

An appeal

- by -

Roger Sampson
("Mr. Sampson")

- 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.: 2018A/17

DATE OF DECISION: March 19, 2018

DECISION

SUBMISSIONS

Roger Sampson on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”) Roger Sampson (“Mr. Sampson”) has filed an appeal of a Determination issued by Guy Massey, a delegate of the Director of Employment Standards (the “Director”), on January 25, 2018.
2. The Determination found Mr. Sampson’s former employer, Whole Foods Market Canada, Inc. (“Whole Foods”), had not contravened the *ESA* in respect of his employment and no wages were owing to him.
3. This appeal alleges a failure by the Director to observe principles of natural justice in making the Determination. Mr. Sampson seeks to have the Determination varied to award him the money he claimed was owing to him.
4. In correspondence dated February 8, 2018, the Tribunal acknowledged having received an appeal, 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.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Sampson and to Whole Foods 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.
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. 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.

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Whole Foods 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. Whole Foods operates a retail grocery store. Mr. Sampson was employed by Whole Foods as part of the prepared food service team from November 11, 2016, to August 7, 2017. In mid-July 2017, Mr. Sampson decided to leave Whole Foods and gave three weeks' notice of his intention, providing August 7, 2017, as his last day. On August 2, 2017, Mr. Sampson decided he wished to leave earlier than August 7, 2017, and there was some discussion of this between Mr. Sampson and members of management, principally Danielle Jacobs ("Ms. Jacobs"), a Team Member Services Lead at Whole Foods.
10. The discussion included an agreement from Whole Foods that Mr. Sampson could leave on August 2, 2017, and he would be paid through the rest of the notice period – to August 7, 2017.
11. There was some discussion about what Mr. Sampson might expect to receive on his final paycheque. It is Mr. Sampson's view of this discussion that led him to file a complaint alleging Whole Foods had failed to pay all vacation pay owed to him.
12. He alleged that as part of the discussion on August 2, 2017, Whole Foods had told him he would receive \$1,600.00 annual vacation pay on his final paycheque. Whole Foods says Mr. Sampson was given an approximate gross amount comprising all wages, for both hours worked and vacation pay, he could expect to receive on his final pay.
13. The Director conducted a complaint hearing. The Determination notes the "undisputed evidence is that Mr. Sampson was paid 4% vacation pay for all hours worked and wages earned". The Director found Whole Foods had never agreed to increase Mr. Sampson's annual vacation entitlement beyond the 4% he was entitled to under *ESA* and his annual vacation entitlement had been fully paid.

ARGUMENT

- ^{14.} In his appeal, Mr. Sampson re-asserts the contention he made in his complaint and at the complaint hearing – that Ms. Jacobs had told him he would be getting about \$1,600.00 in annual vacation pay on his final paycheque – and therefore Whole Foods had, and continues to have, an obligation to pay that amount to him.

ANALYSIS

- ^{15.} 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.

- ^{16.} 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.

- ^{17.} 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.

- ^{18.} 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.

- ^{19.} The appeal asserts a failure to observe principles of natural justice as its sole ground. It is difficult to discern the basis for the appeal, as Mr. Sampson has provided no objectively acceptable evidence showing he 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)

20. It is clear from the record that Mr. Sampson was afforded the procedural rights captured within the above statement. Natural justice does not require the Director to accept the evidence and assertions that each party advances in support of their position. Nor does it prohibit the Director from reaching a conclusion on all of the evidence that might be inconsistent with the position of one of the parties, so long as reasons are provided for that conclusion and it is based on relevant considerations, which I find to be the case here.
21. Mr. Sampson has done nothing more in this appeal than challenge findings made in the Determination without showing there was any reviewable error made in respect of the challenged findings.
22. The burden on Mr. Sampson to show a breach of the principles of natural justice has not been met.
23. The Director made findings of fact and reached conclusions from those facts on Mr. Sampson's entitlements under the *ESA*. The Tribunal must defer to findings of fact made in a Determination unless a reviewable error is shown. There is no such error apparent in the findings made and conclusions reached by the Director. Mr. Sampson is doing nothing more in this appeal than seeking to have the Tribunal ignore the findings made in the Determination and accept his assertions relating to the basis of his claim. He has provided no legal basis in the appeal for allowing the Tribunal to do this.
24. In sum, I find Mr. Sampson has not shown there is any merit to the ground of appeal relied upon.
25. 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

26. Pursuant to section 115 of the *ESA*, I order the Determination dated January 25, 2018, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal