Employment Standards TRIBUNAL

An appeal

- by -

Greg Klem
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE No.: 2015A/172

DATE OF DECISION: March 8, 2016

DECISION

SUBMISSIONS

Greg Klem — on his own behalf

OVERVIEW

1. On November 3, 2015, the Director of Employment Standards (the "Director") issued a determination (the "Determination") according to section 79 of the *Employment Standards Act* (the "*Act*"), requiring Don Zappone Contracting Ltd. (the "Employer") to pay to Greg Klem (the "Appellant") wages and accrued interest in the aggregate amount of $860.60.

2. The Director also required the Employer to pay administrative penalties of $1,500.00, for three separate contraventions under the *Act*.

3. The Appellant disagrees with the result, and challenges the Determination on the basis that:

   (a) the Director has failed to observe the principles of natural justice in making the Determination; and

   (b) evidence has become available that was not available at the time the Determination was made,

   both permitted grounds of appeal, respectively under sections 112(1)(b) and 112(1)(c) of the *Act*.

4. On a preliminary basis, I am to consider whether or not part or all of this appeal should be dismissed according to section 114(1) of the *Act*.

5. In doing so, I have reviewed:

   (a) the Determination issued by the Director on November 3, 2015;

   (b) submissions on behalf of the Appellant, received on December 18, 2015; and

   (c) the Director's Record (the "Record").

THE FACTS AND ANALYSIS

6. The Appellant was a short haul truck driver and started working in the Employer's trucking business on August 15, 2014. The Director found that the Appellant's last day of employment was August 28, 2014, although the Appellant maintains that his last day was August 29, 2014.

7. On January 20, 2015, the Appellant submitted a complaint to the Employment Standards Branch seeking payment of outstanding regular wages, overtime, and vacation pay, together with the return of monies that the Appellant contends were improperly and unjustifiably deducted from his wages.

8. The complaint was heard by telephone on May 6, 2015. Although scheduled to commence at 9:00 in the morning, the Appellant did not appear until 11:50, at which point the Director received the Appellant's evidence.

9. In addition to hearing testimony from the Appellant, the Director heard from the Employer's principal owner, and the Employer's bookkeeper. The Director also reviewed approximately eighty-five pages of documents.

10. The Determination, issued six months after the hearing, addresses the Appellant's rate of pay, his hours worked, and the entitlement to overtime:

(a) *Rate of Pay* - The Appellant claimed that he was promised pay at the rate of $35.10 per hour. The Employer said the promised wage was $32.50. The Director found no evidence to support a rate higher than what was paid by the Employer and, consequently, the wage rate was determined by the Director to be $32.50.

(b) *Hours Worked* – Having found that:

(i) the Appellant was not a credible witness, in part because he had admitted to falsifying records;

(ii) each of the Appellant's four sets of records showing hours worked were inconsistent and incongruent with the others and, in the absence of an explanation for several patent discrepancies, unreliable; and

(iii) the Employer's own records were deficient, and equally unreliable,

the Director elected to calculate the Appellant's hours worked using slips issued with respect to truck loads carried by the Appellant (the "Load Slips") in the course of his employment as a truck driver. Using these documents, the Director concluded that the Appellant worked 114.25 hours from August 15, 2014 to August 28, 2014, inclusive. The Director found no reliable evidence that the Appellant had worked on August 29, 2014.

(c) *Overtime* - The Director determined that 22.25 of the 114.25 hours worked qualified as overtime, using the formula provided in section 37.3 of the *Employment Standards Regulation*. This is a mathematical calculation, derived from the Director's determination of hours worked each day, multiplied by the overtime wage rate, being $48.75.

11. On the basis of these findings, the Director calculated that the Employer was liable to pay to the Appellant, for the period from August 15, 2014, to August 28, 2014, inclusive, a total of $4,237.68 on account of gross wages, overtime, and vacation pay.

12. From this amount, the Director deducted gross wages $3,405.36, found to have been previously paid to the Appellant by way of two cheques dated October 2, 2014, and October 23, 2015.

13. The balance due to the Appellant, according to the Director, is $832.32, plus interest.

14. Within this context, I consider the two grounds of appeal now argued by the Appellant, in reverse order.

Section 112(1)(c) - Fresh Evidence

15. The Appellant says that evidence is now available that was not available at the time the Determination was made.

16. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four-part test before exercising any discretion to accept and consider fresh evidence:

> (a) the evidence could not, with the exercise of due diligence, have been discovered or 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.

17. If any one part of the four-part test is not satisfied, an appeal based on "fresh evidence" must fail.

18. In multiple readings of the Appellant's submissions, I am unable to find anything that might reasonably be construed as fresh evidence. (Asking the Tribunal to search Google Maps does not count.) Rather, it appears to me as though the Appellant's submissions are best characterized as a restatement of the same argument he put before the Director. There is nothing to which I can apply the *Davies* test, and nothing in my view which would support an appeal under section 112(1)(c) of the *Act*.

Section 112(1)(b) – Failure to Observe the Principles of Natural Justice

19. The Appellant also appeals on the basis that the Director failed to observe the principles of natural justice.

20. Natural justice requires the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).

21. In his submissions, the Appellant suggests that he was at a disadvantage because medical treatment left him unable to properly state his case. He expresses disbelief that the Director would take the word of the Employer over his own.

22. If the Appellant had a medical issue which adversely affected his participation, he should have sought an adjournment before or on the day of hearing. Absent a request to postpone the hearing, the Director was correct to proceed, and I see nothing in that which would constitute a breach of the principles of natural justice. On the contrary, I find that the Director acted fairly and in good faith, more so than might have been required, considering both the attempts made to contact the Appellant at 9:00 when he failed to show, and considering that his evidence was admitted notwithstanding his appearance one hundred seventy minutes after the appointed start time.

23. In any event, as I read the Determination, the Director very clearly understood the Appellant's argument, which follow very closely those submissions now before the Tribunal. In my view, it is not a medically induced inability to articulate a position that resulted in rejection of the Appellant's claims, but a damaged credibility arising out of the Appellant's admission that he fabricated records, coupled with the Appellant's conflicting and wholly unsatisfactory documentary evidence.

24. It is worth pointing out that the Determination is also critical of the Employer, and in rejecting the Appellant's argument, the Director did not simply accept the Employer's submissions at face value.

25. Natural justice demands that, procedurally, each party should have the right to a decision on the evidence (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15). For the most part, I find this requirement to have been satisfied.

26. The Director did not blindly favour one party over the other. Rather, the Director took pains to review all of the evidence, separating the wheat from the chaff, and arriving at a decision which for the most part is both logical and reasonable. I am satisfied that the Director's findings with respect to the wage rate payable to the Appellant, the Director's calculation of the total number of hours worked, and the Director's calculation of overtime entitlement, were all decided on the best evidence available and in a manner that was fair to the parties and consistent with the principles espoused by this Tribunal and by our courts.

27. Where the Determination appears to fall short is in the Director's calculation of wages paid to the Appellant prior to the Determination. In reviewing both the Determination and the Record, I am unable to say how the Director concluded that the Appellant was paid gross wages of $3,405.36. I am also unable to say that the Director dealt with the propriety of specific wage deductions raised by the Appellant in his original complaint.

28. The Director says that two payments were made by the Employer, one on October 2, 2014, the second on October 23, 2014. Wage calculation worksheets included in the Record show an aggregate gross amount payable of $3,274.38; with vacation pay, this would be $3,405.36, which is consistent with the Director's calculation. However, the cheque stubs for the payments made on October 2, 2014, and October 23, 2014, indicate gross payments of $2,156.58. This is consistent with what is reported on the copy of the T4 slip included in the Record, but does not match either the wage calculation worksheets or the Director's number. The difference appears to be found in what is noted on the cheque stubs as "subsistence pay", which amounts to $1,200.75, and vacation pay that would be calculated on that amount, equal to $48.03.

29. Before considering that item further, it would be appropriate to hear from the Director.

ORDER

30. As it relates to the calculation of wages actually paid, I order this appeal to proceed under section 112(b) of the *Act*. For clarity, the Director's submissions and any subsequent reply of the Appellant should be limited to addressing the narrow issue of the Director's calculation of wages previously paid to the Appellant.

31. In all other respects, this appeal is dismissed pursuant to section 114(1)(f) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal