Citation: 555659 B.C. Ltd. (Re)
2023 BCEST 114

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

555659 B.C. Ltd. carrying on business as Bubby Rose's Bakery & Café
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

FILE NO.: 2023/120

DATE OF DECISION: December 13, 2023

DECISION

SUBMISSIONS

Joseph Gereluk	counsel for 555659 B.C. Ltd. carrying on business as Bubby Rose's Bakery & Café

OVERVIEW

1. 555659 B.C. Ltd. carrying on business as Bubby Rose's Bakery & Café ("Appellant") appeals a determination issued on July 17, 2023 ("Determination"), by a delegate ("Delegate") of the Director of Employment Standards ("Director").

2. The Determination held the Appellant had contravened the *Employment Standards Act* ("*ESA*") in respect of the employment of Pardeep Kapoor ("Complainant"). The Determination ordered the Appellant to pay the Complainant wages, annual vacation pay and interest totaling $45.74. The Determination also levied administrative penalties totaling $1,000.00 for a total amount payable of $1,045.74.

3. The Appellant appeals on the grounds that the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was being made.

BACKGROUND

4. The Appellant operates several bakery and cafes in Victoria, B.C., that fall within the jurisdiction of the *ESA*.

5. The Complainant was employed by the Appellant beginning January 31, 2021, and was paid a gross salary of $2,200.00 semi-monthly. The exact termination date is in dispute.

6. The Complainant decided sometime around the end of 2021 or the beginning of 2022 that he did not want to work for the Appellant and advised the Appellant's representative that he was quitting. The Complainant submitted that he provided the Appellant with several weeks working notice, while the Appellant submitted the Complainant had quit without notice.

7. When the Complainant subsequently attended work as scheduled, the Appellant's representative told the Complainant he did not have to work. In response to the Appellant representative's suggestion, the Complainant did not work the scheduled shift that day and the Complainant also did not return and work further shifts.

8. The Complainant sought his final pay from the Appellant. However, the Complainant and the Appellant did not agree on the final pay that the Complainant was entitled to.

9. The Complainant filed a complaint under section 74 of the *ESA* alleging that the Appellant had failed to pay the Complainant his final wages and compensation for length of service.

10. A delegate of the Director ("Investigative Delegate") became involved and requested evidence and submissions from the parties. The Investigative Delegate communicated with the parties and their representatives and received statements and evidence on the issues raised in the complaint.

11. The Investigative Delegate prepared a report for the Appellant and the Complainant dated January 30, 2023, summarizing the information provided by the Appellant, the Complainant, and any witnesses and included a list of relevant records and documents ("Investigation Report"). The Investigative Delegate set out the issues under consideration but did not make findings in the Investigation Report. The Appellant and the Complainant were requested to review the Investigation Report carefully and provide further information and clarification. The Appellant's representative provided a response to the Investigation Report.

12. The Investigation Report and responses to the Investigation Report were submitted to the Delegate for a determination.

13. The Delegate issued the Determination dated July 17, 2023. Taking into account the conflicting evidence, the Determination found the Complainant's last day of work was February 6, 2022, when the Complainant attended work for his scheduled shift and was told by the Appellant's representative that the Complainant did not have to work the shift. The Determination found the Complainant was owed the 2 hour minimum pay, pursuant to section 34 of the *ESA*. The Determination states:

> In showing up for a shift that he was scheduled to work on February 6, I find the Complainant entitled to minimum daily hours of 2 at his hourly wage rate in accordance with section 34 of the Act. The Complainant did not initiate the request to leave work early; rather [the Appellant's representative] told the Complainant if he did not want to work, he did not need to, and the Complainant said "ok", and left.

14. The Determination held the Complainant was owed wages, annual vacation pay, and interest totaling $45.74 based on the agreed semi-monthly wage rate and evidence that the Appellant had paid $10.00 to the Complainant after the employment ended.

15. I note the Determination dismissed other claims by the Complainant for further unpaid wages as well as compensation for length of service.

16. The Determination specifically noted the evidence from both the Complainant and Appellant was inconsistent and conflicting and that there was a scarcity of documentary evidence such as contemporaneous emails and time records.

17. As noted above, the Determination levied two administrative penalties of $500.00 each against the Appellant for failure to pay minimum daily hours (section 34) and failure to keep required employee hour records (section 28) totaling $1,000.00 for a total amount payable of $1,045.74.

18. The Appellant appealed the Determination on August 10, 2023.

ARGUMENTS

19. The Appellant submits on the Appeal Form that the Director erred in law, failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was being made.

20. The Appellant submits the Delegate misapplied section 34 of the *ESA* in finding that the Complainant was entitled to the minimum 2 hour pay. The Appellant submits the Delegate misapplied this section of the *ESA*, misapplied an application of general law, and acted on a view of the facts that could not reasonably have been entertained.

21. The Appellant further submits the Delegate erred in law in finding the Appellant contravened section 28 of the *ESA*. The Appellant submits the Delegate erred in misapplying section 28 of the *ESA*, misapplying general law, and making a finding contrary to the information provided. The Appellant submits that it was not in breach of section 28 of the *ESA*. The Appellant submits a time sheet of an anonymous employee in support of the appeal.

22. The Appellant also submits the Director breached the principles of natural justice in making the Determination. The Appellant submits there is "a general duty of fairness imposed upon the Director" and "for the reasons as set out above and based on the principle of fairness the Determination and the Reasons for Determination failed in applying the general duty in this case."

23. The Appellant submits the Determination should be set aside.

ANALYSIS

24. These reasons are based on the written submissions of the Appellant, the Determination, and the section 112(5) record ("Record").

25. On receiving the Appellant's appeal, the Tribunal requested and received the Record from the Director for purposes of the appeal. The Tribunal provided the Record to the Appellant and sought submissions on the completeness of the Record. As the Tribunal did not receive any objections to the completeness of the Record from the Appellant, the Tribunal accepts the Record as complete. I note the Tribunal was not able to provide the Record to the Complainant as the Tribunal does not have their current contact information on file.

Appeal of Determination

26. 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.

27. An appeal is limited to the grounds set out in the *ESA*. An appellant bears the onus to demonstrate the appeal meets one or more of the specified grounds. The appeal process is not meant to be a new hearing of the case, nor is it an opportunity to resubmit an appellant's facts and arguments and 'try again.'

28. As stated by the Tribunal in *Little Farmers' Petting Zoo Society*, 2023 BCEST 44 at para 34:

> The Tribunal has consistently held that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).

Error in law

29. To show an error in law, the Appellant has the burden to show a material legal error in the Determination. Examples of errors in law may include the following: i) a misinterpretation of misapplication of a section of the Act; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12) 1998 CanLII 6466).

30. A disagreement with a finding of fact does not amount to an error in law. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate.

31. The Appellant submits it was an error in law to find the Complainant was entitled to minimum pay pursuant to section 34 of the *ESA*. The Appellant submits the Delegate misapplied section 34 and took an unreasonable view of the facts in finding the Complainant was entitled to the minimum pay. The Appellant submits the Complainant was told that he was not 'required' to work after showing up for work and in fact chose not to work. The Appellant submits that it was an error in law to find the Complainant was entitled to the minimum pay wages where the Complainant attended for work and was told he could go home and then did so.

32. I have reviewed the Determination and the evidence in the Record and do not find an error in law in the Determination. The relevant portions of section 34(1) of the *ESA* provide as follows:

> 34 (1) ...[I]f as required by an employer an employee reports for work on any day, the employer must pay the employee for a minimum of 2 hours at the regular wage whether or not the employee starts work, unless the employee is unfit to work or fails to comply with Part 2 of the Workers Compensation Act, or a regulation under that Part.

33. The finding that the Complainant was entitled to the minimum pay when he arrived for his scheduled shift was consistent with the law and decisions of the Tribunal applying section 34 of the *ESA* (see *Dhindsa Law Corporation*, 2021 BCEST 20; *Top Finalist Services Inc.*, BC EST # D004/00 - employee reporting to work entitled to minimum). The Delegate made a reasoned finding of fact based on the conflicting evidence that the Complainant provided notice and attended for his scheduled shift as required. There was no evidence the Complainant was unfit for work or that Part 2 of the *Workers Compensation Act* was applicable. I note it would be contrary to fairness and intent of the minimum pay provisions if an employer could schedule employees for work and then tell an employee they did not have to work and refuse to

pay wages after the employee had already made arrangements and reported for work as required by the scheduled shift. The wording of section 34 specifically provides that the minimum pay is required "whether or not the employee starts work." The minimum pay provisions at section 34 are minimum statutory standards that cannot be waived (see *Lotte Enterprises Ltd.*, BC EST # D598/01). The Tribunal has held an employee is entitled to the section 34 minimum where the employer had allowed the employee to go home without completing their scheduled shift and the employee chose to do so (see *Hall Pontiac Buick Ltd.*, BC EST # D073/96). I find the Delegate properly considered the submissions and evidence within the law and came to a reasoned decision based on the findings of fact. I find there was no error of law or misapplication of section 34 in finding that the 2 hour minimum wage was owed to the Complainant.

34. I have also considered the calculation of the amount owing to the Complainant for the wages, annual vacation pay, and interest. I find there is no error of law in the calculation and confirm the amounts. I note the Delegate also considered and dismissed claims by the Complainant for additional wages and compensation for length of service which have not been appealed by the Complainant. While the Appellant may not agree with the Determination, I find there was evidence the Delegate could rely on to make the findings of fact and arrive at the calculations and conclusions in the Determination. It is clearly established in Tribunal decisions that this Tribunal will not re-hear the case, nor will it re-evaluate the evidence and substitute its own view of the same evidence.

35. I have also considered the administrative penalties levied in the Determination. As noted above, the Delegate found the Complainant contravened section 34 in failing to pay the Complainant minimum wages and the administrative penalty owed by the Appellant is mandatory in the circumstances (see *537370 B.C. Ltd. (Ponderosa Motor Inn)*, BC EST # D011/06).

36. The Determination also found the Appellant did not keep required records of hours worked by the Complainant as set out in section 28 of the *ESA*. The Determination was based on the evidence and law, and I find the Appellant has not shown that there was an error of law. The records that must be kept by employers are set out in the *ESA* and are considered important employer responsibilities (see *Kenny*, BC EST # D433/01, upheld in *Croft*, BC EST # RD687/01 - importance of employer obligation to keep records; *Owen Business Systems Ltd.*, BC EST # D088/96 and *Della Casa Hospitality Inc.*, BC EST # D021/17 - specific requirements must be met and wage statements not record of hours; *Comtel Integrated Technologies Inc.*, BC EST # D120/11 - daily time records required for all employees). In addition to being a requirement of the *ESA*, it is good practice for an employer to maintain accurate and complete records of employee hours in compliance with the *ESA* so that the employer has the records as evidence. In the absence of the required records, the findings of fact will necessarily be based on the evidence available (see *Kenny* and *Croft*, *supra*).

37. While the Appellant submitted there were no requirements for the form that employment records must be in, the *ESA* and law are clear that the substance of the record requirements must be met. I note the decision submitted by the Appellant in support of the appeal specifically notes that the substance of the required employment records information - in that case the record of hours worked by each employee on a daily basis - was kept and submitted by the employer (see *SN Farm Contractors Ltd.*, BC EST # D567/01).

38. Also as noted in the materials submitted by the Appellant, there is a distinction between the requirements to keep employment records and the requirement to disclose them to the Director. In this case the

Determination is clear that the Appellant was found to be in breach of its requirement to keep the employment records of hours worked by the Complainant as required by section 28 of the *ESA*.

39. In summary, I find the facts and evidence have been properly considered within the law and the Appellant has not shown an error in law in the Determination. The Delegate properly considered the facts and law in finding the Appellant contravened the *ESA* and owed the Complainant wages, annual vacation pay, and interest. Absent an error in law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate.

40. I further find the Delegate properly considered the facts and law in finding the Appellant was in contravention of sections 28 (failing to keep records of Complainant's hours) and 34 (failing to pay minimum daily hours) of the *ESA* and the administrative penalties were properly applied. The law is clear that the administrative penalties owed by the Appellant are mandatory in the circumstances and there is no provision in the *ESA* for them to be cancelled (see *537370 B.C. Ltd. (Ponderosa Motor Inn)*, *supra*).

41. I find there is no error in law and would also dismiss this ground of appeal.

New Evidence

42. The Appellant alleges in the Appeal Form that new evidence has become available since the time the Determination was being made.

43. The Appellant also submitted certain reports dated July 2023 as part of the appeal package. I note the reports do not reference the Complainant nor do they even cover the time period relevant to when the Complainant was employed.

44. The test that must be met to introduce new evidence on an appeal is clearly established. In *Davies et al. (Merilus Technologies Inc.)*, BC EST # D171/03, the Tribunal set out the following requirements for introducing new evidence:

(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.

45. Each of the above requirements need to be met by an appellant seeking to submit new evidence. Previous decisions of the Tribunal make it clear that parties are expected to participate in good faith and present all relevant evidence during the initial investigation and determination stage of complaints before the Director. The introduction of new evidence later at the appeal stage that could and should have been introduced at the investigation and determination stage, will generally result in the dismissal of the appeal.

46. The Appellant in this case submits evidence subsequent to the time of the investigation and the adjudication of the complaint.

47. The evidence and arguments submitted by the Appellant do not meet the requirements for new evidence. The Appellant does not submit an explanation why relevant documents could not have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination. Nor is there an explanation of how the documents meet any of the other factors. As noted above, there is no indication the Complainant is even named in the documents.

48. The law is clear that an appellant must meet the necessary requirements for new evidence and the failure to do so will generally result in a dismissal of the appeal on this ground (see *Davies et al.*, *supra*; *Can-Pacific Trading Inc.*, BC EST # D082/11; *Anthony MacInnis (Re)*, 2020 BCEST 9).

49. The Appellant generally resubmits arguments made during the initial investigation and adjudication stage and does not submit cogent evidence. The Appellant has also not submitted an explanation that relevant evidence could not reasonably have been discovered or presented during the investigation. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.

50. I find there is no merit in this ground of appeal, and it is dismissed.

Natural justice

51. Lastly, I have considered whether the Director failed to observe the principles of natural justice in making the Determination.

52. Natural justice has been described as the right to a fair procedure and includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05). To be successful on this ground of appeal, there must be credible evidence about how the determination procedure did not meet the requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99). It is not enough to simply allege a breach of natural justice without specific evidence and argument (see *683233 B.C. Ltd. et al.*, BC EST # D041/06).

53. As noted above, the Appellant cites a “general duty of fairness imposed upon the Director” and submits on the Appeal Form that the Director breached the duty of fairness “for the reasons as set out above and based on the principle of fairness.”

54. I have reviewed the Record and find there is no basis on the Record for concluding the Director failed to observe the principles of natural justice - or any “general duty of fairness.” The Record indicates the Appellant was aware of the case to be made and had the right to present their case and respond to the evidence. The Record also shows the Investigative Delegate communicated with the Complainant, the Appellant’s representatives, and witnesses during the investigation. The Record indicates the parties, including the Appellant's representatives, were involved in the investigation process and had every opportunity to respond and provide evidence and submissions.

55. In sum, the submissions and evidence do not support that the Director failed to observe the principles of natural justice in making the Determination. I find there is no merit in this ground of appeal, and it is dismissed.

Summary dismissal

56. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.

57. I find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

ORDER

58. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.

59. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal