

Citation: Tan & Tone Youtan Studios Ltd. (Re)
2019 BCEST 55

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.: 2019/27

DATE OF DECISION: June 12, 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 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 (the “Delegate” or “Delegate MacInnis”) of the Director of Employment Standards (the “Director”) on February 7, 2019. In that Determination, the Director found that the Employer had contravened section 18 of the *ESA* by failing to pay Natalia Bailey (the “Employee”) wages to which she was entitled. The Director found that the Employee was entitled to regular wages in the amount of \$158.90 and accrued interest pursuant to section 88 of the *ESA* in the amount of \$4.07 for a total of \$162.97.
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 section 18 of the *ESA* and section 46 of the *Regulation* for a total of \$1,000.00.
3. The Employer was thus ordered to pay a total of \$1,162.97 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?

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 receipt of the complaint by the Branch, Caitlin Sehon, a delegate of the Director (“Delegate Sehon”), contacted the Employer via telephone on September 17, 2018, and was advised by a staff person that of the two appropriate persons to address the complaint, one was on leave and the other no longer employed by the Employer. On that date, Delegate Sehon sent a follow up e-mail to the Employer including a copy of the complaint and links to the relevant sections of the *ESA*.

7. On September 20, 2018, Delegate Sehon placed another call to the Employer's telephone number and was informed that the complaint had been forwarded on to Azadeh Monjezi ("Ms. Monjezi"). The delegate requested Ms. Monjezi's e-mail address but was told by the employee answering the phone that she did not have access to the requested e-mail address.
8. On October 4, 2018, Delegate Sehon sent an e-mail to the Employer requesting their response to the complaint.
9. On October 5, 2018, a response was received from the Employer disputing the complaint and alleging that no wages were owed to the Employee.
10. The Employer was again contacted on October 11, 2018, by e-mail and advised that the matter would be set down for a hearing if they chose not to participate in the complaint resolution process. The Employer was given a deadline of October 17, 2018, at 4:00 p.m. to respond. No response was received.
11. On October 23, 2018, a Notice of Complaint Hearing (the "Notice") and a demand for Employer Records were sent to the Employer's operating address, the records and registered address, and Ms. Monjezi's personal address. Canada Post tracking records indicate that the mail sent to Ms. Monjezi's personal address was returned to the Branch as "unclaimed" while the mail sent to the Employer's operating address and records and registered address was successfully delivered.
12. The deadline for the Demand for Records was November 14, 2018.
13. The Employer failed to attend the hearing scheduled for December 4, 2018 (the "Hearing"). At 9:10 a.m., a delegate of the Director attempted to contact the Employer without success.
14. I am satisfied that the Employer knew of the date of the Hearing. Multiple efforts were made to ensure that the Employer was both aware of the Hearing and the deadline to produce records to the Branch. The obligation is on the Employer to produce records that will allow the Delegate to consider all relevant evidence in arriving at her Determination of the complaint.
15. This is a situation where the Employer simply elected not to either produce the records it is required to produce or to participate in the hearing of the matter.
16. As a result, the only evidence before the Delegate was that of the Employee. The Employer disputes the Employee's claim but did not provide the Delegate with any evidence to support their position.
17. In spite of being given the opportunity to both submit documentary evidence and to make verbal submissions, no evidence was ever received from the Employer and thus Delegate MacInnis issued her decision on February 7, 2019.
18. The Employer submits that there is new evidence that, if considered, could support a variance of the Determination.
19. 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 the Notice. 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 the 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 the Hearing and expect the Director to vary the Determination.

20. 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).
21. 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.
22. For the stated reasons, this appeal must fail.

ORDER

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

Michelle F. Good
Member
Employment Standards Tribunal