

Citation: Everlasting Stucco & Stone Ltd. (Re)
2020 BCEST 136

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Everlasting Stucco & Stone Ltd.
("Everlasting Stucco")

- 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.: 2020/081

DATE OF DECISION: November 23, 2020

DECISION

SUBMISSIONS

Scott D. Chambers	counsel for Everlasting Stucco & Stone Ltd.
Amarjeet Singh Saini	on his own behalf
Rajesh Kumar	on his own behalf
Courtney Milburn	delegate of the Director of Employment Standards

OVERVIEW

1. Everlasting Stucco & Stone Ltd. (“Everlasting Stucco”) has filed an appeal under section 112 of the *Employment Standards Act* (the “ESA”) of a Determination issued by Courtney Milburn, a delegate of the Director of Employment Standards (the “Director”) on April 17, 2020.
2. The Determination found Everlasting Stucco had contravened Part 3, sections 17, 18 and 28, Part 4, section 40 and Part 5, section 46 of the *ESA* in respect of the employment of Rajesh Kumar, Fateh Singh and Amarjeet Singh Saini (collectively, the “Complainants”) and ordered Everlasting Stucco to pay the Complainants wages in the amount of \$90,648.10, an amount that also included interest under section 88 of the *ESA* and concomitant vacation pay, and to pay administrative penalties in the amount of \$2,500.00. The total amount of the Determination is \$93,148.10.
3. This appeal is grounded in an alleged error of law and a failure by the Director to observe principles of natural justice in making the Determination. Everlasting Stucco seeks to have the Tribunal allow the appeal and, although not clearly expressed in the appeal or the supporting submission, cancel the Determination.
4. In correspondence dated May 28, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and advised that following such review all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to counsel for Everlasting Stucco and to the Complainants. An opportunity has been provided to those parties to object to its completeness. Counsel for Everlasting Stucco has acknowledged the completeness of the record and there has been no objection to its completeness from any other party. Accordingly, the Tribunal accepts the record as being complete.
6. I reviewed the appeal and decided to seek submissions on its merits. The responding parties have been provided with the opportunity to make submissions on the merits. Submissions have been delivered on behalf of the Director, by Rajesh Kumar and Amarjeet Singh Saini. Everlasting Stucco has been provided with those submissions and given the opportunity for reply but has not filed any reply submission.

ISSUE

7. The issue here is whether Everlasting Stucco has shown any reviewable error in the Determination or if the appeal should be dismissed as not showing any error.

THE FACTS

8. Everlasting Stucco operates a residential and commercial construction business in and around Kelowna, BC. The Determination indicates Everlasting Stucco was incorporated in the province on April 13, 2018. Harkanwaldeep Singh (“Mr. Singh”) is listed as the sole director. Mr. Singh is also listed as an active sole proprietorship, Harkanwaldeep Singh carrying on business as Everlasting Stucco & Stone.
9. The Complainants were hired by Mr. Singh as stucco plasterers. The Director found that Fateh Singh and Amarjeet Singh Saini commenced their employment on February 11, 2018; that Rajesh Kumar commenced his employment on April 24, 2018; and that Everlasting Stucco was the Complainants’ employer throughout their period of employment.
10. The Complainants were hired through the Temporary Foreign Workers Program and were listed on the Labour Market Impact Assessment (“LMIA”) issued by Service Canada as prospective employees of Harkanwaldeep Singh carrying on business as Everlasting Stucco & Stone. There are employment contracts between Mr. Singh and each of the Complainants which contain, among other things, the duration of the contract, a description of the job, wages and other conditions and a process for terminating the services of the temporary foreign worker. The employment contract of each of the Complainants has a term of 24 months from the first day of employment. Other documents created in the context of an LMIA application include ‘Attestations’ signed by Mr. Singh as the employer that primarily address the employment of the temporary foreign worker and the employer’s obligations under the program.
11. Everlasting Stucco contended there were two entities involved in the employment of the Complainants, the sole proprietorship, which employed the Complainants under the terms of the LMIA until March 2018, when they were terminated from the sole proprietorship and hired by the corporate entity under significantly different terms – a wage reduction of \$10 per hour, no overtime and no statutory holiday pay. Everlasting Stucco contended each of the Complainants voluntarily agreed to the changes in their terms of employment.
12. The Complainants said they never agreed with the changes but did not complain for fear of jeopardizing their immigration status.
13. The Director rejected the contention made by Everlasting Stucco that there were two distinct entities involved in the employment of the Complainants.
14. The Director also rejected the contention of Everlasting Stucco that the Complainants were terminated by the sole proprietorship in March 2018 and rehired shortly thereafter by the corporate entity under different terms. The Director stated that Everlasting Stucco had “provided no records, such as Records of Employment, termination letters, or final paycheques” demonstrating the Complainants’ termination in March 2018. The only evidence provided by Everlasting Stucco – affidavits, one by Mr. Singh and the

other by Onkar Singh, a current employee of Everlasting Stucco – were rejected by the Director as being vague and inconsistent with established facts. The Director found there was one continuous period of employment for the Complainants and, as noted above, that Everlasting Stucco was the employer of record during the wage recovery period.

15. All of the Complainants' employment was terminated on June 13, 2019.
16. Following their termination, the Complainants filed complaints alleging Everlasting Stucco had contravened the *ESA* by failing to pay wages for all hours worked, overtime, annual vacation and statutory holiday pay. They also alleged a contravention of section 10 of the *ESA*. The Director found this aspect of the complaint was not made within the time period provided in section 74(4) of the *ESA* and took no action on it. This finding has not been appealed and will not be addressed in this decision.
17. The Complainants contended that, notwithstanding what was set out in the LMIA, they were never paid the wage rate reflected in the LMIA for all of the hours they worked. The claims of the Complainants were supported by objective evidence which was accepted by the Director as accurate.
18. The Director found the wage recovery period was June 14, 2018 to June 13, 2019.
19. Everlasting Stucco acknowledged it had failed to maintain accurate payroll records. The Director accepted the records provided by the Complainants. The reasons for doing so are set out on pages R6 – R8 in the Determination.
20. The Director found the Complainants were owed wages, based on the rates and conditions found in the LMIA, in the amounts calculated in the Determination.

ARGUMENT

21. Everlasting Stucco submits the Determination is “founded upon errors of fact or misinterpretations of the evidence which have resulted in the Director having made an error in law in making its Determination which has further resulted in a failure to observe the principles of natural justice”.
22. It is unnecessary to attempt to summarize all elements of the argument made by Everlasting Stucco, but the central points of argument are as follows:
 - i. the Director erred in finding the Complainants were not fired by the sole proprietorship and rehired by the corporate entity under different terms of employment;
 - ii. the Director erred in analyzing the evidence upon which the decision to substantially reject the assertions made in the affidavits of Mr. Singh and Onkar Singh was made;
 - iii. the Director erred by failing to properly address the legal distinction between the sole proprietorship and the corporate entity when considering the position of Everlasting Stucco that the Complainants were dismissed by the sole proprietorship and rehired by the corporate entity on different terms;
 - iv. the Director erred by finding the employment of the Complainants was uninterrupted; and

- v. the Director erred by inferring the employment terms agreed to by the sole proprietorship with each of the Complainants to the corporate entity.
23. The submission of the Director initially notes several aspects of the Determination have not been contested by Everlasting Stucco: that Everlasting Stucco was the Complainants' employer during the recovery period; the calculation of the hours worked by the Complainants; that Everlasting Stucco failed to pay the Complainants overtime, annual vacation pay and statutory holiday pay; and that Everlasting Stucco failed to keep proper employer records.
24. In response to each of the points of argument made in the appeal, and listed above, the Director submits:
- i. the finding made on the alleged termination and rehiring of the Complainants was supported on the evidence;
 - ii. the reasons for rejecting the affidavits of Mr. Singh and Onkar Singh are set out in the Determination and are supported on the evidence provided;
 - iii. the facts support the finding that the transition from the sole proprietorship to the corporate entity as the paying employer was "uninterrupted";
 - iv. there was no "termination" of the Complainants' employment by the sole proprietorship and subsequent employment by Everlasting Stucco – the Complainants were employed, on the terms set out in the LMIA, to perform the work of stucco plasterers and performed that work continuously from their date of hiring until their termination; and
 - v. based on all of the evidence, and for the purposes of deciding the complaints, the transition from the sole proprietorship to the corporate entity did not alter the terms of employment of each of the Complainants.
25. In his submission, Amarjeet Singh Saini confirms the information he provided to the Director during the investigation of his complaint. Particularly, he agrees with the finding of the Director that there was no termination of his employment in, or around March 2018. He says Mr. Singh changed his terms and conditions of employment without his agreement.
26. In his submission, Rajesh Kumar also agrees with the findings of the Director on whether he was terminated and agreed to be rehired on terms and conditions that were substantially inferior to what was in the LMIA employment contract. He says he was not terminated and did not agree to be rehired on inferior terms and conditions of employment.

ANALYSIS

27. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.

28. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
29. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
30. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
31. Everlasting Stucco has raised the error of law and natural justice grounds of appeal.
32. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.
33. I am able to address Everlasting Stucco's natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)
34. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Everlasting Stucco was provided with the opportunity required by principles of natural justice to present their position to the Director. Everlasting Stucco has provided no objectively acceptable evidence showing otherwise.
35. It is not a breach of principles of natural justice to make findings on the evidence that do not accord with the position of one of the parties in the complaint process.
36. The submission made on behalf of Everlasting Stucco does not provide argument or analysis demonstrating any relationship between the Determination and a principle of natural justice that might operate in the circumstances and with which the Director failed to comply.
37. There is simply no factual or legal basis for this ground of appeal, it has no merit and it is dismissed.

38. 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.
39. While Everlasting Stucco has not identified error of law as a ground of appeal on its appeal form, it is identified in the appeal submission and each of the arguments made in support of the appeal raises an element of the error of law ground of appeal: error on the facts; error in analyzing the evidence; misapplication of general law and provisions of the *ESA*.
40. In this context, I reiterate that the statutory grounds of appeal do not provide for an appeal based on errors of fact, *simpliciter*, and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law.
41. The test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.
42. To expand the above point, in order to establish the Director committed an error of law on the facts, Everlasting Stucco would be required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D042/13, at paras. 26 – 29.
43. Considering the above definition against each of the arguments raised, I do not find Everlasting Stucco has demonstrated the Director has made any error of law.
44. Everlasting Stucco says the Director erred on the facts in finding the Complainants were not fired in March 2018 and rehired under different terms of employment. Everlasting Stucco challenges a position attributed to Everlasting Stucco in the Determination that the Complainants were fired and “immediately” rehired under different terms.
45. At its root this argument challenges a finding of fact made by the Director and the principles stated above are applicable. It is directly aimed at the conclusion by the Director that there was no termination and rehiring and, consequently, no agreement by the Complainants to end the LMIA agreement and enter into new employment at considerably inferior wage rates, and other conditions, than those contained in the LMIA employment contract.

46. The evidence, referred to in the Determination and found on the record, does not show the finding, and the challenged characterization of the position taken by Everlasting Stucco, was an error of law. The finding, and the characterization, is adequately supported by the evidence, which in the words of the Director includes, “hiring dates documented on immigration forms, payroll records which show the uninterrupted payment of wages through the alleged termination period, and employment confirmation letters provided by [Everlasting Stucco]”.
47. Everlasting Stucco submits the Director erred in assessing the credibility of the evidence provided in the affidavits from Mr. Singh and Onkar Singh. The contention that the Complainants were fired and rehired, which I have found was justifiably rejected by the Director, is also central to this part of the appeal argument. The other part of this argument is that the Director committed an error by failing to provide “adequate” reasons for concluding the affidavits provided were “inconsistent”.
48. I disagree. The Director identified several concerns with the affidavits compared with other evidence which was found to be more compelling, some of which is identified above and includes statements and evidence from the Complainants, information documented on immigration forms, payroll records, letters prepared by Everlasting Stucco and provided to the Complainants and the absence of legally required records and other material that might corroborate the assertions made in the affidavits. I find the reasons provided adequately identified the basis upon which the Director rejected the affidavit evidence.
49. Everlasting Stucco argues the Director erred by failing to recognize the distinction between the sole proprietorship and the corporate entity. For the purposes of the *ESA*, however, there is no distinction between the sole proprietorship and the corporate entity.
50. To be clear, the finding made by the Director is that there was no evidence the Complainants were dismissed at all by the sole proprietorship and rehired by the corporate entity.
51. That finding by the Director, which I have found to be supported by the evidence and has not been shown to be an error of law, and the evidence that the sole proprietorship “transitioned” to the corporate entity Everlasting Stucco is exactly the kind of circumstance caught by section 97 of the *ESA*, which exists in the *ESA* to protect the employment and conditions of employment of employees in a disposition of all or part of the assets of a business.
52. I am not certain why the Director did not reference section 97 of the *ESA*; it is a deficiency in the Determination, but only a minor one as all of the facts are present to cause that provision to apply. Also, section 97 does not require an action by the Director, it applies to any disposition that falls within its language.
53. Section 97 of the *ESA* reads:
- Sale of business or assets**
- 97 If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

54. The transition from the sole proprietorship to Everlasting Stucco is a disposition under section 97 of the *ESA*. In *Lari Mitchell and others*, BC EST # D107/98 (Reconsideration of BC EST # D314/97), the leading case on section 97, the Tribunal stated, at page 11:

We note that the language of section 97 is broad in scope. Although it is natural to speak of section 97 in relation to the “sale” of a business, it is the word “disposed” that is used in the legislation. Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 defines “dispose” as follows:

“dispose” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

The point we wish to make is that the language of section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer.

55. See also *Spirit Ridge Resort Holdings Ltd.*, BC EST # RD119/12 (Reconsideration of BC EST # D070/12) at paras. 40 – 45.

56. To reiterate what I said immediately above, the findings of the Director and the very clear evidence, gained through submissions made by Everlasting Stucco and evidence provided by Everlasting Stucco and the Complainants, the business that employed the Complainants was the same before and after the “transition”. By operation of that provision, the employment of the Complainants, and the terms and conditions of employment expressed in the LMIA employment contracts, was continuous and unaltered by the disposition.

57. As a consequence, the provisions of the *ESA* have the effect of binding the corporate entity to the same employment obligations as were held by the sole proprietorship.

58. The Director made no error in enforcing the terms of the LMIA employment contracts on Everlasting Stucco.

59. Based on all of the above, I find Everlasting Stucco has not shown a reviewable error in the Determination; this appeal has no merit and is dismissed.

ORDER

60. Pursuant to section 115 of the *ESA*, I order the Determination dated April 17, 2020 be confirmed in the amount of \$93,148.10, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal