

An appeal

- by -

1721532 Alberta Ltd. carrying on business as GRN Landscape & Pool Design  
("GRN")

- 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:** Carol L. Roberts

**FILE NO.:** 2018A/12

**DATE OF DECISION:** March 27, 2018

## DECISION

### SUBMISSIONS

Christopher Andrew Green

on behalf of 1721532 Alberta Ltd. carrying on business as  
GRN Landscape & Pool Design

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), 1721532 Alberta Ltd. carrying on business as GRN Landscape & Pool Design (“GRN”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on January 4, 2018. In that Determination, the Director found that GRN had contravened sections 18, 40 and 58 of the *ESA* in failing to pay Daniel Obedi wages, overtime and annual vacation pay in the total amount, including interest, of \$4,355.89. The Director also imposed four administrative penalties on GRN in the total amount of \$2,000, for a total amount payable of \$6,355.89.
2. GRN appeals the Determination on the grounds that evidence has become available that was not available at the time the Determination was being made.
3. GRN’s appeal, which was filed on January 23, 2018, was incomplete. It contained only the appeal form, various documents, typewritten “reasons for appeal” and the first three pages of the Determination. The Tribunal’s Manager of Appeals contacted Mr. Green and requested that he provide the reasons for the Determination as well as a legible copy of one page of the documents attached to the appeal. Mr. Green was asked to provide those documents by February 13, 2018. On February 19, 2018, the Tribunal’s Manager of Appeals again requested that Mr. Green provide the written reasons for the Determination no later than March 5, 2018. On March 8, 2018, Mr. Green requested an extension of time to provide the Tribunal with the requested documents and on March 13, 2018, I granted the Appellant until March 16, 2018, to provide the Tribunal with the written reasons for the Determination. In a letter dated March 9, 2018, the Director’s delegate informed Mr. Green that she was declining to provide the reasons as requested because both the deadline for requesting the reasons for the Determination and the deadline for requesting an appeal had expired.
4. This decision is based on GRN’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Determination, without reasons.

### FACTS AND ARGUMENT

5. The record indicates that on October 15, 2017, Mr. Obedi filed a complaint alleging that he had worked as a landscaper for GRN from May 2, 2017, until August 2, 2017, and that GRN had not paid him wages or vacation pay. He said that he quit his employment because he found another job that paid higher wages. Mr. Obedi alleged that his employer informed him that his cheque was ready to be picked up, but that his attempts to arrange a pick up were unsuccessful. Mr. Obedi then indicated that he asked Mr. Green to mail him the cheque but he never received it.

6. Mr. Obedi submitted copies of cheques and text messages in support of his claim.
7. On November 1, 2017, a delegate of the Director sent Mr. Green an email outlining the nature of the complaint and the complaint process. The email was confirmed delivered and read.
8. The delegate made several attempts to contact GRN by telephone to discuss the complaint without success, and on November 21, 2017, a delegate sent Mr. Green a Demand for Employer Records, to be produced by December 4, 2017, as well as the Notice of Hearing, which was set for December 18, 2017. The message was confirmed delivered.
9. The delegate also sent the Demand for Employer Records and Notice of Hearing by registered mail to Kimberley Green and Christopher Green, the two directors of GRN, and to GRN's registered and records office. Canada Post records confirm that the documents were successfully delivered. The record indicates that GRN did not contact the delegate, submit any documents or reply to Mr. Obedi's allegations.
10. Because GRN did not request reasons for the Determination by the deadline of January 19, 2018, he has not been able to provide the Tribunal with those reasons. I infer from the information I have been provided that the Determination was made on the basis of Mr. Obedi's unchallenged evidence given that GRN did not respond to the delegate's Demand.
11. Attached to the appeal document are a series of Payroll reports, the relevance of which are unexplained. Mr. Green says only that "the total hours for overtime and regular time don't match with records" and that Mr. Obedi maintained his daily hours on an app on his telephone.

## **ANALYSIS**

12. Section 114 of the *ESA* provides that 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.

13. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
14. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that GRN has not met that burden and dismiss the appeal.
15. The record confirms that GRN and its directors received details of the complaint, the Demand for Employer Records and the Notice of Hearing. I find that GRN was aware of the allegations and had every opportunity to respond. GRN did not respond to the delegate or provide any documentation, despite the Demand.

*New Evidence*

16. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) the evidence must be relevant to a material issue arising from the complaint;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
17. GRN's "new evidence" does not meet the test for new evidence. Not only is its relevance to the complaint or appeal unexplained, the documentation, which includes payroll reports from May and August 2017 was clearly available at the time of the hearing. It ought to have been presented to the delegate during the complaint decision process, as required by the Demand.
18. While it appears that the evidence is relevant to the Determination, without any explanation of that information I am unable to determine how it might have led the Director to a different conclusion on the issue of whether Mr. Obedi was entitled to wages, or the amount determined owing. Although Mr. Green contends that "total hours for overtime and regular time don't match with records," no records were ever provided to the delegate during the investigation stage. GRN's attempt to submit what may be relevant documentation for the first time on appeal does not meet the test for new evidence.
19. The appeal is dismissed.

## **ORDER**

- <sup>20.</sup> Pursuant to section 115 of the *ESA*, I Order that the Determination, dated January 4, 2018, be confirmed in the amount of \$6,355.89 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**