

Citation: Westmould Manufacturing and Distributing Ltd. (Re)
2019 BCEST 82

An appeal

- by -

Westmould Manufacturing and Distributing Ltd.
("Westmould")

- 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.: 2019/63

DATE OF DECISION: August 19, 2019

DECISION

SUBMISSIONS

Rodney Gray on behalf of Westmould Manufacturing and Distributing Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Westmould Manufacturing and Distributing Ltd. (“Westmould” or the “Employer”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 10, 2019.
2. The delegate concluded that Westmould had contravened the *ESA* in failing to pay its employee (the “Employee”) wages and accrued interest in the total amount of \$17,558.05. The Director imposed five administrative penalties on Westmould for contraventions of sections 17,18, 21, and 27 of the *ESA* and section 46 of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$2,500, for a total amount payable of \$20,058.05.
3. Westmould appeals the Determination on the basis that evidence has become available that was not available at the time the Determination was being made.
4. This decision is based on Westmould’s written submissions and the section 112(5) “record” that was before the Director at the time the decision was made (the “Record”).

FACTS AND ARGUMENT

5. Westmould is a company registered in British Columbia that operates a foam moulding manufacturing business in Kelowna. Rodney Gray (“Mr. Gray”) and Terri Ellen Gray are the officers and directors of the company. The Employee was employed by Westmould as a Senior Sales and Marketing Director from May 1, 2018, until September 2018.
6. On October 18, 2018, the Employee filed a complaint alleging that Westmould had contravened the *ESA* by failing to pay him regular wages, vacation pay, compensation for length of service, and by requiring him to pay the Employer’s business costs.
7. On November 26, 2018, a delegate informed the Employer of the complaint by email and sought a response. A tentative mediation date was proposed for mid-December. The Branch received confirmation of the delivery of the email. The Employer did not respond. A Notice of Hearing and Demand for Employer Records were sent to the Employer and its two directors by registered mail on December 11, 2018. The documents were returned to the Branch as “unclaimed” or “moved.”
8. On January 21, 2019, a delegate of the Director sent the Employee’s evidence to the Employer by email, indicating that the evidence could be relied upon at a hearing scheduled for February 4, 2019. The Branch did not receive a response from the Employer even though the email was confirmed delivered.

9. A delegate attempted to contact the Employer by telephone on January 23, 2019, but was unable to leave a voice message. The delegate sent another email on January 25, 2019, reminding the Employer of the February 4, 2019 complaint hearing.
10. The Director's delegate conducted a hearing into the Employee's complaint on February 4, 2019. The Employer did not appear at the hearing. The delegate called the Employer and left a voicemail that the complaint hearing was proceeding. She also sent an email to the Employer indicating that she would wait 15 minutes for the Employer's attendance, following which the hearing would proceed. Mr. Gray responded approximately 45 minutes later indicating that he was very sick and sought an adjournment until later that week. Following the hearing, the delegate emailed a copy of additional evidence submitted at the hearing to the Employer. The Employer did not respond to this correspondence.
11. The Employee presented the delegate with documentary evidence in support of his complaint, including an unsigned letter of employment on Westmould letterhead, letters, bank records, and receipts. He also gave sworn evidence at the hearing.
12. That evidence, in summary, was that the Employer persuaded the Employee to leave his previous employment to work for Westmould. The Employee worked for the Employer about 40 hours in April and ultimately entered into an employment agreement with the Employer which provided for guaranteed wages of \$6,000 per month, five weeks' vacation, medical benefits, and reimbursement of printing costs. The contract was to be in effect until October 31, 2018, when it was to "be reviewed and the guarantee is to be lowered if not dropped."
13. The Employee's evidence was that he was never reimbursed for any business expenses and that he did not receive any wage statements despite repeated requests for them. During the employment contract discussions in September, the Employee asked Westmould to send his accountant an outline of the key provisions it expected in the contract. Instead, the Employee received a letter, dated September 17, 2018, that his employment had been terminated for cause effective August 17, 2018. This was the first notice the Employee had that he had been fired.
14. The September 17, 2018 letter read, in part, as follows:

The company came to an arrangement with [the Employee] with regards to pay, and has been asked to submit a proposal to continue on a commission basis. Our thinking is perhaps this will motivate [the Employee], it allows us to discipline and fire him as we have to with regards to these incidents.
15. The Employee sought legal advice regarding his termination. The Employer's response to a letter sent by the Employee's lawyer was to the effect that he would not receive any compensation. The Employee was never provided with a record of employment.
16. The delegate noted that the Employer failed to attend the hearing or provide any evidence in response to the complaint. The delegate also noted that the Employer did not respond to any of the Branch's efforts to contact him prior to the hearing. The delegate was satisfied that the Employer had sufficient notice of the complaint and the complaint process and was provided with multiple opportunities to present evidence and respond to the allegations. The delegate found it was fair and appropriate to proceed with adjudicating the complaint.

17. The delegate determined the Employee's unchallenged evidence to be the best evidence. She found his testimony to be credible and consistent with the text message records. She determined that the Employee was entitled to regular wages in the amount of \$12,804.72.
18. The delegate found no evidence the Employer had just cause to terminate the Employee's employment and determined he was entitled to compensation for length of service in the amount of \$1,384.62.
19. The delegate further accepted the Employee's evidence that he did not take any vacation and was not paid any vacation pay and concluded that he was entitled to vacation pay in the amount of \$2,582.91.
20. Finally, the delegate determined that the Employee had not been reimbursed for business costs consisting of work-related accommodation charges in the amount of \$362.27. The delegate was not persuaded that office supplies purchased (and retained) by the Employee were costs incurred on behalf of the Employer and determined he was not entitled to be paid for those expenses.
21. The delegate imposed five administrative penalties for Westmould's failure to comply with the *ESA* and the *Regulation*. Those penalties were for Westmould's failure to pay the Employee's regular wages on an ongoing basis contrary to section 17 of the *ESA*, for Westmould's failure to pay the Employee all wages owing within 48 hours of terminating his employment contrary to section 18 of the *ESA*, for Westmould's failure to reimburse the Employee for business-related expenses contrary to section 21 of the *ESA*, for Westmould's failure to provide the Employee with a written wage statement contrary to section 27 of the *ESA*, and for Westmould's failure to comply with the Demand for Employer Records, contrary to section 46 of the *Regulation*.

ARGUMENT

22. The Employer contends that it had no knowledge of the hearing as the Branch's correspondence was sent to an address it had not used for five years.
23. The Employer says that although the parties did not have a signed contract, it will "deem him an employee as per RCT ruling" which, I infer, relates to a Revenue Canada determination.
24. Westmould advances a number of arguments regarding the Employee's dates of employment, just cause for terminating his employment and his entitlement to vacation pay. Westmould further contends that the Employee's wage entitlement is subject to "source deductions."
25. In a response to the Tribunal's disclosure of the "record", Westmould says that it will pay the Employee until September 1 [2018] but re-iterated that the wages were subject to source deductions: "we just need effective dates he quit got fired." (sic)

ANALYSIS

26. 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.

27. Although the Employer advanced only one ground of appeal, given that it is self-represented, I have taken a liberal view of the grounds of appeal (see *Triple S Transmission* (BC EST # D141/03). The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision of the Director.
28. After considering the submissions on appeal, I conclude that Westmould has not met that burden and dismiss the appeal.
29. 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 or 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 that 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.

Failure to observe the principles of natural justice

30. 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. There is nothing in the appeal submission that establishes that Westmould was denied natural justice.
31. The delegate notified Westmould about the complaint and issued a Demand for Employer Records. The notice of hearing as well as the Demand were sent by registered mail at the address on the British Columbia corporate registry. Although the mail was returned undelivered, I find that the Employer was made aware of the complaint by both the Employee's lawyer and by a delegate of the Director by email and by telephone. I further conclude that Westmould was made aware of the complaint as well as the opportunity to appear at a complaint hearing by email.
32. The record indicates that on November 26, 2018, a delegate of the Director notified the Employer, by email, that a complaint had been filed by the Employee. The Branch received confirmation that the November 26, 2018 email had been successfully delivered. The record also indicates that on January 25, 2019, a delegate of the Director contacted the Employer, by email, to confirm the complaint hearing scheduled for February 4, 2019. The Branch received confirmation that the January 25, 2019 email had been successfully delivered.

33. Mr. Gray contends only that he had not lived at an address to which the registered mail was sent for the past five years, even though it appears the last annual report for the company was filed June 30, 2017. He does not deny receiving a copy of the complaint as well as Notice of the complaint hearing either by email or by telephone. I find that Westmould had knowledge of the complaint as well as the opportunity to appear at the complaint hearing and respond to the Employee's evidence. I also find the Employer had knowledge of the Demand for Employer Records, which formed the basis for one of the administrative penalties.

New evidence

34. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.

35. Westmould had full opportunity to submit documents in support of its position in advance of, or during the hearing. The limited arguments made on appeal are vague and not substantiated by any documentary evidence. The only document submitted on appeal is an unsigned "Contract." This document was before the delegate at the time she made her decision and does not constitute new evidence. It has already been considered.

36. An appeal is not an opportunity to advance arguments that ought to have been presented to the delegate during the complaint hearing.

Error of Law

37. The Tribunal as 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.

38. The Employer must demonstrate that the delegate's analysis constitutes an error of law.
39. There is nothing in the appeal submission that persuades me that the delegate erred in her calculation of the Employee's wage or vacation pay entitlement. Although the Employer has advanced some contradictory arguments about the length of the Employee's term of employment, there was, and remains, absolutely no evidence that the Employee has been paid what he is statutorily and contractually entitled to. Furthermore, while the Employer appears to reluctantly suggest that it will pay the Employee for work performed until September 1, 2018, the record indicates that the Employee was working well past that date.
40. The Employer contends that the Employee is not entitled to reimbursement for employer costs since "all the items he bought he has in his possession" and that all expenses require authorization and the Employee had none. The delegate's conclusions regarding employer costs all relate to travel expenses only. The delegate was not satisfied that other expenses claimed by the Employee, which the Employer objects to, were costs incurred on Westmould's behalf. There is no evidence to persuade me the delegate's conclusion is in error.
41. Finally, there is nothing in the appeal submission to persuade me that the delegate's findings with respect to the Employee's entitlement to compensation for length of service is in error. Westmould presented no evidence to discharge its burden to establish just cause and, in any event, there is nothing in the appeal submission to persuade me the conclusion is incorrect.
42. I conclude there is no reasonable prospect the appeal will succeed and dismiss the appeal.

ORDER

43. Pursuant to section 115 of the *ESA*, I order that the Determination, dated May 10, 2019, be confirmed in the amount of \$20,058.05 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