

An appeal

- by -

Ressel Constructors Inc.
("Ressel Constructors")

- 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/46

DATE OF DECISION: May 26, 2015

DECISION

SUBMISSIONS

Takis Ressel

on behalf of Ressel Constructors Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Ressel Constructors Inc. (“Ressel Constructors”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 27, 2015.
2. The Determination found that Ressel Constructors had contravened Part 3, section 17 and Part 4, section 40 of the *Act* in respect of the employment of Robert Renner (“Mr. Renner”) and ordered Ressel Constructors to pay Mr. Renner wages in the amount of \$2,318.87 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 \$3,318.87.
3. This appeal alleges the Director failed to observe principles of natural justice in making the Determination. Ressel Constructors seeks to have the Tribunal vary the Determination.
4. In correspondence dated April 13, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from any other parties 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 Ressel Constructors, who have been given the opportunity to object to its completeness. No objection has been raised and, accordingly, the Tribunal accepts the Record 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, and the reasons for the Determination, the appeal, the written submission filed with the appeal by Ressel Constructors 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 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. Renner 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: section 114(1) (f).

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*.

ARGUMENT

9. Ressel Constructors submits the Determination is “inaccurate and unfair”. Ressel says there are “discrepancies” in the work performed and the amounts of overtime payable are “higher than what should be determined”.
10. Ressel Constructors is appealing the calculation by the Director of hours worked, wages payable and the total amount found owing.

THE FACTS

11. Ressel Constructors operates a construction business. Mr. Renner was employed by Ressel Constructors as a carpenter on various construction sites in the province from March 17 to September 25, 2014, at a rate of \$40.00 an hour. Mr. Renner was paid \$10.00 an hour for time spent travelling to and from worksites in northern BC. After his employment ended, Mr. Renner complained that Ressel had not paid all regular and overtime wages earned.
12. The Director conducted a complaint hearing. Mr. Renner appeared and gave evidence on his own behalf. Nancy Ross (“Ms. Ross”) appeared and provided evidence on behalf of Ressel Constructors. Daryl Carey, who was employed by Ressel Constructors during the period Mr. Renner was employed by them, provided evidence on behalf of Mr. Renner.
13. Ressel Constructors had submitted records to the Director during the complaint process. Ms. Ross confirmed the documents at the complaint hearing, but was unable to offer any evidence beyond the documents provided. Mr. Renner substantially agreed with the record of daily hours provided by Ressel Constructors, except he claimed to have worked on days that were not recorded and for which he was not paid: 10 hours on May 31, 2014, and 7.5 hours on July 27, 2014. He also said he had spent 13.5 travelling from Terrace to Prince George on June 8, 2014, for which he was paid only 9 hours. Mr. Carey supported Mr. Renner on some of his claim.
14. Based on the evidence provided, the Director found Mr. Renner had not been paid wages for all hours he worked. The unpaid wages were a combination of regular and overtime wages. The Director calculated the amounts owing to Mr. Renner by applying the evidence and the findings made to the relevant provisions of the *Act*.

ANALYSIS

15. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the relative merits of an appeal, 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.
16. 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.*
17. 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 under one of the statutory grounds of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.
18. This appeal is grounded in a claim that the Director failed to observe principles of natural justice in making the Determination, although Ressel Constructors has done nothing in the appeal submission to show facts supporting this ground. 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:
- 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)
19. It is clear from the Record that Ressel Constructors was afforded the procedural rights contemplated by the above statement, which, I note, are also statutorily protected by section 77 of the *Act*. There are no natural justice concerns in the Determination or in the complaint process adopted by the Director.
20. There is no merit at all to this ground of appeal.
21. Ressel Constructors challenges findings made by the Director in the Determination but does not rely on error of law as a ground of appeal. Although not relied on in this appeal, I will consider whether the Determination contains any error of law.
22. On its face, this appeal expresses disagreement with findings of fact made by the Director and the conclusions reached from those findings, and seeks to have the Tribunal vary them. As indicated above, 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 they are without any rational foundation.

23. The response to these challenges is that there is no basis for them for at least two reasons. First, as indicated above, the Tribunal has no authority to consider an appeal based simply on a dispute with findings of fact absent a demonstrated error of law. Second, there is no error of law. It was entirely reasonable and appropriate for the Director to rely on the evidence provided by the parties during the complaint process. An analysis of the findings in this case show there is nothing perverse or inexplicable in the findings made; they are rational and firmly grounded in the evidence provided and accepted in the Determination, and included in the Record, and in the provisions of the *Act*. In result, the findings made in the Determination stand unaffected by anything in the appeal.
24. I will not speculate too deeply into the rationale for this appeal, but it may be that Ressel Constructors has failed to appreciate the Director found travel time was “time worked” and as such was included in total hours worked for the purposes of calculating overtime payable to Mr. Renner. This may be one of the reasons the totals do not “add up” for Ressel Constructors. In any event, I am unable for the reasons stated above to consider that question in this appeal.
25. In sum, an assessment of this appeal shows it 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.
26. I dismiss the appeal and confirm the Determination.

ORDER

27. Pursuant to section 115 of the *Act*, I order the Determination dated February 27, 2015, be confirmed in the amount of \$3,318.87, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal