

An appeal

- by -

398810 B.C. Ltd. carrying on business as TravelTyme R.V. World  
(the “Appellant”)

- 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:** Robert C.P. Walker

**FILE No.:** 2013A/3

**DATE OF DECISION:** March 22, 2013

## DECISION

### REPRESENTATIVES

Dennis Bigham on behalf of 398810 B.C. Ltd. carrying on business as  
TravelTyme R.V. World

Jennifer Redekop on behalf of the Director of Employment Standards

### INTRODUCTION:

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) 398810 B.C. Ltd. carrying on business as TravelTyme R.V. World (the “Appellant”) has filed an appeal of a determination issued on December 18, 2012, (the “Determination”) by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”). The delegate held that the Appellant was liable to pay Jonathan Andow, a previous employee, the sum of \$10,754.28 as compensation for length of service under section 63 of the *Act* together with accrued interest. A mandatory administrative penalty of \$500.00 was also imposed for failure to pay the length of service compensation.
2. In the Reasons for the Determination the Director held, contrary to arguments of the Appellant, that Jonathan Andow had been temporarily laid off rather than being formally terminated as of November 30, 2011. The Director determined the date of termination to be March 1, 2012.
3. The Appellant’s Appeal Form dated January 25, 2013, states two grounds of appeal. Firstly the Appellant submits that the Director failed to observe the principles of natural justice in making the Determination. Secondly, it submits that evidence has become available that was not available at the time the Determination was being made. In this Decision I will deal with the issues surrounding the new evidence first because submissions made by the Appellant regarding the failure to observe the principles of natural justice include reference to, and the importance of, the new evidence. The Appellant requests that the Tribunal cancels the Determination.
4. Section 114(1) of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) permit the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have determined that this matter may be decided based on the Determination, Reasons for the Determination, the Appellant’s written submissions and my review of the section 112(5) “record” that was before the Director.

### BACKGROUND FACTS

5. Jonathan Andow commenced employment in recreational vehicle sales with 661877 B.C. Ltd. on August 10, 2002. The company did business under the name TravelTyme R.V. World. Throughout his employment he and other employees were laid off from time to time during winter months because of business slowdown. In recent years the business struggled financially and there was concern whether it could continue. The company was dissolved on January 31, 2012, and the assets and liabilities were transferred to the parent company 398810 B.C. Ltd. It carried on business to sell off remaining inventory and the business is now closed.
6. Upon his return to work from a layoff in late 2008 Mr. Andow was appointed General Manager as the previous manager had been terminated. He continued to work without layoff as General Manager through to

November 2011, when he was laid off for an undetermined period. The Appellant argued that Mr. Andow was in fact terminated, had received sufficient notice of termination, and was not entitled to compensation for service.

7. The delegate issued a formal Demand for Employer Records on August 22, 2012, and continued her investigations and correspondence with the parties. The demand required, in part, the production and delivery of “2. any and all documents relating to the termination of the above named employee, including any and all documents that the employer relies on to establish that compensation for length of service is not owed to the above noted employee.”
8. Subsequently the delegate spoke with Mr. Brian Hemming, the employer’s comptroller, and by email dated September 18, 2012, stated to him “As per our discussion last week, if this matter is not going to be resolved voluntarily, please send me all of the documents we discussed including copies of any correspondence you had with Mr. Andow from December 1, 2011 - June 12, 2012 regarding his employment status, any requests he made for severance pay etc. Please send those documents by no later than 8:30 a.m. on Monday September 24, 2012. Thank you.”
9. Upon a full review and consideration of the evidence, including witness statements and documents provided, and consideration of the parties arguments having regard to the provisions of the *Act*, the Director held that Mr. Andow had been temporarily laid off and, because he was not called back to work, was statutorily terminated. Hence he was entitled to compensation for length of service, together with accrued interest.

## **ANALYSIS**

10. The new evidence submitted by the Appellant consists of a number of documents that are appended to the appeal form and submission.
11. The first document is a copy of an email dated February 08, 2012, directed to Brian Hemming of TravelTyme RV World from the provincial vehicle salesman licensing agency concerning the lapse of the sales licence of Jonathan Andow. It requests that the licence be renewed or, if the salesperson is no longer working at the dealership, please fill out an Employment Authorization Form terminating their employment and fax it into the office.
12. The second document is a copy of an Employment Authorization Form completed by Brian Hemming indicating that Jonathan Jeremy Andow “is no longer employed and is no longer an authorized designated salesperson of the business” effective as of an employment end date of December 31, 2011. It is not clear if, or when it was sent or faxed to the Motor Vehicle Sales Authority of BC.
13. The third document is a copy of a sheet showing employees enrolled in the Manulife Benefits plan of TravelTyme RV World as of 12/7/2011.
14. The fourth document is a copy of a letter dated January 31, 2012, from TravelTyme RV World to Freedom 55 Financial concerning the benefits plan. It is signed by Brian Hemming, Controller, and requests the cancellation of coverage for two employees, including Jonathan Andow, effective January 31, 2012.
15. The fifth document is a copy of an order confirmation sheet from InfoTel to TravelTyme RV World related to advertising in the Kelowna 2011 Directory with a confirmation date of September 15, 2011.

16. The sixth document is a Motor/Recreational Vehicle Purchase Agreement dated November 8, 2011, together with a handwritten note directed to Jonathan Andow from Brian Hemming. The documents relate to the purchase of a new trailer by Andow's sister. Evidence of this transaction and oral testimony was before the delegate prior to the Determination being written.
17. The seventh document is a copy of a Profit Sharing Plan Effective Feb 1, 2010 directed to "Employee Partners" including Jeremy Andow.
18. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides, in part:
- 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:
- ...
- (c) evidence has become available that was not available at the time the determination was being made.
19. Section 114 of the *Act* 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 that 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.
- (2) Before considering an appeal, the tribunal may
- (a) refer the matter back to the director for further investigation, or
- (b) recommend that an attempt be made to settle the matter.
- (3) If the tribunal dismisses all or part of an appeal the tribunal must inform the parties of its decision in writing and give reasons for that decision.
20. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chilliwack operating as Alano Club Coffee Bar*, BC EST # D094/05)

21. The Appellant must establish that:
- (i) the evidence could not, with the exercise of due diligence, have been discovered and presented to the director during the investigation or adjudication of the complaint and prior to a Determination being made.
  - (ii) the evidence must be relevant to a material issue arising from the complaint.
  - (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
  - (iv) the evidence must have high potential probative value, in the sense, that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
22. Further, the Appellant has the burden to persuade the Tribunal there is an error in the Determination under one or more of the statutory grounds set out in section 112(1); see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99, and *AM-PM Work Force Ltd*, BC EST # D009/11.
23. The documents described as new evidence by the Appellant all appear to be corporate records that were in its possession during the investigation. For reasons only known to the Appellant they were not produced in spite of the formal demands; or as a result of discussions between the investigator and representatives of the Appellant. There is no explanation given by the Appellant as to why the documents were not produced beforehand. What appears to have occurred is that the Reasons for the Determination were delivered and considered by the Appellant and then a search of the corporate records occurred in an attempt to find new evidence that would support the Appellant's original submissions to the Director. In effect, this appeal is a re-argument of the original issues by the Appellant who now relies upon the new evidence to bolster its case with the hope of reversing the Determination.
24. The Appellant, presuming the new evidence is admissible, argues that the Determination of the Director is in error because materials contained in the documents would lead the Director to no other conclusion than Mr. Andow did receive appropriate working notice and is not entitled to compensation for service pay. This argument is also the pith and substance of the Appellant's second ground of appeal; that there was therefore a breach of natural justice by the Director in weighing and considering all the evidence.
25. It is clear the new evidence cannot be introduced. The Appellant seeks to introduce documentation that obviously was part of the corporate records during the material time; and makes no attempt to explain why the documentation was not produced beforehand. This is clearly contrary to the initial condition established by the Tribunal for introducing new evidence. If the new evidence is not introduced then the Appellant's arguments concerning a breach of natural justice are also untenable.
26. Section 114(1)(f) of the *Act* provides that the Tribunal may dismiss all or part of an appeal if there is no reasonable prospect that the appeal will succeed. It is clear to me that there is no reasonable prospect that the appeal would succeed because the introduction of the "new" evidence would not be permitted.
27. As well, using section 114(1)(c) the Tribunal has held that a "frivolous" appeal is one in which "no justiciable question has been presented and which is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed": see, for example, *Greg Brewer operating Smallbone Millwork & Design*, BC EST # D467/98, and *AM-PM Work Force Ltd*, supra. In my opinion this appeal is also frivolous and should be dismissed.

**ORDER**

28. Pursuant to section 114(1)(c) of the *Act*, I order this appeal be dismissed. Accordingly, the Determination is confirmed as issued in the amount of \$11,254.28 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Robert C.P. Walker**  
**Member**  
**Employment Standards Tribunal**