

An appeal

- by -

Richard Bradley Holtsbaum carrying on business as Woodtree Construction
(“Holtsbaum”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2012A/143

DATE OF DECISION: January 10, 2013

DECISION

SUBMISSIONS

Andrew James Gray

counsel for Richard Bradley Holtsbaum carrying on business as Woodtree Construction

OVERVIEW

1. Richard Bradley Holtsbaum carrying on business as Woodtree Construction (“Holtsbaum”) has filed an appeal under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 26, 2012.
2. The Determination found that Holtsbaum had contravened Part 3, section 18 and Part 7, section 58 of the *Act* in respect of the employment of Terena Hillman (“Ms. Hillman”) and ordered Holtsbaum to pay Ms. Hillman an amount of \$1,159.24, an amount that included wages and interest under section 88 of the *Act*. The Director also found Holtsbaum had contravened Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) by failing to produce or deliver records as required under section 85(1) of the *Act*.
3. The Director imposed administrative penalties on Holtsbaum under Section 29(1) of the *Regulation* in the amount of \$1,000.00.
4. The total amount of the Determination is \$2,159.24.
5. In his appeal, Holtsbaum alleges the Director erred in law by issuing a Determination on a complaint that was allegedly settled with the assistance of another delegate of the Director acting under section 78 of the *Act* (the “investigating delegate”). Holtsbaum also grounds the appeal on evidence becoming available that was not available at the time the Determination was being made, although the appeal neither includes this evidence nor describes its nature.
6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act* and, at this stage, I am assessing this appeal based solely on the Determination, the written submissions made on behalf of Holtsbaum and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

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 period;*
- (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;*

(b) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Ms. Hillman will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

BACKGROUND

8. Holtsbaum operates a construction business on northern Vancouver Island. Ms. Hillman was employed by the business as a labourer from August 2011 to November 30, 2011, at the rate of \$12.00 an hour. In February 2012, Ms. Hillman filed a complaint alleging she had not been paid all wages owing to her by Holtsbaum.
9. A delegate of the Director conducted an investigation of the complaint, which apparently included efforts to settle the complaint. On June 15, 2012, a Demand was sent to Holtsbaum under section 85(1) of the *Act* to produce employer records for Ms. Hillman. The records were required to be delivered to the investigating delegate by October 3, 2012. Holtsbaum failed to provide the required records. On June 18, 2012, a notice of complaint hearing was sent to the parties. On September 10, 2012, counsel for Holtsbaum contacted the investigating delegate, requesting an adjournment of the complaint hearing. The request was denied; counsel was informed the hearing would proceed as scheduled on October 18, 2012. On October 15, 2012, a voicemail message was left for counsel for Holtsbaum regarding the upcoming hearing. On the scheduled hearing date, October 18, 2012, a delegate of the Director attempted to contact Holtsbaum at the numbers he had provided to the Director. That delegate was unable to contact him at those numbers. An initially unsuccessful attempt was made to contact counsel for Holtsbaum. The attempted communication was later returned, with counsel for Holtsbaum advising the delegate that, while he was representing Holtsbaum, he would not be participating in the complaint hearing.
10. The scheduled complaint hearing proceeded with the complainant providing evidence relating to her claim and the Director making findings based on that evidence, ultimately concluding Ms. Hillman was entitled to wages in the amount found to be owing in the Determination.
11. There was no reference in the Determination, or in the material before the Director at the complaint hearing, to any settlement of the complaint.

REASONS FOR THE APPEAL

12. Counsel for Holtsbaum argues a settlement of Ms. Hillman's complaint was agreed to by the parties in a mediation session conducted by the investigating delegate on April 17, 2012, and that, while the Director has authority to enforce the settlement agreement, the Director has no authority to ignore that agreement and issue a Determination on the complaint.
13. Counsel for Holtsbaum also submits the Determination contains factual errors and that "new evidence has become available since the date of the hearing that contradicts the result of the Determination".

ANALYSIS

14. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires

the appellant to provide, demonstrate or establish a cogent evidentiary basis for the grounds of appeal relied upon.

15. There are two grounds of appeal relied on in this appeal: error of law and new evidence. I can deal quickly with the “new evidence” ground of appeal. Appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that 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. In this appeal, not only has Holtsbaum failed to provide any actual evidence, the appeal fails even to identify the nature of the evidence or to what part of the Determination such evidence would apply. These shortcomings with the substance of this ground of appeal are immediate and fatal. There is no merit whatsoever to this ground of appeal.
16. In respect of the “error of law” ground of appeal, while a settlement of the complaint has been alleged, Holtsbaum has provided no evidence supporting the existence of any such settlement. He says it was an “oral agreement, although the appeal submission contains an assertion that a “draft agreement” was forwarded to Holtsbaum by the investigating delegate. No such document, however, is included with the appeal. The appeal submission alleges a cheque for \$200.00 was sent to “the offices of the Employment Standards Branch”, but “bounced”. No copy of such cheque is provided with the appeal. There is reference in the appeal submission to a discussion between the investigating delegate and counsel for Holtsbaum on September 11, 2012, suggesting some sort of settlement might still be possible on certain terms, but there is nothing in the appeal showing Ms. Hillman was ever made aware of this discussion, agreed to the new terms or that Holtsbaum ever made any effort to meet the new terms. In respect of that last statement, the appeal submission contains the comment from counsel that, “it was my understanding until immediately prior to the hearing leading to the Determination that the Appellant would deliver this cheque to the Branch’s offices”. I infer from that comment that whatever “settlement” amount Holtsbaum says he agreed to, he has still failed to pay it to the Director or to Ms. Hillman.
17. In the context of settlement of complaints under the *Act*, the Tribunal has affirmed there are three essential elements to a binding settlement agreement: offer, acceptance and consideration. I am convinced that Holtsbaum, based on the appeal and the material relating to it, cannot establish there was a binding settlement agreement that precluded the Director from issuing the Determination.
18. There is nothing which shows the settlement being suggested in this appeal has been offered to Ms. Hillman and accepted by her and while counsel for Holtsbaum has quite correctly noted the provision in section 78 which rendered a settlement voidable for failure to comply with its terms has been removed, the Tribunal has suggested, rightly in my view, the consideration contemplated by a settlement agreement is nevertheless required to be paid within a reasonable period of time: see *Spadirect Inc.*, BC EST # D116/07. In this case, there is no evidence that any amount has been paid at all by Holtsbaum and the suggestion it can still be remitted at this time - when the settlement was alleged to have been made in April 2012 – is far from payment within a reasonable period. This suggestion is one which does not satisfy the legal requirements for a binding agreement under the *Act* and runs completely counter to the purposes of entitlement to basic standards of compensation and conditions of employment, fairness, finality and efficiency, which find expression in section 2 of the *Act*.
19. After a careful review of the Determination, the section 112(5) “record” and the appeal, and applying well established principles which operate in the context of appeals to the Tribunal, I find the appeal as a whole

lacks any presumptive merit and that the purposes and objects of the *Act* would not be served by requiring the other parties to respond to it. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

20. Pursuant to subsection 114(1) of the *Act*, this appeal is dismissed on the ground that there is no reasonable prospect that it will succeed. Accordingly, the Determination is confirmed as issued in the amount of \$2,159.24 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

David B. Stevenson
Member
Employment Standards Tribunal