

An appeal

- by -

Danial Obermann
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2020/014

DATE OF DECISION: April 8, 2020

DECISION

SUBMISSIONS

Danial Obermann on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Danial Obermann (the “Appellant”) has filed an appeal of a determination issued by John Dafoe, a delegate of the Director of Employment Standards (the “Director”), on December 13, 2019 (the “Determination”).
2. In the Determination, the Director found that there had been no contravention of the *ESA* and that no wages were owed. The Director determined that no further action would be taken.
3. The Appellant appeals the Determination contending that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
4. Section 114 of the *ESA* provides that the Employment Standards Tribunal (the “Tribunal”) may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
5. This decision is based on the section 112(5) “record” that was before the delegate at the time the Determination was made, the Appellant’s submissions, and the Reasons for the Determination.

FACTS

6. The Appellant filed a complaint with the Director alleging that Tsaa-Dunne GP Ltd. (the “Employer”) falsely represented the availability of a position, the type of work, the wages and the conditions of employment contrary to section 8 of the *ESA*.
7. The Employer operates an oil field equipment and servicing company. The Appellant asserted that he was induced to make himself available to work for the Employer as a water truck driver in November 2018.
8. The Director’s delegate conducted a hearing by teleconference on October 15, 2019. Although the Employer had been given notice of the hearing, no one from the Employer participated in the hearing.
9. The Appellant attempted to submit into evidence an audio recording of a meeting between himself and Cam Fellows, a former employee of the Employer. When the Appellant was informed that he would have to provide that recording on a USB stick so it could be disclosed to the Employer, the Appellant was unwilling or unable to do so. The delegate did not consider any audio recording in making his decision.
10. The Appellant alleged that, while working for another employer, he was contacted by Mr. Fellows and offered a job driving a water truck. He said that he had been in contact with the Employer because, although he made good money at his other job, he was tired of the frequent vehicle breakdowns and felt unsafe.

11. The Appellant made his way to Fort St. John on November 19, 2018, the date he was told to arrive if he wanted the job. His evidence was that when he arrived, he was told that the weather had changed so the water truck job was on hold. However, he was offered a job in the shop at a reduced wage until the following week when it was expected that the water truck job would be available. After working two hours on the first day, the Appellant suspected that the Employer had no intention of employing him as a water truck driver. He believed that he would be expected to work in the shop at a lower wage rate. The Appellant checked into a hotel and over the next few days, gave the Employer a number of reasons he could not work in the shop. In the middle of the following week, the Appellant raised his concerns about the availability of the job with Mr. Fellows, and told him that he should be reimbursed for the cost of his accommodation and expenses. He said that he surreptitiously recorded the conversation, but when he told Mr. Fellows that he was doing so, Mr. Fellows ended the meeting and told him to leave or he would call the RCMP.
12. The Appellant said that he had learned about the job by way of a Facebook advertisement. He believed that the job would continue until late March or early April, and that he would be paid overtime. After leaving the Employer's premises, the Appellant drove a truck in January and February, but did not find a good job until July 2019.
13. After considering email correspondence between the Employer and the Appellant, the delegate found that the Employer

...was not actively recruiting [the Appellant] but that [the Appellant] was very anxious to secure employment with them, ideally as a water truck driver although he appeared to be willing to work for them in another capacity for a significantly lower wage when he first contacted them.
14. The delegate also found that the Employer made it clear to the Appellant that the work of building ice roads and bridges was weather dependent. The delegate noted that the Appellant arrived at the conclusion that the Employer had no intention of offering him the water truck job "very quickly and without clear reason beyond the fact that the delay was longer than he was comfortable with."
15. The delegate concluded that the Employer had not "misrepresented any of the four factors identified in section 8 of the [ESA]". He found that when the Employer told the Appellant that the water truck work would start on November 21, they had every reason to believe that was the case, although it was weather dependent, a caveat that was communicated to the Appellant.

ARGUMENT AND ANALYSIS

16. Section 114(1) of the *ESA* provides that 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, 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.

17. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

18. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a large and liberal view of the appellant's explanation as to why the Determination should be varied or cancelled or the matter should be returned to the Director (see *Triple S Transmission*, BC EST # D141/03).

19. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination. I find that the Appellant has not met that burden.

20. The Appellant's appeal consists of the following:

The reason for my appeal is that the agent didnt follow law in any way shape or for. Listen to the hearing and form a legal opinion please and thanks. [reproduced as written]

Error of law

21. The Tribunal as 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.

22. The Appellant has not identified how the delegate erred in his analysis. An appeal is not, in effect, a rehearing. An Appellant must identify how the Director's delegate erred in law. Arguing that the delegate erred in law, without more, is not a sufficient basis for an appeal.

23. Section 8 of the *ESA* provides that an employer must not "induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following: (a) the availability of a position; (b) the type of work; (c) the wages; (d) the conditions of employment."

24. The Tribunal has adopted the following definition of misrepresentation when considering whether an employer has misrepresented any of those four factors:

Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false misrepresentation that which, if accepted, leads the mind to an apprehension of a condition other or different from that which exists. Colloquially, it is understood to mean a statement made to deceive or mislead.

25. I am unable to find that the delegate erred in his conclusion. The Appellant's evidence was that he sought out a position with the Employer, that he indicated he was available for a variety of jobs, and when he was offered the position of water truck driver, he was told his start date was weather dependent. The Appellant presented no evidence to the delegate that the Employer misrepresented the job.

Failure to observe the principles of natural justice

26. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

27. There is nothing in the record or the appeal submissions that supports this ground of appeal. The Appellant had the opportunity to present his case in full. As the Employer did not appear and submitted no evidence in advance of the hearing, there was no evidence for the Appellant to respond to. Although the delegate declined to consider evidence of an alleged recording the Appellant attempted to submit in support of his complaint, the Appellant was aware that all evidence had to be disclosed to the other party, and he declined or refused to provide a copy for the delegate to do so.

28. Such a ruling does not contravene the principles of natural justice and does not demonstrate that the Appellant was denied the right to be heard. I infer that the Appellant believed that the surreptitiously recorded conversation with Mr. Fellows would assist him in establishing a contravention of section 8 of the *ESA*. Given that the documentary evidence established that the Appellant responded to a Facebook advertisement and had subsequent written correspondence regarding the nature of the job, I can only conclude that a discussion which occurred after the Appellant attended the job site would not have assisted the delegate in his assessment of the complaint.

29. The Appellant suggests that the Tribunal should "listen to the hearing." Not only are hearings not recorded at the Employment Standards Branch, the Appellant does not suggest how doing so, had there been one, would establish any of the grounds of appeal.

30. I find no basis to interfere with the Determination.

ORDER

31. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated December 13, 2019, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal