



Citation: OE Construction Solutions Inc. (Re)
2019 BCEST 131

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: November 28, 2019

DECISION

SUBMISSIONS

Katelyn Weller	counsel for OE Construction Solutions Inc. carrying on business as Optimal Efficiency
Bryan Heredia	on his own behalf
Shane O’Grady	delegate of the Director of Employment Standards

OVERVIEW

1. On October 4, 2019, the Tribunal issued a decision, 2019 BCEST 106, that considered an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by OE Construction Solutions Inc. carrying on business as Optimal Efficiency (“Optimal Efficiency”) of a determination (the “Determination”) issued by Shane O’Grady, a delegate of the Director of Employment Standards (the “Director”), on May 23, 2019.
2. This decision dismissed all but one element of the appeal under section 114(1) of the *ESA*.
3. In its appeal, Optimal Efficiency argued the decision to award overtime pay to Bryan Heredia (“Mr. Heredia”) was a reviewable error.
4. Optimal Efficiency submitted the Director erred in awarding overtime pay to Mr. Heredia because Mr. Heredia was a “*high technology professional*” as that term is defined in section 37.8 of the *Employment Standards Regulation* (the “*Regulation*”) and was exempted from most of the provisions in Part 4 of the *ESA*.
5. My review of the record suggested there was some factual basis and sufficient presumptive merit on that issue which compelled further submissions from the parties.
6. In correspondence dated October 4, 2019, the Tribunal requested the Director and the respondent employees to make submission on that issue, providing a deadline for doing so.
7. The Tribunal received a submission from the Director and from Mr. Heredia. None of the other respondent employees made a submission. In correspondence dated October 22, 2019, the submissions were provided to Optimal Efficiency who was invited to respond to those submissions. The Tribunal has received a response on behalf of Optimal Efficiency, which has been disclosed to the Director and all but one of the respondent employees¹.
8. I am now in a position to address the issue on which the submissions were sought.

¹ The Tribunal was unable to provide a copy of the submission to one of the respondent employees as it had no current contact information for that employee.

THE FACTS

9. It is unnecessary to reiterate all of the facts set out in 2019 BCEST 106 in this decision, except to note the fact that, in the Determination, 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 *Regulation*. I would add that neither did the Director consider whether Mr. Heredia was a “*high technology professional*” as defined in the same section.
10. The record contained job titles and job descriptions for each of the respondent employees.

ARGUMENT

11. In its appeal, Optimal Efficiency argues the Director erred in law in finding Mr. Heredia was entitled to overtime pay because he was a “*high technology professional*” and, applying section 37.8 of the *Regulation*, exempted from most of the overtime provisions of *ESA*.
12. The Director and Mr. Heredia have responded to this argument.
13. The Director has not responded directly to the argument, preferring instead to frame the issue as whether Optimal Efficiency should be allowed to advance the argument of Mr. Heredia’s status as a “*high technology professional*” and his entitlement to overtime wages. The Director’s argument rests on three points.
14. First, that Optimal Efficiency was given a reasonable opportunity to raise the high technology exclusion, but did not; second, that in any event, the evidence “was insufficient to satisfy the Delegate that Mr. Heredia was a high technology professional or that OE Construction Solutions Inc. carrying on business as Optimal Efficiency falls within the definition of high technology company”; and third, the evidence supporting the argument is “new evidence” and should not be allowed or considered.
15. Mr. Heredia’s response simply asserts the correctness of the Determination on the issue.
16. In its reply to the submission of the Director, Optimal Efficiency says this is not a case where “new evidence” is being advanced on the issue, as the record provided by the Director includes a copy of Mr. Heredia’s complaint, in which he describes Optimal Efficiency as a “construction management software” employer and his position in the company as that of “Senior UI/UX Designer”. Additionally, Optimal Efficiency had provided the Director with Mr. Heredia’s employment agreement – also included in the record – which included his job description.
17. The record includes the employment agreements and job descriptions of each employee for whom the Director investigated wage entitlement under the *ESA*. Optimal Efficiency submits the job descriptions reveal the majority of the individuals are employed in jobs that would be included in the definition of “*high technology professional*”.
18. Optimal Efficiency says that whether the high technology exemption was raised, its position was that Mr. Heredia was not entitled to overtime and the Director ought to have considered whether the facts raised any question of his entitlement to overtime pay under the legislation.

19. Optimal Efficiency says there is no juristic reason for Mr. Heredia to receive the overtime entitlement; it unjustly enriches Mr. Heredia and deprives Optimal Efficiency of the overtime exemptions in the *Regulation*.

ANALYSIS

20. The appeal on this issue 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.
21. Optimal Efficiency says the error of law rests in the Director failing to consider whether Mr. Heredia was exempted from overtime pay by provisions of the legislation.
22. I agree. This issue does not engage new evidence. All of the evidence necessary to identify and, in my view, decide this issue is included in the record. That evidence is described above.
23. I note as well that each employee who filed a complaint with the Director identified Optimal Efficiency as engaged in software or software development.
24. I reject the suggestion in the Director’s argument that there was insufficient evidence flagging the issue of a high technology exemption. I am also disconcerted by this argument. The inescapable conclusion from an examination of the record, from the Determination, and from admissions made in his submission, is that the Director never turned his mind to whether there was evidence Mr. Heredia might be exempted under section 37.8 of the *Regulation* from overtime entitlement under the *ESA*. The perspective of the Director is expressed in what appears to be one of the last communications in the record, dated February 6, 2019, where the Director, in response to Optimal Efficiency’s response to Mr. Heredia’s overtime claim, says:
- “An employee does not need to have an employment agreement confirming an entitlement to overtime wages to be entitled to overtime wages. Please see section 35(1) of the Act below for clarification . . .”
25. There is no mention in that correspondence – or in any other correspondence relating to that claim – of a possible exemption nor is there any reference to a consideration of a high technology exemption to Mr. Heredia’s overtime claim in the Determination.

26. The Director concedes in argument that:

Although evident that the Appellant was a software company, that Mr. Heredia was employed as a Senior UX Designer, and that he worked long hours on complex projects, no investigation was conducted into the exact nature of the company and into how Mr. Heredia was primarily engaged.

27. I would consider that a serious failing considering the nature of the evidence the Director had before him and the potential implications for Optimal Efficiency. The Director writes off this failing by reason of the “non-participation” of Optimal Efficiency. That characterization of Optimal Efficiency’s participation in the complaint process, however, is inaccurate, and largely irrelevant, as it relates to Mr. Heredia’s overtime claim and the available evidence relating to it. While my earlier decision notes Optimal Efficiency ceased communicating with the Director on February 11, 2019, “leaving lines of inquiry unanswered”, whether section 37.8 of the *Regulation* operated in the case was not one of them because, simply put, the Director was not investigating that line of inquiry. Optimal Efficiency had done much to provide the Director with information requested and required by the Director and that information included a description of its business and the job descriptions of all the respondent employees. Nothing in the Director’s argument indicates or even suggests what more might have been necessary for the Director to engage in such a line of inquiry.

28. The argument by the Director is that Optimal Efficiency had “ample opportunity” to respond to Mr. Heredia’s overtime claim, which presumably included the opportunity to raise and argue the application of the high technology exemption for Mr. Heredia’s employment.

29. That argument, as well as inaccurately suggesting Optimal Efficiency made no response to the overtime claim, ignores two key aspects of the complaint and investigation process and the Director’s role in it.

30. The first is the recognition that most parties who involve themselves in the process are self represented and are unfamiliar with the process and with all of the provisions and nuances of the *ESA*. In several decisions, the Tribunal has reflected on the need for the Director to understand the problems encountered by self-represented parties involved in the complaint process, which may include, but not be limited to, an ignorance of the provisions of the *ESA*, unfamiliarity with the procedure being used by the Director, difficulty in marshalling all of the relevant facts, and a general failure to understand or appreciate directions given or their obligation to comply with orders: see for example, *Jennifer Oster*, BC EST # D120/08, *Director of Employment Standards (Re Milan Holdings Inc.)*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). The Director owes a duty of fairness to self-represented parties which goes beyond simply providing the normally accepted elements of fair treatment and will include actual efforts to accommodate the parties’ unfamiliarity with the process. In this case, Optimal Efficiency was self-represented by persons with no apparent familiarity with the complaint process or a significant depth of knowledge of the legislation. The Director not only made no apparent effort to recognize and accommodate the persons responding on behalf of Optimal Efficiency but misdirected them with the singular reference to Mr. Heredia’s overtime entitlement under section 35 of the *ESA*.

31. The second is the role and responsibility of the Director in the complaint process. The Tribunal has recognized that the Director has the primary statutory obligation of ensuring compliance with the *ESA*. The primary reason the Director is accepted as a party to the processes under the *ESA* is because he has

an interest in protecting the integrity of the *ESA*: see the Tribunal's comments in *Bero Investments Ltd. operating as King George Nissan*, BC EST # D035/06 at paras. 18 – 19.

32. The Director knows, or ought to know, the issues and the provisions of the *ESA* bearing on those issues. The objectives of fairness and efficiency in the *ESA* would suggest the Director has a duty to ensure the parties clearly understand all aspects of the complaint and how provisions in the statute may affect it. As well, considering the nature of the complaint process overall, and the role of the Director and his delegates in that process specifically and under the *ESA* generally, a delegate involved in the complaint process has both the right and the duty to be interventionist – although in doing so must walk the fine line between ensuring fairness and losing neutrality. In the context of the complaint process, the boundaries of legitimate intervention are flexible and will be influenced by the statutory duty of the Director under the *ESA*, the need for intervention, and its affect on the fairness of the process.
33. Returning from the general comments expressed above to the specifics of this case, the material indicates the persons representing Optimal Efficiency did not have a sufficient knowledge of the legislation to appreciate there was, potentially, a high technology exemption in the *Regulation*. This particular feature of Mr. Heredia's complaint generated a duty on the delegate conducting the investigation to ensure that the relevant, or potentially relevant, legislative provisions were known to the parties and the material relied on to decide the complaint was relevant, accurate, reliable, and fair. Imposing this obligation is also consistent with the purposes of the *ESA*, which require "fair and efficient procedures for resolving disputes" and with principles of natural justice that demand procedural fairness.
34. It is particularly important that dual-function administrative agencies such as the Director of Employment Standards be seen as absolutely impartial. That objective is not accomplished if the result of Determination is obviously unfair and when attempts to redress that unfairness are met with extremely technical arguments by the Director that take on the character of advocacy on behalf of one of the parties, in this case Mr. Heredia.
35. The process works only as long as there is a continuing respect and integrity for the Director (and the Director's delegates) by employers and employees, which arises in no small part from the neutrality, impartiality, and lack of bias with which complaints are investigated and determinations are made. It is trite that those qualities are crucially important to the effective implementation of the Director's statutory mandate.
36. The above comments support at least two of the purposes of the *ESA*, as set out in section 2: promoting fair treatment of employees and employers as well as providing fair and efficient procedures for resolving disputes.
37. For these reasons, I reject the notion that Optimal Efficiency had the sole responsibility to raise the high technology argument and should be denied the effect the high technology provisions has on Mr. Heredia's overtime claim. It was the responsibility of the Director to apply the provisions of the *ESA* to the claim in a fair and impartial manner.
38. The material in the record, and which is before me in this appeal, is sufficient to make a decision on this issue, and I find both that Optimal Efficiency was a "high technology company" and Mr. Heredia was a "high technology professional" as those terms are defined in section 37.8 of the *Regulation*. As such,

Mr. Heredia was exempted from all of the relevant and applicable provisions of Part 4 of the *ESA*. That part of the Determination awarding Mr. Heredia overtime pay is cancelled and the Determination is varied accordingly. The matter is referred back to the Director to re-calculate the wages owing to Mr. Heredia.

39. It follows that I do not accept Mr. Heredia's submission that the Determination is correct and his overtime award be confirmed.
40. Finally, I will note here that this decision does not deprive Mr. Heredia of any statutory rights and does not prejudice either party's rights under the *ESA*. The legislation is clear that persons in Mr. Heredia's position are not entitled to overtime pay. The intent and integrity of the legislation is preserved.

ORDER

41. Pursuant to section 115 of the *ESA*, I order the Determination dated May 23, 2019, be varied as outlined above. I retain jurisdiction to confirm the Determination resulting from the re-calculation of Mr. Heredia's wage entitlement.

David B. Stevenson
Member
Employment Standards Tribunal