



An appeal

- by -

Joel Eltom

- 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: Carol L. Roberts

FILE NO.: 2018A/69

DATE OF DECISION: November 7, 2018

DECISION

SUBMISSIONS

Joel Eltom	on his own behalf
Rodney Strandberg	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Joel Eltom (“Mr. Eltom”) has filed an appeal of a Determination issued by Rodney Strandberg, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on May 14, 2018 (the “Determination”). In that Determination, the Delegate found that Western Watershed Designs Inc. (“WWD”) had contravened section 40 of the *ESA* in failing to pay Mr. Eltom overtime wages, sections 45 and 46 of the *ESA* in failing to pay Mr. Eltom statutory holiday pay, and section 58 of the *ESA* in failing to pay Mr. Eltom annual vacation pay. The Director ordered WWD to pay the amount of \$771.63, representing wages and accrued interest. The delegate also imposed two administrative penalties on WWD for the contraventions.
2. Mr. Eltom appeals the Determination contending that the Delegate erred in law in making the Determination. He also asserts that evidence has become available that was not available at the time the Determination was being made.
3. After reviewing the appeal submissions, I asked the Delegate to respond to Mr. Eltom’s contention that his wages had been incorrectly calculated.
4. This decision is based on Mr. Eltom’s written submissions, the Delegate’s August 21, 2018, response on the issue of overtime wage calculations, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Mr. Eltom was employed as a supervisor by WWD, which is in the business of managing construction projects, from August 15, 2017, until October 13, 2017. On November 16, 2017, Mr. Eltom filed a complaint alleging that WWD had contravened the *ESA* in failing to pay him regular wages, overtime wages, statutory holiday pay, and vacation pay. The Delegate held a hearing into Mr. Eltom’s complaint on March 27, 2018.
6. The evidence before the Delegate relevant to this appeal is as follows.
7. Mr. Eltom submitted his time sheets to WWD’s project manager, who approved them before sending them to WWD’s office. Mr. Eltom contended that he worked all the hours he recorded.

8. WWD argued that Mr. Eltom was rarely on site performing the work he was hired to perform. However, even though Mr. Eltom submitted “fraudulent hours,” it overlooked his claim and paid him for his recorded hours. WWD argued that Mr. Eltom should be ordered to repay wages for the hours he did not work.
9. The Delegate determined that he could rely on WWD’s record of Mr. Eltom’s hours of work to determine whether WWD owed Mr. Eltom wages. The Delegate noted that the onus was on the Employer to provide satisfactory evidence that its own records did not accurately record Mr. Eltom’s hours of work. The Delegate found that WWD had not substantiated its allegation that Mr. Eltom had “scammed” it and found Mr. Eltom entitled to the wages noted above, based on WWD’s records.
10. With respect to Mr. Eltom’s overtime wage entitlement, the Delegate found that Mr. Eltom worked 11 hours of overtime between September 11 and 25, 2017, 13.5 hours of overtime between September 26 and October 10, 2017, and one hour on each of October 11 and 12, 2017.
11. Mr. Eltom contends that the Delegate erred in calculating his overtime wages based on the wage statements, which record his regular and overtime hours.
12. Mr. Eltom submitted five pages of paystubs for another WWD employee with his appeal, contending that this evidence demonstrates that WWD paid that employee overtime wages and did not pay him overtime for that same period. He asks whether or not that employee was entitled to overtime for those periods based on the Delegate’s calculation of his overtime entitlement.
13. On appeal, after I sought the Delegate’s explanation of his calculation of Mr. Eltom’s overtime wages, the Delegate noted the statutory provisions regarding overtime wages and acknowledged that he erred in law in calculating Mr. Eltom’s overtime wages to be \$443.88.
14. The Delegate acknowledged that he failed to consider Mr. Eltom’s hours of work for the period October 4 to 13, 2017. The Delegate indicated that Mr. Eltom earned overtime wages in the amount of \$5,251.14, of which WWD had paid him \$1,909.51, leaving unpaid overtime wages owed of \$3,341.63.
15. The Delegate noted that WWD paid Mr. Eltom regular wages for some of the overtime hours, reducing the unpaid overtime by \$134.00, resulting in unpaid overtime wages owed of \$3,207.63. The Delegate determined that Mr. Eltom was entitled to vacation pay of 4% on those wages, in the total amount of \$128.31, plus interest, for a revised total owing of \$3,840.99. The revised amount was calculated as follows: Overtime pay: \$3,341.63, Statutory holiday pay: \$284.50, Annual vacation pay: \$145.04, and Accrued interest to May 14, 2018: \$69.82.
16. The parties made no further submissions to the Tribunal on the Delegate’s recalculations, despite being given an opportunity to do so.

ANALYSIS

17. 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.
18. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Mr. Eltom has met that burden and allow the appeal.

New Evidence

19. Mr. Eltom's "new evidence" consists of documents which were submitted by WWD in advance of the hearing. The date on the covering letter of the material is February 28, 2018, approximately one month before the hearing.
20. In *Re Merilus Technologies* (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 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.
21. Mr. Eltom's "new evidence" does not meet the test for new evidence. It was in fact presented at the hearing and Mr. Eltom could have advanced the arguments he makes on appeal at that time.

Error of law

22. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [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.
23. The Delegate has conceded that he erred in calculating Mr. Eltom's overtime wage entitlement and recalculated the overtime entitlement to be \$3,207.63.
24. Having reviewed the Delegate's submission, I confirm the recalculated wages owing to be \$3,840.99.

ORDER

25. Pursuant to section 115 of the *ESA*, I order that the Determination, dated May 14, 2018, be varied, with a total amount owing, with interest, in the amount of \$3,840.99 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal