

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Shannon Netzel

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/179

DATE OF DECISION: February 13, 2024

DECISION

SUBMISSIONS

Shannon Netzel on her own behalf

OVERVIEW

1. This is an appeal by Shannon Netzel (“Employee”) of a determination issued by a delegate of the Director of Employment Standards (“Director”) made on November 14, 2023 (“Determination”).
2. On June 4, 2022, the Employee filed a complaint with the Director alleging that Peter Divin, carrying on business as The Edge Carbide Tools and as The Edge Carbide Tools Sharpening (“Employer”), had contravened the *Employment Standards Act* (“ESA”) by failing to pay statutory holiday and vacation pay and by making unauthorized deductions from her wages.
3. A delegate of the Director (“Investigating Delegate”) investigated the Employee’s complaint and on July 18, 2023, issued an Investigation Report (“Report”). The Report was provided to the parties for response. The Employer informed the Investigating Delegate that he did not wish to respond. A second delegate (“Adjudicating Delegate”) reviewed the Report and the Employee’s response to that Report before issuing the Determination.
4. The Adjudicating Delegate determined that the Employer had contravened section 58 of the *ESA* in failing to pay the Employee vacation pay.
5. The Director found that the Employee was entitled to the total amount of \$1,010.66 including accrued interest. The Director also imposed three \$500.00 administrative penalties for the Employer’s contraventions of the *ESA*, for a total amount payable of \$2,510.66.
6. The Employee appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination.
7. 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.
8. This decision is based on the section 112(5) record (“Record”) that was before the Director at the time the Determination was made, the appeal submission, and the Determination.

ISSUES

9. Whether the Employee has established grounds for interfering with the Director’s decision.

BACKGROUND AND ARGUMENT

10. The Employer is a sole proprietorship that operates a saw sharpening business in Surrey, British Columbia. The Employee was employed as a saw sharpener from August 30, 2004, until she resigned on May 26, 2022. The parties agreed on the Employee's rate of pay, her normal working hours, her vacation pay entitlement, and that the Employee received paid vacation through salary continuance when she took vacation. The parties disagreed on the number of vacation days the Employee took.
11. The Employer provided the Investigating delegate with employer records, along with explanations regarding the payments the Employee received in May 2022. The Employee disagreed with the payroll deduction online calculator (PDOC) suggesting she had been paid vacation pay. She did, however, submit records showing that she received e-transfers from the Employer in an amount slightly less than the PDOC recorded as vacation pay.
12. The Adjudicating delegate did not accept the Employee's allegation that she had not received vacation pay in the amount recorded. He determined that she had received all wages owed, less statutory deductions, for the month of May 2022.
13. The Adjudicating delegate also found that the Employer had not made an unauthorized deduction from the Employee's wages in May 2022. The Adjudicating delegate did not accept that the Employee was owed \$1,700.00 as an unauthorized deduction as she claimed. The Adjudicating delegate found, based on the Employer's payroll records, that the Employee received an "advance" in mid-May 2022, which she deposited to her account on May 25, 2022. This amount was deducted from the Employee's final pay.
14. The Employee also alleged that the Employer deducted \$200.00 from her final pay, an allegation the Adjudicating delegate characterized as a dispute over whether she received a day of paid vacation. Although the Employer did not dispute that he deducted this amount from the Employee's final pay, the Adjudicating delegate determined this did not constitute an unauthorized deduction. Rather, the Adjudicating delegate found that the Employer was accounting for a day of paid vacation when he was determining the amount of vacation pay outstanding to the Employee. The Adjudicating delegate assessed the amount in calculating the Employee's entitlement to vacation pay.
15. The Employer stated that it was his belief that an employee's rights to vacation entitlements expired if the employee did not request vacation time or vacation pay. The Adjudicating delegate determined (at p. R8) this view was contrary to sections 57 and 58 of the *ESA*:

...while an employee is continuously employed, an employer must ensure that the employee is paid all the vacation pay they earned during the previous anniversary year entitling them to vacation pay before the next anniversary date 12 months later. The Act does not allow for vacation to be banked and rolled over into future years, nor does it allow a "use it or lose it" policy. It is the obligation of employers to ensure that employees take sufficient vacation and to ensure that vacation pay is paid out within the timeframes required set out in the Act.
16. After reviewing the employment records and the parties' submissions regarding vacation days taken, the Adjudicating delegate calculated the Employee was entitled to vacation pay in the amount of \$934.13.

17. The Adjudicating delegate determined that the Employee was not owed any statutory holiday pay. This conclusion has not been appealed.

ANALYSIS

18. 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 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.

19. 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.

20. 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.

21. In her appeal, the Employee says that she is “asking to be paid for 2020 6% that I did not receive. Employer did not make alternate arrangements with me. ... I am owed 3 weeks or 6% ... as determined on page R9.”

22. 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 (see *Triple S Transmission Inc.*, BC EST # D141/03). I have addressed what I understand to be the Employee’s argument, which appears to be that the Adjudicating delegate improperly calculated her vacation entitlement. I have also addressed her specified statutory ground of appeal, that the Director failed to observe the principles of natural justice in making the Determination.

Natural Justice

23. 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.

24. I am satisfied, following a review of the Record, that the Employee was given the opportunity to present her arguments and evidence, as well as to respond to the Employer's evidence.
25. Furthermore, the Record confirms that the Report, which set out the issues and the parties' positions relating to those issues, was sent to the Employee and she made submissions in response to the Report. The Adjudicating delegate considered the Employee's responses in making the Determination.
26. I find no basis for an appeal on this ground.

Error of Law

27. The Employee contends that the Adjudicating delegate erred in calculating her vacation entitlement.
28. 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.
29. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law only if they were based on no evidence, or a view of the facts which could not reasonably be entertained.
30. I am not persuaded that the Adjudicating delegate acted on a view of the facts which could not be reasonably entertained. I am also not persuaded that the Adjudicating delegate misinterpreted or misapplied a section of the *ESA*.
31. The Adjudicating delegate found (at p. R8) that, as the Employee had completed five consecutive years of employment, she was entitled to annual vacation pay of at least 6% of the total wages earned during the previous anniversary year of employment. The Adjudicating delegate also found that the Employer's use of a date of January 1 to calculate the Employee's vacation entitlement complied with section 60 of the *ESA*. The Adjudicating delegate then found that any vacation pay the Employee earned between January 1, 2020, and May 26, 2022, was payable within the recovery period and recoverable.
32. The Adjudicating delegate then considered the total amount of wages the Employee received in that time, and the amount of vacation pay she received. The employment records, including the T4s, demonstrated that the Employee received wages of \$53,000.00 in each of 2020 and 2021, and \$25,664.00 in 2022, which was consistent with earlier years. Noting that the 2022 T4 included the Employee's vacation pay, the Adjudicating delegate calculated the Employee's vacation pay entitlement based on her wages for the recovery period. The Adjudicating delegate then considered the number of days of paid vacation the

Employee received, noting that the parties disagreed on that number. The Adjudicating delegate noted that although the Employee disputed the Employer's records, she had no reliable evidence of her own, and that her position changed after she received disclosure of the Employer's evidence.

33. The Adjudicating delegate found the Employer's records to be the most reliable for several reasons, including the fact that the Employee relied on the Employer's records, both parties' evidence that the Employer documented all the Employee's time off for vacation, and the inconsistency of the Employee's evidence. The Adjudicating delegate determined that the Employee received 12 days of paid vacation in 2021, which he calculated to be equivalent to \$2,445.84 by way of salary continuance.
34. The Adjudicating delegate determined that the Employee was paid a total \$6,709.84 in annual vacation pay for 2021 and 2022. He deducted that amount from the amount he determined she was entitled to under the *ESA*, \$7,644.00, and calculated her outstanding entitlement to be \$934.13. There appears to be a small mathematical error in the calculation of the outstanding vacation entitlement. The revised calculation for the amount is \$934.16 rather than \$934.13.
35. As I understand her argument, the Employee disputes receiving vacation pay or vacation time in 2020. The difficulty with the Employee's argument is that any vacation entitlement earned in 2020 is paid in 2021. As the Tribunal has found (see *Intercity Appraisals Ltd.*, BC EST # D151/97), sections 57 and 58 must be interpreted to provide that vacation pay is based on the previous years' earnings. So, while the Adjudicating delegate calculated the Employee's earned vacation to be 6% for the period January 1 – December 30, 2020, any vacation pay was payable in 2021. In addressing the Employee's vacation entitlement for the recovery period (January 1, 2020 to May 26, 2022), the Adjudicating delegate wrote:
- ...It is therefore necessary to determine the number of days of paid vacation the [Employee] received between January 1, 2021 and May 26, 2022, the period during which the vacation earned above [i.e. the period January 1, 2020 through June 1, 2022] was payable."
36. I am not persuaded that the Adjudicating delegate erred in his assessment or acted on a view of the facts that could not be entertained. He considered the vacation period earned and vacation wages payable, and properly applied sections 57 and 58 of the *ESA* in calculating the Employee's vacation entitlement.
37. In conclusion, I find that the Adjudicating delegate's conclusions were rationally supported by the evidence and that there was no misinterpretation or misapplication of the *ESA*.

CONCLUSION

38. I find that there is no reasonable prospect that the appeal will succeed. I dismiss the appeal under section 114 of the *ESA*.

ORDER

39. Pursuant to section 115 of the *ESA*, I confirm the Determination dated November 14, 2023, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal