

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Garry Landscaping Co. Ltd.  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** John Chesko

**FILE No.:** 2024/008

**DATE OF DECISION:** April 18, 2024

## DECISION

### SUBMISSIONS

Awadh N. Singh

on behalf of Garry Landscaping Co. Ltd.

### OVERVIEW

1. Garry Landscaping Co. Ltd. (“Appellant”) appeals a determination issued on December 18, 2023 (“Determination”), by a delegate (“Delegate”) of the Director of Employment Standards (“Director”).
2. The Determination held the Appellant had contravened section 8 of the *Employment Standards Act* (“ESA”) in making misrepresentations about employment that were relied on and resulted in loss by Les Michael Rumpli (“Complainant”). The Determination ordered the Appellant to pay the Complainant wages, vacation pay, out of pocket losses and interest totaling \$ 2,789.59. The Determination also levied an administrative penalty of \$ 500.00 for a total amount payable of \$3,289.59.
3. The Appellant appeals on the ground that there is new evidence that has become available that was previously not available when the Determination was being made.

### BACKGROUND

4. The Complainant submitted that he met with the Appellant's representatives in response to a help wanted advertisement. The Complainant submits he was offered employment and was assured by the Appellant that there was enough work so that the Complainant could quit work at the company he was currently with and work full-time for the Appellant. Based on the Appellant's employment assurances, the Complainant quit his then-current driving job. However, when the Complainant later tried to meet up with the Appellant to begin working, the Appellant told him there was a delay in the start of the work. When the Complainant tried to meet up with the Appellant at the later date, the Appellant said they were not available, but could meet later. Eventually the Appellant told the Complainant there was not enough work to employ the Complainant.
5. In response to the Appellant now saying that there was no work, the Complainant sought out other work and found another truck driving job a few weeks later.
6. The Complainant filed a complaint under section 74 of the *ESA* alleging that the Appellant had contravened the *ESA* by inducing the Complainant to become an employee by misrepresenting the availability of a position.
7. A delegate of the Director (“Investigative Delegate”) was assigned to the complaint and requested evidence and submissions from the parties. The Investigative Delegate communicated with the parties and their representatives and received statements and evidence on the issues raised in the complaint.
8. The Investigative Delegate prepared a report for the Appellant and the Complainant dated August 17, 2023, summarizing the information provided by the Appellant and the Complainant and included a list of relevant documents (“Investigation Report”). The Investigative Delegate set out the issue under consideration but did not make findings in the Investigation Report. The Appellant and the Complainant

were requested to review the Investigation Report carefully and provide further information and clarification.

9. The ESA section 112(5) record (“Record”) indicates no further submissions were provided by the Appellant or the Complainant and the Investigation Report and evidence was subsequently submitted to the Delegate for a determination.

### **THE DETERMINATION**

10. The Delegate issued the Determination dated December 18, 2023.
11. The Determination found the Appellant had contravened section 8 of the *ESA* and misrepresented that there was employment for the Complainant which caused the Complainant to quit his then current job in reliance on the Appellant's misrepresentations. The Determination states:

I find by inducing the Complainant to work as a truck driver as an employee of [the Appellant] confirming his rate of pay, his start date (October 24, 2022), assuring him there was work, and agreeing the Complainant could give working notice to his previous employer, that [the Appellant] misrepresented the availability of a position.

12. Having found the Appellant had misrepresented the availability of a position to the Complainant, the Delegate determined that the Complainant suffered loss as a result of the Appellant's misrepresentation and considered remedies pursuant to section 79(2) of the *ESA*. As a result of the Appellant's misrepresentation, the Determination found that the Complainant was entitled to compensation pursuant to section 79(2)(c) including wages, out of pocket losses, annual vacation pay (section 58) and accrued interest (section 88) totaling \$2,789.59.
13. The Determination specifically noted the evidence from the Complainant, including the corroborating document evidence of the job advertisement and text messages between the Complainant and the Appellant's representative. The Determination specifically noted that the Appellant had initially denied the job advertisement and text messages and then did not provide any explanation or response when the job advertisement and text messages evidence was subsequently disclosed during the investigation.
14. As noted above, the Determination levied an administrative penalty of \$500 against the Appellant for misrepresenting the availability of a position contrary to section 8 of the *ESA* for a total amount payable of \$3,289.59.
15. The Appellant appealed the Determination on January 25, 2024.

### **ARGUMENTS**

16. The Appellant submits on the Appeal Form that new evidence has become available that was not available at the time the Determination was being made.
17. The Appellant submits further information in support of the appeal written by Awadh N. Singh on behalf of Jaswant S. Randhawa, Director of the Appellant.

18. The Appellant submits facts contrary to the findings of fact made in the Determination. The Appellant submits the Complainant was not hired after an unsuccessful interview and further submits the Complainant was told that he was not hired on the same day. The Appellant also submits other facts in support of the appeal including that it 'does not have any trucking or labour supply business,' that it 'is a very small company,' and that it 'is not aware of the basis of this determination.'
19. The Appellant submits the Determination should be set aside.

## **ANALYSIS**

20. These reasons are based on the written submissions of the Appellant, the Determination, and the Record.
21. On receiving the Appellant's appeal, the Tribunal, the Appellant, and the Complainant received the Record from the Director for purposes of the appeal. The Tribunal requested submissions on the completeness of the Record from the parties. As the Tribunal did not receive any objections to the completeness of the Record from the parties, the Tribunal accepts the Record as complete.

### **Appeal of Determination**

22. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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. An appeal is limited to the grounds set out in the *ESA*. An appellant bears the onus to show that there is an error that meets one or more of the specified grounds. The appeal process is not a new hearing of the case, nor is it an opportunity to resubmit an appellant's facts and arguments and 'try again' with a different decision-maker.

### **New Evidence**

24. The Appellant alleges in the Appeal Form that new evidence has become available since the time the Determination was made.
25. As set out above, the Appellant submits arguments contesting the findings of fact and conclusions in the Determination.
26. The test that must be met to introduce new evidence on an appeal is clearly established. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out the following requirements for introducing new evidence:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) the evidence must be relevant to a material issue arising from the complaint;

- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

27. Each of the above requirements need to be met by an appellant seeking to submit new evidence. Previous decisions of the Tribunal make it clear that parties are expected to participate in good faith and present all relevant evidence during the initial investigation and determination stage of complaints before the Director. The introduction of new evidence later at the appeal stage that could and should have been introduced at the investigation and determination stage, will generally result in the dismissal of the appeal.
28. The evidence and arguments submitted by the Appellant do not meet the requirements for new evidence. The Appellant does not submit any explanation why relevant facts and submissions could not have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination. Nor is there an explanation of how the alleged new evidence meets any of the other factors.
29. The law is clear that an appellant must meet the necessary requirements for new evidence and the failure to do so will generally result in dismissal of the appeal on this ground (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, supra, *Can-Pacific Trading Inc.*, BC EST # D082/11, *Anthony McInnis*, 2020 BCEST 9]
30. The Appellant generally resubmits arguments made during the initial investigation and adjudication stage and does not submit cogent or credible evidence. Nor has the Appellant submitted an explanation that relevant evidence could not reasonably have been discovered or presented during the investigation.
31. The time and place to submit information is during the initial investigation and determination. The jurisprudence is clear that a party will generally not be able to submit information it could and should have submitted during the investigation and determination stage. Evidence that was available and could have been submitted during the investigation and determination stage does not meet the requirements to be considered new evidence under section 112(1) of the *ESA*.
32. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.
33. I find there is no merit in this ground of appeal, and it is dismissed.

### **Error in Law**

34. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc, dba Superior Transmissions*, BC EST # D141/03).
35. Even though I have found the Appellant has not demonstrated that there was new evidence, I will also consider the Appellant's submissions in the alternative on whether there was an error of law in the Determination.

36. While not specifically noted on the Appeal Form, the Appellant's submission also appears to allege that there was an error of law in finding the Appellant contravened section 8 of the *ESA* and misrepresented the availability of a position.
37. To show an error in law, the Appellant has the burden to show a material legal error in the decision. Examples of errors in law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466).
38. A disagreement with a finding of fact does not amount to an error in law. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate.
39. I have reviewed the Determination and the evidence in the Record and do not find an error in law in the Determination. Section 8 of the *ESA* provides as follows:
- 8 An employer must not induce, influence or persuade a person to become an employee, or to work or be available for work, by misrepresenting any of the following:
- (a) the availability of a position;
- (b) the type of work;
- (c) the wages;
- (d) the conditions of employment.
40. The finding that the Appellant misrepresented the availability of a position was consistent with the law and decisions of the Tribunal applying section 8 of the *ESA* (see *Parsons*, BC EST # D110/00; upheld on reconsideration BC EST # D513/00; *Agropur*, BC EST # D126/09 - employee quit previous job on misrepresentation). The Delegate made a reasoned finding of fact based on the evidence including that the Appellant had advertised for work, interviewed with the Complainant and the evidence about statements to the Complainant. I note that the advertisement and text message evidence, which was initially denied by the Appellant, corroborated the Complainant's evidence and was consistent with the findings of fact made in the Determination. I also note the evidence of the text messages between the Appellant and the Complainant about meeting for work after the initial interview is inconsistent with the 'new evidence' provided by the Appellant that the Complainant was told he was unsuccessful at the initial interview and that the Appellant was not seeking to hire. I find the Delegate properly considered the submissions and evidence within the law and came to a reasoned decision based on the findings of fact. I find there was no error of law or misapplication of the *ESA*.
41. I have also considered the calculation of the amount owing to the Complainant for the wages, out of pocket losses, annual vacation pay and interest. Section 79(2) of the *ESA* provides the Delegate with broad jurisdiction to award compensation arising from the misrepresentation (see *BKB Fish & Chips*, 2022 BCEST 63). I find there is no error of law in the calculation and confirm the amounts. While the Appellant may not agree with the Determination, I find there was evidence the Delegate could rely on to make the findings of fact and arrive at the calculations and conclusions in the Determination. It is clearly established

in Tribunal decisions that this Tribunal will not re-hear the case, nor will it re-evaluate the evidence and substitute its own view of the same evidence.

42. I have also considered the administrative penalty levied in the Determination. As noted above, the Delegate found the Appellant contravened section 8 in misrepresenting the Complainant's employment and I find that the administrative penalty owed by the Appellant is mandatory in the circumstances (see *537370 B.C. Ltd.*, BC EST # D011/06).

43. In summary, I find the facts and evidence have been properly considered within the law and the Appellant has not shown an error in law in the Determination. The Delegate properly considered the facts and law in finding the Appellant contravened section 8 of the *ESA* and owed the Complainant wages, out of pocket losses, annual vacation pay, and interest. Absent an error in law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate. As noted above, the Delegate properly considered the facts and law in finding the Appellant was in contravention of section 8 (misrepresentation) and the administrative penalty was properly applied.

44. I find there is no error in law and would also dismiss this ground of appeal.

#### **Summary dismissal**

45. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.

46. I find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

#### **ORDER**

47. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.

48. Pursuant to section 115(1) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

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**John Chesko**  
**Member**  
**Employment Standards Tribunal**