Citation: Kenneth A. MacAulay (Re)
2020 BCEST 31

An appeal

- by -

Kenneth A. MacAulay
(the "Appellant")

- 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: Carol L. Roberts

FILE NO.: 2019/210

DATE OF DECISION: April 8, 2020

DECISION

SUBMISSIONS

Kenneth A. MacAulay — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Kenneth A. MacAulay (the "Appellant") has filed an appeal of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director") on November 19, 2019.

2. On February 7, 2019, the Appellant filed a complaint alleging that Her Majesty the Queen in right of British Columbia as represented by the British Columbia Coroner's Service (the "Employer") had contravened the *ESA* in failing to pay him wages. The Director found no contravention of the *ESA* and determined that no further action would be taken.

3. The Appellant appeals the Director's Determination contending that the Director erred in law and 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 party or the Director if it decides that the appeal does not meet certain criteria.

5. After reviewing the Appellant's submissions, I did not find it necessary to seek submissions from the other party or the Director.

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

FACTS

7. The Appellant has been employed as a community coroner since 2007. In that capacity, the Appellant, like other community coroners appointed under section 55 of the *Coroners Act*, gathers information from the scene of certain prescribed deaths and compiles that information into a report. Upon completion of the report, a full-time coroner assumes responsibility for the investigation.

8. The Appellant works from home. The Employer provides him with a cellular telephone, laptop, printer, and other office supplies. When he is assigned a case, the Employer sends the Appellant a text message. If he responds positively, he is paid from the time of the response until his duties are completed or for a minimum of two hours as required under the *ESA*. If he does not respond to the text within 15 minutes, the Employer's "Connections" system will telephone him. If he does not respond to the telephone call, the Employer decides whether to continue attempting to locate him or to dispatch someone else.

9. The Appellant argued that he "reports for work" at 00:01 daily unless he books off by way of a province-wide dispatch service ("Replay", formerly known as "Connections"). He said that unless he books off, he is expected to be available as needed 24 hours per day, 7 days per week. The Appellant argued that he is largely under the control of the Employer while he is on call as he has significant restrictions on his actions and mobility. He says that because there are many cellular phone "dead zones" in the region, his movements are restricted. He also says that his ability to consume alcohol is similarly restricted, as the Employer has a zero-alcohol policy while on call.

10. The Appellant argued that he was entitled to wages for time spent on call. He contended that the Employer had misinterpreted the definition of work with respect to on call employees and the minimum daily hours provisions of the *ESA*. As a result, he said that he had not been paid for many on-call hours.

11. The Employer argued that, given that the Appellant was on call in his residence, he did not fall within the definition of "work" in section 1 of the ESA.

12. The delegate considered the definition of "work" as defined in section 1 of the *ESA* and determined that the Appellant was not at work while on call in his residence.

13. The delegate noted that the Employer provided the Appellant with a cellular telephone, enabling him to leave his residence while he was on call. He also noted that the Appellant acknowledged that he could go about much of his daily activity in his home community unencumbered by being on call.

14. The delegate considered that while the Appellant could not, for example, go fishing in places where there was no cell service, or drink alcohol without booking off, those restrictions were not sufficiently stringent to alter his conclusion that the Appellant's on call time fell within the exception to the definition of work being on call within a residence.

ARGUMENT

15. The Appellant argues that the delegate erred in law in relying on the *ESA* definition of work. The Appellant also submitted that the delegate erred in not applying the Branch's Interpretation Guideline Manual for on call employees to his circumstances. The Appellant argues that the definition of work "does not cover all the circumstances and exceptions that can arise and be considered for on-call pay".

16. The Appellant's submissions largely repeat the facts and submissions he made before the delegate – that is, he is required to have internet service at his home and that he is supplied with a computer and printer. He argues that his workplace is his home and that he should not be considered to be on call at his residence.

17. The Appellant relies on the Branch's Interpretation Guideline Manual which provides that:

> An employee can be "on-call" virtually anywhere and need not be at a specific location designated by the employer. When that employee responds to a page, or a cellular call, the employee has in effect, "reported" to work and is entitled to minimum daily pay…

18. The Appellant contended that, in effect, he automatically reports to work each day by the Employer's messaging service.

19. The Appellant made several other arguments regarding the minimum hours of work which I have not addressed given my decision on the merits of this appeal.

ANALYSIS

20. 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, 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.

21. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

22. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I conclude that the Appellant has not met that burden.

23. 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.

24. At issue is the proper interpretation of section 1 of the *ESA,* which defines work to mean "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere". Section 1(2) also provides that "[a]n employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence".

25. The statutory definition is not ambiguous. However, if I considered that it was, interpretive aids would not include Branch Interpretation Guidelines, which often reflect Branch policy as well as Tribunal decisions.

26. I find no legal error in the delegate's conclusion that the Appellant could not be deemed to be at work while on call from his residence. The fact that the Employer provided the Appellant with certain devices to assist him with being on call does not have the effect of converting his residence into an office.

27. In my view, the Tribunal's reconsideration decision in *Michael Nicholas Hills* (BC EST # RD094/11) is a full answer to the Appellant's arguments. In *Hills*, the employee was an on-call taxi driver who worked from his residence. He was issued a two-way radio that he was obliged to keep with him at all times during his scheduled shifts. The Employee argued that he was entitled to be paid for all hours he was on call. The Tribunal's reconsideration Panel found otherwise.

28. The Panel found that being on call within one's home does not, without more, constitute work:

> .. when an employee is scheduled to be "on call" for a particular period, that employee is not entitled to be paid for the mere fact of being "on call" unless the employer directs the employee to be "on call" at a specific location (other than the employee's residence).
>
> …
>
> Nevertheless, as soon as an "on call" employee receives a call and must then attend to the employer's affairs, the employee is at "work" and that status continues until the requisite work is completed. In this latter circumstance, the employee must be paid for the greater of: i) their actual working hours, or ii) the daily minimum wage as specified in [the *ESA*]. (para. 26)

29. The Tribunal further held that "on-call employees who are not required to remain in a location designated by their employer are not "working" and thus their "on call" time is not compensable "work" as defined in section 1 of the *ESA"*.

30. Although the Appellant also alleged that the delegate failed to comply with principles of natural justice in making the Determination, he provided no arguments in support of this ground of appeal. Having reviewed the record, I am not persuaded that the delegate failed to provide the Appellant with an opportunity to present his case and to respond to the submissions of the Employer.

31. I conclude that the appeal has no reasonable prospect of succeeding. The appeal is dismissed.

ORDER

32. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated November 19, 2019, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal