

An appeal

- by -

EVL Nurseries Ltd.
("EVL Nurseries")

- 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.: 2020/049

DATE OF DECISION: July 8, 2020

DECISION

SUBMISSIONS

Michael Scholtens

on behalf of EVL Nurseries Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“ESA”), EVL Nurseries Ltd. (“EVL Nurseries”) has filed an appeal of a determination issued by Glen MacInnes, a delegate (“the Delegate”) of the Director of Employment Standards (“the Director”) dated February 7, 2020 (the “Determination”).
2. On January 8, 2019, Blaine McDonald (“Mr. McDonald”) filed a complaint with the Director alleging that EVL Nurseries contravened the *ESA* by failing to pay him annual vacation pay, statutory holiday pay, commissions, and compensation for length of service.
3. A hearing before a delegate was conducted on September 19, 2019, with Michael Scholtens (“Mr. Scholtens”), on behalf of EVL Nurseries, and Mr. McDonald in attendance.
4. The Delegate concluded that EVL Nurseries had contravened sections 58, 46, and 63 of the *ESA* in failing to pay annual vacation pay, statutory holiday pay, and compensation for length of service. The Delegate ordered EVL Nurseries to pay \$6,311.21 in respect of wages and interest. The Delegate also imposed 3 administrative penalties in the total amount of \$1,500.00, for a combined amount of \$7,811.21.
5. EVL Nurseries’ appeal, received by the Tribunal on March 16, 2020, is on the grounds that the Director failed to observe the principles of natural justice in making this Determination.
6. This decision is based on EVL Nurseries’ 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

7. Whether or not EVL Nurseries has established any basis to interfere with the Delegate’s Determination.

FACTS

8. EVL Nurseries is a company duly incorporated under the laws of British Columbia and operates a wholesale nursery that sells plants to customers throughout western Canada and the United States and falls within the jurisdiction of the *ESA*. The head office is in Langley, BC, and Mr. Scholtens is listed as the sole director and officer.
9. Mr. McDonald was employed from March 3, 2016, to August 24, 2018, by EVL Nurseries. From March 3, 2016, to September 30, 2016, he worked as a delivery driver, and from October 1, 2016, to August 24, 2018, he worked as a salesperson selling nursery products to customers in Alberta and the United States.

10. Mr. McDonald was provided with a company vehicle, cellphone, and laptop computer. His travel expenses were paid directly by EVL Nurseries and included fuel, accommodations, and meals.
11. An employment agreement for the sales position was presented to Mr. McDonald around August 2016, and the agreement outlined that Mr. McDonald would receive a base salary of \$2,000.00 bi-weekly. A bonus system was detailed within the agreement.
12. The employment agreement described Mr. McDonald's duties, which included visiting customers and developing a new customer base between February 1 to December 15 each year. Mr. McDonald would also fill out and submit weekly sales reports to EVL Nurseries.
13. Mr. McDonald normally worked eight hours a day from Monday to Friday, beginning his work week at the Langley office on Monday and traveling the balance of the week meeting with and establishing new customers within his geographic area.
14. Mr. McDonald worked on four statutory holidays from August 25, 2017, through August 24, 2018, receiving only his regular wages on these days.
15. On July 28, 2018, Mr. Scholtens sent an e-mail to Mr. McDonald regarding his concerns about the weekly sales reports not being received in time.
16. Based on a harassment complaint against Mr. McDonald and concerns about his lack of productivity, Mr. Scholtens decided to terminate Mr. McDonald's employment.
17. On Friday August 24, 2018, Mr. Scholtens went to Mr. McDonald's home and told him his employment was terminated and then left, taking the EVL Nurseries' vehicle, credit card, and cell phone.

Sexual harassment

18. On August 17, 2018, Mr. Scholtens interviewed an employee (the "Employee") regarding allegations that Mr. McDonald had made inappropriate comments, including calling him "cutie". With Mr. Scholtens' assistance, the Employee prepared an (undated) written complaint of sexual harassment by Mr. McDonald.
19. Mr. Scholtens obtained a written statement from the production and shipping manager, Mr. Noel Heringa ("Mr. Heringa") dated August 16, 2019, and submitted this as evidence at the hearing. The document alleged that in the summer of 2018, Mr. McDonald sought out the Employee to be near him, and when Mr. Heringa would unexpectedly come close, Mr. McDonald seemed jumpy.
20. At the hearing, Mr. McDonald denied the allegation of sexual harassment towards EVL Nursery staff including the Employee.
21. Neither Mr. Heringa nor the Employee participated in the hearing. The Delegate gave no weight to their written statements as the information could not be tested, challenged, or verified; the Delegate took specific note of Mr. Scholtens' assistance to the Employee in writing his statement.

22. The Delegate found that EVL Nurseries failed to meet the onus of proving, on the balance of probabilities, that Mr. McDonald sexually harassed another employee, and found EVL Nurseries did not have cause to terminate Mr. McDonald based on this allegation.

Productivity

23. In August 2018, Mr. Scholtens spoke with Mr. Heringa and the Office and Logistics manager Emma Bauman (“Ms. Bauman”) about his concerns with Mr. McDonald’s productivity. Each provided a written statement on August 16, 2019, with Mr. Heringa writing that in the spring and summer of 2018, some customers told him they had not been seeing Mr. McDonald as often. He also wrote that the tracking program reports showed different information than that provided by Mr. McDonald.
24. Ms. Bauman wrote that she would sometimes be told by Mr. McDonald that he would be off for a block of time, and she would find out later that the appropriate parties had not been told of his absence.
25. Mr. Scholtens reviewed Mr. McDonald’s vehicle movements by way of installed tracking devices and an associated computer tracking program, determining that Mr. McDonald only saw four customers on August 22, 2018, and traveled to various non-work-related locations before settling into his hotel. There was no vehicle movement on August 23, 2018, and on August 24, 2018, he made only one customer stop in addition to some non-work-related stops.
26. An Excel spreadsheet presented by Mr. Scholtens summarized Mr. McDonald’s activities while traveling to the United States between July 31, 2018, to August 24, 2018, based on the company vehicle’s tracking device.
27. The Delegate considered the issue of productivity and limited sales visits between July 31, 2018, and August 24, 2018, giving little weight to a spreadsheet that showed Mr. McDonald’s vehicle activity during this timeframe. The Delegate found it unreasonable to conclude that because Mr. McDonald was not on a sales visit he was therefore not working, as his job included activities not limited to sales visits such as communicating with customers and filling out order forms.
28. The Delegate found EVL Nurseries’ generalization of non work-related stops during the workday to be insufficient evidence to establish that Mr. McDonald was engaged in time theft.
29. The Delegate found no evidence that EVL Nurseries had established specific expectations with respect to productivity aside from submitting weekly sales reports and had then allowed these to be submitted late or not at all.
30. There was no evidence that EVL Nurseries reviewed the weekly sales reports that were submitted and identified concerns with Mr. McDonald about the number of sales visits he was conducting.
31. The Delegate concluded that while there was some expectation with Mr. McDonald regarding his sales reports and sales visits, the Employer did not communicate with Mr. McDonald concerns about lack of sales visits or productivity and did not warn Mr. McDonald that his continued employment depended on an increase in sales visits.

32. The Employer failed to prove Mr. McDonald was terminated for just cause, and accordingly, Mr. McDonald is entitled to two weeks compensation for length of service.

Vacation Pay

33. The final wage statement dated August 31, 2018, shows that Mr. McDonald had accrued \$2,041.60 vacation pay (4% of gross wages) as of January 1, 2018, and had earned \$1,400.00 in vacation pay between January 2, 2018, to August 31, 2018. This was not paid to Mr. McDonald.
34. Mr. Scholtens told the delegate that he did not pay the \$3,441.60 vacation pay to Mr. McDonald because Mr. McDonald was paid regular wages while away from December 26, 2017, to December 31, 2017, on vacation and because he recalled Mr. McDonald taking the balance of his vacation time to visit his father some time in 2018. He did not however recall the dates.
35. The Delegate accepted the payroll records provided by EVL Nurseries as the best evidence of the accrued vacation time taken by Mr. McDonald, apart from the timeframe December 26 – 31, 2017. Mr. McDonald was paid regular wages in that period when he was on vacation, and the amount was not deducted from his accrued vacation at the time. Accordingly, for 2017, the \$800.00 paid as salary in this timeframe will be considered vacation pay.
36. Mr. Scholten's argument that Mr. McDonald took other vacation throughout 2017 and 2018 beyond that recorded in the payroll records was vague and lacked any specific dates. The document submitted from Ms. Bauman (see paragraph 24) also lacked specific dates and could not be tested and was given no weight.
37. Mr. McDonald was entitled to \$2,773.52 for outstanding vacation pay. The actual calculations, not disputed, are contained within a calculation sheet attached to the Determination.

Statutory Holiday Pay

38. Mr. Scholten agreed that Mr. McDonald worked on Labour Day 2017, Thanksgiving 2017, Victoria Day 2018, and BC Day 2018 and received regular wages only.
39. Although Mr. Scholten argued that Mr. McDonald took days off in lieu of working the statutory holidays, he provided no records or specific information to corroborate that Mr. McDonald did indeed take days off in lieu, and the Delegate properly rejected this unsubstantiated argument.
40. The Delegate concluded that in the absence of payroll information to show Mr. McDonald earned 1.5 times his regular wage in addition to an average day's pay, Mr. McDonald was entitled to statutory holiday pay for four statutory holidays worked in 2017 and 2018 in accordance with section 46 of the *ESA*.

ARGUMENT

41. Mr. Scholtens argues that although Mr. McDonald worked a few hours on four 2017 and 2018 statutory holidays, he was not paid for them because he was a salaried employee.

42. When Mr. McDonald did work statutory holidays, he took other days off in the work week in lieu while continuing to receive his full pay.
43. Section 48 of the *ESA* states that an employer, with the agreement of an employee, may substitute another day off for a statutory holiday and this is what happened.
44. Mr. Scholtens argues that Mr. McDonald took vacation time throughout 2017 and 2018 and continued to receive his full salary.
45. Mr. McDonald used his accrued vacation during his employment, including days that he failed to formally request or provide notification of to EVL Nurseries, and the balance to visit his father in 2018.
46. A GPS installed on Mr. McDonald's truck confirmed that he made many nonwork-related stops, and on August 23, 2018, there was no vehicle movement, and on August 24, 2018, he only made one stop to a customer.
47. Mr. Scholtens argues that Mr. McDonald was not entitled to payment for length of service because there was just cause for his dismissal.
48. Mr. McDonald was terminated for sexually harassing another employee and having unsatisfactory productivity.
49. Mr. McDonald acted in an inconsistent manner. When he was supposed to meet new customers, he would stay in the hotel for hours while telling Mr. Scholtens and the manager that he was visiting customers.
50. Mr. McDonald took days off without notice to Mr. Scholtens or other staff.

ANALYSIS

51. 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.

52. 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.

53. 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.

54. EVL Nurseries has brought no new evidence, argument, or error identification to the Tribunal, but rather repeats the arguments made at the hearing before the Delegate and addressed by the Delegate.

55. The appeal represents no more than a challenge to the conclusions of fact made by the Delegate based on the evidence presented by the parties; it is an attempt by EVL Nurseries to have the Tribunal reach different conclusions on the facts that were made by the Delegate.

56. The *ESA* does not allow appeals based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors of factual findings unless such findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing an error of law because of factual error is stringent, requiring the appellant to show that the findings are perverse and inexplicable in the sense that they were made without any evidence, that they were inconsistent with, and contradictory to, the evidence or they were without any rational foundation.

57. While it is apparent that EVL Nurseries disagrees with the Delegate's ultimate conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable, or that the Delegate misapplied the law of the *ESA* relating to dismissal for cause, statutory holidays, and vacation entitlement.

58. EVL Nurseries alleges that the Delegate failed to observe the principles of natural justice in making the Determination.

59. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them, and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

60. EVL Nurseries was informed of the case to meet and was provided with an opportunity to respond to the allegations by providing evidence at a hearing before the Delegate on September 19, 2019. Mr. Scholtens provided direct evidence to the Delegate concerning the matters under review and had the opportunity to question the evidence provided by Mr. McDonald.
61. EVL Nurseries has not identified any reasonable basis that the Delegate was biased in favour of the Mr. McDonald. That a decision maker has preferred the evidence of one party over another is not by itself evidence of bias. An apprehension of bias must be a reasonable one held by reasonable right-minded persons. (See *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394.) The test is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, thinks regarding whether it is more likely than not, whether consciously or unconsciously, that the decision maker would not decide fairly.
62. The Delegate heard evidence from both parties, provided the parties with an opportunity to make submissions on the issues, and decided the case based on the evidence before him. When applying the applicable legal test for bias above, there is no reasonable basis to think that the Delegate would not (or did not) decide fairly. I am not satisfied on a balance of probabilities that the Delegate failed to observe the principles of natural justice in making the Determination.
63. Therefore, I conclude that there is no reasonable prospect that the appeal will succeed and dismiss the appeal.

ORDER

64. Pursuant to section 115 of the *ESA*, I order that the Determination, dated February 7, 2020, be confirmed.

Marnee Pearce
Member
Employment Standards Tribunal