

Citation: Tyco Concrete Finishing Limited (Re)
2018 BCEST 57

An appeal

- by -

Tyco Concrete Finishing Limited
("Tyco")

- 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)

PANEL: David B. Stevenson

FILE NO.: 2018A/31

DATE OF DECISION: May 23, 2018

DECISION

SUBMISSIONS

Tyler Borrowman

on behalf of Tyco Concrete Finishing Limited

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”) Tyco Concrete Finishing Limited (“Tyco”) has filed an appeal of a Determination issued by Michael Thompson, a delegate of the Director of Employment Standards (the “Director”), on February 7, 2018.
2. The Determination found Tyco had contravened Part 4, section 40 of the *ESA* in respect of the employment of Edward Meier (“Mr. Meier”) and ordered Tyco to pay Mr. Meier wages in the amount of \$379.36, an amount which included concomitant annual vacation pay and interest, and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$879.36.
3. This appeal is grounded on the assertion the Director failed to observe principles of natural justice in making the Determination and evidence becoming available that was not available when the Determination was being made. Tyco seeks to have the Tribunal cancel the Determination.
4. In correspondence dated March 22, 2018, the Tribunal notified the parties, among other things, 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 section 112(5) record (the “record”) has been requested from the Director and it has been provided to the Tribunal; a copy has been delivered to Tyco and Mr. Meier, who have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it 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, my review of the material that was before the Director when the Determination was being made, and any additional evidence allowed to be added to 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 any 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 period;*
 - (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 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. Meier 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 is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. Tyco operates a concrete finishing company. Mr. Meier was employed by Tyco as an assistant labourer from September 25, 2017, until October 16, 2017, at a rate of \$20.00 an hour. Following the end of his employment, Mr. Meier filed a complaint with the Director alleging Tyco had contravened the *ESA* by failing to pay all regular and overtime wages owing to him.
10. The Director conducted a complaint hearing, at which Tyler Borrowman (“Mr. Borrowman”), the owner and sole director of Tyco, and Mr. Meier gave evidence.
11. During his period of employment, Mr. Meier recorded his own daily start and end times. The parties substantially agreed that the daily start and end times recorded by Mr. Meier were accurate.
12. In his evidence, Mr. Meier claimed that during his employment he had never taken a full lunch break, believing he was being paid for the lunch break, as he had been in his first pay period.
13. In his evidence Mr. Borrowman said all employees were expected to take a lunch break and deduct the lunch break from their total daily hours. He said while he was not on Mr. Meier’s work site every day, he did witness Mr. Meier taking lunch breaks on site with the other labourers or while travelling between jobs.
14. The Director accepted that Mr. Meier had worked during meal breaks and was consequently entitled to have those breaks treated as time worked.
15. The Director found Mr. Meier had not been paid for 0.67 hours of regular wages and 11.66 hours of overtime wages and was entitled to regular wages in the amount of \$13.40 and overtime wages in the amount of \$349.80. The Director added annual vacation pay and interest to that amount.

ARGUMENT

16. The appeal submission by Tyco disputes several findings of fact contained in the Determination, including the central finding that Mr. Meier had worked during his lunch breaks.
17. The appeal includes a statement from an employee of Tyco which says that, apart from the first day he worked, Mr. Meier took “regular full lunch breaks”. Tyco says the reason it did not provide this statement, and possibly others, at the complaint hearing was because, it “did not believe Mr. Meier would be so bold as to out right lie about breaks”.
18. Tyco alleges there was bias.

ANALYSIS

19. 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.*
20. 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.
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.
22. Tyco has grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.
23. The appeal contains no evidence or submission relating to natural justice and I am unable to find there was any failure by the Director to observe natural justice principles; Tyco was accorded the procedural rights required by the principals of natural justice: see *Imperial Limousine Service Ltd.*, BC EST # D014/05, and *BWI Business World Incorporated*, BC EST # D050/96.
24. The appeal submission alleges bias. The onus is on Tyco to prove an allegation of bias on the evidence. The evidence must show a “real likelihood” or probability of bias. Mere suspicions, or impressions, are

not enough. The evidence presented should allow for objective findings of fact that demonstrate actual, or reasonable apprehension of, bias.

25. Considering the applicable principles in light of the onus on Tyco, I reject completely and without reservation the suggestion that there was bias in the complaint process. There is not one scintilla of evidence showing bias. The allegation made in this appeal appears to be no more than a general expression of dissatisfaction with the complaint process and with the Director doing what is required under the *ESA*. The allegation is not grounded in any objective facts.
26. Tyco has also 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.
27. Tyco’s obvious objective in raising this ground is to have the Tribunal accept the unsworn statement provided by an employee of Tyco and, applying that statement, change the finding of the Director that Mr. Meier did not take half-hour meal breaks during his employment.
28. In respect of this ground of appeal, 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*.
29. I find the evidence sought to be provided in this appeal does not meet the considerations for accepting and considering new evidence.
30. The proposed evidence is not “new”; it was available and could have been provided to the Director at the complaint hearing. The reason given by Tyco for not providing this evidence to the Director is not acceptable.
31. As well, I do not find this statement to be particularly credible: the statement is unsworn, making it unlikely to have been given significant weight, if it was accepted at all; the person making it is only vaguely identified; the statement, which says “other than the first day” Mr. Meier worked – which was October 25, 2017 – he “took regular full lunch breaks when “we” took ours”, is inconsistent with evidence given by Mr. Borrowman, who is recorded in the Determination as having said “the only day Mr. Meier did not take a lunch break was October 2”; and the statement is internally inconsistent, stating Mr. Meier was told by Mr. Borrowman on his first day “how breaks work”, inferring you didn’t work them, then indicating that Mr. Meier was allowed to work his lunch break on that day.

32. In the absence of any basis for arguing the Director made an error of law on the facts – an argument which is not made here – this appeal simply challenges findings of fact, seeking to have the Tribunal change them, which, as indicated above, the Tribunal has no authority to do.
33. In sum, there is no statutory basis for this appeal.
34. 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

35. Pursuant to section 115 of the *ESA*, I order the Determination dated February 7, 2018, be confirmed in the amount of \$879.36, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal