Citation: Wee Bee Hauling and Services Ltd. (Re)
2024 BCEST 80

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Wee Bee Hauling and Services Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	David B. Stevenson
SUBMISSIONS:	Michael R. Scherr and Mikaila Mauro, legal counsel for Wee Bee Hauling and Services Ltd. Kevin Bellis, legal counsel for Daniel Moriarity
FILE NUMBER:	2024/041
DATE OF DECISION:	September 11, 2024

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*ESA*) by Wee Bee Hauling and Services Ltd. ("Wee Bee") of a determination issued by Teneal Gagnon, a delegate ("deciding Delegate") of the Director of Employment Standards ("Director"), on February 29, 2024 ("Determination").

2. The Determination found Wee Bee contravened Part 3, sections 17 and 28 of the *ESA* and Part 7, section 37.3 of the *Employment Standards Regulation* (*"Regulation")* in respect of the employment of Daniel Moriarity ("Mr. Moriarity") and ordered Wee Bee to pay Mr. Moriarity wages in the total amount of $3,633.93, interest under section 88 of the *ESA* in the amount of $401.66, and to pay administrative penalties in the amount of $1,500.00. The total amount of the Determination is $5,535.59.

3. Wee Bee has appealed the Determination alleging the deciding Delegate erred in law and failed to observe principles of natural justice in making the Determination.

4. In correspondence dated April 23, 2024, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record ("record") from the Director, invited the parties to file any submissions on personal information or circumstances disclosure, and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Wee Bee and to Mr. Moriarity, in care of their respective legal counsel of record. These parties have been provided with the opportunity to object to its completeness.

6. Counsel for both Wee Bee and Mr. Moriarity have made submissions on the completeness of the record. Both say the record is incomplete.

7. Wee Bee says the record includes a document it claims not to have received, does not include documents related to a mediation at the Employment Standards Branch ("Branch") in 2016, and does not include documents related to another complainant, whose complaint was investigated co-incidentally with that of Mr. Moriarity.

8. Mr. Moriarity says the record does not include some of the documents attached to a legal submission made during the investigation process.

9. The Director has responded.

10. In respect of the submissions on behalf of Wee Bee, the Director says: the record indicates Wee Bee did receive the Demand for Records it claims not to have received; the only material pertaining to a mediation involving Wee Bee was provided by Wee Bee and was not included in the record; the Branch has no documents or notes relating to any mediation involving Wee Bee in 2016 and, consequently, nothing relating to that mediation, was "before the Director" at the time the

Determination was made; all shared information or documents relating to both complainants were included in the record; and documents that applied only to one of the complainants were not included in the record relating to the other.

11. In response to the submission on behalf of Mr. Moriarity, the Director says the documents identified are not in the file, and has no objection to their inclusion in the record if copies can be provided.

12. Wee Bee has filed a final reply, in which they essentially reiterate the same points made in their initial submission.

13. Mr. Moriarity has provided the documents which the Director acknowledged were missing from the file.

14. This appeal will proceed on the record which has been cobbled together through the above submissions, noting that the documents Wee Bee says are not included in the record for Mr. Moriarity are included, and can be accessed, in the record pertaining to the other complainant. Documents which have been redacted have been done so for a valid reason and the inclusion of documents with redactions does not make the record incomplete.

15. I have decided this appeal is appropriate for consideration under section 114(1) of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the deciding Delegate when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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.*

16. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Moriarity will be invited to file submissions. On the other hand,

if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

17. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

BACKGROUND FACTS

18. Wee Bee operates a trucking, excavating and hauling company in Victoria, BC.

19. Mr. Moriarity was employed by Wee Bee as a short-haul truck driver. Wee Bee paid Mr. Moriarity exclusively for the hours billed to its customers, per assignment. It also paid Mr. Moriarity 30-minutes each day to complete truck inspections.

20. Mr. Moriarity filed a complaint with the Branch alleging Wee Bee had contravened the *ESA* by failing to pay regular wages, including travel time, overtime wages, and annual vacation pay.

ARGUMENTS

Error of Law

21. Wee Bee has appealed the Determination alleging the deciding Delegate erred in law in the following respects:

i. by not applying the employment contract to the legal question of regular wage;

ii. by incorrectly interpreting the *ESA* in "redefining the method of remuneration but then applying a calculation";

iii. in finding and calculating travel time and total time;

iv. in calculating wages earned; and

v. in finding a contravention of section 17 of the *ESA*.

22. Wee Bee's argument that the deciding Delegate erred in not applying the employment agreement to the question of regular wage is extensive, drawing on well-established principles under the *ESA*, legal principles addressing the interpretation of contracts, and its analysis of the facts. Primarily, Wee Bee says the deciding Delegate erred in law by failing to conform to the correct legal tests when interpreting the employment agreement. The point sought to be made here is that the deciding Delegate should have found that the employment agreement, "clearly spells out that employees will be paid a commission structure based on truck billable hours," and any other conclusion about the employment agreement was an error of law.

23. The above argument overlaps with the argument that the deciding Delegate erred in law in finding Mr. Moriarity's regular wage was hourly-based.

24. At its core, the argument alleging error of law interpreting the *ESA* is that the deciding Delegate erred in finding Mr. Moriarity's wage structure was not commission based. More particularly, that the deciding Delegate "erred in disregarding the contractual agreement of how Ms.[*sic*] Moriarity was to be paid": appeal submission para. 42.

25. Some aspects of this argument contain assertions of fact that do not accord with findings in the Determination.

26. The argument on the calculation of travel time is premised on the assertion that travel time is not work unless the employee is performing a service and on the contention that Mr. Moriarity was not hauling material to job sites and did not wait in the yard, as stated in the Determination.

27. The argument that the deciding Delegate erred in law calculating unpaid wages and overtime is grounded in an apparent presumption that wage and overtime calculations should have been based on minimum wage.

Natural Justice

28. Wee Bee also alleges there was a failure to observe principles of natural justice in the following respects:

i. by failing to consider all of the evidence;

ii. by failing to consider the contents of the file, including mediation notes, relating to a wage complaint made against Wee Bee in 2016;

iii. by failing to provide sufficient information of Mr. Moriarity's claim; and

iv. by failing to provide sufficient reasons for the interpretation of the employment agreement.

29. Wee Bee rests their "failing to consider all the evidence" argument on two examples where Wee Bee challenges findings of fact, asserting the evidence provided does not support the findings made.

30. Wee Bee argues the contents of the Branch's file on a 2016 complaint was relevant evidence which was "ignored" and/or not considered by the deciding Delegate and was a breach of natural justice.

31. Wee Bee alleges they were denied procedural fairness – not being provided with sufficient particulars of Mr. Moriarity's claim and not being advised the claims of each of the two complainants would be addressed in separate determinations. On the latter point, they submit dealing with each complaint separately "impacted their ability to provide adequate and detailed information" for each complainant because of the possibility that information provided on one complaint was not being considered on the other complaint.

32. Wee Bee says the deciding Delegate failed to provide sufficient reasons or analysis on the interpretation of the employment agreement. This argument includes the assertion that the deciding Delegate erred in interpreting the information provided by Wee Bee and "seemingly" disregarded the express terms of the employment agreement.

33. Wee Bee seeks to have the Determination cancelled.

ANALYSIS

Error of Law

34. At the outset of the analysis on the regular wage issue, Wee Bee's position is expressed by the deciding Delegate as being: "that Mr. Moriarity was paid '*a commission based on truck billable hours,'* which was meant to remunerate him for all hours worked, including driving to and from job sites." The deciding Delegate notes Mr. Moriarity argued "he was paid an hourly rate." More specifically, in his complaint and in discussions with the investigation Delegate, Mr. Moriarity said his position has always been that he was a regular hourly employee; that he never understood when he took the job that he wouldn't be paid "key-to-key"; that it was never clearly explained or clearly written in the employment agreement that he would not be paid for some work; and there is nothing in the agreement about "averaging of wages," nor does it speak to travel time or overtime.

35. The deciding Delegate, correctly in my view, identified the issue as requiring a decision on Mr. Moriarity's "regular wage," meaning, was it an incentive-based regular wage – a commission – or an hourly-based regular wage.

36. The deciding Delegate found that Mr. Moriarity was not paid an incentive-based wage, but was paid an hourly-based wage.

37. Wee Bee says the deciding Delegate, in making that finding, did not follow the correct legal test for interpreting the employment agreement. I disagree.

38. in deciding the meaning of the words, "drivers are paid a commission wage based on truck billable hours," in the employment agreement, I find nothing in the Determination that is inconsistent with the approach to interpretation of such agreements outlined by the Tribunal in *Re Francesco Acquilini et al and Certain Employees*, 2020 BCEST 90, at paras. 108 - 119. That decision drew extensively from the Supreme Court of Canada (SCC) decision *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633 (*"Sattva"*) (which counsel for Wee Bee has cited in the appeal submission).

39. In *Sattva*, the SCC concluded that the historical approach to contract interpretation, which considered "determining the legal rights and obligations of the parties under a written contract was considered a question of law," should be abandoned in favour of an approach that treats the interpretation of a contract as a question of mixed fact and law. In so deciding, the SCC recognized that contractual interpretation was inherently fact specific.

40. The submission made by Wee Bee correctly identifies the objective of contractual analysis is to "determine '*the intent of the parties and the scope of their understanding*.'" (*sic*)

41. Their assertion, however, that the words in the contract are the "primary source" of intention is wrong.

42. The SCC has made it clear in *Sattva* that the words used in an agreement are no longer the primary source of intention. A more nuanced approach is required, where the interpretation of contracts has evolved towards "a practical, common-sense approach not dominated by technical rules of construction," where the overriding concern is to determine the "intent of the parties within the

scope of their understanding" that requires a decision-maker to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.": *Sattva*, para 47.

43. Within the same analysis, the SCC recognized that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning; the meaning of words is often derived from a number of contextual factors: *Sattva*, para. 48.

44. The deciding Delegate followed the legal test outlined in *Sattva*, and adopted by the Tribunal in *Re Francesco Aquilini*, *supra*., considering the nature of an incentive based regular wage in the context of provisions and purposes of the *ESA* and the reality of Mr. Moriarity's employment considered against the characteristics of incentive-based work. In respect of the latter, the deciding Delegate found: the additional hours sometimes billed for travel time was not an "incentive"; that five occasions of "overlap," which Wee Bee insisted was demonstrative of a "commission" that remunerated Mr. Moriarity for all hours worked, was either arbitrary or simply not paid; that Mr. Moriarity had no "reliable or established mechanism by which he could earn the equivalent or a higher amount of money in the same or less time and, hence, vary his regular wage"; Mr. Moriarity was paid a consistent hourly wage for the time it took to complete daily truck inspections, and for time spent washing the truck and completing minor maintenance; and Wee Bee did not convert wages earned in any pay period into an hourly rate when calculating overtime and statutory holiday pay, paying a consistent hourly wage for overtime and statutory holiday entitlements.

45. The above matters were findings of fact, based on the evidence provided. In result, the deciding Delegate concluded, at page R6 of the Determination:

> . . . the evidence does not support that the convention of pay is incentive-based. Rather, it indicates that Mr. Moriarity was paid a consistent hourly rate for the hours he billed for each assignment or spent completing other work, such as inspections. I am satisfied that the convention by which Mr. Moriarity was paid is not characteristic of resemblant of a commission or any other incentive-based wage. Therefore, I find Mr. Moriarity's wage was hourly-based, and he ought to have been paid at his hourly rate for all hours worked.

46. The analysis, findings of fact, and conclusions of fact set out in the Determination amply support the finding of the deciding Delegate on the question of Mr. Moriarity's regular wage.

47. The logical conclusion is that the deciding Delegate found the reference to "commission" in the employment agreement could not be read as an agreement to pay Mr. Moriarity an incentive-based regular wage.

48. I agree completely with the deciding Delegate; there is nothing in the circumstances that suggests Wee Bee intended the rate of pay for Mr. Moriarity, and other drivers, to be a commission. If that was their intention, they were, as the deciding Delegate noted, required to maintain a record of total hours worked in each pay period, determine the wage rate for each pay period, provide the information required by section 27 of the *ESA* to their employees on each wage statement, and maintain the records required by section 28 of the *ESA*. Wee Bee did not do any of that. The failure of Wee Bee to meet its statutory obligations lends credence to the assertion that the purported

"commission" structure is nothing more than a way to avoid paying its employees the agreed upon hourly wage for all time worked and for overtime.

49. In my view the words in the employment agreement relied on by Wee Bee in this argument are, on the facts, not simply ambiguous or unclear, but meaningless. In addition to those matters identified in the Determination, I will note that a statutorily correct calculation of a commission wage rate would have the effect of reducing the hourly rate for Wee Bee's employees. Such a result would be a violation of its agreements with the City of Victoria and Saanich to pay their drivers a wage rate equivalent to what was being paid to those entities' drivers. Wee Bee acknowledges, at page 236 of the record, that breaching a condition of the agreements could result in a loss of the contract. An interpretation of the employment agreement that countenances that result should be avoided.

50. The proper test for reviewing a question of mixed fact and law is whether the decision-maker made a "palpable and overriding error," unless the decision maker made a discrete and extricable legal error.

51. I find the deciding Delegate made no "discrete and extricable legal error" in finding Mr. Moriarity's regular wage was an hourly-based wage and the burden on Wee Bee here is to show the conclusion of the deciding Delegate – that Mr. Moriarity's regular wage was hourly-based – was a palpable and overriding error.

52. I find they have failed to do so and this argument is dismissed.

53. Based on the above finding, the other arguments alleging error of law can be quickly addressed. The challenges to the calculations for travel time and for regular and overtime wages, are based on evidence acquired during the investigation process and are findings of fact.

54. Most of the arguments made here are grounded in the continued, and incorrect, contention that Mr. Moriarity's regular wage was incentive-based. More to the point, none of the arguments made here are based on an acceptance of the finding that Mr. Moriarity's regular wage was hourly based.

55. Whether or not the deciding Delegate erred in law in respect to the facts, *simpliciter*, is a question over which the Tribunal has no jurisdiction. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

56. A finding of fact is only reviewable by the Tribunal as an error of law on the facts in limited circumstances. The test for establishing findings of fact constitute an error of law is stringent. Based on my assessment of the facts in the record and as found in the Determination, Wee Bee has not met the test. The conclusions of the deciding Delegate were adequately supported on the material before her; there is no basis for alleging, or finding, that the deciding Delegate made an error of law on the facts. Findings of fact made by the deciding Delegate require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.

57. Nothing in the submissions persuades me the deciding Delegate made an error of law on the facts. This argument is also rejected.

Natural Justice

58. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. I find nothing in the appeal that would support a finding there was a failure to comply with principles of natural justice within the complaint process.

59. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> 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.

60. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination.

61. To reiterate, an allegation of a failure to observe principles of natural justice carries the burden to provide some evidence in support of that allegation. Wee Bee has not met that burden.

62. Wee Bee's arguments on this ground are that the deciding and investigating Delegates failed to observe principles of natural justice by: failing to consider all the evidence; failing to consider the contents of the file on the 2016 complaint; failing to provide sufficient information of Mr. Moriarity's claim; and failing to provide sufficient reasons of the interpretation of the employment agreement.

63. The argument alleging failure to consider all the evidence fails on the facts. The argument focuses on what Wee Bee insisted was an "overlap" on truck billable hours and raises a challenge to findings of fact on that matter. The challenge fails; the findings of the deciding Delegate were based on the available evidence and are adequately reasoned in the Determination. There is no basis for the allegation that all of the relevant evidence was not considered.

64. The argument relating to the 2016 complaint presumes this matter is relevant to the complaint of both complainants. It is not, for the reasons expressed to Wee Bee during the investigation process: see record, P. 96.

65. The argument that Wee Bee was not provided with sufficient information of Mr. Moriarity's claim is, simply on an examination of the IR and the record, groundless. Their argument revolves almost entirely on the bare assertion that the decision to treat the complaints of Mr. Moriarity and the other employee who filed a complaint similar to his separately was a denial of procedural fairness. Wee Bee has provided no evidence supporting such an assertion and nothing in the record supports it.

66. The related argument about redactions made to some of the material in the record is similarly groundless.

67. The argument that the deciding Delegate did not provide sufficient reasons of the interpretation of the employment agreement is also not supported on a fair reading of the Determination and has effectively been addressed above, under the error of law ground of appeal. Much of this argument plows old ground, revisiting the argument that the deciding Delegate erred in finding Mr. Moriarity's regular wage was hourly-based. It is no more valid here than it was when considered earlier in this decision.

68. The deciding Delegate provided extensive reasons for her conclusion on Mr. Moriarity's regular wage: see page R3-R6 of the Determination. Those reasons adequately explained the basis for her decision.

69. The argument relating to the 2016 complaint has been addressed above.

70. The argument raising the question of acquiescence was never raised during the complaint process in any way that would have required the deciding Delegate to address it. It is inappropriate, having failed to raise it during the complaint process, to contend the deciding Delegate failed to deal with it.

CONCLUSION

71. For all of the above reasons, I find there is no merit to any of the arguments made and no reasonable prospect this appeal will succeed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it; it is, accordingly, dismissed.

ORDER

72. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated February 29, 2024, be confirmed in the amount of $5,535.59, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal