



An appeal

- by -

Orbit Security Inc.
("Orbit")

- 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/29

DATE OF DECISION: April 23, 2015

DECISION

SUBMISSIONS

Jagsir Singh Gill

on behalf of Orbit Security Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Orbit Security Inc. (“Orbit”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 16, 2015.
2. The Determination found that Orbit had contravened Part 3, sections 18 and 27 of the *Act* in respect of the employment of Baljinder Singh Sohi (“Mr. Sohi”) and ordered Orbit to pay Mr. Sohi wages in the amount of \$544.94 and to pay administrative penalties under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00. The total amount of the Determination is \$1,544.94.
3. Orbit has appealed the Determination on the ground that evidence has become available that was not available when the Determination was being made.
4. In correspondence dated February 25, 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 Orbit, who has been given the opportunity to object to its completeness. Orbit has made no objection to the completeness of the “record” and the Tribunal therefore accepts it as being 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 reasons for the Determination, the appeal and the written submission filed with the appeal by Orbit, 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 it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Sohi 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 a reasonable prospect the appeal will succeed.

ISSUE

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

THE FACTS

9. Orbit operates a security company. Mr. Sohi filed a complaint alleging Orbit had failed to pay him all the wages he was owed for work he performed. Mr. Sohi alleged he had worked for orbit for six days between November 26, 2013, and December 10, 2013.
10. Orbit disputed the number of days and the hours Mr. Sohi claimed he had worked.
11. The Director conducted a telephone hearing on the complaint. In that hearing, Mr. Sohi gave evidence on his own behalf. Additional evidence on his behalf was given by his wife, Surinder Sohi.
12. Jagsir Singh Gill (“Mr. Gill”), a director for Orbit, gave evidence on behalf of the employer. Ranjit Billing, the accountant for Orbit, also gave evidence on behalf of the employer.
13. There was agreement that Mr. Sohi had worked November 26, 2013, for four hours and December 1, 2013, for twelve hours.
14. There was disagreement between Orbit and Mr. Sohi about whether he had worked the other four days for which he claimed wages. There was an issue of the credibility of the respective evidence of the parties and the Director accepted the evidence of Mr. Sohi, stating:

I find Mr. Sohi’s testimony more credible in general than that of Mr. Gill, and in the absence of any Employer records, I find Mr. Sohi’s notebook to be the best evidence available regarding his work between December 2 and 10, 2013.

15. The reasons for the Director accepting Mr. Sohi’s evidence over that of Mr. Gill are set out in the Determination. They are rationally grounded in an assessment of the testimony given by Mr. Sohi and Mr. Gill.

ARGUMENT

16. In this appeal, Orbit submits evidence has come available that was not available at the time the Determination was being made. This evidence comprises details of work done for Orbit by other security employees over the disputed period of time at the work site where Mr. Sohi said his work was performed and copies of invoices presented to the party that contracted Orbit’s services at the site.
17. Orbit appears to acknowledge these documents were available but not produced during the complaint process, but is producing them in this appeal because Mr. Gill feels several statements attributed to him in the

Determination were mistakenly recorded by the Director. Some statements he denies making; other statements he disputes.

18. Specifically, Orbit disputes the finding that Mr. Sohi worked for it on December 2, 8, 9 and 10, 2013.

ANALYSIS

19. 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.

20. 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.*

21. 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.

22. 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.

23. 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.

24. Orbit has not alleged or argued error of law or natural justice as grounds of appeal although clearly this appeal cannot succeed unless I find the Director committed a reviewable error in the findings of fact or in some other way. My view is that this appeal depends entirely on whether the Tribunal will admit and accept evidence submitted with the appeal that was not provided to the Director during the complaint process and on the basis of that evidence order another review of Mr. Sohi's claim. The evidence submitted with the appeal is described above.

25. The ground of appeal relied on by Orbit is generally referred to as the "new evidence" ground of appeal. The admission of "new evidence" is discretionary. The Tribunal has established that appeals based on this ground require an appellant to, at a minimum, demonstrate that 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.

26. In this appeal, the evidence submitted is not “new”; it existed at the time the Determination was being made and could have been provided to the Director at any time during the complaint process. On this basis alone it will does not satisfy the principle criteria for allowing additional evidence on an appeal. As well, I am not persuaded the proposed evidence is relevant, credible or probative. The information in the documents is both incomplete and internally inconsistent. The invoice records 497 hours worked by Orbit security guards at the work site; the sheets purporting to detail that work add up to considerably less than that.
27. As a result of this “new evidence” failing to satisfy the requirements for being admitted in this appeal, Orbit is left with an appeal that simply challenges findings of fact.
28. There is no error shown in the findings of fact made by the Director. The findings and the conclusion of the Director are rationally grounded in an analysis of the evidence, which taken as a whole, showed the Mr. Sohi worked on the days for which he claimed wages. Orbit was given a fair opportunity to present its evidence and argument in response to Mr. Sohi’s claim.
29. The insurmountable problem for Orbit with its appeal is that it would require the Tribunal to interfere with findings and conclusions of fact made by the Director without there being any reviewable error 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 defers to the findings of fact made by the Director in this case.
30. 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 and it is dismissed under section 114(1)(f) of the *Act*.

ORDER

31. Pursuant to subsection 115 of the *Act*, I order the Determination dated January 16, 2015, be confirmed in the amount of \$1,544.94, 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