

An appeal

- by -

Vidao Messenger Inc.
("Vidao")

- 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: Carol L. Roberts

FILE No.: 2017A/115

DATE OF DECISION: November 7, 2017

DECISION

SUBMISSIONS

Sukha Gill

on behalf of Vidao Messenger Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Vidao Messenger Inc. (“Vidao”) has filed an appeal of a Determination issued by Michael Thompson, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), on August 8, 2017. In that Determination, the Director found that Vidao had contravened sections 18, 58 and 63 of the *ESA* in failing to pay nine of its former employees wages, compensation for length of service, and annual vacation pay. The Director ordered Vidao to pay \$64,027.23 in wages and interest. The Director also imposed five administrative penalties in the total amount of \$2,500 for the contraventions, for a total amount owing of \$66,527.23.
2. Vidao appeals the Determination on the grounds that the Director’s delegate erred in law. Vidao also contends that evidence has become available that was not available at the time the Determination was made.
3. Section 114 of the *ESA* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* 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.
4. This decision is based on Vidao’s written submissions, the section 112(5) record, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Vidao, a company incorporated in British Columbia, operates a software development business. It is a high technology company as defined in section 38.8(1) of the *Employment Standards Regulation* (the *Regulation*). Sukha Gill is one of the officers of Vidao. Kamaljeet Gill is also an officer and the sole director.
6. Eight employees filed complaints with the Employment Standards Branch. On July 18, 2017, the delegate informed Vidao that he would conduct an investigation to determine if wages were owed to all Vidao employees. Subsequently, another employee contacted the delegate claiming outstanding wages.
7. All of the employees were employed in various positions that fall within the definition of a high technology professional by section 37.8(1) of the *Regulation*. They provided the delegate with documents in support of their claims including employment offer letters, contracts, email and text communications, and paycheques. All of the employees had been paid wages to the end of May 2017, but none had received wages for June or July 2017, despite assurances from Vidao that they would receive their wages. All of the employees had quit their employment or had been terminated because they had complained about unpaid wages, or had been laid off due to Vidao’s inability to pay them.

8. Vidao paid most of the employees annual salaries in monthly installments, while others were paid hourly wages. None of the employees received wage statements. The employees were paid through a combination of direct deposit, bank drafts, corporate cheques, money transfers and personal cheques from Kamaljeet Gill.
9. The delegate made a number of attempts to contact Vidao by telephone at four different numbers which had been identified by employees. He received no answer and no messages were able to be left at three of the four numbers. The delegate did leave a message at a fourth number, which belonged to “Kam at Vidao,” but did not hear back from Vidao.
10. On July 18, 2017, the delegate sent a registered letter to Vidao’s business address and a letter by regular mail to Vidao’s Registered and Records office notifying Vidao of the complaints and the investigation. The delegate also included a Demand for Employer Records including payroll records and documentation regarding the termination of any employee between January 1, 2017, and the date of the Demand. The delegate also sent the correspondence, including the Demand, to email addresses of Kamaljeet Gill and Sukha Gill.
11. On July 27, 2017, the delegate sent copies of four additional complaints to Vidao by regular mail and email, along with employee submissions. The correspondence indicated that the delegate would issue a determination based on the evidence he had received by August 2, 2017.
12. The delegate received no response from Vidao regarding either the complaints or the Demand. The delegate determined that Vidao had knowledge of the complaints and the investigation, as well as the opportunity to respond to them.
13. The delegate found that Vidao had provided no evidence contradicting the allegations and determined that the employees’ evidence about the wages was the best available evidence.
14. The delegate concluded that some of the employees had not been paid for work performed in May, and that all of the employees were owed wages for June and July 2017. The delegate also determined that Vidao contravened the *ESA* in failing to pay some of the employees at least semi-monthly and within eight days of the end of the pay period. The delegate also determined that Vidao had not provided the employees with wage statements.
15. The delegate found that the employees either quit their employment due to Vidao’s failure to pay wages, were terminated for raising the issue, or were laid off as a result of Vidao’s inability to pay their wages. The delegate concluded that in failing to pay wages for work performed, Vidao made a substantial and unilateral change to the employees’ contracts, and considered that Vidao had terminated their employment under section 66 of the *ESA*. The delegate also found that Vidao had laid off some of the employees in contravention of both their contracts of employment as well as the *ESA*. The delegate determined that all the employees were entitled to compensation for length of service on termination under section 63, and in failing to pay the employees compensation, Vidao had contravened the *ESA*.
16. The delegate also determined that there was no evidence Vidao paid the employees any vacation pay and determined they were all entitled to those wages.

Argument

17. Vidao argues that the amounts due to the employees are much less than what was calculated by the delegate. Attached to the appeal is a spreadsheet setting out what Vidao suggests are the net wages and statutory deductions for eight of the nine employees. Also attached to the appeal submission is a document that “indicates vacation paid owed”.
18. With respect to the ninth employee, Vidao states that this employee was only able to work 20 hours per week, that he was not entitled to vacation pay since he took his vacation between April 24 and May 12, 2016, and that this employee was not entitled to compensation for length of service because he was terminated for cause.

ANALYSIS

19. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
20. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

most lawyers generally understand the fundamental principles underlying the “rules of natural justice” or what sort of error amounts to an “error of law”, these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular “box” that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive “fair treatment” [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant’s explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

21. I have considered whether there is any basis for the Tribunal to interfere with the decision.

New Evidence

22. In *Re Merilus Technologies* (BC EST #D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

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

23. There is no evidence Vidao was unaware of the complaints and investigation. The Director's delegate notified Vidao about the complaints and sought Employer Records in relation to the affected employees by email, telephone and regular mail. Canada Post tracing information confirms that Vidao received copies of the complaints as well as the Director's demand on July 20, 2017. Despite having knowledge of the complaints as well as the opportunity to respond, Vidao did not communicate with the delegate. Mr. Gill does not explain why the records sought by the delegate were not provided by the deadline of August 2, 2017.
24. All the information submitted on appeal was available at the time the Determination was being made. If Vidao wanted the delegate to consider it, it ought to have provided it to the delegate during the investigation. An appeal is not an opportunity to present evidence that ought to have been provided to the delegate in the first instance.
25. I decline to consider the evidence as it does not meet the Tribunal's test for new evidence.

Error of law

26. The 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 [in *Gemex*, the legislation was the *Assessment 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.
27. I find no error in the Determination. The delegate made many attempts to contact Vidao to obtain employer records and its response to the complaints. Vidao did not respond. Accordingly, the delegate found the employees' evidence to be the best evidence before him and made his decision based on that evidence. I find no error of law in his approach.

28. I also find no error in the delegate's calculation of the employees' wage entitlements based on the information before him.
29. The appeal is dismissed.

ORDER

30. Pursuant to section 115 of the *Act*, I Order that the Determination, dated August 8, 2017, be confirmed in the amount of \$66,527.23 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal