



Citation: Match MG Field Canada Inc. (Re)
2023 BCEST 60

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Match MG Field Canada Inc.
("Match MG Field")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE No.: 2023/040

DATE OF DECISION: August 8, 2023

DECISION

SUBMISSIONS

Maria Giagkos

on behalf of Match MG Field Canada Inc.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Match MG Field Canada Inc. (“Match MG Field”) of a determination issued by Mitch Dermer, a delegate of the Director of Employment Standards (“deciding Delegate”), on February 24, 2023 (“Determination”).
2. The Determination found Match MG Field had contravened Part 3, section 18, Part 4, section 40, Part 5, sections 45 and 46, and Part 7, section 58 of the *ESA* in respect of the employment of Connor- Catherine Irene Smith (“Ms. Smith”) and ordered Match MG Field to pay Ms. Smith wages in the amount of \$4,736.67, an amount that included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$2,500.00. The total amount of the Determination is \$7,236.67.
3. Match MG Field filed an Appeal Form with the Tribunal on April 3, 2023, indicating the appeal was grounded on an allegation the Director failed to observe principles of natural justice in making the Determination.
4. The Appeal Form indicated all reasons and arguments for the appeal were attached to the Appeal Form and that the appeal submission was complete. Attached to the Appeal Form was correspondence dated February 6, 2023, from Maria Giagkos (“Ms. Giagkos”), the Senior Human Resources Manager for Match MG Field, to the deciding Delegate, and which was identified as “an additional response”, on the question of whether Ms. Smith was an employee under the *ESA* or an independent contractor.
5. The Appeal Form also contained a request for an extension of the appeal deadline – which was April 3, 2023 – to an unspecified future date. The Appeal Form gave no reason for the requested extension.
6. On April 4, 2023, the Tribunal communicated to Ms. Giagkos, who had submitted the Appeal Form on behalf of Match MG Field, noting the inconsistency between the indication on the Appeal Form that it was complete and the requested extension of the appeal period. The Tribunal also advised that if an extension was being requested, Match MG Field needed to provide its reasons for being unable to file a complete appeal before the statutory appeal deadline. The communication from the Tribunal also gave a deadline for a response and stated that the deadline was not an extension of the statutory appeal period.
7. On April 5, 2023, Ms. Giagkos responded, saying Match MG Field “would require additional time to provide written reasons and argument in support of the appeal for the following reasons:
 - I do not feel Match received their fair fight within this decision. I requested another officer to review my claim since the previous officer (Samuel Crawford) had already made his case prior to listening to our reasoning.
 - Match was assigned to a Director of Employment Standards. Although he accepted my statements, no member from Match spoke to him directly.

- I am the only person who maintains such of these cases. I ensured payment was made based on BC ESA requirement and failed to recognize the appeal deadline date.
 - Due to my travelling schedule during the month of March I was unable to meet with our external counsel to review the case and submit our appeal.
 - I am requesting more time to meet with counsel to provide additional information.
 - Requesting for a June submission date.”
8. On April 14, 2023, the Tribunal advised Match MG Field that the requested extension was granted and set the date of June 1, 2023, as the deadline for providing written reasons and arguments.
9. A document dated June 1, 2023 (received by the Tribunal on June 2, 2023), has been provided by Match MG Field as its submission on their appeal.
10. In correspondence dated June 7, 2023, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (“record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
11. The Director has provided their record to the Tribunal and a copy has been delivered to each of the parties. Both have been provided with the opportunity to object to the completeness of that record.
12. Neither of the parties has raised any objections to the completeness of the record and, for the purposes of this appeal, the Tribunal accepts it as being complete.
13. 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 on the appeal 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 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.

14. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Ms. Smith 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.

ISSUE

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

THE DETERMINATION

16. Match MG Field operates an advertising and public relations business in the province. Ms. Smith was employed with Match MG Field as a merchandiser from January 4, 2021, to February 22, 2022. After her employment with Match MG Field ended, Ms. Smith filed a complaint under the *ESA* alleging Match MG Field had contravened the *ESA* by failing to pay overtime wages, statutory holiday pay, and annual vacation pay.
17. Match MG Field resisted the claim, arguing Ms. Smith was not an employee but an independent contractor.
18. The complaint was investigated by a delegate of the Director (“investigating Delegate”), who produced an Investigation Report, dated November 17, 2022, that was provided to Match MG Field and Ms. Smith. Each of those parties was provided the opportunity to review the Investigation Report and respond to it. The response provided on behalf of Match MG Field was submitted by Ms. Giagkos.
19. The deciding Delegate found Ms. Smith was an employee under the *ESA* and that Match MG Field had contravened the statute relating to her employment by failing to pay all regular wages owed, by failing to pay overtime wages, statutory holiday pay, and annual vacation pay.
20. The deciding Delegate imposed administrative penalties for contraventions of several provisions of the *ESA* by Match MG Field.

ARGUMENT

21. On its Appeal Form, Match MG Field identifies the natural justice ground of appeal, alleging the Director failed to observe principles of natural justice in making the Determination.
22. The choice of this ground of appeal is amplified to some extent in the reasons provided for the extension of the appeal period: that Match MG Field was not treated fairly, that the investigating delegate was pre-disposed to the result, and there was no verbal communication during the complaint process with anyone from Match MG Field.
23. In its June 1, 2023, submission, and in the February 6, 2023, correspondence attached to the Appeal Form, however, Match MG Field makes no reference to the principles which operate under this ground of appeal or indicate how any of the above expressions of concern denied them the rights and protections given by the principles of natural justice. Both the submission and the attachment contain only assertions relating

to whether Ms. Smith is an employee. The opening words of the June 1, 2023, submission state: **“Please see arguments below as to why the complainant is not an Employee”**, and the opening words of the February 6, 2023, correspondence state: “This is an additional response regarding the following question to be answered:

- Was the Complainant an employee under the Act?”

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. 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.

26. Match MG Field asserts there was a failure by the Director (which is inclusive of both the investigating and the deciding Delegate) to observe principles of natural justice in making the Determination.

27. The submission and assertions made by Match MG Field do not, however, identify or argue the appeal in the context of the principles of natural justice that would apply to either the investigation of the complaint or the decision on it.

28. A party alleging a failure to comply with principles of natural justice, as Match MG Field has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a .Honda North*, BC EST # D043/99.

29. The Tribunal has briefly 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).

30. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the

record and in the information submitted to the Tribunal in this appeal, Match MG Field was provided with the opportunity required by principles of natural justice to present their position to both the investigating and the deciding Delegate. Match MG Field has provided no objectively acceptable evidence showing otherwise.

31. There is nothing in the reasons, record, appeal forms, or submissions showing that the investigating Delegate or the deciding Delegate failed to comply with the principles of natural justice (or with the requirements of section 77 of the *ESA*) in making the Determination. The record shows that Match MG Field knew the nature of the complaint made against them by Ms. Smith and was given a full opportunity to respond before the Determination was made. To be clear, it is not required that a delegate, whether investigating or deciding a complaint, speak directly to any of the parties. What is required is that a party know the nature of the complaint and have an opportunity to respond to the complaint and present their position.
32. Match MG Field has not demonstrated the Director failed to observe principles of natural justice in making the Determination and I find no merit to this ground of appeal.
33. More specifically, Match MG Field has not shown the process, which includes the manner in which information was collected during the process, was procedurally unfair to Match MG Field, or that either of the delegates involved in the complaint process was predisposed on the question of whether Ms. Smith was an employe under the *ESA*.
34. The deciding Delegate was aware of all the reasons advanced by Match MG Field to advance their position on Ms. Smith's status under the *ESA* and answered each of them.
35. The appeal submission made by Match MG Field does no more, on my view of the responses and arguments made during the complaint process, than restate facts and arguments on which it seeks to support its position on the status of Ms. Smith under the *ESA*, all of which were substantially addressed in the Determination.
36. As suggested above, nothing in their argument raises natural justice concerns, but rather, at their core, challenge findings and conclusions of fact. When viewed in its full context, it is apparent the actual objective of this appeal is to have this panel of the Tribunal ignore the central finding made by the deciding Delegate – that for the purposes of the *ESA*, Ms. Smith was in an employment relationship with Match MG Field – and change the outcome on that issue, which would by necessary implication eliminate the basis for the complaint and require it to be dismissed.
37. While Match MG Field has not argued error of law, it is appropriate to address whether there is any reason why the Tribunal might consider this appeal under that ground. The Tribunal has not considered itself bound by the chosen grounds on the Appeal Form, but has opted to take a liberal reading of the reasons for the appeal, which directs the Tribunal should inquire into the nature of the challenge to the Determination (or the process that led to it being issued) and then determine whether that challenge, on its face, invokes one of the statutory grounds. see *Triple S Transmission Inc. o/a Superior Transmission*, BC EST #D141/03.
38. More particularly, in this case I am looking at whether the submission of Match MG Field, which in effect challenges central findings of fact made in the Determination, shows an error of law.

39. At the outset, I find the deciding Delegate made no error in identifying the principles that apply to the central issue in this case. I fully endorse the analysis by the deciding Delegate of the legal principles and considerations applicable to the question of whether a person is an employee under the *ESA*. The operative legal principles applying to the question of employee status are well-established and have been consistently applied; there is nothing in the Determination that deviates from those principles.
40. It is well established that, provided the established principles have been applied, and I find they were, a conclusion on whether a person is an employee under the *ESA* is essentially a fact-finding exercise.
41. The application of the law, correctly applied, to the facts as found by the Director is only reviewable by the Tribunal as an error of law on the facts; such a review arises in limited circumstances and the test for establishing an error of law is stringent, requiring an appellant to show the challenged findings of fact and the conclusions reached by a delegate 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.
42. Match MG Field has not argued error of law, either generally or on the facts, and there is otherwise nothing in the appeal or in the record, that would allow for this Panel to find the conclusion of the deciding Delegate on the status of Ms. Smith under the *ESA* was not adequately supported on the material before him.
43. There is nothing to suggest this ground of appeal, even had it been raised, has merit and it could not succeed.
44. For the sake of completeness, I will make one final comment. The appeal submission submitted by Match MG Field dated June 1, 2023, does little more than echo the facts and arguments made during the complaint process. It does, however, include a small number of assertions of fact that are not found in the record, and do not appear to have been made during the complaint process. I have not considered these few new assertions of fact in making this decision as I do not consider them to be part of the evidentiary record in this matter.
45. The only way an appellant may introduce new evidence into an appeal is through section 112(1)(c), which requires the evidence sought to be introduced to be tested 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.
46. Match MG Field does not ground its appeal in section 112 (1) (c) – the ‘new evidence’ ground – but it is clear that even had it been identified as a ground of appeal, the additional assertions of fact made in the appeal submission would not have satisfied the conditions required to be met for the proffered evidence to be considered under this ground.
47. The assertions that can be viewed as potential new evidence are not new and, in my view, are not probative on the salient question decided in the Determination.

48. In sum, Match MG Field has not shown their disagreement with the result on the issue of Ms. Smith's status under the *ESA* is an error that may be reviewed under section 112(1).
49. Simply disagreeing with the conclusion of the deciding Delegate, which was made by applying the legal principles of the *ESA* to the relevant facts, and asking the Tribunal to reassess that finding based on assertions of fact and arguments that have been addressed by the deciding Delegate in the Determination is entirely inconsistent with the error-based approach required for setting aside a determination under section 112 of the *ESA*.
50. Nothing in the appeal of Match MG Field provides a basis for review.
51. I find there is no merit to this appeal, and it is, accordingly, dismissed.

ORDER

52. Pursuant to section 115 of the *ESA*, I order the Determination dated February 24, 2023, be confirmed in the amount of \$7,236.67, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal