

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

D & S Enterprises (2020) Ltd. carrying on business as D & S Drywall Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/093

DATE OF DECISION: September 18, 2023

DECISION

SUBMISSIONS

Sukhdev Singh Sandhu

on behalf of D & S Enterprises (2020) Ltd.

OVERVIEW

1. This is an appeal by D & S Enterprises (2020) Ltd. carrying on business as D & S Drywall (“D & S 2020”) of a decision of a delegate of the Director of Employment Standards (“Director”) made March 31, 2023 (“Determination”).
2. On October 3, 2021, Manu Mohan (“Employee”) filed a complaint with the Director alleging that D & S Enterprise Ltd. had contravened the *Employment Standards Act* (“ESA”) in failing to pay him regular and overtime wages.
3. A delegate of the Director (“Investigating delegate”) investigated the Employee’s allegations and on October 27, 2022, issued an Investigation Report which was sent to the parties for response. The parties did not respond to the Investigation Report. On February 24, 2023, the Investigative delegate notified the parties that information gathered suggested that D & S Enterprises (2020) Ltd. carrying on business as D & S Drywall, DS Drywall Ltd., D & S Enterprises Ltd. and D & S Drywall Ltd. could be considered to be associated businesses for the purposes of the *ESA*. The Director did not receive any responses to the correspondence.
4. A second delegate (“Adjudicative delegate”) reviewed the Investigation Report as well as information gathered about the businesses before issuing the Determination.
5. The Adjudicative delegate found that D & S Enterprises (2020) Ltd. carrying on business as D & S Drywall, and D & S Enterprise Ltd. were associated pursuant to section 95 of the *ESA* and could be considered one employer (“Employer”).
6. The Adjudicative delegate further determined that the Employer had contravened sections 17 and 18 of the *ESA* in failing to pay the Employee wages and statutory holiday pay. The Director also determined that the Employer had failed to deliver payroll records in response to a Demand for Employer Records, contrary to section 46 of the *Employment Standards Regulation*.
7. The Director determined that the Employee was entitled to the total amount of \$2,615.80, including accrued interest. The Director also imposed three \$500 administrative penalties for the Employer’s contravention of sections 17 and 18 of the *ESA* and section 46 of the *Regulation*, for a total amount payable of \$4,115.80.
8. D & S 2020 appeals the Determination on the grounds that the Director erred in law.
9. The deadline for filing an appeal of the Determination was April 24, 2023. D & S 2020’s appeal was filed June 21, 2023. D & S 2020 also seeks an extension of time in which to file the appeal.

10. 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 was not necessary to seek submissions from the Director and the Employee.
11. This decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions, and the Determination.

ISSUE

12. At issue is whether the Tribunal should grant the application for an extension of time in which to file the appeal and whether D & S 2020 has established grounds for interfering with the Director's decision.

BACKGROUND AND ARGUMENT

13. The Employee alleged that he began working for D & S Enterprise Ltd., a construction business, on May 17, 2021, and that he worked 40 hours per week and was paid \$18 per hour. On June 25, 2021, D & S Enterprise Ltd. provided the Employee with a letter confirming his employment, duties and wages. The Employee received wages without issue between June 25, 2021, and August 31, 2021. The Employee received a cheque for the hours he worked from September 1, 2021, to September 15, 2021. The cheque did not include vacation pay and no wage statement was included with the cheque. After depositing the cheque, the Employee's financial institution notified him on September 21, 2021, that the funds could not be deposited due to insufficient funds (NSF). The Employee worked 8 hours a day on September 16, 17, 20 and 21 before he received notification that the cheque had not cleared.
14. The Employee attempted to contact his supervisor by email to inform him that the cheque could not be deposited, and requested payment for the hours worked between September 1 and September 21, 2021. The Employee received no response and did not perform any further work.
15. The Investigative delegate attempted to contact D & S Enterprise Ltd. by telephone and email in September 2022, without success. On September 16, 2022, the Investigative delegate addressed and sent a Demand for Employer Records ("Demand") by registered mail to D & S Enterprise Ltd.'s business address. A copy of the Demand was also sent to D & S Enterprises Ltd. by e-mail and by registered mail to their registered and records office as well as to Sukhdev Singh Sandhu's ("Mr. Sandhu") last known mailing address. The deadline to respond to the Demand was September 30, 2022. The Demand sent to D & S Enterprise Ltd.'s business address was returned to the Employment Standards Branch ("Branch"). The Demand sent to D & S Enterprise Ltd.'s registered and records office and to Mr. Sandhu were successfully delivered on September 20, 2022. D & S Enterprise Ltd. did not respond to the Demand.
16. A BC Registry search conducted September 12, 2022, indicates that D & S 2020 was incorporated in British Columbia on July 13, 2020. Mr. Sandhu is the sole director.
17. A Registry Search conducted February 10, 2023, indicates that D & S Enterprises Ltd. was incorporated in British Columbia on May 23, 2008. Although the Reasons for the Determination indicates that D & S Enterprises Ltd.'s sole director and officer is Baldev Singh **Sidhu**, the Determination and the record confirms that the sole director's name is Baldev Singh **Sandhu** (**emphasis mine**).

18. Both corporations have the same registered and records office address.
19. On February 24, 2023, the Branch sent a letter to D & S 2020 and to D & S Enterprise Ltd. indicating there was evidence of a business association under section 95 of the *ESA*. The parties were invited to respond to confirm or dispute an association by March 13, 2023.
20. Neither corporation responded to the Director's correspondence.
21. At issue before the Director was whether D & S 2020 and D & S Enterprise Ltd. could be found to be associated corporations, and whether the Employee was entitled to wages.
22. The Adjudicative delegate considered the provisions of section 95 of the *ESA* along with the following evidence:
- The Employee's confirmation of employment letter was on D & S Enterprise Ltd. letterhead, and contained the signature of Baldev Singh Sandhu over typewritten signature block "President, D & S Enterprise Ltd."; and
 - The Employee's September 15, 2021 paycheque was issued by D & S Enterprise Ltd.
23. The Adjudicative delegate determined that the evidence suggested that D & S (2020) and D & S Enterprise Ltd., along with their respective directors, had a role in the control and direction of the business. The Adjudicative delegate also noted that both companies had the same registered and records office address.
24. The Adjudicative delegate determined that the companies were associated for the purposes of section 95.
25. In the absence of any information from the Employer, the Adjudicative delegate relied on the Employee's evidence to determine his wage entitlement including wages, vacation pay on those wages, and statutory holiday pay.

Argument

26. Mr. Sandhu contends that D & S 2020 "has never hired" anyone named Manu Mohan. Mr. Sandhu says that the facts outlined in the Determination are incorrect, that D & S 2020 is a different company than D & S Enterprise Ltd., that he is the only employee of the company and that he has received a number of inquiries about D & S Enterprise Ltd. Mr. Sandhu indicates that he is attempting to change the name of his company and suggests that he has been a "victim" because the Branch had taken steps to satisfy the amount of the Determination.

ANALYSIS

27. 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, 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 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.

Extension of time

28. D & S 2020 filed the appeal approximately two months after the statutory time period had expired.
29. In *Niemisto* (BC EST # D099/96), the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:
- a) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - b) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - c) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been aware of this intention;
 - d) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - e) there is a strong *prima facie* case in favour of the appellant.

These criteria are not exhaustive.

30. D & S 2020 provided little information about why they did not file the appeal by the statutory deadline. Mr. Sandhu says only that he “got the email” on June 13, 2023. He does not explain who he received an email from, or what email address he received it at.
31. The record indicates that the Director’s correspondence, including the Demand and the Investigation Report, were successfully delivered both to D & S 2020 and to Mr. Sandhu. Mr. Sandhu confirms that the mailing address to which all the Director’s correspondence was sent is correct.
32. I am not satisfied that D & S 2020 has provided a reasonable explanation for the failure to file the appeal within the statutory time limits.
33. Furthermore, given that the Director has now taken steps to enforce the Determination, I find that both the Employee, who has been without wages for over two years, and the Director would be prejudiced by the granting of an extension.
34. I am also not persuaded that D & S 2020 has established a strong *prima facie* case.

35. 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.

Error of Law

36. 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.
37. It appears that D & S 2020 disputes the Director’s factual findings by alleging that the Determination contains incorrect facts. I note that while error of law is a ground of appeal, error of fact is not. Only errors of fact which rise to the level of constituting errors of law give rise to a ground of appeal.
38. It is not for the Tribunal to reconsider the evidence and substitute different findings of fact for those made by the Director unless those factual findings are not supported by the evidentiary record.
39. I am satisfied that the Investigative delegate notified Mr. Sandhu and D & S 2020 about the complaint and offered them the opportunity to respond, both to the allegations and the Investigation Report, which set out factual findings. I am also satisfied that Mr. Sandhu and D & S 2020 was notified of the Director’s inquiry into whether D & S Enterprises (2020) Ltd. carrying on business as D & S Drywall and D & S Enterprise Ltd. were associated employers. Given that the Director received no response to the correspondence, the Director was entitled to make a determination that the businesses were associated and to treat them as one employer.
40. Section 95 of the *ESA* provides as follows:
- If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and

- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

41. D & S 2020 has not persuaded me that the Director's decision to associate the business entities was irrational or based on a view of the facts that could not be entertained.
42. I am satisfied that D & S 2020 had knowledge of the complaint, the Director's investigation of that complaint as well as the Director's intention to associate the businesses. The appeal submissions contain arguments that ought to have been made during the investigation, not on appeal when the Director takes steps to enforce the Determination.
43. In the absence of any information from D & S 2020, the Adjudicative delegate calculated the Employee's wage entitlement. There is no evidence that the Director's wage calculation was in error.

CONCLUSION

44. Consequently, I find that the appeal was not filed within the applicable time limit. I also find that there is no reasonable prospect the appeal will succeed. I dismiss the appeal pursuant to section 114(1).

ORDER

45. Pursuant to section 115(1) of the *ESA*, I confirm the Determination dated March 31, 2023.

Carol L. Roberts
Member
Employment Standards Tribunal