Employment Standards TRIBUNAL

Citation: Hassan Wali (Re)
2024 BCEST 47

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Hassan Wali
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Brandon Mewhort

FILE NO.: 2024/017

DATE OF DECISION: May 28, 2024

DECISION

SUBMISSION

Hassan Wali — on his own behalf

OVERVIEW

1. This is an appeal by Hassan Wali ("Appellant") of a determination issued by a delegate of the Director of Employment Standards ("Adjudicating Delegate"), dated January 31, 2024 ("Determination"), after an investigation that was conducted by another delegate ("Investigative Delegate"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. The Appellant filed a complaint under section 74 of the *ESA* alleging that he was not paid all his regular wages. In the Determination, the Adjudicating Delegate found the Appellant was a "manager," as defined in the *ESA*, and he was therefore excluded from the overtime provisions in the *ESA*. The Adjudicating Delegate also found that the Appellant was not entitled to any other additional pay for the hours he worked.

3. Section 114(1) of the *ESA* provides that 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, among other things, there is no reasonable prospect the appeal will succeed.

4. For the reasons discussed below, I dismiss this appeal pursuant to section 114(1)(f) of the *ESA*, because there is no reasonable prospect it will succeed.

ISSUE

5. The issue is whether this appeal should be dismissed pursuant to section 114(1) of the *ESA*.

THE DETERMINATION

6. Neapolitan Pizza Ltd. ("Employer"), along with its alleged associated affiliates, Megabite Pizza Ltd. and City Square Pizza Ltd., operate multiple pizza restaurant franchises. The parties agreed that, during the entirety of their employment relationship, the Appellant was employed by the Employer as a "manager," as defined in section 1 of the *ESA*.

7. Between September 1, 2021, and March 31, 2022, the Appellant was employed as a District Manager overseeing several of the Employer's franchise locations and he was paid a bi-weekly salary. On April 1, 2022, the Appellant transitioned to managing a single franchise location and he was paid an hourly wage. The Appellant stayed in that role until August 17, 2022, when he was terminated by the Employer and paid two weeks' pay for compensation for length of service. The parties agreed that there were no issues with the wages paid to the Appellant on and after April 1, 2022. The Appellant's complaint only concerned the wages payable to him between October 19, 2021, and March 31, 2022, when he was paid a bi-weekly salary.

8. In the Determination, the Adjudicating Delegate agreed with the parties that the Appellant's role was managerial in nature, given that he, among other things: had the authority to hire, train, evaluate, discipline, and terminate staff; attended to and addressed daily operational issues; developed promotional material; oversaw small financial matters; and assisted in developing and evaluating pizza recipes. Accordingly, the Adjudicating Delegate found that the Appellant was a manager and was excluded from the overtime provisions of the *ESA*.

9. The Adjudicating Delegate then considered whether, as a manager, the Appellant was entitled to additional pay for extra hours worked in accordance with a wage agreement between the parties. The Appellant said that his salary only covered his working hours from 10:00 am to 6:00 pm; whereas, the Employer said the Appellant's salary covered all working hours. There was no formal written agreement between the parties that addressed this issue.

10. The Adjudicating Delegate found that, other than the Appellant's own oral evidence, there was no other evidence to support the Appellant's position that his salary was only for an eight-hour workday between 10:00 am and 6:00 pm. Given that the parties agreed to switch to an hourly compensation model on April 1, 2022, and only after that did the Appellant begin to keep track of his hours, the Adjudicating Delegate was satisfied the parties never agreed to the Appellant's salary being for a specified number of hours worked. The Adjudicating Delegate also noted that the Employer never resisted paying the Appellant nor challenged him on the hours he recorded when using the hourly compensation model. The Adjudicating Delegate found that, had the parties agreed otherwise, they (and particularly the Appellant) likely would have kept a timesheet of hours worked past 6:00 pm.

11. The Adjudicating Delegate then considered whether the Appellant's salary exceeded the minimum wage under the *ESA*. The Adjudicating Delegate discussed the WhatsApp messages submitted by the Appellant, which the Appellant said supported his position that he worked an additional two to four hours daily, seven days a week, between October 19, 2021, and March 31, 2022. However, the Adjudicating Delegate found that those messages, on their own, did not establish the Appellant worked the hours he claimed, in part because there was no evidence to confirm the amount of time the Appellant worked before and after he sent or received those messages.

12. Based on the limited evidence regarding the hours worked by the Appellant, the Adjudicating Delegate inferred that the Appellant worked an additional three hours daily, seven days a week. Based on those hours, the Adjudicating Delegate found that the Appellant's salary amounted to a regular wage rate that was higher than the minimum wage, and the Appellant was not entitled to any additional wages.

13. Because the Employer did not owe the Appellant additional wages, the Adjudicating Delegate found that there was no need to determine whether the Employer, Megabite Pizza Ltd., and City Square Pizza Ltd. were associated corporations for the purposes of section 95 of the *ESA*.

ARGUMENT

14. When asked in the appeal form to select his grounds of appeal, the Appellant indicated that the Director erred in law and failed to observe the principles of natural justice in making the Determination. However, the Appellant does not explain anywhere in his submissions how the Director failed to observe the principles of natural justice in making the Determination.

15. The Appellant argues that the evidence, particularly the WhatsApp messages between him and the Employer, demonstrates that he worked significant additional hours that were not compensated. The Appellant alleges that such evidence was overlooked by the Adjudicating Delegate in making the Determination.

16. The Appellant also says the WhatsApp messages were not mere indicators of occasional extended hours, but they show a consistent pattern of overwork that was known and approved by the Employer. The Appellant asks for a re-evaluation of the evidence, because, in his view, the evidence shows he is entitled to additional compensation for the substantial hours that he worked.

ANALYSIS

17. The burden is on an appellant to demonstrate a basis for this Tribunal to interfere with a determination: see *Tejinder Dhaliwal (Re)*, 2021 BCEST 34 at para 13.

Alleged error of law

18. The Tribunal has adopted the following definition of an error of law, which was set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA):

a. a misinterpretation or misapplication of a section of the Act;

b. a misapplication of an applicable principle of general law;

c. acting without any evidence;

d. acting on a view of the facts which could not reasonably be entertained; and

e. adopting a method of assessment which is wrong in principle.

19. While the Appellant does not explicitly say which type of error of law he alleges the Adjudicating Delegate made, his submissions suggest that, in his view, the Adjudicating Delegate acted on a view of the facts which could not reasonably be entertained when the Adjudicating Delegate determined the number of hours the Appellant worked. As noted in the Determination, the Appellant agreed he was a "manager" for the purposes of the *ESA*, so he is excluded from its overtime provisions, and the Appellant does not dispute that in his submissions in this appeal.

20. The test for establishing whether a delegate acted on a view of the facts which could not reasonably be entertained has been described as follows (see e.g., *C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para 52, quoting *Delsom Estates Ltd. v. Assessor of Area #11 - Richmond/Delta*, 2000 BCSC 289 at para 18 (CanLII), citations omitted):

> … that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" …

21. In *Nature's Choice Foods Limited (Re)*, 2020 BCEST 130, this Tribunal also discussed the test for establishing when findings of fact constitute an error of law as follows, including when inferences were made by the Director (at paras 31 and 32):

> The test for establishing findings of fact constitute an error of law is very stringent. In this case, in order to establish the delegate committed an error of law on the facts, NCFL is required to show the findings of fact and the conclusions and inferences reached by the delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.
>
> I have carefully read the evidence of the parties in the Record and as summarized by the delegate in the Reasons and I am not at all persuaded that the findings of fact and conclusions and inferences the delegate reached in this case are without a rational basis or perverse or inexplicable. I also note that the Tribunal is generally reluctant to substitute the delegate's finding of facts even if it is inclined to reach a different conclusion on the evidence.

22. In this case, the Appellant argues the WhatsApp messages in evidence demonstrate that he worked extra hours for which he should receive additional compensation, and that evidence was not properly considered by the Adjudicating Delegate.

23. In my view, it cannot be said that the Adjudicating Delegate acted on a view of the facts that could not reasonably be entertained. The Adjudicating Delegate was faced with little evidence regarding the additional hours worked by the Appellant, because neither party kept a record of those hours. The Adjudicating Delegate considered the WhatsApp messages referred to by the Appellant in his submissions and they were discussed at length in the Determination. I find that it was reasonable for the Adjudicating Delegate to conclude those WhatsApp messages, on their own, did not establish that the Appellant worked the hours he claimed, because there was no evidence to confirm the amount of time the Appellant worked before and after he sent or received those messages.

24. The Adjudicating Delegate then inferred that the Appellant worked an additional three hours a day, seven days a week, between October 19, 2021, and March 31, 2022, which I again find to be reasonable given the evidence before him.

25. In my view, the findings of the Adjudicating Delegate were neither inconsistent with nor contradictory to the evidence, and it cannot be said that his findings were perverse or inexplicable. Rather, I find that the Adjudicating Delegate's findings had a rational basis when considering the evidentiary record, even though it was limited.

26. For the reasons discussed above, I dismiss this ground of appeal.

Alleged failure to observe the principles of natural justice

27. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, this Tribunal discussed the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to

> be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST #D050/96.

28. In my view, the record in this case demonstrates that the Investigative Delegate and Adjudicating Delegate afforded the Appellant an opportunity to know the case against him and to present his evidence, and he was heard by an independent decision-maker. There is nothing on the record to suggest otherwise, and as discussed above, the Appellant did not include in his submissions any explanation of how the Director failed to observe the principles of natural justice in making the Determination.

29. Notably, the Investigative Delegate issued an investigation report on September 29, 2023, which summarized the information collected during the investigation, and a copy was provided to both parties. The Appellant was given an opportunity to review and provide comments on the investigation report, but he chose not to.

30. Accordingly, I find that the Appellant has not met his burden of demonstrating that the Director failed to observe the principles of natural justice and I dismiss this ground of appeal.

31. For the reasons discussed above, I find that the Appellant has failed to demonstrate a basis for the Tribunal to interfere with the Determination, and I dismiss the appeal under section 114(1)(f) of the *ESA* as there is no reasonable prospect it will succeed.

ORDER

32. I order that the Determination be confirmed pursuant to section 115(1)(a) of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal