

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Sancat Excavating Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE No.: 2023/180

DATE OF DECISION: February 21, 2024

DECISION

SUBMISSIONS

Jagjeet (Jerry) Sanghara and Sabreena Sanghara on behalf of Sancat Excavating Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Jagjeet Sanghara on behalf of Sancat Excavating Ltd. (“Appellant”) of a determination made by Felisa Friesen, a delegate (“Delegate”) of the Director of Employment Standards (“Director”), on October 23, 2023 (“Determination”).
2. The Determination awarded Michael Stephen Savage (“Complainant”) \$1,789.47 in wages, and imposed \$2,500.00 in mandatory administrative penalties against the Appellant. The Appellant is appealing the Determination on the bases that the Director failed to observe the principles of natural justice in making the Determination, and says that evidence has become available that was not available at the time the Determination was being made.
3. I have concluded that this case is appropriate to consider under section 114(1) of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed with the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 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.
4. For the reasons that follow, I dismiss the appeal under section 114(1)(f) as having no reasonable prospect of success.

ISSUE

5. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

6. The Appellant employed the Complainant as a short haul truck driver. The Complainant filed his complaint alleging a failure to pay wages at the agreed-upon rate, as well as a failure to pay wages for all hours worked, including overtime.
7. While the Complainant alleged the Appellant agreed to pay him \$34 per hour, the Appellant paid him \$32 per hour. In addition, the Complainant alleged the Appellant agreed to pay him overtime rates in excess of those established in the *Employment Standards Regulation* ("*Regulation*").
8. The Delegate was not satisfied that there was sufficient evidence before her to conclude that the wage rate agreed to was \$34 per hour, nor was she persuaded that there was any agreement to exceed the overtime requirements of the *Regulation*.
9. These conclusions notwithstanding, after reviewing all of the evidence available, the Delegate determined that the Complainant was owed \$344 in regular wages, and \$1,262.40 in overtime wages, as well as vacation pay on these amounts.
10. In addition, the Delegate imposed mandatory administrative penalties for breaches of the *ESA* and *Regulation* as follows:
 - Section 17 – Failure to pay wages owing within 8 days of the end of a pay period: \$500;
 - Section 18 – Failure to pay all wages owing within 6 days of the end of employment: \$500;
 - Section 27 – Failure to provide *ESA*-compliant wage statements: \$500;
 - Section 28 – Failure to maintain sufficient payroll records: \$500; and
 - Regulation Section 37.3 – Failure to pay required overtime wages: \$500.
11. Finally, the Determination awarded the Complainant \$118.81 in interest pursuant to section 88 of the *ESA*.

ARGUMENTS

12. As noted above, the Appellant appeals on the bases that the Director failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was made.
13. The Appellant takes issue with certain findings in the Determination. The Appellant disputes the finding that there was no record of hours worked for the Complainant's last day of work, and provided certain dispatch notes for other dates the Delegate noted were missing. The Appellant now provides the work ticket from the Complainant's last day of work and says that surveillance evidence demonstrates that the

Complainant was absent from the worksite for a portion of the time the Delegate concluded he had been working.

14. The Appellant also says early departures from work were communicated verbally rather than in writing.
15. Finally, the Appellant disputes the length of time post-trip inspections should have taken the Complainant, and, accordingly, the wages that were assigned to that work. The Appellant asserts that such inspections should take no more than 15 minutes, rather than the 30 minutes assessed in the Determination.

ANALYSIS

16. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:
 - 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.
17. The Appellant has indicated he is appealing on the basis that the Director failed to observe the principles of natural justice in reaching the Determination, and on the basis that new evidence has become available that was not available at the time the Determination was made. I will deal with each of these in turn.

Natural Justice

18. With respect to subsection 112(1)(b), a party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
19. The Tribunal has summarized the natural justice principles that typically operate in the complaint process in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)
20. As long as the appropriate process elements have been followed, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the Record and in the information submitted to the Tribunal in this appeal, the Appellant was

provided with the opportunity required by principles of natural justice to present their position to the Director.

21. The Appellant does not appear to allege that they were denied an opportunity to present their case or respond to the information provided by the Complainant.
22. Accordingly, I find there has been no failure on the part of the Director to observe the principles of natural justice in reaching the Determination.

New Evidence

23. The appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al.*, BC EST # D171/03. The test requires that:
 - (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.

24. I note that in the matter before me, another delegate (“Investigating Delegate”) conducted the investigation into the Complaint and issued an investigation report to the parties (“Investigation Report”). The Investigation Report was issued to the parties on August 30, 2023, and the parties were given an opportunity to respond to any of the information set out therein.

25. With respect to the information identified as missing by the Appellant in this appeal, and the information they now seek to submit, the Investigating Delegate noted the following:

Mr. Sanghara stated the Complainant worked his last day on August 12, 2022, on which he returned shortly after 2:00PM and called Mr. Sanghara around 4:00-4:30PM to tell him he could not find the wash soap and brush. The Complainant mentioned it would take him until nightfall to wash the truck and Mr. Sanghara asked him why he waited until then to call him and why the wash would take that long. Mr. Sanghara stated the Complainant told him he was hungry and it was too hot to start earlier. (p. IR.9)

The Respondent provided the dispatch notes for each day except July 28, August 4, 8, 11 and 12, 2022. The Employer stated the missing dispatches were likely done by phone. (p. IR.10)

The Sancat tickets were verified by the Respondent by using the site cameras and the hours were further corrected. Mr. Sanghara stated all submitted sheets were reviewed, verified and the hours corrected as per the yard video cameras. (p. IR.10)

26. While the Appellant responded to the Investigation Report with a “closing statement,” that response did not dispute the absence of the dispatch notes identified, and only made reference to the unavailability of surveillance evidence due to the passage of time, and suggesting “if we were notified last year when Mike

had filed with your office and there would of been documented proof of his actual arrivals and departures from the yard that would clearly show the inaccuracies with his pre trip and post trip inspection reports, Aug.10, & 11th falsified times.”

27. Although the Appellant seeks to provide screen shots of text messages they say are responsive to the dates for which information was missing, they provide no reasons why that information was not available or otherwise could not have been provided at the time the Determination was made.
28. Further, although the Appellant says surveillance evidence demonstrates that the Complainant was absent for a period of time when the Delegate concluded he had been working, such evidence has not been submitted, and the Appellant’s assertion that the evidence exists is inconsistent with their earlier statements that it was no longer available.
29. For these reasons, I am not persuaded the test for new evidence has been met and I decline to remit the matter back for redetermination on this basis.

CONCLUSION

30. For all of the foregoing reasons, I dismiss the appeal under section 114(1)(f) of the *ESA* as having no reasonable prospect of success.

ORDER

31. Pursuant to section 115(1) of the *ESA*, I confirm the Determination dated October 23, 2023, together with any further interest that has accrued since the date of issuance.

Ryan Goldvine
Member
Employment Standards Tribunal