

An appeal

- by -

Gareth Bennett  
("Mr. Bennett")

- 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/152

**DATE OF DECISION:** February 3, 2015

## DECISION

### SUBMISSIONS

Gareth Bennett

on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Gareth Bennett (“Mr. Bennett”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 28, 2014.
2. The Determination was made in respect of a complaint filed by Mr. Bennett who alleged his former employer, AlSCO Canada Corporation (“AlSCO”), had contravened the *Act* by failing to pay overtime wages and statutory holiday pay.
3. The Determination found AlSCO had not contravened the *Act*, no wages were outstanding and no further action would be taken.
4. Mr. Bennett 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.
5. In correspondence dated November 18, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
6. The section 112(5) “record” (the “record”) has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Bennett and he has been given the opportunity to object to its completeness. Mr. Bennett has not objected to the completeness of the “record” but says there is a substantial part of it that was not provided to him. There has, however, been no objection to the completeness of the “record” and the Tribunal accepts it as complete.
7. 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 and written submission made on behalf of Mr. Bennett and my review of the “record” 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 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;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

8. 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*, AlSCO 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.

## ISSUE

9. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

## THE FACTS

10. AlSCO runs a uniform and laundry services business. Mr. Bennett was employed as a sales consultant from April 13, 2009, to February 28, 2014, at a rate of \$1,250.00 a month plus commission. Following the termination of his employment with AlSCO, Mr. Bennett filed a complaint with the Director making several claims, which were eventually limited to a claim for overtime wages and statutory holiday pay.
11. Mr. Bennett claimed he was required to work weekends and evenings during his employment, had worked at weekend trade shows and attended after hours meeting with clients. He claimed he had worked at least 10 additional hours a week and an additional 43.3 hours a month in the last six months of his employment. He claimed he had worked Family Day 2014, Remembrance Day 2013, Thanksgiving Day 2013 and Labour Day 2013.
12. Mr. Bennett did not keep a record of his hours and did not submit information to the Director in regards to the overtime hours he claimed. Meetings and telephone calls with clients were recorded in the sales tracking system as having been done during the week.
13. The Director conducted a complaint hearing. Mr. Bennett testified on his own behalf.
14. AlSCO presented several witnesses at the complaint hearing. Tim Harmer, General Manager of the Vancouver region, testified he had no knowledge of Mr. Bennett having worked weekends, statutory holidays or evenings.
15. Will Krebs, Regional Sales Manager for the Vancouver region, testified Mr. Bennett would routinely ensure he had been paid correctly and was also not aware of Mr. Bennett performing work outside regular working hours, except on one occasion. He introduced records of a software program that kept track of Mr. Bennett's, and other sales person's, work and of Mr. Bennett's weekly activities reports. This information showed only one occasion where Mr. Bennett had worked outside of regular office hours.
16. Kerry O'Neill, Regional Human Resources Manager, testified she had never heard of any clients with whom Mr. Bennett had dealt outside of regular working hours.
17. Christina Shah and Tim Guest, Sales Consultants for the Vancouver region, both testified about their hours of work and of receiving compensation for extra hours of work.
18. The Director found there was no evidence showing AlSCO was ever made aware Mr. Bennett was working hours in addition to his regular scheduled hours and, except for one occasion on January 15, 2014, no

evidence that he had ever worked outside of regular hours. The Director found Mr. Bennett was paid for January 15, 2014.

19. The Director found that if Mr. Bennett was working outside of regular hours, there was no evidence that AlSCO directly or indirectly allowed him to work those hours. Mr. Bennett did not present any record of hours or evidence of trade shows or regional meetings where he had worked overtime in the last six months of his employment. He provided no evidence of having worked the statutory holidays for which he claimed payment.
20. In the absence of evidence establishing entitlement to the claims made, the complaint was dismissed.

## ARGUMENT

21. Mr. Bennett relies on the error of law and “natural justice” grounds in this appeal. He submits that all those who testified on behalf of AlSCO lied. He re-asserts he worked trade shows without compensation.
22. He claims all of his evidence is located on his “old company Blackberry phone”, which can be provided to the Tribunal for viewing if requested. He says attempts to access his software program for evidence were unsuccessful and “it seems it had been deleted”. He says this circumstance is evidence that AlSCO was aware of his allegations and took steps to delete proof of what he claimed.

## ANALYSIS

23. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at relative merits of an appeal, 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. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal. More particularly, a party alleging a breach of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
26. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such 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 they are without any rational foundation.

27. Mr. Bennett has grounded this appeal in an allegation that the Director committed an error of law. 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.

28. The Tribunal has also recognized that a failure to observe principles of natural justice is a species of error of law: see *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03.

29. Nowhere in this appeal is the alleged error of law identified or argued and on my assessment no error of law exists unless it can be said to arise in the context of the “natural justice” ground of appeal.

30. In respect of that ground of appeal, it appears to be based on no more than Mr. Bennett’s view that all of the witnesses for Also lied and that Also deleted information that would have proven his claim.

31. In fairness to Mr. Bennett, as he is a lay person, his appeal fails to capture what this ground of appeal entails on the facts of this case. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

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)

32. It is clear Mr. Bennett was afforded the procedural rights contemplated by the above statement; procedural rights, I note, that are also statutorily protected by section 77 of the *Act*.

33. Even though I appreciate Mr. Bennett considers the result to be tainted, he has simply made bald assertions to that effect; assertions that are unsupported by any objectively cogent evidence. More particularly, he has not even come close to satisfying the burden of showing the result of the Determination is tainted by a failure on the Director’s part to observe principles of natural justice. On its face, the Determination is reasonably grounded in evidence that the Director was provided during the complaint hearing and which the Director was entitled to accept and rely on.

34. Having said that, the matter at issue here for Mr. Bennett does not relate to natural justice at all, but as indicated above, to his disagreement with the result. It is apparent that Mr. Bennett is seeking to have the

Tribunal ignore the result of the Director's complaint process and revisit his claim, engaging in an independent investigation and fact finding process.

35. The Determination was grounded in findings of fact made by the Director. Mr. Bennett has not shown any reviewable error has been made in respect of those facts. As indicated above, however, the statutory grounds of appeal in section 112 do not authorize the Tribunal to consider appeals that challenge findings of fact unless those findings are shown to be an error of law and that has not been done here.
36. Mr. Bennett says there is evidence of his claim on his "old company Blackberry phone". If that is so, and there is no evidence supporting this assertion anywhere, that evidence could have, and should have, been provided to the Director during the complaint process. For that reason, the Tribunal would not allow that information to be submitted with an appeal and would certainly not accept the assertions contained in the appeal to form the basis for a fact finding process by the Tribunal. As well, at its core, this submission smacks of the kind of approach consistently rejected by the Tribunal, where, subsequent to an unfavourable Determination, a dissatisfied party submits an appeal seeking to rely on evidence that could have, and should, have been presented to the Director during the complaint process: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
37. Finally, in the circumstances I am not concerned that Mr. Bennett did not receive the documents sent to him in an Xpresspost package before the complaint hearing. Mr. Bennett was made aware the documents existed through communications from the Director. He has not denied the Director went over the material submitted by each party at the outset of the complaint hearing and Mr. Bennett did not indicate he had not received this material. In any event, Mr. Bennett has given no indication in his appeal submissions how this material would have advanced or supported his claims at all or how it denied him the opportunity to present his claims to the Director. Mr. Bennett had received AlSCO's submission and much of their material before the complaint hearing and knew exactly what their position would be at that hearing.
38. The appeal has no basis, no merit and no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
39. I dismiss the appeal and confirm the Determination.

## ORDER

40. Pursuant to section 115 of the *Act*, I order the Determination dated October 28, 2014, be confirmed.

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