Citation: Renbo Capital Inc. (Re)
2024 BCEST 9

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Renbo Capital Inc. aka Canadian Safe-Step Tubs Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/135

DATE OF DECISION: January 26, 2024

DECISION

SUBMISSIONS

Chris Forguson	counsel for Renbo Capital Inc.
Chris D. Drinovz	counsel for Cynthia Leonard
Shannon Corregan	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Renbo Capital Inc. aka Canadian Safe-Step Tubs Inc. ("Employer") of a decision of a delegate of the Director of Employment Standards ("Director") made on August 9, 2023 ("Determination").

2. On May 16, 2020, Cynthia Leonard ("Employee") filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (*"ESA"*) in failing to pay her wages, vacation pay and statutory holiday pay, and in terminating her employment by substantially altering her conditions of employment. She later withdrew the complaint as it related to the termination of her employment and unpaid wages, electing to pursue those claims through a civil action. Remaining at issue was the Employee's entitlement to vacation pay and statutory holiday pay.

3. A delegate of the Director ("Investigating delegate") investigated the Employee's allegations and on December 28, 2022, issued an Investigation report which was provided to the Employee and the Employer for response. A second delegate ("Adjudicating delegate") reviewed the Investigation report, the responses of the Employer and the Employee to the Investigative report as well as additional responses to the supplemental information before issuing the Determination.

4. The Adjudicating delegate found that the Employer had contravened section 58 of the *ESA* in failing to pay the Employee annual vacation pay and determined that the Employee was entitled to the total amount of $202,096.09, including accrued interest. The Director also imposed a $500 administrative penalty for the Employer's contravention, for a total amount payable of $202,596.09.

5. The Employer appeals the Determination on the grounds that the Director erred in law.

6. 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 submissions, I sought submissions from the Director and the Employee.

7. This decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the submissions of the parties, and the Determination.

ISSUE

8. Whether the Employer has established grounds for interfering with the Director's decision.

BACKGROUND AND ARGUMENT

9. The Employer operates a bathtub sales business in Burnaby, British Columbia. The Employee was initially employed either as an employee or an independent contractor as the Director of Sales and Director of Sales & Marketing on October 8, 2008. At some point before September 2, 2016, the Employee became an employee and was paid entirely by commission. The Employee last worked on May 11, 2020, and filed her complaint on May 16, 2020. She resigned on September 30, 2020.

10. In considering the Employee's claim for vacation pay, the Adjudicating delegate noted that sections 57 and 58 of the *ESA* set out an employee's vacation entitlement, with section 57 establishing an obligation on an employer to provide vacation time and section 58 requiring an employer to pay an employee vacation pay.

11. The parties' September 22, 2016, employment agreement provided for vacation as follows:

> **5.1 Vacation**
>
> The Executive will be entitled to four (4) weeks in each calendar year (pro rata in any partial year) to be taken at such times as are reasonably agreed to by the Corporation and the Executive. Vacation entitlement that has been earned but not taken by the Executive in a given year can be carried over from year to year.
>
> **5.2. Vacation in the Event of Termination**
>
> If the Executive resigns or the Executive's employment is terminated for any reason, any vacation accrued but not taken to the last date of active employment or the date on which the Executive ceases to provide services will be paid to the Executive by the Corporation based on the Compensation then in effect.

12. The Employer took the position that the employment agreement only provided for vacation time and was silent on the issue of vacation pay. The Adjudicating delegate disagreed. She found that clause 5.1 made no reference to vacation time, referring only to vacation or "vacation entitlement," and used the language of "weeks." She found that, when viewed on its own, it was unclear whether clause 5.1 referred to vacation time alone, or both vacation time and vacation pay. The delegate also found that clause 5.2 referred to vacation being "paid," which referred to vacation pay, not vacation time. She wrote that it was difficult to understand why the contract would set a deadline for payment of vacation pay if it did not contemplate vacation pay being earned. The delegate further noted that vacation time and vacation pay entitlements.

> …are typically harmonious with one another. It is unusual and unintuitive for an employer to give an employee four weeks' vacation *time* but only two weeks' vacation *pay*. If the parties had intended to agree to such an unconventional arrangement, one might expect that they would have clarified these details in the Contract.
>
> In my view, a reasonable person would interpret clauses 5.1 and 5.2, when read together, to mean that Ms. Leonard was entitled to four weeks' vacation *time* and four weeks' vacation *pay*,

> that any vacation *time* and *pay* earned but not taken in a calendar year could be carried over from year to year, and that any vacation *pay* accrued but not taken at the time of termination would be paid to her.
>
> (Determination pp. R4) [emphasis in original]

13. The Adjudicating delegate further noted that the Employee's wage statements showed that the Employer began paying 8% vacation pay on September 17, 2016. Although the Employer contended that this was a mistake, the Adjudicating delegate did not find this assertion compelling. She found it highly significant that the Employer began paying the Employee 8% vacation pay during the same month in which the employment agreement entitling her to four weeks' vacation time, was signed. The Adjudicating delegate also noted that the vacation pay earned by the Employee in the autumn of 2016 was not paid out until July 2017 at the Employee's express request. The Adjudicating delegate noted that one of the Employer's directors was copied on correspondence with accounting staff discussing how to pay out the Employee's vacation pay and what the accounting implications would be. The Adjudicating delegate determined that the decision to pay out the Employee's vacation pay was "deliberate and intentional."

14. The Adjudicating delegate concluded that the parties agreed that the Employee would earn 8% vacation pay, that she would be able to carry this vacation pay forward from year to year, and that she would be paid out all accrued vacation pay upon termination.

15. On July 27, 2017, the Employer corresponded with the Employee regarding her entitlement to vacation as follows:

> ….
>
> In accordance with BC Employment Standards, you are entitled to vacation pay. As per your contract, you receive 8% vacation pay, paid out in its entirety, bi-weekly.
>
> ….

16. The Adjudicating delegate determined that this letter was evidence that the Employee was already earning 8% vacation pay in accordance with the contract rather than, as the Employer argued, that the letter introduced the 8% vacation pay entitlement. The letter further indicated that the Employee's vacation pay would be calculated and paid out as a portion of her commission payment and that her bi-weekly wages were paid out as commissions of 2.315% and vacation pay of 8%. The Adjudicating delegate determined that his approach was contrary to the *ESA,* based on the Tribunal's decision in *Brandt Tractor* (BC EST # D066/13, upheld on reconsideration BC EST # RD042/17). The Adjudicating delegate wrote that the Tribunal determined that an employer could not incorporate vacation pay with a commission structure as an all-inclusive amount; rather, vacation pay had to be paid *in addition to* the employee's total commissions earned. [emphasis in original]

17. The Adjudicating delegate determined that, according to the contract, the Employee was to earn commission wages of 2.5%, and that any vacation pay earned was to be calculated *in addition to* that amount, not as a part of it. [emphasis in original]

18. The Adjudicating delegate determined that the Employer paid the Employee's commissions in full, but did not pay her vacation pay.

19. After determining that the Employee's recovery period was September 30, 2019, to September 30, 2020, the Adjudicating delegate found that although section 58 of the *ESA* specifies when vacation pay is earned and becomes payable, the parties agreed that the Employee's vacation pay could accrue from year to year if it was not paid out in a given year. She determined that simply because the Employer stopped reflecting vacation pay on the Employee's wage statements did not mean that she ceased being entitled to vacation pay; rather, the Adjudicating delegate concluded that the Employer "chose to cease fulfilling its obligations under the [employment agreement]."

20. The Adjudicating delegate concluded that, according to the terms of the employment agreement, the Employee's vacation pay did not become payable until the termination of her employment.

21. Identifying the dispute as not the amount of vacation pay agreed to but whether the parties agreed that vacation pay would be carried over from year to year, the Adjudicating delegate found that any vacation pay the Employee earned prior to September 22, 2016, became payable prior to the recovery period (September 30, 2019 – September 30, 2020) and could not be recovered in the Determination.

22. The Adjudicating delegate determined that, as of October 29, 2016, the Employee had earned $5,999.19 in vacation pay, which she received in July 2017. However, the Adjudicating delegate determined that after October 29, 2016, vacation pay no longer appeared on the Employee's wage statement and she was not paid any vacation pay earned after this date. The Adjudicating delegate calculated the amount owing based on wage statements for the balance of the 2016 year and T4 statements for the years 2017 through 2020.

23. The Adjudicating delegate determined that the Employee was not entitled to statutory holiday pay. This aspect of the Determination has not been appealed.

ARGUMENT

24. The Employer does not dispute the Adjudicating delegate's interpretation of the employment agreement or her finding regarding the July 27, 2017, letter. It also does not dispute that the Employee is entitled to vacation pay. The Employer contends that the Adjudicating delegate erred in law in calculating both the amount owed as vacation pay as well as the period for which vacation pay is owing. The Employer contends that both calculations are based on an unreasonable view of the facts.

25. The Employer submits that although the Adjudicating delegate found as a fact that the Employee was entitled to vacation pay based on 8% of her wages, in fact the Adjudicating delegate presumed that the September 22, 2016, employment agreement was enforceable. The Employer submits that the Adjudicating delegate erred in "[relying] solely on the [employment agreement] to enforce a term in the [employment agreement] which purports to permit the [Employee] to accrue vacation pay from year to year to be paid out upon termination of employment."

26. The Employer argues that the Employee expressly denied the enforceability of the employment agreement, and at the time she was pursuing the *ESA* complaint, she was also pursuing a civil claim for constructive dismissal and vacation pay in which she took the position that her vacation entitlement was based on 6% of her wages, "consistent with the [Employee's] disavowal of the [employment agreement]."

27. The Employer submits that by pleading the unenforceability of the employment agreement in the civil action and affirming that position before the Director, it was not open to the Adjudicating delegate to find a valid employment agreement.

28. The Employer further argues that while it was possible for the Adjudicating delegate to find, as a matter of fact, that the employment agreement was enforceable despite the Employee's denial that it was, the Adjudicating delegate was obliged to clearly set out her reasons for so doing. The Employer contends that the Adjudicating delegate's failure to do so, including setting out the parties' positions regarding the validity of the employment agreement, constitutes an error of law.

29. Finally, the Employer argues that the Adjudicating delegate's failure to make a finding of fact regarding the Employee's first day of employment constitutes an error of law. The Employer argues that the Adjudicating delegate's failure to do so has an impact on what vacation pay was payable during the recovery period, as the recovery period begins 12 months prior to the earlier of the date of the complaint or the termination of the employment. [emphasis in original] The Employer asserts that because the Employee filed her complaint on May 16, 2020, which was before the termination of her employment, the recovery period should commence May 16, 2019.

ANALYSIS

30. 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.

31. 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;
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.

32. 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.

33. I am not persuaded that the Adjudicating delegate acted on a view of the facts which could not be reasonably entertained.

34. There was nothing before the Adjudicating delegate to establish that the September 22, 2016, employment agreement was unenforceable or that the Employee had "disavowed" it. While the Employee's pleadings in the civil claim were before the Adjudicating delegate, pleadings are argument, not evidence, with the facts to be decided following a trial. Consequently, the Director was entitled to presume that the contract was enforceable based on the evidence before her. In any event, as the Employee submits, pleadings may, and often do, advance inconsistent positions in an alternative pleading, all of which is permissible under the Supreme Court *Civil Rules*. I am not persuaded that the Adjudicating delegate erred in failing to set out reasons for finding the employment agreement enforceable. In light of my conclusion that the Adjudicating delegate did not err in finding the contract enforceable, it is not necessary to address the Employer's argument regarding the recovery period as any vacation pay did not become payable until the termination of her employment.

35. The Employer contends that the Employee should be estopped from taking contradictory positions regarding the enforceability of the employment agreement in the civil action, and the position she took before the Director. The *ESA* is benefits conferring legislation which provides for, among other things, minimum standards and conditions of employment. Although the Employer does not expressly argue that the Employee should be estopped from advancing a claim for vacation pay before the Director, the Tribunal has held estoppel cannot operate to impede the application of the *ESA* (*Re B&C List (1982) Ltd.*, BC EST # RD641/01). There are no grounds for finding an error of law on this basis.

36. While the employment agreement was silent on the issue of vacation pay, it did provide for vacation time. The Adjudicating delegate determined the Employee's vacation pay based on a number of documents, including clauses 5.1 and 5.2 of the agreement, payment information confirming that the Employer had paid the Employee 8% vacation pay starting September 2016, internal correspondence, and the July 27, 2017, letter in which the Employer's director acknowledged that the Employee was entitled to 8% vacation pay "as per your contract." The Adjudicating delegate also found that the employment agreement provided that the vacation pay could be carried forward and paid out on termination. The Employer does not dispute the Adjudicating delegate's interpretation of the employment agreement.

37. I find the Adjudicating delegate's conclusion that the Employee was entitled to vacation pay based on 8% of her wages was rationally supported by the evidence before her.

38. I am also not persuaded that there were any palpable or overriding errors in the Determination.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal