely appeal. I do not find this explanation to be credible or persuasive.

32. Turning to the "new evidence" itself, clearly, all the documents offered as "new evidence" predate the issuance of the Determination on September 19, 2024. The appellant says that it did not have access to these documents until it engaged an independent IT consultant. The appellant does not say why such a person could not have been engaged during the complaint investigation process. The letter accompanying the ESB officer's May 10, 2024, Report includes a direction to the parties to "provide all the information they feel is relevant to these allegations" and also itemized all the information that had been submitted as of the date of the Report. The officer specifically asked the parties to provide any further documents that they believed to be relevant, and which had not yet been submitted. The parties were cautioned that any "documents that are not listed in the report and that you have not identified as relevant in your written response may not be considered in making the determination." The appellant did not provide any further documents, nor did it seek additional time so that it could engage an IT consultant to undertake further document searches.

33. "New evidence" is inadmissible unless it was not "available" at the time the determination was being made. The appellant was able to gather the documents it now submits on appeal, and I fail to appreciate why these documents could not have been, with the exercise of reasonable diligence, collected and provided to the ESB prior to the issuance of the Determination. Further, "new evidence" must be cogent and probative and the documents in question are only marginally relevant, if relevant at all, to the central issue in this dispute.

34. I find that the appellant's "new evidence" does not satisfy the *Davies et al*. test for admissibility on appeal (see *Davies et al.*, BC EST # D171/03).

Errors of Law/Natural Justice

35. Although framed as alleged breaches of natural justice, the appellant's various challenges to the Determination are more accurately characterized as alleged errors of law.

36. Insofar as the rules of natural justice are concerned, I am unable to conclude that there were any natural justice breaches in this case. In general terms, the rules of natural justice require that a party be afforded an opportunity to present their evidence and argument, to respond to the evidence and argument of the adverse party, and to have their case adjudicated by a neutral party based on the evidentiary record properly before the adjudicator. I have reviewed the section 112(5) record (comprising over 450 pages), and it appears that the appellant was given a more than fair and reasonable opportunity to present its case and to respond to the complainant's evidence and argument (see section 77 of the *ESA*). There is no evidence before me that would call into question either the ESB officer's or the delegate's neutrality in this matter. As will be seen, I do not accept that the delegate failed to properly weigh the evidence that was before her.

Errors of Law

37. The appellant's central position is that the complainant simply did not work the additional hours she claimed to have worked. The wage statements issued to the complainant, as noted at pages R3-R4 of the delegate's reasons, indicated that she consistently worked 87 hours in each semi-monthly pay period. The appellant maintained that it had "a very robust and sophisticated accounting system which includes a payroll component system that keeps track of their employee's [*sic*] hours and rates of pay." However, the complainant's hours were not logged into this system; rather, she

recorded her hours in a "daily planner" which the delegate accepted as the "best evidence" available regarding her hours of work. This planner showed that the complainant often worked more than 87.5 hours in a pay period.

38. Apart from the complainant's evidence that she typically worked more than 87.5 hours in a pay period, there was corroborating evidence from three witnesses regarding her working hours. These witnesses' evidence is summarized in the ESB officer's Report — and their statements do not appear to have been meaningfully challenged by the appellant prior to the issuance of the Determination. "ML," the assistant manager in the distillery's tasting room, reported that employees worked "many hours that you did not get paid for" and that the complainant "sometimes for entire workdays, seven days per week, every weekend, and in particular, during the 'heat of summer' when the tasting room had 'lots of employees.'" "MS" worked as the tasting room manager. His evidence was that the complainant "often worked late," that she "had a lot on her plate" and appeared to be "stressed out." "DV" worked as an administrative assistant. Her evidence was that the complainant "probably [worked] 5-6 days/week about 60 hours week" and "easily worked around 60h/week [and] it could have been more at quarterly and year end when the Complainant almost lived in office."

39. The delegate also had evidence in the form of text messages which appeared to corroborate the complainant's position that she was working more than 40 hours each week and that the appellant was aware of the situation (see delegate's reasons, pages R4-R5).

40. The appellant says that the delegate erred in giving "an inappropriate amount of weight" to the three witness statements but has not effectively challenged the witnesses' observations. Indeed, the appellant concedes that at least during some time periods during her employment, the complainant did work "extended hours." The appellant says that the complainant never advised it that she was working considerable "additional" hours and that she never filed a formal claim for additional pay while still employed. While that latter assertion may be correct, the *ESA* requires that employees be paid for all hours worked including those hours that the employer indirectly allows an employee to work. I further note that the employer was aware, at least as of May 26, 2022 (shortly before the complainant was dismissed) that the complainant was working excessive hours and that this was adversely affecting her health. In her May 26, 2022, email to the appellant's CEO she indicated that she was not taking days off or holidays and was working up to 80 hours per week — it does not appear from the record that the CEO ever challenged her on that latter point.

41. Ultimately, the delegate issued an unpaid wage order largely reflecting the complainant's recorded working hours as set out in her daily planner. The appellant argues that the daily planner is inaccurate and, in any event, the complainant's "additional hours" were never authorized. The delegate made a finding of fact that the hours recorded in the daily planner, as corroborated by the evidence of several witnesses and some text messages, showed that the complainant did work additional hours, and that the appellant was aware of that fact.

42. A finding of fact can constitute an "error of law" but only if the factual finding is without any evidentiary justification. The standard for reviewing a finding of fact is "palpable and overriding error" and a decision-maker's findings of fact are entitled to a high degree of deference (see *Housen v. Nikolaisen*, 2002 SCC 33). In other words, the alleged factfinding error must be clear and obvious and highly material to the ultimate outcome. Given the evidentiary record before the delegate, I am unable to conclude that she made a palpable and overriding error. The appellant did not keep proper

payroll records regarding the complainant's working hours, and the complainant's daily planner was corroborated by other independent evidence. I am not satisfied that the delegate erred in finding the daily planner to be the best evidence regarding her actual working hours.

SUMMARY

43. The appellant's application to extend the appeal period is refused. That being the case, this appeal must be dismissed pursuant to section 114(1)(b) of the *ESA*. Further, and in any event, the "new evidence" submitted on appeal is inadmissible and there is no merit to the appellant's "natural justice" and "error law" grounds of appeal.

ORDER

44. Pursuant to section 114(1)(b) and section 115(1)(a) of the *ESA*, this appeal is dismissed. The Determination is confirmed as issued in the amount of $62,013.33 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

/S/Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal