

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Donald Kirkham
("Mr. Kirkham")

- 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.: 2021/075

DATE OF DECISION: November 25, 2021

DECISION

SUBMISSIONS

Donald Kirkham on his own behalf

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Donald Kirkham (“Mr. Kirkham”) of a Determination issued by Catherine Stark, a delegate of the Director of Employment Standards (the “Director”), on July 23, 2021.
2. In the Determination, the Director found the *ESA* did not apply to Mr. Kirkham’s complaint and declined to proceed with it.
3. Mr. Kirkham has appealed the Determination. The Tribunal received the Appeal Form on August 30, 2021, the last day of the statutory appeal period. The appeal contained little besides a copy of the Determination and a request to extend the appeal period to November 1, 2021. Additional information was provided by Mr. Kirkham on August 31, 2021, with a brief explanation of the reasons for appeal. On September 7, 2021, following an e-mail communication from the Tribunal sent to Mr. Kirkham on September 1, 2021, the Tribunal received more correspondence from Mr. Kirkham, which updated the Appeal Form to show the ground of appeal as evidence coming available that was not available when the Determination was being made – colloquially referred to as the “new evidence” ground of appeal – provided a submission expanding on the reasons for appeal and provided a copy of the Reasons for Determination.
4. In correspondence dated September 10, 2021, the Tribunal, among other things, acknowledged having received all of the above appeal submissions, requested the section 112(5) record (the “record”) from the Director and notified the other parties that submissions on the request to extend the appeal period and 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. Kirkham and to the respondent employer, Technical Acid Construction T.A.C. West Ltd. (“TAC West”). 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. After reviewing the Determination and the record, I have concluded this matter must be referred back to the Director under section 114(2) of the *ESA*, which states:
 - 114 (2) Before considering an appeal, the tribunal may
 - (a) refer the matter back to the director for further investigation, or
 - (b) recommend that an attempt be made to settle the matter.

7. In this case, I am referring the matter back to the Director for further investigation. My reasons for doing so are based on what appears to be a failure to investigate and decide essential elements of Mr. Kirkham's complaint.

THE FACTS

8. I am able to glean the following information relating to Mr. Kirkham's complaint from the reasons for the Determination and the record provided by the Director:

1. TAC West operates an industrial lining design and installation business in Quesnel, BC. According to the reasons for Determination, Mr. Kirkham was employed at the operation as a warehouse manager from August 25, 2015 to November 23, 2019.
2. Mr. Kirkham filed a complaint in May 2020, which sought compensation for length of service, described by Mr. Kirkham as severance [sic], even though the complaint form contained no termination date.
3. Mr. Kirkham had been employed by TAC West from August 2014. His first period of employment was, apparently, as a mason tender likely working under a collective agreement.
4. On the complaint form, in response to the question, "Are you covered by a collective agreement?", Mr. Kirkham checked "yes".
5. Mr. Kirkham provided a letter to the Director from TAC West dated September 16, 2019. The letter states, in its entirety:

Due to recent economic conditions we have decided we will be reducing warehouse overhead by changing this position from full time to a part-time basis.

If you are in agreement we can keep you employed but on an hourly paid basis [sic]. This can be done by hiring you through the labourers union much the same as how you started out with TAC West.

This will only work if there is clear communication and coordination on both sides as to when we have activity for shipping out and receiving equipment and materials as well as your personal schedule for other activities or interests.

We have other options for reducing overhead but we wish to offer this to you first.

Effective October 4 2019 we will be issuing you a record of employment.

Please consider the above offer, if you wish to proceed, please acknowledge by signing below and returning it to the Quesnel office.

6. Mr. Kirkham signed the letter. There is no Record of Employment in the record provided by the Director.
7. The Director spoke and communicated with a representative of TAC in Montreal, PQ, Andrew Baird ("Mr. Baird"), a director and Project Manager for TAC West, who provided some documents and information to the Director, including one wage statement for a period from November 17, 2019 to November 23, 2019. In an e-mail dated July 14, 2021, Mr. Baird stated that: "He [Mr. Kirkham] was hired as a salaried warehouse manager at our Quesnel office on

February 8, 2016. His position was changed to part-time work as a unionized construction labourer on September 16, 2019.”

8. In response to inquiries from the Director, Mr. Kirkham said he had been member of the union for the last six to eight weeks of his employment.
9. The Director did not communicate with any representative of the union. After the Determination was issued, Mr. Kirkham phoned the Director to tell the Director a person from the union had told him he was never a member.
10. The record shows the Director was alert to the fact that Mr. Kirkham was employed under a collective agreement but made no effort to determine whether his complaint sought enforcement of or raised any dispute relating to a provision that was contained in, or deemed to be incorporated into, a collective agreement.

9. Some commentary on the above information is necessary.

10. First, although the Reasons for Determination indicate Mr. Kirkham was employed as warehouse manager until November 23, 2019, there is nothing in the record to support that supposition. In fact, in a communication to the Director on July 14, 2021, Mr. Baird said Mr. Kirkham was working part-time in a construction labourer position from September 16, 2019 and as noted above, provided a wage statement for Mr. Kirkham for a one-week work period, from November 17, 2019 to November 23, 2019.

11. The Director did not ask for Mr. Kirkham’s employee records.

12. An assessment of the whole of the record suggests Mr. Kirkham was not employed under a collective agreement in the warehouse manager position, which was eliminated by TAC West effective October 4, 2019.

13. The Director gave no consideration to whether Mr. Kirkham could advance a complaint under the *ESA* for the period his employment was not covered by a collective agreement.

ANALYSIS

14. While the *ESA* does not apply to disputes advanced by employees covered by a collective agreement, the cursory investigation conducted by the Director never addressed, or sought to address, whether the claim made by Mr. Kirkham in his complaint was one “respecting the application, interpretation or operation of” a collective agreement or a provision of the *ESA* incorporated into a collective agreement.

15. Nothing in the complaint filed by Mr. Kirkham or in the record indicates Mr. Kirkham was seeking to raise a dispute respecting the application, interpretation or operation of a collective agreement or a provision of the *ESA* included in a collective agreement. If he was, the nature of that dispute was never identified or addressed in either the investigation or the Determination.

16. I appreciate the complaint filed by Mr. Kirkham is not very clear, but the failure of the Director to explore the exact nature of his complaint does no credit to the process.

17. It bears noting that section 3 of the *ESA* statutorily excludes employees covered by collective agreement from some of the rights and entitlements of the legislation. As such, it should be approached with consideration of the same principles and policies that apply when considering other exclusionary provisions: see *Zack Anthony*, BCEST # RD123/17, at paras. 38 -42. Specifically, in this case, the Director was required to investigate and consider the nature and scope of Mr. Kirkham's claim and whether he was disentitled to advance that claim because he was, possibly, employed under a collective agreement for the last six to eight weeks that he performed work for TAC West.
18. I use the word, "possibly", because it is not entirely clear from the record that Mr. Kirkham was working under a collective agreement. The record indicates that was his impression, but other information submitted with the appeal suggests that his impression was wrong.
19. The Director did not decide Mr. Kirkham had no claim under the *ESA*.
20. I am not satisfied that the Director has set out in her Reasons for Determination a legally sufficient justification for determining that Mr. Kirkham was not entitled to claim length of service compensation for the period of his employment that was *not* covered by a collective agreement. It may be that Mr. Kirkham was employed under a collective agreement for a brief period at the end of his employment and that fact disentitles him to any rights and benefits under the *ESA*, but that question is not addressed in the Determination.
21. On the basis of my assessment of the record, I find there was an insufficient evidentiary basis to refuse to further investigate Mr. Kirkham's complaint and to dismiss it.
22. In light of the fact that the appeal has raised a legitimate question regarding his entitlement to length of service compensation – and in the absence of a proper evidentiary foundation that would allow me to adjudicate this question – I find the most prudent course would be to refer the matter back to the Director for further investigation.
23. Although the Tribunal does have some fact-finding powers (see, for example, section 112(1)(c)), that is not its principal function. An appeal to the Tribunal is not a re-examination of the original complaint without regard for the prior adjudicative process. Bearing in mind that one of the stated purposes of the *ESA* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the *ESA*]" (section 2(d)), I am of the view that the most fair and efficient way to address this matter is to refer it back to the Director to establish a more complete record of Mr. Kirkham's claim, the objective being to establish a fulsome factual matrix that ensures a decision which is based on the totality of the evidence relevant to his claim. It may be that the result does not change, but at the very least the Tribunal will have the benefit of a more complete record before it when considering the appeal.
24. This course of action is also necessary to satisfy the requirement to provide reasons that are comprehensible and grounded in the evidence: see *Teamwork Property Solutions Ltd.*, BC EST # D441/97. This requirement is not merely technical but is fundamental to a proper administration of Part 13 of the *ESA*, including the Rules of Practice and Procedure of the Tribunal. The Tribunal has established, in part, a requirement for appellants to identify the specific determination being appealed and to describe the reasons for the appeal; without comprehensible reasons, these requirements are difficult, if not impossible, to provide.

25. More substantively, it is fundamental to the concept of natural justice that a person, in respect of whom a determination has been made, have a clear understanding about the reasons why the Director reached that conclusion. In this case, it requires the Director to inform Mr. Kirkham why approximately five years of employment – which indisputably was not covered by a collective agreement – does not, in the circumstances, entitle him to length of service compensation under the *ESA*. That information is basic to knowing the case he has to meet in choosing to exercise his right to appeal that conclusion.
26. I also find the record as it presently stands does not show the facts necessary for the Director’s exercise of discretion under *ESA* subsection 76(3)(h).
27. Mr. Kirkham has requested an extension of the statutory appeal period. I shall consider this request more completely once the Director has completed the investigation of Mr. Kirkham’s complaint, but at this stage I am inclined to extend the appeal period such that this appeal is properly before the Tribunal and to give effect to my decision to refer the matter back to the Director for further investigation pursuant to section 114(2)(a) of the *ESA*.
28. In sum, I find the investigation done by the Director is deficient in the manner expressed above and, under section 114(2) of the *ESA*, I order the matter be referred back to the Director.
29. The appeal, if necessary, will be considered when the investigation is concluded, and the results are returned to the Tribunal.

David B. Stevenson
Member
Employment Standards Tribunal