Citation: Central Villa Sand & Gravel Ltd. (Re)
2020 BCEST 145

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Central Villa Sand & Gravel Ltd.
(the "Employer")

- 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.: 2020/137

DATE OF DECISION: December 09, 2020

DECISION

SUBMISSIONS

Sarbjit Dult — on behalf of Central Villa Sand & Gravel Ltd.

OVERVIEW

1. This is an appeal by Central Villa Sand & Gravel Ltd., (the "Employer") of an August 25, 2020 Determination issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director found that the Employer had contravened sections 21 and 58 of the *Employment Standards Act* (the "*ESA*") and section 37.3 of the *Employment Standard Regulation* (the "*Regulation*") in failing to pay a former Employee overtime and vacation wages, and for making unauthorized deductions from the Employee's wages. The Director determined that the Employer owed wages and interest in the total amount of $6,017.22. The Director also imposed three $500 administrative penalty on the Employer for the contraventions, for a total amount payable of $7,517.22.

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

4. Section 114 of the *ESA* provides that 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 reviewing the appeal submissions, I found it unnecessary to seek submissions from the Employer or the Director.

5. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the submissions of the Employer, and the Reasons for the Determination.

FACTS

6. The Employer operates a trucking company in Surrey, British Columbia. Patrick Morin (the "Employee") was employed as a short haul truck driver from September 24, 2018, until March 21, 2019. The Employee filed a complaint alleging that the Employer had contravened the *ESA* by failing to pay him regular and overtime wages, and by requiring him to pay a business cost.

7. The Director's delegate held a hearing into the complaint on August 23, 2019, following which she conducted an investigation.

8. The Employee worked Monday through Friday hauling and dumping materials between job sites. He alleged that he frequently worked over nine hours per day but was never paid overtime. The Employee conducted both pre-trip and post-trip inspections of the truck he was to drive, logging the inspection reports in a Vehicle Inspection Report. By law, those inspection reports were to remain with the truck at all times. The original Inspection Report remained in the truck, while the Employee took carbon copies of

the reports from the truck once or twice a month. The Inspection Reports for certain days were missing, which the Employee believed represented days he drove a different truck.

9. The parties agreed that the Employee was to be paid from the time he drove out of the yard until the time he returned. Although the Employee completed a time sheet each day which captured these times, he did not agree that the time sheet captured all his work hours. He asserted that he spent additional time inspecting his truck, work that the Employer required him to do. The Employee estimated that the pre-trip inspection took him about half an hour while the post-trip inspection was usually brief. The Employee disagreed that the truck's GPS log was the most reliable indicator of time worked, because the time he spent inspecting the truck occurred before the engine was started.

10. The Employer contended that a pre-trip inspection should take 10 minutes at most, and much of the inspection required the engine to be turned on. As such, the Employer took the view that the time spent by the Employee was accounted for in the vehicle GPS log.

11. The Employee also said that he never took lunch or coffee breaks, largely because it was difficult for him to find parking for his vehicle, and that he would eat his lunch while working in his vehicle. The Employer contended that it did not monitor the Employee's break times, and that the Employee could take them at any time during the day.

12. The Employee said that he never requested overtime pay because the Employer's policy was to pay all hours at the regular wage rate. The Employer agreed that it paid the Employee according to the time recorded on the timesheets and that the Employee never had any issues with the way he was paid.

13. There was no dispute that the Employee had not received his wages for the period March 11 until his last day of work on March 21, 2019.

14. In February 2019, the Employer transferred ownership of one of its vehicles to the Employee for his personal use while he was employed, largely because the Employee was able to obtain a cheaper insurance rate. Although the transfer was a nominal transfer in the sense that the Employee did not actually pay any money to the Employer for the vehicle, the Employee did pay the transfer tax.

15. On March 19, 2019, the Employer asked the Employee to take the truck he was driving to get a tire rim repair. The repair shop refused to allow the Employer to charge the expense, so the Employee put the cost on his personal credit card. The Employer later told the Employee that the bill was his responsibility because he had damaged the rim. The Employer later refused to pay the Employee for the cost of the rim repair and to pay him his final wages until the Employee transferred the ownership of the vehicle back to the Employer. The dispute over this payment led to the end of the employment relationship.

16. The Employee brought the Inspection Report for the truck he normally drove to the hearing. The Employer did not challenge the authenticity of the report.

17. Following the hearing, the delegate had to obtain further information regarding the Inspection Report as it had only been disclosed on the day of the hearing.

18. The delegate issued a preliminary assessment letter on June 17, 2020, and the parties were given an opportunity to respond to that letter prior to the issuance of the Determination. The preliminary assessment letter is substantially the same as the final Determination. There is nothing in the record that shows that the Employer responded to the preliminary assessment letter.

19. The delegate found that the Employee was entitled to be paid for the time he spent inspecting the vehicle. She determined that it was work performed for the Employer, at the direction of the Employer.

20. The delegate also found that the Inspection Reports completed by the Employee were the best evidence of the Employee's hours of work. She found that, even though the Employer argued that it was possible that drivers could record extra hours of work, the Employer had actually paid the Employee based on the timesheets. Further, the delegate noted that the Employer did not dispute the accuracy of the hours logged in the Inspection Reports. She decided that, had the Employer noted a discrepancy of hours after a review of the Inspection Reports, it was reasonable that it would have raised that. Finally, the delegate noted that the start time recorded on the Inspection Reports was approximately 30 to 40 minutes earlier than the GPS log, which was consistent with the Employee's evidence regarding how long it took him to complete his inspection report with the engine off. The delegate determined that the Employee started work 30 minutes before the time recorded in the GPS log. The delegate determined, based on those Inspection Reports that the Employee was entitled to additional wages. She found that the Employee did no work during the periods of time in which there were no Inspection Reports, timesheets or GPS logs. She also determined that the Employee had not been paid for work performed after March 10, 2019.

21. Finally, the delegate noted that there was no dispute that the Employer had not reimbursed the Employee for costs incurred by the Employee for repairing the rim of the Employer's vehicle. She noted that the Employer did not dispute that this cost was a business cost and determined that the Employer had no legal basis to withhold the funds. She noted that property disputes were not within the jurisdiction of the Director.

22. The delegate found that the Employee was not entitled to additional wages because he did not take proper lunch breaks. She determined that the Employee was paid for his lunch break, which he was expected to take. She concluded that if an employee worked through a paid lunch break, no additional wages were owed.

ARGUMENT

23. The Employer says that the reason the Employee was not paid was because "he did not accept the cheques" (representing the last pay period and reimbursement for repairs) and did not return the Employer's vehicle. The Employer says that the Employee has still not returned the vehicle.

24. The Employer makes other statements in the appeal submission, including that the Employer did the Employee a favour by giving him a vehicle to come to work, and that the Employer lost income as a result of not having the vehicle returned. The Employer also says it did a lot of other favours to assist the Employee and suggests that it is now being ordered to pay "unfair penalties and interest."

25. The Employer seeks to have the penalties and interest "waived" because they are unfair, and because, like other small businesses, it is struggling financially during these difficult times.

ANALYSIS

26. 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.

27. Section 112 of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:

(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. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that the Employer has done so in this case.

29. An appeal is not an opportunity to re-argue a case. Although the Employer's ground of appeal is that the delegate failed to observe the principles of natural justice, in substance, the appeal is nothing more than a disagreement with the result and an assertion that the imposition of administrative penalties for the Employer's contravention of the *ESA* and the *Regulation* is unfair.

30. 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.

31. The record discloses that the parties participated in a mediation prior to the complaint hearing. The mediation was unsuccessful, and the delegate conducted a hearing followed by a brief investigation on a narrow issue.

32. I am satisfied that the Employer was made aware of the details of the complaint and was given full opportunity to respond, including the opportunity to present evidence and question the Employee at a hearing. I find no basis for this ground of appeal.

33. The Employer does not dispute that it withheld the Employee's final pay cheque and did not reimburse him for costs that were properly the Employer's business expenses. The delegate found that the Employer

had no legal basis to withhold pay or reimbursement costs and consequently, found the Employer in contravention of the *ESA* and *Regulation*.

34. Section 98 of the *ESA* requires that the Director impose a monetary penalty, the amount of which is prescribed by *Regulation*, for a contravention of either the *ESA* or the *Regulation*. In other words, the penalty is mandatory once a contravention is found, and the Director has no ability to, in essence, "waive" that penalty.

35. I find no error of law in the Director's finding of a contravention, nor his decision to impose administrative penalties for the contraventions. The Tribunal has no authority to "waive" penalties on the basis that they are, in the Employer's view, "unfair". Absent bad faith or abuse of process, the Tribunal may only cancel penalties if it determines that that there were no grounds for finding a contravention. (see also *Kopchuk*, BC EST # D049/05) The Employer did not argue, and I do not find, that the delegate's finding of the contraventions was in error.

36. I dismiss the appeal under section 114(1) of the *ESA*.

ORDER

37. Pursuant to section 115 of the *ESA*, the Determination, dated August 25, 2020, is confirmed in the amount of $7,517.22, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal