Employment Standards TRIBUNAL

Citation: Division 2 Contracting Ltd. (Re)
2022 BCEST 30

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Division 2 Contracting Ltd. carrying on business as Devastate Demolition
(the “Employer”)

- 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: Jonathan Chapnick

FILE NO.: 2022/053

DATE OF DECISION: June 1, 2022

DECISION

SUBMISSIONS

Oliver Brett	on behalf of Division 2 Contracting Ltd. carrying on business as Devastate Demolition
Mitchell Dermer	delegate of the Director of Employment Standards

OVERVIEW

1. On October 19, 2020, the Employee, Bahram Sehatpour, submitted a complaint (the "Complaint") to the Director of Employment Standards (the "Director") under section 74 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [***ESA***]. A delegate of the Director, Kathleen Horan (the "Investigative Delegate"), subsequently investigated the Complaint, and later summarized her investigation findings in a written report (the "Report") issued on October 13, 2021. Based on the Report and evidence gathered during the investigation, on January 7, 2022, another delegate of the Director, Mitchell Dermer (the "Adjudicative Delegate"), issued a determination regarding the Complaint and his written reasons for the determination (the "Determination").

2. In the Determination, the Adjudicative Delegate found that Division 2 Contracting Ltd. carrying on business as Devastate Demolition (the "Employer" or the "Company"), contravened sections 18 and 58 of the *ESA* in respect of the Employee's employment. The Adjudicative Delegate ordered the Employer to pay the Employee $2,617.88 in wages and interest and to pay a total administrative penalty of $1,000.

3. Under section 112(1) of the *ESA*, the Employer was allowed to appeal the Determination 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.

4. On February 4, 2022, the Employer appealed the Determination to the Employment Standards Tribunal, selecting the "new evidence" ground of appeal set out in s. 112(1)(c).

5. To succeed in its appeal, the Employer must show that at least one ground under section 112(1) of the *ESA* has been met. The Employer has not done so. For the reasons that follow, the appeal is dismissed.

ISSUES

6. In this part of my decision, I set out the issues I must decide in this case.

7. The Tribunal takes a large and liberal approach to appeals under the *ESA*. This means inquiring into the nature and substance of an appeal to determine whether the grounds of appeal have been met, rather

than mechanically adjudicating the matter based solely on the particular boxes checked by the appellant: *Triple S. Transmission Inc.*, BC EST # D141/03.

8. In this appeal, the Employer presents its challenge to the Determination exclusively within the frame of the new evidence ground of appeal; however, from time to time in its appeal submission, the Employer strays into re-argument of the case that was before the Adjudicative Delegate. Despite these digressions, based on my review of the Employer's submissions and supporting materials, taking a large and liberal approach, I find that the nature and substance of the appeal before me centres on the Employer's assertion that new evidence has become available that was not available at the time the Determination was being made. Accordingly, expressed as a question, the issue in this appeal is as follows:

> Has evidence become available that was not available at the time the Determination was being made?: *ESA*, s. 112(1)(c)

9. The onus is on the Employer to satisfy the Tribunal, on a balance of probabilities, that the answer to this question is "yes": *Robin Camille Groulx*, 2021 BCEST 55 at para. 9.

10. In deciding the issue in this appeal, I have considered the Employer's February 4, 2022 appeal submission, comprising the appeal form, the Employer's written reasons and arguments supporting the appeal, documents provided by the Employer in support of the appeal, a copy of the Determination, and a copy of the Adjudicative Delegate's written reasons for the Determination. I have also considered the record that was before the Adjudicative Delegate at the time of the Determination, which was provided to the Tribunal by the Adjudicative Delegate under section 112(5) of the *ESA* (the "Record"). Finally, I have considered the Employer's April 13, 2022 submission and documents in response to the Tribunal's request for comments regarding the completeness of the Record.

11. I note that due to an oversight by the Adjudicative Delegate when he provided the Record to the Tribunal in March 2022, there was some confusion regarding whether an October 19, 2020 response to the Report from the Employer had formed part of the materials that were before the Adjudicative Delegate when he made the Determination. However, by email to the Tribunal on April 26, 2022, the Adjudicative Delegate confirmed that the Employer's response to the Report had, indeed, formed part of the Record and was specifically considered by the Adjudicative Delegate when he made the Determination.

12. In the discussion below, I do not refer to all of the information and submissions that I have considered. Rather, I only recount the portions on which I have relied to reach my decision.

BACKGROUND

13. In this part of my decision, I set out the background facts and circumstances related to the Complaint and its investigation.

A. Circumstances giving rise to the Complaint

14. The Employer operates a demolitions business in Surrey, BC. The Employee began working for the Employer as a project manager/estimator on August 7, 2018. He worked for the Employer for over two years. On September 14, 2020, the Employee and the president of the Company had a phone

conversation, during which the Employee said he was resigning his employment. Two days later, on September 16, the Employee emailed his letter of resignation to the Employer. In the letter, the Employee indicated that he was providing two weeks' notice of his resignation and stated that his last day at work would be Tuesday, September 29.

15. The Employee collected his final paycheque and Employment Insurance Record of Employment on September 23. He subsequently emailed the Employer on September 28, indicating that he was owed vacation pay and requesting payment of the amount owed. The Employer denied his request. This denial gave rise to the Complaint.

B. Complaint and investigation

16. The Employee submitted the Complaint a few weeks later, on October 19, 2020. In his complaint form, the Employee asserted that he was denied vacation pay for the period between August 7, 2018 and September 29, 2020.

17. The Investigative Delegate contacted the parties on July 23, 2021. Between July 23 and September 26, the Investigative Delegate went back and forth between the parties, gathering information and evidence regarding the Complaint. After completing her investigation of the Complaint, the Investigative Delegate summarized her findings in the Report and provided a copy of the Report to the Employer and the Employee on October 13, 2021, giving them two weeks to respond to the Report with further information and evidence. In the Report, the Investigative Delegate identified certain agreed-upon facts, including the Employee's last day of employment (September 29, 2020) and the wage recovery period (September 29, 2019 to September 29, 2020). She also summarized each party's information and evidence in the Complaint.

18. On October 19, 2020, the Employer submitted a written response to the Report. The Report and the evidence on file was subsequently provided to the Adjudicative Delegate and formed the basis for the Determination.

THE DETERMINATION

19. The Adjudicative Delegate issued the Determination on January 7, 2022. In the Determination, the Adjudicative Delegate stated that the issue before him was whether the Employer owed the Employee vacation pay. He then summarized each party's submissions as follows:

(a) The Employee's evidence was that he took only six days of vacation during his tenure at the Company, for which he was paid vacation pay. According to the Employee, he took no other vacation, and the Employer did not pay him vacation pay.

(b) The Employer, on the other hand, said that it had, indeed, paid the Employee vacation pay. The Employer asserted that it had paid the Employee full pay for each of the eight days when the Company's offices were closed for the holidays in December 2018 and 2019. The Employer also asserted that it had paid the Employee full pay during the pandemic-related office shutdown in March, April, and May 2020 and during the Employee's two-week resignation notice period in September 2020, during which time the Employee did not perform any work. According to the Employer, the payments during each of these periods

were vacation pay. The Employee disputed this, saying that he had never agreed that the payments during these periods were vacation pay.

20. The Adjudicative Delegate decided the Complaint in favour of the Employee. His decision was based on the following findings and analysis of the evidence:

(a) Without an explicit agreement between the parties to treat particular days off as vacation, it was not open to the Employer to decide that its payments to the Employee during those periods were vacation pay.

(b) There was no evidence of an explicit agreement between the parties to treat the time periods identified by the Employer (i.e., the holiday closure periods, the pandemic shutdown period, and the resignation notice period) as vacation.

(c) No vacation pay was identified on the Employee's wage statements, and there was no evidence of a written record of annual vacation days taken by the Employee, despite the requirement (under section 27 of the *ESA*) that payments of vacation pay be noted in the wage statements for the periods in which they are paid, and despite the requirement (under section 28 of the *ESA*) that the Employer keep payroll records that include the dates of the annual vacation taken by the Employee, the amounts of vacation pay paid by the Employer, and the amounts of vacation days and pay owing.

(d) Without documentary evidence supporting the Employer's position, the Adjudicative Delegate preferred the evidence of the Employee that the parties had not agreed to treat the time periods identified by the Employer as vacation and had not agreed to treat the payments during those periods as vacation pay.

21. Given his findings and analysis, the Adjudicative Delegate concluded that the Employee was not paid vacation pay during his employment at the Company, except for the vacation pay he received for the six days of vacation he had taken.

22. The Adjudicative Delegate then considered the amount of unpaid vacation pay the Employer was required to pay the Employee. As the delegate explained in the Determination, section 80 of the *ESA* limits the amount of unpaid wages (including vacation pay) the Director can require an employer to pay by establishing a maximum 12-month wage recovery period. In the case of a complaint under the *ESA*, the amount of wages the Director can require an employer to pay is limited to the amount that was payable during the 12-month period before the date of the complaint or the termination of the employee's employment, whichever was earlier. Accordingly, the Adjudicative Delegate determined that the wage recovery period for the Employee was the 12-month period ending on September 29, 2020, which was the effective date of the employee's resignation.

23. The Adjudicative Delegate then reasoned that "based on the recovery period being limited to September 30, 2019 onwards … only vacation pay earned by the [Employee] from August 7, 2019 (and payable during the recovery period, namely on August 7, 2020) onwards" was recoverable under section 80 of the *ESA*. Neither party appealed this reasoning.

24. Finally, the Adjudicative Delegate imposed two monetary penalties of $500 on the Employer based on his finding that the Employer had contravened two sections of the *ESA*: section 18, which sets time limits

within which an employer must pay an employee all wages owing (including vacation pay) after their employment ends, and section 58, which entitles an employee to vacation pay. The Employee did not appeal this finding, nor any other aspect of the Determination.

ANALYSIS

25. In this part of my decision, I explain my findings regarding the issue in this appeal. In doing so, I outline relevant legal principles and discuss some of the submissions and documents provided to the Tribunal during the appeal process.

A. Has evidence become available that was not available at the time the Determination was being made?: *ESA*, section 112(1)(c).

26. Under section 112(1)(c) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "evidence has become available that was not available at the time the determination was being made." This is the ground of appeal identified by the Employer in this case.

27. The threshold for satisfying this "new evidence" ground of appeal is high. To be accepted on appeal, the evidence that an appellant puts forward to the Tribunal must satisfy each of the following four criteria:

(a) The evidence is new, in the sense that it could not, with the exercise of due diligence, have been discovered and presented to the delegate during the complaint, investigation and determination processes and before the delegate made their determination.

(b) The evidence is relevant. More specifically, the evidence must be relevant to a particular material issue in the complaint that was before the delegate.

(c) The evidence is credible, in the sense that it is reasonably capable of belief.

(d) The evidence has high potential probative value. This means that, if the evidence had been provided to, and believed by, the delegate, it could have led the delegate to reach a different conclusion on the particular material issue in the complaint: *Merilus Technologies Inc.*, BC EST # D171/03.

28. In this appeal, the evidence put forward by the Employer is the "Division 2 Contracting Employment Agreement/Application Form," which the Employer says was signed by the Employee on July 16, 2020 (the "Application Package"). For the purposes of my decision on this appeal, I accept that the Employee signed the Application Package electronically on July 16, 2020.

29. The Application Package is comprised of a listing of training courses that are available to Company employees, hourly pay rate and job description information for several positions at the Company (but not the salaried position of project manager/estimator), an "employee health declaration," and a one-page "employee agreement," which includes provisions related to minimum hours of pay, statutory holidays, employee absences and injuries, management rights, assignment of wages, severance, substance use, and occupational health and safety. At the bottom of the final page of the Application Package, there is a signature line, above which the employee must acknowledge that they "have read, understood and agree to all Company policies, agreements and statements contained in the 'Employee Application' package above, including all appendices and attachments."

30. In its appeal submission, the Employer points the Tribunal to the assignment of wages section of the Application Package, which reads as follows:

> **ASSIGNMENT OF WAGES**
>
> If an overpayment of wages occurs from [the Employer] to an employee, all employees agree and authorize repayment of overpaid wages by means of an assignment of wages in accordance with Section 22 of the Employment Standards Act. Assignment of wages will be a deduction from future hourly wages, salary, accrued vacation pay, stat holiday pay, severance pay or bonus pay. Overpayment of wages can include but is not limited to hourly wages, salary wages, statutory holiday pay, accrued vacation pay and employee advances.

31. The Employer says that the Application Package "was not previously submitted to the Delegate and hence is new evidence." Moreover, the Employer argues that if the Employee was not taking vacation during the holiday closure periods and resignation notice period, then those were periods of unpaid time off. As a result, under the assignment of wages clause in the Application Package, the payments made by the Employer to the Employee during those periods are now deemed to be overpayments, which can be deducted "from any future payments, including vacation pay." According to the Employer, "no documentation was previously submitted to the Delegate to show overpayment of wages or assignment of wages, hence this is new evidence."

32. I do not accept that the information the Employer now puts forward in relation to the Application Package is "new evidence" within the meaning of the four criteria set out above. The Application Package was signed several months before the Complaint, and I have no reason to conclude that it was unavailable during the Complaint process. With the exercise of due diligence, the Employer could have provided the Application Package information to the Investigative Delegate during her investigation or to the Adjudicative Delegate before he made his determination. In its appeal submission, the Employer gives no explanation as to why it did not do so, except to say that it "was not offered or advised of the option to indicate that an overpayment of wages would exist should vacation days [during the holiday closure periods and resignation notice period] be excluded from the vacation pay calculations." I reject this explanation. The Employer knew, during the Complaint process, that it was possible the Adjudicative Delegate would make a determination in favour of the Employee's claim that the payments he received during the holiday closure periods and resignation notice period were not vacation pay. If the Employer feels that the assignment of wages clause in the Application Package is probative evidence in response to such a determination, it should have disclosed that evidence during the Complaint process.

33. I therefore find that the ground of appeal set out in section 112(1)(c) of the *ESA* has not been met in this appeal, without the need to substantively consider matters of relevance, credibility, or probity. The Employer has not shown me, on a balance of probabilities, that evidence has become available that was not available at the time the Determination was being made.

34. Finally, I note that even if the Employer had disclosed the Application Package during the Complaint process, there are several reasons why it is unlikely that such evidence would have led the Adjudicative Delegate to reach a different determination in this case. For example, given the timing and depending on the circumstances surrounding the execution of the Application Package, the Adjudicative Delegate may have found the "employee agreement" portion of the package to be unenforceable. In addition, the Adjudicative Delegate may well have concluded that the broad and open-ended assignment of wages

clause in the Application Package was not a valid "written assignment of wages" within the meaning of section 22 of the *ESA*, based on the language of section 22 and related decisions of the Tribunal (see, *e.g.*, *Rizzuto Construction*, BC EST #D102/16). Not to mention that the Employer, in its appeal submission, purports to apply the assignment of wages clause retroactively to alleged "overpayments" made before the package was signed on July 16, 2020. The Adjudicative Delegate may have questioned the validity of this retroactive application of the assignment of wages clause, both as a matter of contract law and under the *ESA*.

B. Additional points raised in the Employer's appeal submission

35. The central question posed by the Employer in this appeal is whether new evidence has become available that was not available at the time the Determination was being made. I have answered that question in the negative and dismiss the Employer's appeal on that basis. Still, I acknowledge that the Employer raised certain additional points in its appeal submission and briefly address them here.

36. First, in its appeal submission, the Employer seems to suggest that the Tribunal should question the credibility of the Employee's evidence in this case, particularly in relation to whether the Employee performed work during the holiday closure periods and resignation notice period. I find this suggestion to amount to an attempt to reargue matters that were before the Adjudicative Delegate and dismiss it accordingly. Moreover, I note that the Adjudicative Delegate made no findings of fact regarding whether the Employee performed work during the holiday closure periods and resignation notice period, and I find that he was not required to do so to reach his Determination. Regardless of whether the Employee worked on the days in question, it was reasonable for the Adjudicative Delegate not to retroactively classify those days as vacation, given that there was no documentary evidence identifying them as such, nor any evidence that the parties had agreed to treat them as vacation: see *Number 151 Holdings Ltd.*, BC EST #D142/99.

37. Second, in its appeal submission, the Employer provides calculations to show that when the assignment of wages clause in the Application Package is taken into account, there are no unpaid wages owing to the Employee. I have not considered these calculations, as they are based on evidence that I have not accepted on this appeal because it does not meet the threshold established under section 112(c) of the *ESA*.

38. Finally, in its appeal submission, the Employer challenges the two monetary penalties imposed by the Adjudicative Delegate. The Employer argues that when the assignment of wages clause in the Application Package is taken into account, there is no contravention of section 18 or section 58 of the *ESA*, which makes the monetary penalties unwarranted. I have rejected this argument, as it is based on evidence that I have not accepted on this appeal because it does not meet the threshold established under section 112(c) of the *ESA*.

39. For all of the above reasons, the Employer's appeal is dismissed.

ORDER

40. Pursuant to section 115(1) of the *ESA*, the Determination is confirmed.

Jonathan Chapnick
Member
Employment Standards Tribunal

Notice: Paragraph 24 of this version of the reasons for decision has been amended in accordance with the corrigendum issued by the Employment Standards Tribunal on June 23, 2022. The last sentence in paragraph 24 has been corrected as follows: "The Employee did not appeal this finding, nor any other aspect of the Determination."