Citation: 1179522 B.C. Ltd. (Re)
2021 BCEST 87

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

1179522 B.C. Ltd. carrying on business as
JK Trucking and/or JK Bros and/or JK Brothers

("JK Trucking" or 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: Ryan Goldvine

FILE NO.: 2021/072

DATE OF DECISION: November 08, 2021

DECISION

SUBMISSIONS

Jaswinder Kahlon	on behalf of 1179522 B.C. Ltd. carrying on business as JK Trucking and/or JK Bros and/or JK Brothers

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the "*ESA*") by 1179522 B.C. Ltd., carrying on business as JK Trucking and/or JK Bros and/or JK Brothers, (the "Appellant" or "JK Trucking") of a determination made by Kara Crawford, a delegate of the Director of Employment Standards (the "Director"), on July 7, 2021 (the "Determination").

2. The Determination concluded that wages and interest were owing to Harjeet S. Deol in the amount of $3,251.65, and administrative penalties were owing in the amount of $2,500.00 for contraventions of sections 17, 18 and 45 of the *ESA*, and sections 37.3 and 46 of the *Employment Standards Regulation* (the "*Regulation*").

3. The Tribunal received the appeal on August 16, 2021 seeking to overturn the Determination on the basis that the Director has failed to observe the principles of natural justice in making the Determination and on the basis that evidence has become available that was not available at the time the Determination was being made.

4. The appeal was filed within the statutory appeal period.

5. I have concluded that this case is appropriate to consider under section 114 of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made (the "Record").

ISSUE

6. The issue before the Tribunal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

7. The Determination followed an investigation by the Delegate following a complaint by Harjeet S. Deol (the "Complainant") that JK Trucking failed to compensate him for appropriate travel and vehicle inspection time or pay him statutory holiday pay. In the Determination, the Delegate found that the Appellant did not provide the Complainant with his final pay within the time limit established under the *ESA*. The Delegate also found that Complainant was owed unpaid wages and overtime, as well as statutory holiday and vacation pay.

8. The Complainant was employed as a short-haul truck driver from November 30, 2018 to August 1, 2019, when he resigned. There was no written contract of employment.

9. The Complainant alleged that he was paid on an hourly basis, and was not paid for travel time and time spent doing pre and post-trip inspections. The Appellant asserted, instead, that the arrangement between it and the Complainant was that the Complainant would be paid on a per-trip basis, estimating each delivered load to be approximately four hours at the hourly rate asserted by the Complainant. The Appellant asserted that the per-trip rate was intended to include any time spent performing inspections and travel to and from the yard. The Appellant also claimed that the Complainant submitted, and was paid, for hours and trips he did not work.

10. The Delegate issued a demand for records to the Appellant, and provided it with multiple opportunities to provide complete records relating to the Complainant's employment, which would have included a complete set of inspection reports, delivery slips and customer invoices, and a record of daily hours worked. The Appellant provided some records, but not a complete set, and did not provide payroll records that comply with section 28 of the *ESA*. In contrast, the Complainant provided a notebook with a detailed record of his hours worked.

11. The Delegate accepted the Complainant's assertion that he was paid on an hourly basis based on the lack of any evidence from the Appellant to the contrary (other than its direct assertions), as well as the fact that the payroll records that were provided indicated an hourly rate, and in several instances recorded hours not divisible by four – which conflicted with the Appellant's assertion that the Complainant was paid per load, equivalent to four paid hours per load.

Regular Wages

12. The Delegate determined that the Complainant's notebook represented the best available evidence of the number of hours he worked during his employment with the Appellant. This was based on the fact that these notes were taken contemporaneously with the work, and that they did not significantly differ from the hours he was paid. This was also the only available evidence of the Complainant's hours on a daily basis, given that the Appellant was only able to provide monthly totals of the Complainant's hours worked.

13. The Delegate found the Complainant worked additional hours in three months of his employment. Although the Delegate found that the Complainant may have been slightly overpaid in February, April, and May 2019, she acknowledged this could be attributable to difficulty in reading the Complainant's handwritten notes.

14. Ultimately, the Delegate found that the Complainant was owed regular wages in the amount of $616.00, representing 22 hours of regular work in the months of November 2018 and June and July 2019.

Overtime

15. There was no dispute that the Complainant was not paid overtime during his time working with the Appellant, nor was there a dispute that he would be considered a short-haul truck driver as defined by section 1 of the *Regulation*.

16. The Appellant's monthly wage statements confirm that the Complainant must have worked more than the allowable 45 hours per week, and, as with the Delegate's assessment of the Complainant's regular wages entitlement, she found the most credible and only evidence of the Complainant's daily hours to be those recorded in the Complainant's notebook.

17. Based on the established rules for overtime in section 37.3(3) of the *Regulation*, the Delegate calculated the difference to time and one half for hours paid at regular rates that exceeded either 9 hours in a day or 45 hours in a week, and calculated time and one half for overtime hours that were not paid, to reach a total of $2,187.50.

Statutory Holidays

18. There was no dispute that the Appellant did not provide any statutory holiday pay to the Complainant.

19. Upon reviewing the days and hours worked by the Complainant preceding each statutory holiday, the Delegate determined that the Complainant was entitled to statutory holiday pay for each of Family Day and Good Friday.

20. Having noted that there was an apparent overpayment in each of the months in which these holidays fell, the Delegate applied those apparent overpayments to the amounts calculated for statutory holiday pay to conclude that the Complainant was entitled to an additional $153.13 for Family Day.

Vacation Pay

21. As the Complainant is entitled to 4% vacation pay on gross wages, the Delegate determined that the Complainant was owed $118.27 based on the unpaid amounts found elsewhere in the Determination.

Penalties

22. The Delegate assessed penalties against the Appellant for three distinct contraventions of the *ESA* and two of the *Regulation* for a total of $2,500.00 as follows:

a. $500.00 penalty for the Appellant's failure to pay the Complainant at least semi-monthly and within eight days of the end of each pay period, as required by section 17 of the *ESA*, with the most recent contravention occurring on July 9, 2019.

b. $500.00 penalty for the Appellant's failure to pay the Complainant his final wages within six days of his resignation as required by section 18 of the *ESA*.

c. $500.00 penalty for failing to pay overtime rates on hours worked exceeding the thresholds established in section 37.3(3) of the *Regulation*.

d. $500.00 penalty for failing to pay statutory holiday pay contrary to section 45 of the *ESA*.

e. $500.00 penalty for failing to produce a daily record of hours worked by the Complainant for the period set out in the Delegate's Demand for Records by the deadline set out therein, or at all, as set out in section 46 of the *Regulation*.

ARGUMENTS

23. The Appellant asserts that the Director failed to observe the principles of natural justice by "fail[ing] to understand how the dump trucking business operated." The Appellant also asserts that the Director was "unable to comprehend . . . how [the Complainant] was getting paid for more hours than he was putting in."

24. The Appellant also asserts that the Director failed to observe the principles of natural justice by adding findings to the determination with respect to overtime "without understanding the agreement between the company and [the Complainant]."

25. The Appellant asserts that it should not have been assessed penalties under sections 17 and 18 of the *ESA*, and section 37.3 of the *Regulation*, because "[the Complainant] was getting paid according to the daily slips which he was gonna [*sic*] collect a percentage of the hours on them."

26. The Appellant asserts that it should not be penalized under section 58 of the *ESA*, however, no such penalty was assessed.

27. The Appellant does not appear to dispute the penalty assessed under section 45 of the *ESA*, accepting that the Complainant was owed statutory holiday pay.

28. The Appellant provided no submissions to dispute the penalty associated with failing to produce records contrary to section 46 of the *Regulation* but asserts in general that "[the Complainant] was [their] first driver in [their] new company so [they] were still learning and figuring out the fundamentals of trucking and working with [their] employees."

29. The Appellant further submits that new evidence became available that was not available at the time the Determination was being made.

30. With the appeal submission, the Appellant provided slips relating to the "Fusion job" for which it asserts the Complainant was paid time and a half, and only worked two-thirds of the hours.

31. The Appellant also provided documents referencing the hours of operation for "Fraser Valley Aggregates" to assert that the Complainant could not have worked the 12 hours claimed on certain slips because the hours of operation of the pit are under 10 hours.

32. The Appellant further provided slips from January and February, which it asserts are for jobs which were called off, and that, accordingly, the Complainant was paid for time not actually worked.

ANALYSIS

33. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an 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 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 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 of the requirements of section 112 (2) have not been met.

34. The grounds of appeal are statutorily limited to those found in section 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.

35. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

36. 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 there is an error in the determination under one of the statutory grounds.

37. The Appellant has applied to overturn the Determination under subsections 112(1) (b) and (c), which I will assess in turn.

38. With respect to subsection 112(1)(b), a party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

39. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an

> unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

40. As long as the appropriate process elements have been followed, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the Record and in the information submitted to the Tribunal in this appeal, the Appellant was provided with the opportunity required by principles of natural justice to present their position to the Director. Although the Appellant alleges a failure on the part of the Delegate to "understand" how double hauling works, it was in fact the lack of evidence before the Delegate to support the Appellant's assertions that formed the basis for the Determination.

41. On the face of the material on the Record, the Appellant was provided several opportunities to present its case, and was in fact provided a detailed preliminary assessment to respond to in March 2021. The Appellant took the opportunity to respond to the preliminary assessment, providing additional logs and asserted again that the Complainant was paid based on four hours per load, rather than on an hourly basis, an assertion the Delegate had already rejected based on the lack of supporting evidence.

42. The Delegate also provided further opportunities in April 2021 to afford the Appellant every opportunity to submit any and all relevant evidence to demonstrate how commissions were earned and paid, to dispute the finding that the Complainant was paid on an hourly basis.

43. The Appellant asserts that the finding that the Complainant was entitled to overtime did not accord with the principles of natural justice because it was not raised in the initial complaint, and that it and the Complainant had an agreement that he would not be paid overtime.

44. Although the initial complaint did not seek payment for overtime wages, the *ESA* does not restrict the Director from discovering or reaching conclusions on another breach of the *ESA* not initially identified in a complaint, so long as the complaint has been properly filed. (See: *Cownden*, BC EST # D069/01)

45. Further, although the Appellant asserts that it had an agreement with the Complainant that he would not be paid overtime wages, I note that section 4 of the *ESA* establishes that an agreement to waive any requirements of the *ESA* are of no effect. This Tribunal has consistently confirmed that this includes any agreement to be paid straight-time wages for hours that would otherwise attract overtime, other than those expressly permitted under the *ESA* or *Regulation*. (See: *Regional Security Services Ltd.,* BC EST #D200/97*; Goldsmith Enterprises Ltd.,* BC EST #D042/97*; Cliff Roussel Construction Ltd.,* BC EST #D235/97*; Northway Restaurant Ltd.,* BC EST #D133/97)

46. Accordingly, even if the Appellant had been able to provide evidence that the Complainant had agreed to forego overtime rates for work in excess of 9 hours per day or 45 hours per week, such an agreement would be null and void.

47. With respect to the Appellant's submission that it should not be subject to certain penalties, I note that these penalties are mandatory, and prescribed by section 98 of the *ESA* and section 29 of the *Regulation* upon issuing a determination that a contravention of the *ESA* or *Regulation* has occurred.

48. The Tribunal, in *Re 537370 B.C. Ltd.*, at paragraph 17, confirmed that innocent or mistaken contraventions of the *ESA* do not relieve an Employer against the imposition of administrative penalties:

> It follows that even if I were convinced that Ponderosa acted innocently, a matter on which I make no comment, such a conclusion would provide no support for an argument that the Delegate erred in law when she imposed the administrative penalties in the circumstances of this case.

49. Notwithstanding the above, the Appellant argues that it should not have been assessed a penalty under section 58 of the *ESA* (annual vacation pay); however, no such penalty was assessed.

50. Based on the foregoing, I find the Appellant has not demonstrated any lost opportunity to present its case or respond to any findings made, nor is there any allegation that the Delegate acted in anything other than a neutral and unbiased fashion. Accordingly, I find that there is no reasonable prospect the appeal will succeed under subsection 112(1)(b).

51. In addition to the Appellant's arguments with respect to the principles of natural justice, the Appellant also seeks to overturn the Determination based on new evidence under subsection 112(1)(c).

52. The Tribunal has set out guidance on how this ground of appeal is to be assessed in *Re Davies et al.,* BC EST # D171/03. The Tribunal established a four-part test as follows:

(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.

53. The Appellant submitted a number of slips indicating certain jobs and hours dating from November 2018 to February of 2019, many of which appear to have already been provided to the Delegate during her investigation.

54. The Appellant also provided a printout indicating the hours of operation for one of its clients along with the assertion that, based on this information, the Complainant could not have worked the total hours he claimed and was paid for.

55. The Appellant also provided three slips, dated January 24, February 7, and February 8, 2019, which it says indicates hours for which the Complainant was paid, but for jobs he did not work. The Appellant asserts: "[w]e are paid 60-90 days after the job is done. We did not realize he had been putting in hours he did not work because of the time gap we are paid after."

56. It does not appear as though these particular slips were provided to the Delegate, however, no explanation has been provided as to why they were not available at the time the Determination was made,

particularly given that a large number of other slips, both before and after these, were provided to the Delegate by the Appellant.

57. Further, the last of these dates, February 8, 2019, occurred almost six months before the Complainant resigned his employment. Given the Appellant's assertion that it had not realized at the time the Complainant was paid, that he did not do the work, the Appellant nevertheless had almost six months from this date to raise this with its employee.

58. Accordingly, I am unable to find that any of the documents provided with the appeal submission could not have been discovered or presented to the Director during the investigation of the complaint. I find that this ground of appeal also does not disclose a reasonable prospect of success.

59. For all of the foregoing reasons, the appeal is dismissed.

ORDER

60. This appeal is dismissed under subsection 114(1)(f) of the *ESA* as disclosing no reasonable prospect of success.

61. Pursuant to section 115 of the *ESA*, the Determination dated July 7, 2021, is confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal