Employment Standards TRIBUNAL

Citation: Thomas Federuik (Re)
2024 BCEST 12

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Thomas Federuik

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/107

DATE OF DECISION: January 29, 2024

DECISION

SUBMISSIONS

Thomas Federuik on his own behalf

OVERVIEW

1. This is an appeal by Thomas Federuik ("Employee") of a decision of a delegate of the Director of Employment Standards ("Director") made on June 9, 2023 ("Determination").

2. On September 9, 2020, the Employee filed a complaint with the Director alleging that Glentana Development Corp. ("Employer") had contravened the *Employment Standards Act* (*"ESA"*) by misrepresenting the conditions of his employment, failing to pay regular wages, requiring him to pay for the Employer's business costs, and not paying vacation pay.

3. A delegate of the Director ("Investigating delegate") investigated the Employee's complaint and on October 3, 2022, issued an Investigation Report ("Report"). The Report was provided to the parties for response. A second delegate ("Adjudicating delegate") reviewed the Report and the responses of the parties to that Report before issuing the Determination.

4. The Adjudicating delegate determined that the Employer had contravened sections 45/46, 21 and 58 of the *ESA* in failing to pay the Employee statutory holiday and vacation pay and in requiring the Employee to pay the Employer's business costs.

5. The Director found that the Employee was entitled to the total amount of $5,102.20 including accrued interest. The Director also imposed two $500.00 administrative penalties for the Employer's contraventions of the *ESA*, for a total amount payable of $6,102.20.

6. The Employee appeals the Determination on all three statutory grounds of appeal – that is, that the Director erred in law, that the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

7. The deadline for filing the appeal was July 3, 2023. The Employee filed the appeal on July 18, 2023, sought an extension to the appeal period and sought an extension of time to make additional submissions by July 31, 2023. The Employee requested a further extension of time to make his submission to the Tribunal. Without making a decision on the extension to the appeal period, the Tribunal granted the Employee's requests to provide the additional documents to the Tribunal.

8. 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 Employer.

9. 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.

ISSUES

10. Whether the Employee has established a basis for extending the statutory time period in which to file the appeal, and

11. Whether the Employee has established grounds for interfering with the Director's decision.

BACKGROUND AND ARGUMENT

12. The Employer operates a property development and construction business in Victoria, British Columbia. The parties agree that the Employee was employed initially as a First Aid Specialist and then promoted to Site Superintendent. There was no written employment agreement between the parties, and the parties disagreed about the Employee's first and last day of work as well as his rate of pay. The record indicates that the Employee worked for the Employer between approximately March 28, 2020, until approximately May 31, 2020.

13. The issues before the Director were a) whether the Employer had misrepresented the conditions of employment; b) whether the Employee was entitled to regular wages; c) whether the Employee paid the Employer's business costs, and d) whether the Employee was owed vacation pay.

Misrepresentation of conditions of employment

14. The Employee alleged that the Employer contravened section 8 of the *ESA* when it promised to pay for his ferry costs and travel time to and from Vancouver Island as well as for his accommodation costs while he lived and worked on Vancouver Island (the "conditions" of his employment). The Employee contended that these conditions were promised to him by the Employer's former Site Superintendent, David Grant, and submitted text messages to the Investigating delegate in support of his assertions.

15. Finding that the burden of establishing misrepresentation rested on the Employee, the Adjudicating delegate determined that the text messages did not establish that the Employer had offered these conditions. The Adjudicating delegate noted that Mr. Grant and the Employee were acquaintances who worked together on previous construction projects and found that Mr. Grant made personal promises without the knowledge, direction, or involvement of the Employer. The Adjudicating delegate noted that, in the text messages, Mr. Grant used the pronoun "I" in promising the Employee a cottage to stay in. Further, the Adjudicating delegate found that Mr. Pye, the owner of the cottage Mr. Grant stayed in, stated that he intended to enter into a private rental agreement with the Employee after Mr. Grant's employment ended. The Adjudicating delegate determined that the Employee provided no reason to challenge Mr. Pye's evidence.

16. The Adjudicating delegate considered the Employee's evidence that after the Employee was promoted to Site Superintendent, he did not have full authority to promise conditions to any other employees; rather, all final decisions and directions were made by one of the Employer's directors. The Adjudicating delegate found it more likely than not that Mr. Grant had the same limitations on his authority as the Employee

and was not persuaded that the Employer offered the Employee the conditions. The Adjudicating delegate concluded that the Employer had not contravened section 8 of the *ESA*.

Outstanding Wages

17. The Employee claimed that he was owed regular wages, asserting that his rate of pay was $50.00 per hour plus an additional $10.00 per hour "per diem." The Employer's position was that the Employee's pay was $50.00 per hour. The Adjudicating delegate noted that although the Employee attempted to clarify his wage rate with Faizel Kathrada ("Mr. Kathrada"), one of the Employer's directors, Mr. Kathrada did not respond to the Employee's text messages, and Mr. Pye's recollection was that the Employee's wage rate was $50.00 per hour. The Adjudicating delegate further noted that the wage statements confirmed the Employee's wage rate was $50.00 per hour and at no time did the Employee challenge that rate after the initial text message to Mr. Kathrada. The Adjudicating delegate determined that the Employee's wage rate was $50.00 per hour throughout the employment relationship.

18. The Employee submitted several photographs of a vehicle's dashboard in support of his claim for additional wages. The Employee asserted that he had taken the photographs at the start and end of each day. The Adjudicating delegate noted that although the photographs clearly showed the time they were taken, they did not provide sufficient detail to demonstrate the date they were taken. The Adjudicating delegate found there was insufficient information to demonstrate that the Employee took the photographs at the start and end of each workday. The Adjudicating delegate noted that four of the photographs showed the time as being 6:00 p.m. and the GPS showed that the photograph was taken in Shawnigan Lake, which is where the Employee was living while on Vancouver Island. The Adjudicating delegate considered that there was nothing in the *ESA* which required an employer to pay wages to employees for commuting to and from work. The Adjudicating delegate further noted that one photograph taken at 9:15 p.m. showed the Employee parked in an unknown residential neighbourhood, while three others showed the Employee parked in downtown Victoria in the late evening. The Adjudicating delegate determined that the photographs were not taken immediately before and after work, as the Employee asserted. The Adjudicating delegate also found that the photographs "lack clarity and offer no support in establishing the validity of the [Employee's] record of hours."

19. Finally, the Employee claimed that he spent 25 hours creating a Health and Safety Manual for the Employer. In support of this claim, the Employee submitted a copy of that manual. The Adjudicating delegate was not persuaded that the Employee allocated significant time and resources towards the manual, finding that he had compiled the manual from another company's precedent. The Adjudicating delegate further noted that the manual identified a revision date of April 2020, while the Employee claimed that he completed the bulk of the work in May 2020. The Adjudicating delegate found that:

> A review of the Manual suggests that the [Employee] may have put work into the Manual up until page 26. After page 26, the Manual is nothing more than a hodgepodge of copy-pasted material and different sections that conflict with the Manual's Table of Contents. After page 63, the Employer's logo disappears, and the Manual refers to the original Aura precedent. (Determination page R6)

20. The Adjudicating delegate found, based on all these reasons, that the Employee did not work the hours he claimed. Given what he found was the unreliability of the Employee's evidence and in the absence of

any other evidence, the Adjudicating delegate determined that it would be unfair to the Employer and "against the purposes" of the *ESA* to arbitrarily calculate what the Employee's wage entitlement might be.

21. Finally, the Adjudicating delegate was not satisfied that the Employee's timesheets were authentic. The Employer asserted that it had never seen the timesheets prior to the investigation and that the Employer's record of daily hours for employees were created internally. The Adjudicating delegate preferred the Employer's records over those of the Employee for several reasons. Firstly, the Employee provided the Investigating delegate with copies of what he asserted were other employees' timesheets. The Adjudicating delegate found that these timesheets all appeared to have "an identical rushed-print handwriting style." In light of the similarity of the timesheets, lack of any confirmation from the other employees as to the authenticity of those timesheets, an absence of any explanation why the Employee would be in possession of those timesheets, the Adjudicating delegate found that it was more likely than not "that the Employees' timesheets are forged and I cannot rely on the same to confirm the [Employee] worked overtime hours." (p. R6) The Adjudicating delegate further noted that the Employee's timesheets were written in a different handwriting style from those of the other employees, but they were all signed by the Employee, raising the question why the Employee would sign all the timesheets when it was the Employer's practice to require timesheets to be submitted directly to the Employer. The Adjudicating delegate considered and found the Employer's records of hours, signed by Mr. Kathrada, to be more reliable. The Adjudicating delegate further noted that Mr. Pye confirmed that the Employee worked 40 hours per week and that none of the other employees worked overtime.

22. The Adjudicating delegate noted that the Investigating delegate provided the Employee with a number of opportunities to participate in the investigation and clarify his submissions and provide additional evidence, including supporting documentation for time worked between March 28, 2020, to April 18, 2020, and May 17, 2020, to May 30, 2020. Despite the requests, the Employee did not respond to the Investigating delegate's follow up attempts. Preferring the Employer's evidence over that of the Employee, the Adjudicating delegate determined that the Employee had been paid his wages in full but for his vacation pay entitlement. The Adjudicating delegate concluded that the Employer had miscalculated the Employee's vacation pay since it had not taken into consideration that the Employee worked on a statutory holiday. The Adjudicating delegate determined that the Employee's vacation wage entitlement was $400.00.

Business costs

23. The Employee contended that, because the Employer was encountering financial issues, he was obliged to make purchases in an approximate amount of $50,000.00 on his personal credit card. The Adjudicating delegate considered section 21 of the *ESA,* which provides that an employer is not permitted to require an employee to pay for an employer's business costs and if business costs are unlawfully paid by an employee, they are recoverable as wages.

24. In support of his claim, the Employee submitted expense forms and receipts for three separate time periods. The Employee also submitted invoices for equipment rentals dated October 16, 2020, and November 30, 2020. He also made verbal submissions related to travel expenses but provided no documents in support of those expenses despite being asked by the Investigating delegate to do so.

25. The Employer submitted that it had a business account for all building material and supplies, that it never required the Employee to purchase or rent equipment or material and that the Employee did so against the Employer's instructions, and that it had a corporate credit card it could have given the Employee had he asked for it. The Employer also contended that the Employee only submitted receipts to the Employer and did not attach the expense forms, and that any receipts submitted for expenses incurred on the Employer's behalf had been reimbursed. The Employer submitted a copy of a cheque made out to the Employee for expenses to support its assertions. The Adjudicating delegate noted that the amount of the cheque mirrored the amount on the Employee's bank statement and was equivalent to the amount claimed by the Employee for the third time period. The Employee denied that the cheque was related to the amount shown in his bank account and denied it constituted a reimbursement of expenses. The Adjudicating delegate concluded that this was unlikely, and that the Employer had reimbursed the Employee for expenses incurred.

26. With respect to the equipment rental claims asserted by the Employee, the Adjudicating delegate noted that the invoice reflected charges for equipment rentals for September through November 2020. The Adjudicating delegate concluded that, because the employment relationship ended on May 30, 2020, any rental charges were incurred after the Employee was no longer employed and claims related to those charges were more appropriately addressed by way of a civil action. The Adjudicating delegate also noted that the Employee confirmed that he had resolved this issue and his credit card company had refunded the amount charged.

27. With respect to the Employee's receipts for the first two time periods, the Adjudicating delegate found some of the receipts were legible and others were not. Although the Investigating delegate asked the Employee to provide specific details and reasons for the expenses, the Employee did not provide any additional documentation. Similarly, the Employer did not provide any additional information or evidence to support its position that it paid the Employee for the expenses itemized for the first two periods.

28. The Adjudicating delegate found that it was not entirely clear that the Employer had "required" the Employee to pay for the costs itemized for the two time periods, that the evidence regarding the reasons for the expenses was not clear and further, that it was unclear whether some of the expenses fell within the definition of "business costs." Nevertheless, after a review of the legible receipts, the Adjudicating delegate determined that some charges were recoverable as wages while others were not. The Adjudicating delegate determined that the Employee was entitled to recover $3,713.26 from the Employer.

29. Finally, the Adjudicating delegate determined the Employee was entitled to vacation pay in the amount of $312.05.

ANALYSIS

30. 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.

Extension of time

31. The Determination contains the following information within a highlighted box:

> If this Determination was served to you by email and you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on July 3, 2023.
>
> If this Determination was served to you by ordinary or registered mail and you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on July 17, 2023.
>
> The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at… [emphasis in original]

32. In his appeal submission, the Employee indicated that he had received the Determination by email. As such, the statutory time period for filing his appeal was July 3, 2023.

33. Section 109 of the *ESA* gives the Tribunal discretion to extend the time limits for filing an appeal. The Tribunal has consistently stated that extensions should only be granted where there are compelling reasons to do so.

34. In *Niemisto (Re)* (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:

i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been aware of this intention;

iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

v) there is a strong *prima facie* case in favour of the appellant.

These criteria are not exhaustive.

35. In explaining his reasons for filing the appeal on July 18, 2023, 15 days past the statutory deadline, the Employee submitted, in summary, that he had difficulty communicating with the original Investigating

delegate in June 2022, that emails and telephone calls he made to the Investigating delegate went undelivered or not returned, that he has new evidence, that the Employer had been deceitful, and that he had strong grounds for appeal. The Employee also asserted that he had called the Tribunal on July 7, 2023, to inquire into the next steps and was told to follow the steps outlined on the website.

36. I am not persuaded that the Employee has established compelling reasons for failing to file his appeal within the statutory time period. The difficulties he had communicating with the original Investigating delegate one year before the Determination was issued are not relevant to his failure to file his appeal before July 18, 2023. Furthermore, while the Employee may have contacted the Tribunal (after the statutory time period) to obtain information about filing an appeal, that information was contained in the Determination itself, which he received approximately one month earlier. In the absence of any explanation for why the appeal was not filed in a timely manner, I would dismiss the appeal on this ground alone. However, I have also considered the merits of the appeal.

Grounds of appeal

37. 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.

38. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination. The Tribunal has consistently held that an appeal is not simply another opportunity to argue the merits of a claim to a different decision maker.

39. It is difficult to discern the basis for the Employee's appeal other than the fact that he disagrees with the Determination. His submissions consisted of six emails identifying "points" or a series of questions, three binders of materials, one of which contained over 130 pages, and two of which contained over 400 pages, one coil-bound book, as well as a CD containing data which was later provided by way of printed documents. Nothing in the appeal submissions specifically address the statutory grounds of appeal.

40. The documents submitted by the Employee on appeal establish that in June 2020, the Employee filed three separate claims of lien against the subject property with respect to his claims for wages and expenses. The Employer discharged the liens by way of payment of $30,000 into court. The Employee then commenced proceedings in British Columbia Supreme Court to enforce the liens on August 13, 2020. The Employee advanced many of the same claims that were the subject of his Employment Standards complaint, including claims for unpaid wages, changes to the terms of his employment relationship and reimbursement of expenses. He also, for the first time, asserted that he was wrongfully terminated.

41. In the first appeal binder, the Employee sets out his view of the facts along with other matters that do not appear to be in dispute or are not relevant to the issues in the original complaint. It contains references to the *ESA*, poses questions (which I understand to be reactions to the Employer's submissions as well as the Adjudicating delegate's analysis and conclusions), and re-asserts claims made in his original complaint.

The submission also contains references to Tribunal and Supreme Court decisions, largely relating to the question of an employee's managerial status.

42. The second (or what was identified by the Tribunal as the "Black") binder contains, among other things, a transcript of a January 6, 2023, examination for discovery of Mr. Kathrada in the civil action. The questions posed by the Employee during the examination relate to, among other things, safety issues on site, expenses, overtime, rate of pay, and reimbursement for payments made to his credit card.

43. The third (or "Grey") binder includes documents related to the civil action. As I understand the Employee's submission, his claim has not yet been heard by the Supreme Court. The Employee also submitted an affidavit from a third party sworn on December 29, 2023. The affidavit contains the affiant's statements regarding management of the development project, including safety and financial issues, none of which are relevant to this appeal, as well as statements regarding timesheets and the hiring of the Employee.

44. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. (*Triple S Transmission Inc. (Re)*, BC EST # D141/03). I have addressed what I understand to be the Employee's arguments under each ground of appeal.

Natural Justice

45. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.

46. I am satisfied, following a review of the record, that the Employee was given the opportunity to present his documents and make submissions in support of his appeal, as well as to respond to the Employer's documents.

47. The record confirms that the Report, which set out the issues and the parties' positions relating to those issues, was sent to the Employee by email on October 7, 2022. The Report notified the parties that if they wished to respond, that they were to do so by October 17, 2022. The Employee did not do so. Although the Employee claims that he attempted to send the Investigating delegate material that he requested and the emails were returned to him, those emails were sent in September 2022, not in response to the Report.

48. The government email server confirmed delivery of the Report to the Employee. There is nothing in the record to indicate that the email was subsequently undelivered or undeliverable.

49. Section 122(1)(b) of the *ESA* provides that the Report is deemed served if it is "transmitted by email to the person's last known email address according to the records of the director…."

50. The Employee contends that he did not receive the Report. However, he offers no explanation for why that might have been the case. The Report was sent to the email address used by the Employee when filing his complaint, during the investigation, and on appeal.

51. In the absence of any plausible explanation rebutting the presumption that the Report was properly served, I find that the Employee had full opportunity to respond.

52. I find no basis for an appeal on this ground.

New Evidence

53. In *Davies et al.* (*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.

54. Some of the documentation included in the appeal submission was provided to the Investigating delegate and considered by the Adjudicating delegate in making the Determination. That material does not meet the test for new evidence.

55. However, the bulk of the documents submitted on appeal relates to the Employee's civil claim, which was commenced at about the same time he filed his Employment Standards complaint for essentially the same matters. Having been largely denied his Employment Standards claim, it is not now open to the Employee to appeal the Determination through evidence created through the course of the civil action.

56. Section 76(3) of the *ESA* provides that the director may stop or postpone the investigation of a complaint where a proceeding relating to the subject matter of the complaint has been commenced before a court. I infer that the Director's delegates had no knowledge of the Employee's civil action at the time they investigated and adjudicated his claim. However, having had his claim adjudicated upon by the Director, the Employee cannot appeal that Determination based on evidence created and gathered through the civil process. Furthermore, the documents consist of pleadings and affidavits, none of which confirm assertions made by the Employee. While the material may be relevant, it is not automatically credible. The Adjudicating delegate has already found the Employee's evidence to lack credibility, a finding I am not prepared to interfere with.

57. I deny the appeal on this ground.

Error of Law

58. 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.):

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.

59. The Employee disputes the Adjudicating delegate's findings on a number of grounds, including, but not limited to, his conclusion that the Employer's records of hours worked was more reliable than those of the Employee, his conclusions about the Employee's rate of pay, his finding that the evidence did not support a verbal agreement to cover the Employee's travel costs as well as, as I understand it, his failure to address the question of whether or not the Employee was a manager.

60. With respect to the issue of whether or not the Employee was a manager, the Report, which the Employee had the opportunity to respond to, noted that the Employee withdrew his claim for overtime wages. Given that the Employee did not challenge the Report in any way, it was not an error for the Adjudicating delegate not to address that issue. In any event, even if the Adjudicating delegate had determined that the Employee was not a manager, the Employee's record of hours was found to be unreliable. Consequently, the Employee would not have been awarded wages for the overtime hours he claimed he was entitled to.

61. With respect to the Employee's argument regarding the Adjudicating delegate's credibility assessments, as the Tribunal has often stated, credibility assessments are within the purview of the Director and will only be interfered with if they are unsupported by the evidentiary record.

62. The parties did not have a written employment agreement, which required the Adjudicating delegate to make a credibility assessment of the competing assertions. The Adjudicating delegate reviewed the information provided to the Investigating delegate, which was not challenged by the Employee. The Adjudicating delegate articulated his reasons for preferring the Employer's evidence over that of the Employee. I am not persuaded that the Adjudicating delegate erred in his assessment or acted on a view of the facts that was unreasonable.

63. In conclusion, I find that the Adjudicating delegate's conclusions were rationally supported by the evidence and find no basis for the appeal.

CONCLUSION

64. I find that the Employee has not provided any reasonable explanation for failing to file the appeal within the statutory time limit. I also find that there is no reasonable prospect that the appeal will succeed. I dismiss the appeal under section 114(1) of the *ESA*.

ORDER

65. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination dated June 9, 2023, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal