Employment Standards **TRIBUNAL**

Citation: Roomview Technologies Inc. (Re)
2024 BCEST 32

EMPLOYMENT STANDARDS TRIBUNAL

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

\- by -

Roomview Technologies Inc.

\- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2024/012

DATE OF DECISION: April 9, 2024

DECISION

SUBMISSIONS

Sam Mehrbod on behalf of Roomview Technologies Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* ("*ESA*"), Roomview Technologies Inc. carrying on business as Roomvu ("Employer") appeals a determination issued by a delegate of the Director of Employment Standards ("Director") on December 19, 2023 ("Determination").

2. Marjan Radfar ("Employee") filed a complaint with the Director alleging that the Employer had contravened the *ESA* in failing to pay her overtime wages, statutory holiday pay, vacation pay, and a performance bonus.

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 October 26, 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 Adjudicative delegate determined that the Employer had contravened sections 18, 40, 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 $14,822.00.

5. The Director also imposed five $500 administrative penalties for the contraventions of the *ESA* for a total amount owing of $17,322.00.

6. The Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

7. On February 22, 2024, the Director provided the parties with the record. On March 5, 2024, the Tribunal invited the parties to indicate whether the record was complete. Neither party challenged the completeness of that record, and I am satisfied it is complete.

8. 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 the Director.

9. 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.

THE DETERMINATION

10. The Employer operates a social media services business for realtors in Vancouver, British Columbia. Sarmad Mehrbod is one of the two directors of the Employer, which was incorporated in British Columbia in February 2016.

11. The Employee worked for the Employer as a data scientist from June 29, 2020, until April 30, 2021. The Employee earned an annual salary with the opportunity to earn an annual performance bonus based on quarterly key performance indicators (“KPIs”), which were determined by the Employer.

12. The Employee contended that, although Mr. Mehrbod told her that the KPIs would be easy to meet, no KPIs were ever established for her.

13. The Investigating delegate attempted to obtain information about the Employee’s KPIs from the Employer on a number of occasions, but the Employer failed to provide that evidence. Instead, the Employer indicated that it was dissatisfied with the Employee’s performance. The Employee contended that the Employer’s dissatisfaction was based on unreasonable expectations and poor management.

14. The Adjudicating delegate determined that the employment agreement between the parties provided that the Employee was entitled to earn a performance bonus by meeting KPIs, and that an employer could not argue that an employee had failed to meet KPIs without having first established, and then clearly communicated, those KPIs to the employee. The Adjudicating delegate found no evidence that the Employer either established KPIs or communicated them to the Employee. The Adjudicating delegate then found that, having failed to establish or communicate the KPI’s to the Employee, the Employer deprived her of the opportunity to earn a bonus. The Adjudicating delegate determined that the Employee was entitled to the contracted performance bonus of $3,000.00, plus vacation pay on that amount.

Wages

15. The employment contract between the parties provided that the Employee was expected to work 40 hours per week. The Adjudicating delegate found that the Employee was entitled to overtime wages for hours worked over eight hours a day or 40 hours a week. Neither party maintained a record of the Employee’s hours of work. The Employer also did not provide the Employee with a written wage statement on each payday setting out her hours of work and wage rate, contrary to section 27 of the *ESA*.

16. The Employee’s evidence was that she regularly worked overtime hours, starting at 9:00 a.m. and finishing at 6:00 p.m., although she asserted that approximately twice a month she would start work at 8:00 am and sometimes did not finish until 7:00 or 8:00 p.m. She worked from the company office twice per week, and because Mr. Mehrbod’s office had glass walls and he was often in the office, he was aware she often worked until 6:00 p.m. or later. On one occasion, she had to leave work at 4:30 p.m. and Mr. Mehrbod told her that because she was leaving work an hour and a half early, she had to make up the time on the weekend.

17. The Employer disputed the Employee’s claim, taking the position that because the Employee worked entirely from home, Mr. Mehrbod could not know what hours she worked.

18. The Adjudicating delegate found the Employer's response to be "insufficient," stating:

> An employer is responsible for an employee's actions while they are performing work for the employer. Pursuant to section 28 of the Act, an employer has the obligation to create and maintain records of employees' hours of work. [The Employer] failed to do so. Having failed to take any steps to track [the Employee's] hours of work while she was employed, [the Employer] cannot now argue that she is not owed wages simply because it is unable to verify her hours of work.

19. The Employee asserted that employees communicated with Mr. Mehrbod and each other through a group chat, with employees routinely posting in the group chat about what they had accomplished each day. The Employee contended that the group chat demonstrated that employees regularly worked overtime hours, but because she was removed from the group chat when her employment was terminated, she was unable to access those conversations to support her assertions. The Employer did not submit any evidence of the group chats, nor did it provide an explanation for its failure or inability to do so.

20. The Employer took the position that employees were not permitted to work overtime hours, a prohibition which was included in the employee handbook. The Employee contended that she received her instructions from Mr. Mehrbod directly and had no other supervisor or manager, and that she worked overtime hours because that is what was expected of her in light of Mr. Mehrbod's deadlines and expectations. Mr. Mehrbod denied that he gave the Employee permission to work overtime and offered three employees to provide evidence to dispute the Employee's claims. All three witnesses conceded that they had no personal knowledge whether the Employee worked overtime hours. Two of the three witnesses indicated that employees worked overtime hours. During the interviews of those two witnesses by the Investigating delegate, Mr. Mehrbod interrupted the witnesses and according to the Adjudicating delegate, "attempted to recharacterize their testimony, after which both witnesses walked back their statements." The Adjudicating delegate stated that she "drew a negative inference from Mr. Mehrbod's behaviour in these interviews" and concluded that the Employer's employees did indeed work overtime hours for which they were not compensated.

21. The Adjudicating delegate found that the Employee worked overtime hours, and that the Employee's estimate of her hours worked was the best evidence before her. The Adjudicating delegate determined that the Employee typically worked 9 hours per day, five days a week, and that twice a month she worked 10 hours per day.

22. The Employee submitted a screen shot of a message exchange between herself and Mr. Mehrbod in which the Employee communicated that she worked eight hours on July 4, 2020, to complete some tasks that Mr. Mehrbod had assigned some employees to perform the previous day and had not been completed. Mr. Mehrbod's response was that the work hours were difficult to verify and since human resources had recorded zero hours, the matter would be resolved by him paying her for four hours of work.

23. The Adjudicating delegate determined that Mr. Mehrbod's response was "wholly insufficient":

> [The Employee] was reporting her hours worked directly to [Mr. Mehrbod]. There is no suggestion anywhere in the evidence that [the Employee] was required to report her hours worked to someone other than Mr. Mehrbod, or that the human resources department would have had more accurate records of [the Employee's] hours worked than [the Employee] herself. If Mr. Mehrbod believed [the Employee] was lying about having worked eight hours, he had an obligation to investigate further. If Mr. Mehrbod did not want employees to work on the

> weekends at all, he had an obligation to explain that to [the Employee.] He did neither. It appears that [the Employer] was content to receive the benefit of [the Employee's] eight hours of work, but simply chose to pay her for only half of it.

24. The Adjudicating delegate determined that the Employee worked eight hours on July 4, 2020.

25. The Employee also contended that she worked four hours on Christmas Day, and informed Mr. Mehrbod of this fact but was never paid for it.

26. The Employer contended that it never authorized employees to work on statutory holidays. The Adjudicating delegate preferred the Employee's evidence and determined that she was entitled to wages for fours on that day.

27. The Employer did not provide wage statements or payroll records for the Employee, submitting instead three statements from CRA's Payroll Deductions Online Calendar, and the Employee's record of employment (ROE). The Adjudicating delegate determined, based on these records, that the Employee was not typically paid vacation pay on each paycheque. Based on the Employee's statement that she took all the vacation time she was entitled to in 2020 but none in 2021, the Adjudicating delegate determined that she was entitled to vacation pay on all wages earned in 2021.

28. The Employee contended that she was told that her final cheque contained vacation pay, but the accompanying statement did not contain a wage breakdown. The Adjudicating delegate determined that the Employer had paid the Employee's full vacation entitlement.

ARGUMENTS

29. The Employer contends that the Investigating delegate failed to observe the principles of natural justice. Specifically, the Employer alleges that "claims pivotal to the investigation outcome" were not disclosed to the Employer prior to the hearing of the Employer's witnesses. In particular, the Employer contends that the Employee's assertion that she routinely departed from the office premises after 7 p.m., was "verifiably inaccurate." The Employer further argues that the Employee's contention that she received messages instructing her, in essence, not to leave the office until her work was completed, lacked substantiation. Finally, the Employer argues that the Employee's assertion that management insisted she work on a weekend to compensate her request to leave earlier one day was also unsupported by any corroborating evidence.

30. The Employer argues that the Adjudicating delegate's acceptance of the Employee's claims "without proper substantiation" unduly influenced the Determination, and the failure of the Investigating delegate to provide the Employer with the opportunity to address the allegations contravened the principles of natural justice.

31. The Employer also argues that the Adjudicating delegate "presupposed" a standard nine-hour workday without any evidence. The Employer submits that the Employee's tasks and workload varied. While the Employer acknowledged the application of the "best evidence rule," Mr. Mehrbod argues that the Adjudicating delegate erred by relying exclusively on the Employee's assertions without considering the best evidence rule's emphasis on tangible evidence. The Employer points out that the Employee Handbook sets out the process for seeking approval for working overtime hours and contends that the

Adjudicating delegate's findings regarding the Employee's evidence lacked fairness. The Employer contends:

> [The Employer] asserts the inherent difficulty in substantiating negative claims without sufficient evidence to the contrary. The reliance on vague communications and absence of a comprehensive record underscores the ambiguity of the Determination's finding. Recognizing the imbalance in the burden of proof, the company urges the Employment Standards Tribunal to uphold the principle of equitable treatment. By critically evaluating the evidentiary standards and considering the practical challenges faced by the employer, the tribunal can ensure a just and impartial resolution that respects the rights and responsibilities of both parties involved.

32. The Employer further contends that the Adjudicating delegate erred in law in calculating the Employee's entitlement to vacation pay by $125.42, bringing into question all of the Adjudicating delegate's calculations.

33. Finally, the Employer argues that the Adjudicating delegate improperly assessed administrative penalties, arguing, in essence, that the assessment of cumulative penalties for sections 28 and 40, and sections 28 and 46 amount to "double jeopardy" and seeks "a proportional mitigation of the penalties to $500…." The Employer also contends that the Adjudicating delegate wrongfully assessed an administrative penalty under section 18 for the Employer's failure to pay all wages owing to an employee within 48 hours after the employer terminates the contract arguing that the Employer paid all wages owing within 48 business hours noting that the termination occurred on a Friday.

ANALYSIS

34. 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;
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> (b) the appeal was not filed within the applicable time limit;
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> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
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> (d) the appeal was made in bad faith or filed for an improper purpose or motive;
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> (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
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> (f) there is no reasonable prospect that the appeal will succeed;
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> (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.

35. 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.

36. The burden is on an appellant to substantiate the grounds of appeal. An appeal is not an opportunity to re-argue a case that has been advanced before the Director. I find that in many respects, the Employer's arguments are simply a repetition of the submissions made to the Director.

Failure to observe the principles of natural justice

37. 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.

38. 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.

39. The Employer contends that the Director failed to observe the principles of natural justice by not disclosing three specific details of the Employee's claims – that she routinely left the office after 7 pm despite the office central locking system closing at 6 pm; that she received messages instructing her that her work was not finished until she had completed her tasks for the day; and that management insisted that she work on a weekend to compensate for her request to leave earlier for one day – prior to the hearing of the Employer's witnesses. The Employer contends that the Adjudicating delegate's "acceptance of these claims as truth without proper substantiation" influenced the investigation's outcome.

40. It is difficult to understand the Employer's argument in this respect. The assertion appears to be that the Employer's witnesses would have been able to respond to these three specific allegations. Given that those employees stated they had no knowledge of the Employee's hours of work, it is unclear how they could have. Certainly, there is nothing to suggest that the other employees would have had access to communications between the Employee and Mr. Merhbod regarding the completion of her tasks. Furthermore, if the Employer had records of the office central locking system to disprove her claims, Mr. Mehrbod ought to have presented that information to the Investigating delegate during the investigation.

41. Finally, the Report was provided to the Employer on October 26, 2023, asking the parties to review the report carefully and that if they wished to respond, they were to do so by November 6, 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." The Report clearly outlined the Employee's complaint, including details regarding her hours of work and these three specific allegations. Although the Employer had a further opportunity to provide evidence disputing the Employee's claims, there is nothing in the record that indicates the Employer responded to the Report.

42. I find no basis to conclude that the Adjudicating delegate failed to observe the principles of natural justice.

Error of Law

43. 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 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.

44. 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.

45. The Employer argues that the Adjudicating delegate erred in finding that the Employee's evidence was the best evidence of her hours of work.

46. The Employer has a statutory obligation to maintain a record of an Employee's hours of work pursuant to section 28 of the *ESA*. The Employer did not meet its statutory obligation in this respect. The Employee also did not keep a contemporaneous record of her hours of work. The Adjudicating delegate's task was to determine, based on all of the evidence, what the Employee's hours of work were. According to the Determination, the Employee contended that the "group chats" would contain evidence of her work hours but that, because she was no longer an employee, she no longer had access to that information. The record indicates that the Employer failed or refused to disclose evidence of those group chats which could have disproved the Employee's claims, when asked to do so. The Employer's witnesses conceded they had no information about the Employee's hours of work. The Adjudicating delegate determined that the Employee's evidence was most reliable.

47. I find no reviewable error in the Adjudicating delegate's analysis of the evidence or conclusions. In my view, her findings were rationally supported by the evidence before her.

48. I note the Employer's argument, which it also made to the Investigating delegate, that its Employee Handbook established guidelines for overtime work, and that all employees were obliged to take certain steps before engaging in overtime hours. The record shows that, at least by July 6, 2020, the Employer was aware that the Employee was working overtime hours, as evidenced by a text message between Mr. Mehrbod and the Employee. That evidence was disclosed in the Report, which the Employer did not respond to.

49. I agree with the Adjudicating delegate's conclusion that the Employer had the obligation to control the Employee's hours of work and failed to do so. I also agree with the Adjudicating delegate that there was no evidence that the Employer investigated any of the Employee's claims for overtime work if the Employer disbelieved her reporting.

Performance Bonus

50. The Employer contends that the Adjudicating delegate erred in her determination that the Employee was entitled to a performance bonus. Mr. Mehrbod states that the primary reason the Employee was terminated was because of unsatisfactory performance and that “there was a high probability that the potential bonus would not have been earned at all.” This is the same argument the Employer advanced before the delegates. The issue addressed by the Adjudicating delegate was not whether the Employer had just cause to terminate the Employee for performance-related issues, but whether the Employee could rely on a clause of the employment contract which purported to offer the Employee the opportunity to earn a bonus. In essence, the Adjudicating delegate found the clause to be vague and imprecise, as it did not contain any clear performance indicators. Although the Adjudicating delegate did not expressly state as much, I infer that she construed the terms of the contract against the Employer, who drafted the contract, in finding the Employee was entitled to the bonus. I find no error of law in the Adjudicating delegate’s conclusion in this respect, nor in her calculation of the amount of the bonus.

Vacation Pay

51. The Employer submits that the Adjudicating delegate erred in calculating the Employee’s vacation pay. Although the Adjudicating delegate found no additional vacation pay was owed on wages, she determined that 4% vacation pay was owed on the unpaid performance bonus, and $5.42, or 4% vacation pay on the wages the Employee was entitled to for working Christmas Day. I find no factual error in the Adjudicating delegate’s calculation of the Employee’s entitlement to vacation pay.

Administrative Penalties

52. The Tribunal has considered the perceived unfairness in the imposition of mandatory penalties for each contravention of the *ESA* on many occasions. In *537370 B.C. Ltd.* (BC EST # D011/06) the Tribunal determined that penalty assessments can only be cancelled in circumstances amounting to bad faith or abuse of process. As I am not persuaded that the Adjudicating delegate’s finding that the Employer contravened each of the five provisions of the *ESA* to be in error, I find no reason to either cancel or “mitigate” the penalty amounts.

53. Finally, the Adjudicating delegate determined that the Employee was entitled to wages (the performance bonus), which provides the foundation for the section 18 administrative penalty. I find no basis to cancel that penalty assessment.

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

55. I dismiss the appeal.

ORDER

56. Pursuant to section 114(1)(f) of the *ESA*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *ESA*, the Determination, dated December 19, 2023, is confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal