

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

OE Construction Solutions Inc. carrying on business as Optimal Efficiency
("Optimal Efficiency")

- 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.: 2019/058

DATE OF DECISION: October 5, 2020

DECISION

SUBMISSIONS

Shane O’Grady

delegate of the Director of Employment Standards

OVERVIEW

1. On October 4, 2019, the Tribunal issued a decision, 2019 BCEST 106, that considered an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by OE Construction Solutions Inc. carrying on business as Optimal Efficiency (“Optimal Efficiency”) of a Determination issued on behalf of several complainants by Shane O’Grady, a delegate of the Director of Employment Standards (the “Director”), on May 23, 2019.
2. This decision dismissed all but one element of the appeal under section 114(1) of the *ESA*.
3. In its appeal, Optimal Efficiency argued the decision to award overtime pay to one of the complainants, Bryan Heredia (“Mr. Heredia”), was a reviewable error.
4. Optimal Efficiency submitted the Director erred in awarding overtime pay to Mr. Heredia because Mr. Heredia was a “*high technology professional*” as that term is defined in section 37.8(1) of the *Employment Standards Regulation* (the “*Regulation*”) and was exempted from most of the provisions in Part 4 of the *ESA*.
5. In correspondence dated October 4, 2019, the Tribunal requested the Director and the respondent employees to make submission on that issue.
6. The Tribunal received submissions from the Director, Mr. Heredia, and Optimal Efficiency. A supplementary decision was issued on November 28, 2019: Tribunal Decision Number 2019 BCEST 131.
7. The Director sought reconsideration of the supplementary decision and, on April 6, 2020, in 2020 BCEST 30, a reconsideration panel varied the supplementary decision and referred the question of whether Mr. Heredia is a “*high technology professional*” as that term is defined in section 37.8 of the *Regulation* back to the Director.
8. The Director has conducted an investigation of that issue and has submitted a Referral Back Report (the “Report”) to the Tribunal on the findings and conclusions of the investigation.
9. In correspondence dated August 11, 2020, the Tribunal invited Mr. Heredia and Optimal Efficiency to make submissions on the Report. Neither have made a submission.
10. The Tribunal is now in a position to finalize the appeal decision.

THE FACTS

11. The central facts of this matter have been set out in 2019 BCEST 106.

12. In the Report, the Director found Mr. Heredia, as an employee of Optimal Efficiency, was “primarily responsible for designing the user interface for a ‘system’” and in that role satisfied that part of the definition of “*high technology professional*” contained in section 37.8(1) (a) of the *Regulation*.
13. The Director concluded, applying section 37.8(2) of the *Regulation*, Mr. Heredia was not entitled to overtime wages and recalculated Mr. Heredia’s wage entitlement to be \$16,597.62, together with interest (to July 29, 2020) of \$1,167.16, and recalculated the total wages owed to all of the complainants, including interest, to \$107,113.68.
14. Adding the administrative penalties of \$3,000.00 to the wages and interest owed, the total amount of the Determination is \$110,113.68.
15. There has been no objection to the above calculations made by any other party and, accordingly, I accept them.

ORDER

16. Pursuant to section 115 of the *ESA*, I order the Determination dated May 23, 2019, be varied to show Mr. Heredia’s wage entitlement to be \$17,764.78 (as of July 29, 2020), the total wage entitlement to all of the complainants to be \$107,113.68, and the total amount of the Determination to be \$110,113.68, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal