

An appeal

- by -

Beautiworld Development Corporation  
(“Beautiworld”)

- 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.:** 2014A/155

**DATE OF DECISION:** January 29, 2015

## DECISION

### SUBMISSIONS

Allen Au

on behalf of Beautiworld Development Corporation

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Beautiworld Development Corporation (“Beautiworld”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 10, 2014.
2. The Determination found that Beautiworld had contravened Part 8, section 63 of the *Act* in respect of the termination of Andrew Tong (“Mr. Tong”) and ordered Beautiworld to pay Mr. Tong wages in the amount of \$10,222.44 and to pay an administrative penalty under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00. The total amount of the Determination is \$10,722.44.
3. This appeal alleges the Director failed to observe principles of natural justice in making the Determination and that evidence has become available that was not available when the Determination was being made.
4. In correspondence dated November 21, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that 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 Beautiworld, who has been given the opportunity to object to its completeness. On December 18, 2014, Beautiworld communicated with the Tribunal indicating there was no objection to the completeness of the “record”.
6. I have 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, the written submission filed with the appeal by Beautiworld, my review of the material that was before the Director when the Determination was being made and any additional material allowed to be introduced in support of the appeal. Under section 114(1) of the *Act*, 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 that subsection, 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 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*, Mr. Tong will, and the Director may, be invited to file further 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 will be dismissed. In this case, I am looking at whether there is a reasonable prospect the appeal will succeed.

## ISSUE

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

## THE FACTS

9. Beautiworld is a commercial and residential land development company. Mr. Tong was employed as a Financial Controller from September 1, 2006, to December 30, 2013, at a rate of pay of \$70,000.00 per annum.
10. Mr. Tong was terminated from Beautiworld in a letter from Au Bak Ling (“Lord Au”), a director and officer of Beautiworld, dated December 30, 2013, for what was described in the letter as “the wrongful act of sending CWB a copy of Zephyr loan agreement without my prior knowledge and approval as acceptable or excusable”. The facts leading to Mr. Tong’s termination are described in the reasons for Determination at pages R2 – R3, and are indicated in the Determination as not being in dispute. The termination letter describes Mr. Tong’s actions as a “deliberate attempt to torpedo the deal so as to undermine Ian who has succeeded in making the deal. . . . Your admitted wrongdoing is a breach of your fiduciary duties and would ruin the company if I did not have the financial prowess to finance the project”. The reference to “admitted wrongdoing” was in a December 19, 2013, communication from Mr. Tong to Lord Au in which he apologizes for “inadvertently” forgetting to seek Lord Au’s approval before sending CWB a copy of the Zephyr loan agreement. In the communication Mr. Tong refers to this action as a “mistake”, not a “wrongdoing”.
11. Mr. Tong filed a complaint with the Director, contending his employment had been terminated without cause and that Beautiworld had contravened the *Act* by failing to pay of length of service compensation.
12. In response to the complaint, Beautiworld said Mr. Tong had been terminated for cause, contending Mr. Tong having sent a copy of the Zephyr loan agreement to Canada Western Bank (“CWB”) was serious and wilful misconduct justifying summary dismissal. Beautiworld also argued the Mr. Tong’s misconduct in December 2013 was a recurrence of “work deficiencies” for which he had been warned in July of 2007 and for another matter that was said to demonstrate Mr. Tong had a previous history of being involved in a “power struggle with his superiors”. The Determination indicates that while Beautiworld had provided “a couple of examples of past performance concerns it had with Mr. Tong”, it was relying on the “single incident involving the release of the Zephyr loan agreement to CWB” as being sufficiently serious to justify his immediate dismissal.
13. The Director conducted a complaint hearing at which Mr. Tong appeared on his own behalf and gave evidence and Ian Renton (“Mr. Renton”), General Manager for Beautiworld, appeared to give evidence for the employer. The evidence provided to the Director by Mr. Tong and Beautiworld at the complaint hearing is summarized at pages R4 to R6 of the reasons for Determination. The Determination notes that

Mr. Renton “acknowledged there was no written formal policy that the financial controller must obtain approval prior to providing a lender with pertinent documents”.

14. Beautiworld argued the act of Mr. Tong having provided CWB with a copy of the Zephyr loan agreement was a serious breach of his fiduciary duty, a wilful breach of company policy, an intentional act committed for the purpose of ruining the loan application and a further attempt to discredit the efforts of Mr. Renton, who had been working on the loan for more than two years.
15. The Director found Mr. Tong’s providing a copy of the Zephyr loan agreement and responding to questions about it from a representative of CWB were part of his day-to-day duties as financial controller, that Mr. Tong had instructions from Mr. Renton to respond to CWB’s inquiries, had not been told to limit the scope of his responses to CWB and that it would have been impractical to obtain approval from Lord Au for every possible response to every inquiry made by CWB. The Director did not find Beautiworld’s arguments supported by evidence.
16. Based on all the evidence, including the absence of evidence, the Director found Beautiworld had not demonstrated Mr. Tong’s actions constituted serious wilful misconduct and found, consequently, Mr. Tong had not been terminated for just cause and was entitled to length of service compensation.

## **ARGUMENT**

17. In this appeal, Beautiworld submits the Director breached principles of natural justice in the Determination. The specifics of the breach are not provided in the appeal submission, but appear to be based upon a bias by the Director against Beautiworld and a failure to recognize that Mr. Tong’s conduct was a wilful breach of the confidentiality provisions and the prohibition against in-fighting in Beautiworld’s Staff Handbook.
18. Beautiworld argues evidence of the Director’s bias arises in two areas of the Determination: in section V of the reasons, the summary of the argument and evidence of the complainant, and in section VI of the reasons, the findings and analysis.
19. The appeal challenges the evidence attributed to Mr. Renton acknowledging the absence of any written policy requiring the financial controller to obtain approval before providing a lender with pertinent documents. The appeal submits that answer was wrong as the Staff Handbook stipulates such a prohibition. The appeal submission speculates Mr. Renton was answering whether there was a “stand-alone formal written policy governing such an issue”.
20. The appeal submission identifies other findings made by the Director that are challenged, arguing such findings are inconsistent with the evidence and raise a reasonable suspicion of bias by the Director. The argument suggests the Director was not given all of the communications between Mr. Tong and CWB concerning the Zephyr loan agreement and says Mr. Tong and CWB should be required to provide these documents.
21. Finally, the appeal submission makes the same allegations that were rejected by the Director relating to Mr. Tong’s motivation and intention.
22. Beautiworld has submitted the Staff Handbook with the appeal and seeks to have it included and considered in this decision.

## ANALYSIS

23. When considering an appeal under section 114 of the *Act*, the Tribunal looks at its relative merits, 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.
24. 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.*
25. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.
26. 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.
27. It is well established that 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. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
28. Beautiworld has not raised error of law as a ground of appeal although clearly this appeal cannot succeed unless I find the Director committed an error of law, either in the findings of fact or in the legal principles applicable to the issue of just cause under the *Act*. There is no indication in the appeal that the latter consideration is being advanced by Beautiworld in this appeal. I shall address the challenges to the findings of fact later in this decision.
29. Beautiworld has grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination.
30. Beautiworld alleges the Director demonstrated bias in favour of the Mr. Tong in making the Determination. Such an allegation must be proven on the evidence. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact:

. . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

31. An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.
32. In *R. V. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:
- Regardless of the precise words used to describe the test (of bias or apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the *personal* integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)
33. As well, the Tribunal has adopted the view that allegations of bias, as has been made here, must be considered in light of the fundamental nature of the statutory purposes and the complaint process within which a delegate of the Director functions.
34. It follows from all of the above that the burden of proving actual or a reasonable apprehension of bias is high and demands “clear and convincing” objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias.
35. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances would conclude the object of the allegation was biased against him. That burden has not been met; there is no clear objective evidence from which it can reasonably be found the Director was disposed to hold an adverse view of Beautiworld such that the Director’s ability to conduct a complaint hearing, analyze the evidence neutrally and render an impartial decision was compromised.
36. In other respects, there is nothing in the material that remotely suggests the Director failed to observe principles of natural justice in making the Determination. In the context of the complaint process conducted in this case, the notion of “natural justice” required the Director to ensure Beautiworld had the opportunity to know the case against it, give it a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way; see *Imperial Limousine Service Ltd.*, BC EST # D014/05. Those requirements substantially echo what is set out in section 77 of the *Act*. On any reasonable assessment of the “record”, Beautiworld had a full and fair opportunity to present its position to the Director. As indicated above, an appeal is an error correction process, with the burden being on the appellant to show a reviewable error was made by the Director in the Determination. The appeal process is not an opportunity for a disgruntled party to shore up what it perceives after the fact to be deficiencies in its initial presentation in an attempt to have its position fully re-examined by the Tribunal or another delegate of the Director.
37. This ground of appeal is not shown to have any merit and is rejected. The arguments made on this ground of appeal raise no valid natural justice concerns. In my view, the arguments represent nothing more than disagreement with findings and conclusions of fact made by the Director on the just cause issue.
38. That view is reinforced by a consideration of the other ground of appeal advanced by Beautiworld, which is that evidence has become available that was not reasonably available when the Determination was being made. This is colloquially referred to as the “new evidence” ground of appeal.
39. The admission of “new evidence” is discretionary. 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.

40. In this appeal, the only “new evidence” submitted by Beautiworld is a copy of the Staff Handbook. There is other evidence, several of the exhibits from the complaint hearing, attached to the appeal form, but it is unnecessary to consider whether those documents should be considered in this appeal as “new evidence” as they are already included in the “record”.
41. As for the Staff Handbook, I do not accept it as “new evidence”. There are three reasons for this decision. First, the Staff Handbook is not “new”; it existed at the time the Determination was being made and could have been provided to the Director at any time during the complaint process. Second, Beautiworld is seeking to use the Staff Handbook to impugn evidence provided to the Director by its own representative at the complaint hearing, Mr. Renton. That is inappropriate. Third, the proposed evidence adds nothing to the evidence that was already before the Director, which was that Mr. Tong had made a mistake by providing the Zephyr loan agreement to CWB but, in his defence, he was only performing duties required of him as the Financial Controller. In the face of that evidence and the findings made by the Director on that evidence, I do not consider the proposed evidence to be probative.
42. As a result of this “new evidence” failing to satisfy the requirements for being admitted in this appeal, Beautiworld is left with an appeal that challenges findings of fact. As indicated above, an appeal that challenges findings of fact must demonstrate those findings raise an error of law. Beautiworld has not met the test of establishing an error of law on this basis. There is no error of law in the findings of fact made by the Director. The findings and the conclusion of the Director are rationally grounded in the evidence, which taken as a whole, showed the conduct of Mr. Tong did not show serious willful misconduct inconsistent with the continuation of his employment.
43. The insurmountable problem for Beautiworld with its appeal is that it would require the Tribunal to interfere with findings and conclusions of fact made by the Director without there being any error of law in respect of those facts being demonstrated in the appeal. As indicated above, the authority of the Tribunal in respect of appeals challenging findings of fact or seeking to have the Tribunal re-visit and alter findings of fact is limited. Accordingly, the Tribunal defers to the findings of fact made by the Director in this case.
44. There is no merit in this ground of appeal.
45. In sum, on an assessment of this appeal I am satisfied it has no presumptive merit and 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.

**ORDER**

46. Pursuant to subsection 115 of the *Act*, I order the Determination dated October 10, 2014, be confirmed in the amount of \$10,722.44 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**