Employment Standards TRIBUNAL

Citation: O'Brien & Fuerst Logging Ltd. (Re)
2019 BCEST 53

An appeal

- by -

O'Brien & Fuerst Logging Ltd.
(the "appellant")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2019/38

DATE OF DECISION: June 5, 2019

DECISION

SUBMISSIONS

Gloria J. O'Brien — on behalf of O'Brien & Fuerst Logging Ltd.

INTRODUCTION

1. On February 21, 2019, Michael Thompson, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination under section 79 of the *Employment Standards Act* (the "*ESA*") pursuant to which the present appellant, O'Brien & Fuerst Logging Ltd. (the "appellant"), was ordered to pay a former employee (the "complainant") the total sum of $7,488.39 on account of unpaid wages and section 88 interest. The bulk of the wage payment order was in relation to unpaid vacation pay ($5,200), but the wage award also included $2,000 representing two weeks' wages as compensation for length of service.

2. Further, and also by way of the Determination, the delegate levied three separate $500 monetary penalties against the appellant (see section 98) and thus the total amount payable under the Determination is $8,988.39.

3. On April 10, 2019, the appellant filed an Appeal Form (Form 1) purporting to appeal the Determination. The appellant did not indicate on the form which of the three statutory grounds of appeal it intended to rely on (see Part 3 of the form), although it did ask that the matter be referred back to the Director of Employment Standards (see Part 4). The appellant did not check the box in Part 6 of the form addressing extensions of the appeal period, although the appeal was filed after the statutory appeal period expired (see subsection 112(3) of the *ESA*).

4. The appellant appended several documents to its Appeal Form including separate one-page letters dated March 25, 2019, and April 10, 2019, respectively. The appellant also appended various additional documents to its Appeal Form including a summary record entitled "vendor invoices" (totalling $138,118.22) as well as several other documents apparently filed with, or received from, the Canada Revenue Agency, and a Record of Employment regarding the complainant that was apparently filed with Service Canada.

5. The appellant's March 25 letter set out its reasons for appeal as follows:

> …[the appellant] is requesting the Tribunal verify the wage calculation as determined by the…Employment Standards Branch.
>
> The determination errored [*sic*] in calculating [the complainant's] remuneration as $128,000.00 when indeed [the complainant] was paid a total of $114,714.25 as evidenced by the attached T4 summaries provided to Revenue Canada and the Record of Employment submitted to Service Canada…
>
> This appeal is based solely on the fact that [the complainant's] remuneration was calculated wrong when the determination was issued. (my underlining)

6. Thus, it would appear that the appellant is relying on both the "error of law" and "new evidence" grounds of appeal (see subsections 112(1)(a) and (c) of the *ESA*). I will address these two separate grounds of appeal consistent with the Tribunal's decision in *Triple S Transmission Inc.*, BC EST # D141/03.

APPLICATION TO EXTEND THE APPEAL PERIOD

7. The deadline for appealing the Determination to the Tribunal, calculated in accordance with section 122 of the *ESA*, was April 1, 2019. This deadline was set out, along with further instructions regarding the appeal process, in a text box headed "Appeal Information" found on the third page of the Determination.

8. The appellant's April 10 letter, outlining its reasons for failing to file a timely appeal, is reproduced in full, below:

> [The appellant] is requesting the Tribunal approve an extension of time to the statutory appeal period pursuant to section 109(1) of the ESA.
>
> Unfortunately I errored [*sic*] in that I inadvertently submitted the copy of the appeal form and attachments to the Director of Employment Standards on March 25, 2019 but neglected to send the original to the Tribunal office. For this I apologize.
>
> It is my sincere hope that the Tribunal office consider granting this request for appeal and grant this extension. In addition to the request for the extension I attach a complete copy of the determination and the reasons for determination as requested.

THE DETERMINATION

9. The Determination was issued following an oral hearing held, by teleconference, on May 29, 2018. The Determination and the delegate's accompanying "Reasons for the Determination" (the "delegate's reasons") were both issued on February 21, 2019. It is not clear to me why there was a nearly nine-month delay in issuing the Determination after the hearing was concluded.

10. At the hearing, the appellant maintained that the complainant was a "consultant" who was paid a "retainer" every two weeks (I note that the complainant's status – employee or contractor? – is not at issue in this appeal). The appellant's principal witness at the hearing (and who represents it in this appeal), Ms. O'Brien, conceded that the appellant did not pay the complainant any vacation pay and that his services were terminated without just cause and without proper written notice or pay in lieu of notice (delegate's reasons, page R4).

11. The appellant's other witness at the hearing, a payroll clerk, testified that although the complainant never submitted any invoices, he was paid similarly to other contractors "through accounts payable" (page R5) and that since some of his submitted expense were not properly documented, no payments were made for these claims – all properly receipted expenses were paid.

12. The delegate determined that the complainant and the appellant were in an employment relationship. As noted above, the matter of the complainant's status is not an issue in this appeal but, for the sake of completeness, I should note that the delegate's determination that the complainant was an employee appears to be entirely reasonable given the evidence before the delegate. Further, the appellant conceded that it never paid the complainant any vacation pay and that it terminated his services without

proper written notice or payment in lieu of notice. Thus, the complainant was unarguably entitled to both vacation pay and compensation for length of service.

13. The appellant does not contest the complainant's entitlement to vacation pay or compensation for length of service. The parties agreed that the complainant was paid $2,000 every two weeks for his services. But the appellant says that the complainant's vacation pay entitlement was calculated using an erroneous "wage base". Specifically, the delegate found (at page R6):

> The parties agreed that [the complainant] was paid a $2,000.00 salary every two weeks. Eliminating the payments which do not match this salary amount, which I find represent repayment of expenses incurred by [the complainant], the record indicates and I find that [the appellant] paid $128,000.00 in wages to [the complainant]. He is therefore entitled to $5,120.00 in annual vacation pay on his past wages. [i.e., 4% of $128,000].

14. As noted above, the appellant says that the vacation pay award should have been calculated using a "wages paid" base of $114,714.25 rather than $128,000.

15. The delegate calculated the complainant's section 63 compensation for length of service (two weeks' wages) as follows (page R6): "I find that [the appellant] owes $2,000.00 as compensation for length of service, as well as $80.00 in annual vacation pay on these outstanding wages". Thus, the Determination includes a $2,000 compensation for length of service award and a total $5,200 vacation pay award (i.e., $5,120 + $80).

16. The delegate rejected the complainant's claim for $600 in unpaid expenses since there was insufficient evidence to support those expense claims. The matter of expenses is not before me in this appeal.

DISCUSSION

17. There are two issues properly before me. First, there is the matter of the late appeal and the appellant's subsection 109(1)(b) application to extend the appeal period. The second issue, and to a significant degree it is intertwined with the first issue, is whether the appeal has any presumptive merit. I will address each of these matters in turn.

18. Subsection 109(1)(b) of the *ESA* empowers the Tribunal to "extend the time period for requesting an appeal even though the period has expired". The Tribunal considers several factors when assessing an application to extend the appeal period (see *Niemisto*, BC EST # D099/96). These factors include, among other things, the length of the delay, the reason(s) for failing to file a timely appeal, the underlying merits of the appeal, and whether any party would be unfairly prejudiced if the appeal period were to be extended.

19. In this case, the period of delay is modest – only slightly more than one week. The appellant says it filed its Appeal Form with the Director of Employment Standards, as it was obliged to do under subsection 112(2)(b) of the *ESA*, in a timely manner. The appellant neglected to deliver its Appeal Form and supporting documents to the Tribunal at the same time.

20. If this were a presumptively meritorious appeal, I might have been inclined to extend the appeal period. However, I see no utility in extending the appeal period in this case given that this appeal, in my view, is

wholly devoid of merit. The appellant says that the vacation pay award should be referred back to the Director, presumably for recalculation. A calculation error could constitute an error of law if there is a clear and obvious error. But that is simply not the case here.

21. The delegate calculated the vacation pay award based on the rather incomplete payroll records that were before him at the hearing. These records showed that the complainant was paid $138,118.22 during the course of his employment (see delegate's reasons, page R6). The delegate did not use this "wages paid" figure as a base for determining the complainant's vacation pay entitlement because some of the payments set out in the "vendor invoices" summary reflected, so far as the delegate could discern, reimbursement for work-related expenses. Although this latter document was entitled "vendor invoices", the evidence before the delegate was that the complainant never submitted "invoices" because he was regularly paid $2,000 every two weeks. The complainant only submitted expense claims. It is important to note that the delegate primarily relied *on the appellant's own records* in finding that the wages subject to vacation pay totalled $128,000.

22. The appellant now submits, presumably as "new evidence", some T4 records (which, I might add, the appellant prepared relying on other source documents that are not before me) which it says show total wage payments of $114,714.25. These T4s and the Record of Employment were apparently never submitted to the delegate – they are not contained in the subsection 112(5) record (although the 2-page "vendor invoices" document *was* before the delegate) – even though all of these documents were "available" and could have been submitted to the delegate, either at the hearing, or in the months following the conclusion of the hearing prior to the issuance of the Determination.

23. I am not satisfied that the T4 documents and the Record of Employment have much probative value in the circumstances of this case. Leaving that concern aside for the moment, none of these documents is admissible under subsection 112(1)(c) of the *ESA* for the obvious reason that each of these documents was "available" and could have been submitted to the delegate before he issued his Determination on February 21, 2019 (see *Davies et al.*, BC EST # D171/03). The other document, namely, the "vendor invoices", *was* before the delegate and he specifically relied on this document in determining the amount of wages that had been paid to the complainant so that the delegate could, in turn, calculate the complainant's vacation pay entitlement.

24. In my view, the delegate did not commit a legal error when he relied on the best evidence available in order to determine how much vacation pay was owed to the complainant. The additional documents that the appellant now wishes to have considered are of dubious cogency and, more fundamentally, are inadmissible as "new evidence". Thus, even if the appeal period were extended, I would be obliged to dismiss this appeal under subsection 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding. I see no justification for extending the appeal period where the appeal itself must inevitably be dismissed on its merits.

ORDER

25. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued, together with any additional section 88 interest that has accrued since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal