

An appeal

- by -

Hera Studios Inc.  
("Hera")

- 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:** Marnee Pearce

**FILE NO.:** 2019/187

**DATE OF DECISION:** April 6, 2020

## DECISION

### SUBMISSIONS

Agnon Wong on behalf of Hera Studios Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“*ESA*”), Hera Studios Inc. (“Hera”) has filed an appeal of a determination (the “*Determination*”) issued by Vivian Tran, a delegate (the “*Delegate*”) of the Director of Employment Standards (the “*Director*”) dated September 27, 2019.
2. On January 24, 2019, Brendan Kim (“Mr. Kim”) filed a complaint with the Director alleging that Hera contravened the *ESA* by failing to pay him regular and overtime wages, compensation for length of service, and by unauthorized deductions, in particular, banked time hours were deducted without compensation.
3. Following an investigation into the complaint, the Delegate concluded that Hera had contravened sections 40 and 46 of the *ESA* by failing to pay Mr. Kim overtime wages and statutory holiday pay. The delegate ordered Hera to pay \$2,310.48 in respect of those wages and interest.
4. The Delegate also imposed mandatory penalties for Hera’s contravention of sections 17, 18, 40, and 46 of the *ESA*. In keeping with the set penalty amounts, Hera’s total administrative penalty amount is \$2,500.00.
5. Hera’s appeal, dated November 1, 2019, is on the grounds that the Director erred in law and that the Director failed to observe the principles of natural justice in making the *Determination*.
6. This decision is based on the written submissions of the parties, the section 112(5) “record” that was before the delegate at the time the *Determination* was made, and the reasons for the *Determination*.

### ISSUE

7. Did the Delegate err in law or fail to observe the principles of natural justice when she imposed 5 administrative penalties on Hera?

### FACTS

8. Hera is a company duly incorporated under the laws of British Columbia and operates a wedding photography and videography business in Richmond which falls within the jurisdiction of the *ESA*. A January 28, 2019 on-line BC Registry Services search shows that Hera was incorporated on August 24, 2015, and that Agnon Wong (“Mr. Wong”) is listed as the sole director and officer.
9. Mr. Kim was employed as a wedding videographer from April 2018 to August 2018. He signed an employment contract on January 29, 2018, with the starting salary of \$3,200.00 per month and expected hours of 40 hours per week (the “*Contract*”). Mr. Kim attended 3 half-day training sessions in April 2018

and commenced work on May 5, 2018. He was paid \$1,600.00 on the 1<sup>st</sup> and 15<sup>th</sup> of every month until July 20, 2018, when his salary increased to \$3,500.00 per month and he received \$1,750 twice a month.

10. In August 2018, Mr. Wong told Mr. Kim his overtime hours were being banked and would be returned to him at a later date. Mr. Kim asked that the overtime be paid to him and Mr. Wong denied his request, stating that banking the hours was the only option.
11. On August 23, 2018, Hera terminated Mr. Kim's employment.
12. Mr. Kim argued the averaging agreement clause in the contract was invalid because it did not have a specific start date, an end date, or a work schedule. Further, the overtime bank was unilaterally instated by Hera, also contrary to the *ESA*.
13. Hera agreed that the averaging agreement clause was invalid and agreed they had not followed the *ESA* regarding banked overtime. Even so, Mr. Kim wasn't owed additional hours.
14. Hera did not pay any banked overtime to Mr. Kim because even though he did not always work a 40-hour work week, he was paid a flat rate twice a month based on a 40-hour work week. A spreadsheet was provided recalculating Mr. Kim's wage entitlement based on actual hours worked, and Mr. Wong submitted that this established Mr. Kim was overpaid in relation to hours worked over the entirety of his employment.
15. The Delegate considered Mr. Wong's explanation and found that Hera did not average employee's hours of work as stipulated in the Contract. Regardless, the averaging agreement in the Contract did not comply with subsections 37(2)(a)(iv) and (vi) and was not valid under the *ESA*.
16. The Delegate found that neither party provided a complete record of Mr. Kim's wage statements or paycheques during his employment period.
17. The notice of hearing and the demand for employer records were sent to Hera on June 5, 2019, with a due date of June 26, 2019, for the documents to be relied upon at the July 17, 2019 hearing, and for the payroll records for Mr. Kim.
18. An email dated June 25, 2019, from Mr. Wong attached 3 documents which included Mr. Wong's record of employment as prepared by the payroll management company and a record of employment 'break-down' or spreadsheet prepared by Hera.
19. After realizing that Hera was incorrectly banking employee overtime hours, Mr. Wong prepared a spreadsheet recalculating regular and overtime wage entitlement based on actual hours worked and the amounts Mr. Kim was paid by Hera. The Delegate accepted this as the best evidence of wages paid.
20. Section 42 of the *ESA* permits an employer to establish a time bank for an employee if the employee asks for this in writing; both Mr. Kim and Mr. Wong agreed that this did not happen. Thus, there was no valid time bank established for Mr. Kim pursuant to the *ESA*.

21. Pursuant to section 40 of the *ESA*, overtime wages are calculated based on overtime hours worked per day and per week, rather than an average of weekly hours over an entire period of employment. Mr. Kim worked overtime hours and is owed \$1,915.81 in overtime wages.
22. Mr. Kim worked, and is entitled to, statutory holiday pay in the amount of \$301.06.
23. Mr. Kim was found to have been paid vacation pay and compensation for length of service.
24. By failing to pay all wages earned within eight days of the end of each pay period, Hera contravened section 17 of the *ESA* – this contravention occurred on April 24, 2018, the last day that Mr. Kim should have received his training wages from the first pay period of April 2018. A \$500.00 penalty was imposed.
25. By failing to pay overtime wages correctly for multiple pay periods, Hera contravened section 40 of the *ESA* on August 25, 2018. A \$500.00 penalty was imposed.
26. By failing to pay statutory holiday premium pay for Canada Day and BC Day, Hera contravened section 46 of the *ESA*. A \$500.00 penalty was imposed.
27. By failing to produce or deliver records on or before June 26, 2019, after being served with a request for the same, Hera contravened section 46 of the *ESA*. A \$500.00 penalty was imposed.

## ARGUMENT

28. Mr. Wong argues that \$2,000.00 of the \$2,500.00 levied in administrative penalties relate to the single failure to create and sign a binding overtime banked hours agreement with the employee and requests that this be considered in lowering the total amount fined.
29. Mr. Wong argues that the \$500.00 administrative penalty levied under section 46 for failure to produce records as required is a mistake, as Hera worked with staff to gather and create the necessary documents which were provided prior to the deadline of June 26, 2019.

## ANALYSIS

30. Hera has argued that because 4 of the administrative penalties levied relate to the same event or error – banking overtime hours without following the proper process – the penalties should take this into consideration and the total amount reduced.
31. The *Employment Standards Regulation* (the “*Regulation*”), BC Regulation 396/95 provides for mandatory administrative penalties. Subsection 29(1) of the *Regulation* provides as follows:

- 29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, the following monetary penalties are prescribed for the purposes of section 98 (1) of the Act:
  - (a) a fine of \$500 if the director determines that a person has contravened a requirement under the Act, unless paragraph (b) or (c) applies:
  - (b) a fine of \$2,500 if

- (i) after the date of a determination under paragraph (a), the director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (a), and
- (ii) that subsequent contravention occurs within 3 years after the date of the most recent contravention ...

unless paragraph (c) applies:

- (c) a fine of \$10,000 if
  - (i) after the date of a determination under paragraph (b), the director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (b), and
  - (ii) that subsequent contravention occurs within 3 years after the date of the most recent contravention...

32. The *Regulation* provides for mandatory penalties that escalate from \$500.00 to \$10,000 where there are contraventions of the *ESA* or regulations; this provision does not, however, confer discretion to the Director.

33. The Tribunal has consistently held that if the contravention has been found in the determination, the imposition of an administrative penalty is mandatory. In *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04, the Tribunal stated:

Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory....

34. There were four distinct contraventions resulting in the imposition of the administrative penalties – each relating to separate obligations under the *ESA*. Each penalty serves distinct policy goals and were implemented on a mandatory basis.

35. Hera has not shown that the Director erred in finding it had contravened the provisions of the *ESA* upon which the administrative penalties were based. Nor has it shown that the administrative penalties were imposed for matters unrelated to the complaint and the conclusions reached in the Determination.

36. Mr. Wong argues that the \$500 penalty imposed for failing to produce or deliver records after being served with a request for the same was an error and should be rescinded.

37. The Delegate wrote:

Section 46 of the Regulation provides that a person required under section 85(1)(f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required. Hera was served with a Demand for Records that required records to be produced on or before June 26, 2019. No such records were produced, and I had to rely on the Record supplied by the Complainant to determine his hours of work. Accordingly, I find that Hera contravened section 46 of the Regulation on June 26, 2019, and I apply a \$500.00 administrative penalty.

38. The *Employment Standards Regulation* 396/95 provides for mandatory administrative penalties. Section 46(1) concerns the production of records and reads:
- 46 (1) A person who is required under section 85 (1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.
39. Section 85(1)(f) of the *ESA* established the Director's authority to require production of records.
40. On June 5, 2019, a Demand for Employer payroll records and a Notice of Complaint Hearing was sent to Hera, providing the due date for the production of records of June 26, 2019.
41. The Demand for Employer payroll records dated June 5, 2019, detailed that the demand covered any and all payroll records relating to wages, hours of work and conditions of employment, as well as any documents relating to the termination of employment, any records or agreements pertaining to wage rates, and hours worked each day.
42. Section 28 of the *ESA* requires employees to keep records of an employee's wage rate, hours worked by the employee each day, the employee's gross and net wages for each pay period, and the dates of the statutory holidays taken by the employee and the amounts paid by the employer.
43. A June 25, 2019 email to the Branch from Mr. Wong entitled "Cross Disclosure of Evidence: ER839305 Notice of Complaint Hearing Hera Studios Inc.\_Brendan Kim\_17July2019 9AM" provided 3 attachments. These were a list of Documents for the Complaint hearing, a record of employment prepared by ADP (contracted payroll services), and a document called the "Record of Employment Break Down" (subsequently described as a spreadsheet).
44. No wage statements issued to Mr. Kim were provided; indeed, neither party provided a complete record of the Complainant's wage statements resulting in discrepancies in the presented evidence that could not be confirmed or clarified from the submitted records, requiring the Delegate to make findings of fact on the available evidence.
45. *Kopchuk*, BC EST # D049/05, established that, absent circumstances amounting to bad faith or abuse of process, the Tribunal may only cancel a penalty provided for in the *ESA* and *Regulation* if it decides that the contravention which underlies it cannot be supported and must be set aside pursuant to one of the grounds of appeal referred to in section 112 of the *ESA*.
46. 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.

47. 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.
48. 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.
49. Although I accept that Hera provided some payroll information as requested and within a timely fashion, it did not provide "any and all" payroll records relating to hours of work and wages, which included the Complainant's wage statements.
50. With respect to the administrative penalties, Hera has not shown the Director erred in finding Hera had contravened the provisions of the *ESA* upon which the administrative penalties are based. Nor has it shown the administrative penalties were imposed for matters unrelated to the complaint made by Mr. Kim and the conclusions reached by the Director on that complaint.
51. The monetary penalties are mandatory, and since they were correctly levied in accordance with the record of the proven *ESA* contraventions before the delegate, the appeal will be dismissed.

## **ORDER**

52. Pursuant to section 115 of the *ESA*, I order the Determination dated September 27, 2019, be confirmed in the amount of \$4,810.48, together with any interest that has accrued pursuant to section 88 of the *ESA*.

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**Marnee Pearce**  
**Member**  
**Employment Standards Tribunal**