Citation: Sandman Enterprises Ltd. (Re)
2020 BCEST 70

An appeal

- by -

Sandman Enterprises Ltd.
(the "Appellant")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2020/031

DATE OF DECISION: June 18, 2020

DECISION

SUBMISSIONS

Darryl Sanders — on behalf of Sandman Enterprises Ltd.

INTRODUCTION

1. This is an appeal filed by Sandman Enterprises Ltd. (the "appellant"). The appellant appeals a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the "delegate"), on October 24, 2019 (the "Determination"). The Determination was issued pursuant to section 79 of the *Employment Standards Act* (the "*ESA*").

2. By way of the Determination, the appellant was ordered to pay $4,249.88 on account of unpaid wages and interest owed to a former employee (the "complainant"). Further, and also by way of the Determination, the appellant was ordered to pay an additional $3,000 on account of six separate $500 monetary penalties (see section 98 of the *ESA*). Accordingly, the total amount payable under the Determination is $7,249.88.

3. Darryl Sanders ("Mr. Sanders"), who is a director and officer of the appellant, appeared on its behalf before the delegate at a complaint hearing, and he is also acting on behalf of the appellant in this appeal.

4. The Determination was issued following an oral complaint hearing conducted on May 13, 2019. The delegate issued the Determination and her accompanying "Reasons for the Determination" (the "delegate's reasons") some five months later, on October 24, 2019. As recounted in the delegate's reasons, the appellant operates a building exterior finishing business in Penticton, and the complainant worked as a labourer with the firm during the period from early April to late July 2018. The complainant had worked for the appellant on prior occasions in 2016 and 2017.

5. According to the complainant, he agreed to work for the appellant in 2018 at an hourly wage of $25. The appellant maintained that their agreement was for $23 per hour. In her reasons, the delegate expressed some doubt about the veracity of both parties' evidence but ultimately concluded that there was an employment, rather than an independent contractor, relationship between the parties. The delegate determined that the complainant was entitled to 156 hours at $25 per hour ($3,900) plus 4% vacation pay ($156) as well as section 88 interest ($193.88).

6. The deadline for appealing the Determination, presumably calculated in accordance with sections 112(3) and 122 of the *ESA*, was December 2, 2019. This deadline, together with information relating to the appeal process, was set out in a text box headed "Appeal Information" (in boldface text) found at the bottom of the third page of the Determination. This appeal was filed on February 21, 2020, and, that being the case, the appellant now applies for an extension of the appeal period. I will first turn to this application.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

7. Section 109(1)(b) of the *ESA* provides as follows: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: …(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired". In this case, the appeal was filed nearly 12 weeks after the appeal period expired.

8. The leading authority regarding section 109(1)(b) is *Niemisto*, BC EST # D099/96, where several non-exhaustive criteria were identified as being relevant to an application to extend the appeal period including whether: i) there is a reasonable and credible explanation for failing to file a timely appeal; ii) the appellant has had a *bona fide* ongoing intention to appeal that was communicated to both the Director and the respondent party/ies; iii) a respondent party would be unduly prejudiced if the appeal period were extended; and iv) the appeal has presumptive merit.

9. The Tribunal's Appeal Form directs an appellant who is seeking an extension of the appeal period to provide, "[o]n a separate sheet of paper…a reasonable and credible explanation for the extension sought". Mr. Sanders, for the appellant, provided the following explanation: "I was unaware of the appeal deadline but was instructed to ask for an extension to which I am now all other matters are within time constraint" [*sic*]. This alleged lack of awareness is the *sole* basis advanced in support of the application to extend the appeal period.

10. In my view, this is not a proper case to extend the appeal period. Mr. Sanders, on behalf of the appellant, maintains that he "was unaware of the appeal deadline". However, this deadline was clearly set out in a text box (along with information regarding the appeal process) in the Determination. Mr. Sanders does not deny having received the Determination in a timely manner, and I note that the Determination was served on both the appellant (at its registered and records office) and on Mr. Sanders in his personal capacity.

11. The delay involved in this matter is nearly 12 weeks. Section 2(d) of the *ESA* emphasizes that disputes arising under the statute should be adjudicated in a fair and efficient manner. The unpaid wages in this matter date from the early spring of 2018, and the complainant surely is entitled to have this matter finally resolved without further undue delay. In my view, the complainant would suffer prejudice if this matter were further delayed without good reason.

12. Turning to the *Niemisto* factors, the appellant's explanation is, in my view, not credible. The deadline for filing an appeal was clearly set out in the Determination. I also note that the delegate's reasons demonstrate a repeated pattern on the appellant's part of ignoring requests for information and failing to follow procedural requirements. The delegate ultimately concluded that Mr. Sanders was not a credible witness.

13. There is no evidence before me to show that the appellant has had an ongoing intention to appeal in the weeks following the issuance of the Determination. The Determination was issued on October 24, 2019, and the appellant made no effort to appeal it until February 21, 2020. On February 14, 2020, the delegate wrote to Mr. Sanders (and also e-mailed him) advising that she was considering issuing a determination against him personally under section 96 of the *ESA*. Mr. Sanders replied by e-mail on February 14, 2020, and, of course, filed this appeal on behalf of the appellant one week later. I think it entirely reasonable

to conclude that Mr. Sanders was content to simply ignore the Determination until it occurred to him that he might face personal liability for the unpaid wages determined to be owing to the complainant. Mr. Sanders, in his February 14th e-mail, simply stated that he expected the B.C. Provincial Court would "overturn" the Determination and that he intended to file a complaint regarding what he characterized as "government bullying and harassment". Finally, as is discussed below, I consider this appeal to be wholly unmeritorious. Accordingly, this appeal must be dismissed pursuant to section 114(1)(b) of the *ESA*.

APPEAL HAS NO REASONABLE PROSPECT OF SUCCEEDING

14. Even if I were inclined to extend the appeal period, in my view, this appeal has no reasonable prospect of succeeding. That being the case, it must be dismissed in any event pursuant to section 114(1)(f) of the *ESA*.

15. This appellant checked off all three statutory grounds of appeal (see subsections 112(1)(a), (b) and (c) of the *ESA*) on its Appeal Form. The appellant's supporting reasons do not clearly articulate the separate arguments advanced under each ground of appeal (i.e., error of law, breach of natural justice, and "new evidence"). However, as best as I can determine, the appellant maintains that the delegate erred in law in finding that the complainant was an employee rather than an independent contractor. The appellant also appears to be arguing that the delegate erred in calculating the complainant's unpaid wage entitlement. The appellant challenges all of the monetary penalties issued against it. In what might be characterized as a "natural justice" argument, the appellant's representative, Mr. Sanders, says that he was "bullied" by the delegate.

16. The appellant did not submit any new evidence – although it has perhaps advanced some new unsupported allegations – that is admissible under the *Davies et al*. framework (see BC EST # D171/03). All that the appellant has said in this regard is as follows: "There has been new information that has been brought to light and a human rights case filed against the delegate (another story)". This latter allegation is the sum total of the appellant's "new evidence".

17. The appellant appended copies of several text messages to its Appeal Form but, so far as I can determine, these messages were either before the delegate and are included in the section 112(5) record, or otherwise were available to have been provided to the delegate prior to the Determination being issued (and, on that basis, do not constitute admissible "new evidence").

18. The appellant's reasons for appeal largely stand as bald assertions without credible corroborating evidence. The delegate considered the conflicting evidence before her and ultimately concluded that the complainant was an employee rather than an independent contractor. Her reasons in this regard, set out at pages R8 – R9, are cogent, intelligible, and persuasive. I am not satisfied that the delegate made a palpable and overriding error with respect to this issue of mixed fact and law (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

19. Similarly, the delegate's calculations reflect her assessment of the best evidence before her. I am unable to say that her calculations were tainted by a palpable and overriding error. I note her task in determining the complainant's unpaid wage entitlement was complicated by the fact that the appellant never submitted proper payroll records, "did not provide an estimate of how many hours [the complainant]

worked" or "how much money [was] owing to [the complainant]" (page R10). The appellant claimed to have paid the complainant some $10,000 in total (cash payments), and $3,600 for the work in question, but was unable to provide any receipts acknowledging payment or any corroborating bank records. The delegate observed (page R10):

> [The appellant] did not provide evidence of any payments made to [the complainant], such as bank statements evidencing withdrawals. [The appellant] submitted some text messages in which [the complainant] reported his hours worked but did not submit them for the entire period in question, which means that I cannot use them to assess [the complainant's] total hours worked.

20. In my view, the delegate did not blindly accept the complainant's assertions regarding his unpaid wage entitlement but, rather, weighed the parties' conflicting evidence and applied the best evidence rule.

21. As for the appellant's "natural justice" argument, a mere and wholly unparticularized allegation of "bullying" on the part of the delegate falls well short of establishing that the delegate failed to observe the principles of natural justice in making the Determination.

22. Finally, regarding the section 98 monetary penalties, the evidence before the delegate clearly demonstrated that each of the six contraventions was adequately proven (see delegate's reasons, pages R10 – R11).

ORDERS

23. The appellant's application to extend the appeal period is refused.

24. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is dismissed.

25. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of $7,249.88, together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal