Citation: 526989 British Columbia Ltd.
and Wendy Shard (Re)
2022 BCEST 51

EMPLOYMENT STANDARDS TRIBUNAL

Appeals
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

526989 British Columbia Ltd. carrying on business as Valley Business Centre

- and by -

Wendy Shard

- of a Determination issued by -

The Director of Employment Standards

PANEL: Brandon Mewhort

FILE NOS.: 2022/114 and 2022/116

DATE OF DECISION: August 11, 2022

DECISION

SUBMISSIONS

Lucia Silivestru	on behalf of 526989 British Columbia Ltd. carrying on business as Valley Business Centre
Wendy Shard	on her own behalf

OVERVIEW

1. This decision addresses two appeals – one filed by 526989 British Columbia Ltd. carrying on business as Valley Business Centre (the "Employer"), and one filed by Wendy Shard (the "Complainant") – of a determination issued by Sarah Vander Veen, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on April 28, 2022 (the "Determination").

2. In the Determination, the Delegate found that the Complainant was owed unpaid overtime wages by the Employer pursuant to section 40 of the *Employment Standards Act* ("*ESA*"). That finding is the subject of the Employer's appeal. The Delegate also found that the Complainant was not entitled to a bonus that she claimed, because it was not considered to be "wages" as defined in section 1 of the *ESA*. That finding is the subject of the Complainant's appeal. The Complainant also sought an order extending the appeal period under section 109(1)(b) of the *ESA*, which I deal with as a preliminary matter in this decision.

3. 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.

4. I have decided to dismiss these appeals pursuant to section 114(1) of the *ESA*, because there is no reasonable prospect that either of them will succeed. I have assessed the appeals based on the Determination, the reasons for the Determination, the appeals, the written submissions of the Complainant and Employer filed with their respective appeals, and my review of the material that was before the Director when the Determination was being made.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

5. The statutory deadline for appealing the Determination was May 24, 2022. The Complainant requested in her appeal materials that the appeal period be extended by six days to May 30, 2022.

6. The Complainant says she did not receive a copy of the Determination that was originally emailed to her by the Delegate. She says it is possible the email ended up in her spam folder and it was then deleted by her husband inadvertently. The Complainant says she only became aware of the Determination when the Tribunal emailed her on May 25, 2022, to inform her that the Employer filed an appeal. The Complainant then contacted the Employment Standards Branch to ask for a copy of the Determination, which she received on May 26, 2022.

7. This Tribunal has criteria to determine whether an appeal period should be extended, which are set out in the *Niemisto* decision (BC EST # D099/96). Those criteria are as follows:

   a. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

   b. there has been a genuine and ongoing *bona fide* intention to appeal the Determination;

   c. the respondent party, as well the Director, must have been made aware of this intention;

   d. the respondent party will not be unduly prejudiced by the granting of an extension; and

   e. there is a strong *prima facie* case in favour of the appellant.

8. As further held by this Tribunal in *Jun Yang (Re)*, 2020 BCEST 39 at para 31: "These criteria are not an exhaustive list. There may be other factors that ought to be considered. Further, not all of the above factors may be applicable in determining whether an extension should be granted or not, depending on the circumstances of each case."

9. In this case, I find two additional factors to be compelling – the relatively short extension request and the fact the Employer also appealed the Determination. If not for those factors, I would likely not exercise my discretion to extend the appeal period, particularly given that there is not a strong *prima facie* case in favour of the Complainant (in fact, as discussed below, I have found there is no reasonable prospect that the Complaint's appeal will succeed). However, in my view, it would be unfair to refuse such a relatively short extension given the Employer has also appealed the Determination.

10. I therefore exercise my discretion pursuant to section 109(1)(b) of the *ESA* to extend the appeal period for six days from May 24, 2022 to May 30, 2022, as requested by the Complainant.

ISSUE

11. Whether these appeals should be dismissed pursuant to section 114(1) of the *ESA*.

THE DETERMINATION

12. The Employer operates a bookkeeping business in Whistler, British Columbia. The Complainant was employed as a bookkeeper there from December 21, 2004 to December 13, 2019, when she quit. The Complainant did not have a written employment contract with the Employer. The Complainant typically worked Mondays to Fridays and her bi-weekly salary was payment for 40 hours of work per week, although her hours of work were in dispute.

13. The Complainant also received a $10,000.00 bonus every year from 2015 to 2018, usually in the fall. The last bonus the Complainant received was in August of 2018, immediately before the previous owner of the business sold it to its current owners. The new owners did not pay the Complainant a bonus in 2019.

14. The Delegate determined that, pursuant to section 80 of the *ESA*, the Complainant was entitled to any unpaid wages from December 13, 2018 to December 13, 2019. The Delegate had to determine: (1) whether the Employer owed the Complainant a bonus in 2019; and (2) whether the Employer owed the Complainant overtime wages and, if so, how much.

15. The Delegate determined that the Employer did not owe the Complainant a bonus in 2019, because it was a discretionary bonus that was unrelated to the Complainant's hours of work, and it was therefore excluded from the definition of "wages" in section 1 of the *ESA*. The Delegate found that the parties' agreement regarding the bonus was that it would be paid in years in which the Complainant was required to run the business during its owner's lengthy vacations. The bonus was also, partially, a gratuitous payment that the previous owner intended to be put towards the Complainant's retirement savings. Further, the income statements for the business from 2015, 2016 and 2017 characterised the bonuses as "discretionary".

16. The Delegate determined that the Employer owed the Complainant overtime wages in the amount of $5,474.09, plus $328.45 in vacation pay. The Delegate found that the Employer knew or ought to have known that the Complainant was working overtime, given that the Employer's own records demonstrated that. The Delegate found it difficult to believe that the new owners of the Employer ever specifically instructed the Complainant to not work overtime.

ARGUMENTS

The Employer

17. The Employer did not select any grounds of appeal in its appeal form. In its one-page submission, the Employer essentially argues that the Delegate erred in her finding that it knew or ought to have known that the Complainant was working overtime. The Employer also reiterated its argument made to the Delegate that the Complainant was specifically instructed not to work overtime. In the Determination, the Delegate found that argument difficult to believe, particularly because the Complainant's overtime hours were recorded in the Employer's own records, and the Complainant was never disciplined for working overtime despite being told not to.

The Complainant

18. When asked in the appeal form to select her grounds of appeal, the Complainant indicated that the Director failed to observe the principles of natural justice in making the Determination. However, the Complaint did not raise any alleged failures to observe the principles of natural justice in her submission.

19. Rather, the Complainant essentially argues that the Delegate erred in her finding that the bonus was discretionary. In particular, the Complainant argues that the Delegate did not put enough weight on the fact her bonus was part of her expected remuneration for four years before 2019. The Complainant also seems to suggest that the bonus should be paid, because she was an important employee of the business and even more so after it was sold to the new owners.

ANALYSIS

20. In my view, the submissions of both the Employer and the Complainant only raise alleged errors of fact. Specifically, the Employer essentially argues that the Delegate erred in her finding of fact that the Employer knew or ought to have known that the Complainant was working overtime. The Complainant essentially argues that the Delegate erred in her finding of fact that the bonus was discretionary.

21. As discussed recently by this Tribunal in *Taste of Hangzhou Catering Ltd. (Re)*, 2022 BCEST 34 ("*Hangzhou Catering*") at para 62, section 112(1) of the *ESA* does not provide for an appeal based on alleged errors of fact, and "the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law."

22. In *Hangzhou Catering*, this Tribunal then went on to explain how it is rare for a finding of fact to amount to an error of law (see para 63, citing *3 Sees Holdings Ltd. (Jonathan's Restaurant) (Re)*, BC EST # D041/13 at paras 26 to 29):

> The Tribunal has, time and again, said that the test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a "palpable and overriding error on the facts". In this case, to establish the Director committed an error of law on the facts, THC would be required to show the findings of fact and the conclusions and inferences reached by the adjudicating delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable.

23. In this case, I find that the Delegate's conclusion regarding the Complainant's overtime was supported by evidence before the Delegate. For example, the Employer's own records showed the Complainant was working overtime.

24. I also find that the Delegate's conclusion regarding the discretionary nature of the Complainant's bonus was supported by evidence before the Delegate. For example, the business' income statements for 2015, 2016 and 2017 indicated the bonus was discretionary. Also, there was evidence that the bonus was intended, in part, to compensate the Complainant for running the business during the previous owner's lengthy vacations and the Employer had discretion whether to take vacation and leave the Complainant "in charge". There was also evidence that the bonus was partly a gratuitous payment that the Complainant could put into her retirement savings.

25. For the above reasons, I find that the errors of fact alleged by both the Employer and Complainant do not raise errors of law. Both the Employer and Complainant have failed to demonstrate a basis for the Tribunal to interfere with the Determination and I dismiss the appeals under section 114(1)(f) of the *ESA* as there is no reasonable prospect that either of them will succeed.

ORDER

26. I order that the Determination be confirmed pursuant to section 115(1)(a) of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal