

Citation: Tan & Tone Youtan Studios Ltd. (Re)
2019 BCEST 47

An appeal

- by -

Tan & Tone YouTan Studios Ltd. carrying on business as You Tan Studios
(the “Employer”)

- 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.: 2019/19

DATE OF DECISION: May 21, 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 and Tone YouTan Studios Ltd. carrying on business as You Tan Studios (the “Employer”) has filed an appeal of a Determination (the “Determination”) issued by Chantelle MacInnis, a delegate (“Delegate MacInnis”) of the Director of Employment Standards (the “Director”), on January 21, 2019. In that Determination, the Director found that the Employer had contravened sections 17, 18, 40, and 58 of the *ESA* by failing to pay Thais Soares (the “Employee”) wages, overtime pay, and vacation pay to which she was entitled. The Director found that the Employee was entitled to regular wages in the amount of \$201.50; commission sales in the amount of \$73.40; overtime wages in the amount of \$58.50; annual vacation pay in the amount of \$70.02; and accrued interest in the amount of \$4.48 for a total of \$407.90 owed by the Employer to the Employee.
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 contraventions of sections 17 and 18 of the *ESA* and section 46 of the *Regulation* for a total of \$1,500.00.
3. The Employer was thus ordered to pay a total of \$1,907.90 in combined penalties and amounts owed the Employee.

ISSUE

4. Is there new evidence that was not available at the time of the hearing that would justify a variance of the Determination? Did the Director fail to observe the principles of natural justice?

ARGUMENT

5. The Employer argues that Delegate MacInnis’ findings ought to be varied based on information provided to the Director after the hearing and in the form of an appeal of the Determination.

FACTS & ANALYSIS

6. Following the receipt of the complaint by the Branch, the Employer was advised of the complaint on November 19, 2018, via e-mail and was provided with a copy of the complaint form. Given that, at the time, there were two additional complaints against the Employer in which the Employer was non-participatory, the Delegate proceeded with setting down a hearing of the complaint for January 3, 2019.

7. A Notice of Complaint Hearing and Demand for Records was sent to the Employer via e-mail on November 27, 2018, and by registered mail on November 28, 2018, to the operating address, the registered and records office, and to Ms. Monjezi's mailing address. Canada Post's tracking system confirmed delivery to the registered and records office.
8. The deadline for the Demand for Records was December 12, 2018.
9. Both the Employee and the Employer failed to attend the hearing scheduled for January 3, 2019. The Delegate contacted the parties at which time the Employer claimed that she had never received the Notice of Complaint or the Notice of Complaint Hearing and Demand for Records. The suggestion that the Employer did not receive the above-noted notices is implausible given that the Employer replied to this email indicating she disputed the Employees claim and would be forwarding evidence to support her position.
10. Neither party was able to agree on a date when they could both be in attendance at a hearing. Delegate MacInnis offered the Employer an opportunity to submit their own evidence by no later than 4:00 pm on January 7, 2019, or to participate over the phone at certain times on that date. The Employer failed to submit any evidence prior to the deadline and did not confirm participation in the scheduled telephone conference.
11. On January 16, 2019, the Employer contacted the Branch via e-mail advising that all previous emails from the Branch had been redirected to their accountant in error. Given that the Employer replied to select e-mails from the Branch, this argument too is implausible.
12. In spite of being given multiple opportunities to both submit documentary evidence and to make verbal submissions, no evidence was ever received by the Employer and thus Delegate MacInnis issued her decision on January 21, 2019.
13. The Employer submits that there is new evidence that if considered could support a variance of the Determination.
14. Respectfully, it is simply not open to the Employer to seek a variance of the Determination after failing to submit records and evidence as the *ESA* requires. The Records provided by the Employer on appeal are in fact the employment records demanded by the Branch at the time of the original complaint and hearing. That was the Employer's opportunity to bring evidence forward to refute the complaint. The Employer elected not to provide the records and further not to participate in the hearing despite many opportunities provided it by the Branch. The Employer may not now submit records on appeal that by law were to be submitted at the time of hearing and expect the Tribunal to vary the Determination.
15. 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).
16. As the Determination raises no such error of law, the Determination may not be varied. In fact, to do so would be an egregious breach of the principles of natural justice. Further, the rights of the Employee to procedural fairness would be breached if I were to order the variance requested by the Employer.

17. For the stated reasons, this appeal must fail.

ORDER

18. I hereby order that the appeal is dismissed and the Determination of the Director stands.

Michelle F. Good
Member
Employment Standards Tribunal