

Citation: Tan & Tone Youtan Studios Ltd. (Re)
2019 BCEST 41

An appeal

- by -

Tan & Tone Youtan Studios Ltd. carrying on business as You Tan Studios
("YouTan")

- 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.: 2019/12

DATE OF DECISION: April 29, 2019

DECISION

SUBMISSIONS

Azadeh Monjezi

on behalf of Tan & Tone Youtan Studios Ltd. carrying on business as You Tan Studios

OVERVIEW

1. Pursuant to section 112(2) of the *Employment Standards Act* (the “*ESA*”), Tan & Tone Youtan Studios Ltd. carrying on business as You Tan Studios (“YouTan”) has filed an appeal of a Determination (the “Determination”) issued by Chantelle MacInnes, a delegate (“Delegate MacInnes”) of the Director of Employment Standards (the “Director”), on January 8, 2019. In that Determination, the Director found that YouTan had contravened section 17 of the *ESA* by failing to pay the complainant, Patricia Sterling (the “Employee”), wages including overtime pay, to which she was entitled. The Director found that YouTan owed the Employee wages in the amount of \$440.00, overtime wages in the amount of \$39.00, annual vacation pay in the amount of \$43.16, and accrued interest in the amount of \$12.48 for a total amount owing of \$534.64.
2. In addition, mandatory administrative penalties as required by section 98(1) of the *ESA* and, as set out in section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) were ordered in the amount of \$500.00 each for two contraventions: one for a contravention of section 17 of the *ESA* and one for contravention of section 46 of the *Regulation*.

ISSUE

3. Is there new evidence that was not available at the time of the hearing that would justify a variance of the Determination?

ARGUMENT

4. YouTan argues that the Delegate MacInnes ought to vary her findings based on information provided to the Director after the hearing and in the form of an appeal of the Determination.

THE FACTS

5. Following the receipt of the complaint, YouTan was contacted via e-mail and advised of the complaint filed by the Employee and was provided with a copy of the complaint form.
6. A delegate (the “Delegate”) of the Director made numerous attempts to contact YouTan regarding a separate complaint. These attempts were made on September 17 and 20, 2018, and October 4, 11, and 24, 2018. YouTan was subsequently deemed non-participatory with respect to this separate complaint.

7. The Employee's complaint was therefore scheduled for a complaint hearing. The Notice of Complaint Hearing and Demand for Employer Records was sent via e-mail to the attention of Ms. Monjezi on October 23, 2018.
8. On October 24, 2018, the Notice of Complaint Hearing and Demand for Employer Records was sent to YouTan via registered mail to YouTan's operating address, registered and records office, and to Ms. Monjezi's mailing address. The deadline to respond to the Demand for Employer Records was November 14, 2018. Canada Posts' tracking system confirms the package was successfully delivered to YouTan's operating address and its registered and records office. The package sent to Ms. Monjezi's mailing address was returned to the Employment Standards Branch (the "Branch") marked "unclaimed".
9. YouTan chose not to participate, and accordingly, as noted in the Notice of Complaint Hearing, the hearing of the matter was set down for December 4, 2018.

ANALYSIS

10. YouTan was duly notified of the complaint, of the hearing, and of their right to participate in said hearing. Rather than providing the records required, YouTan elected to not participate at all in the hearing of the complaint.
11. Respectfully, it is simply not open to YouTan to refuse all communication with the Branch during the course of the hearing and then submit records subsequent to the conclusion of the hearing and the rendering of the Determination in hopes that the Tribunal will vary the Determination. In fact, it would be an egregious breach of the principles of natural justice and the Employee's rights to procedural fairness would be breached if I were to order the variance requested by the Employer.
12. The documents filed in support of the Appeal of the Determination can in no way be considered new evidence not available at the time of the hearing. These records were available at the time of the hearing and the Delegate demanded their disclosure. YouTan elected not to disclose the documents when requested to do so.
13. Unless the Director's Determination raises an error of law, the Tribunal lacks the jurisdiction to reach factual conclusions that differ from those found by the Director (see *Britco Structures Ltd.*, BC EST # D260/03).
14. Delegate MacInnes made no error of law in her determination of this matter and YouTan does not allege that the Delegate made an error of law. Therefore, the Tribunal lacks jurisdiction to make factual conclusions that differ from those made by Delegate MacInnes in her Determination.
15. I find that this appeal must fail.

ORDER

- ^{16.} I hereby order that this appeal be dismissed and pursuant to section 115(1)(a) of the *ESA*, the Determination dated January 8, 2019, is confirmed.

Michelle F. Good
Member
Employment Standards Tribunal