

An appeal

- by -

Glenn B. Finch
(“Finch”)

- 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.: 2013A/21

DATE OF DECISION: May 16, 2013

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Bains will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

BACKGROUND

8. Bains operates a drywall services business in, and around, Surrey. Finch was employed by the business as a drywall taper from July 24, 2012, to September 17, 2012. Finch claimed he had been hired at the rate of \$25.00 an hour and had not been fully paid. Bains said he was hired at \$16.00 an hour, although he did acknowledge Finch was owed wages. Finch filed a complaint on October 11, 2012, within the time limited by the *Act*.
9. A delegate of the Director conducted an investigation of the complaint, which apparently included efforts to settle the complaint. On December 21, 2012, a Notice of Complaint Hearing along with a Demand for Employer Records under section 85(1) of the *Act* to produce payroll records for Finch was sent to Bains. The section 112(5) “record” shows the Notice and Demand were successfully delivered to Bains, but he failed to provide the required records. On the day appointed for the complaint hearing, Bains did not attend. He was contacted by another delegate of the Director and informed that delegate he would not be attending.
10. The scheduled complaint hearing proceeded. The Determination notes there were two issues: Finch’s rate of pay and his entitlement, if any, to wages. The complainant provided evidence relating to his claim and the Director made findings based on that evidence, ultimately concluding Finch was entitled to wages in the amount found to be owing in the Determination. While Bains did not attend the complaint hearing, he had provided the Director during the investigation of the complaint with “undated telephone records of a text message conversation” said to have been between he and Finch relating to the issue of the wage rate at which Finch was being employed. The Director accepted that information as evidence.
11. Based on the available and accepted evidence, the Director found it likely that the conversation in the text message took place and accepted that as evidence Finch had been hired at \$16.00 an hour. Using that rate, the Director nevertheless found Bains had not paid all wages owing to Finch, calculated that amount owed and ordered it to be paid.

REASONS FOR THE APPEAL

12. This appeal is based on Finch’s disagreement with the finding of the Director on his rate of pay. He makes the following points in his appeal submission:
 - no text conversation ever took place between he and Bains;
 - he owned no cell phone at the time;
 - a transcription of the text messages should not have been used, as Bains never appeared at the complaint hearing; and
 - it was incorrect for the Director to reach any finding based on his inability to produce a copy of the cheque he received from Bains as he had no access to that document once it was cashed.
13. In sum, Finch submits that there was “as much if not more evidence to support a wage rate of \$25.00 per hour” and that it was unfair for the Director “to take the text messages as evidence of \$16.00 per hour”.

ANALYSIS

14. The Tribunal has established that an appeal under the *Act* is intended to be 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. 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 made.*
15. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such 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 the findings of fact made by the Director.
16. No error of law relating to the findings of fact made in the Determination has been shown. Consequently, the effect of this appeal is simply to request the Tribunal 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.
17. Finch has acknowledged in his appeal submission that there was evidence going to both parties' positions on the wage rate. Notwithstanding Bains' absence at the complaint hearing, there was material in the file which the Director was required to consider on the issue of the wage rate and which, on analysis, supported the conclusions reached by the Director. Finch was provided with that material, comprising a transcription of the entire text message, prior to the complaint hearing but provided no response to it other than to claim Bains had either altered or fabricated that text message. This position was not accepted by the Director for the reasons stated in the Determination. Finch asserts in this appeal that the text message did not come from him since he had no cell phone at the time. That assertion does not appear to have been made to the Director and will not be accepted or considered here. If there is any merit to this assertion, it could have been made by Finch to the Director and could have been addressed during the complaint process. The appeal process is not the place to attempt to interject such an assertion without satisfying the conditions established by the Tribunal for the introduction of such evidence in an appeal.
18. It is not material that the information relied on by the Director was not provided during the complaint hearing. The Tribunal has consistently stated that the material before the Director on a complaint is not limited to the material received at a complaint hearing. The Director must consider and weigh all the information that is provided by or on behalf of the parties. The Director may decide to accept or not accept some of the information received outside the complaint hearing as evidence or, if it is accepted, may give it less weight; but so long as reasons for the choices made about such information are provided and do not amount to error of law, those decisions cannot form the basis for an appeal under section 112 of the *Act*.

19. Accordingly, after a careful review of the Determination, the section 112(5) “record” and the appeal, and applying well established principles which operate in the context of appeals to the Tribunal, I find the appeal as a whole lacks any presumptive merit and that the purposes and objects of the *Act* would not be served by requiring the other parties to respond to it. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

20. Pursuant to subsection 114(1) of the *Act*, this appeal is dismissed on the ground that there is no reasonable prospect that it will succeed. Accordingly, the Determination is confirmed as issued in the amount of \$3,585.68 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