



An appeal

- by -

7974400 Canada Ltd. carrying on business as NoBull Contracting
(the “Employer”)

- 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: Michelle F. Good

FILE NO.: 2018A/116

DATE OF DECISION: February 13, 2019

DECISION

SUBMISSIONS

Denis Pelletier

on behalf of 7974400 Canada Ltd. carrying on business
as NoBull Contracting

OVERVIEW

1. Pursuant to section 112(2) of the *Employment Standards Act* (the “ESA”), 7974400 Canada Ltd. carrying on business as NoBull Contracting (the “Employer”) has filed an appeal of a Determination (the “Determination”) issued by the Director of Employment Standards (the “Director”). In that Determination, the Director found that the Employer had contravened sections 17 and 18 by failing to pay the employee, Louis Benjamin McKay (the “Employee”), all wages due him and failed to pay him within the time frames prescribed in the *ESA*. The Director further found that the Employer had made unauthorized deductions from the Employee’s wages in contravention of section 21 of the *ESA*. The outstanding wages owed the Employee amounted to \$6,922.70; that the unauthorized deductions taken from the Employee’s wages totalled \$1,709.55, and further, that interest accrual pursuant to section 88 of the *ESA* amounted to \$276.41 for a total owing the Employee of \$8,908.66.
2. Further, mandatory administrative penalties as required by section 98(1) of the *ESA*, as set out in section 29(1) of the *Employment Standards Regulation*, were ordered in the amount of \$500.00 for each of the three contraventions for a total of \$1,500.00.
3. The amount payable by the Employer for both mandatory administrative penalties and amounts owing the employee totals \$10,408.66
4. This decision is based on Denis Pelletier’s (“Mr. Pelletier”) submissions on behalf of the Employer, the section 112(5) record (the “Record”) that was before the delegate (the “Delegate”) at the time of the hearing, and the Reasons for the Determination.

ISSUES

5. Did the Director fail to observe the principles of natural justice in making the Determination?
6. Was additional material submitted by the Employer new evidence that was not available at the time the Determination was being made?
7. Should the appeal period be extended?

ARGUMENT

8. Mr. Pelletier argues that the Delegate failed to consider payments that were made to the Employee which he claims partially rectifies the failure to pay wages found owing by the Director. Mr. Pelletier further disagrees with the Delegate’s reliance on the Employee’s calendar notations recording his hours of work.

Finally, Mr. Pelletier argues that deductions from the Employee's wages were legitimately for amounts owed the Employer.

THE FACTS

9. 7974400 Canada Ltd. is an employer incorporated under the laws of Canada as an extra-provincial employer on September 19, 2011, as confirmed by a corporate search conducted on February 20, 2018, with Mr. Pelletier listed as the sole director. A BC Online Corporation Search conducted on December 29, 2017, indicates that NoBull Contracting was registered as a sole proprietorship on February 14, 2017, with 7974400 Canada Ltd. listed as the sole proprietor.
10. The Employee filed a complaint with the Employment Standards Branch claiming he had not been paid in full by the Employer and further that the Employer had made unauthorized deductions from his wages.
11. A hearing of the matter was convened on April 11, 2018, and the Determination was subsequently issued on October 11, 2018.
12. The Employer filed this appeal and further requested an extension of the appeal period.

ANALYSIS

13. Section 114 of the *ESA* provides that 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:
 - 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
14. Section 112(1) of the *ESA* provides that:
 - 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.

15. Mr. Pelletier claims that the Director failed to adhere to the principles of natural justice in making the Determination in this matter.
16. An appeal based on an alleged failure to meet the standards of natural justice is a claim that proceedings before the delegate were somehow conducted unfairly resulting in the employer either not having the opportunity to know the case that is made against it or not being given the opportunity to respond as is provided by section 77 of the *ESA*.
17. In the materials provided by Mr. Pelletier in this appeal, at no time does he state that the Employer was not informed of the contraventions alleged. Likewise, the Employer does not claim that it was denied an opportunity to fully respond to the contraventions alleged by the Director.
18. Although it is not stated clearly in the appeal, Mr. Pelletier seems to be contesting the manner in which the Director weighed the evidence available to him and that this amounts to a denial of natural justice.
19. The Director articulated some challenges with the reliability of the evidence before him and was very clear in his Determination as to what weight was given to the different sources of evidence provided to him and a clear rationale for his approach. It is entirely at the discretion of the Director to exercise his jurisdiction with respect to the weighing of evidence.
20. Mr. Pelletier further claims that new evidence became available that was not before the Director at the time of the hearing of this matter and requested an extension to the appeal time period to allow for the submission of these materials.
21. Mr. Pelletier had requested an extension to the appeal time period to allow for the submission of materials he describes as new evidence.
22. On February 21, 2018, the Director forwarded correspondence to Mr. Pelletier by way of electronic mail and by way of registered mail. That correspondence listed what documents and records Mr. Pelletier was required to provide to allow the Director to review the complaint. This correspondence clearly states that:

“The payroll records required are:

- *Any and all payroll records relating to wages, hours of work and conditions of employment as specified in section 28 of the Employment Standards Act.*
- *Any documentation regarding deductions from wages or copies of written authorization for deductions.”*

23. As clearly provided by the Director, the onus is on the Employer to submit any and all payroll records and documentation regarding deductions from wages. That the Employer failed to submit up to date payroll

records as required prior to the hearing does not create an opportunity for post-hearing disclosure of documents under the rubric of “new evidence.”

24. What Mr. Pelletier has submitted as new evidence is in fact an accounting of payments made to the Employee during the relevant period of his employment and an explanation regarding wage deductions which had not been completed prior to the hearing of this matter. It is the Employer’s obligation under the *ESA* to maintain up to date payroll records and the failure to do so does not give rise to an avenue of appeal.
25. Further, the materials submitted as new evidence amounts to information that was in the possession of the Employer at the time the original disclosure was required and as such cannot be seen as evidence not available at the time the Determination was being made as contemplated by section 112(1)(c). Respectfully, this is not new evidence.
26. Therefore, the request to extend the appeal period is denied.
27. The burden of proof rests with the Employer to demonstrate that a breach of the principles of natural justice has occurred. Mr. Pelletier offers neither argument nor evidence to support such a finding. He has not established that the Director failed to observe the principles of natural justice in making the Determination as is provided for in section 112(1)(b) of the *ESA*.
28. The appeal must fail.

ORDER

29. Pursuant to section 115(1)(a) of the *ESA*, I order that the Determination dated October 11, 2018, be confirmed.

Michelle F. Good
Member
Employment Standards Tribunal