

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Tamara Stadel
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

FILE NO.: 2024/021

DATE OF DECISION: June 3, 2024

DECISION

SUBMISSIONS

Tamara Stadel on her own behalf

OVERVIEW

1. Tamara Stadel (“Appellant”) appeals a determination issued on January 23, 2024 (“Determination”), by a delegate (“Delegate”) of the Director of Employment Standards (“Director”).
2. The Determination held the Appellant's employer, J.A.K.K.S. Holdings Ltd. carrying on business as Thompson Cleaning Services (“Employer”), had contravened the *Employment Standards Act* (“ESA”) and ordered the Employer to pay the Appellant wages, annual vacation pay, compensation for length of service, and interest totaling \$3,910.86. The Determination also levied administrative penalties totaling \$1,000.00 for a total amount payable of \$4,910.86.
3. The Appellant appeals on the ground that new evidence has become available that was not available at the time the Determination was being made.

BACKGROUND

4. The Employer operates a cleaning business in Coldstream, B.C., which falls within the jurisdiction of the *ESA*.
5. The Appellant worked as a cleaner with the Employer from February 20, 2020, to July 10, 2022, when the Employer stopped providing work hours.
6. The Appellant and the Employer were unable to agree on the amount of wages, overtime, statutory holiday pay, paid illness/injury leave, annual vacation pay, and compensation for length of service owed to the Appellant.
7. The Appellant subsequently filed a complaint under section 74 of the *ESA* alleging the Employer had contravened the *ESA* by failing to pay the Appellant wages and compensation for length of service.
8. A delegate of the Director (“Investigative Delegate”) followed up with the parties and requested evidence and submissions from each side about their respective positions. The Investigative Delegate communicated with the parties and their representatives and received statements and evidence on the issues raised in the complaint.
9. The Investigative Delegate prepared a report for the Appellant and the Employer dated October 17, 2023, summarizing the information provided by the Appellant and the Employer's representative and included a list of relevant records and documents (“Investigation Report”).
10. The Investigative Delegate set out the issues under consideration but did not make findings in the Investigation Report.

11. The Appellant and the Employer were requested to review the Investigation Report carefully and provide further information and clarification.
12. The Record indicates the Investigative Delegate followed up and discussed the Investigation Report with the Appellant.
13. The Investigation Report and evidence from the parties were submitted to the Delegate for a determination.
14. The Delegate issued the Determination dated January 23, 2024.
15. The Determination held the Appellant was in an employee relationship with the Employer for the purposes of the *ESA*. The Delegate considered the law and facts and stated: “I find the [Employer] exercised a high degree of control and direction over the [Appellant's] work as a cleaner, and that consequently she was an employee for the purposes of the [ESA].”
16. Having found the Appellant was in an employment relationship, the Delegate made findings on the evidence concerning the Appellant's wage rate and the amount of wages, overtime, statutory holiday pay, paid illness/injury leave, vacation pay, and compensation for length of service that was owed to the Appellant. The Delegate specifically noted that there were contradictions and shortcomings in the evidence and the Delegate made a reasoned finding preferring the Appellant's originally submitted evidence as follows:

Based on the lack of evidence provided by the [Employer] and the later contradictions made by the [Appellant], I find the [Appellant's] original Excel spreadsheets to be the best available evidence in relation to this issue. It was prepared by the [Appellant] much closer to the end of her employment than the later amendments, and I find it is worthy of greater weight.

As such, I find that the [Appellant's] original Excel spreadsheet...is the best evidence of her hours worked. Given the state of the evidence in relation to hours worked and my acceptance of the Excel spreadsheet as the best evidence, I find it appropriate to perform a global calculation of all hours worked/wages earned during the recovery period and measure that against the wages that were paid to the [Appellant] during the recovery period.
17. As set out above, the Determination considered the conflicting evidence and the law and held the Employer owed the Appellant wages, annual vacation pay, compensation for length of service, and interest totaling \$3,910.86. The Determination also levied administrative penalties payable by the Employer totaling \$1,000.00 for a total amount payable of \$4,910.86.
18. The Appellant appealed the Determination on February 29, 2024.

ARGUMENTS

19. On the Appeal Form the Appellant submits there is new evidence that has become available since the time the Determination was being made.
20. The Appellant sets out submissions and evidence in support of the Appellant's appeal.

21. The Appellant provides further information and evidence concerning various shifts, hours worked and payments received. The Appellant submits the Determination incorrectly calculated the hours and wages she was entitled to and that she was shorted 39.5 hours
22. In sum, the Appellant submits the calculation of wages, annual vacation pay, and compensation for length of service in the Determination is incorrect and the Appellant is entitled to a higher amount.

ANALYSIS

23. These reasons are based on the written submissions of the Appellant, the Determination, and the section 112(5) record (“Record”).
24. On receiving the Appellant's appeal, the Director provided the Tribunal, the Appellant, and the Employer with the Record for purposes of the appeal. The Tribunal then requested submissions on the completeness of the Record from the parties. As the Tribunal did not receive any objections to the completeness of the Record from the parties, the Tribunal accepts the Record as complete.

Appeal of Determination

25. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.
26. An appeal is limited to the grounds set out in the *ESA* and an appellant has the onus to show that the appeal meets one or more of the specified grounds. An appeal is not another new hearing of the case, nor is it meant to be an opportunity to resubmit an appellant’s facts and arguments and ‘try again.’

New Evidence

27. On the Appeal Form the Appellant alleges that new evidence has become available since the time the Determination was being made.
28. The test that must be met to introduce new evidence on an appeal is clearly established. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out the following requirements for introducing new evidence on appeal:
- (a) the evidence could not reasonably have been discovered and presented to the Director during the investigation or adjudication of the complaint;
 - (b) the evidence must be relevant to a material issue 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 make a difference and lead to a different conclusion in the Determination;

29. Each of the above requirements need to be met by an appellant seeking to submit new evidence. Previous decisions of the Tribunal make it clear that parties are expected to participate in good faith and present all relevant evidence during the initial investigation and determination stage of the complaint. The introduction of new evidence at the appeal stage, that could and should have been introduced previously at the investigation and determination stages, will generally result in the dismissal of the appeal.
30. The Appellant submits findings of fact made in the Determination are incorrect and should be amended in accordance with the Appellant's appeal submission. The Appellant essentially submits evidence that existed at the time of the investigation and determination of the complaint. I note the Appellant does not submit that the alleged new evidence could not have been discovered or presented during the investigation or determination stage of the complaint.
31. The evidence and arguments submitted by the Appellant do not meet the requirements for new evidence. The Appellant has not shown the alleged new evidence could not reasonably have been found and presented during the investigation and determination stage. Indeed, the Appellant is essentially resubmitting arguments and facts previously made to the Delegate. There is no indication the Appellant could not take part in the investigation nor was prevented or limited in discovering or presenting evidence. The Record in fact shows the Appellant was fully involved in the investigation, responded to requests for information, and repeatedly provided evidence and submissions to the Investigative Delegate.
32. The law is clear that an appellant must meet all the necessary requirements for new evidence. The failure to do so will generally result in dismissal of the appeal (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., supra, Can-Pacific Trading Inc.*, BC EST # D082/11, *Anthony McInnis*, 2020 BCEST 9). It is important for the fair and efficient resolution of complaints under the *ESA* that parties participate fully in good faith during the investigation and adjudication of complaints. It would be contrary to the efficient and fair resolution of complaints under the *ESA* for a party to hold out during the investigation and determination stage and then subsequently continue to present information and evidence on appeal that could and should have been presented earlier (see *Kaiser Stables*, 1997 Canlii 25445 (BCEST), and *Dunning and Bourque*, 1997 Canlii 25835 (BCEST) - limited participation).
33. The Appellant in this case essentially resubmits arguments made during the initial investigation and determination stage and does not submit cogent evidence nor explanation regarding how the evidence could not reasonably have been discovered or presented earlier during the investigation. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.
34. I find there is no merit in this ground of appeal, and it is dismissed.

Other grounds

35. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc, dba Superior Transmissions*, BC EST # D141/03).
36. Even though I have found the Appellant has not demonstrated that there was new evidence, I will also consider the Appellant's submissions on other grounds in the alternative.

37. While not specifically noted on the Appeal Form, the Appellant's submission appears to allege that the Director erred in law in finding the amount of wages, annual vacation pay, compensation for length of service that were owed. The Appellant submits a higher amount is owed.
38. To show an error of law, the Appellant has the burden to show a material legal error in the Determination. Examples of errors of law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466).
39. A disagreement with a finding of fact does not amount to an error of law. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate (see *Britco Structures Ltd.*, BC EST # D260/03; *M.S.I. Delivery Services Ltd.* BC EST # D051/06, upheld on reconsideration BC EST # RD082/06; *Noor Investments Ltd. (Re)* 2021 BCEST 50 - calculation of wages owing finding of fact)
40. I have reviewed the Determination and the evidence in the Record and do not find an error of law in the Determination. I have considered the calculation of the amount owing to the Appellant for wages, annual vacation pay, compensation for length of service, and interest totaling \$3,910.86. I find there is no error of law in the calculation and confirm the amounts. While the Appellant may not agree with the Determination, I find there was evidence the Delegate could rely on to make the findings of fact and arrive at the calculations and conclusions in the Determination. As noted in the Determination, the Delegate considered the conflicting evidence and made a reasoned decision based on evidence and the law. It is clearly established in Tribunal decisions that this Tribunal will not re-hear the case, nor will it re-evaluate and re-weigh the evidence and substitute its own view of the same evidence.
41. In summary, I find the Appellant is, for the most part, rearguing her view of the facts and evidence that have already been properly considered and decided by the Delegate in the Determination. Absent an error of law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate.
42. I find there is no error of law and would also dismiss this ground of appeal.

Summary dismissal

43. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.
44. I find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

ORDER

45. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.
46. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal