

Citation: Click Lock Roofing BC Inc. (Re)
2019 BCEST 112

An appeal

- by -

Click Lock Roofing BC Inc.
(the “Company”)

- 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)

PANEL: Allison Tremblay

FILE NO.: 2019/145

DATE OF DECISION: October 23, 2019

DECISION

SUBMISSIONS

Vasil (Bill) Ilkov

on behalf of Click Lock Roofing BC Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Click Lock Roofing BC Inc. (the “Company”) filed an appeal of the June 24, 2019 determination (the “Determination”) of Shannon Corregan, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”). In the Determination, the Delegate found that the Company contravened sections 21 (deductions) and 58 (vacation pay) of the *ESA* with respect to its employee Oliver Duquemin (“Duquemin”) and ordered it to pay \$1,734.36 in wages and interest and \$1,500 in administrative penalties under section 29 of the *Employment Standards Regulation* (the “Regulation”).
2. The Company claims that the Delegate made an error of law. The Company says that Duquemin filed his complaint after the expiry of the 6-month limitation period provided by the *ESA*. The Company also provided new evidence to dispute the Delegate’s estimate of business expenses. Finally, the Company says it was denied natural justice when it was denied an adjournment.
3. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed:
 - 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 the 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 of the requirements of section 112 (2) have not been met
4. I am satisfied that I am able to determine this appeal under section 114(1) on the basis of the material before me, namely, the Determination, the Reasons for the Determination, the appeal form, submissions filed by Vasil (Bill) Ilkov (“Mr. Ilkov”), and the section 112(5) record (the “Record”) provided by the Director.

ISSUE

5. Is there a reasonable prospect of success regarding the following questions:
 - a. Was Duquemin out of time to file a complaint?
 - b. Should the Tribunal accept the new evidence? If so, does the new evidence change the Delegate's assessment of business expenses?
 - c. Was the Company denied natural justice?

THE FACTS AND ANALYSIS

6. Duquemin worked for the Company as a sales representative. He did not have set hours of work. The Company provided Duquemin leads and Duquemin was required to follow up on those leads by telephone and in person. As Duquemin lived in Squamish, BC and many leads were in the Greater Vancouver area, this entailed a substantial amount of driving.
7. The parties agreed that Duquemin's last day paid was May 11, 2018. They disagreed as to his last day of employment. Duquemin said his last day was June 14, 2018. The Company argued that his last day of employment was May 11, 2018. Duquemin argued that his employment did not end on that day, rather, he went on vacation. The Company said that during this time it could not reach Duquemin by telephone. The Company did not provide evidence that it terminated his employment or considered that he had abandoned his job. The Delegate concluded, based on these factors, that Duquemin's last day of employment was June 14, 2018.
8. Duquemin filed his complaint to the Employment Standards Branch on November 13, 2018.
9. On appeal, the Company offers no new argument or evidence as to Duquemin's last day of employment. It simply is rearguing the matter that was decided by the Delegate. An appeal is not an opportunity to take a second kick at the proverbial can. It is not unusual that an employee with no set hours would have a last day of employment that does not coincide with the last day on which he or she worked. I find there is no reasonable prospect of success of an appeal with respect to the timeliness of the complaint.
10. The Company next complains about the Delegate's finding that the Company was required to reimburse Duquemin for fuel expenses incurred in the course of his employment. The Company submits new evidence which it says demonstrates that Duquemin's estimate of how much he drove during his employment was inflated.
11. I need not consider the new evidence. The Delegate ordered that the Company reimburse Duquemin the amounts on the fuel receipts he submitted as evidence. One of the requirements for the admission of new evidence on an appeal is that the new evidence is relevant to a material issue: *Re Bruce Davies et al*, BC EST # D171/03. I find that the number of kilometres Duquemin drove is not a material issue. I decline to admit the new evidence.
12. The third element of the Company's appeal is its claim that it was denied natural justice. The Company says that it sought an adjournment to seek legal counsel, but its request was denied.

13. The Delegate addressed this concern in the Determination as follows:
- Prior to the hearing, I had reviewed some of [an Employment Standards Branch employee's] correspondence with Click Lock, as [the employee] sought my advice in order to answer certain questions that Mr. Ilkov asked her. Mr. Ilkov asked [the employee] multiple questions about the hearing process. He asked whether she would recommend him to have legal representation at the hearing. He did not ask for an adjournment. In my judgement [*sic*], his emails indicated that he intended to participate in the hearing. I was satisfied that Mr. Ilkov had been in communication with the Branch prior to the hearing and if he had wished to request an adjournment, he had the opportunity to do so.
14. The power to adjourn a hearing is discretionary. The Tribunal may only interfere if there is a clear and unequivocal breach of natural justice: *Wicklow Properties Ltd.*, BC EST # D518/99; *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, at p. 568-570.
15. The Record provided by the Director contains emails between the Employment Standards Branch employee and Mr. Ilkov. In one email, the employee advises Mr. Ilkov in the days before the hearing that the hearing process is designed not to require legal counsel but that he could have a representative if he wished. Mr. Ilkov responds, asking further questions about the hearing process.
16. I find there is no reasonable prospect of success on this ground.
17. As there is no reasonable prospect of success on any of the grounds of appeal raised by the Company, I dismiss the appeal pursuant to section 114(1)(f) of the *ESA*.

ORDER

18. Pursuant to section 115 of the *ESA*, I confirm the Determination together with any interest that has accrued under section 88 of the *ESA*.

Allison Tremblay
Member
Employment Standards Tribunal