Citation: Weidong (Rene) Wang (Re)
2020 BCEST 125

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Weidong (Rene) Wang
(the "Complainant")

- 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: Maia Tsurumi

FILE NO.: 2020/125

DATE OF DECISION: November 9, 2020

DECISION

SUBMISSIONS

Weidong (Rene) Wang on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Weidong (Rene) Wang (the "Complainant") has filed an appeal of a determination (the "Determination") issued by Dan Armstrong, a delegate (the "Delegate") of the Director of Employment Standards, on July 17, 2020. In the Determination, the Delegate found that Paladin Security Ltd. ("Paladin") contravened sections 17 and 40 of the *ESA*. He ordered Paladin to pay $2,491.92 to the Complainant and to pay $1,000.00 in administrative penalties.

2. The Complainant appeals the Determination on the grounds that new evidence has become available that was not available at the time the Determination was being made.

3. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without hearing, for any of the following reasons:

    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.

4. Pursuant to sub-section 114(1)(f), I dismiss the appeal and confirm the Delegate's Determination.

5. This decision is based on the submissions made by the Complainant in his Appeal Form, the sub-section 112(5) record (the "Record"), the Determination and the Reasons for the Determination (the "Reasons").

ISSUE

6. The issue before the Tribunal is whether all or part of this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

THE DETERMINATION

Background

7. Paladin is a company incorporated in British Columbia. It operates a security business in Burnaby, British Columbia.

8. The Complainant filed three complaints forms (the "Complaints") against Paladin. He claimed Paladin failed to pay him wages related to training, failed to pay him overtime wages, and failed to pay him compensation for length of service.

9. The Delegate conducted a hearing on April 6, 2020. All of the claims in the Complaints were discussed at the hearing and the parties had multiple opportunities to make written submissions and provide additional evidence. Although the different filing dates of the Complaints had consequences relating to recovery periods, the Delegate determined the *ESA*'s purpose of providing fair and efficient procedures for resolving disputes was achieved by evaluating all three Complaints in a single Determination.

Issues Before the Delegate

10. The issues before the Delegate were: (1) was the Complainant owed wages, and if so, in what amount; and (2) was the Complainant entitled to compensation for length of service, and if so, in what amount?

Evidence and Submissions During the Investigation

11. The parties agreed the employment relationship ended on December 16, 2019 but disagreed about when the Complainant started work as a security officer.

The Complainant's evidence

12. The Complainant said that before he was assigned a shift in 2018, Paladin required him to complete a number of online courses. Also, after he was posted to the Surrey Central Library location, he had to complete additional courses to continue working there. He said he did 21 online courses and provided his record of hours for these courses, which totaled 11.58 hours. He did not record the dates he completed the courses but said he would have done this work at home after working a 12-hour shift. The courses were related to his work at specific Paladin job sites. The Complainant said he already had a security license before he joined Paladin.

13. In response to Paladin's question as to why he did not complete the courses while he was at work, the Complainant said he did not have time to do the courses while at work and that he did not think he was allowed to do the courses during his shift without clear instructions from Paladin to do so.

14. The Complainant also alleged he was owed overtime wages unrelated to his training hours. He said that from February 7 to July 8, 2019, he worked 12-hour shifts, 3 days per week, but was only paid regular wages for these hours.

15. In response to Paladin's claim that he entered into an averaging agreement with it, the Complainant said he did not receive a copy of this agreement. Also, the copy of the agreement produced by Paladin indicates the averaging period started on January 27, 2019, but it was not signed until February 6, 2019, and expired on February 9, 2019. He said Paladin did not ask him to sign any subsequent averaging agreement.

16. Regarding compensation for length of service, the Complainant said he went to China in October 2019 to take a course starting in November and lasting for a month and a half. He planned to return in January and when he left, he was still working for Paladin. He did not notify Paladin that he was going to China because he assumed it was not necessary. His assumption was based on the fact he was only working part-time picking up occasional shifts. After he finished his course in mid-December, he decided to do a practicum in China. Towards the end of January 2020, he was forced to enter into lockdown because of Covid-19. When the lockdown ended in March, the Complainant was able to return to Canada.

17. The Complainant was terminated via e-mail on December 16, 2019, because he did not work the requisite number of shifts. According to him, Paladin had not informed him of its requirement that he work at least one shift every pay period as a member of the Critical Response Team (the "CRT"). Paladin said he was notified about this by e-mail on August 29, 2019, but the Complainant said he had not seen the e-mail. He also added that because he was reassigned in September 2019, he was not a member of the CRT.

Paladin's evidence

18. Paladin said it did not pay the Complainant for completing the training courses because there was nothing that prevented him from completing them during his shifts. There was a computer available to him at work and he ought to have had time to complete them. Paladin's records showed the Complainant completed three courses while on duty.

19. The Delegate asked Paladin's representative why the Complainant did not receive wages for an additional 30 hours for courses he attended on October 24, 25, 26 and 30, 2018. Paladin said the employment agreement included a term that the Complainant's employment would start after he successfully completed required training courses and he needed these basic security courses to get his security license. That was why he did not receive wages for these full-day training courses. (I note that while the Determination says "*October 24, 25, 26 and 30, 2020*", from reading the entire Determination and the Record, I conclude the date referred to is actually October 24, 25, 26 and 30, 2018.)

20. Paladin said the Complainant was not entitled to overtime for work done between February 7 through August 18, 2019, because he had entered into a written averaging agreement.

21. Paladin also said the Complainant abandoned his employment and so was not entitled to compensation for length of service. It was a condition of employment that he work a minimum of eight hours per week, but he went on an unauthorized leave of absence without notifying Paladin. Paladin provided an e-mail and attachment that indicated the Complainant was notified of the requirement to work a prescribed number of shifts. Although the Complainant said he did not see this e-mail, Paladin provided the Delegate with another e-mail in which the Complainant appeared to use the "Reply" function to the August 29, 2019 e-mail to write to Paladin.

22. Paladin disagreed with the Complainant's assertion that he was not a member of the CRT in September 2019. In support of its position, Paladin provided the Delegate with a copy of an e-mail from the Complainant, dated September 13, 2019, which indicated he was a member of the CRT on this date. Additionally, Paladin said its time keeping reports indicated the Complainant was working with the CRT into October 2019. Paladin was not aware of any correspondence with the Complainant reassigning him from the CRT.

Delegate's Findings and Analysis

Regular wages and overtime for training courses

23. The Delegate found the Complainant was owed $481.53 in regular wages and $55.85 in overtime wages for completing training courses.

24. The Delegate explained that sub-section 80(1) of the *ESA* says an employer may be required to pay an employee an amount payable in the period beginning 12 months before the earlier of the date of the complaint or the termination of the employment. Because the Complainant's first Complaint was received on July 11, 2019, he could recover any wages that became payable in the 12 months before this date. His second and third Complaints were received after his employment ended and therefore, he could recover additional wages that became payable in the 12 months before December 16, 2019. Considered together, the Complainant was able to recover wages for the whole time he was employed by Paladin (October 19, 2018 to December 16, 2019).

25. The Delegate found that while Paladin may have preferred its coursework be done during work shifts, there was no evidence that this preference was a policy or that the Complainant was otherwise aware of this expectation. Therefore, the Delegate found he was entitled to wages for any time taking courses outside of his regular work hours.

26. Regarding the courses the Complainant took on or before October 30, 2018, Paladin said he was not considered an employee at this time and under his employment contract, his employment was conditional on his completing any training courses Paladin required. The Delegate noted the definition of "*work*" in the *ESA* includes training directed by the employer or on the employer's behalf, which is related to performing employment duties. Therefore, anyone doing training, at the direction of the employer, to learn how to do their job at the employer's business, is an employee and is entitled to wages.

27. However, Paladin argued that the courses taken in October 2018 were basic security courses required for the Complainant to get his security license and the definition of "*work*" does not include training to obtain or maintain a permit, licence, certificate or ticket that allows the holder to seek employment with any number of employers (e.g. a driver's license, FOODSAFE food handling certificate or security guard license). The Complainant's response to this was that he already had his security license before joining Paladin and the training hours were for courses related to Paladin job sites. Paladin did not provide any documentary evidence contradicting the Complainant's claim that he already had his security guard license before he joined Paladin and so the Delegate preferred the Complainant's evidence on this point.

28. In summary, the Delegate found all training completed by the Complainant from October 19 through 30 was directed by the employer and related to performing employment duties. This meant the Complainant was an employee on October 19, 2018, and he was entitled to wages for the training.

29. The Delegate calculated the wages owing, including wages for hours payable at an overtime rate.

30. First, based on the evidence in the Record, the Delegate determined which of the three courses from the list of courses the Complainant said he took outside of work hours were in fact completed while he was at work. This time was deducted from the total hours the Complainant said he spent on taking courses while he worked for Paladin because he was already compensated for these.

31. Second, the Delegate determined the Complainant's wage rate. The evidence indicated that compensation for training on a certain day was paid at the wage rate the Complainant was paid during regular hours for that pay period. The Complainant did not disagree that Paladin's record of his hours or the base wage rates were accurate and so the Delegate accepted Paladin's record of his hours as accurate and discerned the applicable wage rate for his training hours from his wage statements (these varied from $13.85, $14.00, $14.50, $15.00 to $15.80). For the courses done before October 30, 2019 (the Complainant's first shift of work), the Delegate used the initial rate indicated in his employment contract, which was $13.00.

32. The Delegate determined that for training courses, the Complainant was owed regular wages of $481.53 and overtime wages of $55.85. The overtime wages were included in the Delegate's calculation of amounts owing for total overtime (see below).

33. The Delegate said section 17 of the *ESA* required employers to pay wages at least semi-monthly and within 8 days after the end of the pay period. Under the *ESA*, a pay period means up to 16 days of employment. The parties' evidence indicated that Paladin failed to pay wages for training and so Paladin violated section 17. Paladin was thus subject to a $500.00 mandatory administrative penalty.

Overtime

34. The Delegate found the Complainant was owed $1,844.33 in overtime wages.

35. The Delegate referred to section 40 of the *ESA* that requires overtime wages if an employee works more than eight hours a day or more than 40 hours a week.

36. The Complainant claimed overtime wages unrelated to training. This was for work he did between February 7 and July 8, 2019, when he worked 12-hour shifts, 3 days a week but was only paid regular wages for these hours. Paladin rejected this claim because of the averaging agreement. The Complainant disputed the validity of the averaging agreement, saying he did not get a copy of it; it was not signed until February 6, 2019, but covered the period starting on January 27, 2019; and Paladin did not ask him to sign any subsequent averaging agreements.

37. Under section 37, an employer and an employee can agree to a work schedule of up to 40 hours in one week or an average of up to 40 hours in a 2- to 4-week work schedule without daily or weekly overtime. An averaging agreement must meet all the conditions set out in sub-section 37(2)(a):

i. is in writing;

ii. is signed by the employer and employee before the start date provided in the agreement;

iii. specifies the number of weeks over which the agreement applies;

iv. specifies the work schedule for each day covered by the agreement;

v. specifies the number of times, if any, the agreement may be repeated; and

vi. provides for a start date and an expiry date for the period specified under subparagraph (iii),

38. The Delegate said if the averaging agreement does not meet these criteria, the Director will find that the averaging agreement is not valid and section 40 of the *ESA* will apply.

39. The Delegate found the averaging agreement was invalid because it was signed on February 6, 2019, which was after January 27, 2019, the start date indicated in the agreement. It was also invalid because under sub-section 37(2)(c) an employee has to receive a copy of the averaging agreement before the start of the period specified in the agreement. The Delegate noted Paladin did not dispute the Complainant's contention that he did not receive a copy of the agreement.

40. Although the Complainant did not claim overtime for shifts worked after July 8, 2019, the Delegate found he did not receive overtime wages for hours worked as late as August 18, 2019. Based on the record of hours provided by Paladin, the Delegate determined that from February 7 through August 18, 2019, the Complainant worked overtime hours for which he was paid a regular wage (excluding training which was addressed separately) and earned $5,365.43. The Complainant had already been paid $3,576.95 for these hours and therefore he was owed overtime wages of $1,788.48 ($5,365.43 minus $3,576.95).

41. In total, the Complainant was owed $1,844.33. This was the total of $1,788.48 plus $55.85 (training overtime – see above).

42. In failing to pay overtime, Paladin violated section 40 of the *ESA* and was thus subject to a $500.00 administrative penalty.

Vacation pay

43. Under section 58 of the *ESA*, all employees who have worked more than five calendar days must receive annual vacation pay of at least 4% of the total wages earned. The Delegate found that with respect to outstanding wages, the Complainant was owed vacation pay of $93.03, calculated as follows:

a. regular wages owing: $481.53;

b. overtime wages owing: $1,844.33;

c. $481.53 + $1,844.33 = $2,325.86; and

d. $2,325.86 x 0.04% = $93.03.

Compensation for length of service

44. The Delegate found the Complainant was terminated with cause.

45. The Delegate considered whether the Complainant was entitled to compensation for length of service. He said section 63 of the *ESA* establishes an employer's liability to pay compensation for length of service upon terminating an employee. After 12 consecutive months of employment, an employee is entitled to 2 week's pay or written notice in lieu of pay.

46. The Delegate had found the Complainant began his employment on October 19, 2018, and it was not disputed that his employment ended on December 16, 2019. Therefore, he was employed for more than 12 months and was entitled to two weeks of compensation for length of service.

47. However, the Delegate also said an employer is not required to pay compensation for length of service if an employee quits or is dismissed for just cause. He explained Paladin had the onus to prove it did not need to give written notice or compensation for length of service to the Complainant. Paladin argued that it had just cause for dismissal because it was a condition of his employment that he work a minimum of eight hours per week and he did not meet this requirement. Paladin relied on its August 29, 2019 e-mail to the Complainant with the attached document outlining the expectations for members of the CRT.

48. The Delegate found the Complainant was terminated for cause. He concluded the August 29, 2019 e-mail and attachment was not a basis on which to find the Complainant was terminated for cause because it was only about eligibility requirements for CRT Tier 1 positions. But, the Delegate said the employment contract, section 2(c) stated any employee who has requested and been approved to work on an on-call or part-time basis must commit to working a minimum of one shift per pay period to maintain their employment status. This clause also said that failure to fulfil this term was a cause for termination.

49. The Delegate stated that if an employer wants to rely on company policy to support termination with cause, it must show that the policy is reasonable, has been clearly brought to the employee's attention, has been consistently applied and that the employee was put on notice that a breach of the policy could lead to serious disciplinary consequences.

50. Based on the employment contract and a November 27, 2019 e-mail from Paladin to the Complainant, the Delegate found Paladin could rely on its policy in section 2(c) of the employment contract to terminate the Complainant with cause.

51. The Delegate was satisfied that by signing the employment contract, the Complainant was, or should have been, aware of the policy that he had to work a minimum of one shift per pay period. In addition, this policy was brought to the Complainant's attention by the November 27, 2019 e-mail, which put him on notice about the consequences of not meeting this requirement. The Complainant responded to this e-mail and there was subsequent correspondence between the Complainant and Paladin, leading to termination on December 16, 2019.

52. While there was evidence to indicate the policy had not always been consistently applied, the Delegate did not accept that this rendered the policy entirely void. Although such inconsistency would typically

warrant additional leniency in terms of enforcing the policy, it was clear in the circumstances that the Complainant had no intention of complying with the policy at any time in the near future.

53. Finally, the Delegate held the policy was reasonable and there were legitimate business objectives for Paladin to require employees to work a minimum number of shifts over a particular period of time. Another indicator of reasonability was that the policy was not absolute: the Complainant was asked whether his absence had been approved. He confirmed he had not sought approval. The Delegate found it was reasonable to expect an employee wanting to stay employed would notify an employer of an anticipated absence in excess of three months, particularly if that absence resulted in their being entirely unavailable to work. The Complainant could have responded to Paladin's November 27, 2019 e-mail to let it know he intended to return from China because he wanted to maintain his employment, but he did not. The inference from his response was that he intended to remain in China until the end of February 2020, as he previously indicated. Considering the Complainant's entire evidence, the Delegate found he abandoned his employment with Paladin, and this was just cause for his dismissal.

Accrued interest

54. The Complainant was entitled to interest of $73.03, pursuant to section 88 of the *ESA*.

ARGUMENT

55. The Complainant says Paladin's e-mail terminating his employment, which says he abandoned his job because he did not contact it or work a shift by a certain deadline is wrong because he never indicated an intention to abandon his employment and in fact expressly told Paladin he wanted to continue his employment. With his Appeal Form, the Complainant submitted an e-mail (the "E-mail") he sent to Paladin on November 26, 2019. In the E-mail he stated he was taking a course in China until the end of February 2020, but he liked working for Paladin and wanted to continue his employment with it.

ANALYSIS

56. The only issue on appeal is whether the Complainant is entitled to compensation for length of service. The Complainant does not challenge any of the Delegate's other findings.

57. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

New evidence

58. The Complainant submitted a copy of the E-mail with his Appeal Form. The Complainant based his appeal on this e-mail, which he says is "*new evidence*". However, my review of the Record indicates this e-mail

was before the Delegate when he was making his Determination. New evidence in the context of an appeal to the Tribunal is evidence that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c); *Bruce Davies et al.*, BC EST # D171/03 at p. 3. Thus, the Complainant has no reasonable prospect of success on appeal based on new evidence.

59. I also considered whether the Delegate breached a principle of natural justice or erred in law.

Breach of natural justice

60. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them and have its case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.

61. There is nothing in the Appeal Form, Record, Determination or Reasons that indicates there was a breach of natural justice. The Complainant had an opportunity to make his case against Paladin, including an opportunity to provide documents and make arguments and his Complaints were heard by an impartial decision-maker. In fact, he was largely successful in his Complaints.

Error of law

62. I find the appeal has no reasonable prospect of success because of an error of law. The Delegate's conclusion that the Complainant abandoned his employment was not wrong in principle and was not unreasonable.

63. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

1. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
2. a misapplication by the decision-maker of an applicable principle of general law;
3. where a decision-maker acts without any evidence;
4. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
5. where the decision-maker is wrong in principle.

64. The Tribunal has adopted this definition: see e.g. *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

65. The Complainant says his E-mail (of November 26, 2019) means he never indicated an intention to abandon his employment with Paladin.

66. In making his Determination, the Delegate had the E-mail, as well as other evidence from the Complainant and Paladin about the circumstances of the Complainant's termination. Based on all of the evidence,

including the fact that the Complainant acknowledged that he did not intend to comply with the policy until after the end of February 2020 (three months later), the Delegate concluded he abandoned his employment with Paladin.

67. The Complainant's subjective intention of wanting to keep his job, expressed in the E-mail, indicated he did not intend to quit (i.e. "*abandon*") his job with Paladin, but it did not indicate whether at law, and objectively speaking, he quit his employment or not and whether this gave Paladin just cause to dismiss him. These were the issues the Delegate had to determine. The undisputed evidence was that the Complainant did not intend to work a shift for Paladin until at least after the end of February 2020, which was three months after Paladin explained he had to work at least one shift in any given pay period. Paladin also established on the evidence that this condition of employment was clearly brought to the Complainant's attention and he was put on notice that a breach of it could lead to termination. The Delegate also found the policy was reasonable. Although the policy was not always consistently applied, this did not make the policy void, although it would typically warrant additional leniency in terms of enforcing the policy. However, even if such leniency was applied, it was clear in the circumstances that the Complainant did not intend to comply with the policy until at least three months from the end of November 2019.

Summary

68. In summary, I find that the Complainant's appeal has no reasonable prospect of succeeding and therefore I dismiss it under sub-section 114(1)(f) of the *ESA*.

ORDER

69. Pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated July 17, 2020, confirmed in the amount of $3,491.92, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal