

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Rick McMorris
("Mr. McMorris")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2022/187

DATE OF DECISION: December 19, 2022

DECISION

SUBMISSIONS

Rick McMorris on his own behalf

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Rick McMorris (“Mr. McMorris”) of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the “deciding Delegate”), on September 1, 2022 (the “Determination”).
2. The Determination found Mr. McMorris was owed \$7,000.06 in wages and interest from his former employer, Port Royal Village Developments Inc. (“Port Royal”). The Determination also found Port Royal had committed six contraventions of the *ESA* and imposed administrative penalties in the amount of \$3,000.00. The total amount of the Determination is \$10,000.06.
3. Mr. McMorris has appealed the Determination on the grounds the Director failed to observe principles of natural justice in making the Determination.
4. The appeal also included a request to extend the statutory time limit for filing an appeal, but Mr. McMorris has not met the deadline for providing a submission and/or additional documents relating to that request, and it appears to have been abandoned. If it has not been abandoned, it has at least become moot.
5. In correspondence dated September 29, 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, requested Mr. McMorris to file any additional submissions and any additional documents on his extension request by October 7, 2022, and notified the other parties that submissions on the request for an extension and on the merits of the appeal were not being sought from them at that time.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. McMorris and to Port Royal. Both have been provided with the opportunity to object to its completeness. Neither have responded.
7. In the absence of any objection to the contents or completeness of the record, the Tribunal accepts it is 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 solely on the Determination, the reasons for Determination, the Appeal Form, the written submission filed with the Appeal Form, and my review of the material that was before the Director when the Determination was being made. 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.

9. 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 the respondent employer 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.

ISSUES

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

THE DETERMINATION

11. Port Royal operates a housing complex called the Dockyards in New Westminster, BC. Mr. McMorris, and his partner, Jeanette Marinello (“Ms. Marinello”), were employed as resident caretakers for the complex commencing March 14, 2016, at a salary that started at \$31,000.00 a year for each of them and was adjusted from time to time during their term of employment. They signed an employment agreement prior to commencing work.
12. Mr. McMorris was terminated without cause effective January 7, 2020.
13. Mr. McMorris filed a complaint with the Employment Standards Branch on January 22, 2020, alleging Port Royal had contravened the *ESA* by failing to pay wages, vacation pay and compensation for length of service, as well as failing to reimburse him for business costs and making unauthorized deductions from wages.
14. It is unnecessary to detail all aspects of the Determination. It suffices to say, the deciding Delegate found Mr. McMorris was owed wages, which included pay for extra work performed, statutory holiday pay, compensation for length of service, hours worked in contravention of section 36, unauthorized deduction of business expenses, concomitant vacation pay, and accrued interest under section 88 of the *ESA*.

15. As a resident caretaker, Mr. McMorris was excluded by section 35 of the *Employment Standards Regulation* from most of the provisions found in Part 4 of the *ESA*, including those that govern overtime wages and banking overtime wages. Specifically relating to section 42, the deciding Delegate states, at pages R12-13:

Wages accredited to a section 42 time bank do not become payable according to the timelines set by section 17, but can be carried over from pay period to pay period. . . .

In Mr. McMorris's case, however, the time bank was not created pursuant to the Act. It was created pursuant to an independent agreement between the parties. His time bank does not attract the protections of section 42 . . .

16. The deciding Delegate found that Mr. McMorris and Port Royal had included in their employment agreement a term that allowed Mr. McMorris to bank hours worked outside of his regular scheduled hours and taken as time off in lieu but that the employment agreement never provided that wages Mr. McMorris would have earned by working outside regular hours would ever be payable, or that the hours in his time bank would ever be converted to wages and paid at a later date.
17. The deciding Delegate found this arrangement contravened section 17 of the *ESA*, but also found they impacted his wage claim because the wages represented by the hours in the time bank did not accrue from pay period to pay period.
18. The deciding Delegate found the recovery period for Mr. McMorris was a period from January 7, 2019, to January 7, 2020.
19. Mr. McMorris challenges that finding in this appeal. That is the only aspect of the Determination that is engaged in this appeal.

ARGUMENTS

20. Mr. McMorris submits the deciding Delegate has made an incorrect assessment of the time bank agreement he had with Port Royal. His position is that all of the banked time was accrued and payable upon his termination, just like a time bank under section 42 of the *ESA*. Fundamentally, he argues that the hours in his time bank had been earned over time and should be paid. He says the deciding Delegate should have incorporated the protections of section 42 into the contract.
21. Alternatively, he submits in the circumstances the deciding Delegate should have applied subsection 80(3), which allows the Director to extend the recovery period to 24 months.

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 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. A party alleging a failure to comply with principles of natural justice, as Mr. McMorris has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99. I find nothing in the appeal that would support a finding the deciding Delegate failed to comply with principles of natural justice.
26. 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).
27. Provided the process exhibits the elements of the above statement, it is unlikely the deciding Delegate will be found to have failed to observe principles of natural justice in making the Determination.
28. I find the required natural justice elements were met by the deciding Delegate and the ground of appeal chosen by Mr. McMorris fails.
29. For the sake of completeness, I also find the deciding Delegate made no reviewable error at all in concluding Mr. McMorris' time bank agreement was not protected by the provisions of section 42 of the *ESA* or that, as argued by Mr. McMorris, those protections should in any event have been incorporated into his private agreement with Port Royal. Indeed, such a result would be entirely at odds with the stated legislative intention to exclude resident caretakers from the majority of the provisions in Part 4 of the *ESA*, including section 42.
30. I will briefly respond to Mr. McMorris' submission on subsection 80(3). That provision states:
- 80 (3) Despite subsections (1) and (2), the director may, in prescribed circumstances, extend the 12 months referred to in subsection (1) (a) or (b) or (2) (a) (i) or (ii), as applicable, to 24 months.

31. That provision was included in amendments to the *ESA* in 2019. It appears, based on comments in the legislature about that provision, the intention was to give the Director, and presumably, the Director's delegates, the discretion to extend the recovery period to 24 months in circumstances prescribed by regulation. As of the date of this decision, however, there have been no regulation promulgated for this provision. It has no application to any circumstance; more particularly, it has no application to Mr. McMorris' circumstances, and does not assist his appeal.
32. In sum, I find there is no apparent merit to this 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 this appeal and it is, accordingly, dismissed.

ORDER

33. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated September 1, 2022, be confirmed in the amount of \$10,000.06, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal