Employment Standards TRIBUNAL

Citation: Dwain Halverson (Re)
2019 BCEST 81

An appeal

- by -

Dwain Halverson carrying on business as Levi & Co Trucking
(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: Shafik Bhalloo

FILE NO.: 2019/57

DATE OF DECISION: August 14, 2019

DECISION

SUBMISSIONS

Dwain Halverson on his own behalf carrying on business as Levi & Co Trucking

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Dwain Halverson carrying on business as Levi & Co Trucking Levi (the "Employer") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 11, 2019 (the "Determination").

2. The Determination found that the Employer contravened Part 3, section 21 ("Deductions") of the *ESA* in respect of the employment of Mario Vautour ("Mr. Vautour"). The Determination ordered the Employer to pay Mr. Vautour wages in the total amount of $1,262.14 inclusive of accrued interest. The Determination also levied an administrative penalty against the Employer of $500 for breach of section 21 of the *ESA.* The total amount of the Determination is $1,762.14.

3. The Employer appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination and seeks the Tribunal to cancel the Determination.

4. The deadline to file the appeal of the Determination was 4:30 p.m. on May 21, 2019. On June 6, 2019, after the expiry of the appeal period, the Tribunal received the Employer's appeal together with written submissions on the merits of the appeal and the Employer's application for an extension of time to appeal. In the Employer's extension application, Dwain Halverson ("Mr. Halverson") provides the reason why the Employer was late in filing his appeal. He states that he mistakenly mailed the appeal to "the wrong address". The appeal form shows that Mr. Halverson sent the Employer's appeal dated May 16, 2019, to the Office of the Director of Employment Standards and the Director received the appeal on May 22, 2019.

5. On June 11, 2019, the Tribunal corresponded with the parties advising them that it had received the Employer's appeal including its request for an extension of the deadline to file the appeal. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) "record" (the "Record") and notified the other parties that no submissions were being sought from them on the request to extend the appeal period or the merits of the appeal at this stage. The Tribunal also informed the parties that the Panel assigned to assess the appeal will consider the request to extend the statutory appeal deadline under section 114 of the *ESA*.

6. The Record was provided by the Director to the Tribunal on June 25, 2019. A copy of the same was sent by the Tribunal to the Employer and Mr. Vautour on June 28, 2019, and both parties were provided an opportunity to object to its completeness. Neither the Employer nor Mr. Vautour objected to the completeness of the Record and the Tribunal accepts it as complete.

7. On July 31, 2018, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed, and that following the review, all or part of the appeal may be dismissed under section 114(1)

of the *ESA*. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from Mr. Vautour and the Director on the merits of the appeal. The Employer will then be given an opportunity to make a final reply to those submissions, if any.

8. In this case, I will make my decision whether there is any reasonable prospect that the appeal will succeed based on my review of the Employer's submissions, the section 112(5) Record, and the Reasons for the Determination (the "Reasons").

ISSUE

9. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

10. The Employer is a sole proprietorship owned by Dwain Halverson ("Mr. Halverson"). It operates a log hauling business in 150 Mile House, BC.

11. The Employer employed Mr. Vautour as a logging truck driver from May 7, 2018, to June 6, 2018, at which time it terminated his employment.

12. Mr. Vautour was paid a percentage of the value of each load of logs that he hauled.

13. On June 27, 2018, Mr. Vautour filed a complaint under section 74 of the *ESA* alleging that the Employer contravened the *ESA* by making unauthorized deductions from his wages (the "Complaint").

14. The delegate of the Director conducted a hearing of the Complaint on November 27, 2018 (the "Hearing"). The Hearing was attended by Mr. Vautour and his witness, Candida Reid ("Ms. Reid"). Mr. Halverson attended the Hearing on behalf of the Employer together with the Employer's accountant, Denise Messer ("Ms. Messer").

15. At the Hearing, Mr. Vautour testified that he called Mr. Halverson because he had come to Williams Lake to work and was living in a hotel but could not afford to stay there. He said that Mr. Halverson told him that he would help him, and that Mr. Vautour would not have to pay him back right away. In return, Mr. Halverson required Mr. Vautour to commit to staying until "break-up" in the spring. However, the Employer terminated his employment in early June and withheld his final paycheque to cover the cost of the motel. Mr. Vautour said he never authorized the Employer to make a deduction from his final paycheque.

16. Ms. Candida who moved with Mr. Vautour from Grande Prairie, Alberta to Williams Lake, BC, testified that Mr. Halverson agreed to accommodate them in a hotel room, but told Mr. Vautour that this meant that Mr. Vautour was under his control.

17. On behalf of the Employer, Mr. Halverson testified that in May 2018, the Employer placed an ad seeking a logging truck driver. At that time, Mr. Vautour was working for another firm in the area, KLT Trucking

("KLT"), but was not getting enough hours. Mr. Vautour contacted him looking for a steady job with regular hours.

18. Mr. Halverson also added that when Mr. Vautour was working for KLT, the latter was paying for his hotel room and then deducting the cost from his paycheque. However, when KLT terminated Mr. Vautour's employment, they stopped paying for his room. Mr. Halverson states that he paid for Mr. Vautour's motel bill when Mr. Vautour came to work for the Employer. He told Mr. Vautour that he would have work for him shortly and moved him to a cheaper motel in the meanwhile. He also bought Mr. Vautour a full tank of gas for his car, a couple of packs of cigarettes, and a cell phone. He also gave both Mr. Vautour and Ms. Reid the opportunity to earn a little money by doing several days of cleaning the Employer's vehicles before there was any logging truck work.

19. While Mr. Halverson acknowledged at the Hearing that he did not have a written agreement with Mr. Vautour to deduct accommodation costs from the latter's wages, he had a "handshake agreement" with him that Mr. Vautour would pay him back for the advances he made for accommodation and he expected Mr. Vautour to honour that agreement.

20. While it is not relevant for the purposes of this Appeal why the Employer terminated Mr. Vautour's employment on June 6, 2018, Mr. Halverson states that after terminating his employment, he told Mr. Vautour that he would be deducting all amounts owed to him off of his last paycheque.

21. According to Ms. Messer, after deducting all of the receipts for Mr. Vautour's accommodations paid by Mr. Halverson from Mr. Vautour's final paycheque, Mr. Vautour still owed a further $972.22 to the Employer.

22. After reviewing the parties' evidence, the delegate determined that the Employer violated section 21 of the *ESA* by withholding the entire final net pay of $1,223.92 from Mr. Vautour's final paycheque to account for accommodation bills and the cost of cell phone when the Employer did not have a written authorization from Mr. Vautour to so withhold any wages. The delegate ordered the Employer to pay Mr. Vautour wages in the amount of $1,223.92 plus interested thereon of $38.22 pursuant to section 88 of the *ESA*. The delegate also levied an administrative penalty of $500 pursuant to the *Employment Standards Regulation* against the Employer for violating section 21 of the *ESA.*

SUBMISSIONS OF THE EMPLOYER

23. As indicated previously, the Employer appeals the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination and is seeking the Tribunal to cancel the Determination.

24. In the Employer's written submissions, Mr. Halverson states that the Director "is wrong 'again'" because he made an "oral agreement" with Mr. Vautour which the Director is disregarding. Mr. Halverson submits that Mr. Vautour has been overpaid by about $900 and he is simply asking for common sense to prevail; he is not "asking for a free ride". He states he has lost money on this file "from missing work to defend [his] position."

25. He comments also why Mr. Vautour was fired, but this is irrelevant to the issue under this appeal and I will not summarize those submissions here.

ANALYSIS

26. The grounds of appeal under the *ESA* are statutorily limited to those found in section 112(1):

> **Appeal of director's determination**
>
> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

27. The Tribunal has repeatedly stated in decisions that an appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

28. The grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

29. Having delineated some broad principles applicable to appeals, in this case, the Employer has checked off a single ground of appeal on the Appeal Form, namely, the "natural justice" ground of appeal available under section 112(1)(b) of the *ESA*. I do not find this is a successful ground of appeal for the Employer for the reasons set out below.

30. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05).

31. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96).

32. Having reviewed the Determination, the Record, and the written appeal submissions of Mr. Halverson, I do not find the Employer has discharged its burden to persuade the Tribunal, in the slightest, that there is an error in the Determination on the natural justice ground of appeal. I find the Employer's reliance on this ground of appeal is no more than a bare assertion. Having said this, I note that there is ample evidence in the Reasons for the Determination and the Record to find that the Employer was afforded all of the procedural rights contemplated within the meaning of "natural justice" as defined in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd. (c.o.b. English Inn & Resort), supra*. Therefore, I dismiss the natural justice ground of appeal.

33. While the Employer has not checked off the "error of law" ground of appeal in the Appeal Form, I have also considered this ground of appeal. The Tribunal has adopted the following definition of error of law delineated in 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*;
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.

34. In this case, the delegate relied upon section 21of the *ESA* in making the Determination. I find there are three relevant sections of the ESA that need to be closely examined: sections 4, 21(1), and 22(4)(a).

35. Section 4 of the *ESA* provides that employers and employees cannot waive the minimum requirements of the *ESA*:

> 4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2), has no effect.

36. Subsection 21(1) of the *ESA* prohibits an employer from withholding wages for any reason, except as permitted by law:

> 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

37. Deductions permitted by law include, for example, income tax, CPP, and EI, or a court order to garnish an employee's wages.

38. Where an employer gives an employee an advance on wages, the employer is not permitted to latter unilaterally deduct or withhold from future wages of the employee unless the employee has provided a *written* consent in advance. This is consistent with the requirement of section 22(4)(a) of the *ESA*:

> 22 (4) An employer may honour an employee's written assignment of wages to meet any of the following credit obligations:

> (a) an advance of wages to the employee from the employer, including vacation pay;

39. In the case at hand, Mr. Halverson submits that he had a "handshake agreement" with Mr. Vautour permitting him to deduct from the latter's final wages the monies he advanced him for accommodation and for the cell phone. However, a "handshake agreement" not being a written agreement does not constitute permissible assignment within the meaning of subsection 22(4)(a) of the *ESA.* The requirement of *written assignment* in section 22(4) of the *ESA* being a minimum requirement of the *ESA* cannot be waived under section 4. In the circumstances, I find the delegate's finding that the Employer contravened section 21 of *ESA* and his determination that the Employer owed Mr. Vautour wages amply supported in the evidence before him at the Hearing. I do not find there is any basis to interfere with that finding based on error of law as defined in *Gemex, supra.*

40. In sum, the arguments being made by the Employer in this appeal amount to no more than re-arguing the position Mr. Halverson advanced at the Hearing. The Employer has simply not met the requirement of showing an error in the Determination. In the result, I find this appeal has no reasonable prospect of succeeding. Therefore, there is no need to consider the application to extend the appeal period. The appeal is dismissed under section 114(1)(f) of the *ESA*.

41. Having said this, nothing in my decision prevents the Employer from pursuing recovery against Mr. Vautour in the appropriate venue (possibly the Civil Resolution Tribunal) and to have his claim properly adjudicated. Of course, my comments should not be construed as predetermining the merits of the Employer's potential claim in any such venue. I only mean to convey that this Tribunal is not the right venue for the Employer's dispute.

ORDER

42. Pursuant to section 115 of the *ESA*, I order the Determination dated April 11, 2019, be confirmed in the amount of $1,762.14, together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal