

Citation: Western Wheelcraft Ltd. (Re)
2020 BCEST 14

An appeal

- by -

Western Wheelcraft Ltd.
("Western Wheelcraft")

- 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.: 2019/195

DATE OF DECISION: February 25, 2020

DECISION

SUBMISSIONS

Baldeep Gidda

on behalf of Western Wheelcraft Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Western Wheelcraft Ltd. (“Western Wheelcraft”) has filed an appeal of a determination issued by Vivian Tran, a delegate of the Director of Employment Standards (the “Director”), on October 17, 2019 (the “Determination”).
2. The Determination found Western Wheelcraft had contravened Part 3, sections 18 and 21 and Part 4, section 40 of the *ESA* in respect of the employment of Sing Hang Chan (“Mr. Chan”) and section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The Determination ordered Western Wheelcraft to pay Mr. Chan wages in the total amount of \$1,383.23, an amount that included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$2,000.00. The total amount of the Determination is \$3,383.23.
3. This appeal is grounded in evidence becoming available that was not available when the Determination was being made.
4. The appeal was delivered to the Tribunal on November 25, 2019. The Appeal Form was accompanied by a submission on the appeal, which alluded to “all documents supporting the appeal” being attached. There is, however, no documents other than the Determination and Reasons for Determination attached to the appeal and appeal submission.
5. In correspondence dated November 29, 2019, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to Western Wheelcraft and Mr. Chan. The parties have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it 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 on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other evidence allowed to be added to 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. Chan 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 the request for an extension of the appeal period should be granted 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. Western Wheelcraft operates a mobile automotive wheel painting business in Burnaby BC.
11. Mr. Chan filed a complaint with the Employment Standards Branch (the “Branch”) alleging he was employed by Western Wheelcraft from March 1, 2019, to March 28, 2019, and had not received all wages owed to him.
12. The Determination outlines the largely unsuccessful efforts of the Director to obtain from Western Wheelcraft a meaningful response to the complaint and their participation in the complaint process.
13. A copy of the complaint was sent to Western Wheelcraft by e-mail on May 31, 2019.
14. A delegate of the Director (the “delegate”) made two calls to Baldeep Singh Gidda (“Mr. Gidda”), a director of Western Wheelcraft, to discuss the complaint: May 31, 2019, and June 3, 2019. When Mr. Gidda returned the second call, the delegate was referred to Mr. Chan’s manager, identified as Mr. Prasad, who responded verbally to elements of the complaint. The delegate discussed the complaint resolution process with Mr. Prasad.

15. The delegate e-mailed to Western Wheelcraft a range of mediation dates. There was no response from Western Wheelcraft.
16. There was, in fact, no discussion with or communication from any representative of Western Wheelcraft after June 6, 2019.
17. On June 28, 2019, a Notice of Complaint Hearing and Demand for Employer Records was sent to Western Wheelcraft by registered mail and e-mail. The registered mail address for Western Wheelcraft is also the personal address of another director of Western Wheelcraft, Michael Rishi Prasad. Although the registered mail was not claimed, I am satisfied from the record that Western Wheelcraft was aware of it and chose not to claim it. In any event, section 122 of the *ESA* would operate to deem service.
18. Western Wheelcraft failed or refused to respond to the documents or Demand issued by the delegate. Additional, unsuccessful, attempts were made by the delegate to remind Western Wheelcraft of the requirement to provide the records.
19. The Director conducted a complaint hearing. I am also satisfied Western Wheelcraft was aware of the hearing and was informed of the details of it. No representative for Western Wheelcraft attended the complaint hearing.
20. The Director heard Mr. Chan's evidence and accepted it.
21. The Determination, with reasons, was issued on October 17, 2019.
22. The Director found that Mr. Chan was owed wages in the amounts set out in the Determination and that Western Wheelcraft had contravened several provisions of the *ESA* and had contravened section 46 of the *Regulation*.

ARGUMENT

23. Western Wheelcraft has grounded this appeal in evidence becoming available that was not available when the Determination was being made. However, no supporting documents or any supporting material that might be presented as "evidence that has become available" are attached to the appeal.
24. Western Wheelcraft submits the Director did not have sufficient information to decide the complaint, asserting the information the delegate obtained in the initial stages of the investigation was "not fulsome or correct and was ambiguous".
25. Western Wheelcraft also says the person allegedly directly responsible for "hiring and allocation of wages", Mr. Gidda, "was never contacted and was not available" when the investigation was commenced. On the face of the material, that statement is simply not true.
26. Western Wheelcraft says Mr. Chan was paid all wages and he is owed nothing more. They also allege Mr. Chan's claim is false.

27. None of the assertions made in the appeal submission are “evidence” and, in any event, they all could have been made to the Director in the complaint process had Western Wheelcraft participated.

ANALYSIS

28. 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.*

29. 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.

30. 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.

31. 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.

32. Western Wheelcraft 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.

33. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

34. Stating the above principles or performing an analysis of their applicability to this case is unnecessary as Western Wheelcraft has provided no additional evidence – new or otherwise – in support of its appeal. The assertions made by Western Wheelcraft in its appeal submission are nothing that could not have been advanced during the complaint process.
35. Western Wheelcraft has utterly failed to establish any merit to this ground of appeal and cannot possibly succeed in persuading the Tribunal there is an error in the Determination.
36. In addition to there being absolutely no merit to the chosen ground of appeal, this appeal also fails on the principle expressed in *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, which says a party is not permitted to refuse or fail to participate in the complaint process and, subsequent to a Determination being issued, seek to advance a case to the Tribunal on appeal, when the facts should have been advanced to the Director during the complaint process.
37. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. The Director cannot be said to have “erred” in a fact-finding process that Western Wheelcraft failed or refused to participate in.
38. The facts of this case are similar to those in *Kaiser Stables, supra*, where the concerted efforts of a delegate to have an employer participate in the investigation of a complaint were ignored by the employer. Following a determination with which the employer did not agree, an appeal was filed that sought to introduce new evidence on appeal, although the difference here is that no new evidence at all is presented with this appeal. Nevertheless, the Tribunal statement that it “will not to allow an employer to completely ignore the Director’s investigation and then appeal its conclusions” is apt and applicable to this case.
39. The very limited response of Western Wheelcraft to the efforts to seek their participation in the complaint process and their refusal to comply with the Demand for Employer Records while contending the Determination is wrong on matters concerning the employment of Mr. Chan – his hours of work and wage rate – persuades me that Western Wheelcraft should not be allowed to challenge the Determination in this appeal.
40. Based on all of the above, 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

41. Pursuant to section 115 of the *ESA*, I order the Determination dated October 17, 2019, be confirmed in the amount of \$3,383.23 together with any interest that has accrued under section 88 of the *ESA*.

David Stevenson
Member
Employment Standards Tribunal