

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Janice Tradio

- of a Determination issued by -

The Director of Employment Standards

PANEL: Jeremy Bryant
SUBMISSIONS: Jonathon Braun, counsel for Janice Tradio
FILE NUMBER: 2024/064
DATE OF DECISION: November 7, 2024

DECISION

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act (ESA)*, Janice Tradio (“Appellant”) has filed an appeal of a determination issued by the Director of Employment Standards (“Director”).
2. Ms. Tradio’s complaint alleged Elnaz Ghanchi (“Respondent” or “Employer”) contravened section 74 of the *ESA* when she failed to pay Ms. Tradio wages for work performed as a childcare and household employee between August 21 and August 31, 2022 (“Complaint”).
3. The Director stopped the investigation of the Complaint pursuant to section 76(3)(i) of the *ESA* as the Director’s delegate (“Delegate”) determined the Complaint had been resolved when the Employer paid Ms. Tradio the amount she had claimed in unpaid wages (“Determination”).
4. Ms. Tradio appeals the Determination on the grounds the Director erred in law and failed to observe the principles of natural justice as the Director did not award interest or issue mandatory administrative penalties on the Employer pursuant to the *ESA*.
5. The Tribunal did not receive any objections to the completeness of the *ESA* section 112(5) record (“Record”) disclosed to the parties on July 19, 2024, by the Director.
6. I have considered the Record, the Determination, and the submissions of the Appellant. I did not request submissions from the Director or the Respondent.
7. For the reasons that follow, I confirm the Determination and dismiss Ms. Tradio’s appeal.

ISSUES

8. The issues on appeal are as follows:
 - I. Did the Director err in law by:
 - a. failing to consider all the violations listed in the Complaint;
 - b. incorrectly determining the complaint had been resolved; and
 - c. failing to administer interest and administrative penalties.
 - II. Did the Director fail to observe the principles of natural justice by failing to consider all the evidence submitted and all the violations listed in the Complaint.

BACKGROUND FACTS

9. The Appellant was employed by the Employer as a childcare and household employee from August 21 to 31, 2022.
10. The Appellant’s Complaint was filed with the Employment Standards Branch on February 11, 2023, and indicates:

- a. she was working in British Columbia under the Temporary Foreign Worker Program;
- b. her employment ended on August 31, 2022, when she quit;
- c. she “decided not to continue on with the family since [she] was being overworked”;
- d. she stated, “I still have never been paid for any of my work”;
- e. her preferred resolution was to be paid wages, weekly overtime, vacation pay, and interest; and
- f. she estimated her claim at \$1,264.64.

11. Ms. Tradio was represented by counsel from the Migrant Workers Centre (“Counsel”), who continues to represent her in this appeal.

12. The Record reveals the parties engaged in settlement discussions after the Complaint was filed.

13. On February 19, 2023, Counsel wrote a demand letter to the Employer stating in part:

Ms. Tradio has not been paid for any of this work and her wages are still outstanding. We calculate that Ms. Tradio is owed **\$1264.64** in wages. We write to kindly request that this payment be issued immediately.

52 hours of regular work @ \$16/hour = \$832.00

16 hours of weekly overtime work @ \$24/hour = \$384.00

4% vacation pay = \$48.64

On 11 February 2023, I assisted Ms. Tradio to file an Employment Standards Branch complaint against you. Should that complaint proceed, we are confident that Ms. Tradio will be awarded the full wages that she is owed, plus interest. In addition, each violation of the *Employment Standards Act* carries an administrative penalty of \$500. My assessment is that you have committed at least 7 violations and are liable for an administrative penalty of at least \$3,500.00. These violations include:

- Minimum wage - s.16
- Paydays - s.17
- Payment upon termination of employment - s.18
- Wage statements - s.27
- Payroll records - s.28
- Overtime wages - s.40
- Vacation pay - s.58

Should you pay Ms. Tradio her outstanding wages by **10 March 2023**, she agrees to withdraw her Employment Standards Branch complaint, thereby preventing a Determination being issued and any administrative penalties being owed. If you do not make this payment by that deadline, any willingness to settle will be off the table, and we will ask that the Employment Standards Branch issue a Determination with all resulting penalties.

Accordingly, please issue a cheque made out to Janice Tradio in the amount of \$1264.64. It can be mailed to the Migrant Workers Centre office at the address in my signature.

(emphasis in original)

14. The Employer's husband responded to Counsel on March 14, 2023, indicating some dissatisfaction with Ms. Tradio's work and concluded:

We honestly dont [sic] think she was deserving of the full weeks wages as she didn't do the work she signed up for.

Im [sic] willing to pay her for a partial of the week if she wishes to settle.

15. Counsel responded by email on March 15, 2023, writing in part:

Your choice to simply not pay an employee because you don't think she was "deserving" demonstrates a harmful misunderstanding of your obligations as an employer. ...I strongly urge you to speak with the Employment Standards Branch and Human Rights Tribunal about your obligations as an employer. I also encourage you to seek independent legal advice. While this matter may currently only be about \$1264.64 in wages, sound legal advice might prove helpful in discussing the reputational risks of this action and may also be of benefit for any future employment relationships.

To be clear, we will not be settling for anything less than a full payment of what is owed. Should you continue in your refusal to pay Janice in full we will file a claim against you and your wife in Small Claims court, where we will seek aggravated and punitive damages for the pain and harm that your contract breach has caused and/or a complaint with Human Rights Tribunal for discrimination based on sex. We will also continue our action under the Employment Standards Act, where mandatory administrative penalties may be found to apply. Should you wish to avoid such actions, we expect to receive a cheque for full payment (minus statutory deductions) by Saturday, **March 18, 2023**. If we do not receive this payment by then, we will expect any future settlement discussions to include damages.

...

Based on the above, we look forward to receiving the cheque for Janice's wages this week. Our office is open Tuesday-Saturday 9:00am-5:00pm.

(emphasis in original)

16. On March 20, 2023, the Employer provided Ms. Tradio \$1,264.24 by e-transfer.
17. An investigating delegate of the Director commenced an investigation in January 2024 ("Investigation").
18. The Investigation revealed \$1,264.24 was paid to the Complainant by the Employer on March 20, 2023.
19. Accordingly, the investigating delegate sought submissions on whether the Complaint was resolved pursuant to section 76 (3)(i) of the *ESA* which provides:
- (3) The director may stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if the director is satisfied that

...

- (i) the complaint has been resolved, including by way of a settlement agreement made under section 78.

20. Ms. Tradio took the position no settlement was reached between the parties, and the Complaint should proceed on the issues of administrative penalties against the Employer for breaches of sections 17, 18, and 58(3) of the *ESA* (for failing to pay Ms. Tradio's wages in accordance with the *ESA*) and interest on her unpaid wages.

21. On May 2, 2024, the Delegate issued the Determination, finding as follows:

During the course of the investigation, the investigating delegate received an e-mail from the Complainant's Counsel, Jonathan Braun, on January 13, 2024, stating that the Respondent made a payment to the Complainant on March 20, 2023, in the amount calculated by Mr. Braun. The Complainant received the gross amount of the wages she alleged were owed to her, as calculated by Counsel, with none of the usual statutory deductions having been made by the Respondent, at the request of Counsel.

The Respondent provided the wage statement to the Complainant at the beginning of March, 2024, and it indicated the wages were paid in accordance with the amount that had been calculated by Counsel, \$1,264.64, with none of the usual statutory deductions having been made.

During the investigation, the Complainant did not dispute that the amount the Respondent had paid to the Complainant in March, 2023 satisfied the wages she alleged were owed to her and for which she submitted her complaint.

Counsel for the Complainant cited a demand for interest on the wages and desire for administrative penalties to be imposed on the Respondent. The Complainant did not, at any time, indicate that the funds provided to the Complainant by the Respondent prior to the investigation failed to satisfy the outstanding wage amount owed. Rather, Counsel only noted his desire for interest on outstanding wages and penalties to be applied to the Respondent as reasons for continuing the investigation, two matters that the Act does not enumerate as ones for which a complaint may be made to the Branch.

The Employer's alleged failure to pay the Complainant's wages was the cause of the dispute. The Respondent made a payment to the Complainant for the amount the Complainant alleged to be outstanding prior to the issuance of a Determination. The Complainant or her Counsel provided no indication that the payment was unsatisfactory or deficient. The Complainant received what she had identified as being owed to her on her complaint form.

22. Accordingly, the Delegate exercised her discretion, and determined the Director would stop investigating the Complaint under section 76(3)(i) of the *ESA* as the dispute that caused the Complaint had been resolved.

ARGUMENT

23. The Appellant argues the Delegate failed to properly consider all violations captured by the Complaint and incorrectly determined the matter had been resolved because Ms. Tradio stated in her Complaint summary, “I have still not been paid for any of my work” (emphasis added). She argues, this statement should have led the Delegate to consider the timelines for payment of wages and vacation pay under sections 17, 18, and 58(3) of the *ESA* and interest pursuant to section 88.
24. The Appellant argues that stopping the investigation of the Complaint without issuing administrative penalties to the Employer for their delay in paying her wages was contrary to public policy given the mandatory timelines for payment of wages under the *ESA*, the section 2 purposes of the *ESA*, and the importance of deterring bad behaviour by employers who can make value judgements about paying their employees.
25. The Appellant argues the Tribunal has determined administrative penalties can be issued against an employer even if a matter is resolved prior to a determination, citing the following passage from *Ahead College Inc., formerly known as Ahead Institute of Technology Ltd.*, BC EST # D439/02 (“*Ahead College*”):
- In my view, the fact that an Employer has complied with the *Act* by the date of the Determination, does not preclude a finding that the Employer was in breach of the *Act*, and the imposition of a penalty. Payment of wages is an essential part of the employment relationship, and non-payment of wages, or delayed payment of wages can impose a significant hardship on an employee. An employee should not have to file an employment standards complaint in order to receive regular wages.
26. The Appellant argues that subsequent to the *Ahead College* decision, on November 30, 2002, the *ESA* was amended to impose mandatory penalties on employers for failure to comply with the *ESA*. Therefore, discretion no longer exists and the case for imposing penalties is even stronger.
27. The Appellant argues the imposition of interest is mandatory under section 88 of the *ESA* and the Employer’s eventual voluntary payment of unpaid wages did not excuse them from that payment, citing *Marivic Bariquit (Re)*, 2022 BCEST 14 (“*Bariquit*”).
28. The Appellant seeks administrative penalties be issued against the Respondent for alleged violations of sections 17, 18, and 58(3) of the *ESA* and interest be awarded pursuant to section 88.
29. The Appellant alleges the Delegate breached the principles of natural justice by failing to consider all of the evidence submitted. Specifically, that the Delegate erroneously stated the Appellant’s Counsel requested the usual statutory deductions not be made and that the Delegate failed to appreciate the significance of the Appellant’s statement in her complaint summary that she “still” had not been paid.
30. The Appellant also alleges the Delegate breached the principles of natural justice by failing to consider the alleged violations of sections 17, 18 and 58(3).

ANALYSIS

Error of Law

31. The Tribunal has adopted the following definition of "error of law" from the BC 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.

32. The *Gemex* definition of "error of law" should not be applied so broadly as to include errors of fact alone or errors of mixed law and fact which do not contain extricable errors of law: *Britco Structures Ltd.*, BC EST # D260/03.

33. Section 76 (3)(i) of the *ESA* provides:

- (3) The director *may* stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if the director is satisfied that
...
 - (i) the complaint has been resolved, including by way of a settlement agreement made under section 78.

(emphasis added)

34. The use of the permissive "may," in "the Director *may* stop investigating a complaint if satisfied that the complaint has been resolved," gives the Director discretion in making a decision under section 76(3)(i).

35. The threshold an appellant must meet in order for the Tribunal to interfere with a delegate's discretionary decision under section 76(3) is high. The Tribunal will not overturn a discretionary decision of this nature unless: the exercise of discretion was in bad faith or an abuse of power; the delegate erred in interpreting the limits of their discretionary authority; there was a procedural error in the delegate's exercise of discretion; or the discretionary decision was "unreasonable," in the sense that it was based on irrelevant considerations, or the delegate failed to consider relevant factors or exercised their discretion arbitrarily: *Inderpal Singh (Re)*, 2021 BCEST 94 ("*Singh*"), reconsideration denied in 2022 BCEST 4.

36. The Tribunal also gives a sympathetic reading to a delegate's reasons for determination assuming (unless there is a good reason not to) that the delegate considered and weighed all the evidence and – based on that evidence – found every findable fact necessary to support the conclusions they reached even when they have not expounded upon them: *Singh, supra*.

a. Did the Director err in law by failing to consider all the violations listed in the Complaint?

37. The Appellant argues the statement in Ms. Tradio's Complaint summary, "I have still not been paid for any of my work" (emphasis added), demonstrated she was seeking mandatory penalties under sections 17, 18, and 58(3) of the *ESA* and, by not referring to those sections in the Determination, the Delegate erred in law.

38. I cannot find the Delegate failed to consider alleged violations of sections 17, 18, and 58(3) or interest under section 88 as she reviewed Ms. Tradio's submissions which contained arguments regarding those violations and wrote, "Counsel for the Complainant cited a demand for interest on the wages and desire for administrative penalties to be imposed on the Respondent" (emphasis added). She nonetheless correctly determined the Complaint had been resolved.

39. The Director did not err in law by failing to consider all the violations listed in the Complaint.

b. Did the Director err in law by incorrectly determining the Complaint had been resolved?

40. The Appellant notes the parties did not reach a settlement agreement with the assistance of the Director under section 78 of the *ESA*. However, by virtue of using the word "including" in section 76(3)(i), the legislature has identified a section 78 settlement agreement is only *one* example of a complaint being resolved. Here the Record reveals the parties resolved the Complaint prior to an investigation by the Director.

41. The Delegate identified the amount claimed by the Appellant in the Complaint was paid on March 20, 2023, and the Respondent provided a wage statement at the beginning of March 2024 confirming that amount satisfied the unpaid wages claim (Determination at page R3).

42. The Complaint indicated Ms. Tradio would pursue interest. However, the Delegate identified that after payment of the claim amount and during the ten months between March 20, 2023, and the commencement of the investigation, the Appellant "did not, at any time, indicate that the funds provided ... by the Respondent prior to the investigation failed to satisfy the outstanding wage amount owed" (Determination at page R3). There is no evidence on the Record showing the Appellant pursued interest during that period.

43. On a sympathetic reading of the Determination, as I am required to give it, the evidence that the employer paid the outstanding wages supports the Delegate's conclusion the matter which led to the Complaint had been resolved.

44. As the Delegate reviewed all the evidence provided (Determination at page R2), I must assume she also reviewed the Record which included a settlement offer from Counsel for \$1,254.64 without interest on March 15, 2023 five days prior to the Employer paying that amount to Ms. Tradio on March 20.

45. Although Counsel had indicated the March 15 offer would expire on Friday, March 18, the Respondent's payment two days past that deadline on Monday, March 20 satisfied the outstanding wage amount owing. Further, the wording of the offer suggested "future settlement discussions" may occur and did not firmly state a failure to pay by the deadline would prevent acceptance of the

offer (unlike the February 19 email from Counsel). The offer was silent on whether Ms. Tradio would continue pursuing the Complaint for interest if payment was not made by the deadline.

46. This settlement offer and Ms. Tradio's subsequent acceptance of the outstanding wage amount followed by her ongoing silence with respect to interest, was additional evidence supporting the conclusion the matter had been resolved by the parties.

47. Accordingly, the Delegate did not misinterpret or misapply the *ESA*, a principle of the general law, or exceed the bounds of her discretionary authority. The Delegate's decision was reasonable insofar it was based on relevant considerations free from arbitrariness. The Delegate correctly applied the applicable legal principles in determining the complaint was resolved after considering the evidence.

48. The Director did not err in law in concluding the Complaint had been resolved.

c. Did the Director err in law by failing to administer interest and administrative penalties?

49. The Appellant argues interest under section 88 and the administrative penalties associated with breaches of sections 17, 18, and 58(3) were mandatory and should have been considered.

50. However, by virtue of the Delegate's decision to stop the investigation under section 76(3)(i), no finding was made with respect to a breach of the *ESA*. Thus it would be improper, particularly on the facts of this case, to impose an administrative penalty or require the Employer to pay interest.

51. I find *Ahead College* is distinguished in several respects. The Director did not exercise their discretion to stop the investigation under section 76 of the *ESA* in that case. This may have been due in part to the facts which demonstrated the balance of outstanding wages had not been paid in early June 2002, weeks before the determination was issued (pages 2-3). Additionally, the past record of infractions by *Ahead College* revealed it was the fifth time they had violated Part 3 (Wages, Special Clothing and Records) and the third time they had violated Part 7 (Annual Vacation or Vacation Pay) (page 3) of the *ESA*. In those circumstances, the Tribunal confirmed the Director's determination to issue an administrative penalty on the employer despite their payment of outstanding wages just prior to the determination. The facts in this case are very different. The Director found the Complaint was resolved a little over one month after it was filed and ten months before the investigation commenced. There was no evidence before the Delegate of prior *ESA* violations by this Employer.

52. I also find *Bariquit* is distinguished. In that case the Director's delegate calculated the amounts owing after conducting an investigation (at paragraph 100). The Tribunal Member found the Director's delegate should have calculated interest on those amounts up to the date of the voluntary payment by the employer. In this case, the amounts owing were calculated by Ms. Tradio (without interest) well before the investigation commenced. Ms. Tradio then offered and accepted settlement based on that amount. Accordingly, it cannot be characterized as a misinterpretation of the *ESA* or an error in law for the Delegate not to have considered interest under section 88 - either for the period *before* the October 20, 2023 payment or the period *after* the October 20, 2023 payment (during which the Employer likely assumed the Complaint had resolved, having received no indication their payment did not settle the Complaint).

53. I cannot find the Determination was inconsistent with the section 2 purposes of the *ESA*. Those purposes include ensuring employees receive at least basic standards of compensation and are treated fairly. The Member’s comments in *Ahead College* aptly highlight the importance of timely payment of wages: “[p]ayment of wages is an essential part of the employment relationship, and non-payment of wages, or delayed payment of wages can impose a significant hardship on an employee.” However, the purposes of the *ESA* also include providing fair and efficient procedures for resolving disputes.

54. In this case, the effect of the Determination was a conclusion Ms. Tradio’s unpaid wages complaint was resolved by the parties just over one month after it was filed. It is reasonable to assume the threat of mandatory administrative penalties, as highlighted by Counsel in his correspondence to the Employer, may have been influential in the Employer paying the Complaint amount fairly promptly. Viewed in totality, the Determination was consistent with the purposes of section 2 of the *ESA*.

55. The Director did not commit an error of law by not administering interest or administrative penalties.

Failure to Observe the Principles of Natural Justice

56. The Appellant submits it is a breach of natural justice principles to fail to consider all evidence submitted as per *C and C Taxi Inc.* BC EST # D084/13.

57. The Delegate conducted a review of all information on the file (Determination at page R2). She explained that while she had reviewed all of the evidence, she was only referring to the evidence “as necessary to reach the required findings and to apply the relevant legislation.”

58. As discussed above, the Tribunal assumes the delegate considered and weighed all the evidence and – based on that evidence – found every findable fact necessary to support the conclusions they reached even when they have not expounded upon them (absent good reasons not to do so): *Singh, supra*.

59. The Appellant argues the Delegate failed to consider the statement on Ms. Tradio’s Complaint form, “I have still not been paid for any of my work” (emphasis added), which the Appellant suggests was evidence she was seeking mandatory penalties under sections 17, 18, and 58(3) of the *ESA* and interest under section 88.

60. The Delegate’s reasons show she was aware wages had still not been paid at the time of the Complaint, which was dated February 11, 2023. The Delegate cannot be taken to have failed to consider that evidence. It was the evidence after the Complaint which was relevant to her decision under section 76 (3)(i) and which satisfied her the Complaint had been resolved.

61. The Appellant submits the Delegate did not refer to alleged violations of sections 17, 18, and 58(3) in the Determination which was a breach of natural justice. I have already addressed this allegation under the errors of law analysis above and this does not raise any separate issues with respect to natural justice in these circumstances.

62. I have considered the Appellant's submissions with respect to the allegation the Delegate erroneously stated the Appellant's Counsel requested the usual statutory deductions not be made and find nothing in this appeal turns on that issue.

63. Accordingly, the Delegate considered all the evidence and did not fail to observe the principles of natural justice in making her determination.

CONCLUSION

64. For all of the above reasons, I have dismissed the appeal pursuant to section 114(1)(f) of the *ESA* as there is no reasonable prospect the appeal would succeed.

ORDER

65. The appeal is dismissed pursuant to section 114(1)(f) of the *ESA* as it has no reasonable prospect of success.

66. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed.

/S/ Jeremy Bryant

Jeremy Bryant
Member
Employment Standards Tribunal