Employment Standards TRIBUNAL

Citation: Nery Santos (Re)
2018 BCEST 51

An appeal

- by -

Nery Santos
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2018A/14

DATE OF DECISION: May 8, 2018

DECISION

SUBMISSIONS

Nery Santos — on his own behalf

INTRODUCTION

1. Nery Santos (the "Appellant") appeals a Determination issued by Elaine Ullrich, a delegate of the Director of Employment Standards (the "delegate"), on January 19, 2018. The appeal is filed under subsections 112(1)(a), (b) and (c) of the *Employment Standards Act* (the "*ESA*").

2. The Determination was issued following an oral complaint hearing held on April 25 and May 15, 2017 – there is nothing in the delegate's "Reasons for the Determination" (the "delegate's reasons") explaining why there was an 8-month delay from the completion of the hearing to the issuance of the Determination and reasons. In my view, an 8-month delay, given the relatively commonplace straight-forward nature of this dispute, is not in keeping with subsection 2(d) of the *ESA* – "The purposes of this Act are as follows: …(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act".

3. By way of the Determination, the delegate ordered the Appellant's former employers, West Coast Home & Truss Ltd. and G S Dhesi & Associates Ltd. (conceded to be "associated corporations" under section 95 of the *ESA*) to pay the Appellant the total sum of $12,087.24 on account of unpaid wages (including regular wages, overtime pay, vacation pay and compensation for length of service) and section 88 interest. West Coast manufactures trusses and G S Dhesi provides the requisite engineering services; both firms operated an integrated entity working in both the residential and commercial markets. I shall jointly refer to the two employer corporations as the "Employer".

4. In addition to the wage payment order, the delegate also levied five separate $500 monetary penalties (see section 98 of the *ESA*) against the Employer based on its contraventions of sections 18 (payment of wages on termination of employment), 28 (maintenance of payroll records), 40 (overtime pay), 58 (vacation pay) and 63 (compensation for length of service) of the *ESA*. Thus, the total amount payable by the Employer under the Determination is $14,587.24.

5. The Appellant originally sought $10,875 in overtime pay alone (his total claim was for $25,409.80, not including interest), but the delegate ultimately determined that the Appellant's overtime claim was not sufficiently supported by any corroborating evidence and, as such, only allowed $495.16 on account of the unpaid overtime.

6. The Appellant's appeal solely concerns his overtime pay award: "I am appealing the decision regarding my OVERTIME CLAIM made by the Employment Standard Act office [*sic;* CAPITALIZATION in original text]."

BACKGROUND FACTS

7. As detailed in the delegate's reasons, the Appellant worked for the Employer from November 16, 2015, until December 21, 2016, as a bookkeeper. The Appellant apparently completed a university degree in India in accounting but does not hold any Canadian accounting designation. He worked part-time (3 days/per week) at a $35 hourly rate until March 2017 when his hours expanded to a 40-hour work week and his hourly rate was increased to $50.

8. Throughout his tenure, the Appellant was treated as an independent contractor and he invoiced the Employer at his hourly rate plus the federal Goods and Service Tax. So far as I can determine, the Appellant never invoiced the Employer for any overtime hours (several separate invoices are included in the subsection 112(5) record (the "Record")). The delegate determined that, in law, the Appellant was not an independent contractor but, rather, an employee under the *ESA*. The Employer has not appealed that finding.

9. Toward the end of the employment relationship, the Employer expressed dissatisfaction with the Appellant's work performance, and following an altercation that apparently occurred between the Appellant and one of the Employer's principals (on December 21, 2016 – and the two individuals involved have diametrically opposed versions of what transpired), his employment was formally terminated by separate letters from each employer firm dated December 29 and 30, 2016, respectively. Both letters referred to the termination of the "independent contractor" agreements between the Appellant and each employer firm. The delegate found that the Appellant was entitled to two weeks' wages as compensation for length of service – that finding is not in issue before me. Indeed, as previously noted, the only issue before me concerns the overtime pay award (the Appellant says he ought to have received a great deal more money on that account) and, accordingly, I now turn to that issue.

THE OVERTIME CLAIM – THE DELEGATE'S REASONS

10. In his testimony before the delegate (see delegate's reasons, page R5), the Appellant stated that he recorded his overtime hours each day in a notebook, after arriving home from work. He did not tender this notebook into evidence. Instead, he recorded his overtime hours in an Excel spreadsheet and that document was submitted into evidence. This latter document was riddled with errors. The delegate's reasons, at page R6 state:

> During cross-examination, [the Appellant] could not specifically state what duties he performed while working overtime. [The Appellant] further admitted to making another 23 errors on his spreadsheet. [The Appellant] alleges he made errors on his overtime spreadsheet due to post traumatic stress, which he suffered because of the assault by [a principal of the Employer].

11. The Employer strenuously asserted that the Appellant did not work the overtime hours he claimed in his Excel spreadsheet but conceded he may have occasionally worked some overtime. The delegate did not find the Appellant's evidence regarding his overtime hours to be credible (at pages R18 – R19):

> Based on [the Appellant's] evidence, I am not convinced [the Appellant's] testimony and overtime records are a reliable representation of his hours worked. [The Appellant] admitted his spreadsheet records were not kept contemporaneously. He claimed he copied the records from a notebook, which he alleged was kept contemporaneously but has not provided the notebook into evidence.

> Aside from the times listed on the spreadsheet, [the Appellant] could not provide or recall any meaningful details to indicate what work was performed to warrant working beyond his regular eight-hour day. I found the testimony of [the Appellant] on this matter to be vague and inconsistent…Under cross, [the Appellant] admitted to making errors on his spreadsheet on 23 occasions. [The Appellant] stated that when he prepared his spreadsheet, the errors were due to post-traumatic stress. [The Appellant] has provided no evidence to corroborate that he was mentally incapable of producing an accurate spreadsheet; but, even if he was not mentally capable, the only reason he provided for not submitting his notebook was that he did not think he needed to. I find I cannot rely on [the Appellant's] spreadsheet with any confidence.

12. Notwithstanding the above finding, the delegate did credit the Appellant for some overtime based on the concessions of the Employer and some corroborating documents.

REASONS FOR APPEAL

13. The Appellant, on his Appeal Form, checked the boxes relating to all three statutory grounds of appeal – the delegate erred in law; the delegate failed to observe the principles of natural justice; and that he has new and relevant evidence not previously available (subsections 112(1)(a), (b) and (c) of the *ESA*). However, in the written memorandum attached to his Appeal Form detailing his reasons for appeal, he did not separately identify which particular allegations supported each specific ground of appeal.

14. I presume his "new evidence" relates to certain medical information and WorkSafeBC documents that he appended to his appeal form – all but one of which pre-date either the complaint hearing or the issuance of the Determination.

15. Again, and while not entirely clear, it would appear that his "natural justice" argument is predicated on the assertion that he was in some way misled, or that he misled himself, regarding the sort of evidence he was expected to submit to the delegate in order to prove his overtime claim. Specifically, the Appellant says:

> During the course of the hearing conducted on April 25, May 15 & May 16,2017 [*sic*] I was not clearly informed that I should bring the note book containing my log of overtime information. I was not informed that I should bring the log (note book)
>
> My contention was to prepare a Excel spread sheet [*sic*] to document the overtime worked during the course of my employment…The initial hearing of May 15, 2017 was extended to May 16, 2017 [*sic*, the actual complaint hearing dates, as noted above, were April 25 and May 15, 2017] and I offered to bring the note book containing overtime logs. The office denied my request to submit my log on May 16,2017 [*sic*] …
>
> During my conversation on Jan 23. 2017 [*sic*] with John Cruz after receiving the letter from the Employment Standard Office [*sic*] dated January 19, 2017 [*sic*] I was advised that if I had produced the log (note book) my overtime would be payable since the employer does not have any records to prove the time I worked at their office. Employment Standard Office [*sic*] has fined the employer $2,500.00 (see attached letter)

16. In addition, and regarding the "natural justice" ground of appeal, the Appellant also appears to complain about the fact that certain employees did not attend the hearing. The Appellant, presumably (he did not say

this expressly), maintains that these individuals would have provided evidence that would have corroborated and/or buttressed his overtime claim.

17. The Appellant maintains that he is suffering from post-traumatic stress disorder and that any "errors made on the spread sheet are due to the post traumatic stress disorder" and that, in addition, "the time taken to adjudicate my claim is very long and played a significant role on my mental and physical health".

18. Finally, and I suppose this assertion could be characterized as an alleged "error of law", the Appellant maintains that the delegate's decision regarding his overtime claim was "not a reasonable judgment" and, accordingly, he asks that his overtime claim be referred back to the Director.

THE FINDINGS AND ANALYSIS

19. I propose to address each ground of appeal – and the Appellant's reasons apparently supporting each ground of appeal – in turn.

New Evidence

20. The "new evidence" consists of three separate categories of documents as itemized in the Appellant's memorandum appended to his Appeal Form:

- "Overtime log information from July 2017 to December 2017 (Note book)" [*sic*]
- "WCB letters dated March 2, 2017,June 6, 2017 & November 10, 2017 [*sic*]; and
- "Dr John Du medical report dated January 31, 2018. Dr Miller and Jim Giesbrecht medical information".

21. New evidence is admissible in accordance with the criteria set out in *Davies et al.*, BC EST # D171/03. Briefly, the evidence must not have been available, or was otherwise not discoverable through due diligence and, as such, it was not possible to have submitted the evidence to the delegate; the evidence must be both relevant and credible; and the evidence must have a high probative value (in the sense that if the delegate had the evidence, it might well have led to a different conclusion).

22. In this case, the wage recovery period fixed by section 80 of the *ESA* runs from mid-November to December 21, 2016. Although the Appellant stated that the overtime log covered the period from July to December 2017 (a period of time after the Appellant had already been terminated), in fact, the log purports to cover the period from July 1, 2016 ("1/7/16") to December 20, 2016 ("20/12"). While I readily concede that I am not an expert handwriting analyst, these excerpts from a notebook supposedly contemporaneously maintained by the Appellant, do not have the look and feel of a genuine document and the entries appear to have been written down at a single point in time. However, and apart from my concerns regarding the *bona fides* of this record, this evidence is not admissible under *Davies, supra*, because it could have been submitted to the delegate at the hearing (as noted above, the Appellant referred to this notebook in his testimony). For some reason, the Appellant chose not to do so, preferring instead to submit the summary Excel record he apparently created from the entries in the notebook.

23. The hearing occupied two days – April 25 and May 15, 2017 – and following the hearing, the delegate received final written submissions. The Appellant submitted a written submission on May 31, 2017, and a reply submission on August 8, 2017. In his May 31st submission the Appellant advanced many arguments concerning his employment status, and an alleged assault by one of the Employer's principals, but did not say anything in particular about overtime hours other than to claim that he was entitled to overtime pay. He made no mention of a notebook in which he recorded his hours. In his final August 8th submission, the only statements the Appellant made regarding overtime pay were the following: "I maintained a book which latter [*sic*] was translated to a worksheet at the hearing…Overtime claimed by me are true to the best of my knowledge". The Appellant did not submit excerpts from his notebook as part of either his May 31st or August 8th submission.

24. In my view, the "overtime log" is not admissible under the *Davies* criteria. This evidence, about which I have some concerns regarding its veracity and probative value, should have been provided to the delegate at the complaint hearing. At the very least, the Appellant should have made an application to submit this evidence to the delegate prior to the issuance of the Determination.

25. The next group of documents submitted as "new evidence" consists of three WCB reports dated March 2, June 6 and November 10, 2017. The first of these two documents pre-dates the first day of the hearing (and clearly was available as of that date) and the other two documents pre-date the issuance of the Determination. The Appellant does not indicate what efforts, if any, he made to submit any of these documents to the delegate prior to the issuance of the Determination. The March 2nd letter is wholly irrelevant; the June 6th letter simply states that WorkSafeBC has accepted his claim regarding a "psychological injury" – I fail to see how this document is relevant to the question of whether the Appellant did, or did not, work the overtime hours he claimed. Finally, the November 10th letter simply informs the Appellant that the original WorkSafeBC decision denying his claim was being overturned, and that he while he was *not* suffering from post-traumatic stress disorder, he did have an "Adjustment Disorder with Anxious and Depressed mood". Again, I fail to see how this document is relevant to the question of whether the Appellant did, or did not, work the overtime hours he claimed.

26. The Appellant appears to be saying that his mental state, as reflected in these documents, was such that he was not able to properly present his case. The delegate rejected that assertion and, in any event, found that his testimony regarding his overtime hours was not credible. There is no evidence before me that suggests the Appellant was, by reason of some psychological condition, unable to properly present his case. I am not persuaded that the delegate's finding that the Appellant had the mental capacity to present his case was tainted by any palpable and overriding error (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). I wish to stress that there is no medical evidence whatsoever in the Record before me that suggests the Appellant, due to some sort of psychological condition, was not competent to present his case to the delegate.

27. With respect to the other two documents – the January 31, 2018 Dr. Du report and the information from Dr. Miller and Jim Giesbrecht – while the Appellant claims that his condition flows from an alleged workplace assault, there is no evidence in the Record that such an assault ever occurred. The RCMP, so far as I can gather, investigated the complaint and no charges were ever filed. I should also note, in fairness to the other individual involved, that he has a very different version of what transpired – describing the Appellant as the aggressor, being angry and somewhat irrational. The delegate did not resolve this conflict in the evidence.

It is entirely possible that whatever psychological condition the Appellant may have is attributable to having lost his job and, as noted by Dr. Du, partially attributable to a prior motor vehicle accident. Dr. Du did not report that the Appellant was incapacitated to the extent that he could not present his case to the delegate; indeed, the report states that the Appellant's "concentration and pace" during a 3-hour assessment "appeared largely adequate".

28. There is are no reports before me from Dr. Miller and Jim Giesbrecht – the latter is briefly mentioned (and only tangentially) in Dr. Du's report.

29. In my view, the Dr. Du report is not relevant to the issues that were before the delegate and it is not admissible in accordance with the criteria established in *Davies*.

Natural Justice

30. The Appellant says: "I was not clearly informed that I should bring the note book containing my log overtime information [and] I was not informed that I should bring the log (note book)". However, the Appellant's complaint was adjudicated via a complaint hearing process rather than an investigation. Having reviewed the Record, it appears that the Appellant was clearly informed that it was his obligation to bring any and all relevant evidence to the hearing and, indeed, he was specifically advised in writing (in the "Notice of Complaint Hearing") to produce *all* documents on which he intended to rely prior to the hearing. Any blame relating to the Appellant's failure to produce his notebook rests entirely on his shoulders.

31. The Appellant appears to be saying that he did not produce his notebook at the hearing because he was told that he could not do so. There is absolutely no credible evidence to support that assertion. The Record indicates that the Appellant concluded his case on the first day of the hearing (April 25, 2017); a second hearing day was necessary only because the Appellant, during his testimony, referred to hearsay evidence relating to another employee – the hearing was extended to permit the Employer to call this employee as its own witness.

32. I might add, simply for the sake of completeness, that even if the Appellant's notebook had been before the delegate, I rather doubt it would have affected the outcome given the delegate's findings (quoted above) regarding the dubious nature of the Appellant's overtime claim. As I previously observed, the "notebook" does not appear to be a credible and probative document.

33. Prior to the May 15th continuation, the Appellant sent an e-mail to the Employment Standards Branch indicating that "I would like the following personnel (witness) attend the second hearing" and he then identified five individuals. In an earlier e-mail communication, the Appellant indicated that he wished additional (unnamed) employee witnesses to testify outside the presence of the Employer because otherwise they would not be truthful. The Appellant did not explain how these individuals' testimony would be relevant, nor did he provide any details regarding the subject matter of their testimony. The Appellant's request was refused (and properly so, in my view). *The Appellant did not make any application to submit his notebook as further evidence.*

34. The Appellant, in his final reply submission (August 8, 2017), stated that he did not call any further witnesses because, given they were all employees, "it was deemed that they would not be creditable at the hearing". This is a somewhat curious statement inasmuch as he was told he would not be permitted to call additional witnesses but, in any event, the statement demonstrates that he apparently made an independent decision not to attempt to call further witnesses at the May 15th continuation.

35. Finally, there is absolutely nothing in the Record before me with respect to the Appellant's alleged conversation with "John Cruz" *following* his receipt of the Determination (other than the Appellant's assertion that it occurred). I have grave doubts about the veracity of the Appellant's version of what was supposedly said during that conversation (as it would have been wholly improper for an Employment Standards Officer to make such a reported statement) but, in any event, any such conversation is wholly irrelevant to the issues raised by this appeal given that this conversation did not apparently take place until after the adjudication of this matter was concluded at the Employment Standards Branch level.

Error of Law

36. The Appellant seeks to have the overtime award set aside as "unreasonable" but, in my view, the delegate's finding in this regard is faithful to the evidence that was before her and I see no palpable and overriding error in her treatment of the Appellant's overtime claim.

Summary

37. The Tribunal may dismiss an appeal, without hearing from the respondent parties, if the appeal has no reasonable prospect of succeeding (see subsection 114(1)(f) of the *ESA*). I have reviewed the Appellant's various reasons for appeal and I find that each has no merit whatsoever. Fundamentally, the Appellant simply asks the Tribunal to substitute a different decision for that made by the delegate. However, I see no error in the delegate's analysis, or her evaluation of the evidence before her. The Appellant's notebook was not before the delegate but that was solely because the Appellant did not submit it into evidence. Further, even if the notebook had been before the delegate, I am not persuaded that circumstance would have changed the delegate's decision with respect to the overtime claim.

ORDER

38. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the total amount of $14,587.24 together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal