

An appeal

- by -

Northland Excavating Ltd.
(“Northland”)

- 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: Marnee Pearce

FILE No.: 2017A/18

DATE OF DECISION: April 10, 2017

DECISION

SUBMISSIONS

Michael Thaxter

on behalf of Northland Excavating Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Northland Excavating Ltd. (“Northland”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 9, 2017.
2. The Determination found Northland had contravened Part 7, section 58, and Part 8, section 63 of the *Act* in respect of the employment of Dylan Katz (“Mr. Katz”) and ordered Northland to pay Mr. Katz \$1,137.57 representing compensation for length of service, vacation pay, and accrued interest. Two administrative penalties of \$500.00 each were levied for a total amount owing of \$2,137.57.
3. Northland has appealed the Determination, alleging the Director failed to observe the principles of natural justice in making the Determination.
4. In correspondence dated February 8, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any party pending a review of the appeal by the Tribunal and, following this review, all or part of the appeal might be dismissed.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was provided to Northland on February 21, 2017, allowing the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
6. 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 the Determination, the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the 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 that the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*

(h) *one or more the requirements of section 112(2) have not been met.*

7. If satisfied that the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Katz 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

8. The issue at this stage is whether the appeal shows there is any reasonable prospect it will succeed.

FACTS

9. Northland operates an excavation company and Mr. Katz was employed as a dump truck driver from April 15, 2016, to July 21, 2016. Mr. Katz was employed at the rate of \$27.00 hourly, averaging a 40-hour week. Mr. Katz filed a complaint with the Director that Northlands contravened the *Act* by unilaterally terminating his contract, and that he was entitled to compensation for length of service on his termination.
10. Northland's response to Mr. Katz's complaint was that he was not entitled to compensation for length of service because the nature of the industry is cyclical, and subject to temporary layoffs as an implied term of the employment agreement.
11. The Director conducted an oral hearing on November 22, 2016. Mr. Thaxter was the only witness for Northland, while Mr. Katz spoke on his own behalf.
12. Although directed to do so, Northland did not produce any of Mr. Katz's employment records, and the oral proceeding was held with the absence of this documentation. The parties agreed that for the last eight weeks of his employment, Mr. Katz worked roughly 40 hours per week.
13. The Determination identifies that there were two issues being considered by the Director:
- (a) Did Northland fire Mr. Katz or lay him off?
 - (b) Is Northland exempt from paying compensation for length of service because Mr. Katz was employed at one or more construction sites by an employer whose principal business is construction?
14. The Determination confirmed, based on the evidence, that Mr. Katz primarily hauled material to and from several construction sites where Northland was contracted to provide excavating services. Northland occasionally dispatched Mr. Katz to haul material for other excavating companies, and when there was no hauling to be done, Mr. Katz worked in the Northland yard.
15. The Director determined that about 90% of Northland's business is providing excavation for new construction. The other 10% is made up of smaller landscaping jobs. When Mr. Katz hauled materials for the construction sites, he spent 80 – 90% of his time on the road and 10 – 20% of his time on the site.
16. The Director found the evidence supported that Northland's principal business is construction, in that 90% of its business is providing excavation for new construction projects. However, Mr. Katz spent about 90% of his time on the road, and accordingly, was not found to be employed 'at' construction sites. His destination

was incidental as he spent most his time driving a truck. Mr. Katz was not excepted by section 65(1)(e) of the *Act* from entitlement for compensation for length of service.

17. As the exception outlined in section 65(1)(e) did not apply, the Director turned to the employment relationship. The Director accepted the evidence that Mr. Katz had worked for Northland as a driver for over three months, working a regular schedule of Monday to Friday for his entire employment period. There was no written contract of employment.
18. Mr. Katz was advised by Northland via a text message on July 20, 2016, that there was no work available, and he obtained alternate employment as of August 4, 2016.
19. The Director found that Northland terminated Mr. Katz's employment by not calling Mr. Katz into work. Northland failed to prove that the employment agreement allowed for temporary layoff, and accordingly Northland unilaterally and fundamentally altered the terms of Mr. Katz's employment. Mr. Katz was entitled to one week's wages as compensation for length of service, along with related vacation pay and interest, as set out in the Determination.
20. The Director applied two mandatory administrative penalties associated with the contravention of the requirements of the *Act*, and in the amount set out in the Determination.

ARGUMENT

21. Northland's ground for appeal is that the Director failed to observe the principles of natural justice when making the Determination.
22. The appeal submission outlines that Northland disagrees with the findings in the Determination, arguing that Mr. Katz was hired to work in a "season and job to job work environment". The appeal submission disagrees with the finding that Mr. Katz was terminated, and argues that Mr. Katz did not choose to stay with Northland during a temporary slowdown, consistent with the industry, but took employment with another company instead.

ANALYSIS

23. 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.

24. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have general application and have consistently been applied in considering appeals.

25. 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 that there is an error in the Determination under one of the statutory grounds.
26. Northland's ground for appeal is based on an alleged failure on the part of the Director to observe the principles of natural justice in making the Determination; a party alleging a breach of the principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
27. Principles of natural justice require the Director to provide Northland with the particulars of the case against them, the opportunity to respond to it in a meaningful way and the right to have the case decided by an independent and unbiased decision maker: *BWT Business World Incorporated*, BC EST # D050/96.
28. No evidence has been presented by Northland in support of this ground that shows a failure by the Director to comply with the principles of natural justice. Rather, the appeal submission of Northland reiterates the initial argument made before the Director and expresses disagreement with the conclusion reached.
29. An impartial reading of the Determination and an examination of the record indicates that Northland's position was comprehensively put forward in the evidence and advocated in the submissions made to the Director. Nothing is advanced in this appeal that was not identified and addressed in the Determination.
30. In all, the Director outlined the issues and provided a fair and unbiased forum for resolution. Northland had the opportunity to respond to the allegations, and there is no suggestion, and no evidence, of any bias on the part of the decision maker. Northland has not shown there is any breach of principles of natural justice in this case.
31. As the appeal discloses no failure to observe the principles of natural justice in making the Determination, this ground of appeal cannot succeed.
32. In my view of the appeal, Northland's allegation of a breach of the principles of natural justice in the Determination is simply an expression of disagreement with the findings of fact made by the Director. Northland has resubmitted evidence and argument presented at the hearing in the hope, presumably, that the Tribunal will take a different view of those facts and provide a different result.
33. In *J.C. Creations Ltd.*, BC EST # RD317/03, the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned". As such, I will consider whether there has been an error of law taking into consideration Northland's position on the nature of the employment relationship and the legislated construction exception.
34. 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 facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
35. In the context of the arguments made by Northland, the error of law made by the Director would have to arise under any one, or a combination, of a demonstrated error under 1, 3, 4 and 5 in *Gemex*, above.
36. I find Northland's appeal does not show the Director committed an error of law in either the findings of fact made or the conclusions based on those facts. There was evidence for all of the findings made in the Determination. Northland has failed to show the Director acted without any evidence.
37. It is not an error of law for the Director to "misconstrue" evidence unless it is demonstrated the Director's view of the evidence is perverse, inexplicable, or manifestly wrong. None of that is shown. Northland has not shown that the Director acted on a view of the facts that could not reasonably be entertained or that the Director adopted an assessment of the evidence that was wrong in principle.
38. The conclusions reached by the Director were entirely reasonable and firmly grounded in the evidence.
39. On the question of whether the Director has misinterpreted and misapplied the definitions and terms relating to the construction exception to the facts, I find, on an assessment of the Determination and the materials in the file, no error of law in the Determination. The decision of the Director is consistent with the approach to the construction exception on an employee's entitlement to compensation for length of service mandated by the decisions of the Tribunal.
40. In that respect, the Tribunal has advocated and adopted a functional analysis to decisions about both the principal business of the employer and the situs of the work of the employee, with the burden of showing the exception applies being on the party, typically the employer, advocating exclusion from the statutory benefit provided under section 63 of the *Act*.
41. The definition of construction, and the consequent construction exception, is not broadly applied, but rather, for reasons relating to the nature and purpose of the *Act* and the interpretive principles relating to it, is narrowly construed. As expressed in the following excerpt from *Urban Saving & Grooving Company Ltd.*, BC EST # D112/05, discussing the definition of Construction as defined in the *Act*,
- The definition of construction in the *Act* is comprehensive. Such a broad definition raises certain difficulties, not the least of which is its limits. Technically, one could include in the definition such activities as minor household repairs and gardening. In the context of the *Act* this is hardly appropriate. The *Act* is intended to have a general application to employees in the province. Provisions under the *Act* that allow for exceptions to the application of basic standards of compensation and conditions of employment are strictly construed.
42. Although Northland has continued to submit that that the employment relationship with Mr. Katz was within a 'job to job' work environment in keeping with the construction industry exception, and as such no compensation for length of service was payable, I accept the evidence did not support this conclusion. While Northland's principal business is construction, Mr. Katz spent about 90% of his time on the road driving to and from sites, and was employed as a driver. Mr. Katz was not employed "at" construction sites but rather, construction sites were simply his destination for delivery. The Director did not err in reaching this conclusion.
43. I agree with the conclusion of the Director that Northland did not meet the burden of showing Mr. Katz was excepted by section 65(1)(e) from the benefit provided by section 63 of the *Act*.

44. As the appeal discloses no error of law, this ground of appeal cannot succeed.
45. It is appropriate to exercise my discretion under section 114(1) and dismiss this appeal. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

46. Pursuant to section 115 of the *Act*, I order the Determination dated January 9, 2017, be confirmed in the amount of \$2,137.57 together with any interest that has accrued under section 88 of the *Act*.

Marnee Pearce
Member
Employment Standards Tribunal