

An appeal

- by -

Gerald Lentz (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.: 2016A/6

DATE OF DECISION: March 8, 2016





DECISION

SUBMISSIONS

Gerald Lentz

on his own behalf

OVERVIEW

- On November 30, 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 Ecco Heating Products Ltd. to pay to Mr. Gerald Lentz (the "Appellant") wages and interest in the total amount of \$4,386.29.
- The Appellant says that the wage calculation is incorrect, and he seeks to vary the Determination on the basis that, according to section 112(1)(a) of the Act, the Director erred in law twice.
- 3. An "error of law" exists where:
 - (a) a section of the Act has been misinterpreted or misapplied;
 - (b) an applicable principle of general law has been misapplied;
 - (c) the Director acts in the absence of evidence;
 - (d) the Director acts on a view of the facts which cannot reasonably be entertained; or
 - (e) the Director adopts a method of assessment which is wrong in principle

(see Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam), [1998] B.C.J. No. 2275 (BCCA) at paragraph 9)

- 4. At this stage, I must consider whether or not it is appropriate to summarily dismiss part or all of this appeal according to section 114(1) of the *Act*.
- In doing so, I have reviewed the Determination, the Appellant's argument submitted to the Tribunal on January 7, 2016, and the Director's Record submitted on January 19, 2016.

THE FACTS AND ANALYSIS

- 6. The Appellant says that the Director has committed two errors requiring correction.
- The first error, claims the Appellant, exists in the Director's calculation of the "regular wage".
- 8. During the course of his employment, the Appellant was paid a monthly wage. According to section 1 of the *Act*, his "regular wage" equals "the monthly wage, multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work…"
- The Appellant submits that, for the purposes of this calculation, the Director should have used 32 hours, based on the Director's finding that the monthly salary was based on a 32-hour work week.
- On a full reading of the Determination, however, it is clear that what the Director actually found was an agreement between the parties that Mr. Lentz would work *at least* 32 hours per weeks, and a circumstance in



which Mr. Lentz *almost never* worked just 32 hours per week. That is, the Director found that there were no "normal weekly hours of work" and, therefore, he relied upon the calculation of "average weekly hours of work" for the purpose of calculating the regular wage.

- This is consistent with the *Act* and with the practice previously accepted by the Tribunal in *Kocohani Holdings Ltd.*, BC EST # D337/96.
- The calculation laid out in the Determination is mathematically correct, and the Director's conclusion does not, in my estimation, offend any of the five points enumerated in *Gemex, supra*.
- The Director's second error, according to the Appellant, lies in the wage recovery period calculated according to section 80(1) of the *Act*. The Appellant submits that the first date of that period should be April 30, 2014.
- Section 80(1)(a) of the *Act* provides that:
 - 80 (1) 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, 6 months before the earlier of the date of the complaint or the termination of the employment...
- 15. Section 80(1)(b) of the Act does not apply.
- The Director found that Mr. Lentz resigned his position with the employer on October 30, 2014. The complaint was not filed until January 21, 2015.
- According to section 80(1)(a) of the Act, and having regard to the definition of "month" in section 29 of the *Interpretation Act*, R.S.B.C. 1996, c.238, I agree that the first day of the wage recovery period would be May 1, 2014. The last day is October 30, 2014.
- The Director's calculation is correct and, again, I see nothing to suggest that the methodology used fails the test outlined in *Gemex*.
- Having found both of the impugned calculations to be correct, there is no error of law, and no reasonable prospect that this appeal will succeed.

ORDER

Pursuant to section 115 of the Act, I confirm the Determination issued on November 30, 2015, and I dismiss this appeal pursuant to section 114(1)(f) of the Act.

Rajiv K. Gandhi Member Employment Standards Tribunal