

Citation: A-Star Vinyl Window System Ltd. (Re)
2019 BCEST 40

An appeal

- by -

A-Star Vinyl Window System Ltd.
(the “Company”)

- 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: Allison Tremblay

FILE NO.: 2019/2

DATE OF DECISION: April 29, 2019

DECISION

SUBMISSIONS

Manjit Dhindsa

on behalf of A-Star Vinyl Window System Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), A-Star Vinyl Window System Ltd. (the “*Company*”) has filed an appeal of a Determination issued by Sarah Vander Veen, a delegate (the “*Delegate*”) of the Director of Employment Standards (the “*Director*”), on December 27, 2018 (the “*Determination*”). In the Determination, the Delegate found that the Company contravened sections 17 (paydays), 18 (wages), 45 (statutory holiday pay), and 58 (annual vacation pay) of the *ESA* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) with respect to its employee Jasbir Singh Gill (“*Gill*”) and ordered it to pay \$9,050.06 in wages and interest and \$1,500 in administrative penalties under section 29 of the *Regulation*.
2. The Company seeks to cancel the Determination based on new evidence.
3. The Company did not deliver to the Tribunal a copy of the written reasons for the determination (the “*Reasons*”) as required by section 112(2)(a)(i.1) of the *ESA*.
4. The Director provided the section 112(5) record (the “*Record*”) to the Tribunal. The parties received copies of the Record and were given an opportunity to make submissions on the Record’s completeness. The Tribunal received no objection to the Record’s completeness. Accordingly, I accept the Record as complete.
5. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed:
 - 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:
 - ...
 - (f) there is no reasonable prospect that the appeal will succeed;
 - ...
 - (h) one or more of the requirements of section 112 (2) have not been met.
6. I am satisfied that I am able to decide this appeal under section 114(1) on the basis of the material before me, namely, the Determination, the appeal form, submissions filed by Mr. Dhindsa, and the Record provided to the Tribunal.

ISSUE

7. Should the appeal be dismissed under section 114 of the *ESA*?

THE FACTS AND ANALYSIS

8. On January 15, 2019, the Tribunal received the Company's appeal form, written reasons for the appeal, and an incomplete copy of the Determination.
9. Later that same day, the Tribunal contacted the Company's representative by telephone and directed him to provide to the Tribunal the complete Determination and Reasons. The Company's representative provided the complete Determination but did not provide the Reasons.
10. On January 15, 2019, the Tribunal wrote to the Company requesting that it provide a copy of the Reasons by the appeal deadline. The Company did not comply.
11. On February 5, 2019, the Tribunal wrote to the Company observing the Tribunal had not received the Reasons and requesting that they be provided by February 20, 2019. The Registrar advised that this would not be an extension to the appeal period.
12. On February 20, 2019, the Tribunal received a further submission from the Company but did not receive a copy of the Reasons.
13. On February 25, 2019, the Tribunal Administrator wrote to the Company again observing that the Tribunal had not received the Reasons. The Tribunal Administrator requested the Company provide the Reasons and a written request for an extension of the appeal period by March 11, 2019.
14. The Tribunal received no further correspondence from the Company.
15. Without a copy of the Reasons for Determination, I must assess how the Delegate arrived at the Determination based on the Record.
16. The Record contains a copy of Gill's complaint which he filed on August 31, 2018. He alleges that he worked for the Company from April 1, 2018, to June 30, 2018, but that he was not paid for this work. The Record also contains Gill's documentary evidence, including a Company business card bearing Gill's name, a letter dated April 25, 2018, from the Company confirming Gill's employment and salary, a pay stub, and documentary evidence that Gill performed work for the company, for example, print outs of estimates for window sales. With respect to the pay stub, Gill noted on his list of documents that while he received a pay stub he did not receive the corresponding pay.
17. The Record further demonstrates that the Employment Standards Branch disclosed Gill's evidence to the Company, made a demand for the Company's evidence, and scheduled a hearing. The Notice of Complaint Hearing warns the parties that "The Adjudicator may make a Determination based on information before them, **even if you choose not to participate at the hearing.**" The Record does not contain any evidence submitted by the Company. The Company did not attend the hearing.

18. In its appeal, the Company wishes to adduce evidence that Gill did not work for the Company. The new evidence it seeks to admit is a statement that Gill did not work for the Company, addressed “To whom it may concern” and purportedly signed by nine employees of the Company. The letter is unsworn. There is no indication in it that the signatories knew it was prepared for the purpose of a legal proceeding.
19. The Company also provided copies of invoices for window orders.
20. The test used by the Tribunal on applications to admit new evidence is set out in *Re: Bruce Davies*, BC EST # D171/03. The evidence 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;
 - (b) the evidence must be relevant to a 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.
21. In this case, the evidence of the Company’s employees and the invoices could have been presented at the time of the hearing. The Company chose not to attend that hearing. An appeal is not a venue for parties to present evidence that was available at the time of the hearing but was not presented. Parties are expected to make their best case before a delegate. Additionally, the “To whom it may concern” letter is not sufficiently credible to be relied on in an appeal. In sum, I would not admit the new evidence. Without new evidence, the appeal has no reasonable prospect of success, and I dismiss it pursuant to section 114(1)(f) of the *ESA*.
22. Even if I had decided not to dismiss the appeal under section 114(1)(f), I would not proceed with the appeal as one of the requirements under section 112(2) of the *ESA* have not been met. The requirements of section 112(2) are mandatory. The Company “must” provide a copy of the Reasons for Determination to the Tribunal pursuant to section 112(2)(a)(i.1). The Company has not complied with the requirement and the appeal is incomplete. Because the Company has not complied with the requirements of the *ESA*, I would dismiss the appeal pursuant to section 114(1)(h).

ORDER

23. Pursuant to section 115 of the *ESA*, I confirm the Determination together with any interest that has accrued under section 88 of the *ESA*.

Allison Tremblay
Member
Employment Standards Tribunal