

Citation: GC's Door Express 2007 Ltd. (Re)  
2018 BCEST 88

An appeal

- by -

GC's Door Express 2007 Ltd.  
("GC's")

- 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/77

**DATE OF DECISION:** August 28, 2018

## DECISION

### SUBMISSIONS

Glen Creer on behalf of GC's Door Express 2007 Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), GC's Door Express 2007 Ltd. (“GC's”) has filed an appeal of a Determination issued by Arun Mohan, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on May 29, 2018.
2. The Determination found GC's had contravened Part 3, sections 17 and 18 of the *ESA* in respect of the employment of Marc Czajor (“Mr. Czajor”) and ordered GC's to pay Mr. Czajor wages and interest in the amount of \$8,833.03 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$9,833.03.
3. This appeal is grounded in an allegation the Director failed to observe principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. GC's seeks to have the Determination varied.
4. In correspondence dated July 10, 2018, the Tribunal acknowledged having received the appeal, notified the parties that no submissions were being sought on the merits of the appeal and requested the section 112(5) record (the “Record”) from the Director.
5. The Record has been provided by the Director; a copy has been delivered to GC's and Mr. Czajor, 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 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 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 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. Czajor 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. GC's operates a door manufacturing and installation business in the province. Mr. Czajor was employed as a door builder from August 2016 to May 19, 2017.

10. Mr. Czajor left the employ of GC's and filed a complaint under the *ESA* alleging GC's had contravened the *ESA* by failing to pay regular wages, vacation pay and compensation for length of service.

11. The Director conducted a complaint hearing.

12. The Director found GC's had contravened provisions of the *ESA* and that Mr. Czajor was entitled to unpaid regular wages, accrued vacation pay, compensation for length of service and interest, under section 88 of the *ESA*, on the amounts found owing.

13. In calculating the amount of wages unpaid and owed, the Director found the wage recovery period to be November 20, 2016, to May 19, 2017.

14. The Director also found wages had been paid in full up to the pay period commencing March 20, 2017 and the failure to pay all wages owed occurred in each pay period thereafter until Mr. Czajor's employment ended.

15. During the complaint hearing, a question arose concerning an amount of \$501.00 and whether it should be included in the calculation of what wages were owing. The Director, with Mr. Czajor's agreement, received material and submissions from GC's regarding that amount post-complaint hearing, but found, "nothing in the documents submitted to clearly indicate they represent wage payments for the last six months of employment" and declined to take that amount into consideration in calculating wages owing.

## ARGUMENT

16. GC's submits the amount of \$501.00 "should be counted even though we are unsure of the exact date" the amounts were paid. GC's also submits there is another amount – \$500.00 – that should also be considered in calculating wages owing.
17. In support of their submission, GC's has submitted two documents from the record – a photocopy of a payroll tracking sheet for the payroll period "Sept 19-Oct 2 2017" (although I find the reference to 2017 to be a typographical error which should read "2016") and a copy of the full payroll summary for Mr. Czajor.

## ANALYSIS

18. 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.*
19. 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.
20. 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.
21. I am not persuaded this appeal has any reasonable prospect of succeeding.
22. While the appeal alleges a failure by the Director to observe principles of natural justice, GC's 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.

23. GC's knew the claim being made by Mr. Czajor and was given full opportunity to present its position at the complaint hearing and after the complaint hearing, where the Director allowed GC's an opportunity to provide objective support for its position that the amount of \$501.00 was wages paid in the recovery period and should be considered in calculating wages owing.
24. The findings made by the Director on the position of GC's concerning this amount were findings of fact, which the Tribunal has no authority to consider in an appeal unless those findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
25. GC's has submitted two documents with the appeal, one of which is included in the record. The other document is not found in the record. It is a document that would be viewed as falling within the ground of appeal set out in section 112(1) (c). This ground is commonly referred to as the "new, or additional, evidence" ground of appeal and is intended to address evidence that may bear on the merits of an appeal but which was not presented to the Director during the complaint process, was not considered by the Director and is not included in the record.
26. The Tribunal has a discretion to accept new or additional material presented with an appeal as evidence. Material presented with an appeal under section 112(1) (c) as "additional evidence" is tested against several considerations before the Tribunal will accept it: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03. In respect of this ground of appeal, I need only address the document which was not provided during the complaint process.
27. This proposed "evidence" does not meet the necessary considerations for admission under section 112(1) (c) in two respects: first, it is not "new" – the document, or at least the information in it, appears to have been reasonably available at the time the Determination was made and could have been provided during the complaint process; and second, the document is not relevant to any material issue arising from the Determination or the complaint.
28. I find GC's has not demonstrated the material provided with the appeal should be accepted.
29. The matter of the \$500.00 cash payment made in the pay period Sept 19-Oct 2 2016 – to which these documents appear to be directed – is a bit confusing. That amount does not seem to have been argued by GC's as a discreet matter, but initially, at least, was somehow related to the \$501.00.
30. I do not, however, find the \$500.00 cash payment factored into the wage calculation in any respect as it fell outside of the wage recovery period and well outside the period during which the Director found the wages to have gone unpaid (March 20 to May 18, 2017) and for which Mr. Czajor was owed. As noted in the Determination, the Director only looked at wage statements for the last six months of Mr. Czajor's employment and found wages had been paid in full up to the pay period commencing March 20, 2017. Wages paid, or unpaid, outside of the wage recovery period cannot be considered in the calculation of wages owed during the recovery period. The submission related to this amount has no legal merit.
31. As indicated above, 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**

32. Pursuant to section 115 of the *ESA*, I order the Determination dated May 29, 2018, be confirmed in the amount of \$9,833.03, together with any interest that has accrued under section 88 of the *ESA*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**