

An appeal

- by -

G.W. Cox & Sons Logging Ltd.
(“G.W. Cox & Sons”)

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/179

DATE OF DECISION: February 14, 2012

DECISION

SUBMISSIONS

Stewart Carstairs	on behalf of G.W. Cox & Sons Logging Ltd.
Brian Hill	on his own behalf
Robert D. Krell	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by G.W. Cox & Sons Logging Ltd (“G.W. Cox & Sons”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 4, 2011.
2. The Determination was made in respect of complaints filed by Brian A. Hill (“Mr. Hill”) and Brian L. Pedersen (“Mr. Pedersen”), who alleged G.W. Cox & Sons had contravened the *Act* by failing to pay overtime wages and length of service compensation.
3. The claim for length of service compensation was resolved without a Determination being issued. The claims for overtime wages were disputed and a Determination on those claims was issued. The Director found G.W. Cox & Sons had contravened Part 1, section 18 of the *Act* in respect of Mr. Hill and Mr. Pedersen and ordered G.W. Cox & Sons to pay an amount of \$9,844.77, an amount which included wages and interest.
4. The Director also imposed an administrative penalty on G.W. Cox & Sons under Section 29(1) of the *Employment Standards Regulation* (“the *Regulation*”) in the amount of \$500.00.
5. The total amount of the Determination is \$10,344.77.
6. G.W. Cox & Sons has appealed only that part of the Determination relating to Mr. Hill. In the appeal, G.W. Cox & Sons says the Director erred in law in not finding Mr. Hill was a manager under the *Act* and exempted from its overtime provisions. While the “new evidence” ground of appeal is not formally raised, G.W. Cox & Sons has provided a considerable amount of material that was not provided to the Director during the complaint investigation. G.W. Cox & Sons seeks to have the Determination as it applies to Mr. Hill cancelled.
7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

ISSUE

8. The substantive issue in this appeal is whether G.W. Cox & Sons is able to show the Director made any error in law in making the Determination. The answer on this issue is strongly linked to whether the Tribunal will accept the evidence and argument that has been submitted with the appeal.

THE FACTS

9. The Determination sets out the facts that were before the Director concerning Mr. Hill's claim. Briefly, Mr. Hill claimed he had been employed by G.W. Cox & Sons from February 13, 2008, until January 11, 2011. Following his termination, he claimed overtime wages and entitlement to length of service compensation. The claim for length of service compensation was settled between the parties. G.W. Cox & Sons resisted Mr. Hill's claim for overtime, alleging he was a "manager" and therefore excluded from the provisions in Part 4 of the *Act*.
10. The Determination indicates that, notwithstanding "numerous requests" to both G.W. Cox & Sons and their lawyers to provide the Director with information and reasons for their position respecting Mr. Hill's status under the *Act*, no such information or reasons were provided. The Determination refers to a letter dated September 29, 2011, sent to G.W. Cox & Sons, and copied to their lawyers, advising that if G.W. Cox & Sons failed to provide reasons showing Mr. Hill's employment was exempt from the overtime provisions of the *Act*, a Determination would be issued finding overtime was owed. A copy of that letter is included in the section 112(5) "record".
11. The appeal makes the same assertion concerning Mr. Hill's status under the *Act*. It also includes assertions respecting what are said to be Mr. Hill's "managerial duties" and includes a number of documents that were not provided to the Director before the Determination was made.

ARGUMENT

12. The initial appeal submission alleges Mr. Hill performed "managerial duties" that included reviewing time cards, filling out the daily "Pre-work Plan", instructing employees on "what to do and where to work each day" and providing on-site safety training to employees". The appeal submission argues that Mr. Hill was identified as a manager by other employees and as a "supervisor" on a sign located at the head of the camp wharf. The documents submitted with the appeal are said to support the submission regarding his status under the *Act*.
13. The appeal submission says the "limited participation" of G.W. Cox & Sons in the complaint investigation process was attributable to the company no longer being in business, its principal having moved to "a very remote location" and the company records having been moved to a new location and not being organized.
14. The Director and Mr. Hill have filed replies to the appeal.
15. The Director says G.W. Cox & Sons was provided ample opportunity to make its case that Mr. Hill was a "manager" under the *Act* and exempted from its overtime provisions, but failed to provide any information in that respect despite being warned of the consequences of their failure to do so. The Director says the reasons provided for failing to respond are not persuasive when considered against the efforts made to have G.W. Cox & Sons provide information in support of their position on Mr. Hill over an extended period of time. The Director says at no time during the complaint investigation did G.W. Cox & Sons or its lawyers

indicate there was problem retrieving records or that more time was required to respond to Mr. Hill's complaint.

16. Mr. Hill submits he was not a Manager/Supervisor; he says his job was to run a processing machine and he could not do that and supervise employees as well. He says he had no authority to hire, fire or reprimand employees, was not allowed to speak with employees of other contractors and was not involved in any planning on how the logging performed by G.W. Cox & Sons should be done. He acknowledges he took a supervisor course, but it did not result in any change to his position; he continued to be a process operator until he was terminated. He agrees he filled out paperwork, primarily relating to his own position, and occasionally was asked to write a report on what had taken place in camp that day. He says some of the information provided with the appeal doesn't pertain to him or the job he was actually doing and other information provided was not exclusive to him but could also relate to what was done by other employees.
17. In their final reply, G.W. Cox & Sons has made further submissions, provided additional documents and provided further information on their position.

ANALYSIS

18. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 made.*

19. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied.
20. 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.
21. An appeal to the Tribunal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.
22. There are three things that militate against this appeal.
23. First, as indicated above, while this appeal is not specifically grounded in "new evidence", G.W. Cox & Sons has substantially grounded this appeal on evidence that was not provided to the Director prior to the Determination being made. To reiterate, G.W. Cox & Sons provided no evidence, or argument, during the complaint process supporting their position that Mr. Hill's employment was excluded from the overtime provisions of the *Act*, even though there was ample opportunity and they were specifically invited to do so by the Director.

24. The Tribunal is given discretion to accept or refuse new or additional evidence. 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 or additional 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: see *Merilus, supra*.
25. It is apparent the material sought to be submitted with the appeal was reasonably available at the time the Determination was being made and could have been provided to the Director during the complaint process. On that basis alone it will not be accepted or considered. As well, I am not satisfied the material is sufficiently probative to be accepted and considered.
26. I do not accept the excuse given in the appeal submission for G.W. Cox & Sons not providing any submission or evidence on their position concerning Mr. Hill's status. I note that once the Determination was issued the argument and supporting material for the appeal was assembled quickly. The Determination was issued November 4, 2011; the appeal was delivered to the Tribunal on December 9, 2011. The appeal submission contains evidence and documents that were not provided to the Director. It also indicates other documents were "in transit" from G.W. Cox & Sons to their lawyers. I also note that in their final response, received by the Tribunal on January 26, 2012, G.W. Cox & Sons was able to assemble and provide additional documents that responded to Mr. Hill's submission of January 4, 2012. This apparent ability to acquire and deliver argument and material within a relatively short period of time belies the excuses given for failing to provide that argument and material before the Determination was issued.
27. The effect of this conclusion means there continues to be no evidence going to the question of Mr. Hill's status under the *Act*.
28. Second, having failed or refused to participate in the complaint process and ignored the Director's efforts to have them provide and support their position on Mr. Hill, to allow G.W. Cox & Sons to raise this issue and to enter and argue "new" evidence at this stage would be inconsistent with the objects and purposes of the *Act* and fly in the face of the long standing approach by the Tribunal to such attempts in similar circumstances: see *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97.
29. Third, the burden in this case is on G.W. Cox & Sons. That burden not only requires them to provide evidence showing the Director committed an error of law but also to show that Mr. Hill is excluded from the protection of the *Act* or any part of it; there must be clear evidence justifying that conclusion. While the burden will, in many cases, be demonstrated on the same argument and evidence that is not the case here. In this case, the Director did not decide Mr. Hill was not a manager under the *Act*; the Director decided he was an employee whose employment was protected by the provisions found in Part 4 of the *Act*. As the Director correctly points out in the response to this appeal, all employees, except those shown to be excluded by the *Regulation*, are entitled to the minimum standards found in the *Act*. In this case, there was no evidence on which the Director could have excluded Mr. Hill from the overtime provisions in Part 4. Bearing in mind the definition of error of law adopted by the Tribunal – see *Britco Structures Ltd.*, BC EST # D260/03 – G.W. Cox & Sons has failed to meet the burden of showing the Director made an error in law in deciding, from the material available, that Mr. Hill was an employee whose employment was governed, in part, by Part 4 of the *Act*.

30. In any event, even if I accepted the material submitted with the appeal, I am not persuaded this material shows Mr. Hill was a manager as that term is defined in the *Act*. In *Howe Holdings Ltd.*, BC EST # D131/04, the Tribunal re-examined the definition of manager in the *Regulation* in light of amendments to that definition in November 2002 and confirmed that a conclusion about whether a person's employment fell within the definition:

. . . depends on a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party: see *Director of Employment Standards (Re Amelia Street Bistro)*, BC EST #D479/97.

31. The material provided in the appeal falls far short of being the kind of clear evidence that would be sufficient to show Mr. Hill's "primary employment duties" consisted of supervising and/or directing other employees.

32. For the above reasons, the appeal fails.

ORDER

33. Pursuant to Section 115, I order the Determination dated November 4, 2011, be confirmed in the amount of \$10,344.77, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal