

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Silverthorn Investments Inc.
(the “Employer”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE No.: 2022/204

DATE OF DECISION: February 27, 2023

DECISION

SUBMISSIONS

Clarissa Lester

counsel for Silverthorn Investments Inc.

OVERVIEW

1. This is an appeal by Silverthorn Investments Inc. (the “Employer”) of a decision of a delegate of the Director of Employment Standards (the “Director”) made on November 7, 2022 (the “Determination”).
2. On December 2, 2020, Tracy Brown (the “Employee”) filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (the “ESA”) in failing to pay her regular and overtime wages, statutory holiday pay, vacation pay and compensation for length of service.
3. A delegate of the Director (the “Investigative Delegate”) conducted an investigation and prepared an Investigation Report which was provided to the parties for response. A second delegate (the “Adjudicative Delegate”) reviewed the Investigation Report and the responses of the parties to that report before issuing the Determination.
4. The Adjudicative Delegate determined that the Employer had contravened Sections 28, 45 and 58 of the *ESA* in failing to pay the Employee statutory holiday pay and vacation pay and found that the Employee was entitled to wages and interest in the total amount of \$1,060.10. The Adjudicative Delegate determined that the Employee had been paid at least minimum wage for all hours worked and that she was not entitled to overtime wages. The Adjudicative Delegate concluded she did not have to make a finding on whether or not the Employee quit or was fired from her employment because she was paid compensation for length of service in an amount that exceeded her statutory minimum entitlement. The Director imposed three \$500 administrative penalties for the Employer’s contraventions of the *ESA*, for a total amount owing of \$2,560.10.
5. The Employer appeals on the grounds that the Director failed to observe the principles of natural justice in making the Determination.
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 submission, I found it unnecessary to seek submissions from the Director and the Employee.
7. This decision is based on the Section 112(5) record that was before the Director at the time the Determination was made, the appeal submission, and the Determination.

ISSUE

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

BACKGROUND AND ARGUMENT

9. The Employer is an Alberta registered company with an address for service in Kelowna. Its sole director, Robert Balkan, resided at a home in Kelowna, British Columbia (the “residence”). Mr. Balkan and his spouse occupied the residence between April and October of each year.
10. The Employee was employed as a domestic worker. She resided in the residence and was paid a monthly salary of \$2,100 while the Balkans occupied the home and \$950 when they did not. The parties did not have a written contract.
11. In addition to the monthly salary, the Employee was paid a 10% commission on “significant household purchases” made on behalf of the owners.
12. The employment relationship between the parties ended on October 31, 2020.
13. The Employee filed her complaint on December 2, 2020.

Argument

14. The Employer submits that the Investigative Delegate first contacted Mr. Balkan on or about September 1, 2021, approximately nine months following the filing of the complaint.
15. The Investigative Delegate communicated with Mr. Balkan between September 2021 and August 2022. However, Mr. Balkan says there were significant periods of time in which he did not receive any communication; specifically, from November 2021 to July 2022.
16. The Employer received the Investigation Report on or about August 5, 2022, and the Determination on or about November 7, 2022.
17. The Employer contends that the two-year delay in processing the Employee’s complaint is unreasonable and inordinate, “displaying an abuse of process,” and constituting a failure to comply with principles of natural justice.
18. The Employer submits that the 180-day target for resolving disputes set by the Ministry of Labour in its *2022/2023-2024/2025 Service Plan* (February 2022) was designed to ensure that the purposes of the *ESA*, including the provision of “fair and efficient procedures for resolving disputes over the application and interpretation of this Act”, were met. The Employer contends that the 706 days it took the Director to issue the Determination in this matter fails to meet this target.
19. Noting that the complaint was relatively straightforward and that the issues were addressed within 12 pages of the Reasons for the Determination, the Employer argues that the two-year delay in resolving the complaint is unacceptable and brings the administrative process into disrepute.
20. The Employer further says that it has suffered significant prejudice due to the delay because Mr. Balkan suffered from memory loss; because a witness left the Employer’s company; and because evidence was lost during the investigation. Specifically, the Employer says that Mr. Balkan is a senior and his memory

worsened over the years. It argues that it was difficult for Mr. Balkan to recall the Employee's work when attempting to respond to the Investigative Delegate's questions after July 2022.

21. Further, the Employer argues that one of its witnesses, another employee, retired, and the Employer could no longer rely on his assistance for information about the Employee's employment.
22. Finally, the Employer contends that Mr. Balkan misplaced notes he had kept about the Employee, thus depriving him of the ability to fully respond to the Investigation report.
23. The Employer seeks to have the Tribunal "make remedies available to account for the abuse of process."

ANALYSIS

24. 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.
25. 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.
26. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination.
27. The Employer does not dispute the Director's factual findings, analysis or final decision. The Employer submits that the delay in issuing the Determination constituted a failure to observe the principles of natural justice and seeks an undefined remedy.
28. The Employer relies on the test set out in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, adopted by the Tribunal in *Garrick Automotive Ltd. (Re)* 2020 BCEST 85 in support of its appeal.

29. As noted by the Tribunal in *Garrick*, in order to determine whether a delay amounts to an abuse of process in the administrative law context, two things must be established: firstly, that the delay was unacceptable or inordinate in the context of the *ESA*, and secondly, that the delay caused prejudice of a magnitude that affects the fairness of the hearing or the community's sense of decency and fairness. (at para. 28) In *Blencoe*, the Supreme Court held that it was inappropriate to find an abuse of process solely on the fact of delay alone, as to do so was "tantamount to imposing a judicially created limitation period." (at para 101)

30. The doctrine of abuse of process as it relates to inordinate delay in the administrative context outlined in *Blencoe* was recently revisited by the Supreme Court of Canada in *Law Society of Saskatchewan v. Abrametz* (2022 SCC 29). The Supreme Court affirmed the test in *Blencoe*, concluding that it was not necessary to impose time limits on administrative tribunal decisions given the broad range of tribunals with different purposes, whose decisions differ in complexity and significance.

Was the delay unacceptable and inordinate?

31. *Garrick* found that a two-year delay to issue a thirteen page determination in a matter that was relatively uncomplicated was inordinate and unacceptable.

32. While it took the Director approximately two years to issue a Determination in this complaint, I find that I need not decide whether the delay was inordinate in this matter as I find that the Employer has not met the second part of the test.

Did the delay cause significant prejudice?

33. As the Tribunal found in *Garrick*, while remedies are available to address state-caused delays, those remedies are available only where a party can demonstrate significant prejudice from the delay. (See also *Tung* (BC EST # 511/01))

34. Prejudice is a question of fact. (*Abrametz, supra*, para. 69)

35. Although the Employer contends that it was prejudiced by the Director's delay in concluding the matter because Mr. Balkan's ability to accurately recall the Employee's hours of work had diminished over the period of time in question, the Director determined that the Employee had received at least minimum wage for all hours worked and that she was not entitled to overtime wages. The Adjudicative Delegate also found that the Employee had been paid in excess of her statutory minimum entitlement for compensation for length of service. Given that the Determination was largely resolved in favour of the Employer, it is difficult to understand the Employer's contention that the delay caused significant prejudice.

36. The Employer argues that it experienced prejudice because Mr. Balkan lost some notes during the investigative process. Mr. Balkan does not specify what the notes consisted of, or how the evidence might have led the Adjudicative Delegate to a different conclusion. I note that the Employer failed to maintain Employer Records as required by Section 28 of the *ESA*. Had the Employer been in compliance with the *ESA*, the necessity for Mr. Balkan to recall, for example, details about the Employee's hours of work, may have been alleviated.

37. Similarly, the Employer does not explain why a former employee would no longer be able to provide evidence, what that evidence may have been or how it might have affected the Adjudicative Delegate's ultimate conclusion.
38. I am not persuaded that Employer has demonstrated that it experienced significant prejudice as a result of any delay and find no basis for the appeal.

CONCLUSION

39. Consequently, I find that there is no reasonable prospect that the appeal will succeed under Section 114 of the *ESA*.

ORDER

40. Pursuant to section 115 of the *ESA*, I confirm the Determination dated November 7, 2022.

Carol L. Roberts
Member
Employment Standards Tribunal