

Citation: Rose & William Enterprises Ltd. (Re)
2018 BCEST 73

An appeal

- by -

Rose & William Enterprises Ltd.
carrying on business as The Dear Animal Hospital
("Dear Animal Hospital" or the "Employer")

- 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: Marnee Pearce

FILE NO.: 2018A/45

DATE OF DECISION: July 31, 2018

DECISION

SUBMISSIONS

Dr. Varinder Dabri

on behalf of Rose & William Enterprises Ltd. carrying on business as The Dear Animal Hospital

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Rose & William Enterprises Ltd. carrying on business as The Dear Animal Hospital (“Dear Animal Hospital” or the “Employer”) has filed an appeal of a Determination issued by Janko Predovic, a delegate (the “Delegate”) of the Director of the Employment Standards (the “Director”), on March 28, 2018 (the “Determination”).
2. Georgia Gordon-Snyder (“Ms. Gordon-Snyder”) and Dilfuza Noralieva (“Ms. Noralieva”), (collectively, the “Employees” or the “Complainants”) filed complaints with the Director respectively on January 5, 2018, and February 5, 2018, alleging that Dear Animal Hospital contravened the *ESA* in failing to pay them regular wages, overtime, and annual vacation pay.
3. Following an investigation, the Delegate concluded that Dear Animal Hospital had contravened section 18 (wages), section 58 (annual vacation pay), section 40 (overtime), and section 88 (accrued interest) of the *ESA* and ordered Dear Animal Hospital to pay \$1,661.68 in respect of those wages.
4. The Delegate also levied 4 administrative penalties for contraventions of sections 17, 18, 27 of the *ESA* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”), totalling \$8,000.00.
5. Dear Animal Hospital contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Dear Animal Hospital also contends that evidence has become available that was not available at the time the Determination was being made.
6. As the appeal of this Determination involves multiple complainants, the Tribunal asked both Employees in a May 29, 2018, letter to notify the Tribunal by June 5, 2018, if they did not want certain documents disclosed to the other Respondent. Neither Respondent provided a submission on this issue.
7. The section 112(5) record (the “Record”) has been provided to the Tribunal by the Director and a copy was sent to Dear Animal Hospital and the Employees on June 8, 2018, allowing the opportunity to object to its completeness. No objection was received, and accordingly, the Tribunal accepts it as being the complete Record of the material that was before the Director when the Determination was made.
8. Section 114 of the *ESA* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that this Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
9. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (the

“Reasons”), the appeal, the written submissions filed with the appeal, and my review of the material that was before the Director when the Determination was being made.

ISSUE

10. The issue to be decided at this stage is whether the appeal should be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR DETERMINATION

11. The facts, as set out by the Delegate, are as follows.
12. Dear Animal Hospital is a company duly incorporated under the laws of British Columbia and operates a veterinary clinic which falls under the jurisdiction of the *ESA*. A January 8, 2018, corporate search confirms that the company was established on November 1, 2010, with Varinder Singh Dabri (“Dr. Dabri”) and Gurdish Kaur Dabri (“Ms. Dabri”) as the directors.
13. Ms. Gordon-Snyder was employed as a Veterinary Assistant for Dear Animal Hospital from November 8, 2017, to December 11, 2017, at the rate of pay of \$12.00 per hour; she quit her employment on December 11, 2017.
14. No contract of employment was signed, and no wage statements or tax forms were provided to Ms. Gordon-Snyder from Dear Animal Hospital. Ms. Gordon-Snyder emailed her hours of work to Ms. Dabri on the 15th and 30th of the month.
15. In her written complaint, Ms. Gordon-Snyder claimed \$1,710.00 in regular wages, \$48.00 overtime, and \$85.44 in vacation pay, for a total of \$1,843.44. She reported working 92 hours in her second pay period (November 16 – 30, 2017) and 54 hours and 10 minutes, including 3 hours and 20 minutes of overtime in her third and final pay period of December 1 – 11, 2017.
16. There were three pay periods within Ms. Gordon-Snyder’s brief employment with Dear Animal Hospital. The first pay period resulted in payment of \$360.35; however, the cheque for the second pay period in the amount of \$944.60 was not deposited due to insufficient funds in the Employer’s account.
17. The cheque for the second pay period, which could not be cashed due to insufficient funds in the Employer’s account, was for the 92 hours worked and as reported by Ms. Gordon-Snyder.
18. On December 11, 2017, Ms. Gordon-Snyder quit her job when a bailiff attended Dear Animal Hospital’s place of business and repossessed some laboratory equipment.
19. On December 15, 2017, Ms. Gordon-Snyder went to the employer’s place of business regarding outstanding wages, wage statements, and a requested T-4 slip, and a conflict erupted resulting in police attendance and Ms. Gordon-Snyder’s arrest.
20. On January 11, 2018, the Delegate issued a demand for records from Dear Animal Hospital, with a deadline for submission of January 26, 2018.

21. On January 29, 2018, Dr. Dabri provided payroll records by email, but these were incomplete as they did not contain information concerning Ms. Gordon-Snyder's third pay period.
22. On February 5, 2018, the Delegate sent Dear Animal Hospital his preliminary findings regarding Ms. Gordon-Snyder's complaint. The preliminary findings letter informed Dear Animal Hospital that, based on the evidence to date, Ms. Gordon-Snyder was owed wages as claimed, was credible and reliable, and there was no evidence suggesting the wages weren't owed to her. The preliminary findings also were that Dear Animal Hospital was in violation of sections 17, 18, 27, and 46 [sic] of the *ESA*, and that the mandated penalties would exceed the amount of the wages owing. Dear Animal Hospital was urged to provide the outstanding wages claimed.
23. On February 8, 2018, Dr. Dabri attended the Employment Standards Branch and was shown the evidence submitted by Ms. Gordon-Snyder, including a copy of the uncashed cheque for the second pay period. Mr. Dabri stated that he did not keep track of the hours worked by Ms. Gordon-Snyder; however, he believed that she was only owed about \$900.00.
24. On February 8, 2018, Dr. Dabri wrote a cheque for \$945.00 to replace Ms. Gordon-Snyder's uncashed cheque. This was successfully deposited by the Branch and the funds delivered to Ms. Gordon-Snyder.
25. In her written complaint filed with the Employment Standards Branch on February 5, 2018, Ms. Noralieva claimed \$690.00 in regular wages, \$99.00 in overtime, annual vacation pay, and Statutory Holiday pay for Christmas Day. She reported working in excess of 40 hours in a week between December 24, 2017, and December 30, 2017, and she kept a contemporaneous timesheet that was provided as evidence.
26. Ms. Noralieva was employed as a Veterinary Assistant for Dear Animal Hospital from December 22, 2017, to January 2, 2018, at the rate of pay of \$12.00 per hour; she quit her employment on January 2, 2018.
27. Ms. Noralieva received no wages whatsoever from Dear Animal Hospital, nor did she receive any wage statements.
28. Ms. Noralieva quit her employment on January 2, 2018, once she heard from coworkers that the Employer had a track record of not paying employees properly or on time, and after she was not paid, as promised, at the end of the December 2017.
29. On February 6, 2018, the Delegate notified Dear Animal Hospital of the contents of Ms. Noralieva's complaint filed with the Employment Standards Branch on February 5, 2018. The Delegate also provided his preliminary findings based on Ms. Noralieva's evidence, including the anticipated amount of the wages owing and the associated mandated penalties. Once again, the Delegate urged payment of the outstanding wages claim in order to prevent the penalties.
30. Dr. Dabri responded on February 7, 2018, stating that Ms. Noralieva only worked 50 hours in total and no overtime, and had been mailed a cheque of \$563.70 including vacation pay. If Ms. Noralieva did not receive this cheque, he was willing to replace it, but there remained an essential disagreement over the hours worked.

31. On February 9, 2018, the Delegate wrote to Dr. Dabri stating that the complainants had agreed with his calculations and were willing to accept the amount of \$895.74 for Ms. Gordon-Snyder (in conjunction with the cheque of \$945.00 already provided) and \$751.92 for Ms. Noralieva, based on 57.5 hours of work, and overtime on December 30, 2018. Both of the totals included vacation pay.
32. Dr. Dabri did not get back to the Delegate concerning the settlement of the complaints, and a Determination was issued by the Delegate on March 28, 2018.
33. The Delegate found that Dr. Dabri offered little evidence or argument to refute the claims of the Employees. Dr. Dabri's evidence consisted primarily of asserting that Ms. Gordon-Snyder's claim was too high and that Ms. Noralieva had already been fully paid.
34. The Delegate found that although he had been provided a wage statement from Dr. Dabri as requested regarding Ms. Noralieva, this was unsupported by any proof that the funds referenced reached their intended recipient. Ms. Noralieva denied receiving the \$563.70 cheque and also provided a contemporaneous record of the hours she worked.
35. With respect to Dr. Dabri's statement that Ms. Gordon-Snyder was only owed approximately \$900.00, the Delegate noted this amount is what would have been outstanding had the second paycheque been cashed, and this would explain the discrepancy in the employer and employee's understanding of hours worked.
36. The Delegate preferred the evidence of both Employees over that of Dear Animal Hospital. The Delegate noted the spotty nature of the Employer's record-keeping, and the history of bounced cheques, compared to the evidence of hours worked provided by the Complainants, which he accepted as consistent, reliable, and substantiated by documentation. The Delegate accordingly accepted the evidence of the Complainants to the extent of any inconsistencies between it and the evidence of the Employer.
37. The Delegate found that both Complainants were employees, they worked the dates they indicated they worked, and they worked at the rates of pay they indicated they worked, and they were not paid the wages they claim they were not paid. He also found that the Complainants never received any wage statements.
38. The Delegate outlined the calculations of wages owing to the Complainants in individual calculation sheets attached to the Determination. Both calculation sheets establish entitlement to regular wages, overtime, and vacation pay. There was no entitlement to Statutory Holiday Pay.

ARGUMENT OF THE EMPLOYER

39. Dear Animal Hospital's appeal submissions disagree with the Delegate's push to settle the claim, accusing the Delegate of bullying the Employer into paying money not owed to employees or face a big penalty.
40. The appeal submissions state that vacation pay is always included in payroll and disagreed with the award of overtime to either employee, as they never asked their employees to work overtime.

41. The appeal submissions state that Dear Animal Hospital has no record of the wages Ms. Gordon-Snyder is claiming, and reaffirmed its position that Ms. Noralieva worked only 50 hours and was paid by way of a cheque for \$563.70.
42. Attached to the appeal submission is what appears to be a ledger entry for a cheque to Ms. Noralieva on January 3, 2018, in the amount of \$563.70.
43. The appeal submissions argue that the Delegate failed to observe the principles of natural justice as the decision was biased, no hearing was conducted, and no proof was sought.
44. The grounds of appeal also include an error in law and that evidence has come available that was not available at the time the Determination was made.

ANALYSIS

45. Under section 114 (1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
- 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more the requirements of section 112 (2) have not been met.
46. The grounds of appeal are statutorily limited to those found in subsection 112 (1) of the *ESA* which says:
- 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.

47. 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 that there is an error in the Determination under one of the statutory grounds.

Failure to comply with the principles of natural justice

48. At their essence, the principles of natural justice are procedural rights that ensure that parties know the case being made against them, are given an opportunity to reply, and have the right to have their case heard by an impartial decision maker.

49. There is nothing in the Determination or the Record to support a finding that the Director breached the principles of natural justice. Dr. Dabri was in contact with the Delegate by email, telephone and in person to discuss the substance of the complaints for outstanding wages.

50. The Delegate clearly gave Dear Animal Hospital a full opportunity to respond to the case before it, and while Dr. Dabri disagrees with the Delegate's findings, I find no basis to conclude that the Employer was denied the right to be heard and provide supporting evidence.

51. Dear Animal Hospital argues that no 'proof was sought' to support the Employees' wage claims. This is simply untrue. The Employees provided their own record of hours worked, and a Demand for Records was issued to the Employer on January 11, 2018. The information submitted by the Employees was accepted because it was more reliable than that provided by the Employer, which was found to be incomplete.

52. Dear Animal Hospital argues that they were denied due process because no hearing was held. A live hearing is not required in order to complete a determination – an investigation conducted by a delegate of the Director is an accepted alternative.

53. Dear Animal Hospital argues that the decision-maker was biased and only considered the Employees' 'side'. No evidence was provided to support this statement.

54. Allegations of bias cannot be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

55. The test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one, and the evidence presented should allow for objective findings of fact. Furthermore, because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: (*A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board, and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.)

56. Dr. Dabri makes the allegation of bias without any evidence whatsoever. His allegation appears to stem from the fact the Delegate preferred evidence provided by the Employees, and he disagrees with the results. I find that the allegation of bias was made without any foundation and is unsupported by the record.

57. Dr. Dabri argues that he felt pushed to settle the claim by the Delegate and to pay money to the Employees that he believed Dear Animal Hospital did not owe, or else the Employer would face penalties. No settlement was reached.
58. The role of the Delegate when investigating a claim includes pursuing settlement options. The Delegate encouraged settlement in this instance and explained the implications of not reaching a settlement – in particular, the implementation of non-discretionary penalties.
59. There is no evidence that the Delegate applied unfair or unreasonable pressure on Dear Animal Hospital or made threats to attempt to coerce a settlement. The Delegate’s actions in giving Dear Animal Hospital the opportunity to avoid the implementation of penalties by settling the claim based on the best evidence of wages owing was in keeping with the Delegate’s function and in keeping with the purpose of the legislation as set out in section 2 of the *ESA*.
60. No improper conduct of the Delegate is found and this argument is unsupported by the evidence.

Error of Law

61. 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 facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
62. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on the facts, Dear Animal Hospital is required to show the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13.
63. I find no error of law in the Determination. The conclusion reached by the Delegate on wages owed to the Employees followed an analysis of the evidence presented by the parties during the complaint process and is rationally supported by the facts and law. While I appreciate that Dear Animal Hospital disagrees with the conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all, were perverse or inexplicable, or that the Director misapplied the law and legislation.

New Evidence

64. 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 the 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 potential 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.
65. Dear Animal Hospital has selected as a ground of appeal that new evidence has become available that was not available at the time the Determination was being made. No argument has been put forward concerning this ground but there is an attachment to the appeal form that will be treated as the proposed new evidence. This attachment appears to be a photocopy of a cheque ledger entry, with the date of January 3, 2018, the cheque amount of \$563.70, and the recipient listed as Dilfuza Noralieva.
66. During the investigation, Dear Animal Hospital raised the payment of \$563.70 to Ms. Noralieva as evidence that she was already paid for hours worked and earned wages. Ms. Noralieva denied receiving this payment, and the Delegate addressed this argument in the Determination. Noting that Dear Animal Hospital has a history of writing cheques that bounce, the Delegate was not convinced that a wage statement in this amount constituted reliable evidence of payment. The Delegate commented that there was no proof provided that the funds reached the intended recipient.
67. The photocopy of a cheque ledger entry does not meet the threshold for consideration as new evidence. It could have been, with the exercise of due diligence, presented to the Delegate during the investigation. In any event, it has no probative value as it does not establish that a cheque for \$563.70 was received and cashed by Ms. Noralieva and would not have led the Delegate to a different conclusion on the material issue of outstanding wages owed by Dear Animal Hospital.
68. The appeal is dismissed.

ORDER

69. Pursuant to section 115 of the *ESA*, I order that the Determination dated March 28, 2018, be confirmed in the amount of \$9,661.68, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Marnee Pearce
Panel
Employment Standards Tribunal