Employment Standards TRIBUNAL

An appeal

- by -

H & L Condo Services Inc.
("H & L")

- 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/70

DATE OF DECISION: August 12, 2015

DECISION

SUBMISSIONS

Lilian Lohre on behalf of H & L Condo Services Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), H & L Condo Services Inc. ("H & L") has filed an appeal of a determination (the "Determination") issued by a delegate (the "Delegate") of the Director of Employment Standards on April 14, 2015. The Determination found that H & L had contravened the *Act* by failing to pay overtime wages, statutory holiday pay, and compensation for length of service to a complainant, Lorraine M. Andrews ("Ms. Andrews"), and by failing to reimburse her for utilizing her personal vehicle for work. The Delegate assessed the total wages payable, including interest accrued to the date of the Determination, at $3,124.19. In addition, he imposed $2,500.00 in mandatory administrative penalties, for a total amount payable of $5,624.19.

2. H & L appeals on the basis that the delegate failed to observe the principles of natural justice in making the Determination, and of what it describes as new evidence, which it submits will require the Determination to be revisited.

FACTS

3. The factual background is set out in the Determination and can be summarized as follows.

4. H & L operates a cleaning company. One of the two directors of H & L is Lilian Lohre ("Ms. Lohre"). Ms. Andrews began working for H & L as a housekeeper on March 25, 2013, at a rate of pay of $14.00 per hour.

5. Ms. Andrews filled out a timesheet every day after work and submitted them to H & L every two weeks. The timesheets included hours she worked for an entity called Discover Kelowna under the direction of one Brian Pederson ("Mr. Pederson"). She understood that Ms. Lohre would charge Mr. Pederson for the time she worked for Discover Kelowna.

6. Ms. Andrews said there was a verbal agreement between herself and Ms. Lohre which allowed her to bank overtime hours, and the banked time would be paid out during seasonal slowdowns or at her request. She worked through until September 4, 2013, when she took time off for personal reasons. From her experience in the industry, she expected there would be a seasonal slowdown then, with corresponding reduction in her hours.

7. Ms. Andrews met Ms. Lohre for coffee in early November 2013 to discuss her return to work. The conversation did not go as she expected, and she understood from it that her employment was terminated at that time.

8. Ms. Andrews took the position she was owed wages under the *Act*, including unpaid overtime and statutory holiday pay, compensation for length of service, and reimbursement for vehicle mileage expenses.

9. Ms. Lohre disputed that Ms. Andrews was owed any wages. She told the Delegate Ms. Andrews' hours of work were inflated and were in excess of what the Employer permitted.

10. The Delegate found the timesheets detailed the hours worked on each date and included a tally of the total hours worked and the number of hours paid. She found "the timesheets provided by the Employer and confirmed by the Complainant are an accurate representation of the hours worked" (Determination, p. R4).

11. With respect to H & L's argument that it should not be liable to pay wages for hours it said were unauthorized, inflated, or beyond the scope of the Employer's responsibility, the Delegate found there was "no evidence to support these assertions" (Determination, p. R4). The Delegate continued:

> If work was performed outside of the Complainant's job duties, it would have been available to the Employer to address it with the Complainant at the time, discipline the Complainant or terminate the employment relationship. Instead, the Employer accepted the hours worked, suite numbers recorded and hours of work identified to be for Discover Kelowna on the timesheets submitted by the Complainant and paid the Complainant wages based on the timesheets. The Employer has not provided any evidence to support its allegations that Ms. Andrews' hours worked were unauthorized, inflated or beyond the scope of the Employer's responsibility. (Determination, p. R5)

12. The Delegate accordingly accepted the timesheets as the best evidence available to establish the hours worked by Ms. Andrews. Based on the timesheets, she found that, although Ms. Andrews worked overtime hours, H & L failed to pay overtime wages in accordance with section 40 of the *Act*. The Determination sets out (at pp. R5 – R7) the Delegate's calculation of the amount owing for overtime wages based on the timesheets. Also on the basis of the timesheets, she found statutory holiday pay owing (calculation set out at p. R8). She further found amounts owing for mileage expense reimbursement (pp. R9 – R10) and compensation for length of service (pp. R10 – R11).

ARGUMENT

13. In her appeal, Ms. Lohre for H & L disputes certain findings of fact made by the Delegate. She further submits she has "new evidence" to show the timesheets were not accurate. She submits the findings of wages owing, based on the timesheets, must therefore be re-evaluated.

14. One of the documents Ms. Lohre submits as new evidence is a letter from Mr. Pederson dated May 19, 2015. It states that, during the time Ms. Andrews was providing some services to Pederson's company Discover Kelowna through her employer H & L, she also provided some "check in services" to him not through H & L but "on her own behalf which I paid her directly for".

15. The other three documents are letters from three present or former staff of H & L about Ms. Andrews, expressing negative views and criticisms about her job performance for H & L.

16. Ms. Lohre also attaches H & L's payroll information for Ms. Andrews.

ANALYSIS

17. Under section 112(1) of the *Act*, a determination may be appealed on the grounds that (a) the director erred in law; (b) the director failed to observe the principles of natural justice in making the determination; or (c) evidence has become available that was not available at the time the determination was being made.

18. Thus, error of law is a ground for appeal, but error of fact is not. Only errors of fact which rise to the level of constituting errors of law give rise to a ground of appeal. As explained in *Rose Miller, Notary Public*, BC EST # D062/07, at para. 48:

> In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

19. In the present case, I find H & L's submissions on appeal do not establish that the factual findings of the Delegate, which H & L challenges, were inadequately supported or wholly unsupported by the evidentiary record, such that there is no rational basis for the finding. There is, accordingly, no reviewable error of law shown. Rather, I find H & L's submissions invite the Tribunal to reconsider the evidence and substitute different findings of fact for the ones made by the Delegate. As explained above, this is not something the Tribunal has jurisdiction to do on appeal.

20. H & L's appeal submissions also do not establish any failure to observe the principles of natural justice in making the Determination. It is clear from the Determination that the Delegate relied primarily on the timesheets H & L supplied and Ms. Andrews filled out to determine what hours she worked and what wages were therefore payable under the *Act*. In its appeal, Ms. Lohre for H & L attempts to take issue with the hours recorded on the timesheets, stating, for example:

> On many, many occasions I had conversations with MS. Andrews [*sic*] as to the hours she claimed as worked for H + L. During these conversations she never once suggested that she was involving me for hour's [*sic*] that she worked for Mr. Pederson. One would think, if she was fully clear and aware of a contract with Mr. Pederson that she would have made me aware of this. When she did tell me, however, that she was doing check-ins which Mr. Pederson was paying her for in cash, I advised her that [t]his was a conflict of interest and I would prefer it if she did not continue to carry out these services.

21. The difficulty with this and other submissions by Ms. Lohre on appeal is they indicate that, while she may have been unhappy with aspects of Ms. Andrews' job performance, or suspicious of the hours Ms. Andrews claimed to have worked, Ms. Lohre did not at the time terminate Ms. Andrews' employment for cause or refuse to accept the hours she recorded on her timesheets. As the Delegate correctly pointed out in the Determination, the time to have challenged or refused to accept those claims was when they were made:

> If work was performed outside of the Complainant's job duties, it would have been available to the Employer to address it with the Complainant at the time, discipline the Complainant or terminate the employment relationship. Instead, the Employer accepted the hours worked, suite numbers recorded and hours of work identified to be for Discover Kelowna on the timesheets submitted by the Complainant and paid the Complainant wages based on her timesheets. The Employer has not provided any evidence to support the allegations that Ms. Andrews' hours worked were unauthorized, inflated or beyond the scope of the Employer's responsibility. (Determination, p. R5)

22. H & L now attempts to provide evidence in the form of the letters attached to the appeal to support its allegations that Ms. Andrews' job performance merited termination for cause, or that hours worked were unauthorized, inflated or beyond the scope of the Employer's responsibility. However, I find this evidence does not meet the Tribunal's established test for admitting new evidence on appeal under section 112(1)(c) of the *Act*. First, as the language of section 112(1)(c) indicates, such evidence must "become available" and not have been available at the time the determination was made. The letters from Mr. Pederson and the three former or current employees could have been obtained at the time the matter was before the Delegate.

23. Second, and in any event, the letters merely indicate that other employees thought Ms. Andrews' job performance was poor, and that Mr. Pederson paid Ms. Andrews separately to perform a check-in service for him. They do not establish that H & L brought concerns about Ms. Andrews' job performance to her attention before the coffee shop meeting in November 2013 when her employment was terminated, or that H & L challenged her time sheets as inaccurate at the time they were submitted.

24. To the extent the appeal submissions suggest Ms. Lohre was unaware at the time that Mr. Pederson was paying Ms. Andrews separately to perform check-in services for him, I note Ms. Lohre also states in her appeal: "When she did tell me, however, that she was doing check-ins which Mr. Pederson was paying her for in cash, I advised her that [t]his was a conflict of interest and I would prefer it if she did not continue to carry out these services". Thus, it appears Ms. Lohre was aware Ms. Andrews was performing these services at the relevant time. She says she told Ms. Andrews she would "prefer if it she did not continue to carry out these services". Thus, she does not claim to have directed or required Ms. Andrews to cease providing those services to Mr. Pederson. In these circumstances, I find these submissions do not provide a basis for concluding the time sheets were inaccurate, or that Ms. Lohre could not have challenged or refused to accept the hours Ms. Andrews recorded on the timesheets at that time, based on her knowledge of Ms. Andrews' conduct.

25. There is accordingly no basis for interfering with the Delegate's finding that H & L failed to take action at the appropriate time about the matters it now relies on to claim that it should not be liable for the hours Ms. Andrews worked as recorded on the company's time sheets. I find no error in the Delegate's determination that, having employed Ms. Andrews for the period noted in the Determination, and accepted her hours submitted at the time as valid, H & L must pay wages owing under the *Act* for those hours.

26. I find the appeal raises no reviewable error in the Determination.

ORDER

27. 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