

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Surdell Kennedy Taxi Ltd.
("Surdell Kennedy Taxi")

- 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.: 2021/062

DATE OF DECISION: October 6, 2021

DECISION

SUBMISSIONS

Don Guilbault

on behalf of Surdell Kennedy Taxi Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Surdell Kennedy Taxi Ltd. (“Surdell Kennedy Taxi”) of a determination issued by Tara MacCarron, a delegate of the Director of Employment Standards (the “Director”), on June 11, 2021 (the “Determination”).
2. The Determination found Surdell Kennedy Taxi had contravened Part 3, sections 18, 27 and 28 of the *ESA* in respect of the employment of Sandeep Katal (“Mr. Katal”) and ordered Surdell Kennedy Taxi to pay compensation for length of service to Mr. Katal in the amount of \$4,280.15, an amount which included concomitant vacation pay and interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$5,780.15.
3. Surdell Kennedy Taxi has appealed the Determination on the grounds that the Director erred in law in making the Determination and that evidence has come available that was not available when the Determination was being made. The latter ground of appeal is commonly known as the “new evidence” ground of appeal.
4. In correspondence dated July 27, 2021, the Tribunal, among other things, acknowledged having received the appeal, including supporting documents, requested the section 112(5) record (“the record”) from the Director, invited the parties to file any submissions on personal information or circumstances disclosure and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
5. The record has been provided to the Tribunal by the Director for the appeal and a copy has been delivered to the parties. All have been provided with the opportunity to object to the completeness of the record.
6. There have been no objections to the completeness of the record, and I accept 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 solely on the Determination, the reasons for the 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 additional material 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 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.*

8. If satisfied the appeal or parts of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Katal 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

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

THE FACTS AND THE DETERMINATION

10. Surdell Kennedy Taxi operates a taxi business in the province.
11. Mr. Katal filed a complaint under the *ESA* alleging he had been terminated by Surdell Kennedy Taxi without cause, notice or compensation for length of service. There was also reference in the complaint to Surdell Kennedy Taxi making improper deductions from his wages. That claim was voluntarily resolved during the investigation.
12. On March 17, 2021, the Director notified Surdell Kennedy Taxi that Mr. Katal, and two other persons, had filed complaints with the Employment Standards Branch. This notice was accompanied by a Demand for Employer Records for Mr. Katal for a period from April 1, 2020 to June 15, 2020.
13. Surdell Kennedy Taxi participated in the investigation of Mr. Katal's complaint, providing some documents relating to the termination of Mr. Katal, but no documents relating to those matters found in section 28 of the *ESA*. Surdell Kennedy Taxi contended such documents did not exist as Mr. Katal was not an employee. Surdell Kennedy Taxi did provide copies of some cheques, which it said were not "wages", showing payments to Mr. Katal during the demand period.
14. The Director identified two issues to be addressed in the Determination:
1. Was Mr. Katal an employee of Surdell Kennedy Taxi or an independent contractor; and
 2. If he was an employee, was he entitled to length of service compensation, and, if so, in what amount?

15. The Director found Mr. Katal was an employee of Surdell Kennedy Taxi for the purposes of the *ESA*.
16. The Director found Surdell Kennedy Taxi had not established just cause to terminate Mr. Katal and, based on his years of employment, was entitled to compensation for length of service in an amount equal to five weeks' wages. Mr. Katal provided the Director with records showing his total hours worked and net wages earned in each week of the last eight weeks of his employment: see subsection 63(4) of the *ESA*. The Director accepted these records and used them to determine the weekly wage and the resulting compensation for length of service.
17. The Director found Surdell Kennedy Taxi had contravened sections 18, 27 and 28 of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENT

18. Surdell Kennedy Taxi disputes the finding that it had contravened any provision of the *ESA* relating to Mr. Katal's employment. They submit it was "impossible" to meet the requirements of section 18 of the *ESA* for Mr. Katal because he had not deposited all of his charges in the required time, that they cannot comply with section 27 because of how their accounting system works and had complied with the requirements of section 28. Surdell Kennedy Taxi also disputes the finding that Mr. Katal was an employee under the *ESA* and raises the point that the requirements of sections 18, 27 and 28 would not apply to Mr. Katal as an independent contractor.
19. Fleshing out the submissions of Surdell Kennedy Taxi that relate the status of Mr. Katal under the *ESA*, they have raised several arguments against the finding that Mr. Katal falls within the definition of "employee":
 - i. Surdell Kennedy Taxi disputes several assertions attributed to Mr. Katal on page R4 of the Determination, saying they are "fallacious".
 - ii. Surdell Kennedy Taxi disagrees with the comment in the Determination that their dispatch system is responsible for "assigning pickups for specific drivers". They submit the dispatch system operated by Surdell Kennedy Taxi is not responsible for assigning pickups for specific drivers; it "simply places an incoming request for service in a queue of available drivers in a given zone." Surdell Kennedy Taxi acknowledges a taxi driver could lose his place in the queue by "not responding to the offer [of a pickup]", but contends this consequence cannot be considered as being within the "supervisory, instructive and disciplinary reach" of Surdell Kennedy Taxi.
 - iii. Surdell Kennedy Taxi says that prohibiting a driver from working for another company is not a matter of control, but is a safety issue.
 - iv. Surdell Kennedy Taxi says it does not impose a dress standard. It acknowledges there is a dress standard for drivers at YVR (Vancouver International Airport), but says that is dictated by YVR, not by Surdell Kennedy Taxi.
 - v. Surdell Kennedy Taxi disagrees with the conclusion of the Director on Mr. Katal's ability to set his own schedule. Surdell Kennedy Taxi says Mr. Katal had complete autonomy to set his own hours and days of work; that he started when he wanted and took time off when he

wanted, set his own breaks and was not required to seek permission for or account for personal breaks.

20. Surdell Kennedy Taxi has submitted several “sign on/off” reports, as “new evidence”, which it says shows Mr. Katal worked as much or as little as he wanted to.
21. The submissions of Surdell Kennedy Taxi do not dispute most of the findings and analysis of the Director on the issue of Mr. Katal’s status under the *ESA*.
22. Surdell Kennedy Taxi also argues, presumably in the alternative, they had established on a balance of probabilities that they were relieved of any obligation to pay Mr. Katal compensation for length of service and the Director erred in not reaching that conclusion.
23. Also, on this aspect of the Determination, Surdell Kennedy Taxi contends the information provided by Mr. Katal, which provided the basis for the Director’s calculation of the amount of compensation for length of service, was false. In support of this contention, Surdell Kennedy Taxi has submitted Mr. Katal’s trip sheets and Surdell Kennedy Taxi’s “reporting software” printout for a period from March 12, 2020 to March 23, 2020. These documents are submitted as “new evidence”. The submission accompanying the contention made and the “new evidence” submitted states:

We are concerned that calculations [for length of service compensation] were made based on false information. We have enclosed documentation that serves as evidence that Mr. Katal may not have been forthright with providing his actual income.

ANALYSIS

24. 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.*
25. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
26. 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 an appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
27. 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.

28. The grounds of appeal under the *ESA* 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.

29. The Tribunal has held that findings of fact are reviewable as errors of law under prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal has noted that the test for establishing an error of law on this basis is stringent, citing the reformulation of the third and fourth *Gemex* factors in *Delsom Estates Ltd. v. Assessor of Area #11- Richmond/Delta*, [2000] B.C.J. No. 331 (S.C.) at para. 18:

. . . 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".

30. 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*.

New Evidence

31. I shall commence with an analysis of whether Surdell Kennedy Taxi has established there is evidence which has become available that was not available when the Determination was being made that ought now to be included in the record and considered in their appeal.

32. I am not persuaded to exercise my discretion to accept or consider any of the “evidence” included by Surdell Kennedy Taxi with its appeal and find against accepting or considering it.
33. There are several reasons for this finding.
34. First, and primarily, none of the material provided is “new”. All of it existed at the time the Determination was being made. The Director had made a Demand for Employer Records relating to Mr. Katal to Surdell Kennedy Taxi on March 17, 2020 and pointed out to them on several occasions during the investigation that no payroll records had been provided. In response Surdell Kennedy Taxi took the position that Mr. Katal was not an employee of Surdell Kennedy Taxi but a “lease operator”, that Surdell Kennedy Taxi paid him no wages and there were no “payroll records” for him. In the Preliminary Findings Letter, issued to Mr. Katal and Surdell Kennedy Taxi on April 29, 2020, the Director, addressing the matter of whether compensation for length of service was owed and, if so, in what amount, stated:
- This is both Party’s final opportunity to provide evidence and submissions on this matter. Should either party choose not to participate, I will make my decision on the available evidence and issue a written determination . . .
35. The material which Surdell Kennedy Taxi seeks to provide with this appeal purports to show Mr. Katal’s hours of work for a period unrelated to the period covered by the Demand. I find it highly probable that Surdell Kennedy Taxi had this information during the investigation, as it was required for Surdell Kennedy Taxi to prepare a detailed statement of account of the amount payable to Mr. Katal. On this basis alone, the material submitted with the appeal would not be accepted under the “new evidence” ground of appeal.
36. As indicated above, this ground of appeal is not intended to give a party a second chance to present evidence that could have and should have been presented to the Director during the complaint process. The Director made a Demand for records; Surdell Kennedy Taxi failed to provide any payroll records for Mr. Katal. This failure also engages the principle established through *Tri-West Tractor Ltd.*, BCEST #D268/96 and *Kaiser Stables Ltd.*, BCEST #D058/97 and mitigates strongly against allowing Surdell Kennedy Taxi to challenge Director’s calculation of compensation for length of service.
37. Second, the relevance of the “new evidence” completely evades me. For the purposes of the calculations made by the Director in this case, only material related to wages earned by Mr. Katal in the last eight weeks of his employment is relevant. As already indicated, Surdell Kennedy Taxi has not directly challenged the information provided by Mr. Katal and has made no effort to demonstrate an actual incompatibility between the information in their reporting software and what was provided by Mr. Katal for the relevant period. They have done no more than express a concern that Mr. Katal may not have been forthright and the length of service compensation was based on false information. There is nothing in the appeal that remotely supports their concern.
38. Third, even accepting there is some discrepancy between Mr. Katal’s trip sheets and Surdell Kennedy Taxi’s software in an earlier period does not demonstrate the information provided by Mr. Katal to the Director, and relied upon for calculating compensation for length of service, was “false”. In other words, none of this “new evidence” is sufficiently credible to satisfy the burden of establishing the facts for which

they are advanced – which is that the information provided by Mr. Katal was false and should not have been accepted.

39. Fourth, I do not find the contention made to be particularly probative. The calculations made by the Director were based on the “best evidence” available. Absent some fairly clear evidence that evidence was unreliable or, as suggested by Surdell Kennedy Taxi, false, there is nothing to indicate those calculations would amount to a reviewable error or change the result.

40. I find the circumstances do not satisfy the conditions that would justify allowing the “new evidence” advanced to be entered with these appeals.

Error of Law

41. The error of law ground of appeal has a number of different elements. I will summarize my view of this ground of appeal.

42. Surdell Kennedy Taxi says the Director erred in finding Mr. Katal was their employee and not an independent contractor. If he was an employee, Surdell Kennedy Taxi contends the Director erred on the matter of cause for termination, saying, in effect, they had established cause for terminating Mr. Katal. In any event, Surdell Kennedy Taxi says the Director erred in calculating the amount of length of service compensation. Finally, Surdell Kennedy Taxi says the Director erred in imposing administrative penalties.

43. The finding that Mr. Katal was an employee of Surdell Kennedy Taxi for the purposes of the *ESA* is a question of mixed law and fact. The Tribunal has considered the application of the *Gemex* test to questions of mixed fact and law, and concluded that “error of law” should not be applied so broadly as to include errors of mixed law and fact which do not contain extricable errors of law. As succinctly expressed in *Britco Structures Ltd., 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.

44. I find the Determination is consistent with the legal approach the Tribunal has mandated under the *ESA* for determining employee status and no error of law is shown in this respect.

45. Effectively, the appeal does no more than quarrel with the conclusions reached by the Director in the Determination from the facts provided, seeking either to have those conclusions ignored, have conclusions of fact changed or to have the facts characterized differently and applied toward a different conclusion. To reiterate, absent a demonstrable error of law, disagreement with findings of fact and inferences drawn therefrom does not provide a ground for appeal under section 112 of the *ESA*. The arguments made by Surdell Kennedy Taxi do not present a significant challenge to the findings of fact made by the Director; for the most part, their arguments simply demonstrate a dispute with the facts provided and the conclusions drawn from them. Surdell Kennedy Taxi may quibble with some points of fact, but on a contextual assessment, the facts support the conclusion reached; it was neither perverse nor inexplicable. No error of law on the facts has been established.

46. I will note here that, while the outcome of Tribunal decisions vary depending on the facts, the Determination is far from the first decision the Tribunal has upheld on appeal to conclude that persons who drive taxis are employees of the taxi company under the *ESA*: see for example, *Beach Place Ventures Ltd. and Black Top Cabs Ltd.*, 2019 BCEST 23 (Reconsideration denied in 2019 BCEST 61), (Application for Judicial Review dismissed 2020 BCSC 327), *Victoria Taxi (1987) Ltd.*, BC EST # D601/97; *Sunshine Cabs Limited/Dalvinder Jawandha, Hossein Ataei associated corporations*, BC EST # D012/04; and *Trendtham Group Enterprises Inc. carrying on business as Star Taxi*, BC EST # D032/08. The conclusion reached in the Determination with respect to Mr. Katal is therefore not novel or particularly surprising in the context of determinations made under the *ESA* involving taxi drivers.
47. In the Determination, the Director analysed and made a decision on the issue on the facts and in accordance with, and for the purposes of, the *ESA*. There is no merit to the allegation that the Director erred in law in finding Mr. Katal to be an employee of Surdell Kennedy Taxi.
48. The question of whether an employee has been dismissed for cause is also one of mixed law and fact, and also requires applying the facts as found to the relevant legal principles of cause developed under the *ESA*. Such a decision requires deference.
49. The principles for examining cases raising the question of whether there is cause for dismissal that have been developed under the *ESA* are well-established, have been consistently applied and are expressed as follows:
1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
 2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 - i. A reasonable standard of performance was established and communicated to the employee;
 - ii. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
 - iii. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 - iv. The employee continued to be unwilling to meet the standard.
 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

(*Kruger*, BC EST # D003/97)

50. The Director addressed all of the established legal principles set out above in deciding whether Surdell Kennedy Taxi had established cause to terminate Mr. Katal. I find no error by the Director in the interpretation or application of the legal principles applying to section 63 of the *ESA*. 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.
51. Provided the established principles have been applied, and I find they were, a conclusion on cause is essentially 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. To reiterate, 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, supra*.
52. As already apparent, 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, Surdell Kennedy Taxi is required to show the findings of fact and the conclusions reached by the Director on the facts of Mr. Katal's termination were inadequately supported, or wholly unsupported, by the evidentiary record and, as a result, are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26-29. Surdell Kennedy Taxi has not satisfied this requirement and has demonstrated no merit in this aspect of the appeal.
53. Much of the remainder of the appeal simply challenge findings of fact, such as whether the records provided by Mr. Katal are accurate, without showing such findings amount to error of law. There was evidence on which the findings of the Director could be made and such findings were not perverse or inexplicable.
54. Applying all of the above results, the Director did not err in finding Surdell Kennedy Taxi had contravened the requirements of sections 18, 27 and 28 of the *ESA*. The findings made by the Director are confirmed and the *ESA* and the *Employment Standards Regulation* require the imposition of administrative penalties.
55. In sum, I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objectives of the *ESA* would not be served by requiring the other parties to respond to it and is, accordingly, dismissed.

ORDER

56. Pursuant to section 115 of the *ESA*, I order the Determination dated June 11, 2021 be confirmed in the amount of \$5,780.15, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal