

An appeal

- by -

Zeal Contracting Inc.  
(“Zeal”)

- 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.:** 2017A/12

**DATE OF DECISION:** March 22, 2017

## DECISION

### SUBMISSIONS

Rod MacDonald

on behalf of Zeal Contracting Inc.

### OVERVIEW

1. Zeal Contracting Inc. (“Zeal”) has filed an appeal 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 14, 2016. The appeal included an application for an extension of the statutory appeal period in order to provide Zeal an opportunity to seek written reasons for the Determination from the Director and submit those reasons to the Tribunal
2. The Determination found Zeal had contravened Part 3, section 18 of the *Act* in respect of the employment of John David MacDougall (“Mr. MacDougall”) and section 46 of the *Employment Standards Regulation* (the “Regulation”) and ordered Zeal to pay Mr. MacDougall wages, including concomitant annual vacation pay and interest, in the amount of \$3,449.80 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$4,449.80.
3. This appeal is grounded in new evidence becoming available that was not available at the time the Determination was made. Zeal seeks to have the Determination referred back to the Director.
4. In correspondence dated January 25, 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. The correspondence also acknowledged the request for an extension of time to produce additional documents and gave Zeal until February 8, 2017, to submit the written reasons for the Determination, argument supporting the grounds of appeal and any additional documents supporting the appeal.
5. On February 8, 2017, Zeal communicated with the Tribunal, requesting another extension of one week. On February 17, 2017, a further extension of the appeal period, to February 21, 2017, was requested. The requested extensions were granted by the Tribunal.
6. On February 21, the Tribunal was provided with the written reasons for Determination, Zeal’s written submission on the appeal and a copy of an e-mail delivered on February 17, 2017, to Rod MacDonald, the sole listed director of Zeal and its representative in this appeal. Mr. McDonald seeks to include the e-mail as new evidence in this appeal.
7. 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, 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.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Zeal 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 can succeed.

### **ISSUE**

9. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

### **THE FACTS**

10. Mr. MacDougall was employed by Zeal as a carpenter from February 16, 2016, to August 12, 2016, at a rate of \$30.00 an hour. Mr. MacDougall terminated his own employment on the latter date. He filed a complaint with the Director alleging he had not been paid wages earned in the period from July 31, 2016, to August 12, 2016. He claimed wages for 64.5 hours worked.
11. The Director communicated with Zeal, whose response to the complaint was to suggest Mr. MacDougall was not an employee of Zeal but an independent contractor. The extent of material provided by Zeal was an “invoice” from Mr. MacDougall and two emails from persons stating they were “employed” as independent contractors when working for Zeal in 2016.
12. The Director conducted a complaint hearing. No representative for Zeal attended the complaint hearing. Zeal had provided some evidence prior to the complaint hearing and this evidence was reviewed and considered by the Director.
13. The Director found Mr. MacDougall was an employee under the *Act*, that Zeal had not paid all wages earned and payable and that Mr. MacDougall was entitled to wages in the amount shown in the Determination.

### **ARGUMENT**

14. I do not intend to provide an extensive review of the submissions made by Zeal in this appeal. It suffices to say the submissions do not address the basis for the Determination – that Mr. MacDougall was an employee of Zeal and entitled to wages that were earned and payable to him as an employee – but rather raises a matter that was not raised by Zeal during the complaint process as a possible basis for denying Mr. MacDougall’s claim, and is completely irrelevant to his entitlement under the *Act* to wages for work performed as an employee.

## ANALYSIS

15. 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.*
16. 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.
17. 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.
18. 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.
19. Zeal 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.
20. 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*.
21. I find this evidence does not meet the considerations for accepting and considering new evidence.
22. 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. It adds nothing to the position taken by Zeal in response to the complaint, which was that Mr. MacDougall had contracted with Zeal as an independent contractor, a position that was rejected by the Director on an application of the evidence to the relevant statutory provisions.

23. The proposed new evidence is neither relevant nor probative. It is, in fact, totally irrelevant to Mr. MacDougall's entitlements under the *Act*. Lastly, I am not convinced this evidence, if indeed it can be called "evidence", is credible.
24. This ground of appeal is without merit and is denied.
25. Finally, I note that Zeal, although informed and aware of the complaint hearing, refused or failed to attend and present its case fully to the Director. This failure mitigates heavily against any attempt on the part of Zeal to re-visit the complaint in an appeal, applying the principle established by the Tribunal in *Tri West Tractor*, BC EST # D268/96, and *Kaiser Stables*, BC EST # D058/97.
26. This appeal is entirely devoid of merit. 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) (b) and (f) of the *Act*.

### **ORDER**

27. Pursuant to section 115 of the *Act*, I order the Determination dated December 14, 2016, be confirmed in the amount of \$4,449.80, together with any interest that has accrued under section 88 of the *Act*.

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