

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Jeffrey Atienza
("Mr. Atienza")

- 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.: 2021/040

DATE OF DECISION: August 04, 2021

DECISION

SUBMISSIONS

Jeffrey Atienza on his own behalf

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*ESA*”) by Jeffrey Atienza (“Mr. Atienza”) of a determination issued by Leif Jensen, a delegate of the Director of Employment Standards (the “Director”), on April 1, 2021 (the “Determination”).
2. The Determination found the *ESA* had not been contravened by Mr. Atienza’s former employer, Russell Food Equipment Limited (“RFEL”), and no wages were owing to him.
3. Mr. Atienza has appealed the Determination on the ground the Director failed to comply with principles of natural justice in making the Determination.
4. In correspondence dated May 18, 2021, 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.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Atienza and RFEL. Both 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.
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, my review of the material that was before the Director when the Determination was being made and any material that is accepted as new, or additional, evidence. 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 has some presumptive merit and should not be dismissed under section 114(1), the Director and RFEL 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 can succeed.

ISSUE(S)

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

THE FACTS

9. RFEL operates a construction and design business. Mr. Atienza was employed by RFEL from July 17, 2013 to November 1, 2019. He voluntarily terminated the employment, giving RFEL written notice to that effect. Mr. Atienza was employed as a project manager for most of his period of employment.

10. Mr. Atienza filed a complaint alleging RFEL had contravened the *ESA* by failing to pay wages (a bonus) to which Mr. Atienza claimed he was entitled.

11. The Director conducted an investigation on the complaint and received information and submissions from both parties. Each party was provided with the position of the other and given an opportunity to respond.

THE DETERMINATION

12. The issue before the Director on the complaint was whether Mr. Atienza was entitled to a bonus for the 2018/19 fiscal year, which ran from November 1, 2018 to October 31, 2019. Mr. Atienza claimed he was entitled to the bonus as he was employed for the entire fiscal year; RFEL said he was not entitled to the bonus, because it was a condition of entitlement that an otherwise eligible person must be an active employee of RFEL at the time the bonus was paid out, which was indicated in material describing the bonus as being “within 90 days after fiscal year end”.

13. There was no dispute that Mr. Atienza was not employed with RFEL at the time the bonus was paid out.

14. The Director found the evidence indicated Mr. Atienza was aware a bonus was typically paid several months after the end of a fiscal year. The Director noted that Mr. Atienza had participated in the bonus plan in other years and accepted that he had received documents in previous years which indicated the bonuses were discretionary and conditional upon employment at the time of payout.

15. The Director found the bonus was an incentive based on efficiency and as such met the definition of wages in the *ESA*. The Director also found the *ESA*, absent evidence of bad faith or a contravention of the *ESA*, did not prohibit payment of incentives that were conditional upon meeting certain eligibility requirements. In sum, the Director found the bonus plan as described by RFEL was not contrary to the *ESA*.
16. A central factual issue was whether a communication made to Mr. Atienza on July 16, 2019, which outlined changes to the bonus structure in a Power Point presentation and did not include reference to the condition of employment at the time of payout, displaced that eligibility requirement. For the reasons stated at pages R7 – R8 of the Determination, the Director found it did not.
17. RFEL submitted that the Power Point presentation shown to Mr. Atienza on July 16, 2019, was an early, and incorrect, version of the final version of the bonus structure. The final version was presented to the Director during the investigation; it contained the requirement of employment at the time of payout. RFEL said the final version was “most likely shared” with Mr. Atienza, but could not confirm it, as Mr. Atienza’s supervisor had left the employ of RFEL. They said it was never their intention to eliminate the requirement of employment at the time of payout as an eligibility requirement.
18. The Director accepted the position of RFEL and found Mr. Atienza had not met all of the conditions for entitlement to the bonus and denied his claim.

ARGUMENT

19. Although Mr. Atienza bases his appeal on the natural justice ground, the appeal actually disputes findings of fact made by the Director and conclusions drawn from those facts.
20. Mr. Atienza submits:
- The decision assumes that I was aware of the condition that an employee had to be employed at the time to receive this bonus. I disagree with this assumption. . . .
- I disagree that this condition was communicated to me by the company. . . .
21. Mr. Atienza says that ambiguity in the information provided regarding the condition of employment at the time of payout, the absence of any answers in his communication with his supervisor and the lack of formal wording in his employment contract justify returning his complaint to the Director for re-investigation.

ANALYSIS

22. 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.

23. 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.

24. 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.

25. While Mr. Atienza has grounded his appeal in natural justice, there are no natural justice concerns raised in the appeal submission. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *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).

26. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination.

27. On the face of the material and information contained in the record, Mr. Atienza was provided with the opportunity described in the above summary. Mr. Atienza has provided no objectively acceptable evidence showing otherwise. The natural justice ground fails.

28. Addressing whether the appeal demonstrates any other reviewable error, Mr. Atienza has done nothing more than dispute the findings and conclusions of fact made by the Director on the central question – whether he met the conditions for eligibility for the bonus. That type of argument raises a question of whether the Director made an “error of law” on the facts.

29. 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.

30. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on the facts, Mr. Atienza is required to show the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.
31. The finding of the Director on the central factual issue was a finding of fact, *simpliciter*, and there is nothing in the appeal that indicates Mr. Atienza would succeed in meeting the burden on him of showing that finding was an error of law. The finding of the Director on that issue was sufficiently grounded in the evidence and has not been shown to be unreasonable, perverse, or inexplicable.
32. For the reasons given above, the appeal has no reasonable prospect of succeeding. The appeal does not warrant a finding there was any reviewable error in the Determination.
33. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to the appeal.
34. In sum, the appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

35. Pursuant to section 115 of the *ESA*, I order the Determination dated April 1, 2021, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal