

An appeal

- by -

Burnaby Blacktop Ltd.
("Burnaby Blacktop")

- 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.: 2013A/82

DATE OF DECISION: February 3, 2014

DECISION

SUBMISSIONS

Leo Oster

on behalf of Burnaby Blacktop Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Burnaby Blacktop Ltd. (“Burnaby Blacktop”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 30, 2013.
2. The Determination found that Burnaby Blacktop had contravened Part 3, section 18 of the *Act* in respect of the employment of Randal Lovig (“Lovig”) and ordered Burnaby Blacktop to pay wages to Lovig in the amount of \$2,670.00 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$3,670.00.
3. Delivery of the Determination was accepted by Burnaby Blacktop on November 7, 2013.
4. Burnaby Blacktop has filed an appeal of the Determination on the ground that evidence has become available that was not available when the Determination was being made.
5. A form of appeal was received by the Tribunal from Burnaby Blacktop on December 9, 2013, the final day of the appeal period. The filing was incomplete. It was delivered to the Tribunal by Leo Oster (“Mr. Oster”), a director of Burnaby Blacktop. In correspondence dated December 10, 2013, the Tribunal notified Mr. Oster that under subsection 112(2) of the *Act* and Rule 18(3) of the Tribunal’s *Rules of Practice and Procedure (the “Rules”)*, the appeal was incomplete and late. The correspondence told Mr. Oster what was required to meet the requirements in the *Act* and the *Rules* for completing the filing of the appeal and that he was required to seek an extension from the Tribunal of the statutory time period in order to be allowed to file a late appeal. He was given until 4:30 pm on December 20, 2013, to satisfy the requirements for an appeal and to submit the reasons for the late appeal. On December 12, 2013, Burnaby Blacktop sent an e-mail to the Tribunal outlining efforts, which commenced in the afternoon of December 10, 2013, to obtain the reasons for the Determination. No explanation has been provided by Burnaby Blacktop for not seeking the reasons for the Determination within the period prescribed in section 81(1.2) of the *Act*.
6. On December 16, 2013, the Tribunal acknowledged to the parties that an appeal had been received from Burnaby Blacktop, requested production of the section 112(5) “record” from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
7. The section 112(5) “record” was provided by the Director to the Tribunal and a copy was sent to Burnaby Blacktop and Lovig.
8. Consistent with the December 16, 2013, notice, I have reviewed the appeal, including the reasons for appeal submitted by Burnaby Blacktop, and the section 112(5) “record”.
9. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal 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;
 - (h) one or more of the requirements of section 112(2) have not been met.

10. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Lovig 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*.

ISSUE

11. The issue at this stage of the appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

12. Burnaby Blacktop operates a paving business. Lovig was employed by Burnaby Blacktop for a period from February 14 to June 17, 2013, as an estimator at a rate of pay of \$3,000.00 a month. In his complaint, he claimed regular wages for the final two weeks of employment and expenses incurred during the course of his employment.
13. Burnaby Blacktop was notified of the complaint. On July 24, 2013, the Director delivered a Notice of Complaint Hearing, a fact sheet and a Demand for Employer Records. Burnaby Blacktop failed to comply with the Demand and was assessed an administrative penalty for that failure.
14. The complaint hearing was scheduled for October 8, 2013. Lovig appeared; Burnaby Blacktop did not. The complaint hearing proceeded in the absence of any representation or presentation from Burnaby Blacktop. There is nothing in the file indicating a representative of Burnaby Blacktop attempted to contact the Director to advise Burnaby Blacktop would not, or could not, attend the complaint hearing or to seek any accommodation or delay relating to that process. There is an undated letter with the initial filing to the Tribunal in early December over Mr. Oster’s name referring to personal issues that were consuming his time, but the details of the letter are vague, it is undated and it does not indicate such circumstances were ever communicated to the Director. The letter appears to be in support of a request for another complaint hearing.
15. The Determination was issued on October 30, 2013, and delivered to Burnaby Blacktop by registered mail.

16. The appeal is grounded in what is commonly referred to as “new evidence”. It will assist in appreciating the analysis of this appeal to set out in full what appear to be the primary reasons supporting the appeal:

Reason to terminate Randy Lovig from Burnaby Blacktop

There were Several [sic] reasons why Randy Lovig does not work for Burnaby Blacktop.

This includes 100% attendance problems. He would never show up at office, He [sic] had very poor work performance, problematic conduct. His Attendance [sic] problems include frequent absenteeism or tardiness, or even worse, the “no call, no show” and failed to notify the office. His Work [sic] duties were not met and he became very negligent

He had unprofessional manners and a [sic] inability to properly relate with co-workers, and customers. He never answered his Phone [sic] (Which [sic] we bought him) and never contacted clients as he said he was doing. He never came to our office to pick up his cheques (he said I have no time Please [sic] mail them)

We had several meetings with Randy and he said he would do better as long as we bought him a laptop and then wanted a raise as well.

Bottom line He [sic] did not Perform [sic] He [sic] did not call or contact clients as we did check.

Please accept this as the truth.

Leo Oster

ANALYSIS

17. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
18. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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.
19. 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 appeal.
20. There are so many problems with this appeal, but I need cite only three elements of it that lead me to find there is no reasonable, indeed there is no possible, prospect this appeal will succeed.
21. First, to allow this appeal to proceed at all would require the Tribunal to ignore the long established principle enunciated in cases such as *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, which states that barring special circumstances parties may not fail or refuse to cooperate in the

complaint process and later seek to file an appeal of the Determination when they disagree with it. In this case Burnaby Blacktop failed to respond to the Demand for Records and failed to attend the complaint hearing. Their failure to respond to the Demand and their failure to attend the complaint hearing compels a finding that they may not now seek to challenge the Determination using arguments and evidence that could have been made had they decided to participate in the process.

22. Second, the Tribunal has established that 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, not merely state, 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. All of the foregoing conditions must be satisfied before “new evidence” will be admitted into an appeal. In my view, the “new evidence” sought to be introduced in this appeal was reasonably capable of being provided during the complaint process, is not relevant to any issue arising from the complaint, is not *shown* to be capable of belief and is not probative. In short, it does not satisfy any – let alone all – of the conditions necessary to be allowed and considered as “new evidence” under that ground of appeal.
23. Third, the reasons supporting the appeal, reproduced above, speak only to whether there was a basis for terminating Lovig. The appeal does not relate at all to what appear to be the claims addressed in the Determination: two weeks’ unpaid wages and work related expenses incurred by Lovig. There was no claim made by Lovig for length of service compensation, which in the circumstances is the only claim that would have generated any need to consider whether Burnaby Blacktop had cause to terminate Lovig. The appeal itself is, accordingly, completely irrelevant to the matters addressed in the Determination. Whether Burnaby Blacktop had grounds to terminate Lovig would not affect his entitlement wages for work performed or to reimbursement of expenses incurred during the course of his employment.
24. I reach the above conclusion without finding it necessary to decide whether Burnaby Blacktop should be granted an extension of the statutory appeal period. Were it necessary to do so, I would not have allowed the extension of time, relying on the absence of any reasonable explanation for the delay incurred and the total absence of any merit to the appeal.
25. In sum, an assessment of this appeal shows it has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
26. I dismiss the appeal and confirm the Determination.

ORDER

27. Pursuant to section 115 of the *Act*, I order the Determination dated October 30, 2013, be confirmed in the amount of \$3,670.00, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal