Employment Standards TRIBUNAL

Citation: Wee Bee Hauling and Services Ltd. (Re)
2024 BCEST 87

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.
FILE NUMBER:	2024/053
DATE OF DECISION:	September 16, 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 April 10, 2024 ("Determination").

2. The Determination found Wee Bee contravened Part 3, sections 17 and 28 and Part 7, section 58 of the *ESA* and Part 7, section 37.3 of the *Employment Standards Regulation* (*"Regulation")* in respect of the employment of Michael Yates ("Mr. Yates") and ordered Wee Bee to pay Mr. Yates wages in the total amount of $12,152.48, interest under section 88 of the *ESA* in the amount of $1,179.80, and to pay administrative penalties in the amount of $2,000.00. The total amount of the Determination is $15,332.28.

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 May 28, 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, care of their legal counsel of record, and to Mr. Yates. These parties have been provided with the opportunity to object to its completeness.

6. Counsel for Wee Bee has made a submission on the completeness of the record, saying the record is incomplete.

7. Wee Bee says the record does not include documents that were submitted during the complaint process, includes a document that was not received by Wee Bee, does not include documents related to a mediation at the Employment Standards Branch ("Branch") in 2016, and excludes and redacts information and documents related to another complainant, whose complaint was investigated co-incidentally with that of Mr. Yates.

8. Mr. Yates has not responded.

9. The Director has responded.

10. The Director says: the record indicates Wee Bee did receive the Demand for Records it claims not to have received; the only information pertaining to a mediation involving Wee Bee are documents provided by Wee Bee; the Branch has no record of any mediation involving Wee Bee and, consequently, none were "before the Director" at the time the Determination was made; and

documents that applied only to one of the complainants were not included in the record relating to the other.

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

12. This appeal will proceed on the record which has been assembled by the Director, noting that the documents Wee Bee says are not included in the record for Mr. Yates are included, and can be accessed, in the record pertaining to the other complainant.

13. The matter of the 2016 mediation will be addressed later in this decision.

14. I have decided this appeal is appropriate for consideration under section 114 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:
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> (a) the appeal is not within the jurisdiction of the tribunal;
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> (b) the appeal was not filed within the applicable time limit;
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> (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.

15. 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. Yates 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

16. 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

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

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

19. The Determination describes Mr. Yates responsibilities each day as including:

> . . . reporting to the employer's "yard" where his truck was kept, completing his pre-trip truck inspection, then driving the company truck and/or transporting materials to and from job sites (or assignments) as dispatched by Wee Bee. Once Mr. Yates completed his assignments for the day, he would return his truck back to the yard.

20. Mr. Yates 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 finding the wage recovery period was October 21, 2021, to March 20, 2023;

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

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

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

v. in calculating wages earned; and

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

22. In respect of the error alleged in determining the wage recovery period, Wee Bee argues section 80 is not intended to allow an extension of the wage recovery period because the Director has delayed notifying an employer of a complaint, citing *Re Paradigm Management (B.C.) Ltd.*, BC EST # D420/00, in support of that proposition.

23. Wee Bee also submits the use of the words *"in any other case"* in section 81(1) (b) must be read to apply only to cases that are not brought by a complaint.

24. Wee Bee's argument that the deciding Delegate erred in not giving effect to the employment agreement 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.

25. The above argument overlaps with the argument that the deciding Delegate erred in law in finding Mr. Yates' regular wage was hourly based.

26. At its core, the argument alleging error of law interpreting the *ESA* is that the deciding Delegate erred in finding Mr. Yates' wage structure was not commission based; that the deciding Delegate "erred in disregarding the contractual agreement of how Ms. [sic] Yates was to be paid": appeal submission para. 53.

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

28. 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. Yates was not hauling material to job sites and did not wait in the yard, as stated in the Determination.

29. 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.

30. Wee Bee submits there was no contravention of section 17 of the *ESA*, as Mr. Yates was paid on time.

Natural Justice

31. 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 relating to a wage complaint made against Wee Bee in 2016;

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

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

32. Wee Bee rests their "failing to consider all the evidence" on the contention that the Investigation Report cannot be considered to be an accurate reflection of the facts and the positions of the parties.

33. 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.

34. Wee Bee alleges they were denied procedural fairness – not being provided with sufficient particulars of Mr. Yates' 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 that having to deal 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 complainant was not being considered on both complaints.

35. 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.

36. Wee Bee seeks to have the Determination cancelled.

ANALYSIS

Error of Law

37. On the question of the wage recovery period, I adopt, and apply as determinative, the following analysis and conclusion from the Tribunal's decision *663584 B.C. Ltd. carrying on business as Select Hair Design*, 2024 BCEST 28, at paras. 45-46:

> The Tribunal's leading decision on the wage recovery period is that of *Gulf Coast Materials Ltd.* (BC EST # RD123/09), a reconsideration decision of BC EST # D077/09 ("original decision"). The reconsideration Panel upheld the Tribunal member's original decision that section 80 did not limit a complainant to a maximum of what, at that time, was a wage recovery period of six months' wages. The reconsideration Panel adopted the Tribunal member's conclusion that, in the case of an ongoing employment relationship there was:
>
> > ...no sensible reason for requiring the employee to file another complaint and for successive determinations to be issued each limited to a 6-month post-complaint interval. Such a process seems needlessly bureaucratic and not at all in keeping with the stated purpose of the *Act* to promote fair and efficient dispute procedures (section 2(d)). It should also be noted that the Director's jurisdiction to investigate a possible unpaid wage issue is not predicated on the existence of a formal complaint (see section 76(2))." (original decision, paragraph 27)
>
> The reconsideration Panel determined that the Tribunal member's original decision on the wage recovery period was:
>
> > ...consistent with the language found in section 80, consistent with the fundamental statutory obligation on an employer to pay wages to an employee for work performed and consistent with the expressed purposes of the *Act*, with its objectives and with the remedial nature of the legislation. It is the correct decision and reconsideration is both unnecessary and unwarranted. (at paragraph 50)

38. Based on the above, the finding of the deciding Delegate on the wage recovery period accorded with the interpretation endorsed by the Tribunal in circumstances similar to those at play in this case. No error of law has been shown on this point. The *Paradigm Management* decision, if it has any continuing application at all in light of the *Gulf Coast Materials* case, has no application to the circumstances of this case.

39. This argument is dismissed.

40. The balance of my response to this appeal will mirror my reasons for decision in Wee Bee's appeal on the other complainant, which has been reported at *Wee Bee Hauling and Services Ltd.*, 2024 BCEST 80. The submissions of Wee Bee on both appeals are substantially identical, as my reasons will be.

41. At the outset of the analysis on the regular wage issue, the deciding Delegate set out the positions of the respective parties as being: "Wee Bee argues that Mr. Yates was paid on a commission basis, which included remuneration for all hours worked, including travel time. While Mr. Yates contends that he should have been compensated for his time worked outside of the billable hours, including travel time, as he was paid an hourly rate for billable hours only" (at page R5).

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

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

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

45. in deciding the meaning of the words, "drivers are paid a commission wage based on the 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 and relied on in the appeal submission).

46. 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.

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

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

49. 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 and 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.

50. 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.

51. 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. Yates' employment considered against the characteristics of incentive-based work. In respect of the latter, the deciding Delegate found: there was no evidence of any "overlap," which Wee Bee claimed supported their position that the commission structure remunerated Mr. Yates for all hours worked; there was no evidence Mr. Yates was paid more than he billed; there was no incentive for Mr. Yates to work faster or complete more jobs in a day as he was solely paid based on his truck's billable hours; that Mr. Yates 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. Yates was paid a consistent hourly wage for the hours he billed or spent completing other work, such as daily truck inspections; 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.

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

> Considering the evidence presented, it does not support that Mr. Yates was paid an incentive-based, or a *"commission"*. Rather, it is evident that Mr. Yates was paid a consistent hourly rate for the hours he billed or spent completing other work, such as inspections. Therefore, I find Mr. Yates' wage was hourly-based, and he ought to have been compensated accordingly for all hours worked, including travel time.

53. 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. Yates' regular wage.

54. 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. Yates an incentive-based regular wage.

55. I agree completely with the deciding Delegate; there is nothing in the circumstances that suggests Wee Bee intended the rate of pay for Mr. Yates, 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.

56. 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 316 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.

57. 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.

58. I find the deciding Delegate made no "discrete and extricable legal error" in finding Mr. Yates' 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. Yates' regular wage was hourly-based – was a palpable and overriding error.

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

60. 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.

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

62. 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.

63. 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.

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

65. The argument on section 17 of the *ESA* fails on the simple fact that the deciding Delegate found unpaid wages owing after March 26, 2023. It is dismissed.

Natural Justice

66. 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.

67. 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).

68. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found.

69. 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.

70. 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. Yates' claim; and failing to provide sufficient reasons of the interpretation of the employment agreement.

71. The argument alleging failure to consider all the evidence fails on the facts; it is based on the contention that, since Wee Bee filed a response to the IR and given the "issues" relating to incomplete and omitted information put forward by the Appellants in their response, it is incorrect to say that the IR itself is an accurate reflection of the parties' evidence and position.

72. That argument falls well short of the burden on Wee Bee, which requires them to provide some evidence to support their contention that the IR is inaccurate, not simply to make that bald assertion.

73. The argument relating to the 2016 complaint presumes this matter is relevant to the complaint of both complainants. It is not; the mediation process under the *ESA* is intended to be relatively informal and non-precedential. The results of mediation in one case do not direct the result in any other case. Additionally, the Branch's file did not include any material relating to the mediation and it would be manifestly unfair to reach any conclusion on incomplete information and on the recollections of a person already predisposed to a particular result.

74. The argument that Wee Bee was not provided with sufficient information of Mr. Yates' claim is, on an examination of the IR and the record, simply groundless. Their argument revolves almost entirely on the bare assertion that the decision to treat the complaints of Mr. Yates 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. In any event, as a matter of fact, as part of the requirement to provide the record for each appeal, Wee Bee has been provided with the documents and information for both complainants.

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

76. 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. Yates' regular wage was hourly based. It is no more valid here than it was when considered earlier in this decision.

77. The deciding Delegate provided extensive reasons for her conclusion on Mr. Yates' regular wage: see page R5-R6 of the Determination. Those reasons adequately explained the basis for her decision.

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

79. 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.

80. I find no merit to this ground of appeal.

CONCLUSION

81. 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

82. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated April10, 2024, be confirmed in the amount of $15,332.28, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal