Employment Standards TRIBUNAL

Citation: Marivic Bariquit (Re)
2021 BCEST 75

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Marivic Bariquit

- 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.: 2021/037

DATE OF DECISION: September 1, 2021

DECISION

SUBMISSIONS

Natalie Drolet	on behalf of Marivic Bariquit
Sapinder Mund Gosal and Manjit Gosal	on their own behalf
Tara MacCarron	on behalf of the Director of Employment Standards

OVERVIEW

1. Marivic Bariquit (the "Employee") was employed by Sapinder Mund Gosal and Manjit Gosal (the "Employer") from May 9, 2019 until August 29, 2019. On November 23, 2019, the Employee filed a complaint with the Director of Employment Standards (the "Director"). In her complaint, the Employee alleged that the Employer had contravened the *Employment Standards Act* (the "*ESA*") and the *Employment Standards Regulation* (the "*Regulation*") by misrepresenting the type of work and working conditions, failing to pay her wages for all hours worked and vacation pay, making unauthorized deductions from her wages and failing to pay compensation for length of service.

2. Following an investigation, a delegate of the Director (the "delegate") issued a Determination on March 18, 2021. The delegate concluded that the complaint had been resolved and that no further wages were outstanding.

3. The Employee argues that the Director both erred in law and failed to observe the principles of natural justice in making the Determination.

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 sought submissions from the Employer and the Director.

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

ISSUE

6. Whether the Employee has established grounds for interfering with the Director's decision.

BACKGROUND

7. The Employee, who is a Philippine national, was employed by the Employer under the Temporary Foreign Worker Program (TFWP). The Employer had secured a positive Labour Market Impact Assessment (LMIA) on January 4, 2019 and the Employee signed her TFWP employment contract (the "Contract") on May 3, 2019. The Contract provided that the Employee was to work full time from 12:00 p.m. until 8:00 p.m.

Monday through Friday, and identified her duties as assisting with "childcare, meal preparation, general housekeeping and pet care." The Employee contended that, after she had commenced employment, the Employer made her sign a second work agreement titled "Live-In Caregiver Worker Agreement" (the "Agreement") which set out additional rules and conditions of employment. According to the Employee, the Agreement specified that she was to assist with "afterschool snacks, meal preparation, housekeeping and pet care." The Agreement included a detailed housekeeping description sheet and the Employer assigned the Employee a list of cleaning tasks.

8. The Employer argued that shortly after the Employee began working it became clear she lacked the experience she claimed to have in childcare, housekeeping and basic cooking skills, and that she later confessed she had lied about her ability to cook. The Employer contended that the Employee and the Employer jointly created a detailed list of duties and that the Employer made it clear to the Employee that she was not expected to perform any other tasks besides cleaning the kitchen after dinner, preparing the children's snacks and ensuring that their uniforms, clothing and bedrooms were in order.

9. Although the Employer acknowledged making a slight change to the Employee's job duties, they did not change the overall job description and conditions of employment, taking the position that making afterschool snacks, meal preparation and house cleaning were all components of "childcare."

10. The Employee contended that, in spite of the contract terms specifying that she was to work 8 hours per day and outlining the terms of her employment, she actually worked 10.5 hours per day, and that she was asked by the Employer to work two days in June that were her days off.

11. The Employee contended that she was paid for 40 hours per week and was never provided with any wage statements. The Employer disputed this allegation, and submitted time sheets signed by the parties, records of pay and payroll deductions, a copy of the Contract and Agreement, and a list of the Employee's duties. The Employer denied that the Employee was ever made to work past 8:00 p.m. or work on weekends, and that records the Employee had created to support her claim had been fabricated. The Employer confirmed that they asked the Employee to work overtime hours on June 29, 2019 and on July 27, 2019, for which she was paid $15.00 per hour in cash.

12. The Employee further contended that the Employer also required her to pay $100 bi-weekly for room and board, in contravention of the Contract in which the Employer agreed to provide her with accommodation and meals "at no cost." The Employer denied that the Employee was required to pay for room and board.

13. After receiving the delegate's "Preliminary Findings Letter", the Employee withdrew her allegation that she was entitled to compensation for length of service. She maintained however, that the Employer had misrepresented the conditions of her employment by changing her entitlement to vacation time and by removing "childcare" from her list of duties. She argued that her duties were properly characterized as a house cleaner, not as a nanny.

14. The Employer contended that between August 14 and 28, 2019, the Employee worked and was paid for 28 hours and further, was paid an additional 28 hours of vacation pay. It asserted that the Employee was not owed any additional vacation pay.

The Director's findings

15. The delegate identified the issues before her as follows:

i) Did the Employer misrepresent conditions of [the Employee's] employment?

ii) Is [the Employee] owed overtime wages?

iii) Is [the Employee] owed annual vacation pay?; and

iv) Were unauthorized deductions made from [the Employee]'s wages?

16. The delegate determined that the Employer had not contravened section 8 of the *ESA* by misrepresenting the type of work the Employee would be performing. The delegate noted that the Employee did not raise this argument in her initial complaint; rather, she made this argument in response to the Employer's submissions regarding her complaint. The delegate noted the Employee's position was based on changes to her entitlement for vacation time to vacation pay, and by removing the word "childcare" from her list of duties.

17. The delegate found that the parties agreed that the Employee was responsible for various housekeeping and pet care duties, both of which were provided for in the Contract and the Agreement. The delegate also found that, while the Employee did perform some duties associated with a housekeeper as provided in the LMIA coding, those were not her primary duties:

> . . .
>
> [The Employee] may have been hired to, in part, clean a private residence . . . however, I do not find the evidence shows this was her primary responsibility. Childcare can take many different forms, and, as per the definition of "4411 – nanny", this includes assisting with "household duties . . . ."
>
> While [the Employee] may not have been directly tending to and supervising children during her Employment for [the Employer], she was helping to maintain a safe and healthy environment in the home; planning[,] preparing and serving meals; and performing other housekeeping duties – these of which are duties associated directly with the [LMIA] code "4411 – nanny", not "6731 – light duty cleaner." (page R. 12 of the Determination)

18. The delegate also noted that although the Employee contended that the Employer contravened section 20(c) of the *Temporary Foreign Worker Protection Act* (the "*TFWPA*"), that section did not come into effect until September 17, 2020 and had no retroactive application.

19. The delegate determined that she was unable to rely solely on either the Employer's time sheets or the Employee's personal records. She found that the Employee's records could have easily been fabricated, as alleged by the Employer, while the Employer's records were signed by both parties prior to the end of the Employee's employment. The delegate determined that the Employee's hours of work were consistent with her employment contract; that is, eight hours a day, 40 hours per week. She also found that the Employee worked three additional hours on two weekends for which she ought to have been paid 1.5 times her regular wage rate. The delegate determined that these outstanding overtime wages had been paid in the Employer's voluntary payment of $461.68 prior to the issuance of the Determination, and no further overtime wages were owed.

20. The delegate also found that the Employee was entitled to vacation pay, but that this amount had been satisfied by the Employer's voluntary payment.

21. Finally, the delegate concluded that the Employee did not pay the Employer bi-weekly for room and board. She noted that although she was employed for 16 weeks, the Employee alleged that she had only paid for 12 weeks room and board. The delegate found that it was unusual that the Employer had not required that the Employee pay for the additional four weeks, had that been a condition of her employment. The delegate also noted that the LMIA for the Employer's previous caregiver provided for a payment for room and board while the LMIA for the Employee did not. The delegate concluded that the Employer had not made unauthorized deductions from the Employee's wages.

ARGUMENTS AND ANALYSIS

22. The grounds for the Employee's appeal are as follows:

* the delegate erred in determining that the Employer did not misrepresent the type of work offered to the Employee and failed to provide adequate reasons for concluding that the Employer had not contravened section 8(b) of the *ESA*;
* the delegate ignored evidence in concluding that the Employer did not misrepresent the type of work offered to the Employee and failed to observe the principles of natural justice in failing to investigate whether the Employer misrepresented the Employee's working conditions;
* the delegate erred in concluding that the Employee was not entitled to overtime wages and failed to observe the principles of natural justice in failing to provide adequate reasons for deciding that she was not entitled to overtime wages;
* the delegate failed to observe the principles of natural justice in failing to provide the Employee with an opportunity to respond to evidence that she was not entitled to overtime wages;
* the delegate erred in law in applying the wrong standard of proof in determining that the Employer did not make unauthorized deductions from the Employee's wages;
* the delegate erred in failing to conduct a credibility assessment of the evidence in determining that the Employer did not make unauthorized deductions and failed to provide adequate reasons for her findings;
* the delegate erred in failing to "administer mandatory penalties" on the Employer for the contraventions or mandatory interest on wages owed to the Employee;
* the delegate was biased in favor of the Employer.

23. Finally, the Employee argues that the Director "was not qualified and lacked the requisite expertise to render a Determination on this matter."

24. Both the Director and the Employer made submissions in response to the grounds of appeal. I have referred only to the submissions by the Director in this analysis, as the Employer's submissions contained commentary on the facts and issues that were not part of the Determination, and the arguments were

largely a reiteration of the arguments made to the delegate. I have only considered the facts as found by the delegate in my decision.

25. 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.

26. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination.

27. I will address the Employee's arguments in turn, beginning with her last argument; that is that the delegate was unqualified and lacked the relevant expertise to decide this matter. The Employee submits that the errors in the Determination "demonstrate a lack of awareness of fundamental tenants [sic] of law and inadequate knowledge of the legislation over which the decision maker holds jurisdiction."

28. Section 117 of the *ESA* enables the Director to delegate to any person any of the Director's functions, duties or powers under the *ESA*. The presumption of regularity allows the Tribunal to assume that the delegate properly exercised the Director's statutory powers in making the Determination, and to infer that the Director would not delegate those powers to an unqualified person. The mere fact that the Employee disagrees with the Determination is insufficient to rebut the presumption, even if this was one of the enumerated grounds of appeal, which it is not. I find this argument entirely without foundation.

Did the delegate err in law in determining that the Employer had not misrepresented the type of work offered to the Employee or in failing to provide adequate reasons for concluding that the Employer had not contravened section 8(b) of the ESA?

29. The Employee argues that the delegate applied the wrong legal test in determining that the Employer had not misrepresented the type of work the Employee would be performing. The Employee submits that the delegate ought to have asked whether the duties the Employee actually performed aligned with the type of work the Employee represented to her, and that the delegate failed to conduct an assessment of the Employer's representation of the job offer in the original employment contract.

30. The delegate submits that although the Employee argues that the Director applied the incorrect legal test to determine whether the Employer misrepresented the type of work offered to the Employee, the Employee is in fact challenging the Director's findings of fact. The delegate relies on the Tribunal's decision in *Coughlin* (2019 BCEST 64) in arguing that the Employee must show that the findings of fact, and the conclusions reached by the Director on those facts, were inadequately supported, or wholly unsupported. The Director says that the delegate assessed the Employee's job description in light of the duties she performed and determined that the Employee's predominant responsibilities were in fact caregiving duties. The Director further submits that the delegate considered all of the evidence presented by the parties and fully explained her conclusions.

31. 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 *ESA* [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.

32. Section 112 of the *ESA* does not provide for appeals from questions of fact. Factual determinations are the exclusive purview of the Director and not subject to appeal. However, as the Tribunal recognized in *Britco Structures Ltd.* (BC EST # D260/03), the distinction between law and mixed law and fact is often difficult: questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. In *Britco*, the Tribunal held that the test in *Gemex* did not include errors of mixed law and fact which do not contain extricable errors of law.

33. The parties did not disagree about the work performed by the Employee; rather, they disagreed about how that work should be classified. The delegate considered if the actual duties the Employee was performing could reasonably be encompassed by "caregiving" and whether her duties were in fact primarily caregiving duties.

34. After examining the tasks performed by the Employee, the amount of time spent by the Employee on those tasks, and considering that while some of those tasks could be associated with other job descriptions in the LMIA such as "housekeeper" or "light duty cleaner," the delegate concluded that the Employee's primary duties were that of a nanny.

35. Having made the factual finding that the majority of the Employee's duties were either caring for, or related to caring for the Employer's children, the delegate determined that the Employer had not misrepresented the job opportunity. I am unable to find an error of law in this conclusion, and find no basis for this ground of appeal.

36. I am also unable to find that the delegate "provid[ed] inadequate reasons" for her conclusion. The delegate's reasons are set out in three paragraphs over two pages (R. 11 and R. 12) of the Determination and demonstrate the basis for her conclusion. I dismiss this ground of appeal.

Did the delegate err in concluding that the Employee was not entitled to overtime wages?

37. The Employee argues that the delegate's finding that the Employee worked eight hours a day was based on a preference of the Employer's time sheets without conducting an adequate assessment of the credibility and reliability of relevant evidence and acted on a view of the facts that cannot be reasonably entertained in finding that the Employee did not work overtime.

38. The Director submits that the delegate did not disregard the contradictory evidence presented by the parties nor did she unreasonably favour the records provided by one party over the other. Rather, the Director says, the delegate "engaged in a credibility analysis of the evidence as a whole by assessing the reliability, consistency and practicality of the records submitted" by both parties. Further, the Director says, the delegate "evaluated the credibility and practicality of the [Employee's] story as a whole by way of gauging it against other sources of evidence (in this case, text messages)."

39. The Director says that the Employer's records complied with the requirements of section 28 of the *ESA* and deemed them to be credible. The Director submits that the delegate did not find the Employee's records to be fabricated; rather, she found them less reliable. The Director submits that a "'finding of credibility is based not on one element only to the exclusion of others, but is based on all elements by which it can be tested in the particular case' (*Faryna v. Chorny* 1952 2 D.L.R. 354 B.C.C.A.)". The Director submits that the delegate did not err in determining that the Employee was not entitled to overtime wages.

40. I find no merit in the Employee's argument that the delegate erred by preferring the Employer's evidence about the Employee's hours of work without adequately assessing the credibility and reliability of relevant evidence. The delegate found as follows:

> Given the Employer's time sheets and [the Employee's] personal records are each disputed by the another [sic], it is my finding neither can be solely relied upon as an accurate record of the hours worked by [the Employee]. If I am to disregard the record of hours provided by the Employer on the basis [the Employee] claimed they are false, then I am equally obliged to disregard the records provided by [the Employee], on the basis the Employer claimed they are fabricated. With that said, I think it is notable how the Employer demonstrated [the Employee's] records could have been easily altered and fabricated after the fact where, alternatively, the Employer's records had clearly been produced and signed by both parties prior to [the Employee's] employment even ending. Accordingly, should I be required to accept one version of the records based on the credibility of the parties, I prefer the evidence submitted by the Employer.

41. Based on her evaluation of all of the evidence, the delegate found that the Employee worked eight hours per day, 40 hours a week, which was consistent with the employment contract.

42. The delegate's factual findings were based on the delegate's assessment of the credibility and reliability of the evidence of both parties. Both of these findings are within the purview of the delegate to decide, and are not appealable unless they are made without any factual basis or a view of the facts that cannot be reasonably entertained.

43. The delegate found the Employer's records more reliable than the Employees. I find that this conclusion was supportable on the evidence before her. The record discloses, and the delegate notes, that the parties submitted documentation in support of their arguments about the Employee's hours of work. Contrary to the Employee's argument, the delegate also assessed the credibility of the documentation, and preferred that of the Employer given that the Employee signed the record of her hours of work. That is an assessment that is within the purview of the delegate. While the delegate noted some inconsistencies in the Employer's records, she concluded that they had not been fabricated, as asserted by the Employee. While it is not referred to in her analysis, I note that at page R. 6 of the Determination,

the delegate considered what the Employee asserted was a contemporaneous record of the hours she worked for the Employer as "new evidence," stating that it had not been previously submitted due to an error by her previous representative. The Employee submitted screenshots of the edit history of those notes, showing that they had last been edited on October 10, 2019 (i.e. about six weeks after the end of her employment). In light of the editing, it was open to the delegate to find the Employee's notes less reliable and reject her contention that they were made contemporaneously. I find no error in the delegate's conclusion.

44. I dismiss this ground of appeal.

Did the delegate err in law in finding that the Employer had not made any unauthorized deductions from the Employee's wages?

45. The Employee argues that the delegate applied "the wrong standard of proof" to the question of whether or not the Employer made unauthorized deductions from the Employee's wages. The Employee also contends that the delegate failed to observe principles of natural justice by failing to provide adequate reasons.

46. The Director submits that the delegate did not apply the wrong standard of proof when determining that the Employer did not make unauthorized deductions from the Employee's wages. The Director submits that the Employee overstates her burden to substantiate her claim of unauthorized deductions. The Director submits that the reasons for which the delegate found that the Employee had not established her claim were identified in the reasons, and that the Employee's arguments are factual disputes rather than any legal error.

47. The delegate correctly placed the burden on the Employee to substantiate her allegation that she was made to pay for room and board. The delegate found that she had not discharged that burden. The reasons are clear that the delegate considered all of the evidence and found, on a balance of probabilities, that the Employee had not met that burden. I find no error of law in her analysis.

48. I also find that the delegate's reasons adequately outline the arguments as well as the basis for her conclusions.

Did the delegate fail to observe principles of natural justice in failing to provide the Employee with an opportunity to respond to evidence that she was not entitled to overtime wages?

49. 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. As the Tribunal has repeatedly stated, the content of those rights in the context of complaint hearings and investigations is not the same as those in a judicial context:

> . . . the requirement that arises under both the statute and under common law principles of natural justice for the Director to make reasonable efforts to give a person under investigation an opportunity to respond is not characterized in absolute terms. As stated by the Tribunal in *Tina Argenti*, BC EST # D332/00:

> I start with the proposition that Section 77 does not, nor was it intended to, create a "discovery" obligation such as that found in the B.C. Supreme Court Rules whereby documents are presumptively inadmissible - and therefore cannot be relied on by a party - in the absence of prior disclosure. As well, it is acknowledged that under the *Act*, there is no specific legislative requirement that the Director disclose all information received by the Director to all parties involved.

The above comment has equal application to procedural fairness generally in the *Act*. The Tribunal has long echoed what courts have recognized in respect of procedural fairness before administrative tribunals: that there are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place the decision-making officials and tribunals in a procedural strait-jacket, and, in particular, not to require them to hold judicial type hearings in every case; the purpose of beneficent legislation must not be stultified by unnecessary judicialization of procedure: see *Downing v. Graydon*, (1978) 2 O.R. (2d) 292 (C.A.), at page 310.

To paraphrase the comments of the Court in *Downing v. Grayson* in the context of this ground of appeal: it suffers from the misconception that the right to know and to reply requires adherence to the full panoply of natural justice rights that might arise in a judicial context. This is not so. The appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied. It is well established, however, that there is no "discovery" or "disclosure" obligation in the *Act*: see, for example, *Cyberbc.com AD & Host Services Inc. c.o.b. 108 Temp and La Pizzaria*, BC EST # RD344/02.

As well, while the comments in *Tina Argenti*, *supra*, were made in the context of investigations conducted by the Director, not complaint hearings, the proposition stated and the reference to the absence of legislative requirements obliging the Director to disclose are valid in the context of any part of the complaint process, including a complaint hearing. (*Bernhausen Specialty Automotive Ltd.* (BC EST # D043/16))

50. The Employee, who was well represented by counsel through this process, had many opportunities to provide the delegate with evidence supporting her allegations and to respond to the Employer's position, as well as the opportunity to respond to the delegate's "Preliminary Findings Letter."

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

Did the delegate err in failing to administer mandatory penalties or to include interest on wages or other amounts owed to the Employee?

52. The Employee contends that the delegate erred in failing to impose mandatory penalties under section 98(1) for the Employer's failure to comply with the *ESA* and to calculate interest on the outstanding wages under section 88.

53. In *Raed Eid* (2020 BCEST 58), the Tribunal found that a complainant had no statutory right to demand that the Director impose administrative penalties for contraventions of the *ESA*, as the responsibility for administering the legislation rests with the Director:

> [Mr. Eid] has no rights under the *ESA* relative to the carrying out of the administrative penalty scheme in the legislation; that responsibility, subject to the provisions of the *ESA* and the [*Regulation*], rests solely with the Director (paragraph 19)

54. I find this argument without foundation.

55. With respect to the wages owed to the Employee, the delegate found as follows:

> . . . [the Employee] was owed . . . the amount of $374.68. The Employer made a voluntary payment in the amount of $461.68, which encompassed this $374.68 in owed vacation pay. As such, I find [the Employee] is not owed any further annual vacation pay wages.

56. The delegate's conclusion is entirely in keeping with the purposes of the *ESA* as well as section 88. There was no purpose to be served by assessing interest on payments which were in excess of what the delegate found owing.

57. I dismiss this ground of appeal.

58. Finally, the Employee argues that the delegate was biased in favor of the Employer. This argument is based solely on the delegate's decision not to impose administrative penalties and interest and for enabling the Employer to make a payment voluntarily, in the Employee's view, "to avoid administrative penalties and interest."

59. There is nothing, apart from the delegate's findings in favor of the Employer, to support the allegations and I also find this argument to be without foundation.

60. The appeal is dismissed.

ORDER

61. Pursuant to section 115 of the *ESA*, I order the Determination dated March 18, 2021 be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal