Employment
Standards
TRIBUNAL

Citation: National Storage & Warehousing Inc. (Re)
2023 BCEST 46

EMPLOYMENT STANDARDS TRIBUNAL

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

\- by -

National Storage & Warehousing Inc.

\- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/052

DATE OF DECISION: June 23, 2023

DECISION

SUBMISSIONS

Lauren Edwards on behalf of National Storage & Warehousing Inc.

OVERVIEW

1. This is an appeal by National Storage & Warehousing Inc. (the "Employer") of a decision of a delegate of the Director of Employment Standards (the "Director") made April 4, 2023 (the "Determination").

2. Beverly McGuire, a former employee of the Employer (the "Employee"), filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act ("ESA")* by failing to pay regular and overtime wages, statutory holiday pay and annual vacation pay.

3. A delegate of the Director (the "Investigating delegate") investigated the Employee's allegations and on February 27, 2023, issued an Investigative report (the "Report") which set out the factual assertions and arguments of the parties. The Report was sent to the Employee and the Employer, who were asked to indicate if it contained any errors or required any clarification.

4. A second delegate (the "Adjudicative delegate") reviewed the Report and the parties' responses before issuing the Determination.

5. The Adjudicative delegate found that the Employer had contravened sections 40, 45, 46 and 58 of the *ESA* in failing to pay the Employee overtime wages, statutory holiday pay, and vacation pay. The Adjudicative delegate determined that the Employee was entitled to recover wages and accrued interest in the amount of $15,930.50.

6. The Director imposed five $500 administrative penalties for the contraventions as well as a contravention of section 28 (failing to maintain complete payroll records) for a total amount payable of $18,930.50.

7. The Employer appeals the Determination on the grounds that the Director erred in law in making the Determination. The Employer also contends that evidence has become available that was not available at the time the Determination was being made.

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

9. This decision is based on the section 112(5) "record" that was before the Adjudicative delegate at the time the Determination was made, the Employer's submissions and the Reasons for the Determination.

ISSUE

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

BACKGROUND

11. The Employer operates a storage facility. The Employee was hired on October 1, 2013 by Daniel Faye, the Employer's sole director, and his wife. There was no written employment agreement between the parties which set out the Employee's rate of pay or job duties.

12. The Employee identified her position as "General Manager" while some of the correspondence refers to the Employee as "manager and bookkeeper." The Employee stated that her responsibilities included customer service, driving a forklift, supervising staff, booking storage units, collecting rents and issuing lien notices, ordering supplies, and overseeing rent increases.

13. The Employee went on medical leave on January 22, 2021 and resigned her employment on March 31, 2021 at the end of her medical leave. In response to the Director's Demand for Employee Records, the Employer submitted five wage statements showing the Employee worked 80 hours per bi-weekly pay period. No other records were submitted.

14. The record indicates that the Employee's tasks evolved over time. The owners operated four other businesses and Mrs. Faye worked out of the business premises preparing invoices and paying bills for all the companies. A contract bookkeeper also performed some work including completing year-end work and submitting taxes. Mrs. Faye died suddenly in October 2019.

15. According to the Employee, Mr. Faye did not formally ask her to perform bookkeeping duties for his companies, but following his wife's death he withdrew from responsibilities and the Employee felt she had no choice but to do the work normally completed by Mrs. Faye.

16. The Employee said that she was responsible for all accounts payable and receivable, payroll, Record of Employment forms, making applications for Covid-19 wage subsidies, submitting source deductions to the Canada Revenue Agency, bank deposits and submission of year-end books to accountants for two companies, including the Employer. For another home construction company, she was responsible for paying invoices and ensuring mortgage payments were made. The home construction company ceased construction activities in 2019. The Employee said that approximately 75% of her time was spent on bookkeeping duties.

17. The Employee said that at the end of 2019, she worked 7 days per week 12-16 hours per day and struggled to complete her management tasks, facility maintenance and forklift operator tasks while also performing bookkeeping duties.

18. At the end of 2020, the Employee met Mr. Faye and informed him that she had worked at least 100 days of overtime for which she had not been paid. Mr. Faye and the Employee agreed that the Employee would receive a one-time payment of $5,000 and would get every Friday off for one year. Although the Employee did receive a payment of $5,000, she only got one Friday off work before her employment ended.

19. The Employee maintained her own record of hours of work between October 2019 and February 2021. They were kept for her own reference, and she did not provide them to the Employer. She did not separate the number of hours she spent on management duties versus bookkeeping duties but estimated that 75% of her time was spent on bookkeeping duties.

20. The Employer disputed the Employee's time sheets and suggested they were fabricated. The Employer argued that it was impossible for someone to work as many hours as the Employee said she did. The Employer conceded, however, that the Employee was responsible for setting her own hours. The Employer also advanced arguments about the quality of the Employee's work which the Adjudicative delegate found to be irrelevant to the Employee's entitlement to wages.

21. The first issue before the Adjudicative delegate was whether the Employee was a manager, and if so, whether she was entitled to regular wages and annual vacation pay. Noting that managers were excluded from overtime wages and statutory holiday pay entitlements under section 34 (f) of the *Employment Standards Regulation*, the Adjudicative delegate determined that the Employee was not a manager. In doing so, he considered the list of duties performed by the Employee, only one of which (supervising, training and coaching staff members) was managerial in nature. The Adjudicative delegate found that the Employee was not principally employed as a manager since she did not spend a significant portion of her time independently directing or supervising staff or other resources.

22. The Adjudicative delegate determined that the Employee was entitled to overtime and statutory holiday pay.

23. The Adjudicative delegate noted that the Employer had not complied with its statutory obligation to maintain a record of an employee's daily hours of work under section 28 of the *ESA*.

24. The Adjudicative delegate also discounted the evidence of the Employer's witnesses regarding the Employee's hours of work on the basis that it was either from the period after the Employee ceased working or anecdotal. The Adjudicative delegate concluded:

> [The Employer] provided no specific evidence to challenge [the Employee's] record of hours. Indeed, one of the emails supplied by [the Employer] dated November 25, 2020, recorded [the Employee] having worked a ten hour day, which matches [the Employee's] record for that date.
>
> Much of [the Employer's] evidence and argument regarding [the Employee's] hours of work focused on its dissatisfaction with the work she did, which does not reduce its obligation to pay [the Employee] for the hours she worked. The recordkeeping requirements in the Act exist in large part so that employers can demonstrate that they have paid their employees for all the work they completed. Had [the Employer] kept payroll records they were statutorily required to keep, there would be very little dispute regarding [the Employee's] wage entitlements.

25. The Adjudicative delegate concluded, in the absence of Employer records, the Employee's records of her hours of work was the best evidence. Based on the payroll records that were provided, the Adjudicative delegate determined the Employee's regular rate of pay and determined that she was entitled to $9,115.38 in outstanding overtime pay and to statutory holiday pay in the amount of $3,830.00.

26. The Adjudicative delegate further determined that the Employee was entitled to 40 hours of outstanding vacation pay at the end of her employment, plus an additional 6% holiday pay on the outstanding wages.

ARGUMENT

27. The Employer disagrees with the Determination. In its submission, the Employer states that it has submitted "NEW evidence for further proof in our defence, as it seems to be required."

28. The Employer argues that the new evidence shows that:

- the Employee was a "salaried employee";
- the Employee's records were "dishonest";
- The Employee was paid for 80 hours between January 21, 2021 until February 3, 2021 for which the Employer now believes she was not eligible;
- the Employee was overpaid for 50.36 hours of overtime because "she did not deduct her vacation pay" for the 2020 Christmas break;
- The Employee was paid $5,000 in lieu of overtime she believed she was entitled to, "rendering her eligibility for any further overtime payment null and void";
- The Employee's complaint was motivated by her dissatisfaction with the Employer; and
- The Employee had authority to make executive decisions relating to the business as well as the ability to act independently and make decisions using her own discretion.

29. In its submission, the Employer also submits that it believes that the Employee "embezzled from the company," which supports its contention that the Employee's records were unreliable.

30. The Employer argues that the Adjudicative delegate erred in finding that the Employee was not a manager, as the evidence supported a conclusion that she hired and fired employees and ran most of the business operations since "the owners do not live in the country for large portions of the year."

ANALYSIS

31. Section 114(1) 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.

32. 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.

33. Because this process is designed for the participation of parties who are not legally represented, the Tribunal takes a large and liberal interpretation of the grounds of appeal. (see, for example, *Triple S Transmission*, BC EST #D141/03) I have, therefore, considered the Employer's submissions under each of the identified grounds of appeal.

34. The Employer provided no evidence to support its assertion that the Employee's complaint was made because she was dissatisfied with the Employer. An employee's dissatisfaction with an Employer's business practices does not, in and of itself, support a conclusion that a complaint lacks merit. This allegation, which is entirely unsubstantiated, does not constitute a ground of appeal, and I have not considered it further.

New Evidence

35. The Employer attached several documents to the appeal submission, including contracts signed by the Employee during the period of her employment, paystubs, doctor's notes, and documents prepared by the Employee regarding her complaint which are contained with the section 112 (5) record.

36. 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 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.

37. None of the material submitted on appeal meets the test for new evidence. Much of the documentation was before the Investigative delegate and considered by the Adjudicative delegate when he made his decision. As such, it is not new. The material which was not before the Investigative or Adjudicative delegates was clearly available at the time the Determination was being made and ought to have been submitted to the Investigative or Adjudicative delegates during the complaint adjudication process.

38. Furthermore, the Employer's new argument that the Employee was 'overpaid' ought to have been submitted either during the investigation process, or in response to the Investigative delegate's Report. Considering the Adjudicative delegate's finding that the Employer failed to maintain payroll records in accordance with the *ESA*, I am not persuaded that this argument would have led him to a different conclusion on this issue in any event.

39. In effect, the Employer seeks to have the Tribunal "re-weigh" evidence already considered by the Adjudicative delegate because it disagrees with his conclusion. An appeal is an error correction process, not an opportunity to re-argue a case that has already been presented to the Director.

40. I find no basis for this ground of appeal.

Error of Law

41. The Employer contends that the Adjudicative delegate erred in finding a) that the Employee was not a manager and b) in preferring the Employee's records over the Employer's records.

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.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

43. The Tribunal has no jurisdiction to consider appeals alleging errors of fact unless the factual error raises an error of law. (*Britco Structures Ltd.*, BC EST #D260/03)

44. Factual and credibility findings are within the purview of the Director and will only be interfered with if they are unsupported by the evidentiary record:

> 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 also *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). (*Rose Miller, Notary Public* BC EST # D062/07)

Did the Adjudicative delegate err in law in finding the Employee was not a manager?

45. Whether an employee is a manager is a question of mixed fact and law (*Whitehall Bureau of Canada Limited*, BC EST #026/10).

46. Section 1 of the *Employment Standard Regulation* defines manager as "a person whose principal employment duties consist of supervising and directing, or both supervising and directing, human or other resources" or "a person employed in an executive capacity."

47. The Tribunal has interpreted the definition narrowly in keeping with the remedial purposes of the *ESA*. (see *Director of Employment Standards* (BC EST # D479/97) (*Amelia Street Bistro*) and *North Delta Real Hot Yoga Ltd. (Bikram Yoga Delta)* BC EST #D026/12)

48. Since managers are excluded from overtime provisions of the *ESA,* an employer has the burden of demonstrating that an employee is not entitled to those benefits. Merely identifying someone as a "manager" in a job description or stating that they are "salaried" does not necessarily lead to a conclusion that they are a manager for the purposes of the *ESA*.

49. The Adjudicative delegate considered the actual duties performed by the Employee as well as the amount of time she spent at each and determined that while the Employee performed some managerial functions, her principal employment responsibilities were not managerial in nature. I am not persuaded that the Adjudicative delegate erred in this conclusion.

50. The Employer presented no reliable evidence to refute the Employee's assertion that much of her work involved bookkeeping functions, paying bills, paying invoices and making GST and PST remittances. The Employer understood the Employee was spending a significant amount of time on paperwork. The record contains emails from the Employer to the Employee regarding the amount of time she was spending at those tasks and suggesting that she engage the assistance of others.

51. The Employer argues that the Employee was the sole person in charge of staff and daily operations, that she delegated responsibilities to others, had signing authority and decision-making privileges on hiring subcontractors and entering into business contracts in addition to submitting payroll. While the Employee may well have exercised these tasks which were managerial in nature, I am not persuaded the Adjudicative delegate erred in concluding that those were not her <u>principal</u> duties.

52. I am satisfied that there was sufficient evidence before the Adjudicative delegate on which he could conclude that the Employee was not a "manager" and therefore entitled to overtime wages.

Did the Adjudicative delegate err in preferring the Employee's records over those of the Employer?

53. The Adjudicative delegate determined that the Employer contravened the *ESA* in failing to maintain employee records. He specifically stated that had the Employer kept those records, they would have been in a much better position to confirm or deny the Employee's records.

54. In the absence of any reliable contradictory evidence, the Adjudicative delegate found the Employee's records to be reliable. I find that the Adjudicative delegate's conclusion was entirely reasonable on the evidence before him.

55. The Employer now asserts, without any evidence, that the Employee "embezzled" from the company and that her records were "dishonest." These assertions fall short of demonstrating an error of law.

56. Similarly, the Employer's new argument that the Employee's one-time payment for overtime, in the amount of $5,000, renders her ineligible for further overtime lacks any legal or factual foundation.

Failure to Comply with Principles of Natural Justice

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

58. There is nothing in the appeal submission that establishes that the Director failed to inform the Employer of the allegations or denied it an opportunity to respond either to the allegations or to the Investigation Report.

59. I find no basis for this ground of appeal.

CONCLUSION

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

ORDER

61. Pursuant to section 115(1) of the *ESA*, I confirm the Determination dated April 4, 2023 in the amount of $18,430.50 together with whatever interest may have accrued since the date of issuance, pursuant to section 88 of the *ESA*.

Carol L. Roberts
Member
Employment Standards Tribunal