

An appeal

- by -

Umer Furqan carrying on business as Trifecta Floor Solutions
("Trifecta")

- 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: Carol L. Roberts

FILE NO.: 2018A/52

DATE OF DECISION: July 9, 2018

DECISION

SUBMISSIONS

Umer Furqan on his own behalf carrying on business as Trifecta Floor Solutions

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“ESA”), Umer Furqan (“Mr. Furqan”) carrying on business as Trifecta Floor Solutions (“Trifecta”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on April 10, 2018.
2. On December 23, 2016, Amandeep Singh Multani (“Mr. Multani”) filed a complaint with the Director of Employment Standards alleging that Trifecta contravened the *ESA* in failing to pay him wages, overtime pay, and statutory holiday pay.
3. Following an investigation into the complaint, a delegate of the Director concluded that Trifecta had contravened sections 18, 40, and 58 of the *ESA* in failing to pay Mr. Multani wages, overtime pay, and annual vacation pay. The delegate ordered Trifecta to pay \$5,003.77 in respect of those wages, and interest. The delegate also imposed two administrative penalties in the total amount of \$1,000 for the contraventions of the *ESA*, for a total of \$6,003.77.
4. Trifecta’s appeal, which is dated May 22, 2018, but which was not submitted to the Tribunal until May 24, 2018, is on the grounds that the Director failed to observe the principles of natural justice in making the Determination. Trifecta also submits that evidence has become available that was not available at the time the Determination was being made.
5. The date for filing an appeal of the Determination was May 18, 2018. Trifecta sought an extension of time in which to file the appeal.
6. These reasons are based on Trifecta’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

ISSUE

7. Whether or not Trifecta has established any basis to interfere with the Director’s determination.

FACTS

8. Mr. Furqan is the sole proprietor of Trifecta, a flooring installation company. Mr. Multani stated that he was employed at Trifecta from September 1, 2016, until October 9, 2016.

9. Mr. Multani advised the delegate that he began work on September 1, 2016, working with Mr. Furqan on removing existing flooring and replacing it with new flooring. He said that he and Mr. Furqan agreed to a wage rate of \$18 per hour.
10. Mr. Multani informed the delegate that he was transported to the worksites by Mr. Furqan, who picked him up at his home and returned him to his home at the end of the day, and that Mr. Furqan informed Mr. Multani of the starting time for the following day the night before, either by text or telephone.
11. Mr. Multani maintained a record of his hours of work for the first 25 days of his employment. After that time, he said that Mr. Furqan told him to stop recording his hours because Mr. Furqan was doing so. Although Mr. Multani asked Mr. Furqan for a record of his hours worked, he was never provided with one.
12. Mr. Multani provided the delegate with his record, which showed the dates and locations of his work from September 1 to 19 inclusive, as well as additional days on an appended summary sheet. His record did not show specific dates of work performed in October 2016 because Mr. Furqan told him not to keep a record. Mr. Multani's record also listed hours of work at a number of specific residences.
13. Mr. Multani quit work on October 10, 2016, because he had not been paid, and on October 9, 2016, Mr. Furqan did not contact him regarding any shifts. Mr. Multani also said that Mr. Furqan had blocked his telephone calls.
14. The delegate spoke to a number of witnesses who confirmed they observed Mr. Multani with Mr. Furqan, either picking up supplies, installing flooring, or at a work site. The delegate also spoke with Mr. Multani's sister, who observed Mr. Furqan pick her brother up at their family home. She also said that she brought Mr. Multani lunch while he was working at a townhouse on one occasion in September.
15. On January 23, 2017, the delegate spoke to Mr. Furqan about the complaint. Mr. Furqan informed the delegate that Mr. Multani only worked for a few days and that there was no agreement to pay him \$18 per hour. On February 17, 2017, the delegate provided Mr. Furqan with Mr. Multani's complaint form and issued a Demand for Employer records, including payroll records relating to wages, hours of work, and conditions of employment. The Employer records were to be provided by March 7, 2017. Trifecta did not disclose or produce any employer records in response to the Demand.
16. Mr. Furqan represented Trifecta at a mediation on February 8, 2017. The complaint was not resolved.
17. On March 21, 2018, the delegate sent Trifecta a preliminary findings letter by registered and regular mail. The letter outlined the complaint and the delegate's preliminary findings that Mr. Multani was entitled to wages, overtime wages, and statutory holiday pay. The letter informed Trifecta that it had until March 29, 2018, in which to respond. Trifecta did not do so.
18. The delegate determined that Mr. Multani's evidence was the best evidence. Based on that evidence, the delegate determined that the parties had an agreement whereby Mr. Multani was to be paid \$18 per hour. The delegate also relied on Mr. Multani's written record of the work he performed in determining his entitlement to wages, overtime wages, and statutory holiday pay.

ARGUMENT

19. Mr. Furqan says that because the April 10, 2018, letter from the Director was sent to an old address, he did not receive it. He says that, after speaking to an officer from the Branch on May 11, 2018, he received the Determination later that day.
20. Mr. Furqan says that he found “a lot of discrepancies” in Mr. Multani’s claim, which he submits is not truthful, and wished to send in evidence to rebut those discrepancies. He says that he needs additional time to prepare his appeal.

ANALYSIS

21. 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, 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.
22. 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.
23. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that Trifecta has met that burden.

Failure to Comply with Principles of Natural Justice

24. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. It does not mean that the Director’s delegate must arrive at a conclusion the appellant considers just and fair.
25. There is nothing in Trifecta’s appeal submission that establishes that the delegate failed to provide him with sufficient information about the complaint and afford Trifecta the opportunity to respond to the

allegations. Mr. Furqan was provided with a copy of the complaint and offered his response to the delegate regarding the complaint. Mr. Furqan also appeared at a mediation where I infer the complaint allegations were fully discussed. When the parties were unable to reach a resolution, the delegate sent Trifecta a preliminary findings letter and gave Mr. Furqan the opportunity to respond.

26. Although Mr. Furqan says that he moved his business and did not receive the preliminary findings letter, I note that on January 24, 2017, the delegate sent Mr. Furqan an email informing Mr. Furqan of the mediation date and time and also requesting that, as there were two mailing addresses on file for him, Mr. Furqan should confirm if the delegate should use one of those addresses or another one. Mr. Furqan does not appear to have responded to that email. Mr. Furqan, nevertheless, appeared at the mediation in February, so there can be no doubt he received Branch correspondence as well as the Demand for Employer Records. The Branch also reminded Trifecta by email, on two occasions, about the requirement to submit Employer Records. Trifecta provided no documents in response to the Demand.
27. I find that Trifecta was given every opportunity to provide records in support of its position and failed or refused to do so.
28. I find no basis to conclude that Trifecta was denied natural justice.

New Evidence

29. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
1. 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;
 2. the evidence must be relevant to a material issue arising from the complaint;
 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
 4. the evidence must have high 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.
30. Although Trifecta suggests that Mr. Multani's arguments are "a bunch of lies", it submits no new evidence on appeal except for a rebuttal of Mr. Multani's complaint. That is no different than the position Trifecta appeared to take before the delegate. An appeal is not an opportunity to re-argue a case or to provide documentation that ought to have been presented to the delegate during the investigation.
31. Trifecta provides no information on appeal that meets the test for new evidence. Any documentation relevant to the complaint ought to have provided in response to the Demand for Employer Records.
32. I find no basis for this ground of appeal.

Extension of time

33. The delegate sent the preliminary findings letter on March 19, 2018. Canada Post tracking records indicate that the letter was “refused by recipient.” Canada Post records also indicate that the Determination, which was sent on April 10, 2018, was also “refused by recipient.” There is no indication that Trifecta moved, as Mr. Furqan now suggests.
34. I find there is no reasonable prospect the appeal will succeed.

ORDER

35. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated April 10, 2018, be confirmed in the amount of \$6,003.77, together with whatever interest that may have accrued since the date of issuance.

Carol L. Roberts
Panel
Employment Standards Tribunal