



An appeal

- by -

Berjak Construction Ltd.
("Berjak")

- 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: Carol L. Roberts

FILE NO.: 2019/14

DATE OF DECISION: May 13, 2019

DECISION

SUBMISSIONS

Ahmad Berjak

on behalf of Berjak Construction Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Berjak Construction Ltd. (“Berjak” or the “Employer”) has filed an appeal of a Determination (the “Determination”) issued by Terry Hughes, a delegate (“Delegate Hughes”) of the Director of Employment Standards (the “Director”), on January 11, 2019.
2. On May 2, 2018, Angel Manuel Ponce Valerio (the “Employee” or “Mr. Valerio”) along with another employee (collectively, the “employees”) filed complaints with the Director alleging that Berjak contravened the *ESA* in failing to pay them regular and overtime wages, vacation, and statutory holiday pay.
3. Following an investigation, Delegate Hughes concluded that Berjak had contravened sections 18, 40, 45, and 58 of the *ESA* in failing to pay the employees regular and overtime wages, statutory holiday pay, and annual vacation pay. Delegate Hughes ordered Berjak to pay \$88,023.35 in respect of wages owed to both employees.
4. Delegate Hughes also imposed five administrative penalties on Berjak for contraventions of the *ESA* in the total amount of \$2,500, for a total amount payable of \$90,523.35.
5. Berjak appeals the Determination only as it relates to Mr. Valerio on the basis that evidence has become available that was not available at the time the Determination was being made.
6. The deadline for filing an appeal was February 19, 2019. Berjak’s appeal, which was filed February 19, 2019, also sought an extension of time in which to file the appeal as well as additional documents in support of the appeal.
7. These reasons are based on Berjak’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

ISSUE

8. Whether or not Berjak has established any basis to interfere with the Director’s determination.

FACTS

9. The facts, as set out by Delegate Hughes, are as follows.
10. Berjak operates a construction business. It was incorporated in Alberta on January 21, 2016. Corporate searches conducted on February 23 and November 28, 2018, identified Muhammad Berjak, Ahmad

Berjak, and Glenn Thompson as directors. The registered address of the company was the same address used by Ahmad and Muhammad Berjak. Berjak is not registered in British Columbia.

11. Mr. Valerio was employed as a framer from September 11, 2017, until January 31, 2018, at a construction site in Penticton. He claimed that he was not paid any wages or the full amount of his promised *per diems*.
12. On November 7, 2018, Delegate Hughes sent a registered letter to the Employer's Alberta office as well as to all three directors at the addresses identified in the corporate directory, advising them of the complaints and requesting a response and payroll records. The deadline for responding was November 23, 2018. The letter sent to Ogilvie Law ("Ogilvie"), the registered office of the Employer, was returned, as Ogilvie indicated it was no longer Berjak's registered office. A corporate search indicated that the registered office was changed to the same address of Ahmad Berjak and Muhammed Berjak.
13. Canada Post tracking records indicated that registered mail delivery notice cards and reminder delivery notice cards were left at all three director addresses. The registered mail notice letters were ultimately returned as unclaimed.
14. Delegate Hughes issued the Determination on January 11, 2019. The Employer submitted a response to the Demand after that date.
15. Delegate Hughes determined that, in the absence of any information from the Employer, wages were owed in the amounts set out above.

ARGUMENT

16. Berjaks contends that Mr. Valerio was employed by Ocean Pacific, a company which it subcontracted. Mr. Berjak supplied the first name of the owner/operator of Ocean Pacific. He contended that, after Ocean Pacific abandoned the project, Mr. Valerio asked to work for Berjak at the same rate he was paid by Ocean Pacific. Berjak argues that the hours claimed by Mr. Valerio were fabricated. It contends that Mr. Valerio was paid fairly and on time for the hours he worked. However, Berjak agrees that Mr. Valerio is entitled to wages in an approximate amount of \$4,000. Included with the documentation are pages of what appears to be time sheets.
17. Also attached to the appeal is Mr. Valerio's "Self-Help" Request for Payment dated February 6, 2018.

ANALYSIS

18. Section 114(1) 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:
 - (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, 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 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.

19. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

20. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that Berjak has met that burden.

New Evidence

21. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

1. 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;
2. The evidence must be relevant to a material issue arising from the complaint;
3. The evidence must be credible in the sense that it is reasonably capable of belief; and
4. The evidence must have high 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.

22. Berjak did not respond to Delegate Hughes' invitation to provide a response to the Employees' claims nor to the Demand for Employer Records. Although the unregistered letters were not claimed, none of the letters sent by regular mail were returned. Despite the fact that Canada Post was experiencing a labour disruption, I note that the registered mail sent to Berjak's former registered office was received in a timely fashion and responded to. Berjak did not provide any information about its failure to respond to the Director's Demands in a timely fashion.

23. Given that none of the correspondence sent by regular mail was returned, the Employer was well aware of Mr. Valerio's claim by mid-February 2018, and, in fact, one of the Employer's representatives communicated with a delegate regarding the possibility of a mediation of the complaint in July 2018. I can only infer that Berjak chose not to respond to the Director's correspondence.

24. Given that inference, and in the absence of any explanation for Berjak's failure to respond despite its knowledge of the opportunity to do so, I conclude that the appeal must fail.

25. The material submitted on appeal does not meet the test for new evidence. All of the documents were available during the investigation. Berjak provides no explanation why they were not. As the Tribunal has stated on many occasions, an employer may not “hide in the weeds” and present evidence they believe is relevant only on appeal.
26. Furthermore, I am not persuaded that the “new evidence” would have led Delegate Hughes to a different conclusion on the issue of whether or not the Employee was entitled to wages. The Employer concedes that both the employees are entitled to wages while disputing the amount of wages owed to one of them. Had the information been presented to Delegate Hughes during the investigation, he would have had the opportunity to assess the reliability of that evidence.
27. The Employer is required, under section 28 of the *ESA*, to maintain payroll records which include, among other things, the employee’s wage rate, the hours worked by the employee on each day, the benefits paid to the employee, any deductions made from the employee’s wages, and the employee’s gross and net wages. The documents provided by the Employer on appeal do not satisfy these requirements. In the absence of any reliable Employer records, I am not persuaded that the “new evidence” would have led Delegate Hughes to a different conclusion on the question of whether Mr. Valerio was entitled to wages in the amount decided.
28. The appeal is dismissed.

ORDER

29. Pursuant to section 115 of the *ESA*, I order that the January 11, 2019, Determination be confirmed in the amount of \$90,523.35, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal