Citation: Western Glass Inc. (Re)
2023 BCEST 14

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Western Glass Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2022/207

DATE OF DECISION: March 16, 2023

DECISION

SUBMISSIONS

Ankur Sharma on behalf of Western Glass Inc.

OVERVIEW

1. This is an appeal by Western Glass Inc. (the "Employer") of a decision of a delegate of the Director of Employment Standards (the "Director") made on November 10, 2022 (the "Determination").

2. On April 20, 2021, an Employee filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (the *"ESA"*) in failing to pay him compensation for length of service and wages for all hours worked.

3. A delegate of the Director (the "Investigative Delegate") investigated the Employee's complaint and on September 7, 2022, issued an Investigation Report (the "Report"). The Report was provided to the parties for response. A second delegate (the "Adjudicative Delegate") reviewed the Report and the responses of the parties to that Report before issuing the Determination.

4. The Adjudicative Delegate determined that the Employer had contravened Sections 18, 40, 46, 58 and 63 of the *ESA* in failing to pay regular and overtime wages, statutory holiday and vacation pay as well as compensation for length of service.

5. The Director found that the Employee was entitled to the total amount of $41,061.78 including accrued interest. The Director also imposed four $500 administrative penalties for the Employer's contravention of Sections 18, 40, 58 and 63 of the *ESA*, for a total amount payable of $43,061.78.

6. The Employer appeals the Determination on all three statutory grounds of appeal – that is, that the Director erred in law, that the Director 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.

7. The deadline for filing the appeal was December 5, 2022. The Employer filed the appeal on December 5, 2022, and sought an extension of time to January 16, 2023, to make additional submissions and provide additional documents. Although the Tribunal granted that extension, the Employer did not make any further submissions and no additional documents were submitted.

8. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submission, I found it unnecessary to seek submissions from the Director and the Employee.

9. This decision is based on the Section 112(5) record that was before the Director at the time the Determination was made, the appeal submission, and the Determination.

ISSUE

10. Whether the Employer has established grounds for interfering with the Director's decision.

BACKGROUND AND ARGUMENT

11. The Employer operates a glass manufacturing business. The Employee was employed as a glass cutter, and later, as a glazier, from February 17, 2018, until November 14, 2020.

12. The Employee alleged that, at the commencement of his employment, the Employer paid him below the wage rate specified in his employment agreement and Labour Market Impact Assessment ("LMIA"). The agreement specified that the Employee was to be paid $22.50 per hour but the Employee claimed that the Employer only paid him $16.00 per hour. However, the Employer issued (but did not give the Employee) wage statements and cheques in the Employee's name that reflected the correct wage rate.

13. The Employee also alleged that the Employer required him to open a bank account with the Greater Vancouver Community Credit Union ("GVCCU") and provide the Employer the access card and PIN. The Employer would make regular cash withdrawals from the Employee's account which it then used to pay the Employee wages at the lower wage rate. The Employee maintained a separate personal bank account at a different institution where he would deposit his wages.

14. In support of his allegations, the Employee provided a printout of his bank account activity and screen shots of text messages between himself and a number he contended belonged to the Employer.

15. Throughout his employment, the Employer provided the Employee with a payroll deduction online calculator. This calculator was an accurate accounting of what payments the Employee was actually paid, confirming that the Employee was paid $16.00 per hour. The calculator did not include vacation pay, statutory holiday pay or overtime wages.

16. The Employee also provided the Investigative Delegate with some, but not all, of his timecards from a system called "uAttend" through trackmytime.com along with text messages relating to the Employee's hours of work to support the validity of those timecards.

17. On November 14, 2020, the Employer informed the Employee that they no longer had any work for him and offered him $2,700 if he signed a general release. The Employee refused, asking instead for a letter confirming his termination. No letter was presented. The Employee was of the view that his employment was terminated because he asked for copies of his time sheets and to be paid in accordance with the employment agreement and the LMIA.

18. The Employer provided the Investigative Delegate with copies of the Employee's wage statements and cancelled cheques which indicated that the Employee had been paid $24.50 per hour until April 14, 2020, and $26 per hour after April 15, 2020. The wages included overtime and statutory holiday pay but not vacation pay. Vacation pay was paid out when the Employee took vacation. The Employer asserted that a cheque for unpaid vacation pay had been prepared at the end of the Employee's employment, but the Employee refused to pick it up.

19. The Employer confirmed the Employee's hours were tracked by uAttend but refuted the accuracy of the Employee's timecards. Instead, the Employer provided the Investigative Delegate with Excel sheet records which they asserted were accurate. Those records demonstrated that, in general, the Employee worked 8 hours per day, 5 days per week but that he regularly worked 10-15 minutes of overtime per day. However, he was only paid for 8 hours of work unless he worked more than 15 minutes of overtime.

20. The Employer denied any knowledge of the Employee's GVCCU account or being involved in his banking. The Employer also denied paying the Employee in cash, issuing him payroll calculator records or communicating with him via text messages.

21. The Employer contended it had just cause to terminate the Employee. In support of this assertion, it provided the Investigative Delegate with five written notices of workplace infractions. The first, dated July 14, 2020, related to the Employee missing a day of work without notice to the Employer. That notice was signed by both parties.

22. The remaining notices were signed only by the Employer, and the Employee denied receiving them. The second notice, which was dated July 13, 2020, stated that the Employee refused to clean up his working area and that "the employee has been verbally informed today that he will continue to abide by the Company policy and clean up his area's or will be dismissed as it creates hazards around the workplace." [reproduced as written]

23. The third notice dated July 26, 2020, stated that the Employee refused to cut a particular width of glass because "it was not his responsibility." According to the notice, the General Manager and Floor Manager clarified the Employee's duties were to cut all types of glass and that the Employee had "been given a final warning and any further disruptions in regard to his duties will be a fireable offence."

24. The fourth notice, dated September 4, 2020, stated that the Employee incorrectly cut a piece of glass, causing a customer to become upset and the Employee to argue with the floor manager. According to the notice, a "screaming match" ensued with the Employee behaving "violently" causing the President and General Manager to intervene. The notice continued: "This is [the Employee's] final warning and further disruptions from his end will lead to a termination with cause."

25. The fifth notice, dated October 5, 2020, stated that the Employee missed a full day of work without notice or explanation. "This is the second occurrence of this type of infraction. The 3rd occurrence will lead to an automatic dismissal for cause. The Employee was verbally warned."

26. The Employer claimed that, on November 14, 2020, the Employee became angry and argued with a manager who assigned him work, and that his behaviour escalated when he went to the Employer's office to discuss the dispute. The Employer contended that because the Employee had been previously warned about his refusal to do work and his overall attitude, they decided to terminate his employment.

27. On September 7, 2022, the Investigative Delegate provided the parties with the Report which summarized the complaint and each of their positions. In response, the Employer provided another set of records. The Employer contended that the new timesheets were obtained directly from the platform the Employer used to track employees' hours, and, unlike the Excel sheets, there was no possibility the data could be manipulated.

28. Given the discrepancy in the records, the Adjudicative Delegate analyzed the reliability of the records and found the Employee's records to be the best evidence. Noting that the Employer's own records were inconsistent, the Adjudicative Delegate found that the Employee's records "appear[ed] authentic and unaltered." The Adjudicative Delegate determined that each timecard provided by the Employee showed the date on which it was printed which in turn, was in accordance with the dates of the records, indicating that the timecards were printed contemporaneously. In contrast, the Adjudicative Delegate noted, the Employer's records did not match, which indicated at least one set of records was incorrect. The Adjudicative Delegate further considered that the Employer provided no explanation for the discrepancies.

29. The Adjudicative Delegate found that for some pay periods, the Employer's records were the only ones available. The Adjudicative Delegate determined that the Employee's records were the best available save for those records for which the Employee could not provide, in which case the Adjudicative Delegate relied on the Employer's records.

30. The Adjudicative Delegate relied on the calculator records and copies of cheques provided by the Employee to determine the wages paid to the Employee. The Adjudicative Delegate found the text messages provided by the Employee to be reliable given the "extreme detail and extensive un-work-related conversations" between the parties. Included in those exchanges were messages sent by the Employee containing photos of the calculator records and cheques along with questions disputing the amount paid. Included in those text messages were instances where the Employer told the Employee that he would pay him in cash. The Adjudicative Delegate found that:

> Taken together, these messages and photos contradict the Employer's claim he never paid the [Employee] in cash or issued him [calculator] records. There is no substantiating evidence to show the [Employee] ever received the wage statements provided by the Employer, nor is there supporting evidence to show the [Employee] was paid the amount of wages shown on these wage statements or cashed the cheques they accompanied. Rather, I am satisfied it is more likely the [Employee] was paid for some hours of work at a rate of $16.00 per hour, as per the [calculator] records and photo-copied cheques provided by the [Employee]. (Determination, p. R8)

31. The Adjudicative Delegate continued:

> Not only do I prefer the [Employee's] records over those of the Employer, but the fact both parties have also provided evidence that contradicts the Employer's claims and version of events leads me to question the Employer's credibility and reliability as a whole. As I have already found the Employer's record of hours to be inaccurate, in addition to statements made by the Employer being false or misleading, I am not persuaded to accept the Employer's version of events over those of the [Employee]. The [Employee] and the Employer have raised contradictory claims and, given I am tasked with determining which on is more probable, I prefer to rely upon the [Employee's] evidence over that of the Employer. (Determination, p. R8-R9)

32. The Adjudicative Delegate determined the Employee's outstanding wages based on these conclusions, concluding that he was entitled to wages of $12,783.75, overtime wages of $19,365.12, and vacation pay on these wages in the amount of $2,912.74.

33. The Adjudicative Delegate also determined that the Employee was entitled to statutory holiday pay in the amount of $1,792.02 plus vacation pay on these wages in the amount of $71.68.

34. Finally, the Adjudicative Delegate determined that the Employer had not discharged its burden of establishing just cause for terminating the Employee.

35. The Adjudicative Delegate considered the test for termination in cases of minor misconduct. The Adjudicative Delegate noted that although the Employer asserted it had issued the Employee five written warnings, the Employee contended he had received only one; that is, the warning for a missed day of work. She also noted that the types of warnings differed from one another, ranging from refusing to clean up his work area, for refusing to cut a piece of glass, to an "inappropriate outburst" to missed days of work.

36. The Adjudicative Delegate found that the Employer provided the Employee with only one written warning, that being on July 14, 2020, for a missed day of work. She noted that the asserted reason for terminating the Employee was an "inappropriate outburst." She concluded that the Employer had not previously set a standard of conduct for his behaviour in this respect and therefore, had not demonstrated just cause.

37. The Adjudicative Delegate determined that the Employee was entitled to compensation for length of service in the amount of $1,892.80 plus vacation pay on these wages in the amount of $75.71.

Argument

38. Even though the Employer sought, and was granted, an extension of time in which to file additional submissions on appeal, no further submissions were provided.

39. The sole argument on appeal relates to the reliability of the Employer's records. The Employer contends that the Employee was paid for 80 hours in most pay periods and was not paid for any unauthorized overtime. The Employer says that there were no inconsistencies between the documents submitted, as all the material had only one source.

ANALYSIS

40. Section 114 of the *ESA* provides that at 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 any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious, or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112 (2) have not been met.

41. 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.

42. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination.

43. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. (*Triple S Transmission Inc.*, (BC EST #D141/03)). I have addressed the Employer's arguments under each ground of appeal.

Natural Justice

44. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

45. There is nothing in the submissions that speaks to this ground of appeal. Having reviewed the record, I find that the Employer was given the opportunity to present arguments and evidence in response to the Employee's allegations and to respond to the Report.

46. I find no basis for an appeal on this ground.

New Evidence

47. In *Re Merilus Technologies* (BC EST #D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

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.

48. None of the information submitted on appeal, that is, a revised spreadsheet of the Employee's hours of work, meets the test for new evidence. Not only was the information available to the Employer during the investigation, the data contained in the spreadsheet was already provided to the Investigative Delegate, albeit in a different format.

49. I find no basis for an appeal on this ground.

Error of Law

50. The Tribunal has 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),* [1998] B.C.J. No. 2275 (B.C.C. A.):

a) a misinterpretation or misapplication of a section of the Act;

b) a misapplication of an applicable principle of general law;

c) acting without any evidence;

d) acting on a view of the facts which could not reasonably be entertained; and

e) adopting a method of assessment which is wrong in principle.

51. While not expressly stated as such, it appears that the Employer disputes the Director's conclusion that the Employee's records of hours worked was more reliable than those of the Employer.

52. Findings of credibility are within the purview of the Director and will only be interfered with if they are unsupported by the evidentiary record (*Rose Miller, Notary Public*, BC EST # D062/07, at para. 48):

> In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

53. In arriving at her determination of the Employee's hours of work, the Adjudicative Delegate noted that there were three different sets of records, two of which were submitted by the Employer. The Adjudicative Delegate preferred the records of the Employee for reasons articulated in the Determination. The Employer has not persuaded me that the Adjudicative Delegate misapprehended, misstated or otherwise acted on a view of the facts that cannot be entertained.

54. While the Employer does not appear to dispute the Adjudicative Delegate's conclusion that it had not discharged its burden of demonstrating just cause, I have nevertheless reviewed the record and find no basis to interfere with the Determination on this issue.

55. I find no basis for the appeal.

CONCLUSION

56. Consequently, I find that there is no reasonable prospect that the appeal will succeed under Section 114 of the *ESA*.

ORDER

57. Pursuant to section 115 of the *ESA*, I confirm the Determination dated November 10, 2022.

Carol L. Roberts
Member
Employment Standards Tribunal