

An appeal

- by -

CS Automotive Advisors Ltd.
("CS Automotive")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2018A/73

DATE OF DECISION: October 1, 2018

DECISION

SUBMISSIONS

Chris Schneider

on behalf of CS Automotive Advisors Ltd.

OVERVIEW

1. This is an application by CS Automotive Advisors Ltd. (“CS Automotive”), made pursuant to subsection 109(1)(b) of the *Employment Standards Act* (the “ESA”), to extend the time for appealing a determination. In my view, this is not an appropriate case to extend the appeal period. Further, and in any event, even if the appeal period were extended, this appeal has no reasonable prospect of succeeding and thus must be dismissed under subsection 114(1)(f) of the ESA. My reasons for reaching these conclusions now follow.

THE DETERMINATION

2. Maria Boychuk (the “complainant”) and her husband, William Boychuk, filed separate unpaid wage complaints against CS Automotive. Mr. Boychuk’s complaint was resolved by way of a section 78 settlement agreement concluded on December 19, 2017. The complainant’s unpaid wage claim was the subject of a Determination issued on March 16, 2018, which is the subject of this appeal. The Determination was issued by Colin Gelinias, a delegate of the Director of Employment Standards (the “delegate”).
3. The delegate determined that CS Automotive owed the complainant \$4,035.53 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied four separate \$500 monetary penalties against CS Automotive based on its contraventions of sections 17 (payment of wage at least semimonthly), 18 (payment of wages on termination), 27 (providing wage statements each pay period), and 28 (maintenance of payroll records) of the *ESA*. Thus, the total amount payable by CS Automotive under the Determination is \$6,035.53.
4. There were several issues before the delegate. First, there was a question regarding whether CS Automotive actually employed the complainant – it denied ever having done so. Second, and assuming that the complainant was a CS Automotive employee, there was a question about the amount of her unpaid “regular” wage claim. In addition, the complainant claimed a bonus, compensation for length of service (see section 63), and reimbursement for airline travel.
5. The delegate held that the complainant was a CS Automotive employee and that she had not been paid her salary earned during January 2017 (14 work days, or \$3,181.78) or any vacation pay earned during the entire period of her employment from October 2016 to January 2017 (\$727.27). The delegate rejected the complainant’s claim for a “bonus” due to a complete lack of corroborating evidence and he also rejected her section 63 claim because she voluntarily quit her employment (see subsection 63(3)(c)). Finally, her claim for reimbursement for airline tickets was dismissed because “expenses or allowances do not fall within the definition of wages”.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

6. The deadline for appealing the Determination, calculated in accordance with section 122 of the *ESA*, was 4:30 PM on April 23, 2018. This deadline was set out in a text box that appears at the bottom of the second page of the 4-page Determination:

Appeal Information

Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on April 23, 2018.

The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at (604) 775-3512.

7. CS Automotive's appeal was actually filed on July 4, 2018, not quite 2 ½ months after the expiration of the statutory appeal period set out in subsection 112(3) of the *ESA*. CS Automotive's explanation for its late appeal – set out in Part 6 of its Appeal Form – is as follows (reproduced in full):
- Request for a extension of appeal due to the following facts:
1. Accidentally sent the appeal to employment standards director, I misread where to fax information. I am very sorry and a overwhelmed with the process.
 2. [Note: what follows is simply a blank line]
 3. Employment standard director acknowledged he received the information before deadline.
- [sic]
8. There are a few points to be noted regarding the above explanation.
9. First, I find it difficult to accept that CS Automotive's representative, Mr. Chris Schneider (its principal and its representative throughout these proceedings), "misread" the information regarding appeal procedures set out in the Determination (see above). In my view, that information could not have been clearer, and I fail to see how someone could misread or otherwise misinterpret the information set out in the Determination regarding the appeal process. There is nothing in the material before me to suggest that Mr. Schneider is not able to fully comprehend English.
10. Second, although CS Automotive asserts that it submitted "the information" to the Director (and this is not a statement that it forwarded a completed Appeal Form to the Director), CS Automotive does not say when this information was submitted to the Director, it has not provided a copy of the information for my review, nor has it provided any corroboration of the assertion that the information was, in fact, delivered to the Director.
11. Third, even accepting that "information" was submitted to the Director by the appeal deadline (April 23, 2018), CS Automotive has not provided any explanation as to why a formal appeal was not filed with the Tribunal until July 4, 2018 – there is a significant, and wholly unexplained, delay from April 23 to July 4, 2018. I am unable to determine that CS Automotive proceeded with all reasonable dispatch after supposedly learning that its appeal was to be filed with the Tribunal rather than the Director.

12. In *Niemisto*, BC EST # D099/96, the Tribunal identified several criteria that should be taken into account when determining if an appeal period should be extended in a particular case including whether:
- i) there is a reasonable and credible explanation for failing to file a timely appeal;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (i.e., the employer or employee), as well the Director, were made aware of this intention;
 - iv) any respondent party will be prejudiced if an extension were granted; and
 - iv) there are presumptively meritorious grounds for appeal.
13. In this case, I am not satisfied that CS Automotive has provided a reasonable and credible explanation for its failure to file a timely appeal (see paras. 9 – 11, above). It *may* be (and I hesitate to state the matter any more forcefully), that the Director was aware of a general intention to appeal, but there is no evidence before me that CS Automotive ever communicated this intention to the complainant. The bulk of the complainant's unpaid wage claim represents her salary earned in January 2017 and her unpaid vacation pay claim dates from October 2016. She is, so far as I understand, still waiting for her wages to be paid by CS Automotive. There is no evidence before me that CS Automotive has deposited the complainant's unpaid wages into the Director's trust account, and I am satisfied that the complainant would be prejudiced by further adjudicative delay. In my view, it is not appropriate to ask the complainant to wait even longer for this matter to be concluded.
14. Additionally, in my view, there is no merit whatsoever to this appeal. Thus, even if I were prepared to extend the appeal period, this appeal would necessarily be dismissed in any event as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *ESA*). However, I wish to stress that even if the grounds of appeal had some presumptive merit, I would still refuse the application to extend the appeal period based on a balancing of the other *Niemisto* factors.
15. I propose to briefly address the two grounds of appeal that CS Automotive asserts in this appeal.
16. The first ground of appeal is that the delegate erred in law (see subsection 112(1)(a)). CS Automotive says that the delegate erred in finding that the complainant was a CS Automotive employee. CS Automotive asserts – as it did before the delegate – that she was employed by one or both of her husband (and/or his company) and/or another firm, Pioneer Garage Ltd. (“Pioneer”) through its operating division known as “DriveCo Motors” (“DriveCo”). CS Automotive had, at all times material to this matter, a contract with Pioneer regarding the operations of DriveCo. Additionally, CS Automotive says that the delegate erred in law in that he “committed an egregious misapprehension of evidence which amounts to an error in law” in relation to certain cheques, issued by CS Automotive to the complainant, that were in evidence before the delegate.
17. Second, CS Automotive says that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)). In particular, the delegate “breached his duty of fairness” because his reasons for decision (appended to the Determination and entitled “Reasons for the Determination – the “delegate’s reasons”) “[fall] below the standard of justification, transparency and intelligibility in providing reasons” and that the delegate’s “reasons for preferring the Complainant’s

witnesses over Mr. Schneider's, fell short of the Dunsmuir standard of justification, transparency and intelligibility".

18. There was conflicting evidence before the delegate regarding the complainant's status. In determining that there was an employment relationship between the complainant and CS Automotive, the delegate noted that the work undertaken by the complainant was for CS Automotive's benefit and that she worked at its place of business. The complainant received several paycheques from CS Automotive. CS Automotive claimed (rather disingenuously in the delegate's – and my – view) that these funds were simply "redirections" of wages that were, in fact, owed to the complainant's husband, but paid to the complainant at the latter's request. However, there was no evidence, other than Mr. Schneider's assertion, to support this rather fanciful tale, and both the complainant and her husband disputed the assertion. Mr. Schneider claimed he had records to show that the complainant never was employed by CS Automotive but he never submitted those documents, claiming that they were no longer available. Curiously, CS Automotive conceded that the complainant actually worked for it, but claimed this work was undertaken at the behest, and for the benefit, of the complainant's husband.
19. The delegate's conclusions on the "status" issue, set out at page R7 of his reasons, are as follows:
- I find that there is clear evidence that [the complainant] was permitted by CS to perform work normally completed by an employee of CS. I do not find Mr. Schneider's explanation that [the complainant] performed work for CS but under the direction of another employer, to be persuasive or logical.
- Although Mr. Schneider alleged that [the complainant's husband] was the employer of [the complainant], he did not provide cogent evidence to support this assertion. Again, I do not find Mr. Schneider's explanation to be persuasive, logical or supported by the evidence. [The complainant] performed work for CS and received pay from CS on three occasions. Furthermore, there is no evidence to suggest that [the complainant's husband's] company contracted to perform work for CS. Rather it was [the complainant's husband] himself who CS employed.
- I prefer, based on the evidence available, the most straightforward explanation for [the complainant] receiving cheques from CS was that [the complainant] received pay from CS for work she performed for CS.
20. Clearly, there was disputed evidence before the delegate on the question of who was the actual employer. The delegate heard the witnesses and considered the conflicting evidence. As instructed by the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, findings of fact, and findings of mixed fact and law, should not be set aside unless the factfinder made a palpable and overriding error. I am not persuaded that the delegate so erred in this case. Indeed, I consider the delegate's findings to reflect the most logical state of affairs consistent with the entire body of evidence before him.
21. With respect to the delegate's reasons, I note that they consist of some 10 single-spaced pages and set out the parties' conflicting positions, the governing legal principles, the delegate's findings, and his justification for making those findings. In my view, the delegate's reasons easily pass the "justification, transparency and intelligibility" threshold discussed in the Supreme Court of Canada's decision in

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 (see also, on this point, the Tribunal's reconsideration decision in *Director of Employment Standards and Bayshore Healthcare Ltd.*, 2018 BCEST 63).

22. It should be noted that the delegate did not reflexively accept the complainant's position on every issue and indeed found against the complainant in regard to several matters. The delegate's reasons, in my view, reflect a balanced and entirely defensible view of the evidence and arguments before him, considered in light of the applicable provisions of the *ESA*.
23. CS Automotive filed a brief supplementary submission on September 7, 2018, in which it reiterated some of the reasons for appeal set out in its original appeal documents, but which also included some new allegations. CS Automotive complains about a factfinding meeting that took place on August 21, 2017, attended by Mr. Schneider, the complainant, and her husband. CS Automotive says that since the two complaints were separate, the delegate should not have relied on evidence presented by the husband in the course of adjudicating the complainant's complaint. However, this assertion totally ignores the fact that a party may present whatever evidence that is relevant. Since both the complainant and her husband worked for CS Automotive and had relevant evidence, the delegate was properly entitled to rely on the husband's evidence insofar as it related to the complainant's unpaid wage claim.
24. As noted above, the complainant's husband's complaint was resolved by way of a settlement agreement and CS Automotive now appears to be saying that the delegate somehow coerced CS Automotive to enter into this agreement. There is no evidence to support that latter assertion and, even if it were true, that agreement is not before me in this appeal and I have no jurisdiction to set it aside – that would be a matter for the civil courts.
25. In essence, and by way of summary, CS Automotive's appeal is fundamentally a statement of disagreement with the delegate's reasons but, in my view, CS Automotive has not demonstrated that the delegate erred in law or that his reasons are otherwise legally deficient.

ORDER

26. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is dismissed.
27. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the total amount of \$6,035.53 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal