Citation: Thomas Sokoloff (Re)
2020 BCEST 111

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Thomas Sokoloff
(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: Carol L. Roberts

FILE NO.: 2020/085

DATE OF DECISION: September 14, 2020

DECISION

SUBMISSIONS

David Mardiros	counsel for Thomas Sokoloff carrying on business as Tom's Thumb Landscaping

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Thomas Sokoloff carrying on business as Tom's Thumb Landscaping (the "Employer") has appealed a determination issued by a delegate of the Director of Employment Standards (the "Director") on April 23, 2020 (the "Determination").

2. In that Determination, a delegate of the Director found that the Employer had contravened sections 17/18, 40, 45/46, 58, and 63 of the *ESA* in failing to pay a former Employee wages, overtime wages, statutory holiday and annual vacation pay, and compensation for length of service. The Director determined that the Employer owed wages and interest in the total amount of $21,832.04. The Director imposed seven administrative penalties for the contraventions, for a total amount payable of $25,332.04.

3. The Employer argues that the Director failed to observe the principles of natural justice in making the Determination.

4. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions and the record, I found it unnecessary to seek submissions from the Employee or the Director.

5. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the submissions of the parties, and the Reasons for the Determination.

FACTS

6. The Employer operates a landscaping business in Colwood, British Columbia. Dylan Craven (the "Employee") was employed as a labourer from June 11, 2017, until July 19, 2018. On January 19, 2019, the Employee filed a complaint alleging that the Employer had contravened the *ESA*.

7. At issue before the delegate was whether the Employee was entitled to wages, reimbursement for deductions taken from his wages, and compensation for length of service. The Employer acknowledged that he had contravened the provisions of the *ESA* in relation to a number of matters, including statutory holiday pay and some overtime pay. However, the Employer disputed that the Employee had worked all the hours, and thus the amount of wages, claimed.

8. The Director's delegate decided the complaint by way of a hearing under section 76 of the *ESA*. The Employer appeared at the hearing on his own behalf while the Employee was represented by a legal advocate.

9. At the outset of the hearing on August 22, 2019, the Employer sought an adjournment on the basis that he had not had enough time to compile the necessary documents and because his witnesses were unavailable. The delegate denied the adjournment, noting that the Employer had been ordered to provide records by July 11, 2019, and had not done so or requested an extension of time in which to do so.

10. The Employer provided what the delegate characterized as "some heavily redacted and incomplete timesheets and copies of some wage statements" for [the Employee] after the hearing.

11. In summary, the Employee's evidence was that on each working day, he drove to the Employer's house, spent time loading tools into the work truck, and then he, the Employer, and occasionally other workers, drove together to the work site. He testified that he arrived at the work site by 8:00 a.m. and that he would typically be finished between 5:00 and 6:00 p.m., but occasionally worked later than that.

12. The Employee testified that he kept track of his hours by entering them into the Employer's diary, which remained in the work truck. The Employee did not maintain his own contemporaneous hours of work but submitted a record of his hours at the hearing, which he recreated based on his own recollection.

13. The Employee was paid $16 per hour when he began working, and was told that he would receive a $.50 per hour raise every three months. He said, however, that the first raise he received was in January 2018. He received a second $.50 per hour raise in March 2018, bringing his hourly wage to $17.

14. The Employee was also paid some bonuses, but he could not recall when he received them. He also said that he was paid some overtime, but did not receive overtime pay if he was paid a bonus.

15. The Employee said that he was improperly paid as a subcontractor for several months. After the Canada Revenue Agency ("CRA") determined that the parties had an employment relationship, the Employer was indebted to the CRA for statutory deductions. The Employee was not paid any money for several months while the Employer paid off that debt. The Employee submitted wage statements for the period February 1, 2018, to August 1, 2018, which showed that the Employer had made deductions from his wages, but the Employee was not able to explain the deductions.

16. On July 3, 2018, the Employee texted the Employer to inform him he would be unable to attend work the following day. The Employer told him if he still wanted a job, he would be paid $16.00 per hour.

17. The Employee responded to the Employer stating that he agreed to that wage rate, but that he felt that he did not have a choice. The Employee quit his employment on July 19, 2018.

18. The delegate heard evidence from a witness on the Employee's behalf, who testified that she drove to work with the Employee most of the time and that he was "pretty much always on time and reliable."

19. The Employer agreed that he did not always pay the Employee statutory holiday pay, overtime or vacation pay properly and did not make statutory deductions because he considered his workers to be subcontractors. Once that issue was resolved with the CRA, he was required to pay the outstanding amounts to CRA for CPP and EI deductions. The Employer hired accountants in February or March 2018, and began paying his employees as employees rather than as subcontractors. The Employer said that the Employee agreed to have his unpaid deductions taken off his pay, but the Employer was unable to provide the delegate with any information regarding those deductions.

20. The Employer agreed that his employees were entitled to raises every three months, but, according to the delegate, his evidence about when the Employee received raises or the amount of the raises was unclear. The Employer also agreed that the Employee worked 10 hour days and some Saturdays, and that he paid the Employee for all hours worked at straight time. The Employer denied that the Employee began work before 8:00 a.m., and when asked about text messages in which he told the Employee to be at his house at 7:15 a.m., the Employer stated that the "text was being taken out of context" and that perhaps the Employee "had been coming to his house for croissants before work."

21. The Employer testified that in July 2018, he was frustrated with the Employee's behavior and tried to help him until he got "his act together." He offered to pay the Employee $16 per hour to continue working for him. He said that the Employee agreed to continue to do so, but asserted that the Employee did not have to accept the reduction in pay.

22. Following the hearing, the Employer provided a copy of a notebook containing time entries from July 17, 2017, through July 19, 2018, along with copies of wage statements from June 2017 through July 2018. The wage statements between February 1, 2018, and August 1, 2018, were the same as those provided by the Employee.

23. The delegate noted that the notebook pages had been redacted by the Employer and that the record was unclear and difficult to read, so she was unable to determine how many hours the Employee had worked. The Employer also provided an additional list of days on which the Employee had not worked.

24. Finally, the Employer also provided witness statements from three former employees as well as the Employee's former domestic partner. Although the delegate set out that evidence in the Determination, she decided not to rely on those statements as they did not appear at the hearing and "their evidence was not tested."

25. The delegate noted the Employer's acknowledgment that he had withheld some wages from the Employee as well as his position that he did so at the Employee's request because of the CRA issues. The delegate noted the Employer's argument that the only other option was to have each employee pay their own deductions. She found that the Employer had not provided any evidence regarding the amount of the liability or any payments that were made in respect of the liability. The delegate noted that while section 21 of the *ESA* permitted an employer to withhold an employee's wages for source deductions and the evidence showed that the Employer made statutory deductions, she was without jurisdiction to determine whether the deductions were accurate.

26. The delegate determined that the Employer had not complied with his obligation to maintain a record of the Employee's hours. She found that the records he did provide were "inconsistent, confusing and

difficult to read, and contained redactions of required information, such as the time record for an entire day or the end time of shifts." The delegate further noted that the wage statements did not accord with the record of hours contained in the notebook, which the Employer explained were a result of his generosity in paying the Employee more than the hours he worked.

27. The delegate found the notebook record to be unreliable based on the lack of clarity and the inconsistency with other evidence, including the wage statements.

28. The delegate found the Employee's evidence of his hours of work at the hearing to be the best evidence because the Employee was able to refer to his text messages. She also found the Employee's evidence to be confirmed in many respects by the evidence of the Employer and another employee. The delegate determined that the Employee was entitled to wages for work performed loading the work truck at the Employer's residence. She determined that the Employee worked, on average, from Monday through Saturday from 7:30 a.m. until 5:30 p.m., for a total of 9.5 hours each day, including a one half-hour unpaid break. She found that the Employee's evidence regarding the days he did not work to accord, for the most part, with the Employer's notebook. She noted that both parties agreed the Employee worked Saturdays.

29. The delegate determined, based on text messages from the Employer, that the Employee was to be paid $16.50 per hour effective October 26, 2017, and $17 per hour effective March 12, 2018. The delegate found insufficient evidence to establish that there was any agreement between the parties that the Employee's wages were to increase to $18 per hour in May 2018.

30. The delegate found that the Employer failed to provide payroll records or any proof of payment of wages to the Employee between November 26 and December 15, 2017, and between January 1 and January 10, 2018. She noted that the Employer had multiple opportunities to produce the records, both before and after the hearing. In the absence of any records, the delegate accepted the Employee's evidence that there were several pay periods in which he did not receive wages and concluded that he had not been paid wages during these periods.

31. The delegate determined that the Employee was entitled to regular wages in the amount of $1,443.00.

32. The delegate found, based on text messages between the parties and their evidence, that the Employer reduced the Employee's wages by $1 in early July 2018, and that the Employee only agreed to the reduction because he had to do so in order to keep his job. She found that the wage statement demonstrated that the Employee received wages at the lower rate from July 3 to July 19, 2018. Relying on the Tribunal's decision in *Borisov Maksimovic* (BC EST # RD046/12), the delegate determined that the wage reduction constituted a unilateral change to the Employee's wage rate without consideration, and was thereby "invalid." She determined that the Employee was entitled to be paid at $17 per hour for the period July 3 – 19, 2018, and calculated the difference in regular wages to be $88.

33. The delegate also determined that the Employee was entitled to overtime wages. She noted the Employer's acknowledgement that he had not always paid overtime to the Employee as required. She also considered text messages between the parties regarding overtime pay and bonuses in which the Employer asked the Employee to waive his entitlement to overtime wages in order to receive the bonus.

34. The delegate determined the Employee was entitled to overtime wages in the amount of $13,760.66. She also found, and the Employer acknowledged, that the Employee was entitled to statutory holiday pay in the amount of $2,316.57.

35. The delegate determined that the Employee's employment was terminated as a result of the Employer substantially altering a condition of his employment; that is, by unilaterally reducing his wages, and that he was entitled to compensation for length of service in the amount of $1,292.

36. Finally, the delegate found that the Employer had not paid the Employee vacation pay in the amount to which he was entitled. She determined that the Employee was entitled to vacation pay in the amount of $1,556.85.

ARGUMENT

37. The Employer acknowledged that he was "not well organized in the way that he presented his case, and he was late in responding to requests for disclosure." However, he says that, as a lay litigant, he was not aware of how the process worked, the rules of evidence, and "took the advice of employees at the Branch on how he should present the documents that he wanted the Director to consider."

38. The Employer argues that the Director failed to observe the principles of natural justice. He argues that, as a result of his conversation with the delegate, he was led to believe that written witness statements would be accepted at the hearing. He also contends that he made the redactions from the diary in which the Employee's work days and hours were recorded on the advice from the Branch to remove personal information that did not relate to the matters in issue. The Employer also contends that the delegate considered irrelevant matters; specifically, that she rejected his diary records on the basis that redactions were made, rather than asking him about those redactions.

39. The Employer argues that, in addition to wrongly placing no weight on the witness statements, the Director "disregarded" all his documentary evidence. The Employer contends that, rather than dismissing his evidence about the Employee's hours of work, the delegate ought to have reviewed the Employer's original records. He argued that it was unfair for the delegate to discount his documentary evidence on the basis that the notebook entries were unclear. While the Employer acknowledges that the entries appeared unclear in the photocopied version he submitted into evidence, the original entries were not unclear. He says that he was not asked to re-submit records but would have done so had Director requested that he do so.

40. The Employer also argues that, had the Director undertaken an investigation rather than conducted a hearing, the witnesses identified by the Employer could have been interviewed. He contends that the witnesses could have been interviewed before a Determination was issued "at little additional cost and delay." The Employer submits that the fairness of the complaint resolution should not depend on the Director's decision to decide the matter by way of a hearing rather than by way of an investigation.

ANALYSIS

41. 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.

42. 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, 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.

Failure to observe the principles of natural justice

43. 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.

44. As I understand the Employer's argument, had the delegate determined the complaint by way of an investigation rather than by way of a hearing, his witnesses could have been spoken to and the delegate would have had the benefit of their evidence. He also asserts that, had the delegate investigated the complaint, she would have had the benefit of reviewing the Employer's original documentation, rather than a photocopied version. He argues that the delegate's decision not to investigate the complaint resulted in an unfair hearing.

45. The delegate has the discretion over the form of complaint resolution (sections 76 and 77 of the *ESA*). The Tribunal will only interfere with the Director's exercise of discretion in limited circumstances (see *Takarabe et al.,* BC EST # D160/98, and *Jody L. Goudreau et al.,* BC EST # D066/98):

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

> ... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229

46. One of the purposes of the *ESA* is to "provide fair and efficient procedures for resolving disputes over the application and interpretation" of the *ESA*. The delegate decided to resolve the complaint by way of a hearing. There is no evidence the delegate improperly exercised her discretion in making that decision.

47. However, as this Tribunal has stated (*AZ Plumbing*, BC EST # D014/014), the result of a complaint should not differ depending on the choice of dispute resolution process. In that case, I found that the delegate had the duty to ensure that parties were fairly treated and that one party had not, because of a lack of legal skill, failed to claim rights under the *ESA* or put forward arguments that had already been set out in complaint forms or responses.

48. I am not persuaded that the Director failed to comply with the principles of natural justice. I am also not persuaded that the result of the complaint would have been any different had the matter been investigated rather than resolved by way of a complaint hearing.

49. There is no evidence the Employer was unaware of the details of the complaint. Not only was he provided with all the Employee's allegations, he participated in a mediation conducted by an Employment Standards Branch mediator where all of the issues would have been raised.

50. The record discloses that the Employer was provided with information about the conduct of the hearing. Specifically, on June 27, 2019, the Director sent the Employer a Notice of Complaint Hearing (the "Notice"). The Notice stated:

> You must provide the Branch with any documents you intend to rely on by **4:00 p.m**. **Thursday, July 11, 2019**.

51. The Notice informed the parties how to organize the documents and instructed the parties to "[r]emove ("redact"*) **all confidential or personal information not relevant to the dispute** …". The Notice instructed the parties on how to redact information: "*Redacting is done by photocopying your original, blacking or whiting out the information to be removed, and then photocopying again... You may be required to provide the original document to the Branch*."

52. Included with the Notice was a factsheet on the hearing process.

53. A guide to preparing for the hearing is also located on the Branch's website. It states "**Make sure your witnesses can participate.** … It's best if your witnesses attend the hearing and provide evidence. Written statements from them might not be admitted as evidence or their testimony may be given less weight."

54. On the same date, the Director also issued a Demand for Employer Records (the "Demand"). The Demand identified the records to be provided as "any and all payroll records relating to wages, hours of work and

conditions of employment" and "hours worked on each day". The Employer was required to produce those records to the Director by 4:00 p.m. on July 11, 2019.

55. Section 28 of the *ESA* imposes an obligation on the Employer to maintain these records for each employee. While the Employer initially believed the Employee was a self-employed contractor, he later became aware that the relationship between the parties was one of employer-employee. Once that was clarified for the Employer, he ought to have been aware of his obligation to maintain payroll records as well as hours of work.

56. The record discloses that on July 4, 2019, a delegate of the Director sent the parties a reminder that their documents were due the following week, as well as directions on how the parties were to organize their documents. The Employer responded by expressing his frustration with the process as well as concerns about the limited time he had been afforded to provide the documentation. Although the Employer did not expressly seek an extension of time in which to provide the documentation, he did ask "can there be any way to extend or push back the court date and/or the file deposit date?" The delegate indicated she would pass the request on to the delegate hearing the complaint (the "adjudicator") and get back to him. The record does not disclose when or if that was done.

57. The record discloses that the Employer was aware of the complaint at least by the end of May 2019. The mediation was held on June 20, 2019. Following the unsuccessful mediation, the delegate set the deadline for the exchange of evidence and issued the Demand for Records. The Employer had six weeks to locate and produce the relevant records. Given the purposes of the *ESA*, I do not find that time to be unfair to the Employer.

58. The Employer has acknowledged that he did not comply with the Demand for Records and did not properly prepare for the hearing.

59. The record indicates that the hearing did not end by 4:30 on August 22, 2019. Notwithstanding the Employer's failure to meet the deadlines set out in the Director's notices, the delegate offered the Employer additional time in which to provide the documentation. The Employer subsequently submitted three witness statements, wage statements and photocopies of his diaries (day planners). The Employee's advocate objected to the late submission of the witness statements, arguing that the Employer's witnesses had the benefit of knowing the evidence presented by the Employee. The Employee's advocate argued that if the delegate was intending to accept the late evidence, the advocate ought to be given the opportunity to cross examine them on that evidence.

60. While acknowledging that the Employer is a lay litigant, I find that he had all the information necessary to receive a fair hearing. If there is any unfairness, it can be attributed to his failure to comply with instructions and deadlines set out in hearing notices.

61. Even though the Employer did not comply with deadlines in which to submit evidence, the delegate did allow him to submit evidence after the hearing. Furthermore, there is no evidence she "disregarded" the documentary evidence, as the Employer alleges. The delegate considered the fact that the Employer had the obligation to maintain records under section 28 and failed to do so. While the delegate found the Employer's notebook entries difficult to read, she also found them to be confusing and inconsistent with

the wage statements. She also found the Employer's explanation for the inconsistencies to lack credibility. I find that the delegate did consider the Employer's documentary evidence and found it wanting.

62. It is within the Director's discretion to assess the credibility of evidence. While the delegate found the Employer's photocopied records difficult to read, she did not reject them out of hand. She noted that the Employer's explanation for discrepancies between the photocopied records and the wage statements lacked credibility. The delegate preferred the evidence of the Employee based, in part, on the oral evidence, the discrepancies in the Employer's documentary evidence that was not satisfactorily explained as well as the text messages between the parties. I am unable to find any errors in her analysis.

63. The witness statements submitted by the Employer all related to the hours worked by the Employee. The statements by the other employees were imprecise, which was not surprising given that the other employees were not responsible for maintaining the Employee's hours of work, and did not contain specific details about when the Employee worked or how long. One of the witnesses expressed the opinion that the Employee's work loading the Employer's work truck was unpaid and voluntary. Two of the statements also contained internal inconsistencies (such as the Employee always started work at 8:00 a.m. but sometimes he started at 7:30 a.m.). The third, from the Employee's former domestic partner, quite properly should have been given little weight given the conflict between them and the fact she had no direct evidence about his hours of work. In light of all of the other evidence about the Employee's hours of work, I am not persuaded that, had the delegate spoken to these witnesses, she would have arrived at a different conclusion.

64. I find, pursuant to section 114 of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

ORDER

65. Pursuant to section 114 (1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated April 23, 2020, is confirmed, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal