

Citation: J.E. Sellors Services (2018) Ltd. (Re)
2020 BCEST 102

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

J.E. Sellors Services (2018) Ltd.
(the “Appellant”)

- 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: James F. Maxwell

FILE No.: 2020/071

DATE OF DECISION: August 12, 2020

DECISION

SUBMISSIONS

Jeremy Sellors

on behalf of J.E. Sellors Services (2018) Ltd.

OVERVIEW

1. Johnny M. Alec (the “Employee”) filed a complaint with the Employment Standards Branch against his former employer, J. E. Sellors Services (2018) Ltd. (the “Appellant”). The Employee alleged that the Appellant had failed to pay him all sums owing for regular wages and overtime.
2. A delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) pursuant to the *Employment Standards Act* (the “ESA”) in which the Director held that the Appellant had breached the ESA and was liable to pay to the Employee sums for wages, overtime, and annual vacation pay, together with interest accrued thereon. In addition, the Director assessed administrative penalties in the sum of \$1,500.00. The Director concluded that the total amount payable by the Appellant was \$3,208.72.
3. The Appellant has appealed the Determination.
4. Having reviewed the Determination, the Appellant’s submissions, and the Record provided by the Director, I dismiss the Appellant’s appeal. My reasons follow.

ISSUES

5. The within Appeal raises the following issues:
 - (a) Did the Director err in law in the making of the Determination?
 - (b) Did the Director fail to observe the principles of natural justice in making the Determination?

FACTS

6. The Appellant operates a logging business.
7. The Employee commenced work for the Appellant in December 2018 as a heavy-duty equipment technician. His employment with the Appellant came to an end on February 4, 2019. The Employee worked at a remote fly-in location in northern British Columbia. The Employee traveled to the worksite by aircraft chartered by the Appellant.
8. The Employee filed a complaint with the Employment Standards Branch on April 5, 2019, within the time period contemplated by the ESA for doing so. In his complaint, the Employee sought payment for allegedly unpaid regular wages and overtime.
9. The Employee alleged that he was paid at a rate of \$28.00 per hour, and worked between 12 and 21 hours per day. The Employee contended that the Appellant had failed to pay him for 8 days of work, between

January 28, 2019, and February 4, 2019, a total of \$1,792.00 in regular wages and \$1,344.00 in overtime wages. The Employee alleged that he submitted work orders and two sets of timesheets for the hours worked.

10. The Director requested and received from the Appellant all records related to the Employee's employment. The Director undertook an investigation into the Employee's complaint, interviewing both the Employee and a representative for the Appellant, and examining the records supplied by the Appellant.
11. The Appellant responded to the Employee's allegations, and stated that:
 - (a) The Employee was not present at the worksite and did not work January 28 to January 30, 2019;
 - (b) The Employee was paid for work performed on January 31 and February 1, 2019;
 - (c) The Employee only fuelled the vehicle he used on February 3, 2019. The Appellant has not been able to locate any other work records for the Employee for February 2 – 4. Therefore, the Appellant concluded that the Employee did not work on February 2 or 4.
12. The Director issued a Determination dated March 31, 2020. The Director rejected the Employee's allegation that he was owed for wages and overtime for January 28, 29, 30, 31, and February 1, 2019.
13. The Director noted the Appellant's admission that the Employee was at the worksite on February 2, 3, and 4. The Director also noted that the Appellant did not deny that the Employee had worked on those days, but rather contended that it had not found any record of hours worked on those days, and for that reason did not pay for those dates.
14. The Director held that the Employee was entitled to be paid for 8 hours of regular wages, and 4 hours of overtime wages, for each of February 2, 3 and 4. The Director held that, pursuant to section 18 of the *ESA*, an employer must pay all wages within 6 days of the end of employment.
15. The Director also found, from an examination of the Appellant's records, that the Appellant had not paid overtime during a period in December 2018 in accordance with the requirements of the *ESA*.
16. The Director found, from an examination of the Appellant's records, that the Appellant had paid vacation pay to the Employee only for January 2019, and only on regular wages. The Director held that the Appellant had failed to pay vacation pay for December 2018 or on overtime wages.
17. In the Determination, the Director held that the Appellant had breached the *ESA* by failing to pay to the Employee all amounts owing for regular wages and overtime, and for vacation pay. The Director found that these failures amounted to breaches of sections 18, 40, and 58 of the *ESA*. The Director imposed upon the Appellant 3 administrative penalties in the sum of \$500.00 each.
18. On May 6, 2020, the Appellant filed the within appeal with the Tribunal.

19. In its arguments tendered with its appeal, the Appellant contends that:
- (a) The Determination was issued 8 months after the Employee filed his complaint, after a delay waiting for the Employee to provide additional information. The Appellant argues that the Employee should not have been given “unlimited leeway” in advancing his complaint;
 - (b) The Employee had falsely claimed to be owed for work performed January 28 to February 1. In the face of this error, the Director should not have given weight to the Employee’s allegations;
 - (c) The Director erred in awarding wages to the Employee for February 2 to 4, as there was no record that the Employee had submitted required timesheets for those dates; and
 - (d) The Director acted as an advocate for the Employee, demonstrating bias in the issuance of the Determination.

ANALYSIS

20. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.
21. The burden is on an appellant to persuade this Tribunal that there is justification to interfere with a determination on any one of these statutory grounds.
22. In the present case, the Appellant contends that the Director erred in law, and failed to observe the principles of natural justice, in making the Determination.

Did the Director err in law in making the Determination?

23. This 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.

24. The Appellant, in its appeal submissions, alleges that the Director committed an error of law in making the Determination. The Appellant provides no specifics as to what the Appellant believes is the error of law.
25. I do not see any error in the manner in which the Director applied the provisions of the *ESA*. The Director made specific reference to section 18 of the *ESA*, noting that this section requires an employer to pay all wages owing to the employee within 6 days after the employee terminates the employment. The Director found that the Appellant had not paid the Employee for 3 days worked during February 2019. The Director correctly applied section 40 of the *ESA*, which requires an employer to pay overtime in a number of circumstances. In the present case, the Director found that the Appellant had failed, in December 2018, to pay the correct overtime wages when the Employee worked in excess of 40 hours in a given week. The Director correctly applied section 58 of the *ESA*, which requires an employer to pay vacation pay on an employee's total wages. In the present case, the Director found that the Appellant had failed to pay vacation pay at all during December 2018, and only on regular wages commencing in January 2019.
26. I do not find that the Director misapplied any principle of general law.
27. I do not find that the Director acted without any evidence. The Director's conclusions were based on the information supplied by both the Employee and the Appellant, and upon the records supplied by the Appellant. The Director's conclusions, on that evidence, were reasonable. The Director's calculations of amounts owing were based upon a correct method of assessment.
28. I find that the Director did not err in law in making the Determination, and I dismiss this ground of appeal.

Did the Director fail to observe the principles of natural justice in making the Determination?

29. In its appeal, the Appellant alleged that the Director failed to observe the principles of natural justice in making the Determination.
30. The Appellant bears the onus to show that the Director breached the principles of natural justice in making the Determination.
31. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies 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. Thus, natural justice requires the Director to provide certain procedural protections to both parties, and to conduct investigations in an unbiased and neutral manner.

33. I am satisfied that the Director afforded the Appellant the required procedural protections. The Director provided sufficient opportunities to the Appellant to know the case against it and the right to present its evidence. The Director conducted an investigation and afforded both the Employee and a representative of the Appellant an opportunity to provide evidence. It is clear from the record in this case that the Director afforded the Appellant numerous opportunities to comment upon the evidence presented by the Employee. I am satisfied that the Director carefully weighed all of the evidence supplied by both parties and applied the relevant legislative provisions.
34. The Director is also required to conduct an investigation in a manner that is unbiased and neutral. The Supreme Court of Canada stated, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992], 1 S.C.R. 623 at 636-37, that the test to assess whether an adjudicator has been unbiased is that of the ‘reasonably informed bystander’:
- The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. ... As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
35. I turn now to the specific allegations that the Appellant, in its submissions in this appeal, makes regarding the manner in which the Director made the Determination.
36. The Appellant notes that the Director took 8 months, from the date of the original complaint, to issue the Determination. The Appellant contends that the Director afforded the Employee “unlimited leeway” with respect to providing further information in support of his complaint. In the end, the Employee provided no further information than what he supplied at the outset of the investigation, and the Director issued the Determination on the basis of the information supplied by the parties. I do not believe that a reasonably informed bystander would consider the delay in the issuance of the Determination to demonstrate any bias on the part of the Director.
37. The Appellant argues that the Employee falsely claimed to be owed for work performed January 28 to February 1, 2019. In the face of this error, the Appellant questions whether the Director should have given weight to the remainder of the Employee’s evidence. I find that the Director weighed all of the evidence of both parties in a fair and impartial manner, including the statements made by the Employee and the Appellant, and the records in the possession of the Appellant with respect to the hours worked by the Employee. I see nothing in the manner in which the Director assessed the evidence that would lead a reasonable bystander to believe that the Director had been biased.
38. The Appellant contends that the Director erred in awarding wages to the Employee for February 2 to 4, as there was no record that the Employee had submitted required timesheets for those dates. Section 28 of the *ESA* requires an employer to keep records of the hours worked by each employee. The Employee asserted that he tendered two sets of records of the hours that he worked. The Appellant asserted that it was the Employee’s duty to supply these records, and advised the Director that it had been unable to locate any records for those dates. The Appellant was aware that the Employee was at the remote fly-in location on those dates, but asserts that, in the absence of records supplied by the Employee, the Director

should have concluded that the Employee did not work on those days. I find that it was reasonable, and demonstrated no bias, for the Director to accept the evidence of the Employee that he worked on February 2, 3, and 4, especially in light of the fact that the Appellant had no means to demonstrate that the Employee did not do so, when the Employee was at the Appellant's remote work location. I do not believe that a reasonable bystander would believe that in preferring the Employee's evidence on this question the Director had been biased.

39. The Appellant argues that "the Delegate is not capable of maintaining uninterested and equal representation of both the Complainant and ourselves. After acting as an advocate for the Complainant and ruling in judgement of her own work, she then writes the Determination based on her biased advocacy."

40. Under the *ESA*, the Director is empowered to perform the dual functions of investigating and adjudicating on questions of compliance with the *ESA*. As this Tribunal noted in *Re: Director of Employment Standards (re: Milan Holdings Inc.)*, BC EST # D313/98:

The office of Director is unique, significant and central to the effectiveness of the *Employment Standards Act*. Under Part 10 of the *Act*, the Director is given a series of quintessential investigative powers. The Director may enter and inspect premises: s. 85. She may, with or without complaint, investigate a person to ensure compliance with the *Act*: s. 76. She may receive confidential information: s. 75.

41. In the course of the Director's investigation the Director did not represent either the Employee or the Appellant. I find nothing in the conduct of the Director that amounted to advocacy for either party. While the Director did find facts which led to the conclusion that the Appellant was not paying the Employee in accordance with the provisions of the *ESA*, and while these facts had not all been alleged by the Employee, I am satisfied that the Director's findings were the result of a thorough and unbiased investigation, and not the result of advocacy in favour of the Employee. The Director was not limited, in his investigation, to examining only the issues raised by the Employee. I do not believe that a reasonable bystander would believe that the Director had acted as advocate for the Employee.

42. The Appellant has presented no convincing evidence in support of its allegations that the Director failed to apply the principles of natural justice. On the contrary, I am satisfied that the Director observed the principles of natural justice in conducting the investigation, and in evaluating the evidence provided therein. For this reason, I dismiss this ground of appeal.

ORDER

43. I dismiss this appeal. Pursuant to section 115 of the *ESA* I confirm the Determination.

James F. Maxwell
Member
Employment Standards Tribunal