Employment Standards TRIBUNAL

Appeals

- by -

Sean Good
("Mr. Good")

- and -

Robert J. Kehler
("Mr. Kehler")

- 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/18 and 2014A/19

DATE OF DECISION: April 1, 2014

DECISION

SUBMISSIONS

Sean Good	on his own behalf
Robert J. Kehler	on his own behalf

OVERVIEW

1. This decision addresses appeals filed by Sean Good ("Mr. Good") and Robert J. Kehler ("Mr. Kehler") made under section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 23, 2013.

2. The Determination was made in respect of complaints filed by Mr. Good, Mr. Kehler, and one other former employee of Grizzly Holdings Inc. ("Grizzly"), all of who alleged Grizzly had contravened the *Act* by failing to pay wages owed to them.

3. The Determination found Grizzly had contravened Part 3, sections 17 and 28, Part 4, section 40, Part 5, section 46 and Part 7, section 58 of the *Act*, that the three complainants were entitled to wages totalling $112,741.27, an amount that included interest under section 88 of the *Act*. Of the total wages, Mr. Good was found to be owed wages, and interest, in the amount of $17,483.68 and Mr. Kehler was found to be owed wages, and interest, in the amount of $16,931.12.

4. The Director also imposed administrative penalties on Grizzly in the amount of $2,500.00. The total amount of the Determination is $115,241.27.

5. Mr. Good and Mr. Kehler have filed appeals of the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. While the appeals have been filed separately by Mr. Good and Mr. Kehler, their content is identical. It is appropriate to consider the appeals together.

6. In correspondence dated February 3, 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.

7. The section 112(5) "record" has been provided to the Tribunal by the Director and a copy has been delivered to the Appellants. The Appellants have been given the opportunity to object to the completeness of the section 112(5) "record". There has been no objection and, accordingly, the Tribunal accepts it as complete.

8. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing these appeals based solely on the Determination, the appeals and written submissions made on behalf of Mr. Good and Mr. Kehler, and my review of the section 112(5) "record" that was before the Director when the Determination was being made. Under section 114(1), 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 period;*
>
> *(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.*

9. If satisfied the appeals or a part of them have some presumptive merit and should not be dismissed under section 114(1), Grizzly will, and the Director may, be invited to file further submissions. On the other hand, if it is found either or both of the appeals satisfy any of the criteria set out in section 114(1) of the *Act*, they will be dismissed.

ISSUE

10. In the circumstances, the issue at this stage of the appeal is whether there is any reasonable prospect the appeals will succeed.

THE FACTS

11. Grizzly operated a gold mine located on the Hyland River, Liard Mining District of British Columbia (the "Hyland River Claim"). The background and the findings relevant to this appeal are set out in the Determination.

12. Glenn A. Good, Dean Capstick, and Robert McPherson were business partners in a gold mining project on the Hyland River Claim. Glenn A. Good, Mr. Good's father, acted as project manager and liaison to obtain various mining rights and permits. He also directed and supervised the workers. Dean Capstick supervised and supported Glenn A. Good, and provided labour and equipment.

13. Grizzly arrived at the Hyland River Claim on June 15, 2011. Glenn A. Good, Mr. Good, and Mr. Kehler set up camp, repaired older mining equipment and built roads. It was expected mining would commence at the Hyland River Claim on August 22, 2011, but the mining activities were delayed.

14. When mining did commence, it did not progress as expected. There were cost over-runs, allegations of poor management, lack of funds and no tangible returns, resulting in a strained relationship between Glenn A. Good and Dean Capstick and, ultimately, a falling out between those persons with Dean Capstick and his brother Ward Capstick leaving the Hyland River Claim.

15. Glenn A. Good stayed and kept the mining project operational for the rest of the 2011 season. Mining stopped sometime in October and "gold clean-up" activities started and continued until November 25, 2011. Mr. Good and Mr. Kehler, and the other person, stayed and worked at the Hyland River Claim until November 25, 2011.

16. Mr. Good and Mr. Kehler, and the other person, filed complaints with the Director in January 2012. The Director conducted an investigation resulting in the Determination under appeal here.

17. The Director noted there were two issues: were Mr. Good and Mr. Kehler (and the other complainant) employees under the *Act*; and, if so, was Grizzly liable for wages.

18. The Director found all three complainants, including Mr. Good and Mr. Kehler, were employees of Grizzly under the *Act*. The finding is not appealed by any party and need not be addressed any further in this decision.

19. The Director found all the employees were entitled to wages. There were questions about hours of work and rate of pay for Mr. Good and Mr. Kehler.

20. In respect of hours of work, Mr. Good claimed he worked seven days a week, 10 hours a day for the duration of the project, with the exception of four consecutive days off. Mr. Kehler claimed he worked seven days a week, twelve hours a day for the duration of the project, with the exception of two days missed due to injury. None of Grizzly, Mr. Good or Mr. Kehler kept a record of hours worked. The third employee kept a daily record. Glenn A. Good corroborated the claims of Mr. Good and Mr. Kehler concerning the hours worked and indicated both those employees would have worked similar hours to the third employee. Dean Capstick and Ward Capstick did not contest Mr. Good's hours of work claim.

21. The Director accepted, on the available evidence that Mr. Good had worked seven days a week, 10 hours a day for the duration of his employment with Grizzly, less the four days he took off. The Director accepted Mr. Kehler had worked seven days a week, twelve hours a day for the duration of his employment with Grizzly, less the two days he was absent due to injury.

22. Mr. Good claimed he had been hired at a rate of $3,750.00 a week. In respect of this claim, the Determination states, at page R6:

> Sean Good stated Grizzly promised to pay him $3.750.00 per week. However, this evidence is in conflict with Grizzly's evidence. Dean Capstick said Sean Good was not employed at $3,750.00 per week, and Glenn Good stated he had no discussion with Sean Good about a rate of pay. Sean Good provided no corroborating evidence to establish a rate of pay of $3,750.00 per week. I find there is insufficient evidence to establish Sean Good's assertion concerning the rate of pay.

23. I also note at this point the position Grizzly, through Dean Capstick, took in response to Mr. Good's claim was that he was a contractor hired by Glenn A. Good, was not an employee of Grizzly and was the personal responsibility of Glenn A. Good.

24. Mr. Kehler claimed his rate of pay was set by Glenn A. Good at $3,670.00 per week, plus $800.00 per month living out expenses. Grizzly claimed Mr. Kehler was an independent contractor engaged at a rate of $2,500.00 per month. The Director rejected the argument by Grizzly that Mr. Kehler was an independent contractor, but found evidence supporting Grizzly's assertion that Mr. Kehler's rate of pay was $2,500.00 a month. The Director found this wage rate did not meet the minimum wage requirements of the *Act*.

25. As there was no evidence establishing the wages rates claimed by Mr. Good and Mr. Kehler, the Director applied the default position under the *Act*, the minimum wage rate, and calculated the wages owed to Mr. Good and Mr. Kehler on that wage rate.

26. The Director also found Mr. Good and Mr. Kehler entitled to statutory holiday pay for four statutory holidays that occurred during their employment with Grizzly, but found they had not qualified for the Canada Day statutory holiday. The findings relating to statutory holiday pay entitlement are not appealed, except as they might be affected by any variance of the wage rate.

ARGUMENT

27. Mr. Good and Mr. Kehler have both grounded their appeals in an alleged failure by the Director to observe principles of natural justice in making the Determination. Each argues from the award made in respect of the third employee, submitting all of the employees were "of an equal qualification experience and expertise level in different areas" and an award to the third employee that recognized what he had been promised verbally while they received the minimum wage rate on their claims was unjust and inconceivable.

28. They submit that, as they were hired before the third employee, it is "not believable" he would be hired at a different rate than what they had been hired at. They submit the "rate they were promised verbally", and what the third employee was awarded, "is in line with the BC Labour rate guideline for our level of expertise". The last part of this submission appears to be based on evidence and argument that was not made to the Director during the complaint process.

29. They assert Dean Capstick, "in numerous different conversations" during the summer said they would be compensated "fairly" for the work and time, taking into account the location and working conditions. This assertion also appears to be new and not made to the Director during the complaint process.

30. There are other submissions made by Mr. Good and Mr. Kehler, but as I view them, none go to the matter of their wage rate. Rather they speak of Dean Capstick's father being on the site, their understanding of the partnership arrangement of the Hyland River Claim and an apparent alteration of that arrangement by Dean Capstick.

ANALYSIS

31. When considering whether an appeal has any reasonable prospect of succeeding, the Tribunal looks at the 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.

32. 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.*

33. 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.

34. 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.

35. These appeals are grounded in claims that the Director failed to observe principles of natural justice in making the Determination. Mr. Good and Mr. Kehler submit the decision of the Director to award wages calculated on minimum wage is an unfair and unjust result.

36. In fairness to Mr. Good and Mr. Kehler, as they are lay persons, their submissions do not capture what this ground of appeal entails. 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.

37. It is clear Mr. Good and Mr. Kehler were afforded the procedural rights contemplated by the above statement; procedural rights, I note, that are also statutorily protected by section 77 of the *Act*.

38. Even though I appreciate Mr. Good and Mr. Kehler consider the result to be unjust, they have not demonstrated that result is tainted by a failure on the Director's part to observe principles of natural justice. The decision on the wage rates for Mr. Good and Mr. Kehler is perfectly consistent with the responsibility of the Director to the requirements of the *Act* in circumstances where an agreed on wage rate cannot be found. The Director is not allowed to simply speculate about what the wage rate might have been if the parties had turned their minds to it and expressed it in some way that was objectively evident.

39. Having said that, the matter at issue here for Mr. Good and Mr. Kehler does not relate to natural justice at all, but as indicated above, to Mr. Good's and Mr. Kehler's disagreement with how the wage rate for an employee is established when the evidence does not support the wage rate claimed by the employee or shows a different wage rate that what is asserted. It is apparent, Mr. Good and Mr. Kehler are seeking to have the Tribunal take a different and "more fair and just" view of the facts and alter the findings of the Director on the wage rates to arrive at an amount they believe would be more consonant with a "fair" wage for their work with Grizzly.

40. The decisions by the Director that there was insufficient evidence to establish Mr. Good's assertions concerning his rate of pay and, in respect of Mr. Kehler, that the evidence supported Grizzly's assertion of the wage rate for Mr. Kehler were findings of fact based on the available evidence. As noted, the Director made no error in using the minimum wage rate in the *Act* as the default position.

41. 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.

42. The appeal arguments by Mr. Good and Mr. Kehler have, in some respects, sought to introduce facts into these appeals that are not in the "record" and apparently were not provided to the Director during the complaint process. While the "new evidence" ground of appeal has not been advanced by Mr. Good and

Mr. Kehler, it is nonetheless worth analyzing the elements of this ground for the purpose of showing it would not, in any event, have assisted them with their appeals.

43. The Tribunal has established that appeals based on "new evidence" require an appellant to, at a minimum, demonstrate 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. All of the foregoing conditions must be satisfied before "new evidence" will be admitted into an appeal. In my view, the "new evidence" which is expressed in these appeals was reasonably capable of being provided during the complaint process. I do not consider the assertions made to be *shown* to be capable of belief – the "new evidence" simply comprises statements unsupported in the appeals by any objectively valid evidence – and is not particularly probative to the issue of their wage rate. In short, this "new evidence" does not meet the requirements of this ground of appeal and would not be considered.

44. In sum, an assessment of these appeals shows they have no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to them.

45. I dismiss the appeals and confirm the Determination.

ORDER

46. Pursuant to section 115 of the *Act*, I order the Determination dated December 23, 2013, be confirmed in the amount of $115,241.27, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal