

An appeal

- by -

Meher Trucking Ltd.
("Meher Trucking")

- 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.: 2020/028

DATE OF DECISION: June 8, 2020

DECISION

SUBMISSIONS

Harpreet Singh Madaan on behalf of Meher Trucking Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“ESA”), Meher Trucking Ltd. (“Meher Trucking”) has filed an appeal of a determination issued by Sarah Vander Veen, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) dated January 9, 2020 (the “Determination”).
2. On April 10, 2019, Harpreet Biln (“Mr. Biln”) filed a complaint with the Director alleging that Meher Trucking contravened the *ESA* by failing to pay him regular and overtime wages.
3. Following an investigation into the complaint, the Delegate concluded that Meher Trucking had contravened sections 17, 18, 27, 28, 40, 45 and 58 of the *ESA* in failing to: pay Mr. Biln at least semi-monthly; pay all outstanding wages within 48 hours of termination; provide wage statements with Mr. Biln’s pay; keep a record of daily hours worked; pay overtime wages; pay vacation pay. The Delegate ordered Meher Trucking to pay \$5,116.64 in respect of wages and interest. The Delegate also imposed 7 administrative penalties in the total amount of \$3,500.00, for a combined amount of \$8,616.64.
4. Meher Trucking’s appeal, received by the Tribunal on February 14, 2020, is on the grounds that the Director erred in law, and failed to observe the principles of natural justice in making this Determination.
5. This decision is based on Meher Trucking’s written submissions, the section 112(5) “record” that was before the delegate at the time the Determination was made, and the reasons for the Determination.

ISSUE

6. Whether or not Meher Trucking has established any basis to interfere with the Delegate’s Determination.

FACTS

7. Meher Trucking is a company duly incorporated under the laws of British Columbia and operates a delivery business in the Lower Mainland which falls within the jurisdiction of the *ESA*. An on-line BC Registry Services search on April 9, 2019, showed that Meher Trucking was incorporated on September 9, 2014, and that Harpreet Singh Madaan (“Mr. Madaan”) and Gurmeet Narula Madaan, aka Daisy Madaan (Ms. Madaan”) were listed as the directors and officers (currency date – January 18, 2019).
8. An on-line BC Registry Services search shows that on January 2, 2020, Mr. Madaan was listed as the sole director and officer (currency date – October 2, 2019).
9. On September 25, 2019, a notice of change of directors filed with the BC Registry Services indicates that Ms. Madaan ceased to be a director on August 15, 2019.

10. Mr. Biln was hired as a delivery driver for Meher Trucking commencing September 4, 2018, through to April 5, 2019, when he was terminated from his employment after several days of failing to show up for work and because the amounts Mr. Biln was charging to the Meher Trucking credit account for fuel was excessive.
11. Mr. Biln was provided with a 5-ton truck and hired as a short-haul delivery truck-driver in the Lower Mainland. He was sent to Landmark Cartage Service (“Landmark”) for his delivery assignments, and after several weeks he was sent to the Groundstar Express Ltd. (“Groundstar”) Delta warehouse Monday through Friday for daily delivery assignments and pick up.
12. Neither Mr. Biln nor Meher Trucking kept track of the hours worked by Mr. Biln, and Meher Trucking did not provide evidence of Mr. Biln’s days and hours of work.
13. Mr. Biln did not receive wage statements, a T4 slip, or a record of employment from Meher Trucking.
14. Mr. Biln did not have pay periods within the meaning of the *ESA* but was paid irregularly by e-transfer or cheque a total of \$13,113.00 for work performed from September 4, 2018, through April 5, 2019. However, \$1,240 was returned for insufficient funds resulting in the actual amount paid to Mr. Biln of \$11,873.00.
15. Mr. Madaan told the Delegate (October 10 and 17, 2019) that Mr. Biln earned 43% of the net amount that Landmark and Groundstar paid Meher Trucking. The Delegate found this to be the most accurate reflection of Mr. Biln’s rate of pay.
16. Meher Trucking provided the delivery manifests from Landmark for Mr. Biln’s delivery work between September 4 and September 14, 2018, and at the request of the Delegate, Groundstar provided the work sheets for Mr. Biln’s deliveries from September 18, 2018 – April 5, 2019.
17. With no hourly wage rate or regular payment schedule, Mr. Biln’s wage rate was calculated based on the 43% of the money paid to Meher for Mr. Biln’s driving, and as documented in the Landmark manifests and the Groundstar lists. The pay period was deemed to be the 15th and last day of each month.
18. Mr. Biln was found to have worked, on average, 7.51 hours daily.
19. 43% of the net amount paid by Landmark and Groundstar to Meher Trucking for Mr. Biln’s days of work equaled \$15,510.80.
20. Mr. Biln worked 901.25 hours during his employment with Meher Trucking, resulting in an average hourly rate of \$17.21; the evidence from Groundstar showed that Mr. Biln worked more than 9 hours daily on 16 days, resulting in 15.68 hours of overtime, to be calculated at time and ½.
21. The Delegate distilled the information into a table for each pay period from September 1 through April 15, 2019, and determined that Mr. Biln earned \$15,510.80 regular wages as well as \$139.72 for overtime hours.

22. Both parties agreed that no statutory holiday payments were paid to Mr. Biln. During his employment there were 5 statutory holidays; based on hours worked he was entitled to payment for 4 of these days, equaling \$541.97. This amount reflected his average pay based on \$17.23 hourly over a 7.51-hour day.
23. Both parties agreed that no vacation pay was provided to Mr. Biln. 4% of his regular wages (\$15,510.81), his overtime wages (\$139.73) and his statutory holiday pay (\$541.97) establishes an entitlement of \$647.70 vacation pay.
24. Mr. Biln was not entitled to compensation for length of service, as Meher Trucking had just cause for termination. The evidence supports that Mr. Biln charged \$1,644.49 to the Employer's credit account outside of the context of his employment. Summary termination is an appropriate response to the dishonest use of an employer's gasoline account, and accordingly, Mr. Biln is not owed compensation for length of service.
25. Mr. Biln should have been paid \$16,840.20, the combined total of regular wages, overtime wages, statutory holiday pay, and vacation pay.
26. Mr. Biln was paid \$11,873.00 and is owed the difference of \$4,967.20.
27. On November 14, 2019, Meher Trucking and Mr. Biln were sent the Delegate's Preliminary Assessment via email. In the assessment the Delegate outlined her tentative conclusions and reasons; this included a discussion on wage rate and hours of work, regular and overtime wages, statutory holiday pay, and vacation pay.
28. The Preliminary Assessment gave Meher Trucking two weeks to respond to the tentative conclusions if it disagreed, or to pay within that timeframe the monies owed to Mr. Biln. If the matter proceeded to a determination, Meher Trucking was warned of the likely \$3,500.00 in penalties that would be imposed for the multiple *ESA* breaches.
29. The Preliminary Assessment stated that both Mr. Madaan and Ms. Madaan were directors and officers of Meher Trucking at the time the wages were owed, and accordingly personally liable to pay the equivalent of two months wages to Mr. Biln.
30. The Preliminary Assessment stated that Mr. Madaan was actively involved in the operations of Meher Trucking and knew he was failing to pay Mr. Biln, and as such, he permitted Meher Trucking to contravene the *ESA* and is personally liable to pay the penalties arising from the contraventions.
31. While Mr. Biln agreed with the preliminary findings, no written response or payment was forthcoming from Meher Trucking by the November 28, 2019 deadline.

ARGUMENT

32. Mr. Madaan argues that Mr. Biln signed an Employment Agreement on August 27, 2018, as a subcontractor with no entitlement to overtime pay, vacation pay, CPP, EI or tax deductions. Mr. Biln was to receive 43% of revenue generated on a biweekly basis.

33. In January and February 2019, Mr. Biln took out personal loans from Meher Trucking in the combined amount of \$1,300.00 and agreed to have this amount deducted from his pay. Mr. Madaan attached two brief notes to this effect.
34. On April 3, 2019, Mr. Biln stole \$4,000.00 in fuel.
35. Mr. Biln has been paid his wages in full and is not entitled to the benefits of overtime pay or vacation pay in accordance with a signed contract.
36. The penalties imposed are unjust, particularly on a one-person company.
37. Ms. Madaan has not been part of Meher Trucking since December 2018.
38. A handwritten request from Ms. Madaan to free up Mannat Holdings Ltd. funds currently on hold and associated with this Determination. I would point out now that this is not within my jurisdiction, as it is not part of this Determination. On January 8, 2020, the Delegate told Ms. Madaan that a preliminary assessment would be sent to her on the (separate) issue of whether Meher Trucking and Mannat Holdings Ltd. may be associated within the meaning of section 95 of the *ESA*. No further discussion by me on this issue is needed.

ANALYSIS

39. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
- 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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, or 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 that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more the requirements of section 112(2) have not been met.
40. 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.

41. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

Error of Law

42. 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.

43. Mr. Madaan argues that the Delegate erred in law by finding Mr. Biln to be an hourly employee and points to a signed contract dated August 27, 2018, declaring Mr. Biln to be a subcontractor and not an employee under the *ESA*.

44. Although the contract was not provided to the Delegate during the investigation, the Delegate addressed Mr. Biln’s employment status as part of gathering evidence and establishing facts.

45. The Delegate addressed the issue of whether Mr. Biln was an employee or a subcontractor early in the investigative process. She considered the issues of control, tools and equipment, chances of profit/risk of loss, and integration. She asked Mr. Madaan questions pertaining to this issue during the telephone interview on October 10, 2019.

46. Mr. Madaan’s evidence to the Delegate was that Meher Trucking provided the licenced vehicle, paid for all operating expenses and maintenance of the vehicle, and provided a pallet jack to Mr. Biln as a necessary tool. Meher Trucking directed Mr. Biln to attend at a specific work site where he obtained his daily instructions. Based on this information and the statutory definitions of “employee”, “employer” and “work”, Mr. Biln was found to be an employee of Meher Trucking.

47. The Delegate clearly considered the relevant provisions of the *ESA* and applied those provisions to the established facts. The Delegate took notice of all relevant factors and reached an appropriate conclusion.

48. I find that the Delegate applied the correct legal tests as outlined within the *ESA*, and appropriately considered and weighed the relevant evidence when it found Mr. Biln to be an employee. I find the Delegate made no error of law.

New Evidence

49. Mr. Madaan provided new information with the appeal, specifically, a copy of an “Employment Agreement” signed by Mr. Biln and Mr. Madaan on behalf of Meher Trucking on August 27, 2018, wherein Mr. Biln was designated a subcontractor.

50. 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 potential 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.

51. Mr. Madaan did not argue that Mr. Biln worked as a subcontractor until the appeal process.

52. The “Employment Agreement” dated August 27, 2018, was available prior to the Determination’s completion, and during the investigative process. Mr. Madaan has provided no explanation as to why the agreement was not given to the Delegate during the investigation.

53. The “Employment Agreement” is not new evidence, but rather information Mr. Madaan chose not to provide to the Delegate during the investigation. The first element needed to meet the 4-part test as outlined in *Re Merilus Technologies*, is that the new evidence could not, with the exercise of due diligence, have been presented during the investigation. This has not been met.

54. Further, it is not of high probative value as the *ESA* legislation was applied and Mr. Biln was found to be an employee under the *ESA* and not a subcontractor, and hence entitled to the outstanding wages. This would not change simply by signing a document and calling him a subcontractor; the *ESA* still prevails.

55. The August 27, 2018, “Employment Agreement” will not be accepted as new evidence as it should have been provided in response to the Demand for Employer’s records and could have been raised at any time with the Delegate.

56. Mr. Madaan references personal loans he made to Mr. Biln in January and February 2019, unrelated to Mr. Biln’s entitlement under the *ESA*. In any event if Mr. Madaan thought this was relevant, it should

have been raised during the investigation and an argument made at that time as to why the loans had relevance to the Determination.

57. There is no basis for considering the personal loan information as new or probative in nature, and it will not be accepted as new evidence.

Failure to Comply with the Principles of Natural Justice

58. At their essence, the principles of natural justice are procedural rights that ensure that parties know the case being made against them, are given an opportunity to reply, and have the right to have their case heard by an impartial decision maker.
59. The Delegate clearly gave Meher Trucking a full opportunity to respond to the case before it, including the provision of a preliminary assessment of the anticipated findings. Meher Trucking chose not to follow up with the Delegate to discuss or challenge these findings, which went on to form the basis of the Determination.
60. Although Mr. Madaan disagrees with the Delegate's findings, I find no basis to conclude that the Employer was denied the right to be heard and provide supporting evidence. I find that the allegation of bias was made without any foundation and is unsupported by the record.

Penalties

61. Mr. Madaan argues that the penalties imposed are unjust, particularly on a one-person company.
62. The *Employment Standards 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 ...

63. 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

64. Mr. Madaan 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.

65. The monetary penalties are mandatory, and since they were correctly levied in accordance with the record of the proven *ESA* contraventions before the Delegate, Mr. Madaan's argument is unsuccessful.

Meher Trucking - Directors

66. Mr. Madaan argues that Ms. Madaan has not been part of Meher Trucking since December 2018. Presumably, the point of the argument is that she should not be responsible as a director under section 96 of the *ESA* for up to two months' unpaid wages for Mr. Biln.

67. The only appeal currently before me concerns the Determination issued against Meher Trucking, and I am unaware if a section 96 determination has been issued against Ms. Madaan. In any event, an appeal of a determination against Ms. Madaan is not before me and I make no further comment on this argument.

ORDER

68. I dismiss this appeal and confirm the Determination under section 115(1)(a) of the *ESA*.

Marnee Pearce
Member
Employment Standards Tribunal