



An appeal

- by -

Wundr Software Inc.

(“Wundr”)

- 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.:** 2015A/15

**DATE OF DECISION:** April 22, 2015

## DECISION

### SUBMISSIONS

Ryan Vetter

on behalf of Wundr Software Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Wundr Software Inc. (“Wundr”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 24, 2014.
2. The Determination found that Wundr had contravened Part 1, sections 17 and 18 of the *Act* in respect of the employment of Blake Fisher (“Mr. Fisher”) and Andre Lopes (“Mr. Lopes”) collectively “the complainants”, and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) and ordered Wundr to pay the complainants wages in the amount of \$19,246.32 and to pay administrative penalties under section 29 of the *Regulation* in the amount of \$1,500.00. The total amount of the Determination is \$20,746.32.
3. Wundr has filed this appeal on all of the grounds available under section 112(1) of the *Act*: that the Director erred in law; failed to observe principles of natural justice in making the Determination; and that evidence has become available that was not available when the Determination was being made. Wundr seeks to have the Determination cancelled or returned to the Director.
4. In correspondence dated February 13, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that following such 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 has been delivered to Wundr, who has been given the opportunity to object to its completeness. There has been no objection to the completeness of the “record” and the Tribunal accepts it as complete.
6. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the written reasons for the 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 and any additional material allowed to be introduced in support of the appeal. Under section 114(1) of the *Act*, 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 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.*

7. If satisfied the appeal or a part of the appeal has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Fisher and Mr. Lopes will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

## ISSUE

8. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

## THE FACTS

9. Wundr is a software company incorporated under the laws of Canada. A federal corporation search indicates it was incorporated July 28, 2011. Wundr's directors at the time of the search – November 17, 2014 – were listed as Stewart Cheifet, Ryan Vetter, and Scott Kelly.
10. Wundr operates an on-line publishing business. Mr. Fisher was employed by Wundr from November 21, 2013, to August 6, 2014, as Operations Manager. Mr. Lopes was employed by Wundr from April 23, 2014, to September 2, 2014, as a Web UI Engineer.
11. Following the termination of their employment the complainants each filed claims alleging Wundr had contravened the *Act* by failing to pay all wages owed under the *Act*.
12. The Determination notes Wundr failed to participate in any substantive way in the investigation of the complaints. In the Determination, the Director states:

I am satisfied through my review of the file that extensive attempts were made to elicit a response and/or evidence from Wundr. I am satisfied reasonable efforts were made to contact Wundr by telephone and registered mail to keep the Employer fully informed about the complaints, the evidence of the Complainants, the issues under the *Act*, my preliminary findings and wages calculations and the complaint resolution process.

13. The Director has set out in the Determination the following “non-exhaustive” list of “key communications”:
- On 24 October 2014, I tried to contact Mr. Vetter by telephone using the number provided by the Complainants but the number was out of service;
  - Later that day, I sent an email to Mr. Vetter and to the accounts department at Wundr using email addresses provided by the Complainants, notifying Wundr and Mr. Vetter of the complaints and requesting a response;
  - On 29 October 2014, I sent a further email to Mr. Vetter's Wundr email address, the Wundr accounts department and to Mr. Vetter's personal email address, providing details of the complaints and potential resolution methods and requesting a response;
  - Mr. Vetter responded from his Wundr email address on 29 October 2014 to confirm that Wundr would look into the complaints and “provide [me] with further information”;

- On 4 November I wrote to Wundr providing details of the complaints, setting a deadline for response of 4pm on 17 November 2014. This correspondence was sent via registered mail to both of Wundr's business addresses as provided by the Complainants. Canada Post's online tracking system confirms this mail was successfully received at both addresses on 7 November 2014;
  - On 19 November I wrote to Wundr via registered mail outlining my preliminary findings and wage calculations for the Complainants and provided until 4pm on 3 December 2014 to forward the required payments to the Branch. This correspondence was sent via registered mail to both of Wundr's business addresses as provided by the Complainants, its registered office and to Mr. Cheifet, Mr. Vetter and Mr. Kelly. Canada Post's online tracking system confirms this mail was successfully received by Mr. Vetter on 27 November 2014 and by Mr. Kelly on 24 November 2014;
  - Within the above correspondence I sent a Demand for Employer Records requiring Wundr to deliver payroll records for the Complainants no later than 4pm on 3 December 2014;
  - Wundr has not participated in this process or provided any evidence following Mr. Vetter's email of 29 October 2014.
14. Technically, the last point does not record a communication, but summarizes the failure of Wundr, and its directors, to respond to the claims of the complainants, to reply to Demands made by the Director or participate in the complaint process.
15. Based on the evidence received in the complaint investigations, the Director found Mr. Fisher and Mr. Lopes to be entitled to the wages set out in the Determination and particularized in the summary sheets in the reasons for Determination.

## ANALYSIS

16. When considering an appeal under section 114 of the *Act*, the Tribunal looks at its relative merits, 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.
17. 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.*
18. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.
19. 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.
20. It is well established that 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. 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 that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.

21. Wundr has framed its appeal on error of law, failure by the Director to observe principles of natural justice in making the Determination and “new” evidence, but central to its appeal is whether it was given a reasonable opportunity to respond to the complaints made by Mr. Fisher and Mr. Lopes.
22. Wundr has built its argument from the allegation of breach of natural justice to additional evidence to error of law. The appeal is, in a sense, a house of cards; if the first ground fails, the appeal’s entire foundation is significantly undermined. Wundr concedes its arguments on some aspects of the error of law ground are dependent on the Tribunal accepting the additional evidence submitted with the appeal.
23. Much of the natural justice argument is constructed on assertions of fact concerning the receipt of communications and correspondence from the Director. Although these assertions are unsworn, unsupported by any objective evidence and frequently based on second hand information, I will set them out for the purpose of answering them rather than summarily dismissing them without explanation.
24. 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 and are applicable to the circumstances of this case:

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)

25. Wundr submits Mr. Vetter was never “personally served” with documents. The Determination, however, states Mr. Vetter was provided the details of the complaints by email on October 29, 2014, and acknowledged receiving the same. That email contained copies of the complaints indicating a mailing address for Wundr at 1062 Homer Street. While Mr. Vetter, by return email dated October 29, 2014, said he would “look at these materials and provide you with further information”, he never did. More particularly, for the purpose of addressing this point, he never indicated at any time that Wundr was no longer “actively operating” at the 1062 Homer Street. The “record” shows correspondence was delivered by registered mail to Wundr: the November 4, 2014, correspondence was delivered to the business addresses the Director had on file for Wundr; it was also emailed to Mr. Vetter at the same email address to which the October 29 material was successfully sent; the November 19, 2014, correspondence was delivered to the Homer Street addresses, the registered office address for Wundr and the personal addresses of the directors listed in the Corporations Canada records. Wundr alleges two of these directors had resigned. That assertion is not reflected in the Corporations Canada records. The Director was entitled to rely on those records. Neither of the directors who had purportedly resigned ever notified the Director of that before the Determination was issued.
26. Wundr says there is no record that the registered mail delivered to the Homer Street addresses was ever received there and that none of their directors and officers were ever made aware there was mail at that location.

27. Wundr submits that none of Wundr's directors and officers was ever made aware of any hearing on the complaint. That is not surprising, since no complaint hearing was conducted. The Determination was issued on the results of an investigation of the complaints conducted by the Director.
28. Wundr relies on the Tribunal decision in *Checker Flag Automotive Inc. and another*, BC EST # D029/11, for support to its arguments. I do not need to spend much time considering that case, as it is not similar on its facts to this one. In that case a lack of attention by the Director to information that the business address of the employer had changed, coupled with the complaint process adopted by the Director in that case, which was a complaint hearing, denied that employer the *only* opportunity to respond to the case presented by the complainant. The Director has chosen to proceed by way of investigation on the complaints in this case. Wundr was provided with the details of the complaints on October 29, 2014, and invited to respond. Notwithstanding Mr. Vetter's indication he would review the complaints and provide further information, none was provided. That invitation was an opportunity provided to Wundr to respond.
29. Section 122 of the *Act* allows the Director to deliver processes by registered mail to the *last known address* of the person to whom it is being delivered and deems such mail to have been received 8 days after it was deposited with Canada Post. The Demand for Employer Records is a process that is allowed to be delivered by registered mail, as is the Determination, and both benefit from the deeming provision. The effect is that the November 4, November 19 and December 24, 2014, mailings are deemed by the *Act* to have been served. It bears pointing out that Mr. Vetter had an opportunity to correct any misconception about the business address of Wundr as a result of having received the October 29 email, but he did not. No fault can be placed on the Director for continuing to use 1062 Homer Street as the delivery address for Wundr. In any event, as indicated above, Mr. Vetter received the November 4 material by email.
30. The November 19, 2014, material was delivered by registered mail to the registered office of Wundr, the business addresses on Homer Street and to each of the Directors on record. That material included another Demand for Employer Records, with a deadline for response set at December 3, 2014. Wundr submits Mr. Vetter did not "sign for" or receive this material. That is immaterial. It was deemed served. A copy of the Determination was similarly delivered to the registered office of Wundr, the business addresses on Homer Street and to each of the Directors on record.
31. In sum, I find no merit in the argument concerning the service of the complaints and related documents to Wundr. Each service was valid and each ought to have jolted Wundr into a decision to respond, but they did not. The opportunities, however, were given and accordingly Wundr was afforded the procedural rights contemplated in the above statement from *Imperial Limousine Service Ltd.* and by requirements of section 77 of the *Act*.
32. The natural justice ground of appeal has no merit.
33. Wundr seeks to introduce a substantial number of documents and facts into this appeal that, because of the failure to participate in the complaint process, were not given to the Director. Wundr submits the additional facts they seek to submit with the appeal meet the conditions the Tribunal set out in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, and has consistently applied in considering the "new" evidence ground of appeal.
34. This ground of appeal does not satisfy even the first criteria listed in that decision. Wundr argues the evidence sought to be admitted was not reasonably available "since the Officers and Directors of the Employer were not aware of or given notice of the proceedings/hearings". If it is not apparent from the above factual analysis on the natural justice ground of appeal, I find that statement unbelievable and reject it

accordingly. I am satisfied the evidence sought to be introduced in this appeal was reasonably available and that it ought to have been provided to the Director during the complaint process. That is sufficient reason to conclude the Tribunal would not accept it in this appeal.

35. This ground of appeal has no merit.
36. As a result of the “new evidence” submitted failing to satisfy the requirements for being admitted in this appeal, Wundr is simply left with an appeal that challenges findings of fact. As indicated above, an appeal that challenges findings of fact must demonstrate those findings raise an error of law.
37. I am not persuaded the Director made any error of law in the Determination. The Determination was grounded in findings of fact made by the Director based on the evidence and information provided by the Complainants. Wundr has not, and cannot, show any reviewable error has been made in respect of those findings of fact. As indicated above, the statutory grounds of appeal in section 112 of the *Act* do not authorize the Tribunal to consider appeals that challenge findings of fact unless those findings are shown to be an error of law and that has not been done here. The findings and the conclusions of the Director are rationally grounded in the evidence provided.
38. Overall, I see two insurmountable problems for Wundr with its appeal. The first is stated immediately above: that it would require the Tribunal to interfere with findings and conclusions of fact made by the Director without there being any error of law in respect of those facts being demonstrated in the appeal. As indicated above, the authority of the Tribunal in respect of appeals challenging findings of fact or seeking to have the Tribunal re-visit and alter findings of fact is limited. Accordingly, the Tribunal would defer to the findings of fact made by the Director in this case, all of which accept the claims of the complainants.
39. The second is that, at its core, this appeal is of a type that has been consistently rejected by the Tribunal, one where, subsequent to an unfavourable Determination, the dissatisfied party submits an appeal seeking to rely on evidence that could have, and should have, been presented to the Director during the complaint process: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
40. In sum, on an assessment of this appeal I am satisfied it has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

## ORDER

41. Pursuant to subsection 115 of the *Act*, I order the Determination dated December 24, 2014, be confirmed in the amount of \$20,746.32 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

---

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