

Citation: Murphy's APM Services Ltd. (Re)
2020 BCEST 23

An appeal

- by -

Murphy's APM Services Ltd.
(the "Company")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Allison Tremblay

FILE NO.: 2019/174

DATE OF DECISION: March 13, 2020

DECISION

SUBMISSIONS

Andrew Murphy and Michael Murphy	on behalf of Murphy's APM Services Ltd. carrying on business as Dundarave Automotive
Graeme Watson	on his own behalf
Tami Wilson	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "ESA"), Murphy's APM Services Ltd. carrying on business as Dundarave Automotive (the "Company") seeks to appeal the August 26, 2019, determination (the "Determination") of the Director of Employment Standards (the "Director").
2. In the Determination, a delegate of the Director (the "Delegate") found that the Company failed to pay all wages owing to four employees. The Company had agreed it did not pay wages but disputed the amounts.
3. In its appeal, the Company argues the Delegate made a mistake when calculating owing statutory holiday pay. It also makes what amounts to an argument based on new evidence of an averaging agreement with the employees which would reduce the amount of overtime owing.

ISSUES

4. Did the Delegate err when calculating statutory holiday pay owing?
5. Was the Company denied natural justice?
6. Should the Tribunal accept the new evidence? If so, does the new evidence change the Delegate's assessment of overtime owing?

ARGUMENT

7. The Company argued that the February 2019 statutory holiday was on February 18, 2019: after all the employees were terminated. The Delegate based her calculations as if the holiday fell on February 11, 2019. The Delegate, in her submission, acknowledged this mistake, which occurred due to a computer error which has since been corrected. The Delegate accordingly acceded to this ground of appeal.
8. The Company argued that it had an averaging agreement with its employees under section 37 of the *ESA*. It argued the Delegate did not give it the opportunity to present this evidence. The Company did not present any documents or other evidence to back up its assertion that the employees worked under averaging agreements.

9. The Delegate responded that she gave the company multiple opportunities to present evidence and records, and the Company did not present any evidence of averaging agreements during the investigation of the complaints.
10. Mr. Watson, one of the affected employees, provided a submission that argues about a matter that is not subject to appeal. I decline to consider it.

THE FACTS AND ANALYSIS

11. The Delegate awarded two employees statutory holiday pay under section 46 of the *ESA* (listed as section 45 in the Determination) for work performed on February 11, 2019. February 11, 2019 was not a statutory holiday in British Columbia. Neither employee was employed by the Company on the February 18, 2019 statutory holiday. The Delegate agreed that these amounts were awarded in error.
12. The Company argues it was denied the opportunity to provide evidence about alleged averaging agreements it had with employees which would reduce or eliminate its obligation to pay overtime. The Record provided by the Director contains copies of correspondence the Delegate sent to the Company. Significantly, a letter from the Delegate to the Company on May 17, 2019, referred specifically to overtime calculations and attached an information sheet entitled “*ESA Section 40 - Overtime wages for employees not working under an averaging agreement.*” That letter requested that the Company provide any reasons to dispute the Delegate’s initial calculations which included overtime owing. The Company responded by letter and did not mention an averaging agreement. The Company had ample opportunity to present its evidence and argument with respect to overtime. I find the requirements of natural justice were met.
13. The Tribunal only considers new evidence when that evidence was not available during the Director’s investigation of the complaint and could not have been discovered with reasonable diligence: *ESA*, section 112; *Re Bruce Davies et al*, BC EST # D171/03. The Company’s argument about averaging agreements, and any evidence it had in support of that argument, could have and ought to have been presented during the investigation of the Complaint. The evidence does not meet the test for acceptance on appeal and I decline to consider it.

ORDER

14. The appeal succeeds with respect to statutory holiday pay. In accordance with section 115(1)(b) of the *ESA*, the Determination is referred back to the director for recalculation of the amounts owing in accordance with this award.

Allison Tremblay
Member
Employment Standards Tribunal