

Citation: Modern Home Furnishings Inc. (Re)
2023 BCEST 78

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Modern Home Furnishings Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/103

DATE OF DECISION: October 3, 2023

DECISION

SUBMISSIONS

Glen Stratton

counsel for Modern Home Furnishings Inc.

OVERVIEW

1. This is an appeal by Modern Home Furnishings Inc. (“Employer”) of a decision of a delegate of the Director of Employment Standards (“Director”) made on May 31, 2023 (“Determination”).
2. On May 12, 2022, a former employee of the Employer (“Employee”) filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (“ESA”) in failing to pay her regular and overtime wages, and by making unauthorized deductions from her wages.
3. A delegate of the Director (“Investigating delegate”) investigated the complaint and issued an Investigation Report (“Report”) on May 11, 2023. The Report was provided to the parties for their response. A second delegate of the Director (“Adjudicating delegate”) reviewed the Report and responses, and issued the Determination determining that the Employer had contravened sections 17, 18 and 21 of the ESA and section 46 of the *Employment Standards Regulation* and finding that the Employer owed the Employee wages and interest in the total amount of \$31,840.04.
4. The Director also imposed four \$500.00 administrative penalties for the contraventions, for a total amount owing of \$33,840.04.
5. The Employer appeals on the grounds that evidence has become available that was not available at the time the Determination was being made.
6. 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.
7. This decision is based on the section 112(5) “record” that was before the Adjudicating delegate at the time the Determination was made, the appeal submissions, and the Reasons for the Determination.

ISSUE

8. Whether the Employer has established grounds for interfering with the Director’s decision.

FACTS AND ARGUMENT

9. The Employer operates furniture stores in North Vancouver and Vancouver. The Employer’s two directors are Mohinder Kaur Jassal and Ranjit S. Jassal.

10. The Employee was hired under a foreign worker permit and worked as a Retail Sales Supervisor from March 1, 2020 until April 23, 2022 (although the Determination indicates the last day of employment as April 23, 2020, the record confirms that it was 2022). The Employee complained that she was not paid for all her regular or overtime hours of work and quit her employment.
11. The Employee provided the Investigating delegate with copies of bi-weekly emails sent to the Employer setting out her hours of work, as well as wage statements for the corresponding periods. The Employer never disputed the Employee's hours of work.
12. The Employee complained that she was not paid for the April 1-15, 2022 pay period until August 2022, and provided text messages to support her assertion. She also complained that she was not paid any wages for work performed between April 16 and 20, 2022.
13. The Employee alleged that she was required to pay the Employer \$500 each pay period for expenses incurred by the Employer during the hiring process. She said that the Employer charged her \$40,000 for a two-year work permit/Labour Market Impact Assessment (LMIA). She contended that she initially paid the Employer \$5,000 when the Employer applied for a work permit, and the balance was due when the permit arrived. Because the Employee was unable to afford to pay the balance of \$35,000 as a lump sum, the Employer told her to pay \$500 from each pay cheque. She asserted that the Employer threatened to cancel her work permit if she did not make the payments and refused to sign her paycheques if she had not yet paid \$500 from previous paycheques. The Employee provided copies of notes written by the spouse of one of the owners which recorded the dates of those payments. She said that the notes only captured \$3,500 of the approximately \$12,000 she was required to pay to the Employer during the recovery period because she was unable to photograph all of the information.
14. The Employee also provided the Investigating delegate with two audio recordings in which one of the owners requested that the Employee pay him cash before he would sign her paycheque.
15. The Investigating delegate attempted to contact the Employer by telephone at the two different retail locations. The person who answered the telephone would not provide the Investigating delegate with a telephone number for any of the owners but did provide an email address.
16. The Investigating delegate sent a Demand for Employer Records to the Employer by email, as well as by registered mail to the Employer's registered and records address and the address listed for each director. The Director did not receive a response and the Employer did not participate in the investigation.
17. Based on the uncontested record of hours of work provided by the Employee, the Adjudicating delegate determined that the Employee was entitled to the difference between what she was paid and what she earned, in the amount of \$7,266.84.
18. The Adjudicating delegate found that there was no evidence the Employee was paid any overtime wages during her employment, and that she was entitled to \$1,566.00 in outstanding overtime wages. He further determined that the Employee was entitled to a difference of \$6,543.00 in outstanding weekly wages, \$127.84 in statutory holiday pay and a further \$1,440.00 in statutory holiday premium pay for work performed on statutory holidays.

19. The Adjudicating delegate considered the provisions of section 21 of the *ESA* that prohibit an employer from, directly or indirectly, withholding, deducting, or requiring payment of all or part of an employee's wages for any purpose.
20. The Adjudicating delegate determined that "an indirect deduction may take many forms, including an employer deducting money after the wages have been paid to an employee by requiring the employee to pay back or return a portion of the wages they were paid."
21. Based on the Employee's evidence, the Adjudicating delegate accepted that the Employee was required to make regular payments of \$500 following each pay cheque to reimburse the Employer for costs associated with the Employee's hiring.
22. The Adjudicating delegate wrote:
- While some costs, such as costs associated with immigration or obtaining a work visa, may the obligation of an employee (sic), there is insufficient evidence to differentiate what portion of the regular \$500.00 payment constituted business costs and what portion could genuinely be considered as costs the [Employee] ought to have been responsible for. Regardless of the reason for the \$500.00 payments, or the breakdown between employer and employee costs within that payment, there is no evidence the [Employer] had written authorization for a deduction from the [Employee's] wages as contemplated in section 22 of the Act.
23. In the absence of any evidence the Employee had provided the Employer with a written assignment of wages, the Adjudicating delegate found that the Employer was not entitled to make any deductions from, or require payment of any portion of the Employee's wages, for any purpose. The Adjudicating delegate determined that the Employee was entitled to recovery of \$12,500.00.
24. Counsel for the Employer submits that Ranjit Jassal, the Employer's principal, was on an "overseas tour" in May 2023, and did not receive the Demand for Employer Records prior to his departure. Counsel says that Mr. Jassal returned on June 2, 2023 after which he discovered correspondence from the Employment Standards Branch. Counsel further submits that Mr. Jassal did not receive any emails from the Branch as the email address the correspondence was sent to was incorrect. He says that Mr. Jassal has a .ca email address rather than a .com email address to which Branch correspondence was sent.
25. The Employer contends that there is significant material evidence that was not considered by either the investigating or adjudicating delegate and that "the interests of justice" favour a hearing of the appeal.
26. Attached to the appeal are a significant number of documents, including the employment contract, pay stubs, a release and "information and particulars" relating to the terms of the Employee's employment.

ANALYSIS

27. 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.

28. 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.

29. I am not persuaded that the Employer has demonstrated any basis to interfere with the Determination.

New Evidence

30. 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.

31. These requirements are conjunctive; that is, all four criteria must be met before the Tribunal will admit new evidence.

32. I find that the material submitted on appeal does not meet the Tribunal's test for new evidence.

33. The "new evidence" was available to the Employer during the Director's investigation and adjudication of the complaint and ought to have submitted at that time. The Tribunal has repeatedly stated that an appeal is not an opportunity to provide, for the first time, information that existed during the investigation on the basis that an appellant disagrees with a determination.

34. Although counsel for the Employer asserts that the principal of the Employer was away from Canada and therefore unable to respond to the allegations, counsel provides no evidence confirming either the principal's dates of travel or his lack of access to a telephone or an internet connection.
35. The record discloses that the Investigating delegate took a number of steps to obtain the Employer's response to the complaint. She attempted to call the telephone number on the Employer's website and reached a fax machine. She telephoned the store and, according to the record, a "rude person" refused to provide her with the Employer's name or any telephone numbers for the Employer's head office.
36. The Investigating delegate did obtain an email address to which the Demand for Employer records was sent on April 25, 2023. Although counsel for the Employer contends that the Branch correspondence was sent to a .com address rather than the correct .ca address, the record discloses that the April 25, 2023 Demand was sent to the correct .ca address. Similarly, the Investigation Report was sent to Mr. Jassal at the correct .ca address, identifying May 25, 2023 as the deadline for a response. I am satisfied that Mr. Jassal had knowledge of the complaint and the deadline for submitting the material he now seeks to have the Tribunal consider on appeal.
37. Furthermore, the Employer also provides no explanation why the other director, who appears to have been properly served, did not respond or seek an extension of time in which to respond in light of Mr. Jassal's asserted travel schedule.
38. I find that the Employer had knowledge of the complaint, the Director's investigation, the Demand for Employer Records and the Investigation Report, and had the opportunity to respond. Having failed to do so, the Employer cannot now submit documents that ought to have been considered by the Director at first instance.
39. In any event, I note that much of the material submitted on appeal, including the Employee's hours of work, was before the Investigating delegate. The Employer also now asserts that the wage rate identified in the LMIA was higher than that contained in the employment contract in order to obtain the LMIA, and that the Employee agreed she would not be entitled to overtime wages. The Employer concedes that having the Employee work a number of days without compensation and entering into a release of claims is contrary to the *ESA* but asserts that it is relevant to the issues on appeal.
40. I am not persuaded that the "new evidence" would have led the Director to a different conclusion on a material issue. In my view, the "new evidence" does not demonstrate any error in the Determination.
41. I find, pursuant to section 114 (f) of the *ESA*, that there is no reasonable prospect the appeal will succeed, and I deny the appeal.

ORDER

42. Pursuant to section 115(1) of the ESA, I confirm the Determination dated May 31, 2023 in the amount of \$33,840.04 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