Citation: M&H Distribution Ltd. (Re)
2023 BCEST 64

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

M&H Distribution Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2023/010

DATE OF DECISION: August 17, 2023

DECISION

SUBMISSIONS

Hasibullah Tarzi	on behalf of M&H Distribution Ltd.
Hassan Wali	on his own behalf
Mitch Dermer	delegate of the Director of Employment Standards

OVERVIEW

1. Hasibullah Tarzi, on behalf of M&H Distribution Ltd. ("Appellant"), appeals a determination dated December 22, 2022 ("Determination"), by a delegate ("Delegate") of the Director of Employment Standards ("Director").

2. In the Determination, the Delegate concluded that several sections of the *Employment Standard Act* ("*ESA*") had been breached and awarded Hassan Wali ("Complainant") $14,745.68 in outstanding wages and accrued interest, and imposed administrative penalties in the amount of $3,000.00.

3. Prior to the Determination being issued, the Complainant also received a decision in his favour from the Civil Resolution Tribunal ("CRT") dated August 18, 2021, *Wali v. M&H Distribution Ltd.,* 2021 BCCRT 907, awarding him $3,500.00 in unpaid wages. The award reflects $3,000.00 that the CRT determined was unpaid for November 2020, and $500.00 that was short-paid for December 2020. The Complainant had also claimed for $1,500.00 in unpaid overtime, but the CRT determined that the Complainant failed to demonstrate that his contractual terms of employment included a provision for the payment of overtime, noting that the CRT does not have jurisdiction to award entitlements established under the *ESA*.

4. The Appellant appeals on the basis that the Director failed to observe the principles of natural justice in making the Determination, and on the basis that new evidence has become available that was not available at the time the Determination was made.

5. In response to the appeal, I sought submissions from the Parties, specifically with respect to the following:

    a. Considering the overlap in remedies requested, whether, or to what extent, the substance of the complaint has been appropriately dealt with in 2021 BCCRT 907 *Wali v. M&H Distribution Ltd.*; and

    b. What was the evidentiary basis for concluding that the Complainant worked 418 hours of overtime during the term of his employment?

6. While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision.

7. For the reasons that follow, the appeal is allowed in part. The aspect of the Determination awarding 418 hours of overtime is cancelled and remitted to the Director for a new investigation. The remainder of the Determination stands subject to any changes that may result from the new investigation.

ISSUES

8. As an adjudicator, to ensure a fair and efficient dispute resolution procedure, this Tribunal has said that my role is to take a "large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director": *Triple S. Transmission Inc.* BC EST # D141/03.

9. While the Appellant indicated the grounds for appeal as being on the bases that the Director failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was made, the submissions before me do not directly address these grounds.

10. Specifically, the Appellant does not provide any basis for asserting that they have been denied procedural fairness in any way. Further, while a number of documents are attached to the Appeal, including signed statements from individuals that post-date the Determination, the Appellant provides no basis for persuading me that these documents could not have been made available to the Director prior to the Determination being issued.

11. Instead, the Appellant's submissions are predominantly addressed towards undermining the veracity of the evidence put forward by the Complainant, and disputing the inferences drawn by the Delegate from that evidence.

12. For the reasons that follow, I find the following issues need to be determined in this appeal:

    a. What, if any, weight should be placed on the new documents provided by the Appellant in the course of this appeal; and

    b. Did the Director reach conclusions on a view of the facts that could not be reasonably entertained, and in doing so, err in law in reaching the Determination.

THE DETERMINATION

13. The Determination was concerned with the following issues:

    a. Whether the Complainant was an employee or independent contractor; and

    b. Whether the Complainant was owed:

        i. overtime wages;

        ii. statutory holiday pay;

        iii. compensation for length of service; and

        iv. vacation pay.

14. The Determination concluded that the Appellant had not provided any compelling or material evidence to dispute the Complainant's assertion that he was an employee, and therefore the Delegate accepted this assertion.

15. The Delegate concluded on the evidence before him that the Complainant's monthly wage was $3,000.00 and that this was in exchange for a regular working schedule of 40 hours per week.

16. The Delegate also accepted the Complainant's oral evidence that he had in fact worked 12 hours per day, 5 days per week, for the entirety of his period of employment, amounting to 20 hours of overtime per week, and found he had worked for a total of 418 hours of overtime. The evidence before him on this issue included the testimony of the Complainant's roommate, who asserted that the Complainant "worked from home in the evenings at least five days per week, sometimes until as late as midnight," and from a friend of the Complainant who advised that the Complainant would "contact her frequently after 8 p.m. to ask questions about accounting software and Microsoft Excel." The Delegate also reviewed documentary evidence, including text messages, relating to interactions on five separate days, to support the conclusion that the Complainant worked at least some overtime.

17. The Delegate rejected the Appellant's denials that the Complainant worked the alleged overtime and the Appellant's submissions that there was not enough work for the Complainant to do that would justify the performance of overtime.

18. With respect to statutory holiday pay, the Delegate rejected the Appellant's assertion that statutory holiday pay was included in the salary agreed upon and paid. As it did not appear to be in dispute which statutory holidays the Complainant worked and did not work, the Delegate confirmed that the Complainant was entitled to an average day's pay for New Year's Day, which he did not work, and 12 hours per day at statutory holiday rates for the four statutory holidays he did work.

19. With respect to compensation for length of service, the Complainant claimed he was terminated, while the Appellant took the position that the Complainant resigned following a dispute with a co-worker. Placing the onus on the Appellant to persuade him that it was more likely than not that the Complainant resigned, the Delegate determined the Appellant did not meet this onus, and accepted the Complainant was terminated. As a result, the Delegate awarded the Complainant one week's pay for compensation for length of service.

20. Finally, in the absence of any supporting documentation, the Delegate also rejected the Appellant's assertion that the Complainant received the minimum vacation pay required under the *ESA*. Accordingly, the Delegate awarded 4% of the Complainant's gross earnings, both paid previously and awarded in the Determination.

21. Flowing from these findings, the Delegate also imposed administrative penalties for breaches of the following sections of the *ESA*:

    a. S. 18 – failure to pay all wages owing within 48 hours of the Complainant's termination;

    b. S. 40 – failure to pay overtime;

    c. S. 45 – failure to pay statutory holiday pay for a holiday taken off;

d. S. 46 – failure to pay statutory holiday pay for holidays worked;

e. S. 58 – failure to pay vacation pay; and

f. S. 63 – failure to pay compensation for length of service.

22. The total amount in penalties assessed was $3,000.00.

23. The Delegate also awarded $817.89 in interest pursuant to section 88 of the *ESA*.

ARGUMENTS

24. The Appellant's submissions are limited to the findings relating to overtime, statutory holiday pay, and vacation pay, and so this decision will only address those.

25. The Appellant does not appear to appeal the findings of the Delegate with respect to his conclusion that the Complainant was an employee, nor that he was owed compensation for length of service.

26. In addition, the Appellant makes a number of allegations regarding the Complainant's performance of his role as bookkeeper, and what they say are the adverse consequences to the business caused by his mistakes. I do not find it necessary to address these as they do not relate to the grounds of appeal raised. Accordingly, I also do not address the Complainant's response to these allegations.

27. In response and reply, both the Appellant and Complainant dispute the evidence presented by each, and in fact, new allegations have arisen that the Appellant has improperly attempted to persuade a witness to change their evidence. I find, however, that I do not need to address these allegations in order to reach my conclusions on this appeal.

28. I deal with each of the remaining areas covered by the Determination in turn.

Statutory Holiday Pay

29. The Appellant's only submission with respect to statutory holiday pay is with respect to August 3, 2020, which they say the Complainant did not work. I note, in any event, that the Determination did not award statutory holiday pay for August 3, 2020, as the Complainant had not met the requirements of the *ESA* to be entitled to statutory holiday pay for that day.

30. The Appellant makes no further submissions with respect to compensation for the other holidays awarded in the Determination, and so I do not need to address these further.

Vacation Pay

31. The Appellant's only submission with respect to vacation pay reiterates what they told the investigating delegate, which was that vacation pay was included in the salary already paid to the Complainant. The Delegate rejected this assertion in the Determination on the basis that the Appellant provided no material documentation demonstrating that vacation pay had been paid.

Overtime

32. The Appellant reiterates many of the same arguments they made before the investigating delegate, namely that there was not enough work for the Complainant to justify the need for any overtime.

33. The Appellant responds individually to some of the evidence put forward by the Complainant and disputes the Complainant's assertions, and the Delegate's findings, that these represent evidence that the Complainant worked overtime.

34. The Appellant also points out that the Complainant made a claim to the CRT for $1,500.00 in overtime covering the five months of his employment and that claim was denied. From this I infer the Appellant to be suggesting the Complainant should not get another kick at the can with respect to overtime.

35. The Appellant says that while some of these messages were sent to the Complainant, they were not directions to perform work outside of business hours.

36. The Appellant reiterates that the Complainant took his work computer home on his own initiative, not to perform work for the Appellant, but instead to further familiarize himself with the software required to perform his work.

37. The Delegate points out that the Appellant failed to keep any records of the Complainant's hours as required by section 28 of the *ESA* and provided "no direct evidence challenging the Complainant's." The Delegate says the only first-hand information available was the Complainant's, which was at least partially supported by his documentary evidence.

38. The Delegate goes on to assert "[w]hile oral evidence may not be the most preferable form of evidence, it is evidence; to ignore it in favor of the Appellant's blanket assertion that no overtime was worked, an assertion based on second hand inference rather than direct observation, and where the Appellant had failed to meet its statutory obligations which are in place to resolve exactly these sorts of issues, would have been an error."

39. The Complainant disputes the introduction of testimony from "new witnesses." He also says it is true that he brought work home, but this was a direct response to Mr. Tarzi's consistent requests for after-hours tasks. With respect to the work-related text messages submitted as evidence, the Complainant says these were accompanied by clear direction by telephone that the work must be done immediately.

ANALYSIS

40. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.

41. The Appellant has indicated in their appeal that they are appealing on the latter two grounds; however, as noted above, I find the substance of the appeal to be directed at the assertion that the Director erred in law in making the Determination.

42. Further to section 112(1)(c), however, I also need to determine whether or to what extent any weight is to be placed on the new documents provided by the Appellant.

43. I deal first with the new documents, followed by the issue of whether the Director erred in law.

44. As the Appellant's submission, with respect to vacation pay, serves only to reiterate their assertion that the Complainant was paid vacation pay as part of his salary, I find no basis to infer that any of the grounds in section 112(1) are engaged, and so do not deal with this any further.

New Documents

45. The Appellant provides along with this appeal a number of documents including screenshots from text message exchanges, emails, and a number of purported witness statements regarding the Complainant's employment dated after the date of the Determination.

46. With respect to appeals on the basis of new evidence, the Tribunal has set out guidance on how this ground of appeal is to be assessed in *Re Davies et al.,* BC EST # D171/03 (*Davies*). The Tribunal established a four-part test as follows:

(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.

47. The documents provided, other than the witness statements, all appear to predate the Determination. The Appellant makes no assertions with respect to the unavailability of these documents earlier, and so I find these documents fail to meet requirement of the first part of the *Davies* test.

48. Similarly, I note that two of the witness statements provided are undersigned by individuals who spoke to or otherwise corresponded with the investigating delegate. Their evidence was clearly before the Delegate at the relevant time. Although the evidence proffered by the Appellant from the additional witnesses post-dates the Determination, the Appellant provides no rationale as to whether or why their evidence could not have been available at the time the Determination was being made. This notwithstanding, the evidence of these additional witnesses appears to be general in nature, as to

overtime practices in the workplace, and do not directly address the question of whether or how much overtime the Complainant may have worked, other than by suggesting the drawing of an inference.

49. For these reasons, I decline to consider the additional evidence attached to the appeal and subsequent submissions.

Error in Law

50. As noted above, while the Appellant did not select error of law on the appeal form, I find that nevertheless the substance of the Appellant's arguments are centered around errors they say the Delegate made in reaching the Determination based on the evidence before him.

51. The Tribunal has adopted the following definition of "error of law" set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 Coquitlam),* 1998 CanLII 6466 (BCCA)(*Gemex*):

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.

52. In cases where credibility of the parties is of particular significance the Tribunal has limited authority to review. That is because credibility of witnesses and evidence is a matter best left for the delegate who has heard or reviewed the evidence and observed the parties and any witnesses. Usually, the delegate's analysis and reasons for preferring evidence of one party over another is one which must be carried out diligently and carefully. The reasoning must be legally sound and adequate. (see *Volzhenin v Haile* [2007 BCJ No. 1209, 2007 BCCA 317]; *ARA Development Ltd*., BC EST # D012/08)

53. To the argument that the issue of overtime has been dealt with through the CRT processes, although the Complainant asked for $1,500.00 in his complaint before the CRT representing a claim for overtime, I am not satisfied that the issues of whether the Complainant actually worked overtime, or was entitled to the same under the ESA, were canvassed in any substantive way.

54. In this case there was direct conflict between the evidence of the parties on numerous key issues. The decisions on credibility by the Delegate are central to the key issues. While the *ESA* does not impose a requirement on the Director to conduct an oral hearing in any specific circumstances, there is no impediment to doing so.

55. I note throughout the investigation report and accompanying documents making up the record that there are numerous conflicts between the evidence of the Complainant and that of the Appellant, as well as internal to the Complainant's own evidence.

56. For example, while the Complainant claims to have worked four hours of overtime per day each day, Monday to Friday, the evidence of one of his witnesses indicated that he "often" rather than always took his work laptop home. The Complainant indicates it took him "almost six months" to "finish and fix the entire company's quickbook system," while he was employed for the Appellant for only five months, from the beginning of August to January 3.

57. I note on the complaint submission form, the Complainant noted "[m]ost of the days we worked overtime, if the boss requested as to stay. However, he never paid for overtimes." [as written] When asked how much overtime the Complainant worked, he responded "6pm - 10pm overtime almost every day." While he initially claimed he "may have [a] log book with hours" none was provided.

58. Further, while the Complainant asserts this significant amount of extra time was spent fixing the Appellant's accounting system, the Appellant's evidence was that the Complainant was permitted to take the work computer home in order to learn how to use the accounting system, as he was not familiar with it when he was hired. I note this is consistent with the evidence of one of the Complainant's witnesses, who indicated "when he started the job he started reaching me out almost every nights, asking questions regarding Quickbook's and excel." [as written]

59. The Appellant also refuted the Complainant's assertion that they spoke to clients in the evenings and points out that this was not part of his role as a bookkeeper, and that this did not occur. They say it was the warehouse manager who took orders from clients and passed those orders on to the Complainant for entry.

60. Most telling, however, is that on the evidence presented, the Delegate himself was not persuaded that the Complainant's evidence with respect to overtime hours worked held water. The Complainant provided five documents that he indicated demonstrated that he was performing work outside of business hours. These consisted of text messages he says show requests from the Appellant to perform work either on evenings or, in one instance, on a weekend.

61. The Delegate noted the "extreme" nature of the Complainant's assertion, that he worked 20 hours of overtime per week, equating to 418 hours of overtime, which he never raised with the Appellant prior to the termination of his employment. The Delegate also placed little weight on the evidence of the witnesses presented by the Complainant, noting one witness "carries at least the apprehension of some bias" and finding that the other witness' evidence that the Complainant called her almost nightly for four months as "outlandish," noting "I do not find it is probable."

62. In concluding that "on the balance of probabilities," the Complainant worked the entirety of the 418 hours of overtime claimed, the Delegated noted "I do not, in my view, have discretion to choose an arbitrary number of hours per week that is less than 20, based on the evidence before me, although I suspect that this would more accurately reflect the reality of what hours the Complainant worked."

63. The Delegate notes in his submissions that "[i]n the absence of any evidence directly challenging the Complainant's, his was the best evidence available." It is unclear, however, on the face of the Determination, why it is that the Delegate accepted the Complainant's assertion that he worked overtime, but did not accept the Appellant's assertion to the contrary. While the Delegate states that the Appellant "provided no direct evidence challenging the Complainant's, indicating only that it *should not* have been

necessary for him to perform overtime work" [emphasis included] this was only one of the Appellant's assertions. In fact, the investigation report upon which the Delegate relies notes the Appellant's evidence, while not supported by records, as follows:

> The Complainant worked Monday to Friday, usually 6-8 hours per day, sometimes leaving early to go to the gym or to other appointments. Still, the Respondent paid him his full wage. The Complainant did not work any overtime and was paid vacation pay as part of his wage.

64. While the Delegate relies on the fact that the Appellant did not provide records of the hours worked by the Complainant and says the obligation to do so is "in place to resolve exactly these sorts of issues," I note the overtime claimed to have been worked by the Complainant was worked at home, which is inherently not something amenable to direct observation.

65. In *Hofer*, BC EST # D538/79 (reconsideration dismissed, BC EST # D120/98), the Tribunal observed:

> In the absence of proper records which comply with the requirements of section 28 of the Act, it is reasonable for the Tribunal (or the Director's delegate) to consider employee's records or their oral evidence concerning hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employee's entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate **may** accept the employee's records (or oral evidence) **unless there are good and sufficient reasons to find that they are not reliable**. [**emphasis added**]

66. While the Delegate was of the view that he did not have the discretion necessary to find that the Complainant worked some number of overtime hours less than the 418 claimed, it is not clear how he reached this conclusion. Apart from evening text messages on four occasions, which, on their face, appear to lack context, or any clear direction to perform work, the Delegate identified good and sufficient reasons why the evidence of the Complainant was not reliable.

67. While the *ESA* provides for overtime to be paid "if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week," the Determination does not address the relevance, if any, of the Appellant's assertion that the reason the Complainant was permitted to take the computer home was to learn the software for himself, or whether such an allegation constituted the Employer either directly or indirectly allowing the Complainant to work overtime.

68. Based on all of the foregoing, I find the Delegate's leap from evidence of evening work on four occasions, to accepting the Complainant's assertion that he worked 418 hours of overtime during the course of his employment, to be based on a view of the facts that cannot reasonably be entertained. This is particularly so given the good and sufficient reasons expressed by the Delegate in the Determination as to why the evidence submitted in support of the Complainant was not reliable.

69. I hereby cancel the Determination solely with respect to the number of hours of overtime worked by the Complainant and remit that aspect of the complaint back to the Director for a new investigation.

70. The rest of the Determination stands subject to any revisions that may be required in the event the award of overtime is revised after the new investigation takes place.

ORDER

71. The appeal is allowed, in part. The award of 418 hours of overtime is cancelled and remitted back to the Director for a new investigation.

72. Pursuant to section 115(1)(a) of the *ESA*, I vary the Determination and pursuant to section 115(1)(b) I refer the Determination back to the Director for a new investigation.

Ryan Goldvine
Member
Employment Standards Tribunal