Citation: Darvonda Nurseries Ltd. (Re)
2020 BCEST 103

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Darvonda Nurseries Ltd.
("Darvonda")

- 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: David B. Stevenson

FILE NO.: 2020/078

DATE OF DECISION: August 12, 2020

DECISION

SUBMISSIONS

Matt Splinter — on behalf of Darvonda Nurseries Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Darvonda Nurseries Ltd. ("Darvonda") has filed an appeal of a determination issued by Dawn Sissons, a delegate of the Director of Employment Standards (the "Director"), on April 16, 2020 (the "Determination").

2. The Determination found Darvonda had contravened Part 3, sections 17 and 28, Part 5, sections 45 and 46, and Part 8, section 63 of the *ESA* and section 37.3(2) of the *Employment Standards Regulation* (the *"Regulation"*) in respect of the employment and termination of employment of Abraham (Paul) Houweling ("Mr. Houweling") and ordered Darvonda to pay Mr. Houweling wages in the amount of $18,778.73, an amount that also included interest under section 88 of the *ESA* and concomitant annual vacation pay, and to pay administrative penalties in the amount of $3,000.00. The total amount of the Determination is $21,778.73.

3. This appeal is grounded in failure by the Director to observe principles of natural justice in making the Determination. Darvonda seeks to have some parts of the Determination varied and other parts cancelled. The key areas of the disagreement Darvonda has expressed with the Determination are: the calculation of regular wages, overtime wages, and statutory holiday pay; the finding that Mr. Houweling was employed as a truck driver, not a farm worker; and the finding that Mr. Houweling had not quit his employment, but was terminated without cause or notice, and was entitled to compensation for length of service.

4. In correspondence dated May 15, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the "record") from the Director, and notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal.

5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Darvonda and to Mr. Houweling. An opportunity has been provided to both to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.

6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Houweling will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. Darvonda operates a nursery. Mr. Houweling was employed as a truck driver from January 1, 2013, to July 29, 2019, when his employment was terminated. At the time of termination, his rate of pay was $20.00 an hour for short-haul trips and $0.30 a kilometre for long-haul trips.

10. Mr. Houweling was hired to drive a truck; most of his working hours were for long-haul driving. The Determination notes Darvonda stated that Mr. Houweling was a truck driver and had no other responsibilities.

11. Mr. Houweling filed a complaint alleging Darvonda had contravened the *ESA* and claimed entitlement to regular and overtime wages, statutory holiday pay, and compensation for length of service.

12. The Director investigated the complaint. A substantial amount of material was provided by the parties. The Director found Mr. Houweling's wage statements were an accurate reflection of the wages paid to him, and the log books, local delivery hours summaries, and per trip earnings summaries accurately set out the wages he earned.

13. Darvonda contended Mr. Houweling was a farm worker. The Director found Mr. Houweling was a truck driver, not a farm worker. This finding bore upon his entitlement to overtime wages and statutory holiday pay.

14. The Director found Mr. Houweling was entitled to regular wages related to two pay periods: November 11 to November 24, 2018, and March 31 to April 13, 2019.

15. The Director found Mr. Houweling was entitled to overtime wages, the majority of which were long-haul hours, calculated pursuant to section 37.3(2) of the *Regulation*.

16. Darvonda argued Mr. Houweling, as a farm worker, was not entitled to statutory holiday pay, but even if he was, the Director miscalculated his statutory holiday entitlement for August 6, 2018, September 3, 2018, and May 20, 2019. The Director found Mr. Houweling was entitled to statutory holiday pay in the amount set out in the Determination.

17. Darvonda contended Mr. Houweling was not entitled to compensation for length of service as he had quit his employment. Darvonda said Mr. Houweling quit his employment on July 24 or 25, 2019. The record shows Mr. Houweling worked on July 26 and 29, 2019. The Director found Darvonda had terminated his employment in circumstances that entitled him to compensation for length of service.

18. Darvonda takes issue with the findings under section 63 of the *ESA*.

ARGUMENT

19. I shall summarize the arguments in each of the areas where Darvonda takes issue with the Determination.

Regular wages

20. Darvonda submits the Director did not ask them to provide proof of payment, but simply accepted what Mr. Houweling claimed. Darvonda acknowledges some errors were made by them in their payroll and deposit system, and even in some of the information provided to the Director. The result, says Darvonda, was that the Director made findings that were incorrect for two pay periods.

Overtime

21. Darvonda argues the overtime calculation for Mr. Houweling was flawed because he was "at times a farm worker". Darvonda also says it was not possible that he worked all of the hours used by the Director to calculate his overtime entitlement. In making this argument, Darvonda acknowledges these hours were accepted at the time and paid, although they were paid at straight time.

Statutory Holiday Pay

22. As with the above argument, Darvonda believes the hours on which the Director based statutory holiday pay for August 6, 2018 was "unreasonable" and that the hours used by the Director for statutory holiday pay calculation for September 3, 2018, do not coincide with the hours he "punched in" for that day.

23. Darvonda also raises the argument that Mr. Houweling was a farm worker and was not entitled to statutory holiday pay for May 20, 2019.

Compensation for Length of Service

24. Darvonda asserts the Director erred in finding Mr. Houweling had not quit his employment on July 24 or 25, 2019, but had been terminated as of July 29, 2019. Under this argument, Darvonda disagrees with the statement in the Determination that no evidence was provided by them "to support its claim that Mr. Houweling verbally quit his employment". In its appeal submission, Darvonda says the "delegate did not ask us to provide evidence". The appeal submission contains a number of brief summaries of interactions involving Mr. Houweling and various members of staff and Darvonda's owners. The submission says the discussions in these summaries "can be sworn and notarized".

ANALYSIS

25. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> *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.*

26. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

27. 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 in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

28. Darvonda has raised the natural justice ground of appeal, although it is apparent from the appeal submission that Darvonda alleges the Director made errors of law in several areas and has introduced evidence with the appeal that is not found in the record.

29. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

30. I am able to address Darvonda's natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> 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)

31. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Darvonda was provided with the opportunity required by principles of natural justice to present their position to the Director. Darvonda has provided no objectively acceptable evidence showing otherwise.

32. It is not a breach of principles of natural justice for the Director to make a finding on the evidence that does not accord with the position of one of the parties in the complaint process. There were several such findings in this case, including findings on regular and overtime wages owed, statutory holiday pay entitlement and that Mr. Houweling had not quit his employment but had been terminated without notice or cause.

33. There is simply no factual or legal basis for this ground of appeal and no reasonable prospect it will succeed.

34. As stated above, while Darvonda has not raised error of law as a ground of appeal, there are several elements in the appeal submission that raise this ground and require consideration. For the sake of completeness, I shall address whether there might be some merit in those matters.

35. There is also the matter of the evidence provided with the appeal that was not submitted to the Director during the complaint investigation.

36. 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.

37. Darvonda says Mr. Houweling was a farm worker and excluded from overtime and statutory holiday provisions in the *ESA*. The matter of whether Mr. Houweling was a farm worker is a question involving an interpretation of the *ESA*. The relevant portion of the definition of "farm worker", which is found in section 1 of the *Regulation*, reads as follows:

> ***"farm worker"*** *means a person employed in a farming, ranching, orchard or agricultural operation and whose principal employment responsibilities consist of*
>
> > *(a) growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation,*

> *(b) clearing, draining, irrigating or cultivating land,*
>
> *(c) operating or using farm machinery, equipment of materials for the purposes of paragraph (a) or (b), or*
>
> *(d) direct selling of a product referred to in paragraph (a) if the sales are done at the operation and are only done during the normal harvest cycle for that product, …*

38. The above definition requires that the responsibilities described comprise the *principal* responsibilities of the person being considered under the definition. The evidence before the Director, and the finding made by the Director, was that Mr. Houweling's primary, and near exclusive, responsibility was driving a truck on short-haul and long-haul trips. Darvonda said he had no responsibilities other than truck driving. There is no evidence in the record of Mr. Houweling being engaged at all in any of the activities that define a farm worker.

39. Darvonda has failed to demonstrate the Director made any error in dismissing the contention by Darvonda that Mr. Houweling was a farm worker. There is no reasonable likelihood this argument can succeed.

40. Darvonda says the regular wage calculations for two pay periods are incorrect. The arguments relating to both of these pay periods acknowledge an error was made in the information provided to the Director – in one case, Darvonda says they provided information that applied to another employee, not Mr. Houweling; in the other, Darvonda says Mr. Houweling was paid for this pay period, but this fact was missed. Darvonda has provided some documents to back up their submissions on these amounts.

41. This matter raises somewhat of a conundrum. On the one hand, if the information provided to the Director by Darvonda, and relied on, was wrong because of an innocent mistake, it would seem unfair to saddle Darvonda with the unintended consequences of that mistake – and to coincidently enrich Mr. Houweling. On the other, there was a Demand for Employer Records that required Darvonda to provide all records relating to wages and hours of work. The records were provided late and are not, it appears, complete or correct. The statutory responsibility to provide correct records in a timely manner in response to a Demand falls on Darvonda.

42. I find this is an appropriate circumstance for which to seek additional submissions. I am referring this aspect of the appeal to the parties for submissions. While I am not foreclosing any of the parties from making any relevant argument on this matter, the following questions should be answered by them:

- should this matter be reviewed at all or, even if a mistake has been made by Darvonda, are they saddled with the consequences of their mistake, however inadvertent;
- should I accept evidence relating to the alleged mistake even though the ground of appeal in section 112(1) (c) has not been raised and, if so, are there limits to what I should accept; that is, should I accept evidence that goes beyond simply showing a mistake;
- what is the nature of the burden on Darvonda to show an error has been made; and
- is it shown that an error been made and, if so, how might it be corrected?

43. The arguments raised against the finding of overtime wages and statutory holiday pay and the calculation of the amounts Mr. Houweling was owed for each are more easily addressed.

44. The arguments against the overtime and statutory holiday pay findings based on the contention that Mr. Houweling was, at times, a farm worker, are dismissed for the reasons provided above.

45. Other than the above arguments, the appeals against the findings and calculations on overtime wages and statutory holiday pay do little more than challenge findings of fact. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

46. The test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

47. To expand the above point, in order to establish the Director committed an error of law on the facts, Darvonda is required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.

48. In this context, the contention made by Darvonda against the findings of overtime wages owed is that Mr. Houweling worked less overtime than his recorded hours would indicate because, they contend, he wouldn't, couldn't, and didn't work all of the hours that he recorded. It is not disputed, and is confirmed by an examination of the record, that the hours recorded by Mr. Houweling were never questioned while he was employed, and he was paid based on the hours he recorded. Their appeal submission contains the following statements: "We trusted him implicitly and his hours and time sheets were never questioned" and "his hours were not questioned or even reviewed and now its clear they should have been".

49. Darvonda has four problems with their overtime argument. The first is that the findings on overtime and statutory holiday pay are findings of fact. As stated earlier, the grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. Nothing in the appeal raises Darvonda's argument about the overtime wage calculations to an error of law. The basis for the calculations done by the Director is explained in the Determination and is based on the information provided by both parties. Darvonda has attempted to show an error by reference to pay period 25 in 2018, November 25 – December 8. Darvonda asserts that all hours paid to Mr. Houweling in this pay period 25 (November 25 – December 8, 2018), which it says were 165.73, were done via time clock and that there was no driving. Their own documents, however, show Mr. Houweling was paid for 176.78 hours in that pay period (not 165.73) and was paid $221.00 for 466 kilometres of long-haul driving done in one day – November 27, 2018. It is difficult to take Darvonda's assertions seriously when the evidence upon which they are based is badly misstated. I add that their representations about the improbability of the record of hours worked by Mr. Houweling has been developed nearly seventeen months after the work was done and paid for.

50. Second, and somewhat related to the first, having accepted and paid the hours recorded by Mr. Houweling, they have confirmed the correctness of those hours and may not now resile from that

affirmation. Third, under section 21 of the *ESA*, an employer is prohibited from 'clawing back' wages paid to an employee – even wages allegedly paid under a mistake. The argument made by Darvonda would have the effect of indirectly allowing a 'claw back' of wages already paid and the direct effect of scaling back wage entitlements based on the accepted hours of work by reducing the hours for which overtime wages would be payable. Fourth, there is simply no objective evidence that backs up Darvonda's assertions about the hours of work recorded for Mr. Houweling. It is all quite speculative; as stated in their submission, "his hours were not questioned or even reviewed".

51. I have the same response to the argument concerning the statutory holiday pay calculations. Simply put, Darvonda has not met the burden of objectively demonstrating the Director's calculations are wrong in law.

52. The last matter is whether the Director erred in finding Mr. Houweling did not quit his employment, but was terminated. In the complaint process, Darvonda appears to have taken different positions, once saying Mr. Houweling just stopped showing up for work, then that he told Randell Jansen, who is identified in the appeal submission as a "minority owner and co-founder" of Darvonda, he was no longer working there and wasn't going to work for them anymore and lastly, that he communicated to Lawrence Jansen, owner of Darvonda, "multiple times" his intention to quit. In this appeal, Darvonda says Mr. Houweling "got extremely angry and hostile" when he was asked to leave the house that Darvonda had provided rent free to he and his family for approximately three years and told Randell Jansen "there is no way I'm coming back to work for you guys any more".

53. In its appeal submission, Darvonda asserts facts that were never provided to the Director during the investigation. Darvonda seeks to excuse the failure to provide this information by asserting the Director "did not ask us to provide evidence" that Mr. Houweling quit. The record does not support this explanation. The Director interviewed representatives of Darvonda in December 2019 and canvassed their response to Mr. Houweling's claim he had been terminated without cause. On March 10, 2020, the Director delivered a written report to Darvonda and Mr. Houweling summarizing the results of the investigation. The report indicates one of the issues as whether Mr. Houweling was terminated or quit and summarizes the respective position of the parties on the claim for compensation for length of service. The letter accompanying the report invites the parties to dispute information contained in it or provide addition information relevant to the complaint.

54. The report pre-dates the Determination by four weeks. No additional submission or information was provided by Darvonda on the report.

55. I shall digress briefly to address how these newly presented facts will be treated in this appeal.

56. Darvonda has not grounded its appeal on the "quit" issue on evidence becoming available that was not available when the Determination was being made. If it had done so, however, the following considerations would have been applied.

57. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant

to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

58. I would not accept there is any merit in this ground of appeal had it been raised.

59. The evidence is not "new"; it contains information that was available during the complaint process and could have been provided to the Director. The evidence is not "credible", containing unsupported assertions about what was said to whom by a person – Mr. Splinter – who was not party to those alleged conversations. The suggestion that the content of what appear to be several discussions could be notarized ignores that it is not the function of the Tribunal to advise a party what evidence it should present and that someone's recollection of conversations which took place more than a year ago is not likely to be given much evidentiary weight in any event. Finally, in light of the evidence of his continued employment subsequent to the day he allegedly quit, I do not find this information particularly "probative", in the sense of being capable of resulting in a different conclusion than what is found in the Determination.

60. Accordingly, had this ground of appeal been raised, it would be denied. In sum, the "quit" issue will be decided on the record that was before the Director when the Determination was being made with no consideration of the additional information provided by Darvonda to supplement their position that issue.

61. Mr. Houweling told the Director he did not quit; Darvonda simply stopped contacting him to do deliveries after July 25, 2019. Mr. Houweling worked July 26 and July 29, 2019.

62. The Director was alert to all of the facts which were presented by the parties during the investigation that might bear on the issue.

63. The question of whether an employee has quit is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles developed under the *ESA*.

64. A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error. As succinctly expressed by the Panel in *Britco*, *supra*: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error. A decision by the Director on a question of mixed law and fact requires deference.

65. There is no suggestion that the Director did not apply the correct test and the correct legal principles in addressing whether Mr. Houweling had quit.

66. The test set out in the Determination recognizes there is a subjective element – that the employee communicated to the employer an intention to terminate the employment relationship – and an objective element – that such intention was confirmed by some subsequent conduct.

67. After summarizing the evidence provided, the Director concluded that Mr. Houweling did not express an intent to quit on July 24 or 25, 2019, as alleged by Darvonda, but even had he said words that, subjectively, might have indicated an intention to quit, his subsequent conduct in continuing to work was, objectively, inconsistent with an intention to quit his employment.

68. The Director did what is expected under the test, which is to search the evidence for whether Mr. Houweling had clearly and unequivocally expressed an intention, through words or conduct, to quit his employment.

69. The weight of evidence is a matter for the Director and is a question of fact, not law. It is only where a conclusion reached on the facts is one that could not reasonably be entertained that an error of law is shown. Findings of fact made by the Director require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.

70. Had the error of law ground of appeal been clearly raised, I would find no reasonable likelihood it would succeed.

71. Based on all of the above, I find a substantial portion of this appeal has no reasonable prospect of succeeding and no purpose is served by requiring the other parties to respond to those matters. They are dismissed under section 114(1)(f) of the *ESA*.

72. I have, however, decided that the matter of the findings and calculations on the regular wage should not be dismissed at this stage. I have requested submissions; the Tribunal will communicate with the parties, providing timelines for making those submissions.

ORDER

73. I make no final order on the appeal at this time, pending receipt and consideration of the regular wage question identified in paragraphs 41 and 42 of this decision.

David B. Stevenson
Member
Employment Standards Tribunal