

An appeal

- by -

Yellow Cabs (Kamloops) Ltd.
("YCK")

- 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.: 2016A/150

DATE OF DECISION: January 16, 2017

DECISION

SUBMISSIONS

Abdul Rasheed

on behalf of Yellow Cabs (Kamloops) Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Yellow Cabs (Kamloops) Ltd. (“YCK”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on September 19, 2016.
2. The Determination was the product of an audit conducted by the Director under section 76(2) of the *Act* in response to a confidential complaint. The employment records of forty employees were reviewed for compliance with the requirements of the *Act* and the *Employment Standards Regulation* (the “Regulation”). The audit period was October 1 to December 31, 2015.
3. The Determination found YCK had contravened Part 3, section 17 of the *Act* and section 37.1 of the *Regulation* in respect of thirty-four employees and ordered YCK to pay wages to those employees in the amount of \$18,113.17 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$19,113.17.
4. This appeal alleges the Director failed to observe principles of natural justice in making the Determination in respect of the findings on sixteen persons. YCK seeks to have the Tribunal cancel the Determination.
5. Although not listed as a ground of appeal, YCK has included forty-one pages of material that does not appear to have been provided to the Director during the period the audit was conducted and the Determination issued. It relies on this material to support the appeal.
6. In correspondence dated November 3, 2016, the Tribunal acknowledged receipt of the Appeal and notified all of the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
7. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was delivered to YCK on November 29, 2016. YCK has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
8. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, 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 any 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.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and the affected persons 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) of the *Act*, it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS

11. On January 14, 2016, the Director notified YCK a complaint had been made to the Employment Standards Branch. The complainant had requested anonymity and the Director advised the complaint was being investigated by way of an audit of the payroll records for all drivers of YCK for the period October 1, 2015, to December 31, 2015.
12. On January 14, 2016, the Director issued a Demand for Employer Records for the payroll records of all cab drivers of YCK for the audit period.
13. An audit of the payroll records of forty employees YCK was conducted between January 14, 2016, and April 20, 2016, when the results of the audit were communicated to YCK. There were some communications following April 20, 2016, to clarify aspects of the audit and to aid in the final calculations of wages owing.
14. The Director found YCK owed wages to thirty-four employees in the total amount set out in the Determination. The calculations for each of the thirty-four employees are set out in appendices attached to the Determination.
15. YCK participated in the investigation, providing payroll records, specifically copies of wages statements for the months in the audit period, and the daily logs completed by the drivers for the same time frame.
16. It was YCK's position that, even though the drivers were required to show their start and end time, breaks taken and other times they were not available during their shift, few did. Often the daily logs did not accord with the record of the dispatcher or the online dispatch system, GATA Labs Inc. (the "GATA program").
17. YCK said it relied on the GATA program to determine the actual hours worked by each driver. No paper copy of the dispatch record was kept and, because YCK was in the process of upgrading to a different

dispatch system, it was unable to provide the Director with a printed copy of the dispatch logs for the audit period.

18. Based on the records received, the Director reconciled the driver's logs to the wage statements, accepting the start and end times shown or, if not, extrapolating that information from other logs for the same driver, and accepted the breaks shown on the logs or, if none were shown, deducting one or two thirty minute breaks depending on the length of the shift.
19. The Director was not provided with access to the GATA program or the information it contained.
20. The Director found thirty-four drivers had not been paid at least minimum wage during the audit period

ARGUMENT

21. YCK challenges the findings of the Director in respect of sixteen of the drivers, providing their reasons for disputing the findings for each of the drivers. YCK submits if these reasons are accepted the amounts found owing to each of these drivers would either be greatly reduced or eliminated.
22. The predominant reason given is that the driver in question was not recording all breaks actually taken or periods of unavailability. The appeal includes several notes purporting to be from some of these drivers affirming the reasons provided.
23. Another reason, provided for some of the drivers, is that the daily logs for these drivers do not reflect that each performs other work, for which they are paid separately, while remaining logged on as on duty in a YCK cab. YCK submits that during these periods of other work the driver is not working for it and argues that, if taken into account, they would reduce the number of hours to which the minimum wage calculation was applied for these drivers.
24. In one case, YCK argues the Director calculation is simply wrong because the driver in that case keeps her own record of hours and any discrepancy between her record and what is recorded by YCK is addressed and amended.

ANALYSIS

25. 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.*

26. 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.

27. An appeal is not simply another opportunity to argue the merits of the case 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.
28. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
29. Error of law is not alleged or argued. YCK alleges the Director failed to observe principles of natural justice in making the Determination. In the circumstances of this case, principles of natural justice require the Director provide YCK with the particulars of the case against them, the opportunity to respond to it in a meaningful way and the right to have the case decided by an independent and unbiased decision maker. YCK has not shown there is any breach of principles of natural justice in this case.
30. While YCK has not grounded its appeal on section 112(1) (c) in the Appeal Form nor has it identified and argued that ground in its appeal submission it is apparent this appeal relies on evidence that is not found in the record and does not appear to have been provided to the Director during the investigation. It is also apparent that some of the "evidence" submitted has been created for the purpose of this appeal. I refer specifically to the several notes from drivers named in the Determination.
31. A large part of the material submitted with the appeal appears to be records for a number of the drivers covered by the Determination for periods in September and October 2016. Quite apart from the obvious concern that the material on its face refers to period nearly a year removed from the audit period, it is not identified and the purpose of its inclusion is not explained.
32. In any event of the failure to rely on this ground of appeal, I will address whether any of the material included by YCK in the appeal submission should be accepted and considered.
33. The Tribunal has frequently been called upon to address this ground of appeal, commonly referred to as the "new evidence" ground of appeal. In doing so, the Tribunal has noted the admission of evidence under this ground is discretionary and has taken a relatively strict approach to the exercise of this discretion.
34. The Tribunal tests the proposed evidence 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. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.
35. The opportunity to provide new or additional evidence is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.
36. I am not persuaded to exercise my discretion to accept or consider any of the "evidence" included by YCK with its appeal and find against accepting or considering it.
37. There are several reasons for this finding.

38. First, as indicated above, the material that appears to be records for some of the drivers whose minimum wage calculations are being challenged in this appeal is not identified, not connected in any way to the reasons for the appeal and, on its face, appears to be completely unrelated to the audit period. Even if the information contained in this material did relate to the audit period, YCK has not explained why it was not provided to the Director during the investigation. Further, if it existed at the time of the investigation, it is not “new” evidence.
39. Second, the information contained in the personal notes written by the drivers is not “new”. That information existed at the time the Determination was being made. There was considerable discussion between representatives of YCK and the Director. While YCK took the position during the investigation that drivers often did not accurately record breaks and periods of unavailability, there is no indication of any attempt by YCK to establish this position at the time of the investigation. With some diligence, support for this position could have been provided to the Director. The Director accepted and relied on the best evidence available. Statements of the kind added here were not part of that evidence.
40. Third, I do not find the information contained in the personal notes purporting to be from individual employees can be considered “evidence” at all. Some of the statements made are merely opinion, some are framed in very vague language and generalities, none provide specifics, some of the assertions made are improbable and some are irrelevant.
41. Fourth, even if the statements could be considered “evidence”, for the same reasons I do not find these to be sufficiently credible to satisfy the burden of establishing the facts for which they are advanced.
42. Fifth, I do not find the assertions made in the personal statements concerning breaks and availability to be particularly probative. There is no indication the drivers had access to the same material as was provided to the Director. The records used by the Director to calculate hours worked were not exact. There were discrepancies and some reconciliation was required. The calculations made by the Director were based on the “best evidence” available. There is nothing to indicate those calculations were unreasonable.
43. Overall, the vague nature of some of the “evidence” and the failure of YCK to explain the origin and relevance of other material sought to be included and considered in this appeal does not satisfy the criteria for admitting new evidence or justify my accepting and considering it.
44. My conclusion on the additional material filed with the appeal leaves only the unproven allegation that the Director failed to observe principles of natural justice in making the Determination; the burden on YCK to establish that ground of appeal has not been met.
45. In sum, YCK has not raised a valid ground of appeal or shown a reviewable error in the Determination. The appeal has no reasonable prospect of succeeding and is dismissed on that basis. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

46. Pursuant to section 115 of the *Act*, I order the Determination dated September 19, 2016, be confirmed in the amount of \$19,113.17, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal