Employment Standards TRIBUNAL

Citation: Chris Gordon Jones (Re)
2018 BCEST 17

An appeal

- by -

Chris Gordon Jones aka Christopher Gordon Jones carrying on business as Ka$h Excavating and 1113915 B.C. Ltd.

("Mr. Jones")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE NO.: 2017A/142

DATE OF DECISION: February 21, 2018

DECISION

SUBMISSIONS

Rebecca Andrejew	on behalf of Chris Gordon Jones aka Christopher Gordon Jones carrying on business as Ka$h Excavating and 1113915 B.C. Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Chris Gordon Jones aka Christopher Gordon Jones carrying on business as Ka$h Excavating and 1113915 B.C. Ltd. ("Mr. Jones") has filed an appeal of a Determination issued by Michael Thompson, a delegate of the Director of Employment Standards (the "Director"), on November 3, 2017.

2. The Determination found Mr. Jones had contravened Part 3, sections 18, 21 and 26 and Part 5, section 45 of the *ESA* in respect of the employment of Michael Alberts (Mr. Alberts") and ordered Mr. Jones to pay Mr. Alberts wages in the amount of $5,862.67 and to pay administrative penalties in the amount of $2,000.00. The total amount of the Determination is $7,862.67.

3. This appeal is grounded in new evidence becoming available that was not available when the Determination was being made. Mr. Jones seeks to have the Determination varied.

4. In correspondence dated December 18, 2017, the Tribunal acknowledged having received an appeal, requested Mr. Jones to resubmit certain appeal documents that were not legible when first filed, requested the section 112(5) record (the "record") from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and notified the parties that, following such review, all or part of the appeal might be dismissed.

5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Jones and Mr. Alberts and an opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.

6. 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 Director when the Determination was being made and any material accepted for inclusion in the appeal. 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 the 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;

(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.

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Alberts 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 will succeed.

ISSUE

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

THE FACTS

9. Mr. Jones operated a business in the forest industry as a sole proprietor under the name Ka$h Excavating. Apparently, Mr. Jones is in bankruptcy proceedings.

10. 1113915 B.C. Ltd. is a company incorporated in April 2017. Mr. Jones was one of two directors of this company. The Determination records that, on occasion, 1113915 B.C. Ltd. was used to pay Mr. Alberts' wages.

11. Mr. Alberts was employed by Mr. Jones as a logging truck driver from November 7, 2016, to June 19, 2017. After leaving his employment with Mr. Jones, Mr. Alberts filed a complaint alleging Mr. Jones had contravened the *ESA* by failing to pay regular wages and statutory holiday pay and by making impermissible deductions from his wages. Mr. Alberts contended that he and Mr. Jones had agreed at the outset of his employment that he could paid either 28% of the profits of the truck he was driving with medical benefits or 30% of the profits of the truck without medical benefits. Mr. Alberts said he chose the former, but never received any medical benefits. Mr. Alberts also claimed Mr. Jones had not paid him for the final three loads he hauled for Mr. Jones on June 15 and 16, 2017, had not paid statutory holiday pay and had deducted an amount from his final paycheque which he had not authorized.

12. The Determination indicates Mr. Jones agreed Mr. Alberts had been given the two wage rate options and had chosen the lesser percentage with benefits. Mr. Jones said, however, that it was Mr. Alberts' fault he was not registered for medical benefits. Mr. Jones agreed Mr. Alberts had not been paid statutory holiday pay and

agreed to having deducted $600.00 from Mr. Alberts' last pay cheque, which he said was the unused balance from $900.00 he had advanced to Mr. Albert for fuel.

13. The Director found, confirming the apparent agreement of the parties on this point, that Mr. Alberts had been provided a wage of either 28% of the profits of the truck plus benefits or 30% of the profits of the truck without benefits. The Director found Mr. Jones did not provide, and Mr. Alberts did not receive, the agreed benefits and that Mr. Jones, in failing to make payment for the benefits, had contravened section 26 of the *ESA*. The Director found the monies that ought to have been paid for the benefits fell within the definition of wages in the *ESA* (see section 1, paragraph (e) of the definition of "wages"), that this amount was recoverable as wages and calculated the amount to be 2% of the truck's profits.

14. The Director also found some wages were owed for June 15 and 16, 2017, statutory holiday pay was owed and, applying section 21 of the *ESA*, the $600.00 deduction from Mr. Alberts' final cheque was not allowed and was owed as wages.

15. For the reasons set out at page R6 of the Determination, the Director associated the business of Ka$h Excavating and 1113915 B.C. Ltd.

ARGUMENT

16. Mr. Jones argues the Director made several errors in the Determination, which I can summarize as follows:

i. Mr. Jones has found a document showing Mr. Alberts was to be paid 29% without benefits, not 30% as used in the Determination;

ii. Mr. Alberts was not provided the benefits plan because he incorrectly filled out the required forms;

iii. Mr. Jones and Mr. Alberts had agreed on the total amount owing;

iv. The Director miscalculated the amount owing for June 15 and 16, 2017, by failing to apply the payment of $500.00 made to Mr. Alberts to the amount owed for those days;

v. The $600.00 deducted from Mr. Alberts is owed to Mr. Jones; and

vi. 1113915 B.C. Ltd. was a completely different legal entity from Ka$h Excavating and had nothing to do with that business.

ANALYSIS

17. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

18. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

19. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

20. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

21. Mr. Jones has grounded this appeal in evidence becoming available that was not available when the Determination was made. This ground of appeal is commonly described as the "new evidence" ground of appeal. Strictly speaking, some of the errors alleged to have been made in the Determination are unrelated to the ground of appeal chosen. I have reviewed these matters for any error that might invoke other grounds of appeal.

22. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

23. I find the evidence provided by Mr. Jones with the appeal does not meet the conditions for accepting and considering new evidence.

24. Much of the proposed evidence is not "new"; if relevant at all, it was available and could, applying a reasonable degree of diligence, have been provided to the Director during the complaint process. Of particular note in this context is the purported employment agreement, which was requested by the Director during the complaint investigation but never provided.

25. Some of the assertions made are not "evidence" at all, but simply statements for which there is no objective support. They re-iterate assertions made during the complaint process that were also noted in the Determination as being unsupported.

26. The credibility of the evidence submitted is questionable. It suggests the agreed wage rate for Mr. Alberts was 29% without benefits, not 30% as the Director found in the Determination. That suggestion is inconsistent with what was acknowledged by Mr. Jones during the complaint process as the wage rate agreement and accepting it would require me to find Mr. Jones provided incorrect or misleading information to the Director. Such a finding should be avoided without some clear indication pointing in that direction. As well, and inexplicably, the "new evidence" contains no reference at all to a 28% wage rate with benefits that both parties accepted had been agreed.

27. The "new evidence" is provided without context and without explanation for its inconsistencies with evidence previously provided to the Director. Without such context and explanation, the material cannot be accepted or have the effect of demonstrating the findings made by the Director from the material and information provided and the conclusions reached by the Director amount to a reviewable error.

28. I shall briefly address the other points of argument raised in the appeal.

29. There is nothing in the record or in the additional material provided with the appeal showing there was a settlement of Mr. Alberts' complaint. In the absence of an enforceable settlement which Mr. Jones is able to hold up to show a resolution of the complaint, there is no impediment to the Director completing the statutory mandate of issuing a decision on the complaint.

30. There is nothing in the appeal that shows a reviewable error in how the Director calculated the wage amount owing to Mr. Alberts. In particular, there was no error made in the Director finding section 21 of the *ESA* prohibited Mr. Jones from deducting $600.00 from Mr. Alberts' final pay cheque. That finding is not a finding that Mr. Alberts does not owe that amount to Mr. Jones, only that the *ESA* does not allow such amount to be recovered in the manner used by Mr. Jones. There are other forums available for addressing Mr. Jones' claim to that amount of money.

31. There is no "new evidence" provided on the associated employer designation made by the Director and there is nothing else in the appeal that could affect the conclusion of the Director on that matter. Based on the material before the Director, it was not an unreasonable or unsupported conclusion.

32. I do not accept the "new evidence" ground of appeal has been made out and, accordingly, I am not persuaded this appeal has any reasonable prospect of succeeding. Further, to the extent it may be necessary, I do not find Mr. Jones has shown there is any possible error in the Determination.

33. Based on the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

34. Pursuant to section 115 of the *ESA*, I order the Determination dated November 3, 2017, be confirmed in the amount of $7,862.67, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal