Citation: 663584 B.C. Ltd. (Re)
2024 BCEST 28

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

663584 B.C. Ltd. carrying on business as Select Hair Design

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/189

DATE OF DECISION: March 21, 2024

DECISION

SUBMISSIONS

David J. Taylor — counsel for 663584 B.C. Ltd.

OVERVIEW

1. 663584 B.C. Ltd. carrying on business as Select Hair Design ("Employer") appeals a determination issued by a delegate of the Director of Employment Standards ("Director") on November 27, 2023 ("Determination"), pursuant to section 112 of the *Employment Standards Act* ("*ESA*").

2. Debbie Pedersen ("Employee") filed a complaint with the Director alleging that the Employer had contravened the *ESA* in failing to pay her minimum wage, overtime wages, and statutory holiday pay.

3. A delegate of the Director ("Investigating delegate") investigated the Employee's complaint and issued an Investigation Report ("Report"), which was provided to the parties for response on June 27, 2023. A second delegate ("Adjudicating delegate") reviewed the information produced during the investigation, 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 16, 40, 45/46 and 58 of the *ESA* in failing to pay the Employee wages, overtime wages, statutory holiday pay, and vacation pay under the *ESA*. The Director determined that the Employee was entitled to wages plus accrued interest in the total amount of $8,219.30.

5. The Director also imposed seven $500 administrative penalties for the contraventions of the *ESA* for a total amount owing of $11,719.30.

6. The Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Employer also says that evidence has become available that was not available at the time the Determination was being made.

7. The Tribunal received the Employer's appeal on December 21, 2023. Counsel for the Employer indicated that the appeal was incomplete and sought an extension of time in which to submit additional documentation. The Tribunal granted counsel's request and extended the deadline for providing additional documentation to January 15, 2024.

8. On January 12, 2024, counsel sought disclosure of additional documentation from the Tribunal that he contended were in the possession of the Branch. On January 17, 2024, the Tribunal's Registrar declined to order production of documents, noting that a copy of the section 112 (5) record - that is, the material, including notes made by the Investigating delegate, correspondence to and from the parties, witness statements and documents, that was before the Director at the time the Determination was made - would be provided to the parties in the course of the appeal proceedings. The Registrar advised counsel that if he wished to rely on documents contained in the Record that were not previously disclosed to the Employer, he could make a submission to the Tribunal. No further submissions were received from the Employer.

9. On February 9, 2024, the Director provided the Tribunal and the parties with the record. The Tribunal invited the parties to indicate whether the record was complete after receiving it. Neither party challenged the completeness of that record, and I am satisfied it is complete.

10. Section 114(1) 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 submissions and the record, I found it unnecessary to seek submissions from the Employee or from the Director.

11. This decision is based on the record that was before the Adjudicating delegate at the time the Determination was made, the appeal submission, and the Reasons for the Determination.

FACTS

12. The Employer operates a hair salon in North Vancouver, British Columbia. Khanh Thi (Kim) Le is the sole director of 663584 B.C. Ltd.

13. The Employee began working for the Employer as a hair stylist on October 10, 2000. At the time the Determination was issued, the Employee was still employed by the Employer. Noting that the Employee filed her complaint on November 10, 2021, the Adjudicating delegate determined the first wage recovery period to be November 10, 2020, to November 10, 2021. The Adjudicating delegate also determined there was a second recovery period, from March 31, 2022, to March 31, 2023, based on the finding that the Investigating delegate notified the Employer about the complaint on March 31, 2023.

14. The Employee was paid entirely through commission wages, earning 46% on the services she performed and 10% on products she sold. Although the number of hours the Employee worked was irrelevant to her compensation structure, the parties agreed that the Employer used a clock in and out system at the salon to track the number of hours the Employee worked. While the Employee agreed that the record of hours was accurate, the Employer disputed the accuracy of those hours. The Employer contended that the Employee would leave work after her shift without clocking out, run errands, and return to work to clock out. Although the Investigating delegate asked Ms. Le to provide further evidence or information to support her assertion that the time clock report was inaccurate, Ms. Le refused to do so.

15. The Adjudicating delegate determined that the Employee's principal employment duties were to style hair rather than sell products, and as such, section 37.14 of the *Employment Standards Regulation* ("*Regulation*"; that provision that excluded certain commission salespersons from minimum requirements in the *ESA*) did not apply.

Wages

16. The Adjudicating delegate noted that the Employer's wage statements did not specify that the Employee received any overtime wages or statutory holiday pay. The Employer contended that the Employee received an additional 4% on each paycheque to compensate her for statutory holiday pay. The Employee disputed the Employer's assertion that she was paid statutory holiday pay.

17. The Adjudicating delegate found that the Employer's wage statements did not demonstrate that the Employee was paid statutory holiday pay; rather, he found that the figures merely indicated the services commission amount plus the product commission amount. The Adjudicating delegate determined that the Employee did not receive payment of overtime wages or statutory holiday pay.

18. The Adjudicating delegate noted that although the Employer's wage statements did not explicitly identify the number of hours the Employee worked during each pay period, he inferred that the information was included in one of the fields on the wage statement. The Adjudicating delegate noted that the hours reported in the time clock reports and those appearing in the wage statements were not consistent. The Adjudicating delegate noted the Employer's obligation under section 28 of the *ESA* to maintain a record of days and hours worked by all employees, and determined that the time clock report, retained by the Employer, was a contemporaneous record of the hours worked by the Employee. The Adjudicating delegate rejected the Employer's argument that its own record of the Employee's hours of work was unreliable, noting that not only was the Employer's argument unsupported by any evidence, it was also improbable:

> I find it unreasonable to believe that the Employer would require its employees to clock in and clock out for work every day and would also fail to notice or address an employee repeatedly clocking out an hour and half late (sic), as the Employer alleged occurred. The hours shown in the wage statements are inconsistent with the time clock reports and fail to clearly identify that they are recording hours. (at p. R7)

19. The Adjudicating delegate determined that the time clock reports were reliable and the best evidence of the Employee's days and hours of work. The Adjudicating delegate also noted a "significant discrepancy" in the time clock records and the wage statements for four pay periods, where the time clock records showed that the Employee did not work any hours between August 13 and September 30, 2022, which was directly contradicted by the wage statements. For these four periods, the Adjudicating delegate determined that the time clock records were unreliable, and the best evidence was the wage statements. The Adjudicating delegate determined that, for the pay periods between August 11 and October 10, 2022, the Employee worked 88 hours for each of the pay periods.

20. The Adjudicating delegate determined that the Employee was not paid for a minimum of two hours on two days, December 13, 2020, and October 21, 2021, contrary to section 34 of the *ESA.*

21. The Adjudicating delegate determined that there were several pay periods for which the Employee had not been paid at least the minimum wage and that the Employee was entitled to regular wages in the amount of $1,894.84.

22. The Employer agreed that the Employee was never paid any overtime wages, contending that the Employee was not owed overtime wages and that her commission wages adequately compensated her for any overtime wages she might have been entitled to.

23. The Adjudicating delegate determined that the Employee worked more than 8 hours in a day or 40 hours in a week on multiple occasions during the recovery period, which he calculated to amount to $2,607.32.

24. While the Adjudicating delegate determined that the Employer paid the Employee vacation pay, the calculation of that vacation pay was inaccurate, as it represented slightly less than 6% as required under

the *ESA*. The Adjudicating delegate determined that the Employee was owed an additional $303.63 in vacation pay.

25. The Adjudicating delegate determined that the Employee was entitled to statutory holiday pay for all days in the recovery period, in the total amount of $2,902.30.

ARGUMENT

26. The Employer contends that the Adjudicating delegate:

- erred in law in determining credibility of the parties without a hearing and without interviewing both the Employer and the Employee;
- erred in law in failing to properly calculate the appropriate "recovery periods"; and
- erred in law in making "egregious errors in finding of fact," took into account irrelevant matters and failing to consider relevant matters respecting "almost all of the issues" in the Determination.

ANALYSIS

27. 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, 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.

28. 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.

29. Although the Employer indicated that evidence had become available that was not available at the time the Determination was being made as a ground of appeal, there is nothing in the appeal submissions that identifies any new evidence, nor is there any reference to it in counsel's written submissions. Counsel's submissions in this respect are that "the Director did not take into account or properly interpret available

evidence in making the Determination." I will address this argument below under the first statutory ground of appeal.

Failure to observe the principles of natural justice

30. 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. The Employer appears to suggest that the Director failed to observe the principles of natural justice by not affording the parties the right to an oral hearing.

31. Section 76 of the *ESA* grants the Director the discretion to decide the process by which a complaint will be determined. The Director's exercise of discretion in selecting the process cannot be interfered with unless it is found to contravene a legal principle. (see the *Director of Employment Standards and Sarmiento* BC EST # RD082/13) The Employer has not alleged any error in the exercise of the Director's discretion in this case.

32. Furthermore, the Tribunal has repeatedly stated that there is no absolute right to an oral hearing even where issues of credibility are at issue (see *D. Hall and Associates Ltd. v. Director of Employment Standards* (2001 BCSC 575), *J. C. Creations Ltd. o/a Heavenly Bodies Sport,* BC EST # RD317/03)

33. The Employer contends that the Director erred in failing to properly assess the credibility of the parties. Credibility assessments are within the purview of the Adjudicating delegate, and I am not prepared to interfere with the Adjudicating delegate's assessment of the information before him in the absence of any compelling basis to do so.

34. The Employer has a statutory obligation to maintain a record of an Employee's hours of work pursuant to section 28 of the *ESA*. It is not the Employee's obligation to ensure that those records are complete and accurate, as counsel for the Employer seems to suggest.

35. I am also not persuaded that the Adjudicating delegate erred in "fail[ing] to properly and fairly assess the conduct of the employee in wrongfully recording time when she was not working...". There was no evidence before the Adjudicating delegate that the Employee was "wrongfully recording time." Although the Employer suggested that this time clock was inaccurate and could not be relied upon, she declined or refused to provide any further information or evidence supporting her assertion. The record discloses that after Ms. Le alleged that the Employee did not work the hours she recorded, the Investigating delegate emailed her as follows:

> I understand your position is that [the Employee] does not 'work' the hours she claims, however my assessment of this dispute has been delivered based on the records you have provided. During our phone call yesterday you repeatedly explained that you had evidence to prove [the Employee] works less hours than what is represented by the records you provided however, when asked, you did not want to provide this evidence. As I explained yesterday I would be happy to review this evidence if it were to be provided.

36. The only other evidence of the Employee's hours of work consisted of pay records, again provided by the Employer. It is difficult to understand, considering this evidence, the basis for the Employer's argument that the Adjudicating delegate erred in assessing the credibility of the parties. The Adjudicating delegate's task, having two sets of records provided by the Employer, was to resolve the discrepancies between

them, not to assess the credibility of any oral evidence provided by the parties. I am not able to find any reviewable error on the part of the Adjudicating delegate. While it is the case that the Adjudicating delegate relied on the time clock record as being the best evidence, where that record conflicted with wage statements on four separate pay periods, the Adjudicating delegate found the wage statements to be the most reliable. While unusual, I find no reviewable error in the Adjudicating delegate's analysis of documentation provided by the Employer to determine the Employee's wage entitlement.

37. The Employer further argues that the Adjudicating delegate erred in relying on "findings made by an investigating delegate" and by "failing to make it clear to the Employer that the investigation report stage may be the last opportunity for the Employer to participate in the process before a Decision was made." Counsel for the Employer contends that the Employer "understood and believed that after the investigation report there would be a further process which would involve further investigation and opportunity to provide information and evidence to the adjudicator."

38. The Report was provided to the parties on June 27, 2023, along with a covering letter that indicated to the parties that if they wished to respond, they were to do so by July 11, 2023. The covering letter continued "This report and any responses made by the parties will be considered in making a final determination regarding the complaint."

39. There is nothing in the correspondence to the Employer that indicated that there would be a "further investigation" followed by a "further opportunity to provide information and evidence."

40. I find no basis for concluding that the Adjudicating delegate failed to observe the principles of natural justice.

Error of Law

41. 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),* 1998 CanLII 6466 (BC CA):

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.

42. 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.

Wage Recovery period

43. The Employer argues that the Adjudicating delegate erred in calculating the recovery period. Counsel submits that the recovery period is limited from November 10, 2020, until November 10, 2021.

44. Section 80(1) of the *ESA* provides that the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning

> (a) in the case of a complaint, 12 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 12 months before the director first told the employer of the investigation that resulted in the determination...

45. The Tribunal's leading decision on the wage recovery period is that of *Gulf Coast Materials Ltd.* (BC EST # RD123/09), a reconsideration decision of BC EST # D077/09 ("original decision"). The reconsideration Panel upheld the Tribunal member's original decision that section 80 did not limit a complainant to a maximum of what, at that time, was a wage recovery period of six months' wages. The reconsideration Panel adopted the Tribunal member's conclusion that, in the case of an ongoing employment relationship there was:

> …no sensible reason for requiring the employee to file another complaint and for successive determinations to be issued each limited to a 6-month post-complaint interval. Such a process seems needlessly bureaucratic and not at all in keeping with the stated purpose of the *Act* to promote fair and efficient dispute procedures (section 2(d)). It should also be noted that the Director's jurisdiction to investigate a possible unpaid wage issue is not predicated on the existence of a formal complaint (see section 76(2))." (original decision, paragraph 27)

46. The reconsideration Panel determined that the Tribunal member's original decision on the wage recovery period was:

> …consistent with the language found in section 80, consistent with the fundamental statutory obligation on an employer to pay wages to an employee for work performed and consistent with the expressed purposes of the *Act*, with its objectives and with the remedial nature of the legislation. It is the correct decision and reconsideration is both unnecessary and unwarranted. (at paragraph 50)

47. I find no error in the Adjudicating delegate's calculation of the wage recovery period.

Exemption for Commission Salespersons

48. Section 37.14 of the *Regulation* excludes salespersons who are paid entirely or partly by commission from sections 35 and 40, and Part 5 of the *ESA* on the condition that all wages earned by the employee in a pay period exceed the wages that would be payable under those provisions when calculated at the greater of the employee's base rate or the minimum wage.

49. Counsel argues that the Adjudicating delegate incorrectly determined that the Employee was excluded from certain provisions of the *ESA* under section 37.14 of the *Regulation*. Counsel for the Employer contends that the Employee fell within the exemption provisions of section 37.14 because she was selling a hair styling service rather than "providing" a service, as found by the Adjudicating delegate. Counsel for the Employer contends that the Employee was employed primarily to sell services.

50. I note that the Employer never advanced the argument that the Employee was not a commissioned employee. The Adjudicating delegate analyzed whether the Employee was exempt on his own initiative.

It is only on appeal that the Employer, for the first time, contends that the Employee was employed primarily to sell services and should be exempt from the benefits of the *ESA*.

51. As the Tribunal has often stated, as benefits conferring legislation, the *ESA* is to be given a large and liberal interpretation, and regulatory provisions that limit an employee's entitlement to statutory benefits are to be interpreted narrowly. (see, for example, *Nacel Properties Ltd.*, BC EST # D279/02)

52. I find no merit to the Employer's argument. The Employee was a hair stylist. She was not hired by the Employer as a salesperson to sell anything on behalf of the Employer. In fact, the Employer informed the Investigating delegate that the Employee was initially paid an hourly rate and switched to commission wages at some unspecified later date.

Calculation of vacation pay

53. Finally, the Employer contends that the Adjudicating delegate erred in his calculation of the Employee's wages and hours worked. Counsel submits that the Adjudicating delegate "was unable to identify an extra 4% being added to any commission amount" as claimed by the Employer, which was a palpable and overriding error. Counsel points to an annual vacation pay amount calculated at page R5 of the Determination which represents "more than a 4% addition to wages."

54. I find no basis for concluding that the Adjudicating delegate made a factual error. Rather, he simply noted what the Employer's wage statement for a particular pay period indicated the Employee's annual vacation pay to be. This observation was not the Adjudicating delegate's calculation.

55. Counsel further submits that the Adjudicating delegate was "clearly wrong in finding that neither the wage statements nor the commission documents showed that the [Employee] was paid at least an extra 4% above the commissions she earned." I am unable to find that the Adjudicating delegate's analysis or his attempt to reconcile discrepancies in the Employer's records demonstrated any factual errors.

56. In conclusion, I find that the Adjudicative delegate's decision was rationally based on the facts before him, and I find no basis to interfere with the Determination.

57. I dismiss the appeal.

ORDER

58. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115(1)(a) of the *ESA*, the Determination, dated November 27, 2023, is confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal