Citation: S & S Insurance Services Ltd. (Re)
2023 BCEST 6

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

S & S Insurance Services Ltd.
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

FILE NO.: 2022/179

DATE OF DECISION: February 23, 2023

DECISION

SUBMISSIONS

Aeddy Leung — on behalf of S & S Insurance Services Ltd.

OVERVIEW

1. S & S Insurance Services Ltd. (the "Appellant") appeals a determination issued on August 11, 2022, (the "Determination"), by a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director").

2. In the Determination, the Adjudicative Delegate found the Appellant contravened the *Employment Standards Act* (the "*ESA*") and the *Employment Standards Regulation* (the "*Regulation*") by failing to pay wages for overtime, vacation pay and interest to its former employee, Siu Yin Yau (the "Complainant"). The Determination also levied mandatory administrative penalties for contravening provisions of the *ESA* and *Regulation*.

3. The Appellant appeals the Determination on the ground that new evidence has become available that was not available at the time the Determination was being made.

THE DETERMINATION

4. The Complainant was employed by the Appellant as an Insurance Advisor from November 1, 2016, to January 7, 2021.

5. The Complainant alleged the Appellant failed to pay wages for overtime, vacation, and compensation for length of service.

6. A delegate of the Director (the "Investigative Delegate") requested submissions and evidence from each side about their respective positions. In response to a Demand for Employer Records, the Appellant provided some records, although the Appellant admitted it did not have daily records of hours worked by the Complainant because she was paid by salary.

7. On May 30, 2022, the Investigative Delegate submitted an investigation report to the parties and invited responses. The Complainant and the Appellant presented further evidence and had the opportunity to respond to the evidence and provide further clarification. The investigation report and responses from the parties were submitted to the Adjudicative Delegate for a determination.

8. On August 11, 2022, the Adjudicative Delegate issued the Determination.

9. The Adjudicative Delegate held the Appellant failed to pay the Complainant wages for overtime totalling $5,152.45 contrary to section 37.14 of the *Regulation*, annual vacation pay of $630.38 contrary to section 58 of the *ESA*, and accrued interest of $237.83 pursuant to section 88 of the *ESA*. In addition, the Adjudicative Delegate levied mandatory administrative penalties totalling $1,500 made up of $500 for

failure to maintain daily records of hours contrary to section 28 of the *ESA,* $500 for failure to pay overtime wages contrary to section 37.14 of the *Regulation* and $500 for failure to pay vacation pay contrary to section 58 of the *ESA*. In total, the Appellant was ordered to pay $7,520.66.

10. The Determination also dismissed the Complainant's claim for compensation for length of service, finding that the Appellant had established just cause under the *ESA*.

THE APPEAL

11. The Appellant appeals the Determination on the ground that new evidence has become available that was not available at the time the Determination was being made.

12. While the Appellant does not dispute that the Complainant was owed wages for overtime, vacation pay and accrued interest, the Appellant submits there was an agreement to average hours of work and says that only $3,698.98 is owing for overtime, vacation pay and accrued interest.

13. The Appellant also submits it complied with the *ESA* and should not have to pay the administrative penalties.

ANALYSIS

14. These reasons are based on the written submissions of the Appellant, the Determination, and the Record.

15. 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.

16. The Appellant submits new evidence has come to light that was not available at the time of the Determination. In support of the appeal, the Appellant submits payroll records with a recalculation of wages owed and says there was an agreement to average hours of work.

17. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.,* BC EST #D171/03, the Tribunal set out the following requirements for introducing new evidence:

(a) the evidence could not reasonably have been discovered and presented to the Director during the investigation or adjudication of the complaint;

(b) the evidence must be relevant to a material issue 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 make a difference and lead to a different conclusion in the Determination;

18. I find the Appellant does not meet the requirements necessary to introduce new evidence. I find the Appellant has not provided a clear reason why the payroll records and information about an alleged agreement with the Complainant to average hours of work could not have been discovered with reasonable diligence and provided earlier. I note an agreement to average hours of work has specific requirements set out in section 37 of the *ESA,* including that the agreement is in writing between the employer and employee.

19. With respect to the Appellant's submission that administrative penalties should not be payable, I note the evidence in the Record was clear that the Appellant conceded it did not keep daily records of hours worked. The Appellant also confirmed in this appeal that wages for overtime and vacation pay were owing and it is submitted that only the amount is in question.

20. Accordingly, I find the Appellant's submission does not meet the requirements necessary for introducing new evidence on appeal.

21. While the Appellant's appeal form only alleged the new evidence ground for appeal, in its submissions the Appellant also appears to allege the Director erred in law in the calculation of overtime wages, vacation pay and in levying the administrative penalties.

22. Findings of fact may amount to an error of law where the delegate 'acted without any evidence or on a view of the evidence that could not be reasonably entertained' or arrived at a 'clearly wrong conclusion of fact': *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 Canlii 6466. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view of the same evidence.

23. I have reviewed the Determination and the evidence in the Record and I do not find an error of law in the Determination and the calculation of the amount owing to the Complainant for overtime, vacation pay, accrued interest and the administrative penalty. The Adjudicative Delegate properly considered the applicable law in *Regulation* 37.14 with the submissions and available evidence to come to a reasoned conclusion (see *Kenny* BC EST #D433/01; *Croft* BC EST #RD687/01 [reconsideration refused]; *Grizzco Camp Services Inc.* BC EST #D076/13). I find it was reasonable in the circumstances to apply the commission wages to the pay period in which the cheque issuance falls. Although the Appellant may not agree with the Determination and seeks to reargue the issue with new submissions, I find there was payroll evidence the Adjudicative Delegate could rely on to make the findings of fact and arrive at the legal conclusions in the Determination. I find there was no error of law and confirm the amounts.

24. Lastly, I have considered the Appellant's submission that it should not have to pay the administrative penalties as it believes it was in compliance with Canada Revenue Agency and *ESA* requirements. Whether the Appellant was in compliance with Canada Revenue Agency requirements is not relevant as it is the *ESA* requirements that apply. The administrative penalties were based on the evidence and the findings made in the Determination. The law is clear the administrative penalty owed by the Appellant is mandatory in the circumstances and there is no provision in the *ESA* for it to be cancelled where the Appellant believes they were in compliance (see *537370 B.C. Ltd.*, BCEST #D011/06).

25. Having considered the above issues in the Determination, I find there is no error of law and I dismiss this ground of appeal.

Section 114 of the *ESA*

26. 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.

27. A set out above, I find there is no reasonable prospect the appeal will succeed. Accordingly, the appeal is dismissed under section 114(1)(f).

ORDER

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

29. Pursuant to section 115 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