

Citation: Angel Estate Wineries Inc. and A&A Enterprises Ltd. (Re)
2022 BCEST 15

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Angel Estate Wineries Inc. and A&A Enterprises Ltd.
(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: Brandon Mewhort

FILE No.: 2021/100

DATE OF DECISION: March 2, 2022

DECISION

SUBMISSIONS

Wenjingxiu Luo

on behalf of Angel Estate Wineries Inc. and A&A Enterprises Ltd.

OVERVIEW

1. This is an appeal filed by Angel Estate Wineries Inc. and A&A Enterprises Ltd. (together, the “Appellant” or “Employer”) of a determination issued by Carrie H. Manarin (the “Adjudicative Delegate”), a delegate of the Director of Employment Standards (the “Director”), on November 4, 2021 (the “Determination”). The Determination followed an investigation conducted by Rodney Strandberg (the “Investigative Delegate”), a delegate of the Director. In the Determination, the Adjudicative Delegate found that the Appellant contravened the *Employment Standards Act* (“ESA”) by failing to pay regular wages, vacation pay and compensation for length of service to its former employee, Michael Burri (the “Complainant”).
2. Section 114(1) of the *ESA* provides that 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, among other things, there is no reasonable prospect the appeal will succeed.
3. For the reasons discussed below, I dismiss this appeal pursuant to section 114(1) of the *ESA*, because there is no reasonable prospect it will succeed. I have assessed the appeal based on the Determination, the reasons for Determination, the appeal, the Appellant’s written submission and attachments filed with the appeal, and my review of the material that was before the Director when the Determination was being made.

ISSUE

4. Whether this appeal should be dismissed pursuant to section 114(1) of the *ESA*.

THE DETERMINATION

5. The Complainant was employed as a wine maker with Angel Estate Wineries Inc. Angel Estate Wineries Inc. operates a winery in Delta, British Columbia, on land owned by A&A Enterprises Ltd. A&A Enterprises Ltd. produces fruit on its land and provides it to Angel Estate Wineries Inc. to make wine. The Adjudicative Delegate found that Angel Estate Wineries Inc. and A&A Enterprises Ltd. are “associated employers” for the purposes of section 95 of the *ESA*, which states, in part, that: “the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of [the *ESA*].”
6. The Complainant was employed by the Appellant from September 2, 2015, to August 20, 2019. At the time of the termination of the Complainant’s employment, his rate of pay was \$65,000.00 per year. The Complainant filed his complaint with the Employment Standards Branch on January 21, 2020, which was within the six-month time period allowed under the *ESA*.

7. The Adjudicative Delegate found that the best evidence of the regular wages owed to the Complainant was set out in the payroll records the Complainant provided, which the Employer did not dispute. Based on that evidence, the Adjudicative Delegate found that the Appellant owed the Complainant \$14,346.41, less \$1,000.00 of wages that were subsequently paid, for a total amount owing of \$13,346.41.
8. The Adjudicative Delegate found that the only evidence of vacation pay was provided by the Complainant, which was not disputed by the Employer. The Adjudicative Delegate accepted the Complainant's evidence that he did not take paid vacation leave during his employment. Relying on payroll records provided by the Complainant, the Adjudicative Delegate found that the vacation pay owed by the Employer was \$1,265.54, including the vacation pay owing on the wages owed as compensation for length of service. The Adjudicative Delegate found that, as an employee of more than three years but less than four, the Complainant was entitled to three weeks of normal wages, which was \$3,750.00.
9. As a result, the Adjudicative Delegate found that the amount owing to the Complainant by the Employer for regular wages, compensation for length of service and vacation pay was \$18,361.95, plus interest in the amount of \$1,161.68, pursuant to section 88 of the *ESA*, for a total amount of \$19,523.63.
10. The Adjudicative Delegate also imposed administrative penalties for each contravention of the *ESA* and the *Employment Standards Regulation* ("*Regulation*"), in the total amount of \$1,500.00, particularly for failing to: (1) pay the Complainant's wages at least semi-monthly in contravention of section 17 of the *ESA*; (2) pay the Complainant's outstanding wages within 48 hours of termination in contravention of section 18 of the *ESA*; and (3) produce records in compliance with the Investigative Delegate's Demand for Employer Records in contravention of section 46 of the *Regulation*.

ARGUMENT

11. When asked in the appeal form to select its grounds of appeal, the Appellant indicated that evidence had become available that was not available at the time the Determination was being made. The Appellant did not indicate that either of the delegates erred in law or failed to observe the principles of natural justice in making the Determination.
12. In its appeal materials, the Appellant raised the following four "reasons for appeal":
 - (a) **Vacation pay:** The Appellant attached to its appeal submissions an "employment detail" for the period from January 1, 2019 to December 31, 2019, which consists of payroll information such as gross payments, amounts withheld, amounts deducted, vacation paid, vacation paid hours and vacation earned for the corresponding pay periods. The Appellant states that the vacation pay amount of \$1,265.54 was incorrect, because the Complainant's vacation pay amounts were all included in payroll calculations. The Appellant also states that the gross pay for the period ending August 15, 2019, included \$1,083.30 of vacation pay, and that the gross pay for the period ending August 31, 2019 included \$30.95 of vacation pay.
 - (b) **Withheld amounts:** The Appellant again relies on the "employment detail" that was attached to its appeal submissions and states that, "[a]mounts withheld for CPP, EI, Tax from the unpaid wages totaling \$3,332.87 was reported by the company to CRA".

- (c) **Administrative penalties:** The Appellant asks that the administrative penalties imposed by the Adjudicative Delegate be waived, because, essentially, its business was not doing well for most of 2019 and there was not enough work for the Complainant.
- (d) **Filing of complaint:** The Appellant attached to its appeal submissions a copy of a \$1,000.00 bank draft dated December 29, 2020, from the Appellant to the Complainant. The Appellant suggests that the complaint may not have been filed within six months of the Complainant's last day of employment, because the Appellant issued him the \$1,000.00 bank draft on December 29, 2020. The Appellant says that, by that time, the Complainant did not mention that he filed a complaint and the Appellant also had not received any communication from the Employment Standards Branch.

ANALYSIS

- 13. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.
- 14. As noted above, the Appellant indicated in its appeal form that its ground for appeal is that new evidence has become available. I will address the Appellant's "reasons for appeal" regarding vacation pay and withheld amounts together, because they both rely on the "employment detail" that was attached to the Appellant's appeal submissions.

Vacation pay and withheld amounts

- 15. This Tribunal set out the test for fresh evidence in *Davies et al.*, BC EST # D171/03, as follows (emphasis added):

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (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.

16. In this case, the Appellant has provided no reason why the “employment detail” attached to its appeal submissions was not available at the time the Determination was made. The “employment detail” is for the period from January 1, 2019 to December 31, 2019, so presumably it would have been available during the Investigative Delegate’s investigation, given that the Complainant filed his complaint on January 21, 2020.

17. As described in the Determination, a Demand for Records was issued by the Investigative Delegate to the Appellant on July 19, 2021, which included a demand for the payroll records of the Complainant. However, the Appellant never provided any payroll records, including the “employment detail” now being tendered as fresh evidence, as it was required to. Notably, the Appellant also never responded to an Investigation Report issued by the Investigative Delegate on October 4, 2021, despite being given an opportunity to do so.

18. Accordingly, I find that the “employment detail” does not meet the test for fresh evidence, because it could have been provided to the Investigative Delegate during the investigation of the complaint. I therefore dismiss this ground of appeal.

Administrative penalties

19. As explained by this Tribunal in *537370 B.C. Ltd.*, BC EST # D011/06, the imposition of penalties for contraventions of the *ESA* are mandatory and that: “absent circumstances amounting to bad faith or abuse of process, the Tribunal may only cancel a penalty provided for in the *Act* and *Regulation* if it decides that the contravention which underlies it cannot be supported and must be set aside pursuant to one of the grounds of appeal referred to in Section 112 of the *Act*.”

20. In this case, the Appellant does not allege bad faith or an abuse of process, and I have not set aside any of the contraventions underlying the administrative penalties pursuant to one of the grounds of appeal under section 112 of the *ESA*. This Tribunal does not have the discretion to waive the administrative penalties for the reasons relied on by the Appellant.

21. Accordingly, I dismiss this ground of appeal.

Filing of complaint

22. The test for fresh evidence is set out above.

23. The Appellant has provided no reason why a copy of the \$1,000.00 bank draft dated December 29, 2020, which was attached to its appeal submissions, was not available at the time the Determination was made. The Demand for Records was issued by the Investigative Delegate to the Appellant on July 19, 2021 (which, again, the Appellant did not comply with), well after the bank draft was issued.

24. I also note that, in any event, it is not clear how the \$1,000.00 bank draft is relevant to the issue of whether the complaint was filed in time. There is no dispute that the Complainant's last day of employment was on August 20, 2019, nor is there any dispute that the complaint was filed on January 21, 2020, well within the six-month statutory deadline under the *ESA*.
25. Accordingly, I find that the copy of the \$1,000.00 bank draft does not meet the test for fresh evidence, and I dismiss this ground of appeal.

ORDER

26. I order that the Determination be confirmed pursuant to section 115 of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal