Employment Standards TRIBUNAL

Citation: Bayliff Enterprises Ltd. (Re)
2019 BCEST 88

An appeal

- by -

Bayliff Enterprises Ltd.
(the "Employer")

- 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.: 2019/53

DATE OF DECISION: August 21, 2019

DECISION

SUBMISSIONS

Bryce Bayliff — on behalf of Bayliff Enterprises Ltd.

INTRODUCTION

1. Bayliff Enterprises Ltd. operates a construction business in Williams Lake under the business name "Bayliff Enterprises" (the "Employer"). A former employee, a heavy equipment operator (the "complainant"), filed an unpaid wage complaint under the section 74 of the *Employment Standards Act* (the "*ESA*"). This complaint was subsequently investigated by Jeff Bailey, a delegate of the Director of Employment Standards (the "delegate").

2. On May 10, 2019, and following the completion of his investigation, the delegate issued a Determination ordering the Employer to pay the complainant $2,850 on account of unpaid overtime pay and $240 on account of unpaid statutory holiday pay. The delegate also levied two separate $500 monetary penalties (see section 98) against the Employer for having contravened sections 40 (overtime pay) and 45 (statutory holiday pay) of the *ESA*. The total amount payable under the Determination, including concomitant vacation pay and section 88 interest owed to the complainant, is $4,401.00.

3. The deadline for filing an appeal of the Determination with the Tribunal was June 17, 2019. On June 6, 2019, Mr. Bryce Bayliff ("Mr. Bayliff") filed an Appeal Form (Form 1) – in his own name – seeking to have the Determination varied on the ground that the delegate failed to observe the principles of natural justice in making the Determination. Although the Appeal Form is technically defective, I will proceed on the basis that Mr. Bayliff intended to appeal the Determination on behalf of the Employer (see section 123 of the *ESA*). Although Mr. Bayliff has no personal liability under the Determination as it now stands, it is possible that a subsequent determination might be issued against him personally under section 96 of the *ESA*.

4. Although the Employer's Appeal Form was filed before the appeal deadline expired, the appeal documents were incomplete. In particular, the Employer did not provide any reasons supporting its assertion that the delegate breached the principles of natural justice (as directed by Parts 5 and 7 of the Appeal Form). The Employer appended a note, dated May 27, 2019, to its Appeal Form in which its principal (the sole director and officer), Bryce Bayliff, stated "I am requesting an extension of time". He also appended a copy of the a "Notice of Trial" in the B.C. Small Claims Court (Williams Lake) relating to an action between Mr. Bayliff personally and the complainant. The scheduled trial date is November 25, 2019.

5. The Employer did not provide in the May 27 note appended to the Appeal Form any further particulars regarding how or why this personal small claims action is relevant to the unpaid wage claim filed by the complainant except to note that the trial is "heavily related to some of these allegations". Mr. Bayliff also noted that the Employer "is struggling financially"; that "[m]y accountant assures me that all holiday pay was in fact paid"; and that he "would like to push the deadline back to the [*sic*] January 16, 2020 [and] [t]his is also usually a better time financially".

6. On June 12, 2019, the Tribunal's Registrar wrote to the Employer requesting, among other things, that the Employer "provide the Tribunal with written reasons and argument for the appeal by **no later than 4:30 p.m. on June 17, 2019 [the statutory appeal period deadline as noted in the Determination].** (See the Guide to the Appeal Form and the Tribunal's Rules of Practice and Procedure.)" [**boldface** in original text]. The Tribunal sent a further e-mail to the Employer – essentially reiterating this request – on June 13, 2019. However, the Employer never did provide any further particulars regarding why the delegate breached the principles of natural justice or why a delay in proceeding with this appeal until mid-January 2020 was appropriate. In this instance, the Employer has failed to diligently pursue its appeal (see section 114(1)(e) of the *ESA*).

FINDINGS AND ANALYSIS

7. As matters now stand, this appeal is defective given that the Employer has not provided any explanation supporting its asserted ground of appeal. In my view, delaying this matter to mid-January 2020 would not be appropriate. Section 2(d) mandates the timely resolution of disputes arising under the *ESA*, and I see no legitimate reason for further delaying this matter. The complainant's unpaid wages date from the summer of 2017. In the absence of any legitimate explanation as to why the small claims trial – which is a *personal* claim by Mr. Bayliff against the Appellant – is relevant to the *Employer's* unpaid wage liability, I see no reason to delay this appeal. Even if Mr. Bayliff were successful in the Small Claims Court, that would not create a direct set-off situation with respect to the Employer's liability to the complainant.

8. More compelling, there is simply no presumptive merit to the natural justice ground of appeal. As previously noted, the Employer has provided absolutely no details – despite being specifically requested to do so on two occasions – regarding how or why the delegate breached the principles of natural justice. The delegate's "Reasons for the Determination", issued concurrently with the Determination (the "delegate's reasons"), confirm that the Employer acknowledged not paying overtime pay (and the Employer conceded that the complainant did occasionally work overtime). However, the Employer also asserted that there was an "informal agreement" whereby certain other benefits were provided to the complainant in lieu of overtime pay. As the delegate correctly observed in his reasons, such an "informal agreement" is proscribed by section 4 of the *ESA*.

9. As for the $240 statutory holiday pay award, this was in regard to the 2017 B.C. Day holiday. The complainant did not work on that day, but he met the eligibility requirements relating to payment for B.C. Day and, accordingly, was entitled to an average day's pay for that statutory holiday. There is no evidence that the Employer ever paid the complainant for the 2017 B.C. Day holiday. The $123.60 vacation pay award simply reflects 4% vacation pay on the unpaid overtime and statutory holiday pay awards. There is nothing in the material before me to call into question the correctness of the unpaid wage award made in favour of the complainant.

10. Further, I also note, as detailed in the delegate's reasons, that the delegate sent a "preliminary findings" letter, dated November 6, 2018, to the Employer. The Employer, although invited to do so, never responded to the delegate's November 6 letter. In addition, prior to November 6, 2018, the delegate communicated on several occasions – by e-mail and telephone – with both Mr. Bayliff and with the Employer's accountant. The record shows that the delegate fully satisfied his obligations under section 77 of the *ESA*. I see no basis in the material before me for concluding that there was a breach of the rules

of natural justice in this matter. The delegate appears to have considered all of the evidence and arguments the Employer advanced.

11. In my view, this appeal is not meritorious. The Employer has not provided any evidence or argument that would allow me, even on a presumptive basis, to conclude that there was a denial of the principles of natural justice in this case. The delegate's findings are all amply supported by the documentary record and appear to be wholly in accord with the provisions of the *ESA*. Delaying the adjudication of this appeal is neither fair nor expedient. Parties are entitled to have matters before the Tribunal adjudicated without undue delay.

12. In my view, this appeal (which has never been perfected) has no reasonable prospect of succeeding and thus must be dismissed.

ORDER

13. Pursuant to section 114(1)(e) and (f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of $4,401.00 together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal