Employment Standards TRIBUNAL

Citation: Wildstone Construction & Engineering Ltd. (Re)
2019 BCEST 72

An appeal

- by -

Wildstone Construction & Engineering Ltd.
("Wildstone")

- 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.: 2019/43

DATE OF DECISION: July 24, 2019

DECISION

SUBMISSIONS

Julie Read — on behalf of Wildstone Construction & Engineering Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Wildstone Construction & Engineering Ltd. ("Wildstone" or the "Employer") has filed an appeal against a Determination (the "Determination") of the Director of Employment Standards (the "Director") issued March 22, 2019. In that Determination, the Director found that the Employer had contravened section 58 of the *ESA* in failing to pay a former employee (the "Complainant") $8,278.02 representing vacation pay and interest. The Director also imposed an administrative penalty in the amount of $500 for the contravention, for a total amount owing of $8,778.02

2. The Employer appeals the Determination contending that the delegate erred in law in concluding that the Complainant was entitled to vacation pay. The Employer also sought and received an extension of time in which to submit additional documentation in support of its appeal.

3. This decision is based on the appeal submissions, the section 112(5) record that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS

4. The Employer is a construction and engineering firm with projects in British Columbia and Alberta.

5. The Complainant alleged that he was owed vacation pay from January 1, 2017, until the end of his employment on March 29, 2018.

6. The delegate conducted a hearing on December 18, 2018. The Complainant was represented by counsel. Julie Read ("Ms. Read") and Mark Melissen, a director of the Employer as well as its general manager, appeared on behalf of the Employer.

7. The Employer contended that the Complainant was a self-employed contractor and thus was excluded from the *ESA.* Much of the evidence at the hearing focused on that issue. At the conclusion of the hearing, the Employer also argued that, even if the Complainant was an employee, he was not entitled to vacation pay because he had received paid time off in 2017 and 2018. The delegate permitted both parties to submit additional documentary evidence and make submissions on that issue after the oral hearing concluded. The record demonstrates that additional documents and arguments were submitted up to February 19, 2019.

8. The delegate determined that the Complainant was an employee, and that, under the terms of his employment contract, he was entitled to three weeks' vacation each year. The delegate found that while the Complainant had received his vacation entitlement for the years 2013 through 2016, he had not

received his full vacation entitlement for the 2017 and 2018 years. The delegate determined that the Complainant was entitled to vacation pay of $6,593.33 for 2017 and a pro-rated amount of $1,401.09 for the period January 1 – March 29, 2018.

9. The Employer's appeal, as I understand it, relates only to the delegate's determination of the number of days the Complainant was entitled to be paid for in 2017; that is, whether days it considered to be vacation leave were actually worked by the Complainant.

ISSUE

10. Whether the delegate erred in law in calculating the Complainant's vacation pay.

ARGUMENT

11. The Employer says that the Complainant did not work the month of January 2017 and was paid his holiday time for this period. The Employer argues that the delegate erred in allowing the Complainant to submit documents after the hearing and then improperly relied on those documents in arriving at her conclusion.

12. The Employer says that prior to the December 18, 2018 hearing, both parties were asked to submit all documents in support of their claim. The Employer submitted documents confirming that the Complainant did not work for the "time in question" (which I infer relates to a period in January 2017) as well as documentation from its travel agent confirming the days the Complainant travelled for work-related purposes. The Employer argues that the delegate erred in placing significant weight on a hand-written mileage log submitted by the Complainant in support of his claim that he drove to Penticton to work out of the Employer's main office during the month of January 2017.

13. The Employer disputes both the admissibility and validity of the mileage log for a number of reasons, including the Complainant's own evidence at the hearing that he worked from the main office in Penticton for only one week; the fact that the mileage log was submitted only after the Complainant contended that the travel agent report would support his evidence; the fact that the log was hand-written without any indication of when it was created; and the fact that it was not part of the electronic diary which the Complainant used while working. The Employer also contends that it has no record of the Complainant working in January 2017 in any of its schedules.

THE FACTS AND ANALYSIS

14. Section 114 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.

15. 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.

16. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, BC EST # D141/03, while

> most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
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> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

17. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Employer has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that the Employer has not met that burden.

18. The Employer's argument contains elements both of a denial of natural justice as well as an error of law. I will therefore address the arguments under both grounds.

Denial of Natural Justice

19. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.

20. It appears from the Determination that the first time the Employer raised the argument that if the delegate determined that the Complainant was an employee, he had been paid all vacation pay he was

contractually entitled to, was at the conclusion of the oral hearing. The Employer sought, and was granted, an adjournment in order to submit additional documents relating to this issue after the oral hearing had concluded.

21. While the Employment Standards Branch Fact Sheet regarding Complaint Hearings indicates that the parties must exchange documents they intend to rely on prior to the hearing, given that the Employer raised a new issue at the conclusion of the hearing, both parties were given the opportunity to respond to the new evidence. As noted above, additional documents were exchanged for approximately two months following the hearing.

22. The record consists of 656 pages, of which approximately 60 were submitted post-hearing and consisted of written submissions on the issue of vacation pay by both parties, as well as the Employer's Daily Shift Assignment, Flights scheduled for the Complainant, and the Employee Schedule, all of which were submitted by the Employer.

23. It is incongruous that the Employer, who requested an adjournment in order to submit additional evidence in support of a new argument it raised at the conclusion of the oral hearing, would object to the right of the Complainant to do the same. As there was a new issue to be addressed by the delegate, she correctly allowed both parties to submit additional evidence in support of their positions.

24. I am not persuaded that the delegate failed to observe the principles of natural justice in conducting the hearing in the manner she did or by disclosing the evidence submitted post-hearing to each of the parties for response. Indeed, it would have been a denial of natural justice for the delegate not to have done so.

Error of Law

25. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

26. Most of the Employer's arguments simply restate arguments already made before the delegate. As the Tribunal has said on many occasions, an appeal is not an opportunity to re-argue a case that has been fully made before the delegate. The Employer must demonstrate that the delegate's analysis constitutes an error of law.

27. The record demonstrates that the Employer responded to the Complainant's mileage log which the Complainant submitted as evidence about the number of days he worked in January 2017. In the post-hearing submissions, the Employer argued essentially what it does on appeal; that is, that the delegate

should place little if any weight on the log because it was not dated, had no page numbers, was not neatly written, and could have been created at any time. The Employer also submitted that the reasons the Complainant advanced for keeping the record changed between the hearing and the written submissions, rendering his evidence unreliable. Specifically, the Employer argued that the Complainant's position during the hearing, which was that the Employer could contact the corporate travel agent to obtain flight reports, was not corroborated by the travel reports so the Complainant offered the mileage log to "fabricate" another means of travel. The Employer also noted, in its submissions to the delegate, that the Complainant initially contended that the mileage report was logged in a notebook for reimbursement, while he later contended that the mileage log was used to verify amounts spent on the gas card. Finally, the Employer contended that because the mileage records were not introduced during any previous discussions or disclosure requests, they should be "removed from evidence."

28. The delegate analyzed the post-hearing evidence and arguments as follows:

> Where the parties' evidence differs as to whether the Complainant received paid time off in 2017 and 2018, I prefer the evidence of the Complainant as it was more consistent with the documentary evidence. In particular, I find that the Complainant was working from the Employer's main office in Penticton doing pre-planning for the Gingolx project from January 3 – 23, 2017 as he claimed. The Complainant submitted a handwritten mileage log for January to April 2017 that he said he kept at the Employer's request to substantiate his gas expenses which were paid by the Employer. The Complainant argued that this showed he travelled daily from his residence in Princeton, BC to Penticton, BC between January 3 and 23, 2017. Although the Employer disputed this record because it did not appear to be written in a bound journal, the Employer provided no other evidence to dispute the information contained in it. Given that the mileage log contains some detailed information regarding what the Complainant was doing on certain dates as well as the daily temperature, I conclude that it is a reliable record that was created contemporaneously with his work.
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> … The Complainant's invoices for January 3 – 23, 2017 show the project he was working on was the Gingolx project, but no living out allowance was claimed. Accordingly, I find the preponderance of the evidence shows that the payments made to the Complainant for January 3-23, 2017 were for work he performed at the Penticton office planning the Gingolx project and that it was not paid time off.

29. The Determination shows that the delegate considered the Employer's arguments about the reliability of the post-hearing documents. I note, however, that in finding that the mileage log was a reliable basis to conclude that the Complainant performed work for the Employer in January, the delegate did not address inconsistencies between the log and the Complainant's evidence at the hearing; specifically:

> he completed a project in Alberta in mid-December 2016 and then returned to BC and received three weeks paid vacation leave. He then worked out of Wildstone's main office in Penticton, BC for about a week to review the Gingolx waste water treatment plant project near Terrace, BC. He flew to Terrace on January 23, 2017 with the project manager, met with the client and had a "mini job fair".

30. Simply because a record has no page numbers, is not bound, and is hand written is not a basis for either rejecting it or giving it any weight. Indeed, hand written documents that are created contemporaneously

are often more reliable than documents that are contained in bound journals. I find that the delegate did not err in accepting and considering the mileage log.

31. Given that the issue before the delegate initially was whether or not the Complainant was an employee or a self-employed contractor, it is not surprising that the evidence at the hearing would not be specific to the amount of time the Complainant worked in January 2017. It is also not clear if the delegate was focussed on the number of days the Complainant worked in January 2017 when recording the Complainant's evidence. While there were indeed some inconsistencies between the recorded evidence that the Complainant worked out of the Penticton office for "about a week" and the mileage records that indicate the Complainant drove to Penticton daily from January 5 to January 23, other evidence corroborates the Complainant's documentary evidence. The Employer's corporate travel records confirm that the Complainant flew to Terrace on January 24th (rather than the 23rd noted by the delegate) and returned on January 27th. The delegate noted the Complainant was not paid living allowance for this period. The record also demonstrates that the Complainant's evidence was that he was obliged to maintain a mileage log to verify the amounts he billed for fuel on a company credit card. The delegate noted that the Employer provided no evidence contradicting the Complainant's evidence other than a general assertion that it had no record of the Complainant working out of the Penticton office during that period in any of its schedules.

32. As the decision maker in the complaint hearing, the delegate was best placed to assess the credibility of the parties as well as the reliability of their evidence. I am not persuaded that she erred in her conclusion that the Complainant's record of his hours of work in January 2017 was the best evidence. There is no evidence the delegate misinterpreted or misapplied the *ESA* or an applicable principle of general law, including the admissibility and reliability of evidence. There is also no evidence that she acted without any evidence or acted on a view of the facts that cannot reasonably be entertained. I found the reasons intelligible, rational, and supported on the evidence before the delegate.

33. I find there is no reasonable prospect the appeal will succeed.

ORDER

34. Pursuant to section 115 of the *ESA*, I order that the Determination, dated March 22, 2019, be confirmed in the amount of $8,778.02 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