Employment Standards TRIBUNAL

Citation: SM Cycle Ltd. (Re)
2020 BCEST 60

An appeal

- by -

SM Cycle Ltd.

- 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.: 2020/045

DATE OF DECISION: June 3, 2020

DECISION

SUBMISSIONS

Matthew S. Fingas — counsel for SM Cycle Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), SM Cycle Ltd. carrying on business as Island BMW (the "Employer") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on February 5, 2020 (the "Determination").

2. Following a hearing into a complaint by a former employee, the Director determined that the Employer had contravened sections 40, 46 and 58 of the *ESA* in failing to pay wages to the employee. The delegate determined that wages and interest in the amount of $34,020.72 was owed. The delegate also imposed three $500 administrative penalties for each of the contraventions, for a total amount owing of $35,520.72.

3. The Employer appeals the Determination contending that the delegate erred in law.

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 Employer's submissions and the Reasons for the Determination.

FACTS

6. The Employer operates a motorcycle dealership. The Employee was employed as a bookkeeper/controller from November 30, 2016, to January 24, 2019, and was paid an annual salary. After terminating her employment, the Employee filed a claim with the Branch for overtime wages.

7. The delegate conducted a hearing into the complaint on October 1, 2019. The Employee appeared on her own behalf. The Employer was represented by Van Colaco, the Employer's Chief Financial Officer.

8. The issues before the delegate were whether the Employee was a manager and entitled to overtime wages, and if she was not a manager, the amount of those wages.

9. The Employee was initially hired by the dealership as a bookkeeper, with responsibility for maintaining the company's financial records and completing payroll. The business was sold in January 2018 to a new owner who operated several dealerships. Although the Employee's tasks remained the same, her position was identified as a controller. The new owner also issued the Employee business cards identifying her as the Office Manager.

10. The Employee did not supervise any staff and had no authority to hire, discipline or fire any employee, or approve any pay increases. She was not involved in any other decision-making aspects of the business.

11. At the time the Employee was first hired, the parties did not specifically discuss her hours of work. However, the Employee understood she was to work 40 hours per week and that her salary included statutory holiday pay and vacation pay. The Employee initially worked five days per week. However, the Employer later agreed the Employee could schedule her work so that she would only work four days per week provided she could complete all of her tasks in that time. The parties did not have a written employment agreement.

12. The Employee occasionally worked additional days at the end of the month when reports were due. The Employer saw the Employee at work beyond regular business hours but did not maintain a record of her hours of work. The Employee maintained her own personal records of her hours of work and did not submit them to anyone.

13. At the time the dealership was purchased in January 2018, Mr. Colaco spoke with the Employee by telephone, and told her that her working arrangements would not change. He told her, in essence, to do whatever she needed in order to "get the job done" and that if she had to stay late or come in early to do so, that is what she needed to do. The new owner's evidence was that he understood that the Employee worked a five-day, 40-hour week.

14. In October 2018, the Employer purchased two additional dealerships, and the Employee assumed responsibility for preparing the payroll for those two businesses. For a period of two months, she also supervised an employee from one of the new business.

15. Overwhelmed by the additional workload, the Employee terminated her employment at the end of January 2019.

16. Mr. Colaco was surprised when the Employee gave notice and told him she wanted to discuss compensation for her overtime hours. She later emailed him and told him she had worked 600 hours of overtime.

17. The Employer said that overtime hours were to be authorized by the general manager and that the Employee never sought such approval. The Employer also said that the Employee never notified anyone that she was struggling with her workload or that she was unable to perform her tasks within her regular work schedule.

18. The owner of the business in 2016 testified that he recalled seeing the Employee at the dealership working outside business hours but did not keep a record of her hours. William Wellbourne, the General Manager of the dealership after the business was purchased in 2018, testified that he saw the Employee working at the dealership after it was closed. Although he was aware she worked extra hours he was not able to estimate how many hours she worked, or how often. The company's corporate controller also testified that she was aware that the Employee was working extra hours but did not know how many.

19. The delegate determined that Employee was not a manager as defined in the *Employment Standards Regulation* (the "*Regulation*"). The delegate found that the Employee did not, with the exception of one

brief period, supervise any employees, schedule staff and that she had no authority to hire, fire or discipline staff. The delegate also found that the Employee's primary responsibility was to ensure that accounting records and payroll records were accurate and that she had no responsibility for ordering product, or for dealership inventory. As the Employee was not a manager, she was not excluded from the overtime entitlements in the *ESA*.

20. The Employer argued that the Employee never informed it that she was unable to complete her tasks within a 40-hour work week. It also argued that it had no ability to verify the accuracy of the Employee's reported overtime hours because she had not sought authorization for them.

21. The delegate found that, even if there was a policy in place requiring pre-approval of overtime hours, Mr. Colaco had given her that approval by telling her to "just get the job done." The delegate determined that the Employee was entitled to overtime wages.

22. The delegate found that, although the parties had an arrangement whereby the Employee could work four days instead of five, the parties did not have a valid averaging agreement under section 40 of the *ESA*.

23. The delegate determined that the Employer had contravened section 28 of the *ESA* in failing to maintain payroll records as required. She found that the Employer had not maintained a record of the hours worked each day by an employee.

24. The delegate determined that the Employee's handwritten record of her hours of work was both reliable and the best evidence to determine what wages were owed to her.

25. The delegate noted that the recovery period under the *ESA* was one year from the last date of the Employee's employment, or January 25, 2018, to January 24, 2019. The delegate relied on the Employee's records in calculating her overtime entitlement for that period.

ARGUMENT

26. The Employer contends the delegate erred in finding that it contravened section 28 of the *ESA* by failing to maintain payroll records. The Employer argues that the Employee's job duties were to prepare the payroll, and if the Employee neglected to do so in accordance with section 28, that was a contravention of her employment duties. The Employer submits that it is logically inconsistent for the delegate, after finding a contravention of section 28, to then rely on the Employee's handwritten records in determining her overtime wages and that this constitutes an error of law. The Employer argues that the Director cannot use the Employee's records to "penalize" the Employer.

27. The Employer argues that the delegate erred in finding that the Employee was not a manager. The Employer argues that the delegate failed to consider evidence that demonstrated that the Employee had control over the management of the Employer's "accounting and payroll systems".

28. The Employer also contends that the delegate erred in finding that it contravened the *ESA* in failing to pay overtime. It argues that the Employee understood she was to work a 40-hour week and that because she was responsible for payroll, she had knowledge of the Employer's policy requiring authorization of

overtime hours. The Employer says that even though the Employee had a duty to act in good faith and abide by reasonable employment policies, the Employee conceded that she did not seek authorization to work overtime despite her knowledge that she was required to do so. The Employer says that it could not take steps to meaningfully improve or modify the Employee's hours because the Employee did not seek authorization. The Employer argues that the Employee should not benefit from a breach of workplace policies by concealing written records and "prohibiting her supervisors from making informed decisions on the management and operations of [the] business."

29. Finally, and in the alternative, the Employer argues that if the Tribunal upholds the delegate's conclusion that it failed to comply with section 40 of the *ESA*, the Tribunal should reduce the overtime award by 50% because the Employee was "also at fault," as her actions prevented the Employer from verifying or refuting the Employee's hours of work.

ANALYSIS

30. 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.

31. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.

32. At issue is whether the appeal should be dismissed under section 114 of the *ESA*. I have concluded that there is no reasonable prospect the appeal will succeed and that it should be dismissed without hearing from the Director or the Employee.

Did the delegate err in finding that the Employee was not a manager?

33. The *Regulation* defines manager to mean

a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or

b) a person employed in an executive capacity.

34. The Employer contends that the delegate erred in finding that the Employee was not a manager because she managed "other resources," and specifically the Employer's accounting and payroll systems. Regardless of any job title that the Employer may have given the Employee, the evidence, including that of the company's accountant, was that the Employee was a bookkeeper. There is no evidence the Employee had any professional accounting designations or performed any tasks that an accountant would perform. Although the Employee had some authority to order office supplies and for a two-month period supervised an employee, she had no authority to make any decisions that affected the business.

35. The Tribunal has said on many occasions, if a person is to be denied statutory benefits because they are a "manager," it should be clear and obvious that they meet the regulatory definition of "manager." (see *J.P. Metal Masters 2000 Inc.*, BC EST # D084/05; judicial review dismissed, 2006 BCSC 928) There is no evidence the Employee's principal duties consisted of managing any human or other resources.

36. I find no basis for the Employer's argument that the delegate erred in concluding the Employee was not a manager.

Did the delegate err in finding that the Employee was entitled to overtime in the amount awarded?

37. Section 35(1) of the *ESA* requires an employer to pay an employee overtime wages *in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.* [my emphasis]

38. In *International Energy Systems Corp.* (BC EST # D189/97) and *BCA Industrial Controls (1995) Ltd*. (BC EST # D245/97) the Tribunal held that section 35 placed an obligation on an employer to control and direct its employees' hours of work: "if an employer does not wish its employees to work overtime it must not only order them not to work but must ensure that they do not work any hours not scheduled by the employer."

39. The facts and the Employer's arguments are very similar to those in *Director of Employment Standards (Small Town Press)* (BC EST # RD016/04) in which an employee maintained her own record of hours and never sought approval of overtime hours. The Reconsideration Panel relied on the principles outlined above in allowing the Employee's overtime claim.

40. There was no evidence before the delegate that the Employer had an overtime policy, or that if it did, that the Employee was bound by it. However, even if the Employer had an overtime policy that applied to the Employee, there was no evidence that the Employer ever enforced that policy with respect to the Employee. The evidence was that the Employer was aware the Employee was working long hours and took no steps to direct her not to work any overtime hours.

41. I find no reasonable prospect that the appeal will succeed on this issue.

42. There is no legal basis for the Tribunal to unilaterally and arbitrarily reduce the Employee's overtime award by 50%, as argued by the Employer. The Employee submitted records that the delegate found reliable and, in the absence of any evidence from the Employer, the best evidence. There is no principled basis on which to reduce the award by half. I find no reasonable prospect the appeal will succeed on this issue.

Did the delegate err in finding that the Employer had contravened section 28 of the ESA?

43. Section 28(1)(d) provides that, for each employee, an employer must keep records of the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis.

44. The record confirms that the Employer, who has the responsibility to maintain records that comply with the *ESA*, did not maintain records of the hours worked by the Employee. The evidence was that the Employee was directed to, in essence "do whatever she needed to do to get the job done," and that she was never required or directed, either verbally or in writing, to report her daily hours of work. The obligation to maintain records is that of the employer, not an employee. There is no evidence the Employee was directed to maintain payroll records as required by the *ESA.*

45. There is no evidence that the delegate erred in law in her conclusion that the Employer failed to comply with section 28.

46. I find no reasonable prospect the appeal will succeed and dismiss the appeal.

ORDER

47. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115(1) of the *ESA*, the Determination, dated February 5, 2020, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal