

Citation: The Gentleman's Chair Barber Shop Ltd. (Re)
2023 BCEST 92

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

The Gentleman's Chair Barber Shop Ltd.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

FILE No.: 2023/099

DATE OF DECISION: October 30, 2023

DECISION

SUBMISSIONS

Soheil Aramesh

on behalf of The Gentleman's Chair Barber Shop Ltd.

OVERVIEW

1. The Gentleman's Chair Barber Shop Ltd. ("Appellant") appeals a determination issued on June 7, 2023 ("Determination"), by a delegate ("Delegate") of the Director of Employment Standards ("Director").
2. The Determination held the Appellant had contravened the *Employment Standards Act* ("ESA") in respect of the employment of Yago Maistrello ("Complainant"). The Determination ordered the Appellant to pay the Complainant wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service and interest totaling \$21,297.45. The Determination also levied administrative penalties totaling \$3,500.00 for a total amount payable of \$24,797.45.
3. The Appellant appeals on the ground that new evidence has become available that was not available at the time the Determination was being made.

BACKGROUND

4. The Appellant operates a barber shop in North Vancouver, B.C. that falls within the jurisdiction of the *ESA*.
5. The Complainant worked at the Appellant's shop from April 20, 2021, to October 15 or October 29, 2021. The last day that the Complainant worked was disputed.
6. The Complainant filed a complaint under section 74 of the *ESA* alleging that the Appellant had contravened the *ESA* by failing to pay the Complainant his final wages.
7. A delegate of the Director ("Investigative Delegate") requested evidence and submissions from the parties about their respective positions. The Investigative Delegate communicated with the parties and their representatives and received statements and evidence on the issues raised in the complaint. A Demand for Employer Records dated November 21, 2022, was sent to the Appellant.
8. The Investigative Delegate prepared a report for the Appellant and the Complainant dated February 8, 2023, summarizing the information provided by the Appellant, Complainant and witnesses and included a list of relevant records and documents ("Investigation Report").
9. The Investigative Delegate set out the issues under consideration but did not make findings in the Investigation Report.
10. The Appellant and the Complainant were requested to review the Investigation Report carefully and provide further information and clarification.
11. The Investigation Report and the Complainant's response to the Investigation Report were submitted to the Delegate for a determination.

12. The Delegate issued the Determination dated June 7, 2023.
13. The Determination held the Complainant was in an employment relationship with the Appellant. The Determination also held the employment relationship ended on October 29, 2021, when the Appellant terminated the Complainant without just cause. Taking into account the evidence, the Delegate made findings concerning the Complainant's rate of pay and the amount of wages and gratuities paid to the Complainant. As noted above, the Determination held the Appellant had failed to pay the Complainant wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service and interest totaling \$21,297.45. The Determination also levied administrative penalties totaling \$3,500.00 for a total amount payable of \$24,797.45.
14. The Appellant appealed the Determination on June 27, 2023.

ARGUMENTS

15. On the Appeal Form the Appellant submits that evidence has become available since the time the Determination was made.
16. The Appellant sets out submissions and evidence in support of the Appellant's appeal.
17. The Appellant submits that it's representative could not have submitted the new evidence due to health reasons caused by an accident. The Appellant submitted a physician's letter in support.
18. The Appellant further submits the Complainant's evidence is not reliable.

ANALYSIS

19. These reasons are based on the written submissions of the Appellant, the Determination, and the *ESA* section 112(5) record ("Record").
20. On receiving the Appellant's appeal, the Tribunal requested and received the Record from the Director for purposes of the appeal. The Tribunal provided the Record to the Appellant and to the Complainant and sought submissions on the completeness of the Record. As the Tribunal did not receive any objections to the completeness of the Record, the Tribunal accepts the Record as complete.

Appeal of Determination

21. 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.
22. An appeal is limited to the grounds set out in the *ESA*. An appellant bears the onus to demonstrate the appeal meets one or more of the specified grounds. An appeal is not another new hearing of the case, nor is it meant to be an opportunity to resubmit an appellant's facts and arguments and 'try again.'

New Evidence

23. The Appellant alleges that new evidence has become available since the time the Determination was being made.
24. The test that must be met to introduce new evidence on an appeal is clearly established. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out the following requirements for introducing new evidence:
- (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;
25. Each of the above requirements need to be met by an appellant seeking to submit new evidence. Previous decisions of the Tribunal make it clear that parties are expected to participate in good faith and must present all relevant evidence during the initial investigation and determination stage of complaints before the Director. The introduction of new evidence later at the appeal stage that could and should have been introduced at the investigation and determination stage, will generally result in the dismissal of the appeal.
26. The Appellant in this case submits evidence that existed at the time of the investigation and the adjudication of the complaint. The Appellant submits health reasons related to an accident prevented the Appellant's representative from presenting evidence during the investigation and adjudication of the complaint, but the Appellant does not submit any explanation about how the health reasons prevented the Appellant from discovering or presenting the evidence.
27. The evidence and arguments submitted by the Appellant do not meet the requirements for new evidence. Although the Appellant submits health reasons prevented the Appellant's representative from discovering or presenting the evidence, the evidence in the Record from the Investigative Delegate indicates the Appellant's representative communicated regularly with the Investigative Delegate during the investigation and agreed to provide all requested statements. There is no indication the Appellant's representative could not take part in the investigation or was prevented or limited in discovering or presenting evidence. In fact, the Record also shows the Appellant's representative directed inquiries from the Investigative Delegate to the Appellant's accountant and authorized the accountant to work with the Investigative Delegate to discover and provide the information needed for the complaint.
28. The law is clear that an appellant must meet the necessary requirements for new evidence and the failure to do so will generally result in dismissal of the appeal (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03; *Can-Pacific Trading Inc.*, BC EST # D082/11; *Anthony McInnis*, 2020 BCEST 9). It is important for the fair and efficient resolution of complaints under the *ESA* that parties participate in good faith during the investigation and adjudication of complaints. It is contrary to efficient and fair resolution of complaints under the *ESA* for a party to hold out at the investigation and

adjudication stage and then seek to present information on appeal that could and should have been presented earlier (see *Kaiser Stables*, 1997 CanLII 25445 (BC EST); *Dunning and Bourque*, 1997 CanLII 25835 (BC EST) limited participation; *Black Forest Cedar Products Inc.*, 2005 CanLII 93892 (BC EST) health reasons rejected).

29. The Appellant generally resubmits arguments made during the initial investigation and adjudication stage and does not submit cogent evidence, nor explanation of how the evidence could not reasonably have been discovered or presented during the investigation. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.

30. I find there is no merit in this ground of appeal, and it is dismissed.

Other grounds

31. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc, dba Superior Transmissions*, BC EST # D141/03).

32. Even though I have found the Appellant has not demonstrated that there was new evidence, I will also consider the Appellant's submissions on other grounds in the alternative.

33. While not specifically noted on the appeal form, the Appellant's submission appears to allege that the Director erred in law in finding there was an employment relationship, as well as finding wages, overtime, statutory holiday pay, annual vacation pay, and compensation for length of service were owed to the Complainant.

34. To show an error of law, the Appellant has the burden to show a material legal error in the decision. Examples of errors of law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466).

35. A disagreement with a finding of fact does not amount to an error of law. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate.

36. I have reviewed the Determination and the evidence in the Record and do not find an error of law in the Determination. The finding that the Complainant was in an employment relationship and was not an independent contractor was based on the applicable law and facts found by the Delegate. Although the Appellant resubmits arguments about the Complainant's reliability and intention, the Delegate properly considered the submissions and evidence within the established law and came to a reasoned conclusion based on findings of fact (see *Beach Place Ventures and Black Top Cabs*, 2019 BCEST 23, aff'd 2019 BCEST 61, aff'd 2021 BCSC 1463, aff'd 2022 BCCA 147, leave to appeal dismissed 2023 CanLII 8624 (SCC); *Zip Cartage*, BC EST # D109/14, aff'd BC EST # RD005/15; *United Specialty Products Ltd.*, BC EST # RD126/12).

37. I have also considered the calculation of the amount owing to the Complainant for wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service and interest. I find there is no error of law in the calculation and confirm the amounts. While the Appellant may not agree with the Determination, I find there was evidence the Delegate could rely on to make the findings of fact and arrive at the calculations and conclusions in the Determination. It is clearly established in Tribunal decisions that this Tribunal will not re-hear the case, nor will it re-evaluate the evidence and substitute its own view of the same evidence.
38. Lastly, I have also considered the administrative penalties levied in the Determination. The law is clear that the administrative penalties owed by the Appellant are mandatory in the circumstances and there is no provision in the *ESA* for them to be cancelled (see *537370 B.C. Ltd.*, BC EST # D011/06).
39. In summary, I find the Appellant is, for the most part, rearguing its view of the same facts and evidence that have already been properly considered and decided in the Determination. Absent an error of law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate.
40. I find there is no error of law and would also dismiss this ground of appeal.
41. Lastly, I have considered whether the Director failed to observe the principles of natural justice in making the Determination.
42. Natural justice has been described as the right to a fair procedure and includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05). To be successful on this ground of appeal, there must be credible evidence about how the determination procedure did not meet the requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).
43. I have reviewed the Record and find there is no basis on the Record for concluding the Director failed to observe the principles of natural justice. The Record indicates the Appellant was aware of the case to be made and had the right to present their case and respond to the evidence. The Record indicates the Investigative Delegate conducted an ample investigation of the issues and the parties, including the Appellant, were involved in the investigation process and had every opportunity to respond and provide evidence and submissions. Indeed, the Record shows the Investigative Delegate followed up repeatedly with the parties to move the investigation forward and seek further information and evidence.
44. In sum, the evidence does not support that the Director failed to observe the principles of natural justice in making the Determination. I find there is no merit in this ground of appeal, and it is dismissed.

Summary dismissal

45. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.
46. I find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

ORDER

47. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.
48. Pursuant to section 115(1) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal