



Citation: Darvonda Nurseries Ltd. (Re)
2020 BCEST 116

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: October 7, 2020

DECISION

SUBMISSIONS

David Neufeld	on behalf of Darvonda Nurseries Ltd.
Abraham (Paul) Houweling	on his own behalf
Michael Thompson	delegate of the Director of Employment Standards

OVERVIEW

1. On August 12, 2020, the Tribunal issued a decision, 2020 BCEST 103 (the “decision”), that considered an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Darvonda Nurseries Ltd. (“Darvonda”) of a Determination issued by Dawn Sissons, a delegate of the Director of Employment Standards (the “Director”), on April 16, 2020.
2. The decision dismissed all but one element of the appeal under section 114(1) of the *ESA*.
3. One of the arguments in its appeal was that there were reviewable errors in the regular wage calculation.
4. Darvonda submitted the errors were the result of incorrect information having been provided to the Director during the investigation and incorporated into the regular wage calculation.
5. My review of the argument, the record and the Determination indicated there was sufficient presumptive merit on that argument to warrant further submissions from the parties.
6. In correspondence dated August 12, 2020, the Tribunal requested the Director and the complainant, Abraham (Paul) Houweling (“Mr. Houweling”), to make submissions on that issue, providing a deadline for doing so.
7. The Tribunal received a submission from both the Director and Mr. Houweling. In correspondence dated September 3, 2020, the submissions were provided to Darvonda who was invited to respond to those submissions. The Tribunal has received a response on behalf of Darvonda, which has been disclosed to the Director and to Mr. Houweling.
8. On September 29, 2020, the Tribunal received a further, and unsolicited, submission from Mr. Houweling, commenting on Darvonda’s submission. While it has been disclosed to the Director and Darvonda, its contents have not been considered in making this decision.
9. I am now in a position to address the issue on which the submissions were sought.

THE FACTS

10. It is unnecessary to reiterate all of the facts set out in 2020 BCEST 103 in this decision, except to reiterate the Director found Mr. Houweling was entitled to regular wages related to two pay periods: November 11 to November 24, 2018 (“the November 24 pay period”) and March 31 to April 13, 2019 (“the April 13 pay period”).

ARGUMENT

11. The decision identified the following questions for which I sought answers:
- 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?
12. I shall summarize the submissions by each of the parties on those questions, as well as any additional relevant submissions.
13. The Director submits the Tribunal should respect the integrity of findings of fact made by the Director unless those finding raise an error of law which, in the circumstances of this case, would involve a consideration of whether the findings of fact were made without sufficient evidentiary basis or were made without providing a party with the opportunity to respond.
14. The Director submits “new evidence” should only be accepted in accordance with the principles laid out in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. These principles were discussed at paragraph 57 of the decision. The Director says the burden on Darvonda, as in any appeal, is to show, from the record and any “new evidence” accepted in the appeal, a reviewable error was made and if that burden is met, the normal consequences – variance, referral back or cancellation – would follow.
15. In the circumstances, the Director acknowledges, in respect of the November 24 pay period, there were errors made: by Darvonda in submitting a pay statement for an employee other than Mr. Houweling and by the Director in not noticing the error (among thirty pay statements submitted) and relying on the incorrect information to calculate regular wages. The Director says the compounding of those errors justify finding a reviewable error was made.
16. The Director submits a fair and efficient result would be to admit the correct pay statement and make appropriate adjustments to the regular wage calculation based on the correct information.
17. In respect of the April 13 pay period, the Director submits there was no reviewable error made; that the submission of Darvonda on this point requires the Tribunal to admit and give effect to payroll records for which a Demand for Employer Records was made, but which were not provided, and which existed and

were available at the time the Determination was made. The Director contends Darvonda is only seeking to avoid its own failure to fully comply with the statutory obligation to produce the complete employment record for Mr. Houweling. The Director says the material sought to be admitted does not meet the conditions set out in *Davies and others, supra*. The Director also notes the findings of the Director for this pay period were based on the information provided by Darvonda and which contained no patent flaws; the finding was grounded in evidence found to be reliable at the time. The Director submits there is no overriding statutory purpose served by relieving Darvonda from its own failure to provide complete information to the Director during the investigation of the complaint.

18. Mr. Houweling says nothing in the Determination should be varied because: the appeal is frivolous, vexatious, trivial and an abuse of process; the behaviour of Darvonda's representatives is illegal and malicious; Darvonda has made false accusations, both generally and against him; Darvonda failed to produce documents in a timely manner; and Darvonda did not bring forward the errors in a timely way.
19. Mr. Houweling's submission includes multitude examples, drawn from several sources, to support assertions he has made in the position he has taken in his response.
20. Finally, Mr. Houweling says that if the regular wage calculation is to be varied, Darvonda should not receive the benefit of such variance, but should be paid to his wife or allocated to other aspects of the case, such as appeal costs. I will state at this point that the *ESA* would not allow this result and I need not address it further.
21. In reply, Darvonda says the regular wage calculations for both pay periods should be reviewed, as both were "simple errors" that were not made with the intent of harming any party in the proceedings. Darvonda submits that otherwise Mr. Houweling would receive monies he did not earn.
22. Darvonda acknowledges the failure to provide all the relevant information for the April 13 pay period was an error of omission.

ANALYSIS

23. I substantially agree with the submission of the Director on this issue. Most significantly, I agree that the documents submitted on the November 24 pay period are qualitatively different than those submitted for the April 13 pay period.
24. My analysis commences with the request by Darvonda to provide new evidence with their appeal. To restate what was said at paragraph 57 of the decision:

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*.

25. The key point to be taken from the above excerpt is that the Tribunal has discretion whether to accept or refuse new or additional evidence; that discretion is exercised in a principled manner, taking into account several considerations, but if those considerations were determinative in every case, there would cease to be any discretion and the Tribunal could be rightly accused of abrogating its authority in that regard. In my view, this is one of those rare cases where a rote application of the conditions will not meet the purposes and objectives of the *ESA*.
26. It is agreed by all parties that Darvonda submitted wrong information to the Director for the pay period ending November 24; it was not information that related to Mr. Houweling, but to another employee. There is no basis for suggesting this error was anything other than inadvertent. The name of the other employee is shown on the payroll record: see page 659, record. The Director also made an error by not noticing the payroll record was not for Mr. Houweling but for another employee. In these circumstances, it would be unfair not to accept the addition of the correct payroll record with the appeal.
27. I agree with the Director's submission that Darvonda's not including the "new evidence" ground in its appeal does not foreclose me from considering whether new evidence should be accepted or refused.
28. My view of the additional evidence relating to the material relating to the April 13 pay period is different. In this matter, the fault for providing wrong information to the Director lies entirely with Darvonda, which failed to meet its statutory obligation to comply with the Demand for Employer Records. There is no indication this failing was inadvertent or accidental; it was, at best, negligent. This material could have, and should have, been given to the Director during the investigation, in response to the Demand. The Tribunal has never used its discretion to allow new or additional evidence to relieve a party of its own default or negligence and will not start now. The material relating to the April 13 pay period will not be accepted in this appeal.
29. The acceptance of the payroll information for the November 24 pay period changes the factual matrix of the Director's calculation for that period with the result that the findings of fact and the conclusion reached by the Director on the matter of regular wages owed for that period were unsupported by the evidentiary record and must be set aside.
30. The refusal to accept additional evidence relating to the April 13 pay period does not change the factual matrix for the Director's finding for that period and consequently has no effect on the Determination.
31. It follows from my findings and conclusion, that I do not accept the submissions of either Darvonda or Mr. Houweling except where they are consistent with those findings and conclusions.
32. I have not ignored that this decision may result in Mr. Houweling receiving more in regular wages than what might otherwise have been found had Darvonda met its obligations under the *ESA*, but that result is the consequence of its own failure.

ORDER

33. Pursuant to section 115 of the *ESA*, I order the Determination dated April 16, 2020, be varied as outlined above and that this matter be referred back to the Director to vary the amount of regular wages owing in accordance with this decision. I retain jurisdiction to confirm the Determination resulting from the recalculation of Mr. Houweling's regular wage entitlement.

David Stevenson
Member
Employment Standards Tribunal