

An appeal

- by -

Pearls Auto Spa Ltd.
(“Pearls”)

- 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: Elena Miller

FILE No.: 2015A/35

DATE OF DECISION: April 28, 2015

DECISION

SUBMISSIONS

David Volberg

on behalf of Pearls Auto Spa Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Pearls Auto Spa Ltd. (“Pearls”) appeals a determination (the “Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on January 20, 2015. The Determination found that Pearls had contravened the *Act* by failing to pay wages for overtime to a former employee, Christopher Colangelo (“Mr. Colangelo”). The Delegate assessed the total wages payable, including interest, at \$2,658.19. In addition, he imposed \$1,000 in mandatory administrative penalties, for a total amount payable of \$3,658.19.
2. Pearls appeals on the ground that the Delegate failed to observe the principles of natural justice in making the Determination. David Volberg (“Mr. Volberg”) on behalf of Pearls asks the Tribunal to cancel the Determination because the time cards Mr. Colangelo submitted as evidence are alleged to be untrue and inaccurate.

FACTS

3. Pearls operates an automobile detailing service. Mr. Volberg is the sole director. Mr. Colangelo was employed as an auto detailer from February 1, 2013, to July 25, 2013. At the start of his employment he was earning \$13.00 per hour and on May 21, 2013, his rate of pay increased to \$16.25 per hour. On September 13, 2013 he filed a timely complaint that Pearls had contravened the *Act* by failing to pay wages for overtime.
4. The Delegate conducted a hearing into the complaint on April 1, 2014. The Delegate notes in the Determination (p. R2) that Mr. Colangelo did not arrive at the scheduled time for the hearing of 9:00 a.m., and at 9:50 a.m. the Delegate proceeded with the hearing in his absence. Mr. Volberg was present as the representative for Pearls, and the Delegate received Pearls’ evidence. Mr. Colangelo then arrived after the hearing had concluded. Mr. Volberg had not yet left, so the Delegate re-convened the hearing. He reviewed for Mr. Colangelo the evidence he had received from Pearls and provided an opportunity to cross-examine, which Mr. Colangelo declined.
5. The Determination then states:

Mr. Colangelo provided the original time cards he used for punching in and out of work to support the copies he had supplied as his evidence. Mr. Volberg raised an objection to the time cards on the basis that the time cards were the property of the Employer and as such Mr. Colangelo should not have them. Mr. Volberg also objected to the validity of the cards as they could have been altered.

Mr. Volberg confirmed the time cards are the same ones used by his employees and he stated the employees would turn in their time cards to the office manager who would enter their time on the payroll timesheets. Mr. Volberg also received copies of the time cards as part of Mr. Colangelo’s evidence which was provided to him in advance of the hearing.

I determined that I would retain the original time cards in order to review them against the copies submitted as evidence as not all the copies were completely legible. (pp. R2 – R3)

6. The Delegate then noted that Mr. Colangelo relied primarily on the time cards and testified that they accurately reflected his hours of work. When he took breaks he would punch out his time card at the start and punch back in when he returned to work. His breaks varied between 15 minutes and 30 minutes per shift. He did not live close to the shop and denied taking longer breaks to return home. He provided copies of wage statements he had received from Pearls.
7. Mr. Volberg testified the auto detailing business was open Monday through Friday, 8:00 a.m. to 6:00 p.m. and Saturday from 8:00 a.m. to 4:00 p.m. He said Mr. Colangelo would typically start at 8:00 a.m. and would take longer breaks of one and half to two hours as he lived close to the shop. Mr. Colangelo would use a time card to record his hours and the shop manager, Mike Hernandez (“Mr. Hernandez”) would record the hours worked on a weekly time sheet.
8. The Delegate noted the only records provided by Pearls were Mr. Colangelo’s weekly time sheets. Mr. Hernandez testified by telephone. He confirmed each employee used the punch card system to record their hours worked and he would transfer the information from the time cards onto the weekly time sheets used for payroll purposes. Mr. Hernandez stated Mr. Colangelo’s hours fluctuated throughout the week and he would take a minimum of one hour for lunch each day.
9. The Delegate noted a Demand for Records was issued to Pearls on February 27, 2014, requiring Pearls to produce any and all payroll records relating to wages, hours of work and conditions of employment by March 11, 2014. Pearls did not provide copies of Mr. Colangelo’s wage statements; the only records submitted by Pearls were the weekly time sheets. The Delegate found that, by failing to provide complete payroll records as required by section 28 of *Act*, Pearls had contravened section 46 of the *Employment Standards Regulation* (the “*Regulation*”). He assessed the mandatory penalty of \$500.00 for this contravention.
10. The Delegate then noted that section 40 of the *Act* requires an employer to pay overtime at a rate of 1.5 times the employee’s regular wage for all hours worked in excess of eight hours per day or 40 hours per week. In order to determine whether Mr. Colangelo was entitled to wages for overtime, the Delegate stated he had to rely on the best evidence available documenting the hours he worked. He noted the weekly time sheets provided by the employer only indicated the days of the week and the number of hours worked, not the rate of pay or Mr. Colangelo’s start and end times or record of breaks taken. He further noted Mr. Hernandez testified the information he entered on the weekly time sheets was taken directly from Mr. Colangelo’s time cards. The time cards showed a date, start time, time out for lunch, time for return to work, and end time.
11. The Delegate found the time cards showed lunch break punch times which were “on a whole consistent with the evidence provided by Mr. Colangelo” that his breaks varied between 15 and 30 minutes (p. R4). He found there were only a few instances in which Mr. Colangelo’s lunch breaks exceeded 30 minutes. The Delegate then stated:

When I compare the hours worked on the time cards with the information entered on the weekly time sheets I find that there are only four weeks during Mr. Colangelo’s employment in which the hours recorded on the time cards correspond exactly with the hours recorded on the time sheets. These include the first three weeks of Mr. Colangelo’s employment and the last week he worked. The remainder of the time Mr. Colangelo was not paid for all hours of overtime worked on either a daily or weekly basis. While some of the time sheets document overtime hours the hours are consistently less than those recorded on the time cards. For these reasons I find that I cannot rely on the Employer’s time sheets for those weeks in which they differ from the recorded hours on the time cards. (p. R4 – R5)

12. The Delegate then stated that, in the absence of complete wage statements from the Employer, he relied on the eight wage statements provided by Mr. Colangelo to determine the wages paid to him. Those wage

statements included his final statement, which showed the year to date amounts for wages paid. The Delegate found this to be the best evidence of the actual wages paid to Mr. Colangelo.

13. Based on the final wage statement and the time cards, the Delegate calculated the difference between what Mr. Colangelo earned and what he was paid to be \$2,544.22. A wage calculation summary is appended to the Determination showing how this amount was determined. There is also a table showing how the Delegate calculated the amount of interest owing on this amount to the date of the Determination (\$113.97), for a total amount owing to Mr. Colangelo of \$2,658.19. The Delegate assessed Pearls another mandatory penalty of \$500.00 for failing to pay overtime as required by section 40 of the *Act*.

ARGUMENT

14. Mr. Volberg for Pearls submits that Mr. Colangelo “ran two different time cards during his shift”, and that the time cards he submitted as evidence are “untrue” and inaccurate. He further submits that there is “no way he could have had the timecards as they are collected each week/recorded then shredded”. He submits he feels that Mr. Colangelo has “run this type of scam before” and asks the Tribunal to “review past employment standards cases submitted by Mr. Colangelo”. He further states: “I would like to see the timecards submitted by Mr. Colangelo to determine their authenticity as each day the manager would sign his name beside the hours recorded.”
15. Mr. Volberg submitted his appeal to the Tribunal on February 27, 2015. On April 7, 2015, the Tribunal sent a letter to him, Mr. Colangelo and the Delegate, advising that the appeal had been assigned to a Member. No submissions were requested. Nonetheless, on April 8, 2015, the Tribunal received a late submission from Mr. Volberg, enclosing a letter dated April 9, 2015, from Mr. Hernandez. The contents of the letter will be discussed below.

ANALYSIS

16. Under section 112(1) of the *Act*, a determination may be appealed 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.
17. In the present case, Pearls relies on section 112(1)(b) of the *Act*, alleging the Delegate failed to observe the principles of natural justice in making the Determination.
18. In his submissions, Mr. Volberg for Pearls does not set out how the Delegate is alleged to have failed to observe the principles of natural justice. Rather, the focus of Mr. Volberg’s submissions is on his assertion that Mr. Colangelo submitted false time cards.
19. Mr. Volberg says there is “no way” Mr. Colangelo could have had the actual time cards “as they are collected each week/recorded then shredded”. He also says they should have been signed by the manager, Mr. Hernandez. In his April 9, 2015, letter, Mr. Hernandez states the time cards submitted by Mr. Colangelo are “missing my daily authorization signature”. He further states that the time cards are “collected at the end of every week, reviewed and recorded by David Volberg” and they are then “stored in a locked cabinet, and regularly shredded to protect employment privacy”.

20. The Determination states, and Mr. Volberg does not dispute, that he “received copies of the time cards as part of Mr. Colangelo’s evidence which was provided to him in advance of the hearing” (p. R2). Mr. Volberg was also at the hearing when Mr. Colangelo provided what he described as the original time cards. The Determination records that Mr. Volberg objected on the basis that the time cards “were the property of the Employer” and on the basis that they “could have been altered” (p. R2). However, it does not record an objection that the time cards must be false because they lacked Mr. Hernandez’s daily authorization signature or because the originals would have been shredded, and Mr. Volberg does not assert he made those objections at the hearing.
21. Mr. Hernandez’s April 9, 2015, letter, which Mr. Volberg submitted in support of Pearls’ appeal, states that Mr. Volberg reviews the time cards “at the end of every week”. Accordingly, Mr. Volberg would have been familiar with what the time cards should look like, including whether they should have had Mr. Hernandez’s authorizing signature on them. Yet, Mr. Volberg does not claim he raised this objection either when he was provided with copies of the time cards on which Mr. Colangelo was relying in advance of the hearing, or when Mr. Colangelo produced the originals at the hearing.
22. Mr. Volberg says in his appeal submission that he “would like to see the time cards submitted by Mr. Colangelo to determine their authenticity as each day the manager would sign his name beside the hours recorded”. However, he does not explain why he apparently did not examine the copies he was provided in advance of the hearing for that purpose, or the cards Mr. Colangelo provided at the hearing. The time to have requested to examine the time cards submitted by Mr. Colangelo was at the hearing before the Delegate, when the cards were placed into evidence.
23. Mr. Volberg raised other objections to the time cards at the hearing, but he does not assert he made the objections he now raises on appeal. He also does not assert he made the allegations against Mr. Colangelo that he now makes on appeal – namely, that Mr. Colangelo “ran two different time cards during his shift” or that Mr. Colangelo has “run this type of scam before”. I further note Mr. Volberg provides no factual support for either of these allegations other than his new assertions that the time cards should have been signed and would have been shredded. In any event, the time to have made such allegations was at the hearing. As noted in *Electronic Online Systems International Inc.*, BC EST # D108/10 at para. 51: “...appeal is not an opportunity for a party to make new arguments or embellish arguments previous made during the investigation...”.
24. To the extent Mr. Volberg’s appeal submissions or Mr. Hernandez’s April 9, 2015, letter can be considered new evidence, I find they do not meet the Tribunal’s well established test for admitting new evidence on appeal, as set out in *Merilus Technologies Inc.*, BC EST # D171/03. Evidence or testimony from Mr. Volberg or Mr. Hernandez that time cards should bear the daily authorization signature of Mr. Hernandez and that they are shredded on a regular basis could, with the exercise of due diligence, have been presented at the hearing before the Delegate.
25. The Determination shows the Delegate decided Mr. Colangelo’s complaint after an evidentiary hearing at which Mr. Volberg had an opportunity to present evidence for Pearls and to hear and object to the evidence presented by Mr. Colangelo. The Determination records the objections Mr. Volberg raised to the time cards presented by Mr. Colangelo. Mr. Volberg does not assert those objections included the objections he now raises on appeal. The Delegate cannot be faulted for not considering objections which were not made to him. In these circumstances, the appeal provides no basis for concluding the Delegate denied Pearls a fair hearing (breached principles of natural justice) and the Tribunal’s test for admitting new evidence is not met.

26. Mr. Hernandez's letter also states that, as per company policy, Mr. Volberg "frowned on" overtime and so Mr. Hernandez "would never allow overtime on a daily basis and on such a continuous basis". He further states that Mr. Volberg "did all the payroll at that time, and would have spoken with me about this breach of our policy". Apart from the fact that these evidentiary assertions could have been made at the hearing (and therefore do not constitute admissible new evidence on appeal), I find in any event they do not provide a basis for interfering with the Determination. The issue before the Delegate was not whether Pearls had a general policy against allowing overtime, but whether Mr. Colangelo did in fact work overtime for Pearls, and if so whether he was paid for it.
27. In that regard, the Delegate preferred the evidence of the punched time cards over the evidence of the weekly time sheets on the question of the time Mr. Colangelo worked, for the reasons given in the Determination. The Delegate concluded, on the basis of the time card evidence and the wage statements which Mr. Colangelo provided (as Pearls failed to provide wage statements), that Mr. Colangelo had worked overtime for which he had not been paid. He calculated the amount of unpaid wages owing, setting out his calculations at the end of the Determination.
28. I find the appeal does not provide a basis for interfering with the Delegate's assessment of the evidence before him, his findings of fact based on that evidence, or the conclusion he reached on the merits of the complaint. The appeal also does not establish that the Delegate breached principles of natural justice, or provide any other basis for interfering with the Determination under section 112 of the *Act*.
29. Under section 114 of the *Act*, the Tribunal may dismiss an appeal at any time after it is filed, if it determines that "...(f) there is no reasonable prospect that the appeal will succeed...". Having reviewed the appeal as set out above, I find there is no reasonable prospect that it will succeed. Accordingly, it should be dismissed at this stage of the Tribunal's proceedings.

ORDER

30. For the reasons given, the appeal is dismissed. Pursuant to section 115 of the *Act*, the Determination is confirmed.

Elena Miller
Member
Employment Standards Tribunal