Citation: Ron Armour (Re)
2022 BCEST 25

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Ron Armour
("Mr. Armour")

- 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: Shafik Bhalloo

FILE NO.: 2022/091

DATE OF DECISION April 27, 2022

DECISION

SUBMISSIONS

Ron Armour — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Ron Armour (Mr. Armour") has filed an appeal of a determination issued by Carrie Manarin, a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director"), on February 3, 2022 (the "Determination").

2. The Determination found that Teal-Jones Group, a partnership between Columbia River Shake & Shingle Ltd. and Teal Cedar Products Ltd. ("TJG"), violated Part 8, section 63 (compensation for length of service) of the *ESA,* in respect of the employment of Mr. Armour.

3. The Determination ordered TJG to pay Mr. Armour wages in the total amount of $12,084.39 consisting of compensation for length of service, vacation pay and accrued interest.

4. The Determination also levied an administrative penalty against TJG of $500 under the *Employment Standards Regulation* (the "*ESR*") for breach of section 63 of the *ESA.*

5. On February 25, 2022, Mr. Armour appealed the Determination on the error of law ground of appeal under section 112(1)(a) of the *ESA.*

6. On February 28, 2022, TJG cross appealed the Determination on the "natural justice" ground of appeal under section 112(1)(b) of the *ESA.* TJG's appeal was dealt with separately under 2022 BCEST 24 and dismissed.

7. On March 7, 2022, the Tribunal corresponded with the parties advising them that it had received Mr. Armour's appeal. The Tribunal also informed TJG and the Director that, at this time, no submissions were being sought from them on the merits of the appeal.

8. In the same correspondence, the Tribunal requested the Director provide the Tribunal with the *ESA* section 112(5) record (the "Record") that was before the Director at the time the Determination was being made.

9. The Director provided the Tribunal with the Record and on March 29, 2022, the Tribunal sent a copy of the same to Mr. Armour and TJG and provided them an opportunity to object to its completeness by no later than 4:00 p.m. on April 12, 2022.

10. On April 13, 2022, after not receiving any objections to the completeness of the Record from Mr. Armour or TJG, the Tribunal informed the parties that the appeal is assigned to a panel, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. If all or part

of the appeal is not dismissed, the Tribunal would seek submissions from the other parties on the merits of the appeal.

11. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based solely on Mr. Armour's appeal submissions, the Record, and the Reasons for the Determination (the "Reasons"). Under section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any reasons listed in the subsection. If satisfied the appeal or part of it should not be dismissed, the Director and TJG will be invited to file submissions. On the other hand, if the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed.

12. I have reviewed Mr. Armour's appeal submissions, the Record, and the Reasons and am able to decide this appeal solely on the basis of these written materials.

ISSUE

13. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed, or dismissed under section 114(1) of the *ESA.*

THE FACTS AND REASONS FOR THE DETERMINATION

Background

14. A BC Registry Services Search conducted online on April 5, 2019, with a currency date of March 1, 2019, indicates that TJG is a partnership of Columbia River Shake & Shingle Ltd. and Teal Cedar Products Ltd., registered in British Columbia on January 21, 2003.

15. TJG operates a timber harvesting and lumber product manufacturing business in Surrey, British Columbia.

16. Mr. Armour was employed by TJG as a welder commencing on March 27, 2011.

17. In July 2015, Mr. Armour was temporarily laid off but returned to his position less than a month later without interruption to his employment.

18. On June 2, 2020, Mr. Armour received a one-week unpaid suspension for failing to report his absence from work in advance of his shift commencing on May 30, 2020. He served the suspension on June 6, 7, 8 and 9, 2020.

19. On August 23, 2020, Mr. Armour was performing work on a quadrant feeder within the worksite and was not wearing fall protection equipment (fall safety harness).

20. On August 25, 2020, Mr. Armour was sent home pending an investigation into fall safety procedure compliance during his shift on August 23, 2020.

21. On August 28, 2020, Mr. Armour attended a disciplinary meeting and his employment was terminated without notice or pay in lieu of notice for failing to wear a fall safety harness on August 23, 2020 when he was working at a height above 10 feet.

22. At the time of termination, Mr. Armour's rate of pay was $37.77 per hour (plus a $0.50 per hour supplement for having his trade ticket) and he was entitled to 9% vacation pay.

23. On September 16, 2020, Mr. Armour filed a complaint under section 74 of the *ESA* alleging that TJG failed to pay him termination pay (the "Complaint").

24. A delegate of the Director (the "Investigative Delegate") investigated the Complaint and received submissions and evidence from the parties and their witnesses.

25. On November 2, 2021, the Investigative Delegate forwarded the file containing the evidence of both parties she obtained during the investigation to the Adjudicative Delegate to decide the Complaint.

26. On February 3, 2022, based on a review of the information in the file, the Adjudicative Delegate issued the Determination and the Reasons.

27. As indicated previously, the Determination found that TJG contravened Part 8, section 63 (compensation for length of service) of the *ESA,* in respect of the employment of Mr. Armour, and ordered TJG to pay Mr. Armour wages in the total amount of $12,084.39 consisting of compensation for length of service, vacation pay and accrued interest.

28. In calculating Mr. Armour's compensation for length of service pursuant to section 63, the Adjudicative Delegate determined that "as an employee of more than 8 years of service, [Mr. Armour] is entitled to 8 weeks' wages which is calculated based on the last 8 weeks of normal or average wages at [Mr. Armour's] regular wage rate".

29. However, since Mr. Armour did not work for the full pay period, August 16 – 29, 2020, the Adjudicative Delegate says that she calculated compensation for length of service based on the previous bi-weekly pay periods.

30. More particularly, the Adjudicative Delegate determined that "[Mr. Armour] is entitled to [compensation for length of service] of $10,710.60 plus accrued vacation pay on that amount of $963.95 for a total of $11,674.55." The Adjudicative Delegate also added interest of $409.84 pursuant to section 88 of the *ESA* for a total of $12,084.39.

SUBMISSIONS OF MR. ARMOUR

31. In his handwritten appeal submissions, Mr. Armour says that he agrees with the Determination except for the Adjudicative Delegate's calculation of compensation for length of service. He says that his:

> "hourly rate [of pay] was $37.77 per hour which equates to $1,510.80 per week. This should equate to $12,860.40 [*sic*] not $10,710.60 for the eight weeks…".

32. He also submits "the 40 hr per week 'averaging agreement'" which was submitted previously to the investigating delegate during the investigation and forms part of the record.

33. It appears that Mr. Armour's calculation of compensation for length of service is based on 40 hours per week multiplied by $37.77 for a total of $1,510.80 per week multiplied by eight weeks for a total of $12,086.40.

ANALYSIS

34. As indicated previously, Mr. Armour's appeal is based on the error of law ground in section 112(1)(a) of the *ESA*.

35. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco Structures Ltd*., BC EST # D260/03, in which the Tribunal 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), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *ESA;*
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.

36. Mr. Armour argues that the Adjudicative Delegate has erred in calculating his compensation for length of service. An error in calculation for wages owing may amount to an error of law if the error was made by a delegate acting without any evidence or acting on a view of the facts which could not reasonably be entertained under the test in *Britco*, above.

37. Section 63(4) of the *ESA* sets out the calculation method to be used in determining the amount of compensation for length of service payable on termination of employment. It states:

> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
>
> (a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
>
> (b) dividing the total by 8, and
>
> (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

38. Only regular wages are included in the calculation of compensation for length of service. Overtime wages earned under sections 37 and 40 of the *ESA* are excluded.

39. The eight-week calculation period is also limited to weeks in which the employee worked "normal" or "average" hours. Any week an employee did not work or when the only wages paid were a result of annual vacation or statutory holiday pay under the *ESA* are excluded.

40. Further, while establishing "normal" or "average" weekly hours of work is determined by the circumstances of each employment situation, "normal" weekly hours are the hours an employee regularly works. "Normal" weekly hours refers to a circumstance in which the employee has a consistent schedule of hours of work from week to week and those hours usually do not fluctuate. However, where an employee's normal weekly schedule has been temporarily reduced (not a normal seasonal reduction) in one or more weeks during the last eight weeks in which the employee worked, due to reasons such as illness or a change in the schedule, the calculation under this section will exclude the reduced week(s) from the calculation.

41. Having said this, I have reviewed the payroll documents in the record, including particularly those the Adjudicative Delegate says she relied upon prior to the pay period August 16 – 29, 2020. While there are some irregular periods in the payroll records such as when Mr. Armour was suspended without pay or the occasions where there was "NO WORK", his "normal" or "average" weekly hours of work appear to be 40, which is consistent with the averaging agreement the parties signed. In the circumstances, I am unable to reconcile the Adjudicative Delegate's calculations with the payroll documents in the record. There is, evidently, an error in the Adjudicative Delegate's calculation.

42. I also note that while Mr. Armour says that his hourly rate is $37.77, in the Reasons, the Adjudicative Delegate made a finding of fact that Mr. Armour also received an additional "$.50 per hour supplement for having his trade ticket" which the payroll documents show as well.

43. I note that section 115(1) of the *ESA* provides:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

44. I have decided that in this case it is appropriate for me to refer the matter back to the Director with instructions to recalculate wages owing to Mr. Armour for compensation for length of service based on the documents contained in the Record, along with any concomitant adjustment to vacation pay, and any interest payable under section 88(1).

45. In *Hub-City Boat Yard Ltd.,* BC EST # D028/04, the Tribunal articulated its practice with respect to matters that are referred back:

> The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST #D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a

new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

46. Upon receipt of the Director's report the Tribunal will provide a copy of the report to Mr. Armour and TJG and allow both parties a sufficient opportunity to respond to the report.

ORDER

47. Pursuant to section 114(2)(a) of the *ESA*, I order that the Determination be referred back to the Director of Employment Standards for a recalculation of wages (compensation for length of service) ordered to be paid to Mr. Armour based on the documents contained in the Record, along with any concomitant adjustment to vacation pay, and any interest payable under section 88(1).

Shafik Bhalloo
Member
Employment Standards Tribunal