Citation: Larix Landscape Ltd. (Re)
2023 BCEST 31

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Larix Landscape Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/025

DATE OF DECISION: May 17, 2023

DECISION

SUBMISSIONS

Kaitlin Wells on behalf of Larix Landscape Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Larix Landscape Ltd. carrying on business as Larix Landscaping (the "Employer") filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on February 14, 2023 (the "Determination").

2. Craig Paul (the "Employee") filed a complaint with the Director alleging that the Employer had contravened the *ESA* in failing to pay him regular and overtime wages, compensation for length of service and vacation pay.

3. Two delegates of the Director (the "Investigative delegates") conducted an investigation into the Employee's complaint and issued an Investigation Report (the "Report") on October 14, 2022. The Report was provided to the parties for response. A second delegate (the "Adjudicative delegate") reviewed the information produced during the investigation, 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 17/18, 40, 45/46, 58 and 63 of the *ESA* in failing to pay the Employee wages, overtime wages, statutory holiday pay, vacation pay and compensation for length of service. The Director determined that the Employee was entitled to the amount of $4,586.74 plus $387.72 interest for a total amount owed of $4,974.46.

5. The Director also imposed four $500 administrative penalties for the contraventions of the *ESA* for a total amount owing of $6,974.46.

6. The Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Employer also submits that new evidence has become available that was not available at the time the Determination was being made.

7. 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 submissions and the record, I found it unnecessary to seek submissions from the Employee or the Director.

8. This decision is based on the section 112(5) "record" that was before the Adjudicative delegate at the time the Determination was made, the appeal submission and the Reasons for the Determination.

FACTS

9. The Employer operates a landscaping business in Victoria, British Columbia. Joel Cuttiford is the sole director and officer.

10. The Employee was initially employed in May 2014 as an estimator but was promoted to the position of general manager during his last season of work. The parties did not have a written employment agreement.

11. The issues before the Director were the Employee's length of service, his rate of pay, whether or not he was a manager, whether he was owed regular and overtime wages, and if so, how much, whether the Employee was owed statutory holiday pay, vacation pay and compensation for length of service, and if so, in what amounts.

Length of service

12. The Employee began working on May 19, 2014, but was issued several Records of Employment ("ROEs") showing that he worked for multiple discrete periods. There was no dispute that the Employer regularly laid off its employees for between four and six weeks from December to January or February due to weather conditions. The Adjudicative delegate found that temporary layoffs were an implied term of the employment relationship. There was no dispute that the Employee did not resign from his employment at any time and the Employer did not terminate his employment between May 2014 and May 2020.

13. The Adjudicative delegate found that the Employee's employment terminated on March 12, 2015 following a 13 week period of temporary layoff, and that he began a new employment relationship on May 14, 2015. The Employee was laid off again from July 24, 2015 to April 1, 2016, a period of 252 days. The ROE indicated that the reason for issuance was illness or injury. The Adjudicative delegate found, based on the ROE and the parties' evidence, that the Employee's illness or injury layoff was not a temporary layoff but a medical leave of absence. The Adjudicative delegate determined, based on that evidence, that the Employee's employment was continuous from May 14, 2015 until May 4, 2020:

> There is no letter of termination or resignation for the relevant time period included in the evidence before me, and no evidence to support that the [Employee] underwent a new hiring process before he returned to work for the Employer on April 1, 2016. In addition, there is no dispute that the [Employee] returned to work for the Employer after the layoff, and that he continued to work for the Employer for several subsequent years. I find that the evidence of the parties' actions at the time of the layoff and their evidence regarding the layoff being for a medical reason outweighs any contrary notations on the ROEs. (p. R11)

Rate of pay

14. The Employee contended his rate of pay was $30 per hour while the Employer contended that he paid the Employee $28 per hour at the end of his employment. In the absence of any written employment agreement and no clear documentation regarding the Employee's hourly rate, the Adjudicative delegate relied on the Employee's record of hours, which was not disputed by the Employer, to determine the number of hours worked by the Employee. Relying on the Employer's payroll records, the Adjudicative delegate divided the gross wage by the hours worked to determine the Employee's wage rate to be $30 per hour.

Was the Employee a manager?

15. The Employer sent the Employee text messages on a daily basis about the work he wanted him to perform. The parties agreed that, in his last two years of employment, between 70-75% of the Employee's duties

consisted of estimating and marketing and between 25-30% consisted of project managing. The Employee tracked his own hours of work which he sent to the Employer by text message on a bi-weekly basis.

16. According to the Employer, as part of his project management duties, the Employee trained and supervised employees and organized the foremen, ensuring they stayed within budget. In addition, the Employee participated in strategic meetings and staff meetings. The Employee had no authority to hire, fire, or grant leave or schedule other employees, although there was some evidence the Employer sought the Employee's input before taking any of these actions. The Employee was not the only employee with authority to make purchases on behalf of the Employer, as foremen also had the authority to purchase supplies necessary to perform their work. The Employee did not have to adhere to a budget, but he had to obtain a purchase order to make purchases exceeding $15,000 on the Employer's behalf.

17. The Adjudicative delegate considered the definition of manager contained in section 1 of the *Employment Standard Regulation* (the "*Regulation*") and concluded that:

> Although some of the [Employee's] employment responsibilities may have been related to supervising and/or directing human or other resources, I find that his principal employment responsibilities were to work in the field as an estimator, meet with clients and complete estimates. Therefore, I find the Complainant as not a "manager" as defined by section 1 of the Regulation and section 34 of the Regulation does not apply. (p. R14)

Regular and Overtime wages

18. The Adjudicative delegate found there was insufficient evidence to make any findings regarding the Employee's wage entitlement prior to February 18, 2020, and was only able to calculate the Employee's regular earning for pay periods from February 26, 2020 to May 1, 2020. The Adjudicative delegate noted that the Employer's Record of Hours and Earnings did not differentiate between amounts paid as regular wages, overtime wages or statutory holiday pay, and that the Employer had not provided any additional payroll records or information to clarify which wage entitlements it paid the Employee each pay period. The Adjudicative delegate found that it was "reasonable to attribute" the amounts paid each pay period to regular wages and subsequently to overtime wage entitlements. Based on those records, the Adjudicative delegate arrived at amounts owed for the pay periods February 26, 2020 to May 1, 2020. The Adjudicative delegate determined that the Employee was entitled to $60 in regular wages and $45 in overtime wages.

19. Additionally, the Employee asserted that the Employer had not paid him for the few hours he worked on May 4, 2020. The Employee stated that he had not sent a record of his hours to the Employer as he normally did because he was frustrated, exhausted and simply forgot. The Employer contended that the Employee did not work any hours on May 4, 2020.

20. The Adjudicative delegate noted that while there was no evidence supporting the Employee's assertion that he performed work on May 4, he was still in possession of the company vehicle and other property at the time of the text messages between the parties.

21. The Adjudicative delegate also determined that the evidence supported a conclusion that the Employee performed work between his usual start time of 0800 until he sent his final response to Mr. Cuttiford at 11:58 on May 4, 2020 and was entitled to regular wages in the amount of $119.10 for that period.

22. The Adjudicative delegate considered the Employee's allegation that he performed additional work taking calls from clients after he completed his normal workdays. The Employee did not maintain a record of those hours and did not report them to the Employer. He also gave several, very different, estimates of the number of hours he performed. In the absence of any reliable evidence, the Adjudicative delegate found there was insufficient evidence to determine what, if any wages, the Employer might owe the Employee.

Statutory holiday pay

23. The Adjudicative delegate determined that the Employer's Record of Earnings and Hours established that the Employee qualified to receive statutory holiday pay and worked for eight hours on Good Friday April 10, 2020 but was not paid for that day. The Adjudicative delegate determined that the Employee was entitled to $292 in statutory holiday pay.

Vacation Pay

24. The Adjudicative delegate determined that the Employee was not entitled to vacation pay calculated based on at least 6% of his gross earnings as he had not completed five consecutive years of employment with the Employer. However, the Adjudicative delegate determined that the Employee was entitled to an additional amount of $178.14 in vacation pay for the pay period February 26, 2020 to May 4, 2020.

Compensation for Length of Service

25. On May 3, 2020, the Employee informed the Employer that he was no longer interested in working in the field on a full-time basis and offered to train someone else or to find someone to replace him. The parties engaged in an exchange of text messages regarding the Employee's responsibilities and his employment related grievances. The following morning, the Employer informed the Employee that he would be reducing his hourly wage from $30 to $26, stating that the Employer was not busy enough to have a general manager, so the Employee could do estimating exclusively. The Employee informed the Employer that if his wages were reduced, he "was out as of right now." The Employer informed the Employee that his position had not changed, and if he was not satisfied with the arrangement, he could drop his truck off later that day. The Employee responded "OK" and "Peace" and returned the truck, keys and the company computer later that day.

26. The Employee contended that his employment had been terminated when the Employer unilaterally reduced his hourly wage.

27. The Employer contended that the business downturn caused by the COVID 19 pandemic provided him with a right not to compensate the Employee for compensation for length of service and that the wage reduction of $2 per hour did not represent a substantial change.

28. The Adjudicative delegate considered sections 63 and 66 of the *ESA* and exercised his discretion to determine that the Employer terminated the Employee's employment on May 4, 2020. The Adjudicative delegate decided as follows:

> The Employer argued that the change it made to the [Employee's] wage rate was not substantial, but it provided no evidence in support of its argument. The change in the [Employee's] wage rate from $30.00 per hour to $26.00 per hour represents a 13.33 percent reduction in the [Employee's]

> hourly earnings. The [Employee] explicitly rejected the change in the text message correspondence he provided, stating "Touch my wages and I am out as of right now." I find that an objective, reasonable person would view the change the Employer made to the [Employee's] wage rate to be unfair, unreasonable, and unacceptable, and that it is a substantial change within the meaning of the Act. (p. R19)

29. The Adjudicative delegate determined that the Employee was entitled to four weeks wages as compensation for length of service.

ANALYSIS

30. 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.

31. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

32. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination. An appeal is not an opportunity for a party to re-argue a case that has been made before the Director.

33. 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*, (BC EST #D141/03)). I have addressed the Employer's arguments under each statutory ground of appeal.

<u>Failure to observe the principles of natural justice</u>

34. 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. It does not mean that the Director must make a decision that an appellant considers to be "fair" or "just."

35. The Employer contends that the Director erred in finding that the Employee performed work on May 4, 2020, contending that it was a breach of natural justice for the Director not to consider all of the facts. The Employer submits that not only did the Employee indicate that his last day of work was May 1, 2020 in his complaint, but that he did not submit any record of hours. I will address this argument in my decision under the heading "error of law".

36. I am satisfied that the Employer was provided details about the Employee's claim and was given full opportunity to respond to the allegations. Furthermore, the Employer was provided with the Report and provided a full response to the information contained within it.

37. The fact the Employer disagrees with the Adjudicative delegate's analysis and findings does not constitute a denial of natural justice. I find no basis for this ground of appeal.

Evidence has become available that was not available at the time the Determination was being made

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

1. 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;
2. The evidence must be relevant to a material issue arising from the complaint;
3. The evidence must be credible in the sense that it is reasonably capable of belief; and
4. The evidence must have high 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.

39. The Employer submitted a large number of documents on appeal, including correspondence relating to various projects the Employee was involved in, including a deck design, a retaining wall proposal and a fence and Hedgerow proposal. All the documents, dated between 2018 and 2020, were available during the investigation of the Employee's complaint and ought to have been presented to the Director's delegate. The Employer has not met the first part of the four-part test.

40. Furthermore, while the documents are relevant, I am not persuaded they would have led the Adjudicative delegate to a different conclusion. The Employer submitted the documents in support of its argument that the Employer had just cause to terminate the Employee's employment. However, the Adjudicative delegate's decision was not made under section 63 of the *ESA* and he did not analyze whether or not the Employer had just cause. The record demonstrates that the Employer took the position during the investigation that the Employee quit. Rather, the Adjudicative delegate exercised his discretion under section 66 of the *ESA* to determine that the Employer had substantially altered a condition of employment. Consequently, I find that none of this "new" information would have led the Adjudicative delegate to a different conclusion. The Employer has also not met the fourth part of the four-part test.

41. Consequently, I find no basis for this ground of appeal.

Error of Law

42. 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.

43. The Employer contends that the Director erred in finding that the Employee was entitled to wages for work on May 4, 2020. The Employer argues that not only did the Employee not claim that he performed work on May 4, 2020 in his original complaint, he did not send in any record of hours worked for that day at any time. The Employer argues that the fact that the Employee provided no corroborating evidence ought to have led the Adjudicative delegate to conclude that he did not perform any work that day.

44. The Adjudicative delegate arrived at his conclusion largely based on text messages between the parties and the fact that the Employee returned the Employer's vehicle and other property to the Employer's workplace that day. Of note, the Employer's payroll records were based on the Employee's reported hours of work and the Employee did not report the time spent returning these items to the company. I am not persuaded that the Adjudicative delegate's finding was based on a view of the facts that could not reasonably be entertained. In other words, his conclusion was rationally supported by the evidence. I am not persuaded the Employer has demonstrated an error of law.

45. The Employer also argues that the Director erred in finding that the Employee was not a manager. As the Adjudicative delegate noted, the *Regulation* defines "manager" as "a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity."

46. In its submission, the Employer included an unsourced definition of "executive capacity." It argues that a person is employed in an executive capacity when they make "key decisions which are critical to the business," including how many employees are to be employed, what services are to be provided, what product should be purchased, and from whom products should be purchased.

47. The definition of executive capacity relied on by the Employer is not contained in either the *ESA* or the *Regulation*. The leading Tribunal decisions on the interpretation of "manager" are *Common Ground Publishing Corp.* (BC EST #D433/00), and *Whitehall Bureau of Canada Limited* (BC EST #D026/10). The cases underscore the principal that the burden of establishing that a person is excluded from the protection of the *ESA*, or any part of it, rests with the person asserting it and there must be clear evidence justifying that conclusion.

48. In *Common Ground,* the Tribunal incorporated the definition of "executive capacity" from Black's Law Dictionary to mean "duties … [that] relate to active participation in control, supervision, and management of business." There was no evidence before the Director that the Employee was an active participant in

the control, supervision or management of the Employer's business. Although the parties had no written employment agreement, they agreed that during the Employee's last season of employment, at least 70% of his work related to estimating, none of which had any managerial level of authority and responsibility. The Employer confirmed that the Employee did not do any hiring, firing, granting leaves from work or scheduling employees, and while he was responsible for organizing some employees, those were not his primary duties. While the Employee may have had some management or supervisory responsibilities, they formed less than half of his duties during his final year of employment, which formed the basis for the wage determination. I find no basis to interfere with the Adjudicative delegate's conclusion on this issue, as I am not persuaded he acted on a view of the facts that cannot be entertained.

49. The Employer further argues that the Director erred in concluding that the Employee was entitled to vacation pay. The submissions are somewhat difficult to follow but seem to suggest that the Adjudicative delegate erred in determining the length of time the Employee was continuously employed. Given that the Adjudicative delegate found that the Employee was not entitled to 6% vacation pay based on his consecutive years of service and the vacation pay entitlement was calculated for the period February 26 to May 4, 2020, I find no reviewable error of law.

50. The Employer contends that the Adjudicative delegate erred in finding that it had not discharged its burden of demonstrating that it was not liable to pay the Employee compensation for length of service under section 63 of the *ESA*. The Employer submits that it had just cause for dismissing the Employee based on "defiance of authority."

51. The Employer appears to have misapprehended the findings of the Adjudicative delegate in making his determination that the Employee was entitled to compensation for length of service.

52. The Adjudicative delegate exercised his discretion, pursuant to section 66 of the *ESA*, that the Employee's employment had been terminated based on his conclusion that the Employer had substantially altered a condition of his employment; that is, that the Employer had unilaterally reduced his hourly wage by 13%. As noted above (para. 40) the Adjudicative delegate did not analyze (and indeed, the Employer never argued) whether the Employer had just cause. The record indicates that the Employer initially took the position that the Employee quit, then argued that the Employee himself changed his conditions of employment, and then, finally, suggested that the wage reduction was a result of "COVID." I find no reviewable error of law.

53. The Employer contends that the Director erred in stating the workplace address. While I accept that the workplace address identified in the Determination was incorrect, no consequences flow from this apparent inadvertent error.

54. Finally, the Employer advances a number of arguments about the Adjudicative delegate's conclusions about the Employee's entitlement to overtime. Once again, the Employer appears to have misconstrued those findings, as they made submissions regarding overtime hours on weekends. The Adjudicative delegate found that the Employee had not provided persuasive evidence about the number of overtime hours and denied that claim. The overtime wages found owing ($45) was based on the Employer's Record of Hours and Earnings. As a result, I find no basis to interfere with the Adjudicative delegate's findings, as they were founded on evidence provided by the Employer.

55. In conclusion, I find that the Adjudicative delegate's decision was rationally based on the facts before him and I find no basis to interfere with them.

56. I find, pursuant to section 114(1)(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed. Accordingly, I dismiss the appeal.

ORDER

57. Pursuant to section 115(1) of the *ESA*, the Determination, dated February 14, 2023, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal