

An appeal

- by -

Alexander Giraud
(“Mr. Giraud”)

- 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/151

DATE OF DECISION: February 1, 2017

DECISION

SUBMISSIONS

Alexander Giraud

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Alexander Giraud (“Mr. Giraud”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 27, 2016.
2. Mr. Giraud had filed a complaint alleging his former employer, International Crowd Management Inc. (“ICM”), had contravened the *Act* by failing to regular wages, overtime wages and compensation for length of service. The Determination found the *Act* had not been contravened, no wages were outstanding and no further action would be taken.
3. Mr. Giraud has filed an appeal of the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Mr. Giraud seeks to have the Determination cancelled and the matter referred back to the Director.
4. In correspondence dated November 7, 2016, the Tribunal notified 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.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Giraud. He has been provided with the opportunity to object to its completeness. No objection has been received and I am satisfied the record is complete.
6. 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. 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;*

(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) of the *Act*, the Director and ICM 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 can succeed.

ISSUE

8. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

9. Mr. Giraud was employed by ICM as a security guard from July 1, 2015, to October 2, 2015, at a rate of \$14.00 an hour. He filed a complaint with the Director claiming regular wages, overtime wages and compensation for length of service.
10. The Director conducted a hearing by telephone. Mr. Giraud attended on his own behalf and gave evidence in support of his claims. ICM was represented by Carl Folio (“Mr. Folio”).
11. The Determination indicates Mr. Giraud attended on the phone for 45 minutes, outlined his position and exited the hearing without providing an explanation for some of his evidence or submitting himself to cross-examination and without waiting to hear the evidence and argument of ICM. Mr. Giraud was advised the hearing would proceed in his absence and a decision would be based on the “best available evidence”.
12. ICM provided a copy of its payroll record for Mr. Giraud. As a result of a self audit done before the complaint hearing, ICM had deposited an amount with the Director that was found by them to be owed to Mr. Giraud. ICM submitted it had not terminated Mr. Giraud and claimed to be unaware of any incident where he was taken off the switchboard (the scheduling system). Mr. Folio stated he was unaware Mr. Giraud was experiencing any issues accessing the scheduling system and that no other employee had reported difficulties with access to it.
13. The Director found, aided largely by Mr. Giraud’s leaving the hearing without providing explanation or evidence relating to some aspects of his wage claim, that no further wages were owing to Mr. Giraud. The Director accepted the payroll records and unchallenged evidence provided by ICM over unexplained elements of the calculation sheet submitted by Mr. Giraud.
14. In respect of Mr. Giraud’s claim for compensation for length of service, the Director found insufficient evidence to conclude ICM had terminated his employment.

ARGUMENT

15. Mr. Giraud argues the Director erred in law in calculating amounts he claimed were owing to him. He submits the error was a result of the Director not accepting his claim that he was to be paid \$17.00 an hour for July 1, 2015, not \$14.00 an hour as found by the Director, not accepting he worked more hours on July 24 – 26, August 12, August 15, August 16 and September 22, 2015, than was recorded by ICM and accepted by the Director and in not finding he was terminated by ICM and entitled to compensation for length of service.

16. Mr. Giraud submits the Director failed to observe principles of natural justice by failing to adhere to fundamental rules of fairness. He says that, during his attendance in the hearing, the Director spent too much time on what Mr. Giraud considers were unnecessary questions concerning his calculations which left no time for “cross-examination” which resulted in the Director favouring ICM’s evidence on his wage claims.

ANALYSIS

17. 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.*

18. 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.

19. 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. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

20. 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.

21. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
- 2. a misapplication of an applicable principle of general law;
- 3. acting without any evidence;
- 4. acting on a view of the facts which could not reasonably be entertained; and
- 5. adopting a method of assessment which is wrong in principle.

22. I find there is no merit to this appeal.

23. Mr. Giraud argues error of law. This argument does no more than challenge the decision of the Director to accept the payroll records and other evidence presented by ICM rather than what was presented by Mr. Giraud. The reason for the Director’s decision is explained in the Determination. It is grounded in what

the Director perceived as unclear and insufficient evidence supporting Mr. Giraud's claims stemming mainly from his leaving the hearing without providing an explanation for apparent discrepancies in his material or allowing for cross-examination by ICM on areas of contention in their respective positions.

24. The Director is not required to accept, without question, all the evidence provided by the parties. The process would be unworkable if that were so.
25. The Director must make a reasoned decision based on an evaluation of all the records and evidence that is available.
26. ICM presented their payroll records for Mr. Giraud. There is no indication the Director believed those records did not comply with section 28 of the *Act* or had been shown to be incorrect. In such circumstances, the information provided by the payroll records is compelling. Absent good and sufficient reason to find the payroll records were not reliable, the Director was entitled, perhaps even required, to accept them. Mr. Giraud's opportunity to show the payroll records were wrong was lost when he abandoned the hearing.
27. The burden for Mr. Giraud in challenging the findings based on the payroll records in this appeal is to show it was unreasonable for the Director to have accepted the payroll records as being an accurate record of hours worked and wages paid. He has failed to meet that burden.
28. As I have concluded above, because the employer maintained records that complied with section 28 of the *Act*, it was proper for the Director to have accepted them as accurate and relied on them in addressing Mr. Giraud's wage claims.
29. I also accept the conclusion of the Director on the claim by Mr. Giraud for length of service compensation: that there was insufficient evidence to show Mr. Giraud had been terminated by ICM.
30. In this part of the appeal, in order to establish the Director committed an error of law on this issue, Mr. Giraud is required to show the conclusion reached by the Director was 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. Mr. Giraud has not succeeded in meeting this burden.
31. I find the Director's conclusion was reasonably supported by the evidence on the record, the lack of contrary evidence, and the conclusion was one which the Director was entitled to reach.
32. Mr. Giraud has failed to show an error of law in respect of the claim for length of service compensation.
33. Mr. Giraud argues the Director breached principles of natural justice in making the Determination. This argument arises primarily in the context of the complaint hearing. The obligation on the Director relating to the conduct of a hearing arises from the Director's statutory obligation contained in section 77 of the *Act* and to the common-law duty to observe principles of natural justice, which in the context of the complaint process, has been described by the Tribunal in the following terms 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.

34. The Director satisfied the obligation to provide Mr. Giraud with the opportunity encompassed in the above legal requirements. Mr. Giraud's complaint about the hearing process arises from his own decision to leave the hearing prior to its completion. The Director cannot be faulted for that. No breach of natural justice has been shown.
35. This argument and ground of appeal is rejected.
36. In sum, there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

37. Pursuant to subsection 114(1)(f), I dismiss the appeal. Pursuant to section 115(1)(a) of the *Act*, I order the Determination dated September 27, 2016, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal