Employment Standards TRIBUNAL

Citation: Isayas O. Kiflemariam (Re)
2019 BCEST 2

An appeal

- by -

Isayas O. Kiflemariam
("Mr. Kiflemariam")

- 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/112

DATE OF DECISION: January 2, 2019

DECISION

SUBMISSIONS

Isayas O. Kiflemariam on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Isayas O. Kiflemariam ("Mr. Kiflemariam") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 12, 2018 (the "Determination").

2. The Determination found that Canucks Electric Inc. ("CEI") contravened Part 3, sections 27 (wage statements) and 28 (payroll records) of the *ESA* in respect of the employment of Mr. Kiflemariam, but the latter is not entitled to any additional wages. The Determination levied two administrative penalties against CEI totaling $1,000 for breaches of sections 27 and 28 of the *ESA*. The total amount of the Determination is $1,000.

3. Mr. Kiflemariam appeals the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination.

4. The deadline to file the appeal of the Determination was 4:30 p.m. on October 22, 2018. On October 22, 2018, the Tribunal received Mr. Kiflemariam's incomplete appeal submission consisting of the Appeal Form (Form 1) and written reasons and argument. On the same day, a representative of the Employment Standards Tribunal emailed Mr. Kiflemariam informing the latter of the requirements of Rule 18(3) of the Tribunal's *Rules of Practice and Procedure* and requested that he provide the Tribunal with a completed Appeal Form, a copy of the Determination, and the written reasons for the Determination by the statutory deadline referred to in the Determination – 4:30 p.m. on October 22, 2018. Mr. Kiflemariam failed to comply with the request.

5. Subsequently, on October 31, 2018, the Tribunal made another attempt to obtain the documents requested from Mr. Kiflemariam by sending him a reminder with a new deadline of November 15, 2018, to deliver the documents.

6. On November 15, 2018, the Tribunal received the requested documents from Mr. Kiflemariam.

7. On November 20, 2018, the Tribunal corresponded with the parties advising them that it had received Mr. Kiflemariam's appeal. In the same correspondence, the Tribunal noted that the completed appeal was filed after 4:30 p.m. on October 22, 2018, and requested Mr. Kiflemariam to submit his written reasons for requesting an extension to the statutory appeal period by 4:00 p.m. on December 4, 2018. I note that in the Appeal Form filed by Mr. Kiflemariam, he does not check-off the box for requesting an extension of time to the statutory appeal period. Further, his written submissions in support of the appeal also do not contain a request for an extension of the statutory appeal period. He also failed to make any submissions in support of such a request by the deadline provided by the Tribunal. I do not think anything in this decision turns on this.

8. In the same correspondence of the Tribunal on November 20, 2018, 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 on the request to extend the appeal period or the merits of the appeal at this stage.

9. The Record was provided by the Director to the Tribunal on November 28, 2018. A copy of the same was sent by the Tribunal to CEI and Mr. Kiflemariam on November 29, 2018, and both parties were provided an opportunity to object to its completeness.

10. Neither Mr. Kiflemariam nor CEI objected to the completeness of the Record and the Tribunal accepts it as complete.

11. On December 18, 2018, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed under section 114(1). If all or part of the appeal is not dismissed, the Tribunal would seek submissions from CEI and the Director on the merits of the appeal. Mr. Kiflemariam 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 Mr. Kiflemariam's submissions, the Record, and the Reasons for the Determination (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. CEI is an electrical contracting company duly incorporated under the laws of British Columbia on August 31, 2007, and Farshid Morady ("Mr. Morady") is listed as its sole director.

15. Mr. Kiflemariam was employed as an electrical apprentice from November 14 to 29, 2017.

16. On April 3, 2018, within the time period allowed under the ESA, Mr. Kiflemariam filed a complaint against CEI that the latter failed to pay him wages for 70.5 hours at the agreed upon wage rate of $22 per hour for his work and parking charges he incurred when attending job sites to work for CEI (the "Complaint").

17. Subsequent to Mr. Kiflemariam filing the Complaint, but before the hearing, CEI submitted a payment of $1,173.12 to the Director representing payment for 70.5 hours of work by Mr. Kiflemariam at $16.00 per hour plus any related annual vacation pay.

18. It should be noted that the hearing of the Complaint was originally scheduled for Thursday September 6, 2018, but on July 20, 2018, a delegate of the Director forwarded a revised Notice of Complaint Hearing (the "Revised Notice") to the parties rescheduling the hearing to September 11, 2018. The Revised Notice

contained an error, namely, the date of the hearing is shown as *Thursday*, September 11, 2018, when it should have read *Tuesday*, September 11, 2018.

19. As a result of the error in the Revised Notice, on September 11, 2018, while Mr. Morady called in at 9:25 a.m., the delegate was concerned that Mr. Kiflemariam may not. The delegate adjourned the hearing for an hour to allow for a representative from the Employment Standards Branch to contact Mr. Kiflemariam to let him know that the hearing would be proceeding at 10:30 a.m. The Branch's representative emailed and also telephoned and left a message for Mr. Kiflemariam indicating that the hearing would proceed at 10:30 a.m. with or without his participation, and provided instructions for him to dial in to the hearing. Mr. Kiflemariam did not call in to the hearing at 10:30 a.m., and the hearing proceeded without his attendance. It should be noted that in the Appeal, Mr. Kiflemariam does not take issue with the hearing proceeding without his attendance.

20. The issues before the delegate, at the hearing, were the following two:

a. What was Mr. Kiflemariam's agreed rate of pay?

b. Is Mr. Kiflemariam entitled to reimbursement for his parking expenses?

21. While Mr. Kiflemariam did not provide oral evidence at the hearing, the delegate did have the benefit of his complaint form, text messages between Mr. Kiflemariam and Mr. Morady, and a written statement of Mr. Kiflemariam regarding his employment with CEI.

22. In the Complaint form, Mr. Kiflemariam claimed that he was owed wages for 70.5 hours at $22.00 per hour, as well as $140.00 reimbursement for parking expenses. In the Reasons, the delegate notes that in his written statement accompanying the Complaint form, Mr. Kiflemariam states that on November 20, 2017:

> I reminded him [Mr. Morady] that we hadn't discussed hourly pay yet. He said That (sic) we will do it tomorrow. The next day he showed up at the site briefly to talk to the Forman and drop (sic) some materials. He left right away with out (sic) discussing the payment with me. I again demanded we settle the payment for I started to realize most of the work has been done in the restaurant. He agreed and showed up the next day at the site. He pulled me aside and told me he will pay me $16/hr. I disagreed strongly and reminded him that it is not the industry standard for level 3 apprentices and he should know better. He told me I am slow and can't perform on my own as a level 3 electrician. I disagreed reminding him he never tested me and never was there to see me (sic) how I work. Finally, after a few minutes of back and forth he agreed to pay me $22/hr. although (sic) it was a $1/hr. (sic) less than my previous job I agreed also.

23. The written statement indicates that an agreement with respect to his wage rate was made on November 23, 2017, which was also his last day of work until November 27, 2017. On November 28, 2017, Mr. Morady terminated Mr. Kiflemariam's employment.

24. With respect to the text messages Mr. Kiflemariam submitted, the delegate notes that Mr. Kiflemariam asked Mr. Morady to resolve the wage rate issue on November 19. The text messages also indicate that Mr. Kiflemariam asked Mr. Morady for his wages regularly, until on December 21 when Mr. Morady responded: "By the way your cheque will be based on $16/hour. That what really you deserve… . (sic)" Mr. Kiflemariam responded to the text stating: "We agreed on 22/hr. After I demanded a meeting to

discuss the wages when you didn't even showed (sic) up at all or the only time you showed up you left with out (sic) saying anything."

25. In his testimony at the hearing on behalf of CEI, Mr. Morady stated that CEI did not submit payroll records or wage statement relating to Mr. Kiflemariam in response to the Demand for Employer Records (the "Demand") issued by the Branch on July 16, 2018, because it is CEI's practice not to add new, or "trial", employees to its payroll system until it is clear that they will continue working. All he or CEI had in terms of record of hours worked by Mr. Kiflemariam are the text messages from Mr. Kiflemariam recording his hours worked.

26. Mr. Morady also described at the hearing how CEI came to hire Mr. Kiflemariam. He stated that he posted an ad for an electrician on Craigslist, and Mr. Kiflemariam responded. He interviewed Mr. Kiflemariam the morning of November 14, 2017, and during the interview Mr. Kiflemariam inquired about the wage rate for the position. Mr. Morady said that he told him that he could not promise any particular wage rate until he had seen his work. Mr. Kiflemariam was okay with that response and began work with CEI that same morning.

27. Subsequently, Mr. Morady stated that Mr. Kiflemariam asked to meet with him on November 20, 2017, but he was too busy to meet and he was also not prepared to set a wage rate without Mr. Kiflemariam proving himself first.

28. On November 27 or 28, 2017, Mr. Morady stated he had a meeting with Mr. Kiflemariam and informed him then that he would pay him $16.00 per hour based on feedback he received of Mr. Kiflemariam's work from CEI's foreman. Mr. Morady said that Mr. Kiflemariam asked for a higher rate because he said he was a third-year electrical apprentice. Mr. Morady stated that he told him that he should perform a set of tasks on November 28 to prove if he was worth a higher rate. When he attended the work site on November 29, Mr. Morady said he noticed everything had been done wrong by Mr. Kiflemariam and he terminated his employment. Mr. Morady denied ever agreeing to pay Mr. Kiflemariam $22.00 per hour. Instead, he states, he paid Mr. Kiflemariam based on $16.00 per hour.

29. Having summarized the evidence of both parties in the Reasons, the delegate went on to consider the question of the applicable wage rate of Mr. Kiflemariam. In concluding that there was not an agreement between the parties on the wage rate at any time and Mr. Kiflemariam received at least minimum wage for all hours worked and therefore he was not owed any additional wages, the delegate reasoned as follows:

> Mr. Kiflemariam's written statement indicates that he and Mr. Morady agreed to a $22.00 per hour rate on November 23, 2017. There is no evidence to support this assertion. The text messages do not record any substantive discussion of a wage rate prior to the end of Mr. Kiflemariam's employment, much less agreement between the parties. In fact, in his text message of December 21 Mr. Kiflemariam states that he only met with Mr. Morady once after he began working, and that they did not discuss the wage rate at that time. It is difficult to reconcile this evidence from the text messages with Mr. Kiflemariam's written statement indicating that he met with Mr. Morady and agreed to a $22.00 per hour rate on November 23. Furthermore, in his affirmed testimony Mr. Morady stated that he never agreed to a $22.00 per hour wage rate, or indeed any wage rate.

> Based on the foregoing, I find that there was no agreement between the parties on a wage rate at any time. As Canucks has submitted payment for all hours worked by Mr. Kiflemariam at a rate exceeding the minimum wage, I find that there are no additional wages owing to the Complainant for his time worked at Canucks.

30. With respect to the second question, namely Mr. Kiflemariam's claim for reimbursement for $140.00 in parking expenses, the delegate noted that the *ESA* allows employees to seek recovery of wages as defined by section 1 of the *ESA*, but expenses or allowances are specifically excluded from the definition of wages, and parking costs are expenses which are not covered by the *ESA*. Accordingly, the delegate dismissed Mr. Kiflemariam's claim for parking reimbursement.

31. The delegate did, however, impose penalties of $500 each, pursuant to section 29(1) of the *Employment Standards Regulation*, for contravention by CEI of sections 27 and 28 of the *ESA* for failing to produce wage statements for Mr. Kiflemariam and payroll records, including a daily record of hours worked by him, his wage rate, and gross and net wages earned in each pay period.

SUBMISSIONS FROM MR. KIFLEMARIAM

32. In his single page written submissions on appeal, Mr. Kiflemariam, in large part, reiterates the content in his written statement that accompanied his complaint form which the delegate considered at the hearing.

33. Mr. Kiflemariam is also seeking the Tribunal to again review his text exchanges with Mr. Morady. He is disputing how the Director arrived at the decision that $16 per hour is acceptable wage for someone like him. More particularly he states:

> I am not sure what kind of evidence got (sic) the Director of Employment (sic) from Mr. Morady that convinces (sic) Him (sic) that Mr. Morady's mantra you deserve $16/hr. is acceptable (sic).
>
> I would like to know what evidence is there (sic) to show that I alone as level 3 in the electrical construction trade deserve $16/hr. as opposed to the industry's standard (sic) $23-28/hr. range. Besides of (sic) the Act of Employment of standards (sic) that promises minimum wage only.
>
> …
>
> Please reconsider and decide according to reality out there which is (sic) a level 3 construction Electrician trade wage is (sic) between $22-28/Hr.

34. He also submits that he is unable to accept Mr. Morady's "trial employment policy" which he finds exploitative of "honest workers" like himself. He states he worked hard for his money and should be paid at the industry or agreed to rate.

ANALYSIS

35. 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.

36. 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).

37. 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. In *Britco Structures Ltd.,* the Tribunal stated that the test for establishing an error of law on this basis is stringent and requires the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence, or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director.

38. Having delineated some broad principles applicable to appeals, in this case, Mr. Kiflemariam appeals on the sole ground that the Director breached the principles of natural justice in making the Determination.

39. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05).

40. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the [*ESA*], and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST # D050/96)

41. Having reviewed the Determination including particularly the Record and the written appeal submissions of Mr. Kiflemariam, I do not find Mr. Kiflemariam has discharged his burden to persuade the Tribunal that there is an error in the Determination on the natural justice ground of appeal. To the contrary, I find sufficient evidence in the Record and the Reasons to conclude that the Director afforded Mr. Kiflemariam all of the procedural rights within the meaning of the decisions in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd. (c.o.b. English Inn & Resort), supra*. Therefore, I dismiss the natural justice ground of appeal.

42. Having said this, I note in his written appeal submissions, Mr. Kiflemariam clearly disagrees with the delegate's assessment of the evidence and findings of fact that there was no agreement between the parties on the wage rate at any time. However, this is not a valid basis for appeal to the Tribunal. The Tribunal will not substitute its opinion for the Director's without some basis for doing so. The burden is on Mr. Kiflemariam to show the Determination is wrong. Where the appellant, as in this case, is challenging a conclusion of fact, the appellant must show that the conclusion of fact was simply based on wrong information, was manifestly unfair, or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna operating as the Achillion Restaurant,* BC EST # D576/98). I do not find Mr. Kiflemariam has done this here. I find that the delegate's conclusion that there was *no* agreement on the wage rate between the parties is supportable by the evidence adduced at the hearing which the delegate relied upon in making the Determination.

43. I find Mr. Kiflemariam is attempting to take the proverbial "second kick at the can" and have this Tribunal take a different view of the facts and arrive at a different conclusion than the Director. I find there is no basis for the Tribunal to interfere with the Determination.

44. Pursuant to section 114(1)(f) of the *ESA,* I dismiss Mr. Kiflemariam's appeal of the Determination.

ORDER

45. Pursuant to section 115(1) of the *ESA,* I confirm the Determination made on September 12, 2018, together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal