



Citation: Excellence Auto Glass Ltd. (Re)
2019 BCEST 22

An appeal

- by -

Excellence Auto Glass Ltd.

- 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: Marnee Pearce

FILE NO.: 2018A/126

DATE OF DECISION: March 12, 2019

DECISION

SUBMISSIONS

Fares Fani on behalf of Excellence Auto Glass Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Fares Fani (“Mr. Fani”) has filed an appeal on behalf of Excellence Auto Glass Ltd. (“Excellence Auto Glass”) of a Determination issued on November 22, 2018 (the “Determination”), by Jennifer Sencar, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”).
2. Ahmad Zia (the “Complainant”) filed a complaint with the Director alleging that Excellence Auto Glass contravened the *ESA* in failing to pay him twelve hours of work he performed for the employer.
3. Following an investigation, the delegate concluded that Excellence Auto Glass had contravened section 18 of the *ESA* by failing to pay the Complainant wages owed over a two-day period.
4. The Determination awarded \$138.61 to the Complainant for wages and accrued interest.
5. The Determination imposed mandatory penalties against Excellence Auto Glass for first contraventions of section 18 of the *ESA* and section 46 of the *Employment Standards Regulation* for a total administrative penalty amount of \$1,000.00.
6. Excellence Auto Glass appealed the Determination to the Tribunal on the ground that the Director failed to observe the principles of natural justice in making the Determination. Further, Excellence Auto Glass submits that evidence has become available that was not available at the time the Determination was made. Excellence Auto Glass asks that the Determination finding that Excellence Auto Glass owed wages to the Complainant for twelve hours of work be varied.
7. After receiving the appeal, the Tribunal’s Registrar sought the 112(5) record (the “Record”), that is, all the material before the delegate pertaining to the complaint, including but not limited to, Canada Post tracking information, corporate searches, payroll demands, and investigative notes from the Director. The delegate produced the Record on January 14, 2019.
8. A copy of the Record was sent to Excellence Auto Glass and to the Complainant via e-mail on January 15, 2019, allowing an opportunity to object to its completeness. No objection was received, and I am satisfied that the Record is complete.
9. This decision is based on Mr. Fani’s appeal submissions on behalf of Excellence Auto Glass, the Record, and the Reasons for the Determination.

ISSUE

10. Whether or not Excellence Auto Glass has established any basis to interfere with the Director's Determination.

FACTS

11. Excellence Auto Glass is a company duly incorporated under the laws of British Columbia and operates an auto glass repair shop which falls within the jurisdiction of the *ESA*. A June 14, 2018, corporate search confirms that the company was established on October 13, 2011, with Mr. Fani as the sole director and officer.
12. During the November 13, 2018, hearing the Complainant testified by telephone that he went to the Employer's shop and worked for four hours on May 15, 2018, completing two jobs – a windshield on a truck and a glass on a vehicle door, and that the rate of pay he was told he would receive for this work was \$18.00 per hour.
13. The Complainant testified that Mr. Fani was happy with his work and said that he would train him on the administration of ICBC windshield claims. The Complainant provided a copy of a text he received from Mr. Fani containing the Employer's user names and passwords relating to processing ICBC claims.
14. The Complainant testified that he returned to work on May 16, 2018, at the request of Mr. Fani and performed 5 jobs over an 8-hour period. At the end of the work day, he was told by Mr. Fani that there was no further work for him, and he would only be paid \$13.00 per hour for the work completed.
15. During the November 13, 2018, hearing Mr. Fani testified by telephone on behalf of Excellence Auto Glass. He testified that the Complainant attended for a job interview on May 15, 2018, and was shown around the shop; however, the Complainant did not work on any vehicles as he did not have WCB coverage. He did take the Complainant into the office and show him how to order parts and the general nature of the business but stated that in order to work on ICBC claims the Complainant needed to be certified and he was not.
16. Mr. Fani denied sending a text or an email to the Complainant with user names and passwords for ICBC related accounts, stating that the Complainant must have sent it to himself.
17. Mr. Fani testified that he did not hire the Complainant on May 15, 2018, but asked him to come in the following day to explore the possibility of training the Complainant so he could become certified. He denied that the Complainant worked on May 16, 2018, and Mr. Fani states he ultimately did not hire the Complainant.
18. Mr. Fani denied offering the Complainant \$13.00 per hour, as the Complainant was never hired.
19. The delegate preferred the evidence of the Complainant, describing it as more probable under the circumstances and more consistent with the documentary evidence.

20. The delegate wrote that Mr. Fani provided no evidence that the Complainant had access to his computer, nor could he explain how the text/email with ICBC details was sent to the Complainant without Mr. Fani's knowledge. It was unreasonable that Mr. Fani would have shown the ICBC information to the Complainant if he had not hired the Complainant, and it did not make sense to send this information to someone he had not hired.
21. The delegate wrote that Mr. Fani did not provide an adequate explanation for why he would ask the Complainant to return on the following day if it was not to see his work. His testimony that he told the Complainant, whom he did not hire the previous day, to 'come in and see' was less probable than the Complainant's evidence that he was asked to come in and work.
22. The delegate determined that the Complainant worked 12 hours for the Employer for which he was not paid.
23. The delegate determined that without a written agreement supporting the Complainant's assertion that he was owed \$18.00 per hour, and in the absence of payroll records, the Complainant would be paid for 12 hours of work based on the minimum wage, \$11.35 per hour, for a total of \$136.20, and any accrued interest.

ARGUMENT

24. Excellence Auto Glass's appeal submission, prepared by Mr. Fani, argues that as there was no written or verbal contract of employment, and as the Appellant did not have the Complainant's full name, address or SIN number, there was no payroll documentation or need for the same.
25. Mr. Fani argues that the Complainant had access to Mr. Fani's office computer when Mr. Fani stepped out for five minutes to help a technician. He did not have the Complainant's email address, nor was information sent to the Complainant useful to the Complainant, as it related to ordering glass, which is done from the office. He reiterated his initial argument that the Complainant sent an unauthorized email to himself containing passwords and user names belonging to Excellence Auto Glass.
26. Mr. Fani argues that the Complainant was at Excellence Auto Glass for an interview on May 15, 2018, for about one hour only. This interview included looking at web addresses on the office computer relating to ordering parts for auto glass repair. As the Complainant had to leave early, he asked to reattend the following day, and Mr. Fani agreed. When the Complainant attended on May 16, 2018, he stayed for about 45 minutes; as it became evident that he was not qualified, no work was performed, nor was an employment contract offered.
27. Mr. Fani argues that he has new evidence in the form of a written statement from the lessee of the building in which Excellence Auto Glass is located. The building lessee shares the premise with Excellence Auto Glass, who have a sub-lease. The lessee confirms Mr. Fani's evidence that the Complainant only attended for one hour on May 15, 2018, was left alone for about 5 minutes in the Employer's office, and was able to access the office laptop without supervision. The lessee also confirms that the Complainant was at the shop for about an hour only on May 16, 2018.

ANALYSIS

28. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 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 any 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 the requirements of section 112 (2) have not been met.

29. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA* which says:

- 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.

30. 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 in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

Failure to comply with the principles of natural justice

31. At their essence, the principles of natural justice are procedural rights that ensure that parties know the case being made against them, are given an opportunity to reply, and have the right to have their case heard by an impartial decision maker.

32. There is nothing in the Determination or the Record to support a finding that the delegate breached the principles of natural justice, nor has Mr. Fani articulated reasons for believing Excellence Auto Glass was denied natural justice. His allegation appears to stem from the fact the delegate preferred the evidence provided by the Complainant, finding it more probable, and he disagrees with the results.

33. The delegate clearly gave Excellence Auto Glass a full opportunity to respond to the case before it, and while Mr. Fani disagrees with the Delegate's findings, I find no basis to conclude that the Employer was denied the right to be heard and provide supporting evidence. I find that the allegation of bias was made without any foundation and is unsupported by the record.

Error of Law

34. Excellence Auto Glass appears to primarily disagree with the findings of fact reached by the delegate.
35. 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 facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.

36. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on the facts, Excellence Auto Glass is required to show the findings of fact and the conclusions reached by the delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13.

37. I find no error of law in the Determination. The delegate analyzed the evidence presented by the parties during the complaint process, and the conclusion to accept one version of the events over another was supported by both this analysis and the documentary evidence. Although Excellence Auto Glass disagrees with the findings of facts and conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all, were perverse or inexplicable, or that the delegate misapplied the law and legislation.

New Evidence

38. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
- 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;
 - b. the evidence must be relevant to the material issue arising from the complaint;

- c. the evidence must be credible in the sense that it is reasonably capable of belief; and
- 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.

39. Excellence Auto Glass has selected as a ground of appeal that new evidence has become available that was not available at the time the Determination was being made. Mr. Fani argues that the written statement of the building lessee from whom he subleases a portion of the shared workspace should be accepted as new evidence.
40. During the November 13, 2018, hearing Mr. Fani was asked about the email containing business user names and passwords that was sent to the Complainant from the Employer's email address. Mr. Fani stated that he did not send this information and that the Complainant must have sent it to himself when left alone in the office during the initial interview. The delegate did not accept Mr. Fani's explanation, noting that Mr. Fani provided no evidence that the Complainant had access to his computer.
41. Ultimately, this documentary evidence containing user names and passwords was critical to the decision that the Complainant was an employee and entitled to wages.
42. Excellence Auto Glass was aware that this document would be raised at the November 13, 2018, hearing, as it was properly disclosed – on October 24, 2018, an email with this attachment was sent to the Employer.
43. The statement from the building lessee which does provide some evidence that the Complainant had access to the business computer does not meet the threshold for consideration as new evidence. It could have been, with the exercise of due diligence, presented to the delegate during the investigation.
44. I am not persuaded that there is a basis to interfere with the Determination, and the appeal is dismissed.

ORDER

45. Pursuant to section 115 of the *ESA*, I order that the November 22, 2018, Determination be confirmed in the amount of \$1,138.61, together with any further interest that has accrued under section 88 of the *ESA*.

Marnee Pearce
Member
Employment Standards Tribunal