Employment Standards TRIBUNAL

Citation: DC Process Servers Inc. (Re)
2023 BCEST 3

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

DC Process Servers Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2022/205

DATE OF DECISION: February 16, 2023

DECISION

SUBMISSIONS

Daniele L. McDonald — legal counsel for DC Process Servers Inc.

INTRODUCTION

1. DC Process Servers Inc. (the "appellant") appeals a determination issued against it by Shannon Corregan, a delegate of the Director of Employment Standards ("Delegate Corregan"), on October 28, 2022 (the "Determination"). This appeal is filed pursuant to subsections 112(1)(a) and (c) of the *Employment Standards Act* (the "*ESA*"). The appellant says that Delegate Corregan erred in law in making the Determination (section 112(1)(a)), and also bases its appeal on evidence it says was not available when the Determination was being made (section 112(1)(c)).

2. By way of the Determination, the appellant was ordered to pay its former employee, Christopher Dow (the "complainant"), a total sum of $10,241.12, including section 88 interest. The complainant worked for the appellant as a security guard from May 15, 2019, to February 20, 2020. The appellant was also ordered to pay an additional $2,500 on account of five separate $500 monetary penalties (see section 98 of the *ESA*). The bulk of the monies payable to the complainant ($8,838.84) represent unpaid overtime pay, and the central thrust of the appellant's case on appeal is that a large portion, if not all, of this latter award reflects wages that were not payable since the complainant was not "on call" at a location designated by the appellant (see the section 1(1) definition of "work").

3. The appellant's so-called "new evidence" – which, on its face, falls outside the ambit of section 112(1)(c) – is a copy of a "preliminary findings" letter that was delivered by electronic mail to both the appellant and the complainant on August 11, 2021, by Joy Archer, also a delegate of the Director of Employment Standards ("Delegate Archer").

4. The Determination and Delegate Corregan's accompanying "Reasons for the Determination" (the "Reasons") were both issued on October 28, 2022, nearly three years after the complaint was filed (on December 17, 2019). The delay involved in the investigation of this relatively straight-forward complaint is not at all keeping with the statutory purposes set out in sections 2(b) and (d) of the *ESA* ("fair treatment of employees and employers"; "fair and efficient" dispute resolution procedures). Even more troubling, at least four different delegates have been involved with this matter, and during the course of the investigation different opinions have been provided to the parties regarding the underlying merits of the complaint.

FACTUAL BACKGROUND

5. As noted above, the complainant filed his complaint on December 17, 2019. A review of the section 112(5) record shows that a Director's delegate, Avishka Lakwaijaya ("Delegate Lakwaijaya"), first contacted the complainant on December 24, 2019, to confirm if he was still employed. The next contact with the complainant was on March 4, 2020. Other than these two communications with the complainant, Delegate Lakwaijaya does not appear to have taken any substantive steps to investigate the merits of the unpaid wage complaint. In June of 2021, the complaint was apparently assigned to Delegate Archer. On

August 11, 2021, Delegate Archer e-mailed her "preliminary findings" to both the complainant and the appellant. Delegate Archer noted that the complainant's

> …shifts were 12 hours in length, of the 12 hours, he would work doing static patrol/checks for approximately 4 hours, the remaining 8 hours he was on call for any alarms, and was required to be in uniform ready to respond. [The complainant] stated that alarm calls were few and far between, on average he maybe received 3 calls per month, [the complainant] did not keep a record of the dates/hours he was called out on alarms. [The complainant] was not required to be at a particular spot designated by the Employer, he could be anywhere he chose (home, restaurant etc) as long as he was no more that [*sic*] 20 – 30 minutes away from the city.

6. With respect to the question of whether the complainant was "on call" other than at a location designated by the appellant (and thus not considered to be "working" for purposes of the *ESA*), Delegate Archer's preliminary finding was as follows:

> The question that arises here is whether the requirement for Mr. Dow to be within a 20 – 30 minute radius of town constitutes being "at a location designated by the employer"?... (underlining in original text)
>
> It would be an unreasonable interpretation of the definition of work in my view to consider an unspecified area within a twenty to thirty minute radius to be a designated location as contemplated by the legislation. The employer must designate the location and thus restrict the employees' freedom of movement for the on call time to be considered as work…
>
> He did not come under the direction of the employer until a call came in from a customer, or he had to respond to an alarm. Once the task was completed, he was free to do as he wished within the 20 to 30 minute radius. When he ceased to provide labour or services for the employer his status at that point changed to on call. Since he was not at a location designated by the employer the on call time does not fall under the definition of work thus it does not attract the payment of wages (or overtime pay) as set out in the Act…
>
> In conclusion it is my preliminary finding that the Act has not been contravened.

7. The record shows that the complainant immediately contacted Delegate Archer expressing disappointment with her preliminary findings. Delegate Archer replied stating:

> …when I looked at the records with the only working 4 – 5 hours a day [*sic*] and being on call for the remainder of your shift that still only puts you at a 28 - 35 hour work week max which does not enlist the premium pay provisions of Section 40 of the Act. The issue of on-call has been dragged through the Tribunal and the outcome is always the same and specific in its interpretation.

8. The complainant indicated that he wished to appeal but was assured by Delegate Archer that "[t]here is nothing to appeal as of yet [since] these findings are my preliminary findings, [and] they have not been confirmed in a determination." Delegate Archer asked the complainant to submit any additional information that might change her preliminary view. On September 22, 2021, Delegate Archer e-mailed the complainant advising that "I am re-evaluating my preliminary findings to determine if wages are outstanding and will respond in kind once I have completed my evaluation."

9. On October 12, 2021, Delegate Archer again e-mailed the complainant stating "[f]urther examination shows there will be an amount outstanding, not as much as you were hoping for, however a small amount is owed."

10. On December 7, 2021, Delegate Archer e-mailed her "reconsideration of my preliminary findings" to both the complainant and the Appellant. Delegate Archer noted that "[i]nformation also provided by both parties during the initial investigation was that [the complainant] was required to be in uniform and monitor his radio for the full 12 hour shift he was scheduled for as well." Delegate Archer concluded: "it is my updated preliminary finding that [the complainant] was required to be available and performed work for the employer for 11.5 hours of the 12 hours he was scheduled for on mobile alarm shifts, and for not being provided 32 hours free from work." Delegate Archer made a provisional finding that the complainant was "owed wages in the amount of $4,817.29 (overtime pay $4,576.01 + $56.00 minimum daily pay + $185.28 4% annual vacation pay)." This appears to have been Delegate Archer's last communication to the parties regarding the complaint.

11. On April 20, 2022, another delegate – Taylor McDowell ("Delegate McDowell") – appears to have been assigned to complete the investigation of the complaint. Delegate McDowell sent an e-mail to the appellant (which was not copied to the complainant) advising that he was investigating the complaint and requesting the appellant to contact him within a week. Delegate McDowell's communication continued: "If I do not hear from you by then, my next step will be to issue an Investigation Report, after which the Branch will issue a formal Determination…". Delegate McDowell never issued an "Investigation Report" or a determination.

12. On August 12, 2022, Delegate Corregan (at that point, the fourth delegate assigned to investigate the complaint) issued an "Investigation Report" that was sent to both the complainant and the appellant. Delegate Corregan noted that although Delegate Archer had previously made certain preliminary findings, she (Delegate Corregan) was giving "notice to both parties that the decision-maker is not bound by Delegate Archer's preliminary assessments." In her report, Delegate Corregan indicated that having reviewed the information contained in the file, she was satisfied: i) that wage statements issued to the complainant showed that there were two occasions when the complainant did not receive the 2-hour minimum pay (section 34); ii) the appellant never produced a copy of the section 73 variance it claimed to have regarding the payment of overtime; iii) and that the wage statements also showed the complainant was not paid statutory holiday pay in accordance with section 46. Delegate Corregan asked the parties to provide their written responses to her report by no later than August 26, 2022.

13. The record shows that the appellant's principal had various telephone conversations with Delegate Corregan in late August 2022 following the issuance of her "Investigation Report". This individual pressed the point that the complaint was closed some time ago, and that the business had been sold. However, the appellant did not provide any additional evidence or argument beyond what had already been submitted.

14. On October 28, 2022, Delegate Corregan issued the Determination and her Reasons. The record shows that on November 2, 2022, the appellant's principal left a voicemail message with Delegate Corregan indicating that he intended to appeal the Determination. The appellant's appeal was filed on December 2, 2022.

THE DETERMINATION AND REASONS

15. The appellant maintained that the complainant was not entitled to any overtime pay since it had a variance. Delegate Corregan determined, correctly in my view, that the appellant did not have such a variance. The appellant does not challenge that finding. The appellant also argued that Delegate Corregan should not have issued the Determination since Delegate Archer had previously "closed" the investigation. There is no evidence to support that latter assertion, and, in my view, Delegate Corregan correctly determined that issue against the appellant. The appellant does not challenge that aspect of the Determination.

16. Delegate Corregan determined that notwithstanding the sale of the business, the appellant remained liable for any wages owed to the complainant. I agree with this conclusion, and it is not challenged on appeal.

17. The central issue in this appeal is whether the complainant was "on call" at certain times, and thus not considered to be at "work". This latter term is defined in section 1(1) of the *ES*A as follows:

> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

18. Delegate Corregan's analysis of this issue was as follows (Reasons, pages R9-R10):

> … The parties also agree that [the complainant] was not required to be at a designated location as long as he remained within 20 - 30 minutes of the city. If this were the only evidence before me, I would find that [the complainant] was not on call at a location designated by the employer, and therefore not entitled to wages for the time spent on call. However, this is not the only evidence before me…
>
> [The complainant] stated that he was required to be in uniform and monitor his radio while on call. [The appellant's principal] stated variously that [the complainant] 1) was required to be in uniform; 2) was not required to be in uniform when he was on call; 3) if he changed out of his uniform, would have to change back in order to answer a call; and 4) was permitted to wear his uniform to "save" his own clothing if he wished…On the evidence before me, I find it more likely than not that [the appellant] required [the complainant] to wear his uniform while he was on call.
>
> … [the complainant] was providing a service to [the appellant] by wearing his uniform: the service he provided was following the instructions he was given, and the ability to respond more rapidly to an alarm, rather than having to get dressed in his uniform first. While an employer may require an employee to be on-call without it being considered "work" under the Act, an employer cannot impose additional requirements on the employee or give them instructions about what to do during that time without running the risk of this time being considered "work." [The appellant] chose to exercise control and direction over [the complainant's] activities by requiring him to wear his uniform when he was on-call. This circumscribed [the complainant's] freedom (he was not free to wear his own clothing or represent himself as he wished in public) and provided a benefit to [the appellant], as discussed

> above. I find that the time [the complainant] spent on call was work, and he is owed wages for that work.

19. Having determined that the complainant worked several hours for which he was not paid (principally due to an "undercounting" of his actual time at work due to the "on call" finding), he was entitled to an unpaid wage award that reflected unpaid overtime pay, unpaid statutory holiday pay, minimum daily pay, hours worked contrary to section 36, and concomitant vacation pay. The total unpaid wage award, including section 88 interest, was fixed at $10,241.12.

20. Delegate Corregan also levied five separate $500 monetary penalties in light of the appellant's contraventions of sections 16 (failure to pay at least minimum wage), 34 (minimum daily pay), 36 (minimum hours free from work), 40 (overtime pay), and 46 (statutory holiday pay) of the *ESA*.

REASONS FOR APPEAL

21. As previously noted, the appellant bases its appeal on both the "error of law" and "new evidence" grounds set out in section 112(1) of the *ESA.*

New Evidence

22. The "new evidence" ground must be summarily dismissed. The appellant submits, as "new evidence", Delegate Archer's August 11, 2021 "preliminary findings" report sent to the parties by electronic mail. Delegate Archer subsequently issued (on December 7, 2021) a "reconsideration" of this latter report in which she disavowed her earlier preliminary view regarding the "on call" issue. Both of these reports were provided to the appellant and were before Delegate Corregan when she was making the Determination. Indeed, both reports are contained in the section 112(5) record (the former document in multiple locations) and were referenced in Delegate Corregan's August 12, 2022 "Investigation Report".

23. In sum, the August 11, 2021, preliminary findings report is neither "new" nor relevant.

Alleged Errors of Law

24. The appellant asserts that Delegate Corregan erred in finding that the complainant was required to wear his uniform while on call. The appellant asserts that the evidentiary record does not support such a finding.

25. Following its position regarding the on-call issue, the appellant asserts that if it prevails on this point, the complainant's various unpaid wage claims (e.g., overtime and section 36 pay) cannot stand. The appellant says that the payroll records clearly show that the complainant was properly paid (perhaps even overpaid) for work undertaken on various statutory holidays.

26. Finally, the appellant says that since it did not contravene any provision of the *ESA*, all five monetary penalties should be cancelled.

FINDINGS AND ANALYSIS

27. Having reviewed the record and the Reasons, it seems clear that Delegate Corregan issued the Determination based on her review of the evidence that had previously been submitted to the Employment Standards Branch, and that she did not gather any further relevant evidence prior to issuing

the Determination. It also seems clear that Delegate Corregan afforded both the appellant and the complainant, consistent with sections 77 and 78.1 of the *ESA*, one last opportunity to respond to the evidence in hand, as summarized in her "Investigation Report". Neither party appears to have provided any additional evidence.

28. I can appreciate that both parties were frustrated by the excessive delay involved in this matter, and that the appellant is further exasperated by a situation where, initially, Delegate Archer indicated that there was no contravention of the *ESA* (August 11, 2021), and then later took the view that there was a contravention with the complainant being entitled to about $4,800 – a sum that more than doubled when the Determination was finally issued.

29. Nevertheless, Delegate Archer never issued a section 79 determination, and thus Delegate Corregan was not legally proscribed from doing so.

30. Insofar as the appellant's "new evidence" ground is concerned, for the reasons given above, I find that it has no reasonable prospect of succeeding and thus the appeal is dismissed as it relates to this ground.

31. However, at this juncture, I am unable to conclude that any or all of the appellant's "error of law" grounds are bound to fail. That being the case, I will require further submissions from both the Director of Employment Standards and the complainant by way of response to the appellant's error of law grounds of appeal and will also provide the appellant with a final right of reply. With these submissions in hand, I will then finally adjudicate the error of law grounds of appeal.

32. In their submissions, I would particularly direct the parties to address whether the complainant was at "work" while on call, and whether the evidence contained in the record shows that the complainant met his burden of proof with respect to all aspects of his unpaid wage claim.

ORDERS

33. Pursuant to section 114(1)(f) of the *ESA*, the appellant's section 112(1)(c) ground of appeal ("evidence has become available that was not available at the time the determination was being made") is dismissed.

34. The Tribunal will notify the parties regarding the timetable for filing further submissions, as noted above. I will issue a final decision regarding this appeal once these further submissions have been filed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal