Citation: Nolan Logan (Re)
2020 BCEST 122

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Nolan Logan
(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: Carol L. Roberts

FILE NO.: 2020/115

DATE OF DECISION: October 29, 2020

DECISION

SUBMISSIONS

Nolan Logan on his own behalf

OVERVIEW

1. This is an appeal by Nolan Logan (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "*ESA*") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 25, 2020.

2. Mr. Logan filed a complaint alleging that Aspol Motors (1982) Ltd. ("Aspol") contravened the *ESA* in failing to pay wages for work performed during the month of July 2018. The Director concluded that the *ESA* had not been contravened and decided that no further action would be taken.

3. Mr. Logan appeals the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination.

4. This decision is based on the Appellant's written submissions and the section 112(5) "record" that was before the Director at the time the decision was made (the "Record").

FACTS AND ARGUMENT

5. Aspol operates an automobile dealership in Dawson Creek. The Appellant claimed that he was employed as a fixed operations manager from July 3, 2018, until August 1, 2018. The Appellant's father, Todd Logan, was Aspol's General Manager. The Appellant asserted that he and his father agreed that he would work at Aspol after his school term ended, and that he would be paid $5,000 per month. The Appellant detailed the nature of work he performed on a daily basis. He said that he began work July 3, 2018, and that he was suspended with pay on July 26, 2018. He said that on August 1, 2018, he was told that he was no longer employed.

6. The Appellant claimed that he completed employee documentation that was left on his father's desk during the week of July 23 – 27, 2018. The documentation was never sent to the company's accountant as both the Appellant and his father were suspended on July 26, 2018.

7. The Appellant contended that he was not paid any wages or vacation pay.

8. Todd Logan confirmed that he had offered his son $5,000 per month to "explore efficiencies in the service department." Two former Aspol employees also informed the delegate that the Appellant worked essentially full-time at the time of his dismissal. They also indicated that the Appellant's tasks were related to making the departments operate more efficiently.

9. The delegate wrote that in March 2020, he issued a preliminary findings letter which indicated that he was prepared to find that the Appellant had been employed from July 3, 2018 until August 1, 2018. The

delegate stated that because he had insufficient information on the Appellant's rate of pay, he could only find that the Appellant was entitled to the minimum wage rate effective at that time, plus vacation pay on those wages. The delegate noted that the Appellant was unable to provide any additional evidence to alter the preliminary assessment.

10. Aspol took the position that the Appellant was never hired as an employee at any time. It asserted that the Appellant's wage claim was the subject of a larger dispute between Aspol and Todd Logan regarding the sale of the business. Aspol argued that Todd Logan had no authority to hire his son, and that if the Appellant was present at the dealership in July 2018, his duties were to assist with Todd Logan's efforts to purchase the business rather than any tasks that were in Aspol's interest. Aspol further contended that because a deal to sell the business had already been reached by July 2018, there was no purpose to be served by engaging the Appellant's services to "explore efficiencies."

11. An employee in Aspol's parts department during the relevant period confirmed that the Appellant was in the dealership for about three weeks in July 2018 and that the Appellant would occasionally assist him in moving heavier items in the parts department or would perform other simple labourer tasks.

12. Aspol's external bookkeeper indicated that, to her knowledge, the Appellant was not employed by Aspol.

13. Although Aspol disputed the correctness of the preliminary findings letter in March, it sent a cheque in the amount of the preliminary determination, less statutory deductions, to the Director in trust for the Appellant. Although Aspol requested that the funds be released to the Appellant on the condition that he supplied either his Social Insurance Number or a completed TD1 form, that condition was rescinded when the Appellant refused to do so. The Director subsequently released the funds to the Appellant.

14. The delegate found that, as Aspol had paid the amount in the preliminary findings letter, no further amounts were owed to the Appellant.

Argument

15. Although the grounds of appeal are that the Director failed to comply with the principles of natural justice, nothing in the appeal submissions relate to this ground of appeal. Rather, the Appellant argues, as I understand it, that the delegate wrongly attributed a wage rate equivalent to the effective minimum wage at the time in question. The Appellant argues that the delegate could have contacted other dealerships to determine the average monthly compensation of a fixed operations manager position to arrive at a reasonable salary rather than limiting his wages to the minimum wage.

16. The Appellant submitted a 2019 Salary & Compensation Survey for the BC Retail Auto Sector, which he asserted was commonly referred to when hiring employees at automotive dealerships. He contended that, based on this survey, a salary of $5,000 per month was not unreasonable.

17. The Appellant also argued that the delegate "overlooked" the evidence of his father, who was the General Manager at the time he was hired.

18. Finally, the Appellant contends that he was suspended with pay on July 26, 2018, and terminated on August 1, 2018, for a total of 21 days of work. He notes that the preliminary assessment amount calculated his pay for 19 days, and that he is entitled to an additional 3 days pay.

ANALYSIS

19. 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 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 that 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.

20. 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.

21. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal (see *Triple S Transmission*, BC EST # D141/03).

22. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that he has not.

Failure to observe the principles of natural justice

23. 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. There is nothing in the appeal submission that establishes that the Appellant was denied natural justice.

24. After investigating the complaint, the delegate informed the Appellant of his preliminary conclusions. The delegate invited the Appellant to submit evidence that might cause him to arrive at a different conclusion

and determined that he had not done so. Even though Aspol disputed that the Appellant was an employee, it nevertheless made a payment in the amount decided.

25. I find that the Appellant had every opportunity to advance his complaint as well as to respond to Aspol's submissions. There are no allegations, nor is there any evidence, that the delegate was biased.

26. I therefore find no basis for this ground of appeal.

Error of Law

27. 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.

28. The Appellant has not identified any errors of law which the delegate may have committed. Upon a review of the Record, I find that the delegate properly applied the relevant sections of the *ESA*.

29. The Determination notes that the delegate issued a preliminary assessment of the complaint. The Appellant was unable to provide any evidence to cause the delegate to change his conclusion even though he was offered an opportunity to do so. Although Aspol challenged the delegate's preliminary assessment that the Appellant was an employee and entitled to wages, it nevertheless paid the amount determined. The Appellant accepted the funds and the delegate determined that no further wages were owed.

30. It is this conclusion that the Appellant contends is incorrect. Although the Appellant suggests that the delegate ought to have conducted an investigation into salaries comparable to his asserted position, the burden is always on a complainant to prove his case on a balance of probabilities. The Director's obligation is to make a decision based on the best evidence before him. A salary report compiled by the Canadian Automobile Dealers Association is not evidence of any purported agreement between the Appellant and his father. While it is true that the Appellant's father corroborated the Appellant's evidence, there was no independent documentary evidence of any agreement, which was disputed by Aspol.

31. I also find no error in the delegate's decision that no further wages were owed. The delegate made a preliminary assessment of the Appellant's entitlement to wages even though he had not made a conclusive decision on the question of whether or not the Appellant was an employee. The payment appears to have been made as a settlement agreement, even though the funds were paid to the Appellant without either a settlement agreement or a release ever being required as a condition of the payment.

32. Given that the delegate did not make a finding either on the question of whether the Appellant was an employee, or whether he was entitled to wages, the only conclusion I am able to address is whether the delegate erred in concluding that there had been no contravention of the *ESA* and that no wages were owed.

33. On the basis of all the information before me, I am unable to find any errors in the delegate's conclusion. The Appellant received funds that, while not documented by the Director as such, appeared to be in full settlement of his complaint. Given that the delegate made no final determination about the Appellant's employment status, I cannot find that he erred in his final conclusion that no wages were outstanding after the funds were paid out to the Appellant.

34. I find that the Appellant has not demonstrated any error of law in the Determination.

New evidence

35. In *Re Merilus Technologies Inc.* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

36. The material submitted by the Appellant does not meet the test for new evidence. Furthermore, I find, even if this information met the test for new evidence, I am not persuaded that it would not have led the delegate to a different conclusion on the material issue before him as noted above. Not only is the wage survey not evidence of the Appellant's employment, it is also not evidence of an agreed upon wage rate.

37. Therefore, I conclude that there is no reasonable prospect that the appeal will succeed and dismiss the application.

ORDER

38. Pursuant to section 115 of the *ESA*, I order that the Determination dated June 25, 2020, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal