Employment Standards TRIBUNAL

Citation: Verne Rathjen (Re)
2020 BCEST 75

An appeal

- by -

Verne Rathjen
(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: Carol L. Roberts

FILE NO.: 2020/057

DATE OF DECISION: July 7, 2020

DECISION

SUBMISSIONS

Verne Rathjen	on his own behalf
Paul Grace	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Verne Rathjen carrying on business as All Floor You (the "Appellant") filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on August 2, 2019 (the "Determination").

2. The Director found that the Appellant had contravened sections 17, 18, 40, and 58 of the *ESA* in failing to pay an employee wages and vacation pay. The Director determined that wages and interest were owed in the total amount of $1,536.57. The Director also imposed three $500 administrative penalties on the Appellant for the contraventions for a total amount payable of $3,036.57.

3. The deadline for filing an appeal of the Determination was September 9, 2019. The appeal was submitted April 8, 2020.

4. The Appellant appeals the Determination contending that new evidence has become available that was not available at the time the Determination was made. The Appellant also seeks an extension of time in which to file the appeal pursuant to section 109 (1)(b) of the ESA.

5. 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. After reviewing the appeal submission, I sought a response from the delegate solely on the issue of service of the Determination.

6. 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, the delegate's submission on the issue of service of the Determination, and the Reasons for the Determination.

FACTS

7. The Appellant operated a flooring company in Chilliwack, B.C. The employee was employed as a labourer on a project in Whistler from October 1, 2018, until he quit on November 2, 2018. On December 3, 2018, the employee filed a complaint alleging that the Appellant had failed to pay him wages and sought truck repair and towing costs.

8. On February 14, 2019, the delegate attempted to reach the Appellant by telephone to advise him of the complaint. There was no answer and there was no ability to leave a voice message. The delegate made

further attempts to reach the Appellant by telephone on February 20, 22 and 26, 2019, and March 1, 2019, with the same results.

9. On February 27, 2019, the delegate sent the Appellant a letter advising him of the complaint, requesting a response by March 8, 2019. The letter was returned to the Branch as "moved or unknown."

10. On March 4, 2019, the delegate sent the Appellant a Notice of Complaint Hearing and a Demand for Employer Records by registered and regular mail at the Appellant's last known address as well as the Whistler worksite address.

11. All correspondence was returned as "moved" or "unknown." The delegate determined that all reasonable efforts had been made to provide reasonable notice to the Appellant of the complaint as well as the consequences of non-participation. The delegate conducted a hearing into the Employee's allegations on April 17, 2019. The Appellant did not appear.

12. The Employee's evidence was as follows.

13. On September 30, 2018, the Appellant told the Employee that his truck had broken down, so the Employee was required to use his own truck to carry four other employees and their work equipment to Whistler. The Appellant told the Employee he would compensate the Employee for any damage to the truck. The Employee drove to Whistler with the employees and their equipment on October 1, 2018.

14. On November 2, 2018, the Appellant told the Employee that he did not have money to pay all the wages owed and that he would have to wait to get paid. The Employee quit and left the following day to return to Chilliwack. Although he took the other employees with him, he left the work equipment at the work site. The Employee's truck broke down on the return trip and was towed to be repaired. The Appellant did not pay the Employee for either the towing charges or the cost of the repairs.

15. The Employee received wages by way of a bank draft dated October 14, 2018, by e-transfer on November 2, 2018, and by e-transfer on November 6, 2018.

16. The Employee did not record his daily start and end times but did record the total hours he worked each day. In the absence of any evidence from the Appellant, the delegate accepted the Employee's record of his hours of work. Based on that record, the delegate determined that the Employee was entitled to regular and overtime wages. From that amount, the delegate deducted the wages that had already been paid to the Employee, which left $433.00 regular wages outstanding. The delegate also determined that the Employee was entitled to overtime wages.

17. The delegate determined that the Appellant had required the Employee to pay employer business costs, contrary to section 21 of the *ESA*. The delegate calculated mileage from the Employee's home to the worksite and applied a Canada Revenue Agency automobile mileage rate to determine the Employee's entitlement to mileage expenses.

18. The delegate denied the Employee's claim for towing or repair charges on the basis that they were incurred after the Employee quit. The delegate also found insufficient evidence that the vehicle

breakdown was caused by being overloaded by the Appellant's equipment, as the equipment was not being transported at the time of the breakdown.

19. The delegate calculated vacation pay on the wages owing and imposed administrative penalties for the Appellant's failure to pay wages owed as required by the *ESA*, for requiring the Employee to pay the employer's business costs, and for failing to produce payroll records as directed.

ARGUMENT AND 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:

(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.

22. 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*, BC EST # D141/03).

23. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination. I find that the Appellant has not met that burden.

24. The appeal was submitted to the Tribunal on April 8, 2020, approximately seven months after the statutory deadline for filing an appeal. The Appellant says that he had no knowledge of the complaint or the Determination until his bank account was suspended. The Appellant provided no information about when he became aware of the Determination, or how soon thereafter he took steps to appeal it.

25. The Appellant says that he and the Employee lived at the same address in 2017, but that he moved from that address in 2018. The Appellant's appeal submission does not identify his current address.

26. The Appellant also says that all correspondence was sent to his previous address and that the Employee had full knowledge he no longer lived there. While I prepared to accept that the delegate attempted to contact the Employer at an address that he had not lived at for some time, the Appellant's submission is silent on the correctness of the telephone number called by the delegate to inform him of the appeal or why correspondence sent to the worksite would not have been received.

27. The delegate says that he made seven attempts to contact the Appellant by telephone between February 14, 2019, and August 27, 2019; on each occasion he received a recorded message stating that the number was "unavailable" and there was no opportunity to leave a message. The delegate further states that there is no record of the business All Floor You being registered with BC Registry Service.

28. The delegate says that the Determination was sent to the Appellant by registered mail on August 2, 2019, and that it was returned to the Branch on August 23, 2019, as it was unclaimed.

29. The ESA permits service to be "deemed" in certain circumstances. Subsections 122(1) and (2) provide for the service of determinations and demands as follows:

> (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if
>
> (a) served on the person, or
>
> (b) sent by registered mail to the person's last known address.
>
> (2) If service is by registered mail, the determination or demand is deemed to be served eight days after the determination or demand is deposited in a Canada Post Office.

30. I find that the notice of the hearing and the Determination were served in accordance with the *ESA*. The Appellant acknowledged that the address used by the Branch was his address in 2017. Although he moved from that address, he provided no mailing address with his appeal submission, either residential or business. Furthermore, the Appellant did not register his business in British Columbia.

31. In *Niemisto*, BC EST # D099/96, the Tribunal held that Appellants seeking extensions of time in which to file an appeal must satisfy the following factors:

> i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
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> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
>
> iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;
>
> iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
>
> v) there is a strong *prima facie* case in favour of the appellant.

32. The Appellant provided no information on his current address and does not explain why the delegate was unable to contact him by telephone. I find that the Appellant has not provided a reasonable and credible explanation for his failure to request an appeal within the statutory time limit, nor has he demonstrated a genuine and on-going *bona fide* intention to appeal the Determination.

33. The Appellant contends that the Employee was an independent contractor and that his rate of pay was not as the Employee alleged. He contends that the Employee was to provide him with a record of his hours of work and did not do so. The Appellant argues that the Employee's record of hours was incorrect and showed "substantially" higher hours than those that he actually worked.

34. The Tribunal as 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.

35. While I find that the Appellant did not have an opportunity to present his case to the delegate, I am not persuaded that he has a strong *prima facie* case.

36. Firstly, although the Appellant contends that the Employee was an "independent contract worker", the record suggests that he was in fact an employee. The Appellant says that the Employee was given the responsibility of removing carpets in a hotel that was being renovated even though the Employee had no prior experience doing that work.

37. The *ESA* defines "employee" broadly to include, *inter alia*, a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee". An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee". (Section 1 of the *ESA*)

38. The Appellant hired the Employee and directed his work. In the appeal submission, he states that the Employee was provided with accommodation at the job site. There is no evidence that the Employee had the ability to delegate his work to anyone else, or that he was in business for himself as a self-employed contractor.

39. Furthermore, although the Appellant contends that the Employee's record of his hours of work was "substantially higher" than what he in fact worked, there is no evidence the Appellant was present at the job site on a regular basis, or instructed the Employee how or where to record his hours of work. In fact, the difference between what the Appellant paid the Employee and what the delegate determined the Employee was owed for regular wages was less than $500.

40. The Appellant did not maintain Employer records as required under the *ESA*. In the absence of any Employer records, the delegate would have relied on the Employee's records in any event. There is nothing in the appeal submission to persuade me that they were unreliable.

New Evidence

41. 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.

42. Although the Appellant's appeal submission is essentially his response to the complaint, I am not persuaded that, had the delegate considered his position, he would have arrived at a different conclusion. The appeal contains no evidence the Employee was a self-employed contractor, and the Appellant provides no evidence regarding the Employee's hours of work.

43. I deny the application to extend the time in which to file an appeal as I find no good explanation for the Appellant's failure to request an appeal within the statutory time period, and I find that the Appellant has not demonstrated a *prima facie* basis to interfere with the Determination.

ORDER

44. Pursuant to section 114 (1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated August 2, 2019, is confirmed, together with whatever interest may have accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal