

An appeal

- by -

Richard Place  
("Mr. Place")

- 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.:** 2019/190

**DATE OF DECISION:** February 7, 2020

## DECISION

### SUBMISSIONS

Richard Place on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Richard Place (“Mr. Place”) has filed an appeal of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the “Director”), on October 7, 2019 (the “Determination”).
2. The Determination found Mr. Place was not an employee under the *ESA* of John B. Pub Ltd. carrying on business as John B. Neighbourhood Pub (“John B. Pub”) and, as a result, the *ESA* did not apply to his complaint. The Director decided no further action would be taken.
3. This appeal is grounded in error of law by the Director and an allegation the Director failed to observe principles of natural justice in making the Determination.
4. In correspondence dated November 20, 2019, the Tribunal acknowledged having received an appeal and requested the section 112(5) record (the “record”) from the Director.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Place and to counsel for John B. Pub. An opportunity has been provided to both 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 submissions filed on 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 John B. Pub 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. John B. Pub operates a restaurant and pub. Mr. Place worked as a disc jockey (“DJ”) at the rate of \$250.00 per evening or event, from 2011 or 2012 to September 8, 2018, when John B. Pub ceased using Mr. Place as a DJ.
10. Mr. Place filed a complaint with the Employment Standards Branch alleging John B. Pub had contravened the *ESA* by failing to pay overtime wages, vacation pay and compensation for length of service.
11. The Director found the evidence showed Mr. Place was not an employee of John B. Pub but an independent contractor conducting his own business as a DJ and denied the complaint.

### **ARGUMENT**

12. In the appeal, Mr. Place contends the Director erred in law in several respects in the complaint process and the Determination.
13. First, Mr. Place submits the Director erred by ordering him to produce his income tax returns for all years in which he worked as a DJ for John B. Pub and any and all promotional material he used to promote his services as a DJ during the period he worked at John B. Pub. Mr. Place did not comply with this order. He says the basis for the order, and the relevance of the information and the documents required to be produced to his relationship with John B. Pub, was never adequately explained.
14. Second, Mr. Place says the Director reached a conclusion in the Determination without having all the evidence – because a former manager of John B. Pub refused to provide information during the investigation – and relied on hearsay evidence.
15. Third, Mr. Place says the Director made numerous errors in dealing with the evidence.

16. Mr. Place also contends the Director failed to observe principles of natural justice in making the Determination. Included in this ground of appeal is an accusation of bias in favour of John B. Pub, reflected, he says, in questions asked of him during the investigation, by what he describes as “an ever-changing line of procedures, the majority of which seems to be made up on the spot” and by an “[u]nreasonable request” for tax returns.
17. Also included in this ground of appeal is the assertion the Director engaged in speculation, reaching several findings of fact without evidence.

## 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. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99. Allegations of bias command a high evidentiary bar and require clear and objective evidence.
22. 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. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle.

23. I shall first address Mr. Place's challenge to the Determination based on the Director's decision to order him to produce his tax returns and promotional material.

24. I must admit to some confusion with this argument as Mr. Place refused to provide the material he was ordered to produce. Mr. Place argues the Director's order is an error of law but does not place the alleged error into the definition of error of law adopted by the Tribunal or explain how the neglected order to produce generated any error in the Determination.

25. If Mr. Place is arguing the Director misinterpreted or misapplied the *ESA*, for the reasons that follow, I completely disagree and reject such an argument.

26. The authority vested in the Director to require a person to produce records arises under section 85 of the *ESA*. The relevant portions of that provision state:

85 (1) *For the purpose of ensuring compliance with this Act and the regulations, the director may do one or more of the following: . . .*

(c) *inspect any records that may be relevant to an investigation under this Part;*

. . .

(f) *require a person to produce, or deliver to a place specified by the director, any records for inspection under paragraph (c), . . .*

27. Based on the above provisions, the Director clearly had the authority to require production of records that were actually or potentially relevant to the investigation of Mr. Place's complaint. The question of actual or potential relevance is decided, in the first instance, by the Director. Mr. Place has a right to challenge that decision; he does not have a right to reject it. Nothing in the nature of the material ordered to be produced would indicate it was so highly prejudicial that it ought not be provided and, even if there was a concern by Mr. Place in that regard, there was an onus on him to raise and argue such concern, not simply ignore the order.

28. If Mr. Place is arguing the Director somehow committed an error of law by finding the documents and material Mr. Place was required to provide had potential relevance to the question the Director was being asked to decide, I also reject that argument. I accept, as the Director did, that the material had, at least, potential relevance to the question of Mr. Place's status under the *ESA* and nothing in Mr. Place's argument affects that conclusion.

29. The position of Mr. Place on this matter is further confounded by the fact Mr. Place decided to act as arbiter on the question of actual or potential relevance of the documents and material, refusing to comply with the order to produce and refusing to answer questions from the Director concerning his DJ business, even though the Director expressed to him such questions were relevant to an analysis of his status. In his view, expressed in an e-mail to another delegate of the Director dated April 8, 2019, "all of the requests have zero to do with any determination of my relationship with the John B. Pub, before, during or afterwards."

30. Mr. Place's refusal to comply with the order to produce and his refusal to answer questions relating to his DJ business generally is sufficient to dismiss this argument. In any event, the Director was able, through other evidence, to conclude Mr. Place was in business for himself as a DJ. This conclusion was based on facts provided to the Director and was included in the analysis of his status under the *ESA* in the Determination. Mr. Place has not shown this conclusion was an error of law by the Director.
31. In respect of his argument that the entire process was somehow flawed – and biased – because he was not provided with an adequate explanation for the Director concluding this material was actually or potentially relevant and requiring its production, I have two comments to make: first, I am not persuaded the Director was required to provide Mr. Place with an explanation for requiring production; and second, it was Mr. Place's decision not to participate in the teleconference discussing the request by legal counsel for John B. Pub for production. Such participation would have allowed him to both hear the rationale for the request and provide an opportunity to respond.
32. The above argument has no reasonable prospect of succeeding.
33. The question of whether a person is an employee under the *ESA* is a question of mixed law and fact, requiring applying the facts as found to the relevant legal principles relating to those provisions.
34. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco, supra*, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.
35. In the Determination, the Director has correctly identified the legal framework within which the question of whether a person is an employee under the *ESA* is assessed: see pages R11 – R12. The correct factors were identified and assessed. Typically, in cases considering whether a person is an employee or an independent contractor, there were facts and factors that pointed in each direction with the weight of evidence tilting to the finding made.
36. Provided the established principles have been applied, a conclusion on whether a person is an employee under the *ESA* is a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is, as noted above, a question over which the Tribunal has no jurisdiction. The application of the law, correctly found, to the facts as found by the Director does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.
37. This question of whether the Director committed an error of law on the facts, framed in the words used in the definition of error of law, is whether the Director acted without evidence or acted on a view of the facts which could not reasonably be entertained.
38. This is not a case where the Director acted without evidence.

39. That test for assessing whether the Director acted on a view of the facts that could not reasonably be entertained has been stated to be as follows:
- ... that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word “could” ... (*Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11 Richmond/Delta*, [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18, cited with approval in *British Columbia (Assessor Area No. 27-Peace River) v. Burlington Resources*, 2003 BCSC 1272
40. I am unable to find that the conclusions of the Director on Mr. Place’s status as an employee of John B. Pub for the purposes of the *ESA* are based on a view of the facts which could not reasonably be entertained. I have reviewed the Determination and the record. I find the analysis of the Director on Mr. Place’s status is coherent, consistent with the evidence and logically supports the resulting finding.
41. Applying the above test, I am satisfied the conclusions of fact reached by the Director were ones that were entirely justified on the evidence presented. While I appreciate that Mr. Place disagrees with the resulting decision, it is not shown in this appeal that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable. Mr. Place argues some of the statements and findings in the Determination amount to “speculation”. Some examples are provided in the appeal submission. In my view, none of the examples can be described as mere speculation; all are either statements of fact whose source is found in the evidence and material before the Director or conclusions of facts based on that material.
42. The burden in this appeal is on Mr. Place, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. More specific to the application of that burden in the case, Mr. Place must persuade the Tribunal that it was wrong to have concluded he was not an employee of John B. Pub under the *ESA*.
43. I am not persuaded that burden has been met. At its core, this appeal does no more than challenge the Director’s conclusion on the question of his status under the *ESA*, arguing the evidence does not support the conclusion reached. The appeal seeks to have the Tribunal accept there were errors in the evidentiary basis for the Determination, reassess the factual context and reach a different result. The *ESA* does not allow the Tribunal to do this.
44. To reiterate, an appeal is an error correction process. The burden of demonstrating an error in this case lies with Mr. Place. The Tribunal is reluctant to venture into a re-examination of the conclusions of the Director absent demonstrated reviewable error. Mr. Place has not established the Director committed an error of law in finding he was not an employee of John B. Pub under the *ESA*.
45. In sum, I am not persuaded the Director made any error of law in finding Mr. Place was not an employee of John B. Pub under the *ESA* and this ground of appeal has no reasonable prospect of succeeding.

46. Mr. Place has also grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination.
47. As noted above, there is a burden on Mr. Place on this ground to provide some objective evidence in support of this allegation and, where an allegation of bias is made, the evidence must be objective and clearly point to a finding of bias. Mr. Place's position on natural justice is grounded only in subjective impressions, a refusal to accept explanations made by Branch delegates and an apparent misunderstanding of the process and the role of the Director in it. Nothing in this appeal comes near to satisfying the test for establishing bias: see *Dusty Investments Inc. d.b.a. Honda North, supra*, at pages 7 – 9.
48. Mr. Place has provided no objectively acceptable evidence showing he was denied the procedural protections reflected in the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. It is clear from the file that he was afforded the procedural rights reflected in the *ESA* and captured by natural justice principles.
49. There is simply no basis for this ground of appeal.
50. Based on all of the above, 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**

51. Pursuant to section 115 of the *ESA*, I order the Determination dated October 7, 2019, be confirmed.

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