

An appeal

- by -

Cross Roads Excavating Ltd.
("Cross Roads")

- 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.: 2016A/20

DATE OF DECISION: March 10, 2016

DECISION

SUBMISSIONS

Mauro Cervellin

on behalf of Cross Roads Excavating Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Cross Roads Excavating Ltd. (“Cross Roads”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 21, 2015.
2. The Determination found Cross Roads had contravened Part 3, sections 18 and 21, Part 4, section 34, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Marcel Leroux (“Mr. Leroux”) and ordered Cross Roads to pay Mr. Leroux wages in the amount of \$22,150.93 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$23,150.93.
3. Cross Roads has appealed the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. In correspondence dated January 29, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, 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 Cross Roads. Cross Roads has been provided with 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 complete.
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 Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an 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 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*, the Director and Mr. Leroux 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.

THE FACTS

9. Cross Roads operates a site servicing and excavation company in the Lower Mainland of the province. Mr. Leroux was employed by Cross Roads as an estimator/project manager for a period from January 2, 2013, to November 4, 2014. His compensation comprised an annual salary of \$50,000.00 and a profit share. Following the termination of his employment in November 2014, Mr. Leroux filed a complaint with the Director that Cross Roads had contravened the *Act* by failing to pay his profit share, regular wages earned and compensation for length of service and by requiring him to pay Cross Roads' business costs.
10. Cross Roads' response to Mr. Leroux's complaint was that he was not entitled to a profit share "because the company was not profitable", that he was not owed any regular wages as he had been paid twice for his annual holidays, that he was not owed compensation for length of service as he was sent home because he was not doing his job and that Mr. Leroux had been repaid for all expenses he claimed.
11. The Director conducted a complaint hearing on May 15 and May 28, 2015. The Director heard evidence from Mr. Leroux on his own behalf. Mr. Leroux also called two supporting witnesses whose evidence was not relied on by the Director in deciding the complaint. Cross Roads provided evidence through Mauro Cervellin ("Mr. Cervellin"), the General Manager of Cross Roads, and Antonio Russo ("Mr. Russo"). Mr. Cervellin and Mr. Russo are both listed as directors and officers of Cross Roads in corporate search documents found in the record.
12. The Determination sets out four issues:
1. Is Mr. Leroux owed a profit share and if so how much is owed?
 2. Is Mr. Leroux owed regular wages and if so how much is owed?
 3. Is Mr. Leroux owed compensation for length of service and if so how much is owed?
 4. Did Mr. Leroux pay Cross Roads' business costs and if so how much is owed?
13. A summary of the evidence provided by Mr. Leroux, Mr. Cervellin and Mr. Russo is set out in the Determination. While the appeal contends the Director erred in law and failed to observe principles of natural justice, it takes no issue with the summary of the evidence but rather that the Director "misconstrued" that evidence in deciding Mr. Leroux was entitled to a profit share.
14. Mr. Leroux claimed he was owed \$48,082.40 in profit share. The Director found he was entitled to a profit share in the amount of \$17,617.18. The Director made this finding on the body of the evidence provided, but was substantially influenced by the evidence of a profit sharing calculation and agreement made between Mr. Leroux and Mr. Cervellin recorded in a document dated July 31, 2014, entitled "Bonus Payment Agreement", and a document entitled "Profit Sharing Agreement" which has a date of July 31, 2014, but which shows as being signed by Mr. Leroux and Mr. Cervellin on October 23, 2014.

15. The Director found Mr. Leroux was entitled to unpaid wages for two hours on his final day of work, November 4, 2014, was entitled to compensation for length of service, annual vacation pay on the wages found owing and to repayment of Cross Roads' business costs paid by him.
16. The appeal does not take issue with any finding other than that made on Mr. Leroux's claim of a profit share, and by logical inference the annual vacation pay award on the profit share amount.

ARGUMENT

17. Cross Roads submits the Director "misconstrued the evidence", and thus erred in law, in finding Mr. Leroux was entitled to share in the profits of Cross Roads.
18. Cross Roads submits the Director erred by accepting the evidence that appears on the face of the July 31 and October 23, 2014, documents and treating it as an agreement, rather than what Cross Roads says it was: a consensus based on information compiled by Mr. Leroux that set out an amount he would receive "if anticipated profits were generated". The submission goes on to restate the position made to the Director that Mr. Leroux's profit sharing entitlement was "strictly contingent on the anticipated profits actually being generated" and refers to some of the evidence submitted to the Director in support.
19. Cross Roads also asserts the Director failed to observe principles of natural justice by denying Cross Roads' witnesses the opportunity to "fully explain" their position and in so doing exhibited a bias against Cross Roads.

ANALYSIS

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 that have general application and have consistently been applied in considering appeals.
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. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
24. 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.

25. 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 the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
26. In the context of the arguments made by Cross Roads, the error of law alleged to have been made by the Director would have to arise under any one, or a combination, of a demonstrated error arising under points 3, 4, and 5 in *Gemex*, above.
27. I find Cross Roads’ 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 the findings made in the Determination. Cross Roads has failed to show the Director acted without any evidence.
28. 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. Cross Roads has not shown 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.
29. Based on the evidence, which as a whole is not disputed by Cross Roads, the Director rejected the contention from Cross Roads that the profit share “was to be paid after all year-end profits and costs, including fixed overhead costs, had been tabulated”. The Director notes that neither the profit share agreement nor the bonus payment agreements contained that condition. Those documents specifically fixed the amount of Mr. Leroux’s profit share for a period from January 2, 2013, to July 31, 2014, with the profit share on three other jobs to be calculated and paid out subsequently. The amount fixed was not indicated to be contingent on any subsequent event or requirement. In respect of the figures contained in the agreements, the Director stated, at page R12:
- The only calculations that have been verified are those that Mr. Leroux and Mr. Cervellin completed together and agreed to on July 31, 2014 and again on October 23, 2014.
30. The conclusion reached by the Director was entirely reasonable and firmly grounded in the evidence.
31. The appeal represents no more than a challenge to the conclusions of fact made by the Director based on the evidence presented by the parties; it is an attempt by Cross Roads to have the Tribunal reach different conclusions on the facts than were made by the Director.
32. As the appeal discloses no error of law, this ground of appeal cannot succeed.
33. Cross Roads alleges failure to comply with principles of natural justice asserting the Director denied Cross Roads the opportunity to “fully explain” their position and demonstrated a bias against them.

34. The appeal submission does not indicate what “position” Cross Roads was prevented from advancing at the complaint hearing. Based on the arguments made in this appeal, which I accept as “fully explaining” Cross Roads’ position, the Director had a complete explanation of their position and a body of evidence that Cross Roads advanced to support it. A fair reading of the Determination and an examination of the record indicates Cross Roads’ position was comprehensively advanced in the evidence and advocated in the submissions made to the Director. More particularly, nothing is advanced in this appeal that was not identified and addressed in the Determination.
35. No evidence has been presented by Cross Roads in support of this ground that shows a failure by the Director to comply with principles of natural justice. The allegations made are merely allegations, not evidence, and are insufficient to satisfy the burden when advancing this ground of appeal.
36. Of special comment is the allegation of bias made against the Director. Such allegations impugn the integrity of the person against whom they are made and must be objectively demonstrated through clear and convincing evidence. They may not be based on some subjective perception. As with the other natural justice arguments, there is no evidence, let alone the clear and cogent evidence required, in support of such an assertion.
37. There is no apparent merit to this ground of appeal.
38. In sum, there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

39. Pursuant to subsection 115(1) of the *Act*, I order the Determination dated December 21, 2015, be confirmed in the amount of \$23,150.93, together with whatever further interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal