Employment Standards **TRIBUNAL**

Citation: White Wilderness Heliskiing Inc. and Skeena River Lodge Services Ltd. (Re)
2023 BCEST 68

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

White Wilderness Heliskiing Inc. and Skeena River Lodge Services Ltd.
("Appellants")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2022/201

DATE OF DECISION: August 25, 2023

DECISION

SUBMISSIONS

Blair Curtis, Legal Counsel	counsel for White Wilderness Heliskiing Inc. and Skeena River Lodge Services Ltd.
Donna Penman	on her own behalf
Michael Thompson	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed under section 112 of the *Employment Standards Act* (*"ESA"*) by White Wilderness Heliskiing Inc. and Skeena River Lodge Services Ltd., ("Appellants" or "Employer"), of a determination issued by Michael Thompson, a delegate ("Delegate") of the Director of Employment Standards ("Director"), on October 19, 2022 ("Determination").

2. In the Determination, the Delegate found that the Complainant, Donna Penman, was not a manager as defined by the *ESA*. Although the Determination concluded that the Complainant was not required to work "excessive hours", it did accept the Complainant's evidence that she worked "355 13-hour days with no break," in part on the basis that the Appellants failed to provide any records of hours worked to contradict that evidence. Following this finding, the Delegate calculated an average hourly wage based on the salary received, and in turn calculated daily and weekly overtime owing, as well as amounts owing for statutory holidays. The Delegate also concluded that the Complainant was owed compensation for two months of paid vacation that was not paid as of the date of her termination.

3. In sum, the Delegate concluded that the Complainant was entitled to $40,688.24 in unpaid overtime, vacation pay, and statutory holiday pay, plus interest. The Delegate also imposed administrative penalties in the amount of $1,500.00 for contraventions of sections 40, 46 and 58 of the *ESA*.

4. The Appellants appeal on the basis that the Director erred in law, and that evidence has become available that was not available at the time the Determination was being made.

5. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and the submissions received from the parties.

6. The Tribunal received submissions from the Complainant on February 13, 2023, from the Director on February 21, 2023, and from the Appellants on March 24, 2023.

7. Upon review of the submissions received, I concluded the Appellants raised new issues in reply that the Director and Complainant did not have the opportunity to respond to. Accordingly, I sought and received further submissions from the parties thereafter.

8. Although I have reviewed all of the materials provided by the parties, I address only those portions necessary to reach my decision.

9. For the reasons that follow, I allow the Appellants' appeal and refer the matter back to the Director, for reinvestigation/reconsideration of the hours worked by the Complainant, and for reconsideration of the Complainant's entitlement to compensation for vacation time not taken.

ISSUES

10. Should the new evidence, in the form of timesheets prepared during the Complainant's tenure with the Appellants ("Timesheets"), be accepted for further review, and potentially, a redetermination?

11. Did the Director err in law when it reached the conclusion that the Complainant worked 13 hours every day for the duration of her employment?

12. Did the Director err in law when it reached the conclusion that the Complainant was entitled to $12,000 as compensation for two months of vacation not taken prior to her termination?

THE DETERMINATION

13. The Determination set out four issues to be decided. While only two are relevant to this appeal, I will identify all four to provide the necessary context.

14. The four issues identified were as follows:

    a. Did the Complainant work excessive hours contrary to section 39 of the *ESA*?

    b. Was the Complainant a manager as defined by the *ESA*?

    c. What hours did the Complainant work and was she paid all wages earned?

    d. Is the Complainant entitled to two months' wages in lieu of paid time off under her contract of employment?

15. The Delegate determined, first, that although he found the Complainant worked what could "colloquially" be defined as excessive hours, he concluded the Appellant had not contravened section 39 as the Complainant had not demonstrated any effects of her work on her health or safety.

16. The Delegate further determined, based on a review of the Complainant's job duties, that she was not a manager under the *ESA*.

17. Neither of these two conclusions are contested in the appeal before me.

18. The Delegate accepted the evidence that the Complainant worked 13 hours per day for 355 consecutive days, without a break. He found that although the Employer was asked for records of the Complainant's hours worked, those records were not provided. From this, he presumed all wages paid to have been paid at straight time, and calculated daily and weekly overtime on that basis, and on the basis that the Complainant worked 13 hours each day, proceeded to calculate daily and weekly overtime rates, as well as pay for overtime and vacation he found were not paid in accordance with the *ESA*.

19. Finally, the Delegate concluded that although the Complainant received 4% of her paid salary each pay period as vacation pay, she was entitled to two months' pay in lieu of her vacation time not taken, which was provided for in her contract of employment as "a maximum of (2) months off during each year."

20. The Delegate did not accept the Appellants' assertions that this provision provided the Complainant only with vacation time that could be taken during the life of the employment term, and not compensation in lieu if that time is not taken.

21. As a result of the Delegate's findings, the Appellants were ordered to pay $43,035.59, an amount which included interest, to the Complainant, and an additional $1,500.00 in administrative penalties.

ARGUMENTS

Hours Worked and Wages

22. In seeking to have additional evidence reviewed in response to the Determination, the Appellants dispute the Delegate's conclusion that the Complainant worked 13 hours per day, each day, for 355 consecutive days.

23. The Appellants provide evidence that they attempted to provide the Timesheets to the investigating officer, but inadvertently sent them to their legal counsel rather than to the investigating delegate. I note, parenthetically, that the legal counsel the Timesheets were provided to was not the same legal counsel representing the Appellants with respect to employment matters.

24. The Appellants rely on *Darvonda Nurseries Ltd. (Re)*, 2020 BCEST 116 (*Darvonda*), in which new evidence was accepted in circumstances where that information was not provided earlier due to inadvertence.

25. The Appellants also say the documents submitted meet the test set out in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 (*Davies et al.*), as being relevant, credible, probative, and support a different outcome than set out in the Determination.

26. The Appellants say it was only through inadvertence that these documents were not before the Delegate, and that they were prepared during the life of the Complainant's employment and with her input. The Appellants also submit that the Timesheets directly contradict the finding of the Delegate that the Complainant worked 13 hours per day for 355 consecutive days.

27. In response, the Delegate says the Timesheets could have been presented during the investigation, but were not. The Delegate says the Appellant did not mention the Timesheets, or advise the investigating officer of their existence, at any point during the investigation. The Delegate also points out that the Timesheets were not included in the investigation report, nor was their absence noted by the Appellant.

28. The Delegate says *Darvonda* is distinguishable from the current circumstances, as in that case an incorrect document was submitted, and the delegate erred in failing to take notice of this fact. The Delegate likens this case instead to another aspect of *Darvonda* in which another timesheet was rejected on the basis that the employer in that case simply neglected to submit.

29. The Delegate says to permit the Timesheets to be reviewed would be to "permit the Appellant to take another kick at the can…having discovered that its evidence given during the investigation was insufficient."

30. The Complainant also provided a response submission which included arguments parallel to the submissions by the Delegate, but also sought to dispute the veracity of the documents the Appellants seek to introduce. In her submission, she also seeks to introduce emails demonstrating that she was working on certain dates and/or times. The Complainant also suggests that it is unreasonable to believe the Appellants' legal counsel would have received these documents in error and not notified the Appellants of their mistake.

31. In reply, the Appellants dispute the Complainant's assertions that the Timesheets are "not credible, reliable or believable" and also point to several inconsistencies in the Complainant's documents that were before the Delegate as they relate to the number of hours she claimed to have worked. For example, the Appellants point to the original complaint document on which the Complainant indicated she had worked 10 hours per day, seven days per week. That same document indicated "From January/2020 to March 20/2020 we were required to work more than 10 hours per day."

32. The Appellants say these inconsistencies, as well as the fact that the Complainant admitted to keeping no record of her own hours worked, directly contradict the Delegate's finding that the Complainant worked 13 hours per day, every day, and the remission of the matter back to the investigating officer is required "to avoid a gross miscarriage of justice."

33. In further reply, the Delegate says the "most detailed evidence" of the Complainant was provided when she described her 'typical' day as starting between 4 and 5 a.m. and ending around 7 p.m. The Delegate notes that this was also confirmed by the Complainant's witness.

34. The Complainant says the Appellants' submissions seek to reverse the onus on tracking hours from the employer to the employee, which is improper. The Complainant also says that at no time during the investigation did the Appellants deny her assertion that "an average days work consisted of 13 hours." In addition, the Complainant challenges the accuracy of some of the assertions made by the Appellants.

Vacation

35. In addition to seeking to have the Timesheets reviewed as part of a redetermination, the Appellants say the Delegate erred in law in finding that the Complainant was entitled to two months' pay in lieu of vacation time not taken under her contract of employment.

36. The Appellants submit that the Delegate misinterpreted or misapplied sections 57 and 58 of the *ESA*, misapplied applicable general principles of law, and acted on a view of the facts that could not reasonably be entertained.

37. The Appellants also assert that the Delegate misapplied the Tribunal's own jurisprudence in reaching this conclusion. The Appellants rely on Re: *Xinex Networks Inc.* BC EST # D068/99, *Wolfe Chevrolet Oldsmobile Ltd. (Re)*, BC EST # D259/03, and *Renshaw Travel Ltd. (Re)*, BC EST # D050/08, for the proposition that vacation pay is distinguishable from vacation time.

38. The Appellants say the parties clearly agreed to separate the issues of vacation pay and vacation time. They say "[i]t is an absurdity to find that an employment agreement with a provision for payment of 4% vacation pay also contains a second provision for vacation days that creates an implied second right to substantial additional vacation pay."

39. The Appellants submit that implying a term, in this case that the "up to two months' vacation" was paid, constituted an error of law. The Appellants say this error resulted from failing to interpret the contract as a whole and, assessing two months' wages as vacation on top of the 4% already paid, failing to distinguish between the employment agreement's provision for vacation pay, from vacation time.

40. In response, the Delegate says it was based on the Appellants' own evidence that the investigation confirmed that the vacation time described was to have been paid, and asserts that for the Appellants to seek to change this evidence on appeal is impermissible. The Delegate says that the paid nature of the vacation time was also something affirmed by the investigating officer in his investigation report, and that the Appellants did not dispute this when that report was delivered.

41. In reply, the Appellants note in the record its evidence that "vacation time was not compensation" and points to correspondence between the Appellants and the Complainant confirming that her vacation pay had already been provided and that there was no money owing to her for unused vacation time.

ANALYSIS

42. 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.

43. 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 (BC CA) (*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.

44. I will deal first with the new evidence the Appellants are seeking to introduce under section 112(1)(c), followed by the Appellants' assertions with respect to alleged errors in law.

The Timesheets

45. The parties don't dispute that the appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al., supra*. The test requires that:

(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.

46. While I accept that the evidence the Appellants seek to submit is relevant to a material issue, and has high potential probative value, I am not persuaded that the evidence could not have been presented to the Director prior to the Determination being made.

47. While the Appellants have provided convincing evidence, which is not disputed, that the Timesheets were sent to the wrong individual, their submissions give no indication why the Timesheets were not, in any event, disclosed earlier.

48. To begin with, it appears undisputed the investigating delegate requested the Employer provide records of hours worked by the Complainant on April 14, 20, 27 and 28, 2022. The Investigation Report that was provided to the Employer on or about August 5, 2022, confirmed this, and also confirmed that no records of hours worked had been provided. Even if the Appellants had not realized earlier that they had inadvertently sent the Timesheets to the wrong individual, the Investigation Report provided a clear indication that they had not been received by the Director.

49. The Appellants do not suggest they did not review, or have the opportunity to review, the Investigation Report prior to the Determination being issued, and in fact, the Record indicates they sought, and were granted, an extension to provide a response to the Investigation Report.

50. This notwithstanding, the Appellants provided no response to the Investigation Report, either by the extended deadline of August 26, 2022, or at any time before the Determination was issued on October 19, 2022.

51. Accordingly, I am not prepared to remit the matter back to the Director on the basis of the new evidence provided.

Hours Worked

52. Of greater concern, however, is the fact that, in arriving at the Determination, the report substantiating the Complainant's hours appears to be drawn from a telephone call between the investigating officer and the Complainant on May 2, 2022, and her description of a "typical day." Although the Investigation Report indicates "Days and hours of work: **10-13 hours** per day 7 days a week" the Determination nevertheless extended the "typical day" to define the hours worked every day. [**emphasis added**]

53. On the basis that the Appellants did not provide a record of hours worked for the Complainant, the Delegate determined that "Ms. Penman's is the best evidence available as to her hours of work and that she worked seven days per week, 13 hours per day for the duration of her employment."

54. As pointed out by the Appellants, the Complaint as filed indicates under "Number of hours worked per day," "10", and under "Total hours worked per week," "70." Although at one point the Complainant insists she worked 13 hours per day, every day, the workflow notes record a call from the Complainant in which she claims she "worked more than 10 hours often but was common practice so has no records of such hours." I note that "working more than ten hours often" is a qualitatively different assertion than working 13 hours every day for 355 consecutive days.

55. An email from the Complainant to the investigating officer on April 26, 2022, stated that regardless of the hours shown on the paystubs "I was still working 10-14 hours per day on the staff housing project…." Prior to this, the Complainant on April 14, 2022, had indicated she was working 14 hours per day. In an explanation of her pay stubs, she again indicates she worked 14 hours per day but "was compensated for 10 hours per day…for 30 days a month."

56. It also appears correspondence continued by email between the Complainant and the investigating officer in which the investigating officer continued to question the Complainant's hours worked as they relate to the pay stubs provided, which showed different numbers.

57. Further to this, although the parties agreed that in May 2020, "the Complainant agreed to a temporary 50% reduction in hours and wages in lieu of a lay-off" the Delegate nevertheless concluded that there was no reduction in hours worked, and that the Complainant continued to work 13 hours per day, every day, during this "reduction."

58. Apart from the Complainant's general assertions, the Determination does not specifically address the basis for rejecting the agreed reduction in hours, and instead accepting that the Complainant worked 13 hours per day throughout. The Complainant does not dispute that she agreed to the wage reduction, but does not appear to have been asked, specifically, whether she in fact worked fewer hours during this period.

59. Given the inconsistencies in the Complainant's own allegations and evidence as to the number of hours worked, I find that the conclusion reached that the Complainant worked 13 hours per day, every day, for 355 consecutive days to be one that is based on a view of the facts that cannot be reasonably entertained. Accordingly, I hereby cancel the determination with respect to the finding of the Complainant's hours worked and remit it back to the Director for a reinvestigation/redetermination.

The Vacation Time

60. As the Appellants point out, sections 57 and 58 provide separate entitlements to vacation time and vacation pay. I note that the Complainant did not allege, nor did the Delegate find, a breach of section 57, which requires an employer to ensure an employee is given time away from work. Instead, but for the recalculation of hours performed by the Delegate, the Employer met its obligations to pay the minimum amounts of vacation pay required by section 58(1).

61. The Delegate found, however, that the vacation time provision of the Complainant's contract of employment provided for two months of paid vacation that was to be in addition to the 4% vacation pay paid on each paycheque.

62. The Appellants point out, and I accept, that this Tribunal has distinguished between the requirements under the *ESA* for vacation time (section 57) and vacation pay (section 58). In *Xinex, supra*, the Tribunal observed:

> There is no interdependency between Section 57 and Section 58 of the Act. They share a commonality only to the extent that they both deal with different statutory obligations relating to annual vacations. Section 57 deals with the statutory obligation to ensure an employee takes time off for vacation, not with the requirement to pay vacation pay. Section 58 of the Act deals with that statutory obligation. Failure by an employer to allow an employee to take annual vacation time as required by Section 57 is a contravention of the Act and may be subject to a penalty, even if vacation pay is paid out. Similarly, failure to pay vacation pay as required by Section 58 is a contravention of the Act, even if annual vacation time off is given.

63. In addition to the Complainant's salary being inclusive of 4% vacation pay, as required under section 58(1), her contract of Employment provided under "Vacation & Travel" that:

> Employee will receive a maximum of (2) months off during each year, to be taken at times that are conducive to operational needs.
>
> Employee understands and agrees that some administration and communication will still be required during this period.
>
> Employee will be entitled to (2) one-way airline tickets per annum, to a maximum value of $500.00 each, as required, to be used at times conducive to operational requirements.

64. I do not accept the Appellants' assertions that this agreement provided for unpaid vacation time. I agree with the Delegate that the Appellants' own evidence was that the Complainant would continue to be paid her regular salary during any period of time taken off pursuant to this agreement. This is noted on multiple occasions in the Record.

65. In my view, however, this does not end the inquiry.

66. It is clear, and undisputed, that although the Delegate determined the Complainant was not a manager (and by extension, not excluded from the overtime provisions of the *ESA*), the parties entered into the employment agreement on the clearly expressed assumption that she was a manager.

67. I have no doubt the parties intended that the Complainant would continue to be paid her regular salary during any period of time taken off under this agreement, though, as indicated, it would remain subject to operational needs, and would require the Complainant to remain in contact and available to perform some administrative work as necessary.

68. It is also clear that the Complainant's own understanding was that this period of up to two months vacation was meant to be in exchange for the fact that the Complainant's salary was intended to be fixed, while at the same time she would be required to work "in excess of 8 hours per day 7 days a week." In an email the Complainant wrote to the Appellants after her termination, she asserted that:

> Our contracts with your companies, as Managers, require us to work 7 days a week and an unlimited number of hours every day. There is no compensation for any excessive hours we have to work each day;no [*sic*] scheduled days off each week;no [*sic*] stat holidays and no overtime pay,which [*sic*] eliminates us of all the normal compensations that every other BC employee receives. Therefore, the vacation **time** was incorporated into our managerial contracts as that compensation. This is how it was explained to me… [**emphasis added**]

69. While I don't agree with the Appellants that the words "without pay" should be read into the contract (or, conversely, that "with pay" should not), I find in failing to consider the bargain as a whole, and the lack of any complaint, or evidence, to support a complaint under section 57, the Delegate has instead read into the agreement a provision that any unused vacation time would be paid to the Complainant, and has ignored the words "a maximum of" that were clearly stipulated in the employment contract.

70. I find the Delegate's failure to consider the totality of the circumstances in which this employment agreement was made, and the parties' understanding of the same, as well as the importance of the words "a maximum of" in reference to the two months' of time off, and the lack of a stipulation relating to pay for any unused time constitutes an error in law, having acted on a view of the facts that could not reasonably be entertained.

71. Further, although the Complainant describes various work and/or projects that kept her busy throughout the year, the uncontested evidence is that she never sought, nor was denied, time off from work. Further, the Appellants say that a review of the Timesheets described earlier in this decision demonstrate that the Complainant did, in fact, take some time off, though I do not understand the Appellants to be saying she took time off in the order of weeks at a time.

72. In addition, and on a less significant note, the Delegate's finding in this regard would also over-compensate the Complainant, by awarding $12,000 for two months' vacation, which is an amount reflective of her regular salary which was inclusive of 4% vacation pay. This is a different number than the Delegate determined to be her regular wages ($2,884.62 per pay period or $14.63 per hour, other than for May 2020, which was $1,442.31 per pay period or $19.02 per hour).

73. Based on all of the foregoing, I also refer back to the Director the issue of whether, or to what extent, any remedies arise out of the redetermination as a whole, as it relates to vacation time not taken, considering the specific language used by the parties in the employment agreement.

ORDER

74. The Appeal is allowed pursuant to section 112(1)(a).

75. The Determination as it relates to the Delegate's calculations of hours of work and overtime, and statutory holidays is cancelled and referred back for reinvestigation/redetermination.

76. The Determination as it relates to the award of $12,000 in additional vacation pay is also cancelled and referred back for reconsideration considering all of the foregoing.

77. The remaining aspects of the Determination are confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal