Employment Standards TRIBUNAL

Citation: 0927468 B.C. Ltd. (Re)
2019 BCEST 135

An appeal

- by -

0927468 B.C. Ltd. Carrying on Business as Peak H20 Purified Water Store
(the "Appellant")

- 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: Richard Grounds

FILE NO.: 2019/135

DATE OF DECISION: December 16, 2019

DECISION

SUBMISSIONS

Paul Sekhon	on behalf of 0927468 B.C. Ltd. Carrying on Business as Peak H20 Purified Water Store

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), 0927468 B.C. Ltd. Carrying on Business as Peak H20 Purified Water Store (the "Appellant") has filed an appeal of a determination issued on May 29, 2019, by Rodney J. Strandberg, a delegate of the Director of Employment Standards (the "Delegate").

2. The Appellant operates a purified water bottling facility in Langley, British Columbia. The Appellant employed Har-Daiven S. Saggir (the "Complainant") from July 11, 2018, to August 14, 2018. The Complainant filed a complaint under section 74 of the *ESA* for failing to pay wages.

3. The complaint proceeded to a hearing in front of the Delegate on April 24, 2019. The Delegate concluded that the Complainant worked an additional 15 minutes each day and overtime on August 7, 2018, for which he had not been paid. The Delegate determined that the Appellant owed the Complainant unpaid wages, vacation pay, overtime, and interest and imposed administrative penalties for contraventions of the *ESA*.

4. On September 3, 2019, the Appellant appealed the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination. In addition, the Appellant appealed the Determination on the basis that evidence has become available that was not available at the time the Determination was being made.

5. The Appellant failed to file the appeal within the statutory time limit which expired on July 8, 2019. The Appellant requested an extension of time to the statutory appeal period.

6. For the reasons that follow, the Appellant's request for an extension of time to file the appeal is denied.

ISSUE

7. The issue is whether or not to grant an extension of time to the statutory time limit for the Appellant to appeal the Determination.

ARGUMENT

8. The Appellant submitted on appeal that the Delegate failed to act fairly and was completely biased in favour of the Complainant, who was "inauthentic and lacked integrity which was clearly evident during the entire process of the discovery". The Appellant submitted that the Complainant provided misleading

evidence relating to a text message sent to one of the Appellant's managers and that the Complainant provided false information in regards to times that he worked.

9. The Appellant submitted that the only day that the Complainant worked alone was on Saturdays because the managers had Saturdays off. The Appellant submitted that the Complainant had agreed to work until Labour Day and was to work Monday to Friday from 9:30 a.m. to 5:00 p.m. and on Saturdays from 10:00 a.m. to 5:00 p.m. The Appellant submitted that the Complainant would have a lot of "down time" at work and, on average, would only have to work for approximately 4 hours each shift and the Complainant was given the opportunity to go for lunch whenever a manager was present. The Appellant submitted that the Complainant was paid for lunch to compensate him for any extra time worked.

10. The Appellant included with its appeal cash register records that it submitted were used as an employee time clock and also alarm records showing the arming and disarming of the alarm for the time frame that the Complainant worked at the water store. The Appellant submitted that the alarm records are not "determinant" compared to the "shift clock itself". The Appellant submitted that it would only take approximately one minute to sanitize, disinfect, pressurize, and refill a bottle which supports that a text message by the Complainant (that it would take him an hour and a half to fill 17 empty bottles) was false. The Appellant submitted that the Complainant was paid the correct amounts by cheque within the required time frames, including the last cheque that was prepared three days after he quit but was not picked up by the Complainant. The Appellant also included with its appeal payroll information and copies of the cheques paid to the Complainant.

11. The Appellant's submissions were prepared by Paul Sekhon ("Mr. Sekhon"), one of the Appellant's managers. The Appellant submitted that "during the time period of this situation as well as the discovery and after [the] fact", two of Mr. Sekhon's relatives passed away and he was also dealing with an auto immune disorder that made it hard for him to work every day. The Appellant submitted that the Employment Standards Branch lacked empathy and compassion for not taking this into consideration.

12. In regards to its application for an extension of time to appeal, the Appellant submitted that "during the time frame of this process" they were "hindered with personal issues" due to "a couple of deaths in [their] immediate family and friends circle that were at the forefront of [their] daily routine". In addition, the Appellant submitted that it had a problem scanning the documents and only sent in a portion of the required documents by July 8, 2019. The Appellant submitted that it did not fully receive the submissions from the owner for the appeal until July 11 or 12, 2019. Further, Mr. Sekhon submitted that he was not regularly available since July 10, 2019, due to an auto immune disorder. The Appellant submitted that it did not learn of the Tribunal's July 15, 2019 correspondence (requesting information for the appeal) until it found the email in its spam folder on the day it submitted its appeal (September 3, 2019).

13. Submissions on the merits of the appeal were not requested from the parties or the Delegate.

THE FACTS AND ANALYSIS

Background Facts

14. The Complainant operates a purified water bottling facility in Langley, British Columbia. The Appellant employed Har-Daiven S. Saggir (the "Complainant") from July 11, 2018, to August 14, 2018.

15. On August 27, 2018, the Complainant filed a complaint under section 74 of the *ESA* for failing to pay his final wages and for extra hours that he had been forced to work.

16. The complaint proceeded to a hearing in front of the Delegate on April 24, 2019. The Complainant testified on his own behalf and Mr. Sekhon, one of the Appellant's managers, testified on behalf of the Employer. At the conclusion of the hearing, the Delegate ordered the Complainant to provide copies of text messages referred to in the hearing and also ordered the Employer to provide alarm records for the water store where the Complainant worked. The Complainant provided the text messages to the Delegate but the Employer did not provide the alarm records.

The Determination

17. On May 29, 2019, the Delegate completed the Determination and summarized the evidence from the parties. The evidence from the Complainant included: his duties included opening the store; looking after the day to day operations; filling and cleaning customers' water bottles; cleaning the store; filling customers' water bottles after the store was closed for pickup the following morning, a task which took approximately 15 minutes each day except for August 7, 2018, when he worked until 6:45 p.m.; and setting the alarm. The Complainant stated that he was not paid for his last six days of work, for the extra hours worked, or for the vacation pay on the unpaid wages.

18. The evidence from Mr. Sekhon, the store's manager, included: he was having problems with the Complainant who was unable to work certain shifts which required the Employer to reschedule other workers; the Complainant did not work until Labour Day, which he had agreed to, and this cost the Employer money; the time that the Complainant spent looking after customers was small and he had lots of free time to do what he wanted; he prepared a cheque for the Complainant's final wages but required him to sign a release before he would provide it to him; the Complainant had to disable and set the alarm and the alarm records would show when this was done and that the Complainant did not start early or leave late.

19. The Delegate noted that the Employer was requested to provide payroll records for the Complainant, but it did not do so. In addition, the Delegate noted that the Employer had been ordered after the hearing to provide the alarm records for the period of time that the Complainant worked at the water store, but it did not do so and instead provided some records from the cash register. According to the Director's Record (at pages 34 – 38), the original request for the alarm records was made on April 24, 2019, to be provided on April 25, 2019, and the records were requested again on May 8, 2019, with the deadline extended to May 15, 2019.

20. The Delegate concluded that the best information relating to the Complainant's hours worked each day was the Complainant's evidence that he worked approximately 15 minutes extra each day after closing and that he worked an extra 1.75 hours on August 7, 2018, for which he had not been paid. The Delegate determined that the Appellant owed the Complainant unpaid wages for the wages not paid (for the Complainant's last six days worked), for the extra time worked after closing each shift including on August 7, 2018, vacation pay, and interest. The Delegate calculated the total wages owed to the Complainant as $815.48.

21. The Delegate imposed three mandatory administrative penalties totaling $1,500.00 for contraventions of the *ESA* relating to failing to pay the Complainant for the extra hours worked each shift within the required time, for failing to pay the Complainant the final wages owed to him after he stopped working on August 14, 2018, and for failing to produce payroll records.

Appeal of the Determination

22. The Determination informed the Appellant that if it wished to appeal the Determination, it must deliver its appeal to the Employment Standards Tribunal by 4:30 p.m. on July 8, 2019.

23. On July 8, 2019, the Appellant submitted an appeal by email to the Tribunal. Although the Appellant's email has the time listed as 4:30 p.m., the email was not received by the Tribunal until July 9, 2019. The appeal submission was incomplete because it contained only a scanned copy of every second page of the Determination and written reasons for the Determination.

24. On July 11, 2019, the Appellant contacted the Tribunal by telephone and was advised that its appeal submission was incomplete because it did not include the written reasons for appealing, a complete copy of the Determination and written reasons for the Determination or written reasons for requesting an extension of time to the statutory appeal period deadline. The Appellant provided the written reasons for appeal but did not provide the other information requested. The Tribunal sent the Appellant an email that same day confirming that the Appellant must still provide a complete copy of the Determination, written reasons for the Determination, and written reasons for requesting an extension of time to the statutory appeal period deadline. The information was requested to be provided by 12 p.m. on July 12, 2019.

25. On July 15, 2019, the Tribunal sent the Appellant further correspondence advising that it had not received the requested information and extended the deadline to do so until 4:30 p.m. on July 19, 2019. The Tribunal informed the Appellant that the extension was to the deadline to the time to provide the requested information and not an extension to the statutory appeal deadline. The Tribunal informed the Appellant that the file would be closed if the requested information was not received. On July 23, 2019, the Tribunal sent the Appellant correspondence advising that the requested information had not been received so the file was being closed.

26. On September 3, 2019, the Appellant provided the requested information for its appeal to the Tribunal

ANALYSIS

27. The Determination was issued on May 29, 2019. The Appellant filed its appeal outside the statutory deadline to appeal the Determination and has requested an extension of time to the appeal period. The deadline to appeal was provided in the Determination which stated that an appeal must be delivered to the Employment Standards Tribunal by 4:30 p.m. on July 8, 2019. This date complies with section 112(3)(a) of the *ESA* which provides that the appeal period is "30 days after the date of service of the determination, if the person was served by registered mail".

28. The Appellant filed incomplete documents for its appeal on July 8, 2019, but these were not received by the Tribunal until July 9, 2019, which is outside the deadline to appeal.

29. Section 11 of the *Administrative Tribunals Act*, [SBC 2004] Chapter 45, provides that "the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it." The Tribunal has enacted rules that relate to the timely filing of an appeal of a Determination. The Tribunal's *Rules of Practice and Procedure* (2015) in place at the time set out that an appeal must be received within the appeal period in the *ESA* and must include a complete copy of the Determination and a complete written copy of the written reasons for the Determination (Rule 18). These rules reflect the requirements set out in section 112(2) of the *ESA*.

30. The Appellant spoke to the Tribunal on July 11, 2019, and was informed of what was required to file its appeal in a complete manner. The Appellant was sent correspondence from the Tribunal on July 11, 2019, and July 15, 2019, requesting this information and again on July 23, 2019, when the Appellant was advised that the file was administratively closed. The Appellant did not file its appeal until September 3, 2019. The Appellant now requests an extension of the time limit to appeal the Determination.

31. There is no automatic right to an extension of the time limit to appeal. In *Niemisto*, BC EST # D099/96, the Tribunal identified the following non-exhaustive criteria to consider when deciding whether to extend an appeal period:

i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;

iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

v) there is a strong *prima facie* case in favour of the appellant.

32. These criteria were applied by the court in *Gorenshtein* v. *British Columbia (Employment Standards Tribunal)*, 2013 BCSC 1499, when reviewing a decision by the Tribunal not to extend an appeal period where the Appellant was unable to file an appeal due to having surgery. Each of these criteria will be considered below.

Reasonable and credible explanation for the failure to request an appeal within the statutory time limit

33. The Appellant submitted that it was delayed in requesting an appeal due to the deaths of two persons in Mr. Sekhon's family and due to an auto-immune disorder that Mr. Sekhon suffers from. While these are undoubtedly difficult circumstances for anyone to contend with, there is no indication about when these events occurred and their impact on the specific appeal period time frame from the date of the Determination on May 29, 2019, to July 8, 2019. In the Appellant's appeal submissions, it submitted that these were also factors which it felt the Delegate should have taken into consideration which suggests that they were not recent events. This is not to minimize the significant impact such events would have but to provide context for this criterion.

34. The Appellant submitted that it had difficulty scanning the documents which it submitted on July 8, 2019. The Appellant did not, however, ensure that it sent these documents in time to be received on July 8,

2019, so they were not received until July 9, 2019, which was after the appeal period had expired. Even if the Appellant's documents had been received on July 8, 2019, they did not comply with the requirements of the *ESA* to appeal the Determination because they did not contain a complete copy of the Determination and its reasons. It was the Appellant's responsibility to ensure that it submitted a complete copy of the documents required to file its appeal.

35. The Appellant was informed of this failure by the Tribunal on July 11, 2019, verbally and in writing, but it still did not submit its appeal until September 3, 2019. Although the Appellant submitted that it did not receive the Tribunal's written correspondence because it ended up in its spam folder, the Appellant was informed verbally on July 11, 2019, of the requirements to file its appeal but it did not do so until September 3, 2019. Mr. Sekhon, on behalf of the Appellant, submitted that this was also due to the fact that Mr. Sekhon did not have the appeal submissions from the owner until July 11 or 12, 2019. This does not explain why the Appellant did not submit its appeal at that point but continued to wait until September 3, 2019.

36. The Appellant's submission about missing the deadline is somewhat vague and lacking detail about why it did not submit its appeal on time. I am not satisfied that there is a reasonable and credible explanation for failing to request an appeal within the statutory time limit.

There has been a genuine, and on-going bona fide intention to appeal the Determination;

37. The Appellant attempted to file an appeal at the last minute of the appeal period and failed to ensure that its appeal submission was complete or received on time. In addition, when informed on July 11, 2019, of the requirements to file its appeal, the Appellant failed to take the necessary steps until September 3, 2019. Given this evidence, I am not satisfied that the Appellant exhibited a genuine and on-going *bona fide* intention to appeal the Determination.

The respondent party, as well as the Director, has been made aware of this intention;

38. There is no evidence relating to whether or not the respondent party was made aware of the Appellant's intention to appeal. The Appellant's appeal form, which is dated July 8, 2019, does indicate that the Director has been served with a copy of the appeal form.

The respondent party will not be unduly prejudiced by the granting of an extension;

39. The issue relating to the request for an extension of time is not substantively related to the merits of the Determination, i.e., whether or not the Complainant was owed wages. Accordingly, I am satisfied that the respondent party would not be unduly prejudiced by the granting of an extension.

There is a strong prima facie case in favour of the appellant.

40. The determinative issue relates to whether or not the Complainant was owed wages. The Appellant has provided the Tribunal with its appeal payroll records, cash register records, and alarm records which it submits to support its position. In addition, the Appellant's submissions include evidence from Mr. Sekhon about the time required to fill water bottles which it uses to impugn the Complainant's credibility. These records and evidence in the Appellant's appeal submission are evidence that was not before the

Delegate but which the Appellant seeks to rely on for its appeal. The Appellant has included as a ground of appeal that evidence has become available that was not available at the time the Determination was being made.

41. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.*, BC EST # D171/03, where it stated (at page 3):

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (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;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (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.

42. The first stage of the test for admitting new evidence on appeal requires that 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. The payroll records were requested from the Appellant on February 1, 2019 (see pages 14 – 15 of the Director's Record) but were not provided. The alarm records were requested following the hearing but were not provided. The Appellant provided one cash register record to the Delegate (instead of alarm records) and included additional cash register records with its appeal. There is no indication that the evidence about the time required to fill water bottles was provided to the Delegate but, even it had been, the Delegate was entitled to prefer the evidence of the Complainant.

43. It is apparent that all of the evidence submitted with the Appellant's appeal was in existence at the time of the Determination and with due diligence could have been presented to the Delegate for consideration prior to the Determination being made. The Appellant failed to exercise this due diligence to provide the evidence to the Delegate. Accordingly, the first stage of the test to admit the new evidence on appeal has not been met.

44. The new evidence submitted by the Appellant will not be admitted as part of the appeal as it does not meet the test for admission. The appeal will be decided on the basis of the evidence before the Delegate, which is contained in the Determination and in the Director's Record.

45. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp*. v. *British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (BCCA):

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.

46. The Appellant has submitted that the Delegate failed to act fairly, was biased in favour of the Complainant, and that the Complainant only worked until 5:00 p.m. each shift with a lot of "down time" and paid lunches. The Delegate considered the evidence from the parties and, given the effective absence of records that the Appellant said would support its case, concluded that the Complainant's evidence was the best evidence about the extra hours worked. The Delegate applied the provisions of the *ESA* to determine the applicable contraventions. The Delegate's reasoning was reasonable, and he did not improperly exercise his discretion. Given the evidence, there is no reasonable basis to find that the Delegate erred in law in concluding that the Complainant worked extra hours or that the Appellant had contravened the *ESA*.

47. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them, and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

48. The Appellant was informed of the allegations made by the Complainant and was given an opportunity to respond to the allegations. The Delegate requested records from the Appellant to ensure the Appellant had an opportunity to produce evidence to support its case. The Appellant did not provide the requested records.

49. The Appellant has submitted that the Delegate was biased in favour of the Complainant, who it stated was "inauthentic and lacked integrity which was clearly evident during the entire process of the discovery". That a decision maker has preferred the evidence of one party over another is not by itself evidence of bias. In addition, that one party thinks that the other party was not credible is not by itself evidence of bias. Nor are these two factors in conjunction evidence of bias without something more to support such a conclusion.

50. An apprehension of bias must be a reasonable one held by reasonable right-minded persons (see *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394). The test is what would an informed person, viewing the matter realistically and practically, and having

thought the matter through, think in regard to whether it is more likely than not, whether consciously or unconsciously, that the decision maker would not decide fairly.

51. The Delegate heard evidence from both parties about the hours worked by the Complainant and provided the Appellant an opportunity to provide additional proof to support its case. When the Appellant did not provide the additional records requested (that the Appellant said would support its case), the Delegate decided the case based on the evidence before him. The Delegate concluded that the best evidence about the extra hours worked came from the Complainant. When applying the applicable legal test for bias above, there is no reasonable basis to think that the Delegate would not decide fairly. I am not satisfied that the Delegate failed to observe the principles of natural justice in making the Determination.

52. The Appellant has not provided any new evidence with its appeal that with due diligence could not have been provided to the Delegate before the Determination was made. The Delegate did not commit an error of law or fail to observe the principles of natural justice in making the Determination. Given the evidence and these factors, I am not satisfied that there is a strong *prima facie* case in favour of the Appellant.

53. I have considered the above relevant factors to determine whether or not an extension to the statutory time limit for the Appellant to appeal the Determination should be granted. Given the factors discussed above, I am not satisfied that an extension should be granted.

ORDER

54. The Appellant’s request to extend the time period for requesting an appeal is denied. Pursuant to section 114(1)(b) and (f), the appeal is dismissed and pursuant to section 115(1)(a), the Determination is confirmed.

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Richard Grounds
Member
Employment Standards Tribunal