Citation: Colonial Countertops Ltd. (Re)
2024 BCEST 69

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Colonial Countertops Ltd.

("employer")

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Kenneth Wm. Thornicroft
SUBMISSIONS:	T. Reid Fraser, legal counsel for Colonial Countertops Ltd.
FILE NUMBER:	2024/043
DATE OF DECISION:	August 6, 2024

DECISION

INTRODUCTION

1. On March 5, 2024, Dawn Sissons, a delegate of the Director of Employment Standards ("delegate"), issued a Determination pursuant to section 79 of the *Employment Standards Act* ("*ESA*") ordering the appellant, Colonial Countertops Ltd. ("employer"), to pay a former employee ("complainant") $26,991.31 on account of unpaid overtime ($23,758.28), concomitant vacation pay ($950.33), and section 88 interest ($2,282.70). By way of the Determination the delegate also levied four separate $500 monetary penalties against the employer based on its contraventions of sections 17, 18, 28, and 40 of the *ESA*. Accordingly, the employer's total liability under the Determination is $28,991.31. The delegate issued her "Reasons for the Determination ("delegate's reasons") concurrently with the Determination.

2. The employer appeals the Determination pursuant to sections 112(1)(a) and (b) of the *ESA*, arguing that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.

3. In my view, the employer's positions that the delegate erred in law and failed to observe the principles of natural justice are not tenable. Accordingly, after considering the employer's evidence and argument, I find that this appeal has no reasonable prospect of succeeding and, as such, there is no need to hear from the respondents. This appeal is dismissed pursuant to section 114(1)(f). My reasons for doing so now follow.

THE DETERMINATION

4. The employer manufactures and sells countertops. The complainant held, at the point of her resignation on September 22, 2022, the job title of "office manager" and was paid a $60,000 annual salary. The principal issue in dispute between the parties was whether the complainant was a "manager" as defined in section 1(1) of the *Employment Standards Regulation* ("*Regulation*"):

> **"manager"** means
>
> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
>
> (b) a person employed in an executive capacity...

5. Employees who are "managers," as defined in the *Regulation*, are exempted from the *ESA*'s hours of work and overtime provisions (i.e., Part 4 of the *ESA*; see section 34(f) of the *Regulation*).

6. The complainant maintained that she was a "manager" in name only, and that her fundamental job duties did not significantly involve "supervising or directing" human or other resources. The employer did not argue that the complainant was employed in an "executive capacity." The delegate determined that the complainant "did not exercise authority or discretion over Colonial's financial resources," and that "her principal employment responsibility was customer service tasks (taking

orders and collections), and that only a small part of her job duties consisted of directing and controlling staff (including some hiring and firing)" (delegate's reasons, page R5).

7. Having determined that the complainant was not a "manager," the delegate then turned her mind to the complainant's unpaid overtime claim, ultimately determining that the complainant was entitled to $23,758.28 in unpaid overtime wages plus concomitant vacation pay (at 4%) and section 88 interest.

THE DELEGATE'S REASONS

8. The complainant was originally hired on May 6, 2016, to work on the "front desk," a position that the employer never asserted was a managerial position. From June 1, 2021, to October 7, 2022, the complainant held the title of "office manager." As recorded in the delegate's reasons, the complainant maintained that her duties did not materially change when she moved from the "front desk" position to "office manager." The complainant described her duties in the latter position as follows (at page R4):

> ...assisting customers in the showroom, handling telephone inquiries, taking/entering orders, scheduling measures, templates & installs, pricing orders, interacting with sales representatives regarding new products, keeping the showroom tidy, calling customers regarding overdue accounts, contacting customers with quotes, collecting payment from customers, filing, locate & load customer countertops, training and assisting new employees, checking order statuses and monthly invoicing and assisting with some of the hiring and firing. She also trained, answered inquiries and provided assistance to new employees.

9. The employer's evidence was that the complainant was a "showroom supervisor" who "independently hired at least three employees between December 2021 and August 2022." More generally, the employer's "human resource manager" described the complainant's duties as follows (at page R4):

> ...train employees including how to perform quotations; dealt with complicated orders and calculations, control and monitor other sales representatives' performance; ensure that " all is put in system"; interview new employees and make decisions about their suitability, attend weekly management meetings, determine the starting wage for new employees and sign off on hiring packages, handle onboarding and conduct performance evaluations of new employee's [sic]; order office supplies; maintain a presentable show room...

10. The employer's branch manager confirmed that the complainant "did not have any financial authority and did not have a budget," but did attend weekly managerial meetings (but was apparently not required to do so) and had three staff members reporting to her (page R4). The employer's previous branch manager (who held this position until April 15, 2022 – i.e., about five months before the complainant resigned) stated that the complainant's "job duties essentially remained unchanged when she became an office manager, although scheduling became a larger part of her work, and her wages went up" (page R4). The previous branch manager stated the complainant had independent purchasing authority up to $20,000. This latter statement stood in contrast to the current branch manager's evidence that the complainant did not have a budget or any "financial

authority." The delegate observed that the employer never provided "any evidence to show that it delegated signing authority to [the complainant] whether to draw on its bank accounts or to contractually bind it in employment contracts, service contracts or purchasing agreements" (page R5).

11. Ultimately, the delegate determined that the complainant's job duties remained "relatively unchanged" when her position changed to "office manager," and that while "some employees may have reported to her and that she was involved in some hiring and firing…I do not find..[her] principal employment responsibility was supervising and/or controlling staff [and that it was] unlikely that the majority of her time was spent supervising and/or controlling staff" (page R5). The delegate concluded that the complainant's job duties as "office manager" consisted of the following tasks: "…her principal employment responsibility was customer service tasks (taking orders and collections), and that only a small part of her job duties consisted of directing and controlling staff (including some hiring and firing) …" (page R5).

12. Having determined that the complainant was not a "manager" as defined in the *Regulation*, the delegate then addressed the complainant's unpaid overtime pay claim. This claim was calculated with reference to the complainant's employment contract, signed June 1, 2021, which provided for a $60,000 annual salary and a 40-hour work week. This agreement contemplated the complainant working beyond 40 hours in a week "from time to time" (paragraph 8): "The Employee acknowledges that it may be necessary to work extended hours from time to time in order to fulfill the duties and responsibilities of the position."

13. The employer "did not track [the complainant's] hours of work and so did not provide a daily record of [the complainant's] hours of work" (delegate's reasons, page R7). The complainant submitted monthly calendars showing her hours of work from September 1, 2021, to September 22, 2022. The employer disputed her hours of work as set out in those documents. The delegate accepted the complainant's records as being "the best evidence available of her daily hours of work," and used those records to calculate her unpaid overtime pay entitlement.

14. The parties agreed that the complainant was paid a $10,000 bonus in December 2021. The employer's human resource manager described the bonus as having been paid "as appreciation of [the complainant's] input into the company including extra hours and extra efforts in the management role, that she held the second half of the year 2021." The employer's former branch manager stated that the bonus was based on a "percentage of profit." The delegate did not take the bonus into account in calculating the complainant's unpaid overtime entitlement because it "was not paid based on the number of daily and/or weekly overtime hours that [the complainant] worked and was not paid out within the bi-weekly pay period," also noting that the bonus "was paid out yearly…and was based on a percentage of the Employer's profit" (page R8).

15. In calculating the complainant's unpaid overtime pay, the delegate accounted for some time off in lieu of overtime that the complainant had worked during the wage recovery period (pages R10-R11).

THE EMPLOYER'S APPEAL

16. As noted above, the employer appeals the Determination based on both the "error of law" (section 112(1)(a)) and "natural justice" (section 112(1)(b)) statutory grounds of appeal.

17. The employer says that the delegate erred in law in determining that the complainant was not a "manager." The employer says that the job description for the complainant's "officer manager" position showed that she met the regulatory definition, and that the delegate erred in finding that there was no job description for the complainant's position. The employer says that several of the delegate's findings of fact were unsupported by, or were otherwise unreasonable in light of, the evidence before her.

18. The employer also says that the delegate's failure to consider and give appropriate weight to the complainant's office manager job description "was a breach of natural justice."

19. The employer says that the complainant never raised the issue of unpaid overtime during her tenure and that the complaint with respect to unpaid overtime was an "attempt to obtain a windfall to which she is not entitled."

20. It is undisputed that the complainant was paid a $10,000 bonus in December 2021. The employer says that the bonus was paid as compensation for overtime hours worked in 2021. The employer says that the delegate erred in failing to take this bonus payment into account when determining the complainant's unpaid overtime pay entitlement.

FINDINGS AND ANALYSIS

The complainant's status

21. The employer's fundamental position is that the delegate erred in law in finding that the complainant was not a "manager" as defined in the *Regulation*. At this juncture, I should note that the complainant's contractual agreement was for a 40-hour work week, subject to occasional "extended hours from time to time." The delegate determined that the complainant worked 492.11 hours of "daily overtime" and 37.14 hours of "weekly overtime." Even if an employee *is* a manager, they are still entitled to be paid, based on their contractually agreed wage, for all hours worked. Of course, in such circumstances, the overtime premia set out in the *ESA* do not apply. That being the case, even if the employer were to succeed on the "manager" issue, this matter would still have to be referred back to the Director of Employment Standards in order to calculate the complainant's entitlement in line with the *Kamloops Golf and Country Club Limited* line of authorities (see BC EST # D278/01, reconsideration refused: BC EST # RD544/01; subsequent review: BC EST # RD236/02; judicial review dismissed: *Kamloops Golf & Country Club Ltd. v. British Columbia (Director of Employment Standards)*, 2002 BCSC 1324).

22. Turning to the question of the complainant's status, as the employer acknowledges, this is a question of mixed fact and law. A determination of a question of mixed fact and law can only be set aside where the decision-maker made a "palpable and overriding error" (see *Housen v. Nikolaisen*, 2002 SCC 33). The delegate, at page R5 of her reasons, stated: "I find that *in the absence of a written*

job description for the Office Manager position, [the former branch manager] knows best what [the complainant's] job duties were" (my *italics*).

23. In fact, the record before the delegate *did* include a job description for the office manager position. The employer, focusing on this omission, now maintains that this fact constitutes an error in law because the delegate acted on "an inaccurate and therefore unreasonable view of the facts." The job description contained in the record for the office manager position is dated "September 2021." Although the delegate misstated the evidence before her when she found that there was no "office manager" job description, the Tribunal has consistently held that job descriptions do not constitute indisputable evidence regarding an individual's actual job duties. In all cases, the decision maker's focus must be on the actual duties that were undertaken by the employee in question.

24. The delegate weighed the conflicting evidence before her and rejected the human resource officer's evidence regarding the complainant's duties, largely because the latter had few direct dealings with the complainant regarding her daily activities. I note that the delegate principally relied on the former branch manager's evidence in determining that the complainant was not a "manager." This individual was in perhaps the best position to *objectively* comment on the complainant's duties. I do not consider that the delegate erred in law or otherwise breached the principles of natural justice in not relying on the job description in deciding whether the complainant was a "manager." Although the delegate erred when she stated that there was no job description for the office manager position, I find that this error was not one that wholly undermined her decision, given that the delegate did focus on the key issue, namely, the nature of the complainant's actual duties.

25. The employer, observing that the former branch manager's employment ended about five months before the complainant resigned, maintains that the delegate should not have principally relied on his evidence. However, the employer never submitted any evidence showing that the complainant's job duties materially changed during her last five months of employment. As for the employer's human resource officer's evidence, I note that the evidence showed she was not well-positioned to comment on the complainant's duties. The current branch manager stated that the complainant did not have any "financial authority" or a budget, although there was evidence that she had limited spending authority (as do many employees who are not "managers"). The complainant, not surprisingly, maintained that she had very few "managerial" responsibilities and, principally, was an administrative clerk. Although there was some evidence to support the employer's position, on balance, I am unable to conclude that the delegate's determination regarding the complainant's status was tainted by a palpable and overriding error. I consider the delegate's reasons for rejecting the employer's position to be intelligible and transparent. I also conclude that her decision that the complainant was not a manager was based on a proper evidentiary foundation.

26. In interpreting the "manager" definition, it should also be recognized that the "managerial" overtime exemption eliminates a statutory minimum overtime entitlement for a particular class of employees. As such, employees should not be characterized as "managers" without clear evidence that their *principal* duties involved "supervising or directing, or both supervising and directing, human or other resources."

The delegate's unpaid overtime pay calculations

27. The employer says that the complainant's unpaid overtime pay claim was not credible, particularly since she never advanced an overtime claim (save for one minor incident when she covered for another person who was ill) until after her employment ended. However, the delegate noted that the employer was aware that the complainant regularly worked through her lunch break (but that it was her "choice" to do so), and was aware that she regularly commenced work at 7 AM even though the firm did not open for business until 8 AM (and that the employer "did not mind" her doing so). The human resources officer stated that if the complainant worked overtime, it was only because she was "being overly meticulous." This evidence tends to corroborate, not undermine, the complainant's position regarding her hours of work. There was also evidence before the delegate, not seriously challenged by the employer, that she occasionally worked from home in the evening hours, since she had off-site access to the employer's computer system. Finally, it should be noted that there is no doctrinal rule to the effect that an employee's overtime claim is legally foreclosed simply because they never advanced it prior to leaving their employment.

The $10,000 bonus

28. Finally, the employer challenges the delegate's decision to refuse to account for the $10,000 bonus that was paid to the employee in December 2021 in calculating the complainant's overtime pay entitlement. The delegate was required to determine the essential nature of this bonus. A "bonus" that consists of "money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency" is defined to be "wages" in section 1(1) of the *ESA*. Such a bonus, since it is an integral component of the wage-effort bargain, cannot be used to offset overtime pay to which an employee is otherwise entitled under the *ESA*. Similarly, discretionary bonuses paid as part of a profit-sharing program should not be used to offset an employee's overtime pay entitlement. On the other hand, monies paid to an employee that are clearly referrable to overtime hours worked must be taken into account when determining an employee's overtime pay entitlement.

29. The employer says the only reasonable interpretation with respect to the December 2021 $10,000 bonus was that it was paid to compensate the complainant for the "extended hours" she would work from time to time as contemplated by her employment agreement. However, this latter agreement also stated, in the very same paragraph referring to the extended hours: "The Employee shall not be eligible for overtime." In other words, the complainant's employment contract seemingly contemplated a contractual obligation to work *unpaid* overtime, a clear contravention of the *ESA* if she were not a "manager."

30. The precise nature of the bonus was not clearly set out in the evidence before the delegate. Although the employer asserted that the bonus was a payment for otherwise uncompensated overtime, it does not appear to have been calculated with reference to the complainant's actual overtime hours. Rather, it appears to have been based on the employer's profits for the year and was, according to the human resource manager, a "yearly bonus" (I note it appears to have been paid on December 22, 2021). The preponderance of the evidence suggests that the bonus was a discretionary payment. Paragraph 13 of the complainant's June 1, 2021, employment agreement refers to a maximum $250 annual bonus based on years of service and the company's profitability. If the bonus were designed

to compensate the complainant for her unpaid overtime hours, one would assume that the complainant would have been required to submit her overtime hours to the employer, and that the payment would have been based on some metric linking the overtime hours worked with the payment made – no such evidence in this latter regard exists.

31. In my view, the delegate's finding that the bonus was not paid to compensate the complainant for her accumulated unpaid overtime hours but, rather, was a discretionary bonus paid to her based on the employer's profitability during 2021, was an entirely reasonable finding given the evidence before her.

ORDER

32. Pursuant to sections 114(1(f) and 115(1)(a) of the *ESA*, this appeal is dismissed, and the Determination is confirmed as issued in the total amount of $28,991.31, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal