Employment Standards TRIBUNAL

Citation: OE Construction Solutions Inc. (Re)
2019 BCEST 106

An appeal

- by -

OE Construction Solutions Inc. carrying on business as Optimal Efficiency
("Optimal Efficiency")

- 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: David B. Stevenson

FILE NO.: 2019/58

DATE OF DECISION: October 4, 2019

DECISION

SUBMISSIONS

Katelyn Weller	counsel for OE Construction Solutions Inc. carrying on business as Optimal Efficiency
Sara G. Parchello	counsel for OE Construction Solutions Inc. carrying on business as Optimal Efficiency

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), OE Construction Solutions Inc. carrying on business as Optimal Efficiency ("Optimal Efficiency") has filed an appeal of a determination (the "Determination") issued by Shane O'Grady, a delegate of the Director of Employment Standards (the "Director"), on March 23, 2019.

2. The Determination found Optimal Efficiency had contravened Part 3, sections 17, 18, 21, 26, 28, Part 4, section 35 and Part 8, section 63 of the *ESA* in respect of the employment of thirteen employees (collectively "the employees") and ordered Optimal Efficiency to pay the employees wages in the amount of $112,645.33, an amount that included wages and interest under section 88 of the *ESA*. The Director imposed administrative penalties for contraventions of the *ESA* in the amount of $3,500.00. The total amount of the Determination is $116,145.33.

3. Optimal Efficiency has appealed the Determination on the ground the Director erred in law in the Determination. The appeal is also grounded in evidence becoming available that was not available when the Determination was being made.

4. Optimal Efficiency seeks to have the Determination varied, cancelled and/or referred back to the Director.

5. In correspondence dated June 21, 2019, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the "Record") from the Director and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.

6. The Record has been provided to the Tribunal by the Director and a copy has been delivered to counsel for Optimal Efficiency and to each of the employees, appropriately severed or redacted to protect privacy rights of other employees. All parties have been provided with the opportunity to object to its completeness.

7. The Tribunal has received no objection to the completeness of the Record and accepts it as being complete.

8. 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

appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made and any additional evidence that is accepted and added to the material in the Record. Under section 114(1), the Tribunal has discretion to dismiss all or part of an 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 the appeal will succeed;*
>
> *(g) the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> *(h) one or more of the requirements of section 112(2) have not been met.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and the employees will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

10. The issue is whether all or part of this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

11. Optimal Efficiency is a software development company. In mid-2018, it experienced a financial setback and found it necessary to significantly reduce their work force.

12. All of the employees lost their employment with Optimal Efficiency. Seven of the employees filed complaints (the "Complainants"), alleging Optimal Efficiency had contravened the *ESA* in several respects, including failing to pay regular wages, overtime wages, vacation pay and length of service compensation. During the course of the investigation the Director was alerted to an additional group of employees who might also have been entitled to advance a claim under the *ESA*.

13. The Director conducted an investigation, receiving documents and information from Optimal Efficiency and each of the employees, made findings of fact based on the information received – or not received as the case may be – and found each of the employees were entitled to wages in the amounts set out in the appendices to the Determination.

14. Of some importance to a consideration of this appeal are the following facts identified by the Director and findings made by the Director:

i. Optimal Efficiency provided a summary response to the request by the Director for payroll information relating to the investigation of the group of employees who might be owed wages but had not filed complaints.

ii. Optimal Efficiency ceased communicating with the Director on the investigation February 11, 2019, leaving lines of inquiry unanswered. Most particularly, complete records relating to the employees who had not filed complaints was not provided.

iii. Optimal Efficiency provided the Director with a "Payroll Detail Review", which provided payroll information for each of the employees who filed complaints (the "Complainants") showing salary earned by each of those employees in each pay period, statutory deductions made, vacation pay accrued and paid out, deductions for each component of the group benefit program for those employees who participated in it. The Payroll Detail Review did not include a record of hours worked for any employee. The Director found the Payroll Detail Review to be "of little support in determining what outstanding regular wages were owed to the Complainants" for the reasons set out in the Determination.

iv. The Director found the "wages owing breakdown provided by Optimal [to be] unreliable in determining the actual wages owed to each Complainant".

v. The Director found the evidence provided by the Complainants as to what regular wages had not been paid in the final pay period, or in one case several pay periods, preferable to that provided by Optimal Efficiency for the reasons set out in the Determination.

vi. The Director found:

> …the wage statements provided by Optimal are not a credible reflection of the wages owed to each of the Complainants. The difference between the final wage statements received by most Complainants (in July) and the wage statement provided by Optimal (in August) contain a number of differences, most notably a significant change in vacation pay owing to the Complainants, which in some cases is a difference of thousands of dollars. No supporting evidence to credibly explain the changes have been provided by Optimal.

vii. The Director found the "August wage statements, the 'details of final payment document' and the Attendance Tracker are not reliable documents in terms of determining the total outstanding vacation pay owing to each of the Complainants" for the reasons set out in the Determination.

viii. The Director did not consider, or make any findings on, whether Optimal Efficiency was a "high technology company" as that term is defined in section 37.8 of the *Employment Standards Regulation* (the *"Regulation"*).

ARGUMENT

15. Optimal Efficiency argues the Director erred in law in the Determination.

16. Optimal Efficiency submits the Director committed the following errors:

    a. in calculating the daily rate of pay for employees resulting in employees being owed more wages than their actual entitlement;

    b. crediting Optimal Efficiency only for net amounts paid, rather than gross amounts;

    c. failing to account for vacation already used;

    d. finding one of the Complainants, Bryan Heredia ("Mr. Heredia") was entitled to overtime wages; and

    e. finding two of the employees, Kiky Tangerine ("Mr. Tangerine") and Joshua Melton ("Mr. Melton"), were entitled to compensation for length of service.

17. I shall summarize the salient points of each of the above arguments.

18. Optimal Efficiency says that, because the employees were paid an annual salary on a semi-monthly basis, the appropriate method of calculating each employees' daily wage rate would have been to divide the annual salary into 24 pay periods and then divide the resulting figure by the number of working days in the pay period, or, possibly, periods, under consideration. An example is provided applying the calculation to the salary and working days in the pay period August 16 – 31 for one of the Complainants.

19. Optimal Efficiency submits the Director only credited them with net amounts of wages paid, rather than gross amounts, resulting in the Director finding the employees were owed more than they should have been.

20. Optimal Efficiency submits the Director "did not adequately review and account for the vacation information provided by [them]". In essence, Optimal Efficiency argues the Director was wrong to ignore the 'vacation tracker' provided and says, "[Optimal Efficiency] anticipates providing vive [*sic*] voce evidence and/or affidavits in support of the accuracy of the vacation tracker". In its written argument, Optimal Efficiency uses the example of one of the Complainants, Omagbitse Ejoor, to make the point that he had overused his vacation entitlement and been overpaid, with the amount of the overpayment – as calculated by Optimal Efficiency – having been deducted from his final pay cheque. Similar submissions were made for three other employees.

21. Optimal Efficiency argues Mr. Heredia was not entitled to overtime because he was a "high technology professional" and, applying section 37.8 of the *Regulation*, exempted from the overtime provisions of *ESA*.

22. Optimal Efficiency says neither Mr. Tangerine nor Mr. Melton should have been awarded length of service compensation, as both employees quit. In support of its argument relating to Mr. Tangerine, Optimal Efficiency has provided a copy of an e-mail from Mr. Tangerine to Karine Samson, who is listed as the sole director of Optimal Efficiency, which was not provided to the Director during the investigation.

23. While Optimal Efficiency has raised the 'new evidence' ground of appeal, how this ground applies in the context of the appeal is not addressed in any of the submissions made.

ANALYSIS

24. 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.*

Error of Law

25. The appeal asserts error of law. 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.

26. With two exceptions, the arguments made under this ground of appeal challenge factual findings and conclusions made by the Director from the evidence provided during the process. Findings related to wages paid, and amount still owed, vacation pay entitlement and entitlement to compensation for length of service were all based on the evidence provided to the Director by the parties during the investigation.

27. It is apparent from the appeal that Optimal Efficiency seeks to have the Tribunal review the entire file and reach different findings and conclusions that those made by the Director. 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.

28. 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, Optimal Efficiency 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*, *D041/13*, at paras. 26 – 29.

29. I find all of the matters which counsel for Optimal Efficiency says amount to errors of law on the facts are adequately supported on the evidentiary record and are rationally supported in the Determination. The conclusions reached on the factual findings are correct on the law developed under the *ESA*.

30. The findings of the Director on what wages were paid was substantially dictated by the failure of Optimal Efficiency to provided reliable payroll information. In the example provided – Aled Carver – the Director noted on the calculation sheet for this employee, at page D37:

> No wage statement was provided to Mr. Carver with the payment.
>
> . . . As he was not provided with a wage statement for the payment of [specific amount omitted] made to him in November, he is unable to determine how Optimal calculated the payment of if his outstanding wages have been paid in full.

31. The Director also noted the onus was on Optimal Efficiency to show wages had been properly paid and that Optimal Efficiency had provided wage statements for the employee that did not reflect the dates or amounts it allegedly paid to him in November 2018, provided no proof of payment, date of payment, amount paid, deductions made from the payment or record of hours worked.

32. The argument made by Optimal Efficiency that the Director did not "adequately review" the vacation information provided by them does not meet the test for establishing an error of law. The Director did review vacation information provided by Optimal Efficiency, but found that information to not be reliable, providing reasons for that conclusion in the Determination: *cf.* pages D14 – D15.

33. In any event, this argument seems to be directed as much to the Director not allowing Optimal Efficiency to "claw back" any perceived overpayment of vacation pay by deducting the overpayment amounts from the final pay cheque of a number of employees. The Director quite correctly found this was not allowed under the *ESA*.

34. The finding of the Director on the entitlement of Mr. Tangerine and Mr. Melton to compensation for length of service was based on the evidence provided. The Director correctly noted the onus was on Optimal Efficiency to show these employees had lost that entitlement and that it had failed to do so. Optimal Efficiency has sought to submit evidence with this appeal which it says meets its onus. This evidence appears to be the only example of material included or referred to in the appeal that is not in the Record and might invoke the "new evidence" ground of appeal. I shall digress to address the elements of this ground of appeal and my finding on this piece of additional material.

35. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director

before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

36. The "new evidence" ground of appeal applies only to evidence *"that was not available at the time the determination was made"*.

37. The proposed evidence is not "new"; it was available and could have been provided to the Director during the complaint process had Optimal Efficiency opted to provide information relating to Mr. Tangerine during the investigation process. Instead, it chose to close off communications with the Director without providing the requested information to the Director for the seven employees who had not filed complaints.

38. I find the evidence provided by Optimal Efficiency with the appeal, and the information relating to it, neither meets the elements of this ground of appeal nor does it meet the considerations for accepting and considering new evidence in an appeal.

39. In sum, Optimal Efficiency has not shown the Director erred in law in respect of any the matters addressed above.

40. On the other two arguments, which raises questions of whether the Director correctly interpreted and applied the *ESA*, Optimal Efficiency has met with mixed results.

41. First, Optimal Efficiency has not shown the Director erred in the formula applied for calculating the daily rate of pay for the employees. The calculation by the Director of the employees' rate of pay applies the definition of "*regular wage*" found in section 1 of the *ESA*. The calculations undertaken by the Director are entirely in accord with that definition and with the statutory objectives of consistency and efficiency in the resolution of disputes under the *ESA*. The formula for converting a yearly wage to an hourly wage rate is not ambiguous; it requires a simple mathematical application: see paragraph (e) in the definition of "*regular wage*". The Director made no error in using the formula statutorily provided or in the result reached. The method of calculation advanced by Optimal Efficiency is neither clear nor consistent and finds no support in any provision of the *ESA*.

42. To summarize my decision thus far, I find the appeal has no reasonable prospect of succeeding on any of the above arguments. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to them and that part of the appeal which relies on these arguments is dismissed under section 114(1) of the *ESA*.

43. The final point of argument made by Optimal Efficiency alleges the Director erred in awarding overtime to Mr. Heredia, because Mr. Heredia was a *"high technology professional"* as that term is defined in section 37.8 of the *Regulation* and exempted from most of the provisions in Part 4 of the *ESA*. While the submission by Optimal Efficiency on this point does not contend Optimal Efficiency is a *"high technology company"*, which is one of the conditions for finding an employee satisfies the definition and is exempted from most provisions in Part 4, my review of the Record strongly suggests it would meet the definition of *"high technology company"*, although I make no finding in that respect. This argument has sufficient presumptive merit that it should not be dismissed at this stage.

ORDER

44. Pursuant to section 115 of the *ESA*, I order the Determination dated May 23, 2019, be confirmed as outlined above and that submissions be sought on the matter of the overtime entitlement awarded to Mr. Heredia. The Tribunal will establish the procedure and time period for such submissions and notify the parties as necessary.

David B. Stevenson
Member
Employment Standards Tribunal