

An appeal

- by -

True Confections Inc.

- 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.: 2020/030

DATE OF DECISION: May 28, 2020

DECISION

SUBMISSIONS

Xiaolin Zhang

on behalf of True Confections Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), True Confections Inc., (the “Appellant”) filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 3, 2020 (the “Determination”).
2. Following an audit, the Director determined that the Appellant had contravened sections 27 and 28 of the *ESA* and imposed two \$500 administrative penalties for each of those contraventions.
3. The Appellant appeals the Determination contending that evidence has become available that was not available at the time the Determination was made.
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 parties or the Director if it decides that the appeal does not meet certain criteria.
5. This decision is based on the section 112(5) “record” that was before the delegate at the time the decision was made, the Appellant’s submissions, and the Reasons for the Determination.

FACTS

6. On October 1, 2019, the Director initiated an audit of the Appellant to determine its compliance with the *ESA* from September 2018 to September 2019.
7. On September 27, 2019, the delegate sent the Appellant a Notice of Investigation and Audit. At the same time, the delegate sent the Appellant a Demand for Employer records. The Appellant provided the delegate with copies of wage statements issued to employees, as well as its daily record of hours for each employee between September 2018 and September 2019.
8. The delegate found that while the Appellant had properly paid its employees statutory holiday pay, the employees did not receive wage statements that specified the amounts they earned for statutory holiday pay. The Appellant conceded that its accountant erred by combining holiday pay with regular pay in 2018, which led many staff to ask why they had not been paid statutory holiday pay. The delegate found that the Appellant had failed to comply with section 27 of the *ESA* by issuing incomplete wage statements and imposed an administrative penalty.
9. After reviewing the Appellant’s records of employee work hours, the delegate noted that it appeared that some employees worked 22- or 24-hour shifts. The Appellant agreed that it had trouble with some of its staff clocking in and out at incorrect times, leading it to adjust the employee shifts which had been

recorded on an online scheduling system. The records of that online system were not provided to the delegate. The delegate noted that while the Appellant claimed that the clock-in and clock-out records were incorrect, those were the only records provided to the delegate during the audit.

10. The delegate wrote:

In the absence of accurate records, my ability to determine full compliance for the purpose of this audit is limited. Additionally, based on the evidence provided, I am not satisfied that True Confections Inc. retains an accurate record of daily hours worked by each employee.

11. The delegate determined that the Appellant had contravened section 28 of the *ESA* and imposed an administrative penalty.

12. The Appellant's argument is, in essence, that the delegate unreasonably imposed a "fine" for each of the contraventions of the *ESA*.

13. The Appellant contends that it provided all the clock-in and clock-out records requested by the delegate, and any errors in those records were due to employees not following "the policy." The Appellant also says that it advised the delegate that it could provide the electronic online scheduling system, but the delegate did not ask for it.

14. The Appellant also says that it has a "holiday pay column" since 2019. It contends that when it purchased the business in 2018, it continued to employ the services of the previous bookkeeper, and that the bookkeeper's old payroll documents did not specify holiday pay. Once notified of the problem, the Appellant says it corrected its error.

15. The Appellant says it wishes the Tribunal to "re investigate and provide all the prove of documents for the both fined items which is incorrect." [reproduced as written]

ANALYSIS

16. 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.

17. 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.
18. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a large and liberal view of the appellant's explanation as to why the Determination should be varied or cancelled or the matter should be returned to the Director (see *Triple S Transmission Inc.*, BC EST # D141/03).
19. As the Tribunal has said on many occasions, an appeal is not an opportunity to re-argue a case. Rather, the Appellant must demonstrate a basis for the Tribunal to interfere with the Determination. The Appellant has not done so.
20. At issue is whether the delegate erred in finding that the Appellant contravened the *ESA*, and if he did not err in those conclusions, whether he erred in imposing a monetary penalty in respect of those contraventions.

Did the delegate err in finding two contraventions of the ESA?

21. Section 27 of the *ESA* provides:
- (1) On every payday, an employer must give each employee a written wage statement for the pay period stating all of the following:
 - (a) the employer's name and address;
 - (b) the hours worked by the employee;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the employee's overtime wage rate;
 - (e) the hours worked by the employee at the overtime wage rate;
 - (f) any money, allowance or other payment the employee is entitled to;
 - (g) the amount of each deduction from the employee's wages and the purpose of each deduction;
 - (h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for;
 - (i) the employee's gross and net wages;
 - (j) how much money the employee has taken from the employee's time bank and how much remains.

22. Section 28 reads, in part, as follows:
- (1) For each employee, an employer must keep records of the following information:
 - (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
- ...
23. The Appellant conceded that it did not comply with the requirements of the *ESA*, offering reasons for not doing so. I find no error in the delegate's conclusions that the Appellant failed to comply with sections 27 and 28 of the *ESA*. The fact that the Appellant was unaware of those contraventions until they were identified by the delegate, and has since corrected them, is not a basis to conclude that the delegate's findings were in error.
- Did the delegate err in imposing administrative penalties for the contraventions?*
24. Once the delegate finds a contravention of the *ESA*, the delegate has no discretion whether or not to impose a monetary penalty. Section 98(1) provides that:
- In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
25. Furthermore, the amount of the administrative penalty is fixed by the *Employment Standards Regulation* (the "*Regulation*"). Section 29(1)(a) of the *Regulation* provides as follows:
- Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
- (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3-year period preceding the contravention, a fine of \$500.
26. I find no legal error in the delegate's findings.

Failure to observe the principles of natural justice

27. 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. The principles do not require the delegate to arrive at a conclusion that one party considers to be fair to them.
28. Although the Appellant contends the penalties are unfair, I find that the Appellant was offered the opportunity to respond to the delegate's audit investigation and was given full opportunity to respond.

New Evidence

29. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.
30. As I understand the Appellant's argument, it had records that complied with the *ESA*, and did not provide them to the delegate because she did not ask for them.
31. The record indicates that the delegate issued the Appellant with a Demand for Employer Records on September 27, 2019, and identified the payroll records that were required to be produced. The delegate attached a copy of section 28 of the *ESA*, which identified what payroll records consist of, to the Demand. The delegate also attached a copy of relevant section of the *Regulation* outlining the consequences of the Appellant's non-compliance with the Demand, including the imposition of administrative penalties.
32. I am unable to find that there is new evidence on appeal. All of the documentation referred to by the Appellant was in existence at the time of the delegate's investigation and ought to have been produced in accordance with the Demand, during that investigation. Although the Appellant says that the delegate ought to have asked for its electronic online system, the fact is, the delegate did so, through his issuance of the Demand for Records.
33. I find no reasonable prospect that the appeal will succeed.

ORDER

34. Pursuant to section 114 (1)(f) of the *ESA*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated January 3, 2020, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal