Citation: Garrick Automotive Ltd. (Re)
2020 BCEST 85

An appeal

- by -

Garrick Automotive Ltd.
(the "Employer")

- 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.: 2020/006

DATE OF DECISION: July 13, 2020

DECISION

SUBMISSIONS

Gary Bruce Lanoue	on behalf of Garrick Automotive Ltd.
Jeff Bailey	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Garrick Automotive Ltd. carrying on business as Adrenaline Auto Recycling (the "Employer") filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on December 9, 2019 (the "Determination").

2. The Director found that the Employer had contravened sections 18 and 58 of the *ESA* in failing to pay a former employee, Kevin Packer (the "Employee"), wages and vacation pay. The Director determined that wages and interest were owed in the total amount of $677.05. The Director also determined that the Employer had failed to submit employer records as required under section 46 of the *Employment Standards Regulation* (the "*Regulation*"). The delegate imposed three $500 administrative penalties on the Employer for contraventions of the *ESA* and *Regulation* for a total amount payable of $2,177.05.

3. The Employer appeals the Determination contending that the Director failed to observe the principles of natural justice in making the Determination. The Employer also says that new evidence has become available that was not available at the time the Determination was made.

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. After considering the grounds of appeal, I sought submissions from the Director and the Employee. Although the Director made submissions, the Employee did not.

5. This decision is based on the section 112(5) "record" that was before the delegate at the time the decision was made, the submissions of the Employer and the Director, and the Reasons for the Determination.

FACTS

6. The Employer is an automotive recycling business incorporated in British Columbia. Gary Bruce Lanoue ("Mr. Lanoue") is the sole director. The Employee was employed as a labourer/mechanic from May 18, 2013, until his employment was terminated on February 14, 2017.

7. The Employee alleged that the Employer had contravened the *ESA* in failing to pay him final wages, annual vacation pay, compensation for length of service, and statutory holiday pay. The delegate conducted a teleconference hearing regarding the complaint on November 20, 2017.

8. The facts relevant to this appeal, briefly, are as follows.

Wages

9. The Employee contended that the Employer had not paid him for work performed in February 2017 when the Employer was on holidays. At issue before the delegate was the reliability of the evidence of both parties regarding the Employee's hours of work during that period.

10. In support of his claim, the Employee submitted a calendar from his worksite in which he recorded his hours of work.

11. The Employer testified that when he returned from his vacation, other employees told him that the Employee had been absent from work during work hours. Consequently, the Employer changed the Employee's recorded hours of work based on what various people reported to him about the Employee's absences.

12. The delegate considered the evidence of a number of witnesses on behalf of the Employer on what they observed at the workplace when the Employer was on vacation. The delegate found that some of the witnesses' evidence was based on assumptions while the evidence of other witnesses conflicted.

13. The delegate found the Employer did not have sufficient evidence to alter the Employee's recorded hours of work. He determined that the Employee's recorded hours were the best available evidence and calculated the Employee's outstanding wages to be $594. The delegate also noted that the Employer agreed that he had not paid the Employee for the two hours he worked on the date his employment was terminated.

14. The Employer terminated the Employee's employment on February 14, 2017, on the grounds that the Employee had misappropriated the Employer's property. Although the Employee claimed compensation for length of service, the delegate determined that the Employer had established just cause to terminate the Employee and denied his claim in this respect. The Employer sent the Employee a final pay cheque on February 15, 2017. The Employee contended that the Employer had not sent any accompanying wage statement and that surprised him because the Employer had always done so previously. The delegate imposed an administrative penalty on the Employer for failing to provide the Employee with a wage statement with his final pay cheque.

ARGUMENT

15. The Employer contends that he contacted the Employment Standards Branch to seek advice on how to proceed. He says that he proceeded as instructed, including obtaining witnesses and submitting documents. He submits that when he initially discussed how to proceed with the delegate, he agreed to pay the Employee for two hours work on the day his employment was terminated but that he received advice to wait to pay that amount until the hearing was concluded. He submits that, being assessed an administrative penalty after following the advice of the Branch is unfair.

16. The Employer also argues that it is inconsistent for the delegate to accept the evidence of some witnesses regarding the Employee's theft of gas, and to then reject their evidence regarding the Employee's hours of work. He says that the delegate improperly rejected the evidence of some of the witnesses because their evidence was inconsistent with statements they had written. The Employer argues that it is

understandable that the evidence might be somewhat inconsistent, given that the witnesses wrote their statements immediately after the incidents and the hearing was held nine months later.

17. The Employer also argues that the Determination is flawed in that the delegate referred to a witness as a he, when the witness was in fact female. He also says that the delegate made other mistakes in the Determination and suggests that these errors were a result of the delegate taking two years to issue it. The Employer says that the delegate has not supplied his "notes" from the hearing and argues that his failure to do so combined with the absence of "constructive reasoning or logic" indicates that he did not take any.

18. Finally, the Employer contends that the delegate erred in relying on the Employee's evidence that he did not receive a wage statement with his final pay. He says that the delegate erroneously recounted his evidence on the issue of the wage statement as being that he didn't know if a wage statement had been included with the final pay. The Employer contends that he testified that was his normal practice to include wage statements and was confident he had in that case. He says that it was in error for the delegate to accept the Employee's evidence in this respect after finding that the Employee had been dishonest in stealing the Employer's property.

19. The delegate submits that in *Tung*, BC EST # D511/01, the Tribunal has found that delay, without more, does not constitute abuse of process in the administrative law context. He says that the passage of 24 months between the hearing and the issuance of the Determination did not affect his ability to make credibility assessments and arrive at factual findings.

20. The delegate submits that any delay must be unacceptable to the point of being so oppressive as to taint the proceedings, and there must be evidence of prejudice flowing from the delay.

21. The delegate says that the Employer has provided no evidence of prejudice resulting from the delay, that the evidence of the witnesses did not change between the hearing and the issuance of the Determination and that the Determination is based on the evidence at the hearing. The delegate says that the witnesses had the opportunity to review their statements before giving evidence, and that the delegate did not question the honesty of the witnesses or need to assess their credibility.

ANALYSIS

22. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

23. 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).

24. 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 conclude that the Appellant has met that burden, in part.

25. I will first address the question of delay.

26. The Employee filed his complaint in August 2017. The delegate conducted a hearing by teleconference on November 20, 2017, and issued his Determination decision over two years later.

27. In assessing the issue of delay in the context of employment standards hearings, the Tribunal has relied on *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44.

28. In *Blencoe*, the Supreme Court held that, in order to determine whether a delay amounts to an abuse of process in the administrative law context, two things must be proven:

(1) the delay was unacceptable or inordinate, determined in the context of the proceedings; and

(2) the delay caused prejudice of a magnitude that affects the fairness of the hearing or the community's sense of decency and fairness.

29. Where there is no prejudice to the hearing process, the delay must directly cause significant personal or psychological prejudice. To constitute an abuse of process, the delay must be such that it brings the administrative process in issue into disrepute. (*Blencoe* at paras. 104, 115, 122, 133)

30. Both delay and prejudice are separate factors must be weighed separately, with delay to be addressed first.

31. The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay. (*Blencoe* at para. 122)

32. The record indicates that the complaint was not legally complicated. It was decided by way of a hearing rather than an investigation. There was no ongoing communication between the parties or any preliminary determination issued for response. Although the delegate was obligated to consider the evidence of several witnesses, their evidence was not overly complex or lengthy. The Reasons for the Determination, even with the consideration of the witness evidence, was only thirteen pages.

33. The delegate has not addressed the question of why the Determination was issued over 24 months following the hearing.

34. One of the purposes of the *ESA* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act" (s. 2(d)). A 2-year time period to issue what is a factually and legally uncomplicated Determination not only fails to meet this statutory purpose, it, in my view, offends

the community's sense of fairness. The public must be satisfied that complaints are dealt with quickly, and that they have finality.

35. I find that the delay was inordinate and unacceptable, and that it brings the administration of the employment standards scheme into disrepute.

36. Although the Employer did not specifically state that he was prejudiced as a result of the delay, as noted above (paragraph 23), the Tribunal has not required that unrepresented, non-legally trained parties specifically address legal tests.

37. However, while remedies are available in administrative contexts to deal with state-caused delays, those remedies are available only where a party can demonstrate significant prejudice from the delay. In *Tung* (BC EST # D511/01), the Tribunal found that mere delay does not warrant a stay, or cancellation of a Determination; there must be proof of substantial prejudice:

> "To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. There is no abuse of process by delay *per se*. [It] must [be] demonstrate[d] that the delay was unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121). While I am of the view that the delay in this case was inordinate (this was not a complicated matter and it ought to have been dealt with considerably more expeditiously), I cannot conclude that this delay "tainted" the proceedings. (*Tung*, BC EST # D511/01)

38. Although the Employer suggests that he is seriously affected by the fact that he received what appears to be an unreliable decision following a two-year delay, I am not persuaded that this constitutes significant prejudice for the purposes of the *Blencoe* test. The Employer has not demonstrated, for example, that the delay has seriously and negatively affected his reputation, health, or financial circumstances. Thus, the *Blencoe* test has not been met.

39. With respect to the Employer's argument that errors in the Determination demonstrate that the delegate was unable to recount the evidence accurately due to the delay, there is no mechanism beyond a review of the record for measuring the accuracy of the delegate's recall and assessment of the evidence. As the Tribunal noted in *United Specialty Products*, BC EST # D057/12, the delegate's notes in a hearing do not form part of the record.

40. The Employer does not identify any evidence in the record that establishes that the Determination contains palpable and overriding errors of fact. Some errors alleged by the Employer are evident on the face of the Determination. For example, the delegate does not deny referring to one of the witnesses as a "he" when the witness was female. He also did not dispute the Employer's allegation that he mistakenly identified a party as the Employer. These errors are unfortunate as they undermine confidence in the delegate's decision-making in much the way as the inordinate delay does. However, I find they do not establish the delegate no longer recalled the evidence accurately due to the delay or otherwise establish a basis for setting aside the Determination.

41. I will now turn to the Employer's appeal of the Determination on its merits.

Error of law

42. 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.

43. Once a contravention of the *ESA* is found, the delegate has no discretion as to whether a penalty is imposed or not (Section 98). I am only able to cancel a penalty if I find that there is no underlying contravention. As the Employer does not dispute that he failed to pay the Employee for work performed on his last day of work in accordance with the *ESA*, I am unable to cancel the penalty assessment, unfair as it may seem to the Employer.

44. The assessment of the reliability of evidence as well as the credibility of the witnesses is within the authority of the delegate. The issue of what weight to be given to certain evidence and the credibility of any witnesses are questions of fact, not law. Absent any persuasive evidence that the delegate's assessment was, for example, affected by bias, or made findings of fact that were unsupported by any evidence, I have no jurisdiction to interfere (see *Britco Structures Ltd.*, BC EST # D260/03). I do not find the delegate's acceptance of the evidence of parties on some issues while rejecting it on others to be unsupported by the evidence.

45. Finally, the Employer has provided no evidence in support of his allegation that the delegate erred in finding that no wage statement had been issued to the Employee with his final pay. The Employer provided no evidence to the delegate during the complaint resolution process, and provides none on appeal. His argument that it was his normal business practise to do so does not constitute evidence. In the absence of any evidence, I am not persuaded that the delegate's conclusion was unsupported by the evidence.

46. I dismiss the appeal.

ORDER

47. Pursuant to section 115 of the *ESA*, I order the Determination, dated December 9, 2019, be confirmed, together with whatever further interest has accrued under section 88 of the ESA, since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal