Citation: Ashton Lane Hair Company Ltd. (Re)
2021 BCEST 15

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Ashton Lane Hair Company 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.: 2020/143

DATE OF DECISION: February 3, 2021

DECISION

SUBMISSIONS

John Connelly on behalf of Ashton Lane Hair Company Ltd.

OVERVIEW

1. This is an appeal by Ashton Lane Hair Company Ltd. (the "Employer") of an August 31, 2020 Determination issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director determined that the Employer had contravened sections 18, 40, and 58 of the *Employment Standards Act* (the "*ESA*") in failing to pay a former employee wages, overtime and vacation pay, and ordered the Employer to pay wages and interest in the amount of $390.01. The Director also imposed two $500 administrative penalties for contraventions of sections 18 and 28 of the *ESA*, for a total amount owing in the Determination of $1,390.01.

3. The grounds for the appeal are that the Director erred in law and failed to comply with the principles of natural justice in making the Determination. The Employer also contends that evidence has become available that was not available at the time the Determination was being made.

4. Section 114 of the *ESA* provides that 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 submissions, I found it unnecessary to seek submissions from the Employee or the Director.

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

BACKGROUND

6. The Employer operates a hair salon in Coquitlam, B.C. Mr. Connelly and his spouse Sonia Connelly are the two directors.

7. Natalia Jankowski (the "Employee") was employed at the salon for four days in December 2019. She alleged that she quit after four days because she was asked to sign a two-year employment contract, which she did not want to do. After her employment ended, the Employee asked the Employer for her wages; and subsequently filed a complaint with the Employment Standards Branch (the "Branch") alleging that the Employer contravened the *ESA* in failing to pay her wages when those wages were not paid.

8. The Employee alleged that she was to work eight hours a day, but that she was required to work overtime on two days without prior notification.

9. The Employer initially asserted that the Employee was never employed at the salon. However, after being shown email correspondence between the Employee and the salon manager, Mr. Connelly informed the

delegate that the Employee had been offered a one week unpaid "shadowing or training position" to determine whether or not she was a suitable candidate for the job. The Employer asserted that the Employee was not a "good fit" and asked her not to return after two days of work.

10. Mr. Connelly informed the delegate that it was common to have stylists "work on multiple models without pay to show us their work" and that the "reward and compensation is awarded to successful candidates." Mr. Connelly further asserted that this type of unpaid relationship was consensual. He further informed the delegate that the Employee's work did not enrich his business and that the Employer did her a "favour by allowing her in our space".

11. The record indicates that when the delegate informed Mr. Connelly that the *ESA* considered the Employee's duties as work for which she was entitled to be paid, Mr. Connelly disagreed. When the delegate informed the Employer about the provisions of the *ESA*, the record notes that the Employer contended the delegate was "blackmailing him."

12. In a subsequent email, Mr. Connelly acknowledged that the Employee was offered paid employment at the salon and that she was an employee. Mr. Connelly acknowledged that the Employee worked on December 10 and 11, 2019. (In the Determination, these dates are recorded as December 10 and 11, 2020)

13. The Employer provided the delegate with a screenshot of the salon's staff scheduling program for December 12, 2019, as evidence that the Employee did not work that day. However, he acknowledged that the scheduling program also did not show the Employee working on December 10 or 11 either. Mr. Connelly asserted that the Employee had not shown up for work on December 13, 2019, and submitted copies of messages between the Employee and the salon manager in which the Employee stated that she was sick and would not be coming to work that day. The Employee messaged the salon manager on December 14, 2019, indicating that she was not well on that day either, and would not be in to work. After the Employee did not report for work again on the 17th, the Employer informed her that her employment was at an end. When the Employee asked about her wages, the salon manager asked her to provide her social insurance number and stated that [Mr. Connelly] would pay her.

14. The Employer had no record of the Employee's hours of work. After reviewing camera footage and computer logs and speaking to other employees, the Employer agreed that the Employee worked for two days, but contended that she had only worked for 6 hours on each of those two days. The screen shot of the salon's staff scheduling program for December 12, 2019 showed that the two other staff worked for 9 hours on that day and one worked 8.25 hours.

15. The Director's delegate found that there was an employment relationship between the parties, and that the Employee was entitled to wages for the hours she worked. The delegate found that the Employer's staff scheduling program was not reliable evidence about the Employee's hours of work. The delegate also noted that the Employer, who initially denied that the Employee was ever employed at the salon, had not maintained employee records as he was required to do pursuant to section 28 of the *ESA*. As a consequence, the delegate found the Employee's evidence about her hours of work on December 12, 2019 was more reliable than that of the Employer, and found that the Employee worked on December 10, 11, and 12.

16. The delegate found that the schedules of the salon's staff on December 12, 2019, was consistent with the Employee's claim that her shift was in excess of eight hours. He also noted that the messages between the Employee and the salon manager indicated that, had the Employee reported for work that day, she would have worked in excess of eight hours. He found the Employee's evidence that she worked overtime to be credible. The delegate determined that the Employee worked eight hours on December 10, eight hours 40 minutes on December 11, and nine hours on December 12, 2019.

17. The delegate also found that the Employer terminated the Employee's employment on December 17, 2019, and that, because she was employed for more than five days, the Employee was entitled to vacation pay.

ANALYSIS

18. 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.

19. Section 112 of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:

(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.

20. Because this process is designed for the participation of parties who are not legally represented, the Tribunal takes a large and liberal interpretation of the grounds of appeal. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. An appeal is an error correction process, not an opportunity to re-argue a case that has been presented to the Director. I am not persuaded that the Employer has met the burden in this case.

21. The Employer argued that the delegate was biased against him and "mishandled" the complaint. Mr. Connelly also asserted that the delegate "ignored our statements, favoring the information given with no

prof by [the Employee]" (sic), asserting that the Employee worked no more than six hours on December 10 and 11.

22. The Employer also asserted that his bookkeeper prepares payroll for the salon as well as his construction company and that he has never had any complaints from employees about their wage statements.

23. Attached to the appeal submission are a large number of emails between the delegate and the Employer regarding the complaint.

24. The Employer also submitted statements from Sonia Connelly, who works in the salon; the salon manager; and three other salon employees regarding the Employee's hours of work. The Employer also submitted a statement from the bookkeeper. Mr. Connelly contends that the delegate "refused to accept my word" about the Employee's hours of work, that his finding that the Employer failed to maintain employer records "is without merit" and "follows a pattern of one sided unfair treatment." The Employer also contended that the delegate's "charge of not keeping records is his attempt at punishing me complaining to his supervisor regarding his handling of the case." (sic)

25. I will address each ground of appeal in turn.

New Evidence

26. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> 1. 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;
> 2. the evidence must be relevant to a material issue arising from the complaint;
> 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
> 4. the evidence must have high 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.

27. None of the statements submitted by the Employer on appeal constitute new evidence. All of the information contained in the employee and bookkeeper statements was available at the time the delegate was investigating the complaint, and, had the Employer considered that information relevant, ought to have been presented at that time. Furthermore, the other employees speak only to their own hours of work and several indicate they did not know the Employee's hours of work on December 10, 11 and 12. The bookkeeper merely states that she prepares payroll based on information provided to her by the salon manager and is not evidence about the Employee's hours of work.

28. The salon manager, who appears to have been the person to have the best opportunity to provide evidence regarding the Employee's hours of work stated that "[i]t is my recollection that [the Employee] work[ed]…". The salon manager's statement does not persuade me that the delegate would have arrived at a different conclusion about the Employee's hours of work in light of the other evidence.

29. In her statement, Sonia Connelly states that the Employee was late for work on two days, that she took "approximately one hour" for her lunch and that she did not work on the third day. Ms. Connelly provides no direct or reliable evidence of the Employee's hours of work or wage payments. Ms. Connelly's statements do not fulfill the Employer's obligation to maintain Employer records.

30. In my view, none of the information in the statements would have led the delegate to a different conclusion on the material issue before the delegate which was whether the Employee had been compensated for all her hours of work. None of the statements contain any detailed or reliable information regarding the Employee's hours of work.

31. I find no basis for this ground of appeal.

Failure to comply with the principles of natural justice

32. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

33. There is no evidence, or suggestion in the appeal submissions, that the Employer did not know about the complaint, or that it was denied the opportunity to respond.

34. Allegations of bias against decision makers are serious, and bare assertions unsupported by any evidence, or mere speculation, are insufficient to make out a claim that natural justice has been denied. The onus of demonstrating bias lies with the person who is making the allegation. (see *R. v. S.R.D.,* [1997] 3 S.D.R. 141, *Gallagher,* BC EST # D124/03, and *Chengalath*, 2018 BCEST 55).

35. While I understand the Employer believes that the delegate had made up his mind in favor of the Employee, I am unable to find that the delegate was in any way predisposed to finding in her favour. The record indicates that the Employer initially denied that the Employee was employed at the salon, as noted in the Determination. When the Employer later indicated that the Employee was offered "unpaid training" and the delegate informed him she would be entitled to be paid for that time, the Employer disagreed with his interpretation. The delegate acknowledged the Employer's view, but indicated that he would nevertheless write a decision finding that the Employee was entitled to wages. The record also indicates that the delegate suggested that the Employer seek independent legal advice on its practise of not paying potential employees. The Employer continued to disagree with the delegate's communications and asked for his supervisor's contact information as he felt "attacked."

36. The Employer obviously had his own views about the status of the Employee and her entitlement to wages and declined to follow the delegate's recommendation that he seek independent legal advice. A disagreement with the delegate over an interpretation of the *ESA* does not support a finding of bias.

37. I find no basis for this ground of appeal.

Errors of law

38. 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.

39. It appears that the Employer disagrees with the decision of the delegate to prefer the Employee's evidence over that of the Employer as well as the delegate's imposition of administrative penalties for contraventions of the *ESA*.

40. Section 28 of the *ESA* requires an employer to maintain Employee records:

(1) For each employee, an employer must keep records of the following information:

(a) the employee's name, date of birth, occupation, telephone number and residential address;

(b) the date employment began;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

(e) the benefits paid to the employee by the employer;

(f) the employee's gross and net wages for each pay period;

(g) each deduction made from the employee's wages and the reason for it;

(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

(i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;

(j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must

(a) be in English,

(b) be kept at the employer's principal place of business in British Columbia, and

(c) be retained by the employer for 4 years after the date on which the payroll records were created.

41. There appears to be no dispute that the Employer did not maintain the records as required by the *ESA*. A statement from the bookkeeper that she prepared the payroll based on information provided to her by the salon manager does not discharge the Employer's obligations under section 28.

42. In the absence of Employer records, the delegate preferred the evidence of the Employee on her record of hours worked. I find no error in this conclusion, particularly given the Employer's inconsistent responses to the complaint.

43. The Employer initially denied the Employee worked at the salon, then he conceded she worked, but, in essence, for no pay. Only much later did he concede that she was a paid employee. The Employer then was unable to provide any reliable records of the Employee's hours of work even though he is obliged to maintain them. While the Employer continued to dispute the delegate's information about his obligations under the *ESA*, he has failed to provide any persuasive evidence of the Employee's hours of work.

44. I also find no error in the delegate's decision to impose two administrative penalties on the Employer for its failure to comply with the *ESA*.

45. I find no basis for this ground of appeal.

46. I conclude that there is no reasonable prospect the appeal will succeed, and dismiss the appeal pursuant to section 114 (1)(f) of the *ESA*.

ORDER

47. Pursuant to section 115 of the *ESA*, I confirm the Director's August 31, 2020 Determination, together with whatever interest that may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal