Employment Standards TRIBUNAL

Citation: TRASBC Freight Ltd. (Re)
2020 BCEST 128

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

TRASBC Freight Ltd.
("TRASBC")

- 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.: 2020/123

DATE OF DECISION: November 13, 2020

DECISION

SUBMISSIONS

Inderjit Aulakh on behalf of TRASBC Freight Ltd.

OVERVIEW

1. This is an appeal by TRASBC Freight Ltd. (the "Employer") 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 July 17, 2020.

2. An Employee of the Appellant filed a complaint alleging that the Employer contravened the *ESA* in failing to pay wages, compensation for length of service and annual vacation pay. Following an investigation, the Director concluded that the Employer had contravened sections 18, 40, 45, 58 and 63 of the *ESA*, and ordered the Employer to pay $13,852.18. The Director also imposed eight administrative penalties in the total amount of $4,000 for the contraventions, for a total amount owing of $17,852.18.

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

4. Section 114 of the *ESA* provides that the Employment Standards Tribunal (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 receiving the Employer's submissions, I decided not to seek submissions from the Employee or the Director.

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

FACTS AND ARGUMENT

6. The Employer operates a freight transportation business in New Westminster, B.C.

7. Mr. Aulakh is the Employer's sole director and officer.

8. The Employer employed Harsimran Chabra (the "Employee") as a truck driver until May 6, 2019. On May 30, 2019, the Employee filed a complaint alleging that the Employer had contravened the ESA.

9. The Employee contended that between February 7, 2019, and May 6, 2019, he worked 527.25 regular hours, 138.28 overtime hours and 6.5 hours on Good Friday. In support of his claim, he provided screenshots of text messages between himself and the Employer's dispatcher (the "dispatcher"), as well as trip sheets and inspection reports containing data such as dates, mileages, serial numbers of containers transported and identification of customers. The Employee asserted that the Drive Smart software logbook, which TRASBC submitted in response to the complaint, was capable of modification by the

Employer, and outlined how that was possible. The Employee identified several examples of differences between logins and logouts recorded by the software and those recorded in his documentary records.

10. The Employee said that he received only two payments during his employment, and that after he was involved in an accident with a company vehicle on May 6, 2019, he was not recalled to work. The Employee said that he contacted the Employer six times after the accident to inquire into his employment status and was told that he would need to reimburse TRASBC $25,000 for expenses related to the accident or he would not be permitted to return to work.

11. The Employer contended that although the parties entered into an employment contract on February 6, 2019, the Employee was only officially hired on March 16, 2019. The Employer contended that, on that date, the Employee was permitted access to all electronic Drive Smart software, which was used to calculate working hours from pre-trip inspection to the time the vehicle was shut off. The Employer contended that if the Employee worked prior to March 16, 2019, he was not aware of that and had not authorized it. The Employer argued that the hours the Employee alleged to have worked prior to March 16, 2019, related to training that the Employer had not authorized or agreed to.

12. On March 11, 2020, after investigating the complaint, a delegate of the Director issued a preliminary assessment in which he determined that the Employee had been employed since February 7, 2019, and that he was entitled to wages and compensation for length of service. Following that preliminary assessment, the Employer made a voluntary wage payment to the Employee of $4,954.00 representing regular and overtime wages, statutory holiday and vacation pay.

13. After receiving the delegate's preliminary assessment, the Employer confirmed that the Employee rode with other drivers prior to March 16, 2019. The Employer wrote that the Employee "was riding with our drivers before he received his work permit on February 7…" and suggested that he had not claimed those hours "likely because he was not permitted to work in Canada at the time. In our view, this strongly supports [our] position that [the Employee] was engaged in the ride-alongs of his own volition." The Employer contended that it would not have permitted the Employee to work without a valid work permit.

14. In addition to the two cheques issued to the Employee, the Employer contended that it provided the Employee with additional cash payments in the total amount of $3,000. The Employer contended that the Employee fabricated his driver log sheets and training hours.

15. The Employer also asserted that the trip logs and sheets submitted by the Employee were old forms that it stopped using in January 2018. The Employer claimed to be unaware of how the Employee had obtained the forms, suggesting that he had done so illegitimately. The Employer also argued that the containers the Employee claimed to have transported had been transported by another driver who the Employee accompanied on deliveries.

16. Finally, the Employer contended that it had not terminated the Employee's employment; rather, there were no trucks available to assign to him following the May 6, 2019 accident. It also asserted that even if a truck were available for him to drive, the Employee was driving without a valid BC Driver's licence, which prevented the Employer from allowing him to continue to drive.

The Determination

17. The delegate determined that the Employee commenced employment on February 7, 2019, based on text messages to the Employee from the dispatcher, which the delegate found offered "compelling proof of his claim to have been directed to work by [the Employer] prior to March 16, 2019." The delegate found these texts to have enhanced the Employee's credibility and diminished that of the Employer. The delegate found that the Employer was both aware of and authorized the Employee's work prior to March 16, 2019. The delegate noted that the Employer could not explain why the Employee would not have started work more than five weeks after the execution of the employment contract. The delegate also noted, in addition, that the Employer confirmed that the Employee was "riding with our drivers before he received his work permit on February 7."

18. In light of his decision on this point, the delegate also found that the Employer's records, which did not record the Employee's work prior to March 16, 2019, were not reliable. He wrote, in part, that "such a finding does not require that a problem exists with the software. Rather, the accuracy of the information generated by the software is only going to be as reliable as the data entered into it."

19. The delegate relied on the Employee's own records as being the most credible evidence of his hours of work. He also found that the Employee's explanation that he was accompanied by, or accompanied, another driver, for trips claimed in the name of another driver, to be reasonable.

20. The delegate noted that, even if the Employee was simply in training between February 7, 2019, and March 16, 2019, he was nevertheless entitled to be paid for his training time, under the *ESA* definition of "work."

21. The delegate further noted that the Employee was described in the employment contract as a long-haul truck driver, which conflicted with the Employee's evidence that he did not drive more than 160 kilometres from the home terminal. The delegate noted that the characterization of the Employee's position had implications under the *ESA* for overtime wages.

22. The delegate determined that the Employee was a short-haul truck driver based on the Employee's evidence that his work was entirely performed within a 160k radius from his home terminal. The delegate found that the Employee was thus entitled to overtime wages. The delegate calculated the Employee's entitlement to overtime and statutory holiday pay based on the Employee's records.

23. The delegate found that the Employee was entitled to one-week compensation for length of service based on his employment start date of February 7, 2019. The delegate noted the Employer's contention that it had not terminated the Employee's employment; rather, that there were simply no trucks available to assign to him. The delegate also noted the Employer's argument that the Employee had no valid driver's licence, and finally, that the accident was caused by the Employee's negligence.

24. The delegate found that the Employee was not called to work after May 6, 2019, and that there was no evidence supporting the Employer's assertion that the Employee was personally responsible for the vehicle accident. In noting that the Employee's December 10, 2019, driver's abstract contained no "convictions, discharges, and other actions," the delegate found that the Employer did not have just cause to terminate the Employee.

25. The delegate determined that the Employee was entitled to compensation for length of service, as well as annual vacation pay.

26. The delegate found that the Employer's assertion that it gave the Employee cash payments to be unsupported by any evidence.

Argument

27. Although the grounds of appeal are that the Director failed to comply with the principles of natural justice, nothing in the appeal submissions relate specifically to this ground of appeal.

28. Rather, the Employer argues that the delegate erred in the following ways:

1. Failing to review the Employer's documents in their entirety, breaching the Employer's right to a fair determination;
2. Failing to understand the evidence provided by the Employer due to a lack of inquiry; and
3. Preferring the evidence of the Employee over that of the Employer.

29. The Employer says that the Director erred in relying on text messages to the Employee from the dispatcher, dated February 17, 2019, to establish the Employee's start date as February 7, 2019. The Employer says that although it entered into an employment agreement with the Employee on February 6, 2019, the start date was intentionally left blank because the Employer was waiting for the Employee to obtain a valid driver's licence. The Employer says that the Employee commenced work without a licence because it was "showing 'good faith'" towards the Employee given his financial circumstances. The Employer says that they were aware the Employee was legally able to drive a truck in British Columbia with his then-current Ontario driver's licence for 90 days.

30. The Employer further argues that the delegate erred in discounting the Employer's position that the Employee had a separate and side arrangement with the dispatcher, an arrangement that the Employer had no knowledge of. The Employer notes that the dispatcher had no authority to hire or fire employees, or to provide training to potential employees.

31. The Employer further argues that, contrary to the findings of the delegate, any work done by the Employee was not for the Employer's benefit. It contends that the Employer cannot be held responsible for the arrangement between the dispatcher and the Employee.

32. The Employer contends that the delegate "misunderstood how training is implemented at [TRASBC]." As I understand the Employer's argument, the Employer does not train Employees as they only hire drivers who are already trained.

33. The Employer contends that the delegate erred in relying on the Employee's handwritten records over the Employer's digital records, which it says were maintained and operated by independent software companies. The Employer says that it cannot alter or enter information to edit an employee's activity and that the employee is responsible for submitting information into the digital program.

34. Finally, the Employer contends that the Employee was not entitled to compensation for length of service because his employment began March 17, 2019. Further, the Employer contends, the Employer suspended the Employee pending an ICBC investigation. The Employer says that the Employee's December 10, 2019, driving abstract would not reflect anything related to the accident because ICBC is still investigating it.

35. The Employer contends that the Employee was negligent and personally responsible for the accident because he was driving over the speed limit when it occurred. In support of this argument, the Employer submitted a description of the accident drawn by the Employee on May 14, 2019, as well as a driver statement.

ANALYSIS

36. 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 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.

37. 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.

38. 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)

39. 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

40. 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 Employer was denied natural justice.

41. The record discloses that on August 27, 2019, the parties appeared at an Employment Standards Branch mediation. Further, the record discloses that the delegate informed the Employer of the complaint as well as its opportunity to respond. On December 10, 2019, the delegate held a fact-finding conference at which the parties were invited to present evidence supporting their positions. On March 11, 2020, the delegate wrote to the parties informing them of his preliminary assessment and invited them to provide any additional information that might cause him to arrive at a different conclusion. On April 7, 2020, the delegate again wrote to the Employer informing it of his assessment of the Employee's claim and offering the Employer a further opportunity to provide additional information.

42. On May 12, 2020, the delegate once again wrote to the Employer noting the Employer's belief that some evidence had been overlooked and explained his reason for preferring the Employee's evidence over that of the Employer.

43. I find that the Employer had every opportunity to respond to the Employee's complaint. There are no allegations, nor is there any evidence, that the delegate was biased.

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

Error of Law

45. 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.

46. The Employer's arguments appear to be that the delegate acted without any evidence or acted on a view of the facts that cannot reasonably be entertained.

47. The Employer also argues that the delegate erred in preferring the Employee's evidence over that of the Employer.

48. Credibility assessments are to be made by the decision maker; in this case, the Director's delegate. The Tribunal will not interfere with the delegate's credibility assessment unless a party can make a clear and persuasive argument on appeal that that the delegate's decision was unsupported by the facts.

49. I find that the delegate's decision to prefer the evidence of the Employee over that of the Employer to be supportable on the evidence. The delegate offered the Employer an opportunity to explain why, after entering into a contract of employment with the Employee on February 6, 2019, he did not pay the Employee for work until March 16, 2019.

50. The Employer offered a number of explanations, including that the Employee did not have a valid work permit, that the Employee was simply "riding-along" with other drivers, and because the Employee did not have a valid driver's licence. The Employer also said that even though the Employee did not have a valid driver's licence, the Employer nevertheless permitted the Employee to start work because he had a valid licence out of Ontario. When asked to explain the text messages from the Employer's dispatcher instructing the Employee to report for work, the Employer simply said that there was a side agreement between the dispatcher and the Employee, without providing any information from the dispatcher. Although the Employer argues on appeal that the Employer had no control over the dispatcher, I find the delegate's conclusion - that it was not reasonable for the dispatcher to be directing the Employee without the Employer's knowledge - to be a rational one.

51. Furthermore, on appeal, the Employer contends that the dispatcher's texts messages to the Employee to "going along" with the driver that the dispatcher is simply doing the Employee "a favour." In my view, this argument supports the Employee's contention that he was working for the Employer prior to March 31, 2019.

52. The test of an employment relationship is not solely whether the Employee was performing tasks that were of benefit to the Employer. Whether or not the Employee was simply accompanying another driver to familiarize himself with routes and schedules as a trainee or not, the time spent by the Employee is considered work under the *ESA*. (Section 1 of the *ESA* defines employee to include a person being trained by an employer for the employer's business)

53. I find the delegate's assessment of the Employer's lack of credibility was well supported by the inconsistent explanations and the fact that the dispatcher continued to be employed by the Employer. The record also discloses that on July 2, 2019, the Employer filed a civil action in the Supreme Court of British Columbia in which it claimed that the Employee was hired as a truck driver and operator on or about February 7, 2019.

54. The Employer also contends that the delegate erred in finding the Employee's documentation to be reliable, and in preferring the Employee's handwritten trip records over the Employer's digital trip records. I am unable to find that the delegate acted without any evidence, or that his conclusions were not rationally supported by the evidence before him. The delegate found that the software could only record information that was input into it. Although the Employer argues that employees are responsible for submitting information into the digital program, a failure to input information into the "system" does not lead to a conclusion that the Employee's handwritten records were inaccurate or unreliable.

55. The Employee submitted handwritten trip records containing details that could easily have been refuted by the Employer, such as the Truck number, odometer readings, gas receipts, container numbers and the name of the customer. It is easy for the Employer to simply say the records were falsified, without providing any evidence that the customer did not receive the delivery, or other documents refuting the odometer readings. I am not persuaded that the delegate's conclusions were unsupported by any evidence.

56. Finally, the Employer contends that the delegate erred in finding that the Employee was entitled to compensation for length of service.

57. The delegate correctly noted that the burden of establishing just cause, thereby relieving the Employer from paying compensation for length of service, rests on the Employer. In response to the Employee's claim, the Employer advanced a number of conflicting arguments. Firstly, the Employer informed the delegate that it had not terminated the Employee; rather, it simply had not recalled the Employee because there were no trucks for him to drive. The Employer also made a number of allegations of negligence. On appeal, the Employer contends that the Employee was merely suspended until ICBC completed its investigation, and secondly, that the Employee was negligent and personally responsible for the accident, providing the Employer with grounds for termination. Given the Employer's conflicting, inconsistent and changing reasons explaining why the Employee no longer working for the Employer, I find no error in the delegate's conclusion that the Employer had not met the burden of showing just cause and that the Employee was entitled to compensation for length of service.

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

New evidence

59. In *Re Merilus Technologies* (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;
>
> (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.

60. The Employer submitted a driver statement and map drawn by the Employee following the accident, as new evidence on appeal. This material does not meet the test for new evidence as it clearly was available during the investigation of the complaint and ought to have been provided to the delegate. Furthermore, even if this information met the test for new evidence, I am not persuaded that it would have led the delegate to a different conclusion on the material issue before him. The Employer's reason for the fact

that the Employee no longer worked for him was that it had no truck for him to drive, not the fact that he was in an accident.

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

ORDER

62. Pursuant to section 115 of the *ESA*, I order that the Determination dated July 17, 2020, be confirmed in the amount of $17,852.18, together with whatever interest that has accrued, pursuant to section 88 of the *ESA*.

Carol L. Roberts
Member
Employment Standards Tribunal