

Citation: Rene Gieseler, Jeffrey Close, and Kevin Close (Re)
2019 BCEST 43



An appeal

- by -

Rene Gieseler, Jeffrey Close and Kevin Close, carrying on business as TSM
Management, a.k.a. TSM Co-op, a.k.a. Total Skills Management Co-op
("TSM")

- 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.: 2019/20

DATE OF DECISION: May 8, 2019

DECISION

SUBMISSIONS

Jeffrey Close

on behalf of Rene Gieseler, Jeffrey Close and Kevin Close, carrying on business as TSM Management, a.k.a. TSM Co-op, a.k.a. Total Skills Management Co-op

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Rene Gieseler, Jeffrey Close and Kevin Close, carrying on business as TSM Management, a.k.a. TSM Co-op, a.k.a. Total Skills Management Co-op (“TSM”) have filed an appeal of a Determination (the “Determination”) issued by Shannon Corregan, a delegate of the Director of Employment Standards (the “Director”), on January 22, 2019.
2. The Determination found TSM had contravened Part 3, sections 18 and 21 of the *ESA* in respect of the employment of Blaine Kwiatkowski (Mr. Kwiatkowski”) and section 46 of the *Employment Standards Regulation* and ordered TSM to pay Mr. Kwiatkowski wages in the amount of \$4,343.63 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$5,843.63.
3. This appeal is grounded in new evidence becoming available that was not available when the Determination was being made. TSM seeks to have the Determination cancelled.
4. In correspondence dated March 12, 2019, the Tribunal acknowledged having received an appeal, which included a request to extend the statutory appeal period found in section 112 of the *ESA*. The appeal contained no written reasons or argument on the merits of the appeal and contained no additional documents supporting the appeal or the chosen grounds of appeal. The correspondence requested TSM to submit its written reasons for the appeal and/or argument and any additional documents no later than 4:00 p.m., April 1, 2019. TSM has not met this request. The Tribunal has received nothing from TSM other than an incomplete appeal filing.
5. The correspondence also 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 notified the parties that, following such review, all or part of the appeal might be dismissed.
6. The record has been provided to the Tribunal by the Director. A copy has been delivered to TSM and Mr. Kwiatkowski and both have been given an opportunity to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
7. 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 and any material accepted for inclusion in 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 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.*

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Kwiatkowski 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 TSM has failed to diligently pursue the appeal, whether TSM has met the requirements of section 112(2) of the *ESA*, and whether there is any reasonable prospect the appeal will succeed.

ISSUE

9. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

10. TSM operates a commercial and industrial building construction business as a registered general partnership between Rene Gieseler, Jeffrey Close, and Kevin Close. Mr. Kwiatkowski worked for TSM from May 28, 2018, to June 16, 2018. He filed a complaint with the Director alleging TSM had contravened the *ESA* by failing to pay wages and by failing to reimburse him for expenses he incurred on TSM's behalf.
11. TSM took the position that Mr. Kwiatkowski was not an employee for the purposes of the *ESA* but an independent contractor.
12. The Director issued a Demand for Employer Records, with which TSM failed to comply.
13. The Director conducted a complaint hearing. The Determination records a less than complete participation by TSM in the complaint hearing and in a post-hearing process conducted by the Director.

14. The Director found Mr. Kwiatkowski was an employee for the purposes of the *ESA*, was owed wages, and had incurred expenses on behalf of TSM for which he was entitled to be reimbursed.

THE APPEAL

15. The entire appeal comprises a mostly completed Appeal Form, a single sheet of paper and a copy of the Determination and the reasons for Determination. The single sheet of paper contains two sentences, which read:

Reason for extension, Construction Manager is working out of town.

We request an extension until April 1 2019. [*sic*]

16. It bears noting that the appeal was delivered to the Tribunal on March 1, 2019, the last day of the statutory appeal period set out in section 112(3).

ANALYSIS

17. 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.*

18. 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.

19. 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.

20. TSM has 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.

21. Although TSM identified this ground of appeal on its Appeal Form, and requested an extension of the appeal period to satisfy deficiencies in its appeal, it has provided nothing beyond what I have described above; TSM has not responded to the request of the Tribunal to provide some basis for the appeal, has not provided reasons and/or argument for its appeal or provided any material that might be considered “new evidence” and which might, arguably, support its appeal.

22. In failing to do so, TSM has not met the burden imposed on it to establish there is an error in the Determination on the chosen ground of appeal.

23. I find TSM has not diligently pursued this appeal and, in any event, the 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) of the *ESA*.

ORDER

24. Pursuant to section 115 of the *ESA*, I order the Determination dated January 22, 2019, be confirmed in the amount of \$5,843.63, together with any interest that has accrued under section 88 of the *ESA*.

David Stevenson
Member
Employment Standards Tribunal