

Citation: Cannaviri Laboratories Ltd. (Re)  
2019 BCEST 7

An appeal

- by -

Cannaviri Laboratories Ltd. and Artillery Holdings Ltd.  
[an appeal by Cannaviri Laboratories Ltd.]  
("Cannaviri")

- 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/107

**DATE OF DECISION:** January 14, 2019

## DECISION

### SUBMISSIONS

Gerald Hipple

on behalf of Cannaviri Laboratories Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Cannaviri Laboratories Ltd. (“Cannaviri”) has filed an appeal of a Determination issued on September 14, 2018 (the “Determination”), by Alana DeGrave, a delegate of the Director of Employment Standards (the “Director”).
2. The Determination found Cannaviri was, together with Artillery Holdings Ltd., an employer for the purposes of the *ESA* and, as an employer, had contravened Part 3, section 18 of the *ESA* in respect of the employment of Babajide Shinaba (“Mr. Shinaba”) and section 46 of the *Employment Standards Regulation*. The Director ordered the employer – Cannaviri and Artillery Holdings Ltd. – to pay Mr. Shinaba wages and interest in the amount of \$22,491.22 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$23,491.22.
3. This appeal is grounded in an allegation the Director failed to observe principles of natural justice in making the Determination. Cannaviri seeks to have the Determination varied.
4. In correspondence dated October 23, 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 from the Director.
5. The record has been provided by the Director; a copy has been delivered to Cannaviri and Mr. Shinaba, and an opportunity has been provided to each to object to its completeness. Cannaviri has indicated its acceptance of the completeness of the documentary material in the file but has raised a concern that there is no recording or transcript of the complaint hearing, contending its absence compromises the ability of Cannaviri to present its appeal. This matter shall be addressed later in this appeal decision.
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 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Shinaba 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. Cannaviri operates an internet-based marketing company that develops and sells cannabidiol products. Mr. Shinaba filed a complaint alleging he was employed by Cannaviri as an online marketing manager from April 18, 2016, to October 17, 2017, and had not been paid wages for that period.
10. Cannaviri disputed that Mr. Shinaba was an employee, submitting he was engaged by Cannaviri as an independent contractor, and, in any event, his term of engagement with Cannaviri was terminated in February 2017.
11. The Director conducted a complaint hearing. At the complaint hearing, Cannaviri was represented by Matthew Kyska, a director and officer of Cannaviri, and Mr. Shinaba represented himself. The Director received evidence from Mr. Kyska, Mr. Shinaba, and five other persons.
12. The Director identified three issues: whether Mr. Shinaba was an employee or an independent contractor; if Mr. Shinaba was an employee, who was his employer; and whether, if he was an employee, he was owed wages.
13. The Director found Mr. Shinaba was an employee under the *ESA*, that Cannaviri and Artillery Holdings Ltd. exercised common control and direction over Mr. Shinaba's employment and met the requirements to associate them under section 95 of the *ESA* as his employer and that Mr. Shinaba was owed wages by his employer.
14. In deciding Mr. Shinaba was an employee under the *ESA*, the Director considered and evaluated the "substantive nature of the relationship" against the definitions of "employer", "employee", and "work" found in section 1 of the *ESA*, as well as the nature and purposes of the legislation.

15. The Determination records that the evidence showed there was “considerable direction” from Cannaviri and Artillery Holdings Ltd. over Mr. Shinaba’s work, that Mr. Shinaba worked in an office paid for by Cannaviri, on a computer owned and provided by the employer, worked substantially on the employer’s projects, had e-mail addresses that identified him with the employer and that Mr. Shinaba was not in business for himself or sub-contracting work from the employer.

## ARGUMENT

16. Cannaviri argues Mr. Shinaba was never an employee, asserting several facts operated against a finding of employee status: the absence of a formal employment agreement, that Mr. Shinaba provided no social insurance number, that Cannaviri had no employees and had not authorized the hiring of any employees, had no source-deduction account, and paid Mr. Shinaba based on invoices provided by him.
17. On a related point, Cannaviri says the above facts were not referred to or addressed in the Determination and the failure of the Director to do so has compromised its ability to appeal the Determination.
18. The appeal also directly disagrees with findings of fact and contains assertions of fact that have no foundation in the Determination or in any of the material in the record.
19. Alternatively, Cannaviri argues that even if Mr. Shinaba were found to be an employee of Cannaviri, he performed little or no work for Cannaviri after February 2017. In this respect Cannaviri argues “[t]here is a need to make a distinction between Cannaviri and Artillery relationships and liabilities” as Cannaviri had ceased operating after February 2017 pending new financing. During the Claim Period, Cannaviri says Mr. Shinaba was working independently on his own projects and had been invited to use the premises rented by Cannaviri while the term of the lease on those premises expired.

## ANALYSIS

20. 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.*
21. 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.
22. 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.

23. 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.
24. The Tribunal has no authority to consider an appeal that challenges findings of fact unless those findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
25. I am not persuaded this appeal has any reasonable prospect of succeeding.
26. While the appeal alleges a failure by the Director to observe principles of natural justice, Cannaviri 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)
27. Cannaviri knew the claim being made by Mr. Shinaba and was given full opportunity to present its position at the complaint hearing. Cannaviri has established no factual foundation for demonstrating there was a denial of natural justice. The burden on Cannaviri to show a breach of the principles of natural justice have not been met.
28. Reduced to its component parts, the appeal continues to express the view of Cannaviri that Mr. Shinaba is not an employee and re-states its basis for that position; disputes the decision of the Director to associate Cannaviri and Artillery Holdings Ltd.; and expresses disagreement that Cannaviri should be held liable for any wages owing to Mr. Shinaba other than what might be directly attributable to work performed for Cannaviri.
29. I shall address the deficiency of each of these components of Cannaviri's arguments.
30. First, a question involving the employment status of an individual under the *ESA* is primarily a question of fact, requiring the Director to apply findings of fact to the correct legal analysis. In this case, the Director has applied the correct legal analysis – there is no argument in the appeal asserting otherwise – and, as indicated above, the Tribunal has no authority to consider an appeal challenging findings of fact unless those findings raise an error law. Error of law is not relied on in this appeal and, in any event, there is no basis upon which an error of law on the facts might be found.
31. In answer to the argument that the Director failed to refer to or address several matters raised by Cannaviri in support of its position on Mr. Shinaba's status, I have two comments.

32. First, all of the points raised by Cannaviri to support this contention were made to the Director before and during the complaint hearing. It is not necessary for the Director to expound on every piece of evidence submitted and argument made; it is sufficient that the findings linking the evidence and argument to the result can logically be discerned.
33. Second, in the context of the specific points made by Cannaviri, employment status under the *ESA* is not determined by whether there is a formal employment agreement, by whether the putative employee provided a social insurance number, by whether the putative employer had specifically “authorized” the employment or had established a mechanism for making and remitting source deductions to appropriate government agencies. Employment status under the *ESA* is determined, as the Director correctly noted, by whether the substance of the relationship, viewed as a whole, in the context of the evidence and with an appreciation of the intention and purposes of the legislation meets the definitions found in the *ESA* and satisfies the purposes and objectives of the legislation. In answer to Cannaviri’s concern about the absence of a transcript or recording of the complaint hearing, the Director’s response to this concern is accurate. The record of the complaint hearing is the Determination and the record upon which it is based. As noted above, the Director need not address every fact or piece of evidence. The “facts” which Cannaviri says were not noted or assessed in the Determination were before the Director in the complaint process. Viewed in context, these “facts” provided no assistance to either Cannaviri or the Director in deciding the issue of Mr. Shinaba’s status and the absence of any reference to them in the Determination has not impacted either the finding of the Director or the ability of Cannaviri to make this appeal.
34. In sum, the arguments being made by Cannaviri against the Director finding Mr. Shinaba was an employee under the *ESA* amount to no more than re-arguing the position it took on that issue before the Director without meeting the requirement of showing an error in the Determination.
35. On predominantly the same basis, the arguments concerning the Director’s decision to associate Cannaviri and Artillery Holdings Ltd. under section 95 are dismissed. The Director applied the correct considerations arising under that provision to the facts as found, which are not challenged in this appeal and which more than adequately support the basis for the decision to associate.
36. For completeness, I also find that none of the disagreements with findings of fact made by the Director are reviewable in this appeal and there is nothing in the appeal showing the factual assertions made in it, including what appear to be new factual assertions, would have any affect on the Determination.
37. The argument that a distinction should be made between wage liabilities that can be attributed to Cannaviri and wage liabilities that can be attributed to Artillery Holdings Ltd. ignores that the legislative effect of section 95 is to create one employer bearing all of the rights and responsibilities under the *ESA* that any of the entities included in the association had. The provision clearly states, each entity included in the association is “jointly and separately liable” for the amount stated in a determination.
38. 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**

- <sup>39.</sup> Pursuant to section 115 of the *ESA*, I order the Determination dated September 14, 2018, be confirmed in the amount of \$23,491.22, together with any interest that has accrued under section 88 of the *ESA*.

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