

An appeal

- by -

Avery Enterprises Inc.
("Avery Enterprises")

- 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/167

DATE OF DECISION: February 20, 2017

DECISION

SUBMISSIONS

David Avery

on behalf of Avery Enterprises Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Avery Enterprises Inc. (“Avery Enterprises”) has 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 Avery Enterprises had contravened Part 3, sections 17 and 18 of the *Act* in respect of the employment of Brad Cameron (“Mr. Cameron”) and ordered Avery Enterprises to pay Mr. Cameron wages in the amount of \$194.74 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$1,194.74.
3. This appeal is grounded in new evidence becoming available that was not available at the time the Determination was made. Avery Enterprises seeks 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 Avery Enterprises, which has been provided with the opportunity to object to its completeness. There has been no such 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;*
- (h) *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. Avery Enterprises operates a composting business. As a result of some health issues affecting the owners of Avery Enterprises, Mr. Cameron was engaged by Avery Enterprises, at a rate of \$20.00 an hour, for a period from late March to late May 2016 to operate the compost business.
10. Mr. Cameron filed a complaint with the Director alleging he had not been paid all wages owed for the work he performed for the compost business.
11. Avery Enterprises' response was that Mr. Cameron 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 (which did not include, as Mr. Cameron claimed, time waiting for compost orders) at minimum wage. Avery Enterprises also argued Mr. Cameron was not entitled to any further wages because he had paid himself from the proceeds of compost sales without authorization and failed to account for all sales.
12. The Director conducted a complaint hearing, heard evidence from Mr. Cameron, and two witnesses appearing on his behalf, in support of his claim; the Director heard evidence from David Avery ("Mr. Avery"), the president of Avery Enterprises, on behalf of the employer.
13. Based on the facts presented, applied to the definition of employee in the *Act*, the Director found Mr. Cameron was an employee and that he was owed wages in the amount \$194.74.

ARGUMENT

14. Avery Enterprises submits there is "new" evidence that shows Mr. Cameron was an independent contractor during the period he was engaged by them. Avery Enterprises says this evidence shows "beyond a shadow of a doubt" that Mr. Cameron was engaged as an independent contractor.
15. 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 compost business while Mr. and Mrs. Avery looked after their health issues. 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

16. 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.*
17. 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.
18. 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.
19. 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.
20. Avery Enterprises has 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.
21. 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 Avery Enterprises 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.
22. In the circumstances of this appeal, unless Avery Enterprises can show the Director made an error of law, this appeal cannot possibly succeed.
23. 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*.

24. I find this evidence does not meet the considerations for accepting and considering new evidence.
25. 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 Avery Enterprises in response to the complaint, which was that Mr. Cameron had contracted with Avery Enterprises 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 three paragraphs of the Determination answering the question of whether Mr. Cameron was an employee or an independent contractor: see 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 Avery Enterprises; section 4 of the *Act* would not allow such an agreement to be given effect.
26. This ground of appeal is without merit and is denied.
27. Avery Enterprises does not challenge any of the findings of fact found by the Director to be relevant on the question of Mr. Cameron’s status under the *Act*. The Determination states, on page R7:
- . . . 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. . . .
- . . . [Mr. Cameron] was under the direction and control of Mr. Avery on behalf of [Avery Enterprises]. Although Mr. Avery was not present on the site of the compost operation to supervise him, Mr. Avery gave him detailed written instructions as to what tasks to do and when and how to do them. [Mr. Cameron] had no investment in [Avery Enterprises]’ compost business; Mr. Avery on behalf of [Avery Enterprises] negotiated the location of the compost operation (and work site) with Mr. Hui, supplied all of the tools and equipment and paid all of the operating expenses (eg. fuel and telephone). These matters are not disputed by [Avery Enterprises]. [Mr. Cameron] had no opportunity for profit or risk of loss in the performance of his work because he was guaranteed an hourly rate of pay.
28. There is no error in the Determination. I find there is no basis in the *Act* for 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

29. Pursuant to section 115 of the *Act*, I order the Determination dated November 4, 2016, be confirmed in the amount of \$1,194.74, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal