

An appeal

- by -

1068808 B.C Ltd. carrying on business as Expert Shows
("Expert Shows")

- 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/154

DATE OF DECISION: March 19, 2018

DECISION

SUBMISSIONS

Vern Peterson

on behalf of 1068808 B.C. Ltd. carrying on business as
Expert Shows

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”) 1068808 B.C. Ltd. carrying on business as Expert Shows (“Expert Shows”) has filed an appeal of a Determination issued by Colin Gelinias, a delegate of the Director of Employment Standards (the “Director”), on November 21, 2017.
2. The Determination found Expert Shows had contravened Part 3, sections 18 and 28 of the *ESA* in respect of the employment of Nora Halla (“Ms. Halla”) and ordered Expert Shows to pay the Ms. Halla wages in the amount of \$2,632.70, an amount which included interest, and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$3,632.70.
3. This appeal is grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. Expert Shows seeks to have the Determination varied.
4. The appeal was filed on December 29, 2017, which was the deadline for filing the appeal. Expert Shows requested the Tribunal grant it an additional 90 days in which to provide additional supporting documents and to consider “acquiring and informing legal counsel”. The Tribunal declined to grant Expert Shows the requested 90 day extension but rather Expert Shows was granted an additional 45 days to provide its supporting documents. No additional supporting documents were provided by Expert Shows.
5. In correspondence dated January 12, 2018, the Tribunal acknowledged having received an appeal, requested Expert Shows provide written reasons and argument for the grounds of appeal, with supporting documents if any, 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.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to Expert Shows and Ms. Halla and an opportunity has been provided to each to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
7. No written reasons and argument for the grounds of appeal has been received by the Tribunal.
8. 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 very brief written submission filed 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.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Ms. Halla 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

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

THE FACTS

11. Expert Shows operates a home show marketing business. Ms. Halla was employed by Expert Shows as a bookkeeper for a period from March 24, 2017, to April 16, 2017, when she terminated her employment. Her rate of pay was \$1,500 bi-weekly.
12. Ms. Halla filed a complaint under the *ESA* alleging Expert Shows had not paid her all wages owed and had made unauthorized deductions from wages.
13. The Director conducted an investigation and held a complaint hearing. Ms. Halla did not attend the complaint hearing. She had provided a full summary of her claim and that was provided to Expert Shows. Elements of her claim that were unclear were not accepted by the Director.
14. Vern Peterson (“Mr. Peterson”), the managing partner for Expert Shows, represented Expert Shows at the complaint hearing. Expert Shows did not provide any employment records for Ms. Halla or any other documentary evidence relating to her employment or wage payments made to her, notwithstanding a Demand for Records having been delivered to Expert Shows on June 22, 2017, requiring production of all of Ms. Halla’s employment records. At the complaint hearing, Mr. Peterson contended Ms. Halla had not worked all of the hours claimed, but that, by and large, her records were accurate.

15. The Director found Ms. Halla had worked, and was owed regular wages, for a three-week period and had been paid for only one week, that she had worked some overtime hours, accepting Ms. Halla's records as the best evidence of the number of overtime hours worked, but adjusted the hours claimed to discount obvious errors, and that she was owed annual vacation pay calculated according to the requirements of the *ESA*.

ARGUMENT

16. As best I can determine, Expert Shows has based its appeal on a possible misunderstanding or miscommunication concerning information provided to the Director by Mr. Peterson during the hearing portion of the complaint process.

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:

- (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.

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 not simply another opportunity to argue the merits of a claim to another decision maker. 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. 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.

21. 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.
22. The appeal neither identifies nor argues an error of law in the context of the above definition. I would be hard pressed in any event to be able to identify where and how a discreet error of law might arise in a case like this, which is entirely grounded in findings of fact based on information and material that was before the Director when the Determination was being made.
23. The appeal asserts a failure to observe principles of natural justice as one of its grounds. Expert Shows has provided no objectively acceptable evidence showing it was denied the procedural protections reflected in section 77 of the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. These concerns have been briefly summarized by the Tribunal in an oft-quoted excerpt from *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.
24. Expert Shows was provided with the procedural rights described in the above excerpt. There is no foundation for contending there was a denial of natural justice. The burden on Expert Shows to show a breach of the principles of natural justice has not been met.
25. In sum, I find Expert Shows has not shown there is any merit to the grounds of appeal relied upon.
26. 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

27. Pursuant to section 115 of the *ESA*, I order the Determination dated November 21, 2017, be confirmed in the amount of \$3,632.70, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal