Employment Standards TRIBUNAL

Citation: Neil Fridd (Re)
2018 BCEST 2

An appeal

- by -

Neil Fridd
(“Mr. Fridd”)

– of a Determination issued by –

The Director of Employment Standards
(the “Director”)

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

and

An application for suspension

- by –

Neil Fridd
(“Mr. Fridd”)

– of a Determination issued by –

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: David B. Stevenson

FILE Nos.: 2017A/107 & 2017A/112

DATE OF DECISION: January 16, 2018

DECISION

SUBMISSIONS

Daleen A. Thomas — counsel for Neil Fridd

OVERVIEW

1. Neil Fridd ("Mr. Fridd") has filed an appeal under section 112 of the *Employment Standards Act* (the *"ESA"*) of a Determination issued by Jordan Hogeweide, a delegate of the Director of Employment Standards (the "Director"), on April 21, 2017.

2. The Determination found Mr. Fridd had contravened Part 3, sections 17, 18 and 27 of the *ESA* in respect of the employment of West Reynolds ("Mr. Reynolds") and section 46 of the *Employment Standards Regulation* (the *"Regulation"*). The Determination ordered Mr. Fridd to pay Mr. Reynolds wages in the amount of $13,022.46 and to pay administrative penalties in the amount of $2,000.00. The total amount of the Determination is $15,022.46.

3. This appeal is grounded in error of law, failure by the Director to observe principles of natural justice in making the Determination and in evidence coming available that was not available when the Determination was being made.

4. The Appeal Form was delivered to the Tribunal on August 28, 2017. The Appeal Form included a request to extend the time period for filing an appeal.

5. Mr. Fridd has also made an application under section 113 of the *ESA* to suspend the effect of the Determination. Mr. Fridd has offered to pledge tangible assets as security for a suspension order. The value of the assets is stated to be less than the amount of the Determination. Mr. Fridd says pledging the assets is appropriate because he has provided a full defense to Mr. Reynolds wage claim and, even if found to owe wages to Mr. Reynolds, the evidence provided with the appeal shows he could not have worked the hours claimed and Mr. Fridd claims a set-off against any wages owed for what he says is an amount owed to him by Mr. Reynolds.

6. Mr. Fridd has also requested complete anonymization within the appeal process. The Director and Mr. Reynolds were provided with an opportunity to express their views on this request, and Mr. Fridd was given an opportunity to reply to any submissions made.

7. In correspondence dated August 30, 2017, the Tribunal acknowledged having received an appeal, acknowledged the request for additional time to file a complete appeal submission and set a deadline of September 8, 2017, for filing a complete appeal submission. The correspondence 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, following such review, all or part of the appeal might be dismissed.

8. The record has been provided to the Tribunal by the Director and a copy has been delivered to legal counsel for Mr. Fridd, 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.

9. 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, any additional evidence allowed to be included with the appeal and my review of the material that was before the Director 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 the 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.*

10. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the complainant 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 the appeal period should be extended and, even if it is, whether there is any reasonable prospect the appeal will succeed.

ISSUE

11. At issue are: whether to grant the anonymization request; whether to grant a suspension of the Determination; and whether the appeal should be dismissed under section 114(1) of the *ESA*.

Anonymization

12. Mr. Fridd has requested "complete anonymization within this process."

13. The Tribunal generally follows the open court principle. There is a strong public interest in the efficacy and openness of the Tribunal's appeal process. The anonymization of a decision should only occur in rare circumstances, such as where it is necessary to protect a vulnerable person.

14. Having viewed and considered the basis for the request, I have decided it is neither necessary nor appropriate to grant Mr. Fridd's request for anonymization. Accordingly, it is denied.

THE FACTS

15. The Director found Mr. Fridd was, at the relevant time, engaged in a "farming" or "agricultural" operation. That finding has not been appealed. It is therefore unnecessary to assess the factual basis upon which that finding was made.

16. The Director found Mr. Reynolds was a "farm worker" as that term is defined in section 1 of the *Regulation* and was employed by Mr. Fridd as such from February 5, 2016, to July 15, 2016, at a rate of pay of $17.00 an hour from February 5 to April 30, 2016, and $30.00 an hour from May 1 to July 15, 2016. Mr. Fridd contests these findings, arguing Mr. Reynolds was not an employee but an independent contractor and, even if he were an employee, disputes the Director's findings on Mr. Reynolds' days worked, hours of work and wage calculation.

17. The record indicates the Director began communicating by telephone with Mr. Fridd concerning the complaint on January 10, 2017. On January 18, 2017, the Director sent a copy of the complaint and a Demand for Employer Records to Mr. Fridd by e-mail and registered mail. No employer records were provided, likely because none were kept.

18. The record and the Determination indicate efforts to communicate with Mr. Fridd and obtain a response to the complaint. While Mr. Fridd expressed his position in a telephone call with another delegate of the Director, the only record of any written response from Mr. Fridd is found in a rather cryptic e-mail from him dated March 8, 2017 – one day before a scheduled complaint hearing – in reaction to material provided by Mr. Reynolds in support of his complaint, in which he says: "As stated previously there is no known employment contract between Owl Creek Farms Ltd. and Mr. Reynolds. This sheet is a complete fabrication".

19. The Director conducted a complaint hearing by teleconference on March 9, 2017. Mr. Fridd did not participate in the complaint hearing, although notified of both the hearing date and time and the potential consequences of non-attendance. Mr. Reynolds provided his evidence and presented three other witnesses.

20. The Determination was issued on April 21, 2017. It clearly indicates any appeal must be delivered to the Tribunal by the end of the working day on May 29, 2017. This appeal was not delivered to the Tribunal until August 28, 2017, nearly three months after the statutory time period for filing an appeal had expired, and a completed submission was not delivered to the Tribunal until September 11, 2017.

ARGUMENT

21. The appeal provides submissions on both the statutory grounds of appeal and the request for an extension of time to file the appeal.

22. On the matter of the requested extension Mr. Fridd argues an extension should be given because in his opinion there is a good case for appeal.

23. On the merits of the appeal, I will do no more than summarize the essential aspects of the chosen grounds of appeal.

24. Mr. Fridd says the Director erred in finding Mr. Reynolds was his employee under the *ESA*. He submits Mr. Reynolds was not an employee, but an independent contractor. He says this is so because Mr. Reynolds provided only casual labour and there was no written contract of employment between Mr. Fridd and Mr. Reynolds. Mr. Fridd submits none of the indices of an employment relationship at common law were present on the relationship between Mr. Fridd and Mr. Reynolds and some elements of the relationship run against a finding of employment.

25. Mr. Fridd alleges the Director failed to observe principles of natural justice. The central assertion is that Mr. Fridd was never informed of the case against him and consequently never had an opportunity to answer it. He also points to the finding of the Director that he was Mr. Reynolds' employer, when Mr. Reynolds had named the employer as Owl Creek Farms when filing his complaint.

26. The additional evidence Mr. Fridd has included with the appeal, and seeks to have the Tribunal accept and give effect, comprises several assertions of fact made in the appeal submission, but not included in the Determination and not supported by any material found in the record, and statements said to have been provided by four persons who apparently were casual labourers working at Owl Creek Farm during the same period as Mr. Reynolds.

27. Most of the evidence sought to be introduced in the appeal challenges findings of fact made in the Determination, most obviously the Director's findings on days and hours worked by Mr. Reynolds. Other aspects of the additional evidence submitted with the appeal expresses opinions for which the declarant has no apparent knowledge or expertise.

ANALYSIS

28. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

> Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

29. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:

> i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
>
> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;

iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

v) there is a strong *prima facie* case in favour of the appellant.

30. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST # D132/97.

31. In this case, I find the length of the delay to be unacceptable. Mr. Fridd has provided no reasonable explanation for the delay.

32. I find there was no genuine and ongoing intention to appeal the Determination. There is compelling evidence in the appeal material that Mr. Fridd had no intention of appealing the Determination until collection proceedings were commenced by the Director.

33. I also find Mr. Reynolds will be unduly prejudiced by a further delay, and cost, that will necessarily accompany granting an extension. There has already been a delay of almost eight months from the issuance of the Determination to this point in time and more than a year from the filing of the complaint. The *ESA* contemplates expeditious resolution of wage complaints; an employee who has been denied wages should not be compelled to wait more than a year to receive what has been earned and is payable under the *ESA*.

34. When considering the *prima facie* strength of the case presented by Mr. Fridd in this appeal, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds. The analysis under section 114(1) (f) is similar.

35. 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:

(a) the director erred in law;

(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.

36. There are certain broad principles applicable to appeals that have consistently been applied to the statutory grounds of appeal chosen by an appellant. The following principles bear on this appeal.

37. 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.

38. Mr. Fridd alleges the Director erred in law in finding Mr. Reynolds was his employee. His position, stated verbally during the complaint process was that Mr. Reynolds was not an employee because he was casual labour without a contract of employment. The finding of the Director on that argument was that casual employees are employees under the *ESA*, even if there is no "contract of employment". That conclusion is consistent with definition of "employee", "employer" and "work" in section 1 of the *ESA*. It also accords with many decisions of the Tribunal, which have considered the issue raised here; all have made it clear that the definition of "employee" is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the *ESA*, see, for example, *Kelsey Trigg*, BC EST # D040/03, *Christopher Sin*, BC EST # D015/96, and *Jane Welch operating as Windy Willows Farms*, BC EST # D161/06.

39. In my view, the appeal submission is fundamentally flawed, either failing to recognize or refusing to acknowledge that the "law" relating to an individual's status under the *ESA* is not determined by common law principles, but by an application of the provisions of the *ESA*. In that respect, I confirm the following statement from *Project Headstart Marketing Ltd.*, BC EST # D164/98:

> . . . I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".

40. It is clear from the record that Mr. Fridd falls within the definition of "employer" and that Mr. Reynolds falls within the definition of "employee" found in section 1 of the *ESA*. Notwithstanding the complaint form identified the employer as "Owl Creek Farm", it is the statutory obligation of the Director to determine the identity of the employer and there is no basis for submitting the Director erred in meeting that obligation.

41. The appeal does not show the Director erred. There is no merit to this ground of appeal and no reasonable prospect it would succeed.

42. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

43. As I read the appeal submission, Mr. Fridd alleges a failure to comply with principles of natural justice because he was not given an opportunity to either know or respond to the case against him. I reject that contention. The Determination and the record show Mr. Fridd knew the claim being made by Mr. Reynolds and was provided ample opportunity to respond. It was Mr. Fridd's decision to not participate, except in the most cursory fashion, in the complaint process. What Mr. Fridd complains of is entirely self-inflicted. He has not met the burden on him of showing, on objectively cogent evidence, there was a failure by the Director to observe principles of natural justice in making the Determination.

44. 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. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia 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.

45. In its challenge to findings of fact made by the Director, the appeal does not show any of the findings made amount to an error of law. I reach this conclusion regardless of whether or not I accept the additional evidence presented with this appeal.

46. On the matter of the additional evidence, the principles that apply to this ground are well established. The Tribunal has discretion to accept or refuse additional evidence. When considering 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*.

47. The additional evidence Mr. Fridd seeks to present to the Tribunal does not meet the conditions necessary for it to be accepted and considered. First, none of this evidence is new; all of it was available when the Determination was being made and could, with a reasonable degree of diligence and cooperation on the part of Mr. Fridd, have been provided to the Director during the complaint process. Within this finding I note Mr. Fridd's conscious decision to not participate in the complaint hearing or respond in any meaningful way to Mr. Reynold's wage claim. Second, none of the statements of the four persons are particularly cogent or relevant to the material issues. The status of Mr. Reynolds for the purposes of the *ESA* is determined by the facts of his relationship with Mr. Fridd applied to the definitions and purposes of the *ESA*. Third, for the reasons provided above (*cf.* paras. 26 and 27), I find the additional evidence is not reliable or capable of resulting in a different conclusion than what is found in the Determination.

48. In respect of other "evidence", provided through unsupported assertions liberally sprinkled though the appeal submission, there is no basis upon which these statements could be accepted or, even if accepted, could be used to alter findings of fact made by the Director in the Determination.

49. One final comment on the merits of this appeal is appropriate, which is that this appeal would also fail on the principle expressed in *Triwest Tractors Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.

50. The evidence sought to be introduced and the arguments advanced by Mr. Fridd in this appeal are evidence and arguments that could have been advanced to the Director. A party is not permitted to refuse or fail to participate in the complaint process and, subsequent to a Determination being issued, seek to advance a case to the Tribunal on appeal, when the facts should have been advanced to the Director during the complaint process. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. In my view, the Director cannot be said to have "erred" in a fact-finding process, when Mr. Fridd failed to participate in that process in any meaningful way.

51. In sum, I find this appeal does not present a strong *prima facie* case. There is no justification for extending the appeal period. An extension of the time for filing an appeal is denied.

52. That decision is sufficient to dispose of this appeal.

53. In any event, I am not persuaded this appeal has any reasonable prospect of succeeding and regardless of whether it would have been appropriate to grant an extension of time, this appeal would be dismissed under section 114(1) (f) of the *ESA*.

54. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to the appeal.

55. My conclusion makes a decision on the application for a suspension of the effect of the Determination unnecessary. However, if I were required to make such a decision, I would have denied the application as the application does not propose depositing the full amount of the Determination but of pledging assets purportedly valued at some lesser amount on the totally mistaken presumptions there is merit in the appeal and that the Tribunal might set off a $5,000.00 liability alleged to be owed by Mr. Reynolds to Mr. Fridd against wages found owing.

ORDER

56. Pursuant to section 115 of the *ESA*, I order the Determination dated April 21, 2017, be confirmed in the amount of $15,022.46, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal