

An appeal

- by -

David Avery and Liesbeth Avery
(“Mr. and Mrs. Avery”)

- 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/166

DATE OF DECISION: February 20, 2017

DECISION

SUBMISSIONS

David Avery on his own behalf and on behalf of Liesbeth Avery

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), David Avery and Liesbeth Avery (“Mr. and Mrs. Avery”) have filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 4, 2016.
2. The Determination found Mr. and Mrs. Avery were employers and had contravened Part 3, sections 17 and 18 of the *Act* in respect of the employment of Brad Cameron (“Mr. Cameron”) and ordered Mr. and Mrs. Avery to pay Mr. Cameron wages in the amount of \$2,122.17, an amount that included annual vacation pay and interest, and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$3,122.17.
3. This appeal is grounded in new evidence becoming available that was not available at the time the Determination was made. Mr. and Mrs. Avery seek to have the Determination cancelled.
4. In correspondence dated December 16, 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. and Mrs. Avery, who have been provided with the opportunity to object to its completeness. There has been no objection and, accordingly, the Tribunal accepts it as being 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 and 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 should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Cameron 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 will succeed.

ISSUE

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

THE FACTS

9. Mr. and Mrs. Avery operate a farming business in Canyon Alpine near Boston Bar, BC.
10. Mr. Cameron rented an RV site on the property of Mr. and Mrs. Avery from April 2014 to April 2016.
11. In December 2015, Mr. and Mrs. Avery were involved in a motor vehicle accident and were unable to work their farm. They asked Mr. Cameron to look after their livestock until such time as Mrs. Avery could resume those duties, and he did. From December 24, 2015 to February 3, 2016, Mr. Cameron performed work for Mr. and Mrs. Avery that included feeding and watering their livestock (cattle, pigs, hens and ducks), collecting eggs and once repairing a fence that had been damaged by the cattle. There was an agreement that Mr. Cameron was to be paid \$25.00 an hour for his work.
12. Mr. Cameron received no money for his work and filed a complaint with the Director alleging wages were owed for the work he performed.
13. Mr. and Mrs. Avery's response was that Mr. Cameron was a friend who had agreed to look after the livestock for no pay; alternatively, he was an independent contractor to whom the *Act* did not apply but, if he was an employee under the *Act*, he was entitled only to actual hours worked at minimum wage and the resulting amount should be set off against rent arrears and other debts he was alleged to owe to Mr. and Mrs. Avery.
14. The Director conducted a complaint hearing, heard evidence from Mr. Cameron on his own behalf and from Mr. Avery ("Mr. Avery") on behalf of he and his wife.
15. Based on the facts presented, applied to the definition of employee in the *Act*, the Director found Mr. Cameron was an employee, that Mr. and Mrs. Avery had agreed to pay him \$25.00 an hour for work performed and that he was owed wages, including annual vacation pay, in the amount \$2,080.00.
16. The Director dismissed a claim by Mr. Cameron for statutory holiday pay.

ARGUMENT

17. Mr. and Mrs. Avery submit there is "new" evidence that shows Mr. Cameron was an independent contractor during the period he was engaged by them. They say this evidence shows "beyond a shadow of a doubt" that Mr. Cameron was engaged as an independent contractor.

18. The “new” evidence comprises a statement from an individual who says he was involved in some discussions between Mr. Cameron and Mr. and Mrs. Avery in the spring of 2016 about Mr. Cameron taking care of the farm while Mr. and Mrs. Avery recovered from the motor vehicle accident. The statement also refers to discussions later between this individual and Mr. Cameron when the latter “was fulfilling” the contract, in which Mr. Cameron, allegedly, “begrudgingly” agreed he was a sub-contractor.

ANALYSIS

19. 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.*

20. 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.

21. 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.

22. 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.

23. Mr. and Mrs. Avery have grounded this appeal in evidence becoming available that was not available when the Determination was made. This ground of appeal is commonly described as the “new evidence” ground of appeal.

24. This appeal is not grounded in error of law, although that ground of appeal is implicit in the primary point being advanced in this appeal – that the Director erred in finding Mr. Cameron was an employee of Mr. and Mrs. Avery under the *Act*. 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.

25. In the circumstances of this appeal, unless I accept and consider the new evidence and am persuaded that evidence shows the Director made an error of law, this appeal cannot possibly succeed.

26. In respect of the chosen ground of appeal, the Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and 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 evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal 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*.
27. I find this evidence does not meet the considerations for accepting and considering new evidence.
28. The proposed evidence is not “new”; it was available and could, applying a reasonable degree of diligence, have been provided to the Director at the complaint hearing. However, it adds nothing to the position taken by Mr. and Mrs. Avery in response to the complaint, which was that Mr. Cameron had agreed to look after the livestock as a favour or, alternatively, that they had engaged him as an independent contractor. That position was defeated on the evidence of the nature of the relationship between the parties, which is described in the Determination at the bottom of page R5 to the top of page R6. The proposed new evidence is neither relevant nor probative. The question was not whether Mr. Cameron or the individual making the statement thought Mr. Cameron was sub-contracting and was “his own man”, but whether he was an employee under the *Act*. If the facts of the relationship bring Mr. Cameron within the definition of employee in the *Act*, it is irrelevant what was “intended” by the contract made between Mr. Cameron and Mr. and Mrs. Avery; section 4 of the *Act* would not allow such an agreement to be given effect.
29. This ground of appeal is without merit and is denied.
30. Mr. and Mrs. Avery do not challenge any of the findings of fact determined by the Director to be relevant on the question of Mr. Cameron’s status under the *Act*. The Determination states, on page R5:
- . . . when determining if a worker is an employee or an independent contractor, the central question is whether the worker is performing work normally performed by an employee or is performing it as a person in business on his own account.
31. On the evidence, the Director found the work Mr. Cameron did was work normally performed by an employee: it was integrated into the farm business of Mr. and Mrs. Avery, who were the registered owners of the farm property and who also owned the livestock, the equipment and the supplies relating to the operation of the farm. Mr. Cameron had no investment in the farm business.
32. There is no error in the Determination. The unchallenged findings of fact applied to the statutory considerations for deciding whether a person is an employee for the purposes of the *Act* provide an unimpeachable basis for the Determination.
33. I find no ground of appeal listed in section 112(1) of the *Act* has been made out. There is no merit to this appeal and it has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

- ³⁴. Pursuant to section 115 of the *Act*, I order the Determination dated November 4, 2016, be confirmed in the amount of \$3,122.17, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal