

Citation: Octiscapes Landscaping Ltd. (Re)
2019 BCEST 13

An appeal

- by -

Octiscapes Landscaping Ltd.
("OLL")

- 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: Shafik Bhalloo

FILE NO.: 2018A/114

DATE OF DECISION: January 30, 2019

DECISION

SUBMISSIONS

Amie Poole on behalf of Octiscapes Landscaping Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Octiscapes Landscaping Ltd. (“OLL”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 6, 2018 (the “Determination”).
2. The Determination found that OLL contravened Part 4, sections 40 (overtime wages) and Part 7, section 58 (annual vacation pay) of the *ESA* in respect of the employment of Rhyan Houston (“Mr. Houston”). The Determination levied an administrative penalty of \$500 against OLL for breach of section 40 of the *ESA*. The total amount of the Determination is \$1,555.04.
3. OLL appeals the Determination on the sole ground that the Director erred in law in making the Determination.
4. The deadline to file the appeal of the Determination was 4:30 p.m. on October 15, 2018. On November 1, 2018, the Employment Standards Tribunal (the “Tribunal”) received OLL’s incomplete appeal submission consisting of page 1 of the Appeal Form (Form 1), a 2-page correspondence to the Tribunal, 4 pages of supporting documents, the Determination, and the written Reasons for the Determination (the “Reasons”).
5. On November 6, 2018, a representative of the Tribunal emailed OLL informing the latter of the requirements of Rule 18(3) of the Tribunal’s *Rules of Practice and Procedure* and requested OLL to provide the Tribunal with page 2 of the Appeal Form, the missing appeal letter referenced in the correspondence to the Tribunal, and written reasons for requesting an extension of the appeal period by 4:30 p.m. on November 14, 2018.
6. On November 14, 2018, the Tribunal received the requested documents from OLL. As concerns OLL’s request for an extension of the appeal period, OLL submitted that it had sent its appeal before the expiry of the appeal period to the Employment Standards Branch and only discovered that the appeal was not received by the Tribunal when OLL enquired about the status of the appeal with the Tribunal. OLL produced a fax transmittal receipt showing that it had successfully sent a fax to the Branch totaling 17 pages.
7. On November 15, 2018, the Tribunal corresponded with the parties advising them that it had received OLL’s appeal. In the same correspondence, the Tribunal noted that it had also received the requested documents including OLL’s written reasons for requesting an extension to the statutory appeal period.

8. In the same correspondence, the Tribunal informed the Director to provide the section 112(5) “record” (the “Record”) and notified the other parties that no submissions were being sought from them with respect to the request to extend the appeal period or the merits of the appeal at this stage.
9. On November 21, 2018, the Director provided the Record to the Tribunal. A copy of the same was sent by the Tribunal to OLL and Mr. Houston on November 22, 2018, and both parties were provided an opportunity to object to its completeness by December 6, 2018.
10. While OLL did not object to the completeness of the Record, Ms. Poole provided more legible copies of some pertinent pages in the Record relating to hours and overtime hours worked during the recovery period that were a bit difficult to read. In the case of Mr. Houston, he responded that “one email correspondence with 3 documents (exhibit C, exhibit D, exhibit G) that were submitted and reviewed during the oral hearing are not contained in the [Record]” and submitted the missing documents. In response to Mr. Houston’s submissions, the delegate, in his correspondence to the Tribunal dated December 19, 2018, acknowledged that the missing documents Mr. Houston identified were indeed presented by him at the hearing of the Complaint on July 10, 2018, and they were cross disclosed to OLL and should have been part of the Record submitted to the Tribunal. The Director also submitted copies of the missing documents and sequentially numbered them as pages 484 to 504 of the Record. Mr. Houston was subsequently afforded an opportunity to respond to the submissions of the delegate but did not.
11. On January 16, 2019, the Tribunal informed the parties that the appeal had been assigned to a Panel, that it would be reviewed and that following the review, all or part of the appeal may be dismissed under section 114(1) of the *ESA*. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from Mr. Houston and the Director on the merits of the appeal. OLL will then be given an opportunity to make a final reply to those submissions, if any.
12. In this case, I will make my decision whether there is any reasonable prospect that the appeal will succeed based on my review of OLL’s submissions, the Record, and the Reasons.

ISSUE

13. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

14. OLL is a landscaping business incorporated under the laws of British Columbia on October 13, 2009, and Amie Lynette Poole (“Ms. Poole”) and Cameron John Turtle (“Mr. Turtle”) are its directors.
15. OLL employed Mr. Houston as an excavator operator commencing on April 12, 2016. He was paid wages at the rate of pay of \$30.00 per hour. Mr. Houston’s last day of work was October 16, 2017, when he was injured on the job. Thereafter, he remained an employee of OLL on an approved medical leave.

16. On February 4, 2018, Mr. Houston filed a complaint with the Branch alleging that OLL contravened the *ESA* by failing to pay him regular wages, overtime wages, annual vacation pay on the unpaid wages, and business expenses (the “Complaint”).
17. On July 10, 2018, the delegate conducted a hearing of the Complaint (the “Hearing”). Before the Hearing, OLL submitted \$469.47 to the Branch designating it as payment to reimburse Mr. Houston for business expenses claimed by the latter in his Complaint. As a result, during the Hearing, Mr. Houston withdrew his claim for reimbursement for business expenses.
18. In the Reasons, the delegate sets out certain points of agreement between the parties and those matters not in dispute. He notes that the parties indicated their understanding that the period for which any outstanding regular and overtime wages could be awarded (the “recovery period”) is August 5, 2017, to February 4, 2018.
19. The delegate also notes that OLL agreed that it did not pay Mr. Houston appropriate overtime rates for some hours worked during the recovery period. However, both parties agreed that Mr. Houston was paid at least his regular rate of pay for all hours he worked for OLL. On October 16, 2017, he was injured after working 1.5 hours and paid his regular rate of pay for 1.5 hours.
20. The parties also agreed that OLL paid Mr. Houston annual vacation pay on each pay-day.
21. At the start of the Hearing, Mr. Houston added the allegation that OLL required him to work excessive hours during the weeks of August 13 to 19, 2017, and October 8 to 14, 2017. He wanted the Director to instruct OLL to change parts of its written company policy, but he withdrew this request during the Hearing.
22. The issues before the delegate, at the Hearing, were the following four:
 - i. Did OLL require Mr. Houston to work excessive hours?
 - ii. Is Mr. Houston entitled to regular wages for October 16, 2017, and if so in what amount?
 - iii. Is Mr. Houston entitled to overtime wages and if so in what amount?
 - iv. Is Mr. Houston entitled to annual vacation pay and if so in what amount?
23. In the appeal, as OLL does not dispute the outcome in the Determination with respect to all issues save the matter of the calculation of Mr. Houston’s overtime wages, I will only focus on that part of the Reasons under this heading that is pertinent to this singular issue.
24. The delegate notes in the Reasons that Mr. Houston and his girlfriend gave evidence at the Hearing with respect to the hours he worked. Their evidence is that Mr. Houston generally worked five days per week, rarely worked on Sundays, and was always scheduled to work eight hours per day. Mr. Houston frequently worked more than eight hours a day and occasionally worked on Saturdays in order to complete landscaping projects. Some projects required fewer than eight hours to complete.
25. Mr. Houston testified that he generally did not receive overtime rates when he worked more than eight hours in a day. OLL did not pay overtime until after 45 hours were worked in a week. On October 16,

2017, he worked 1.5 hours before he was injured and had to leave work. OLL paid him regular wages for 1.5 hours for that day.

26. In total, Mr. Houston contended that he worked a total of 51.75 hours during the week of August 13 to August 19, 2017, and 39.25 hours during the week of October 8 to October 14, 2017. He did not work on Thanksgiving Day on October 9, but he was paid 8 hours at his regular wage rate. When these eight hours are added to the 39.25 hours he worked during the rest of the week, the total is 47.25.
27. On the part of OLL, Ms. Poole and Kristian Armstrong ("Mr. Armstrong"), OLL's bookkeeper, presented evidence at the Hearing.
28. OLL's evidence showed that it did not pay Mr. Houston appropriate overtime rates for many of the days when he worked more than eight hours. OLL's statement of understanding signed by Mr. Houston and OLL on August 4, 2017, indicates that overtime rates are only paid after 45 hours worked and that no overtime would be paid if the total number of hours worked in a week were less than 45.
29. OLL also confirmed that Mr. Houston was regularly scheduled to work an eight-hour day, and he was not paid two hours at his regular rate for the day he worked 1.5 hours on October 16, 2017.
30. While OLL paid Mr. Houston annual vacation pay on each paycheque, it did not pay him appropriate annual vacation pay on some wages earned from April 12, 2016, to February 4, 2018.
31. As with Mr. Houston's evidence, OLL's evidence was that Mr. Houston worked 51.75 hours during the week of August 13 to 19, 2017, and 39.5 hours during the week of October 8 to 14, 2017. He did not work on Thanksgiving Day in 2017 but was paid eight hours at his regular rate of pay for this holiday.
32. With respect to the matter of overtime wages, the delegate noted that section 40 of the *ESA* requires an employer to pay an employee 1.5 times the employee's regular rate of pay for hours worked over eight in a day and 40 in a week, and it must pay the employee two times the regular rate of pay for hours worked over 12 in a day. He further noted that OLL indicated that it did not pay Mr. Houston appropriate wages for overtime hours worked during the wage recovery period between August 5, 2017, and February 4, 2018, and agreed that the employment records submitted were accurate.
33. Based on the employment records, the delegate concluded that Mr. Houston was entitled to receive \$2,505 in overtime wages for the recovery period, August 5, 2017, to February 4, 2018, but OLL only paid him \$1,023.75 in overtime wages for this period. As OLL submitted to the Branch \$978.07 for outstanding overtime wages for Mr. Houston before the Hearing, the delegate credited OLL this amount together with the overtime paid amount of \$1,023.75 leaving the balance overtime owing of \$503.18 plus \$23.55 for vacation pay on the said amount for a total of \$531.23.
34. The delegate also levied an administrative penalty of \$500 against OLL, pursuant to section 29 of the *Employment Standards Regulation*, for contravening section 40 of the *ESA*.

SUBMISSIONS OF OLL

35. Ms. Poole, in her written submissions on behalf of OLL, states that in his calculation of overtime wages owed to Mr. Houston, the delegate made a calculation error. She states:

... the delegate did not credit Octiscapes with the wages that were paid for regular hours of work and that it is only the overtime portion that remains outstanding rather than the entire amount.

36. According to her calculation, OLL only owes Mr. Houston \$19.45 on account of overtime wages after taking into account the overtime paid to him during the recovery period of \$1,023.75 and the pre-Hearing payment of \$978.07.

ANALYSIS

37. The grounds of appeal under the *ESA* are statutorily limited to those found in section 112(1):

Appeal of director's determination

- 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.

38. The Tribunal has repeatedly stated in decisions that 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 on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

39. The grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

40. Having delineated some broad principles applicable to appeals, in this case, OLL is appealing on the sole ground that the director erred in law in making the Determination because the delegate, in calculating overtime wages owed to Mr. Houston, did not credit Octiscapes for the regular wage rate the latter paid for the overtime hours Mr. Houston worked. Therefore, OLL is arguing that it is only responsible to pay Mr. Houston the difference between the regular and overtime wage rates for the overtime hours worked. Furthermore, as it submitted to the Branch \$978.07 for outstanding overtime wages for Mr. Houston before the Hearing, OLL submits that by its calculations it has largely satisfied the overtime claim of Mr. Houston and he is only owed \$19.45 on account of overtime wages.

41. If there is an error in the calculation of overtime wages owed to Mr. Houston by OLL as contended by OLL then this would, in my view, constitute an error of law (*Britco Structures Ltd.*, *supra*). Having said this, I have reviewed the pay slips and the summary of overtime hours worked and paid by OLL during the recovery period contained in the Record and the missing pages in the Record sent by the Director to the Tribunal on December 20, 2018. I have also reviewed clearer copies of the schedule of overtime hours worked and paid that OLL submitted the to the Tribunal on November 22, 2018. Based on my review of

these documents, I am not convinced that the delegate, in concluding at page R6 of the Reasons that the total overtime wages owed to Mr. Houston during the recovery period is \$2,505 (before deductions of \$1,023.75 and \$978.07 for overtime paid by OLL to Mr. Houston and pre-Hearing payment by OLL respectively), gave proper credit to OLL for all the regular wages paid by OLL.

42. In the circumstances, I am unable to dismiss OLL's argument as having no reasonable prospect of succeeding in the appeal. Therefore, I invite the Director and Mr. Houston to make submissions on the merits of OLL's appeal with respect to the matter of overtime wage calculation. I would particularly urge the Director to show with greater particularity and specificity how the overtime wages of \$2,505 at page R6 were calculated and if the regular wages that OLL paid for the same period were taken into account in the calculation of overtime wages owed.
43. Further, if the Director and Mr. Houston wish to make submissions on the timeliness of the appeal they may do so when responding to the above.

ORDER

44. The Director and Mr. Houston are invited to file submissions on the matter of the overtime wage calculations. Octiscapes Landscaping Ltd. shall be given an opportunity to reply to those submissions.
45. I continue to be seized of this appeal and following receipt and review of the submissions of the parties, if any, I shall finalize the appeal.

Shafik Bhalloo
Member
Employment Standards Tribunal