

An appeal

- by -

Silver Arrow Investments Ltd.
(“Silver Arrow”)

- 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.: 2016A/119

DATE OF DECISION: October 19, 2016

DECISION

SUBMISSIONS

Michael Roessler

on behalf of Silver Arrow Investments Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Silver Arrow Investments Ltd. (“Silver Arrow”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 22, 2016. In that Determination, the Director found that Silver Arrow had contravened sections 18, 40, 58 and 88 of the *Act* in failing to pay Daniel Watson wages, overtime wages, annual vacation pay and accrued interest. The Director ordered Silver Arrow to pay \$2,334.35 in respect of those wages. The Director also imposed three administrative penalties of \$500 each for the contraventions, for a total amount owing of \$3,834.35.
2. Silver Arrow appeals the Determination contending that the delegate erred in law and failed to observe principles of natural justice in making the Determination. Silver Arrow also says that evidence has become available that was not available at the time the Determination was being made.
3. This decision is based on Silver Arrow’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Daniel Watson was hired by Silver Arrow, an automobile brokerage company, to set up and work in its mechanics shop. His first day of work was March 7, 2016. The parties agreed that Mr. Watson would be paid a wage of \$33.50 per hour regardless of the number of hours worked. Silver Arrow contended that, effective April 1, 2016, Mr. Watson would be paid a “flat rate” for each repair job completed, an assertion that Mr. Watson denied. Mr. Watson took the position that his wage arrangements did not change during the course of his employment.
5. Mr. Watson resigned on April 14, 2016, to take a similar position closer to his home and on May 31, 2016, filed a complaint alleging that Silver Arrow contravened the *Act* by failing to pay him regular wages and vacation pay. Silver Arrow contended that Mr. Watson had been paid for all hours worked.
6. The delegate conducted a hearing on July 20, 2016. Mr. Roessler and Ryan Brady, a representative of Silver Arrow’s directors, appeared on behalf of Silver Arrow. Mr. Watson appeared on his own behalf. At issue before the delegate was Mr. Watson’s wage rate for the month of April.
7. Mr. Watson was paid twice monthly. At mid-month, he was given an advance on wages, the amount of which was deducted from total wages at month end. On March 16, 2016, Mr. Watson was paid an advance of \$3,000. On March 31, 2016, Mr. Watson was paid \$4,403.50, representing 212.5 hours of work plus vacation pay less the \$3,000 advance. On April 15, 2016, Mr. Watson was paid a \$1,500 advance and on April 27, 2016, Mr. Watson was paid \$451.04 representing 56 hours of work less the advance.
8. Mr. Watson contended that he typically worked a nine hour day but that, on occasion, he would work slightly more or fewer hours. Because Silver Arrow was just starting up, it did not have a computer system and

- Mr. Watson maintained a record of his hours of work on a handwritten sheet that he submitted to Silver Arrow at month end.
9. Towards the end of Mr. Watson's employment, Silver Arrow instituted a computer software program called "Shop Key." Because the program was not fully operational at the time of Mr. Watson's departure, he did not use the program to record his hours of work.
 10. Mr. Watson said that on March 29, 2016, he gave Silver Arrow a record of his hours of work from March 7 to March 29 because the individual responsible for payroll was going on holidays. He asserted that this record did not include his hours of work for March 30 or 31.
 11. Neither Silver Arrow nor Mr. Watson provided the delegate with a copy of Mr. Watson's hours of work for March or the document Mr. Watson submitted to Silver Arrow at the end of March. Mr. Watson contended that the payment he received for March represented wages for the work he performed between March 7 and 28, 2016.
 12. Mr. Watson provided the delegate with a copy of his handwritten record of his hours of work from March 28 to April 14 which totaled 110 hours.
 13. Silver Arrow contended that, starting April 1, 2016, Mr. Watson was be paid a flat rate for each repair job completed, and relied on 14 repair orders which collectively recorded 56 hours of work, as its record of Mr. Watson's hours. Mr. Roessler said that the repair orders were generated using the "Shop Key" software. The delegate noted that all the repair orders had March 2016 start dates. Mr. Roessler acknowledged that many of the repair orders had completion dates after April 14, 2016.
 14. Mr. Roessler said that Mr. Watson was responsible for recording his own hours of work and that it trusted him to do so accurately. However, he questioned whether Mr. Watson worked all the hours he submitted for March and April, contending that Mr. Watson performed mechanical services on friends and family vehicles at Silver Arrow's shop. Mr. Watson agreed that he did work for friends and family at Silver Arrow's shop, but denied that he billed Silver Arrow for those hours of work.
 15. The delegate determined that Mr. Watson's regular wage rate did not change through the period of his employment based on his April 1 – 14 wage statement that indicated an hourly rate identical to that in March. The delegate noted that Silver Arrow provided no documentary evidence supporting its assertion that Mr. Watson's terms of employment changed as of April 1, 2016, and found the evidence of Mr. Roessler and Mr. Brady regarding these changed terms to lack credibility. The delegate found that while the parties may have discussed a change to the wage rate, Silver Arrow had not provided sufficient evidence to establish that the change had been implemented.
 16. The delegate further noted that although Silver Arrow disputed Mr. Watson's hours of work, it did not maintain an independent record of his hours, permitting him to work on an "honour system." Silver Arrow's failure to maintain a daily record of Mr. Watson's hours of work constituted a contravention of section 28 of the *Act*. Its failure to maintain a record of Mr. Watson's hours also undermined Silver Arrow's contention that Mr. Watson worked on a "flat rate" basis, since the calculations required to determine his regular wage were not possible. The delegate found that the repair orders did not constitute payroll records and did not demonstrate Mr. Watson's hours of work.
 17. The delegate further noted that although Silver Arrow alleged that Mr. Watson performed cash jobs in the shop and then billed Silver Arrow for his time, it provided no evidence to support this allegation.

18. The delegate determined that Mr. Watson was paid for all hours of work in March based on Silver Arrow's earning report which indicated that Mr. Watson was paid on March 31, 2016, and the wage statement for April indicated that it was for the period April 1 – 14, 2016. The delegate also considered the number of hours Mr. Watson indicated he worked over the 19 days in March and concluded that he was “most likely” paid for March 30 and 31.
19. The delegate found that the only evidence of the actual hours worked by Mr. Watson in April was provided by Mr. Watson. As Silver Arrow failed to produce a record of Mr. Watson's hours, the delegate relied on Mr. Watson's timesheet, which she found was the best evidence available.
20. Finally, the delegate noted that although the parties agreed that Mr. Watson would not be paid overtime wages, she found this agreement to be contrary to section 4 of the *Act*, which does not permit the minimum requirements of the *Act* to be waived. The delegate found the documents submitted by the parties as to Mr. Watson's hours of work to be less than reliable, but concluded, on the agreement of the parties that Mr. Watson had worked 212.5 hours in four weeks, that 160 of those hours should be paid at his regular rate of pay and the balance at overtime rates.

Argument

21. Silver Arrow submits that the delegate erred in the following ways:
 - Finding that Mr. Watson worked on outside vehicles for cash payment with no compensation to Silver Arrow. Mr. Roessler contends that Mr. Watson billed Silver Arrow for his time while he did so and that he has three witnesses to Mr. Watson's outside work;
 - Finding that Mr. Watson worked overtime hours even after Mr. Watson did not claim for overtime wages and stated that he agreed to work for a set hourly rate irrespective of his actual hours of work; and
 - Declining to find that the “flat rate” payment schedule was in place by March 11, 2016, and took effect on April 1, 2016.
22. Attached to Silver Arrow's appeal were two documents; a March 8, 2016, Shop Key Order Form/Invoice and a direct debit form which appears to be a document that accompanied each Silver Arrow invoice.

ANALYSIS

23. Section 114(1) of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

24. Section 112(1) of the *Act* 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.

25. Acknowledging that the majority of 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 Ltd.*, (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.

26. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not Silver Arrow has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that Silver Arrow has not met that burden.

Failure to observe the principles of natural justice

27. Natural justice is a procedural right that includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that Silver Arrow was denied natural justice. Silver Arrow was aware of the case it had to meet and participated fully in the hearing. It was able to submit relevant documents and ask questions of Mr. Watson.

28. I find no basis for this ground of appeal.

New Evidence

29. Silver Arrow’s submission is, in essence, a contention that the delegate’s conclusions on three issues were wrong. In support of two of those arguments, Silver Arrow says it has three witnesses who could testify that Mr. Watson worked on outside vehicles. I note that Mr. Watson conceded in the hearing that he did so, but denied that he billed Silver Arrow for his time. Silver Arrow produced no evidence at the hearing to contradict that. It now says it has the “new evidence” of those three witnesses.

30. Silver Arrow also submitted as new evidence a “Shop Key” Order Form/Invoice which it says supports its position that the delegate erred in finding that there was no agreement between the parties regarding a change to Mr. Watson’s wage rate effective April 1, 2016.
31. 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.
32. Silver Arrow had full opportunity to submit the Shop Key document at the hearing before the delegate. It was created well before the hearing date and could have been presented during the adjudication of the complaint. This document does not persuade me that the delegate erred in finding that Mr. Watson did not agree to a flat rate payment schedule as of April 1, 2016. The invoice does not have Mr. Watson’s signature anywhere and certainly does not constitute evidence of any agreement between the parties, either with respect to wage rate or anything else. I find that this document does not meet the test of new evidence.
33. The witnesses referred to by Silver Arrow were certainly available at the time of the hearing. Had Silver Arrow considered their evidence to be material to supporting its assertion that Mr. Watson billed time to Silver Arrow that he ought not to have, it had the obligation to call those witnesses during the hearing. Furthermore, even if the witnesses observed Mr. Watson working on outside customers’ vehicles, Mr. Watson did not deny that fact. He did, however, dispute Silver Arrow’s claim that he billed Silver Arrow for those hours of work. There is nothing in the appeal submission that suggests the three witnesses had any evidence to the contrary. I conclude that this evidence does not meet the test for the admission of new evidence.

Error of Law

34. The Tribunal as 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.

35. Silver Arrow also contends that the delegate erred in law by concluding that Mr. Watson was entitled to overtime given that he agreed to work on a set hourly rate irrespective of his hours of work.

36. The delegate considered section 4 of the *Act* which provides as follows:

The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements...has no effect.

37. Although Mr. Watson agreed he would not be paid overtime wages and did not pursue a claim for overtime, the *Act* prohibits parties from contracting out of the minimum standards as the delegate concluded. I find no error of law in her conclusion.

38. I find that Silver Arrow has not met the burden of establishing any of the statutory grounds of appeal. I am not persuaded that there is any prospect that the appeal will succeed or that it serves the purposes of the *Act* to seek submissions from the other parties.

39. The appeal is dismissed.

ORDER

40. Pursuant to section 115 of the *Act*, I order that the Determination, dated July 22, 2016, be confirmed in the amount of \$3,834.35 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal