



Citation: Captain Foods Ltd. (Re)
2022 BCEST 3

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Captain Foods Ltd.
("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: Richard Grounds

FILE NO.: 2021/087

DATE OF DECISION: January 10, 2022

DECISION

SUBMISSIONS

Hargurvir Chhokar

on behalf of Captain Foods Ltd.

OVERVIEW

1. This is an appeal by Captain Foods Ltd. (the “Appellant”) pursuant to section 112 of the *Employment Standards Act* (the “ESA”) regarding a Determination issued on September 1, 2021 (the “Determination”), by Tara MacCarron, a delegate of the Director of Employment Standards (the “Delegate”). Manoj Kamboj (the “Complainant”) brought a complaint against the Appellant for failing to pay him wages for the hours he worked in September 2020.
2. The Delegate completed an investigation and determined that the Complainant was owed wages based on working 173 regular hours and 17.25 overtime hours in September 2020, including statutory holiday pay and vacation pay.
3. The Delegate found the evidence from the Complainant to be more credible and relied on handwritten timecards kept by the Complainant to determine the hours he worked in September 2020.
4. The Appellant appealed the Determination on the bases that the Delegate failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made. The Appellant has also requested an extension of time to provide vehicle GPS tracking data.
5. For the reasons that follow, the Appellant’s request for an extension is denied and its appeal is dismissed. The Determination is confirmed.

ISSUES

6. The issues are whether or not the Delegate failed to observe the principles of natural justice in making the Determination and whether to grant an extension of time to provide additional evidence.

ARGUMENTS

7. The Appellant’s submissions on appeal focus on vehicle GPS tracking data which it says would prove that the Complainant was lying about the hours he worked in September 2020. The Appellant requested an extension of the appeal period to October 27, 2021, to provide the vehicle GPS tracking data to the Tribunal. The Appellant has not submitted any additional evidence for its appeal.
8. Submissions on the merits of the appeal were not requested from the other parties.

ANALYSIS

Background

9. The Appellant operates a meat packaging business in Surrey, BC. Hargurvir Chhokar (“Mr. Chhokar”) is the sole director of the Appellant. The Appellant employed the Complainant as a driver from June 15, 2020 to October 10, 2020. The Complainant claimed that he worked in September 2020 but was not paid. The Complainant also requested an experience letter after his employment ended. The Appellant provided the Complainant with an experience letter confirming that he had worked full time from June to August 2020 and in October 2020.
10. On November 16, 2020, the Complainant made a complaint for wages owed for hours worked in September 2020.
11. The complaint proceeded to an investigation after which the Delegate issued a Determination on September 1, 2021.

The Determination

12. The Delegate extensively summarized the evidence from the Complainant, from a witness who was a former co-worker and had worked with the Complainant in September 2020 (but who was no longer employed by the Appellant), and from the Appellant’s witnesses including Mr. Chhokar and Mr. Chhokar’s brother, Garry Chhokar, who was the Complainant’s manager. The Delegate also spoke with another witness who was a current employee of the Appellant (the “Current Employee”).
13. The Delegate identified the primary issue as one of credibility about whether or not the Complainant had worked for the Appellant in the month of September 2020. The Complainant’s evidence was that he worked in September 2020, Mr. Chhokar sometimes texted him with a start time (and he had screenshots of some of these texts in September), and he kept handwritten timecards. The Complainant also acknowledged that he did offer to withdraw his complaint if the Appellant wrote him an accurate experience letter confirming he had worked in September 2020, because the experience letter was his priority. The witness who was the Complainant’s former co-worker confirmed that they used handwritten records of hours.
14. The Appellant’s evidence was initially that the Complainant had not worked in September 2020, and that the text messages provided by the Complainant were fake. On behalf of the Appellant, Mr. Chhokar then confirmed that the Complainant had worked part time in September 2020 and his last paycheque was for both September and October 2020. Mr. Chhokar said that the Complainant had been overreporting his hours, so he had been changed to part-time starting in September. Mr. Chhokar provided a recording where the Complainant offered to withdraw his complaint if he was provided with an experience letter.
15. Mr. Chhokar’s evidence was also that he does not text full-time employees, that the Appellant does not use handwritten timecards but instead uses an electronic clock for payroll records, but the records are not kept, and he provided vehicle GPS data from the Complainant’s delivery truck which confirmed the Complainant only worked 13 days in September and 6 days in October.

16. The Delegate found the Complainant's evidence to be consistent and uncontradicted throughout the investigation. In contrast, the Delegate found the Appellant's evidence to be internally inconsistent and appeared to evolve as further evidence came to light. The Delegate considered that the Current Employee's evidence was not objectively reliable and that the GPS data provided by the Appellant was "simplified and summarized". The Delegate concluded that the Complainant's handwritten timecards were a more accurate record of the hours the Complainant worked in September 2020.
17. The Delegate calculated the amount of wages owed to the Complainant based on his regular wage rate and the number of hours he recorded that he had worked in September 2020. The Delegate calculated the applicable overtime, statutory holiday pay, vacation pay and interest. The total amount of wages payable was \$3,209.72. The Delegate imposed administrative penalties in the total amount of \$1,000.00 for contraventions of the *ESA*, for failing to pay the Complainant all of his outstanding wages within 48 hours after his employment was terminated and for failing to keep certain payroll records.

ANALYSIS

18. 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.
19. The Appellant submitted that the Delegate failed to observe the principles of natural justice in making the Determination. The Appellant submitted that it had more GPS tracking data evidence to show that all of the hours the Complainant presented to the Delegate were not true. The deadline to submit an appeal to the Tribunal was October 12, 2021. On October 12, 2021, the Appellant requested an extension of time to the statutory appeal period to October 27, 2021, to allow it to submit the GPS tracking data.
20. In its appeal submission on October 12, 2021, the Appellant submitted that it would have the GPS tracking data by the end of the following week, which would have been the week of October 18 – 22, 2021. On October 14, 2021, the Tribunal requested that the Appellant submit the additional documents no later than 4:30 pm on November 4, 2021. The Appellant has not submitted any additional evidence for its appeal.

Failure to observe the principles of natural justice

21. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
22. The Appellant was provided with notice of the issues and was provided an opportunity to provide evidence in support of its position. The Delegate considered all of the evidence from the parties, including the simplified GPS data initially provided by the Appellant. The Delegate was an impartial decision maker and there is no evidence that the Delegate was biased to any degree.

23. The role of the Tribunal is not to make a fresh decision based on the evidence that was before the Delegate. The Tribunal's role is to determine whether the grounds of appeal are sufficient to overturn the Delegate's decision. The Appellant submits that the Delegate failed to observe the principles of natural justice in making the Determination. Other than relying on potential new evidence, the Appellant has not identified any failures on the part of the Delegate that would support such a finding.
24. The evidence does not support a finding that the Delegate failed to observe the principles of natural justice in making the Determination.

Extension of statutory appeal period

25. The Appellant has requested an extension of time to the statutory appeal period in order to provide additional GPS tracking data to the Tribunal that was not before the Delegate.
26. Section 114(1)(b) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal if the appeal was not filed within the applicable time limit. There is no automatic right to an extension of the time limit to appeal. In *Niemisto* (BC EST # D099/96), the Tribunal identified the following non-exhaustive criteria to consider when deciding whether to extend an appeal period:
1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 2. There has been a genuine, and on-going *bona fide* intention to appeal the Determination;
 3. The respondent party, as well as the Director, have been made aware of this intention;
 4. The respondent party will not be unduly prejudiced by the granting of an extension; and
 5. There is a strong *prima facie* case in favour of the appellant.

27. These criteria were applied by the Supreme Court of British Columbia in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2013 BCSC 1499, when reviewing a decision by the Tribunal not to extend an appeal period where the Appellant was unable to file an appeal due to having surgery.

28. While the Appellant filed its appeal, along with its extension application before the expiry of the appeal period, the considerations that apply in this case are substantially the same as if the request had occurred after the expiry of the appeal period: *Ctour Holiday (Canada) Ltd.*, 2021 BCEST 73.

29. The Appellant has not provided the GPS tracking data to the Tribunal. Accordingly, the Appellant has not exhibited an on-going intention to appeal the Determination.

30. The Appellant did not advise the Respondent or the Director of the Appellant's intention to appeal.

31. There is some prejudice to the Complainant if the extension is granted, because to allow the extension would invalidate the certainty of the deadline to appeal noted in the Determination.

32. The Appellant has appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination and that new evidence has become available. The Appellant's proposed evidence in support of the appeal is the GPS tracking data for the vehicle used

by the Complainant. The Appellant submits this GPS tracking data will prove that the Complainant's evidence was not accurate. As noted above, the Appellant has not provided the GPS tracking data to the Tribunal.

33. The proposed new evidence does not support a finding that the Delegate failed to observe the principles of natural justice in making the Determination based on the evidence gathered for the investigation. Although the Appellant has not provided the GPS tracking data, it is useful to consider the test for admitting new evidence on appeal which was considered by the Tribunal in *Bruce Davies et al.* (BC EST # D171/03), where it stated (at page 3):

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.

34. The first stage of the test for admitting new evidence on appeal requires that 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. The GPS tracking data was discoverable by the Appellant with the exercise of due diligence and could have been presented to the Delegate of the Director for the investigation. In fact, the Appellant did provide some simplified GPS data to the Delegate, but the Delegate did not find it to be reliable.

35. The Appellant has not met the first stage of the test to admit new evidence on appeal. Given the evidence does not support a finding that the Delegate failed to observe the principles of natural justice in making the Determination and no new evidence will be admitted, the Appellant does not have a strong *prima facie* case.

36. I have considered the above relevant factors to determine whether or not an extension to the statutory time limit for the Appellant to appeal the Determination should be granted. Given the factors discussed above, I am not satisfied that an extension should be granted

ORDER

37. The Appellant's request to extend the time period for requesting an appeal is denied. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal