

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

STP Canada Enterprises Ltd.
("STP")

- 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.: 2022/106

DATE OF DECISION: June 30, 2022

DECISION

SUBMISSIONS

Martin Yeung

on behalf of STP Canada Enterprises Ltd.

OVERVIEW

1. STP Canada Enterprises Ltd. (“STP”) has filed an appeal under section 112 of the *Employment Standards Act* (the “ESA”) of a determination issued by Jennifer Redekop, a delegate of the Director of Employment Standards (the “deciding Delegate”), on March 25, 2022 (the “Determination”).
2. The Determination found STP had contravened Part 3, sections 17, 18 and 28 of the *ESA* in respect of the employment of Alex Qu (“Mr. Qu”). The Determination ordered STP to pay Mr. Qu wages in the total amount of \$2,080.42, and amount that included 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 \$3,580.42.
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 April 28, 2022. The Appeal Form was accompanied by a submission on the appeal, which indicated that “all documents supporting the appeal” were attached. The attached documents comprise 5 pages of WeChat screenshots, containing WeChat dialogue, and what purports to be a translation of that dialogue to the English language, attributed to the following dates: 20201015, 20201016, 20201105, 20210105 and a handwritten date of March 6, 2021.
5. The documents are submitted to support the assertion made by STP during the complaint investigation that Mr. Qu had received \$600USD as payment for wages owed. This assertion is addressed in the Determination.
6. In correspondence dated May 4, 2022, the Tribunal, among other things, acknowledged having received the appeal, 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.
7. The record has been provided to the Tribunal by the Director and a copy has been delivered to STP and Mr. Qu. Those 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.
8. 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.

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Qu 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 will succeed.

THE DETERMINATION

10. STP operates a freight forwarding business. Mr. Qu was employed as Operations Manager at the rate of \$27.00 an hour.
11. STP submitted there was no employment contract with Mr. Qu. The deciding Delegate found that even though Mr. Qu worked for STP on a casual part-time basis, considering the definitions of “employer”, “employee”, and “work” in the *ESA*, the work he performed for STP, and the remedial nature of the legislation, Mr. Qu was an employee of STP for the purposes of the *ESA*.
12. There was a difference about Mr. Qu’s last day worked and his last day of employment. The deciding Delegate found his last day of work and of employment was March 24, 2021.
13. The deciding Delegate found the complainant was entitled to unpaid regular wages.
14. The deciding Delegate found the complainant was entitled to unpaid vacation pay for his entire period of employment, from early November 2019 to March 24, 2021.
15. The deciding Delegate found STP had committed three contraventions of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

16. STP has based its appeal on evidence coming available that was not available when the Determination was being made. This ground of appeal is colloquially referred to as the “new evidence” ground of appeal. STP submits the WeChat dialogue, which is described above, as “new evidence”, contending this material shows Mr. Qu received wages in the amount of \$600USD and that amount should be credited to STP.
17. The argument made by STP on this ground states, in its entirety:
- Refer to five (5) pages of screenshots from WeChat history attached to this file, explanatory. Therefore, STP Enterprises Ltd. Is claiming 600USD equivalent to $600 * 1.12834 = \$770.04$ Cdn.
18. STP also submits the number of administrative penalties should be reduced because there was no settlement discussion between the parties at the Employment Standards Branch level on the claim made by Mr. Qu.

ANALYSIS

19. 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.
20. 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.

New Evidence

21. 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*.

22. I do not accept there is any merit in this ground of appeal for several reasons.
23. First, I do not accept the material attached to the appeal is “new”; it contains information that existed when the investigation was being conducted and could have been provided during the complaint process.
24. STP did, in fact, contend during the investigation that Mr. Qu was paid 600USD by a Mr. Zhang of Shanghai (a listed company in China) directly: see pages R5-R6 of the Determination.
25. The deciding Delegate addressed this contention on page R9 of the Determination as follows:
- The Employer [STP] says the Complainant [Mr. Qu] received \$600.00 from Mr. Zhang, but did not provide any evidence to prove that payment was made or how it would be considered wages paid by STP.
26. The deciding Delegate accepted the evidence of Mr. Qu that he had been paid wages for the amounts set out in what are referred to as the November and December 2019 timesheets but had been paid nothing thereafter.
27. The above is a finding of fact that was reasonably based on the evidence before the deciding Delegate at the time the Determination was being made.
28. Second, I agree with the deciding Delegate that the material is not credible on the question of whether the amount was ever paid directly to Mr. Qu or, even if it was, that it was for wages that was owed to him by STP for work performed between March 6, 2020, and March 5, 2021. More particularly, it does not show STP had met any part of its obligations to pay Mr. Qu wages for that period.
29. Third, in light of the foregoing, I do not find this information to be particularly “probative”, in the sense of being capable of resulting in a different conclusion than what is found in the Determination.
30. This ground of appeal is denied.

Administrative Penalties

31. There is no basis for disturbing the administrative penalties imposed.
32. Simply put, once a contravention of the *ESA* is found in a determination and an order has been made relative to that contravention, the imposition of an administrative penalty is mandatory: see section 98(1) of the *ESA*.
33. Multiple contraventions can result in multiple administrative penalties. The circumstances in this case clearly establish STP committed multiple contraventions of the provisions of the *ESA* and the imposition of multiple administrative penalties was both correct and required by the *ESA*.
34. The argument made by STP for a reduction of the administrative penalties has no legal or factual foundation and is not accepted.

35. In sum, I find there is no apparent merit to the appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it. The appeal is, accordingly, dismissed.

ORDER

36. Pursuant to section 115 of the *ESA*, I order the Determination dated March 25, 2022, be confirmed in the amount of \$3,580.42, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal