Employment Standards TRIBUNAL

An appeal

- by -

Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd.

("MDC and the associated companies")

- 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.: 2017A/16

DATE OF DECISION: May 17, 2017

DECISION

SUBMISSIONS

Ryan P. Berger	counsel for Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd.

OVERVIEW

1. On December 21, 2016, the Director of Employment Standards, through his delegate (the "Director"), issued a Determination against Mainland Demo Contracting Ltd. ("MDC") and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd. in favour of Gurpal S. Sekhon (Mr. Sekhon") for wages in the amount of $18,231.38, representing unpaid overtime, statutory holiday pay, vacation pay, compensation for length of service and interest.

2. The Determination associated the five entities named in this appeal under section 95 of the *Act* and found the associated companies, who will be collectively referred to in this decision as MDC and the associated companies, had contravened Part 5, section 45, Part 7, section 58 and Part 8, section 63 of the *Act* and Part 7, section 37.3 of the *Employment Standards Regulation* (the *"Regulation"*) relating to the employment of Mr. Sekhon and imposed administrative penalties in the amount of $2,000.00.

3. MDC and the associated companies have appealed the Determination on the grounds the Director erred in law and failed to observe the principles of natural justice in making the Determination. MDC and the associated companies seeks to have the Determination varied or cancelled and the matter referred back to the Director.

4. In correspondence dated February 6, 2017, 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 MDC and the associated companies, which has been provided with the opportunity to object to its completeness.

6. On March 17, 2017, the Tribunal received a submission from counsel for MDC and the associated companies objecting to the completeness of the record. Counsel contended the record ought to have included any notes, including hearing notes, or other relevant documents produced by the delegate conducting the complaint hearing and any notes or other relevant documents produced by the delegate conducting a fact-finding session held on March 31, 2016.

7. The Director has produced the notes from the fact-finding session, but – at least inferentially – objects to the production of notes produced by the delegate at the hearing, relying upon the view expressed by the Tribunal in *United Specialty Products Ltd.*, BC EST # D057/12, and *24/7 Excavating Ltd.*, BC EST # D066/15, concerning the production of notes made by a delegate during a complaint hearing. In the *24/7 Excavating Ltd.* case, the panel there referred to, and adopted, the following comment from *Lockerbie & Hole Industrial Inc.*, BC EST # D071/05, at page 7:

> Without finally deciding whether the Tribunal could ever lawfully order such notes to be produced, there are two reasons why it would be highly exceptional to do so. First, there is a reliability concern. Note-taking by a Delegate is not the same as note-taking by a court reporter or hearing secretary. This is because a decision-maker's hearing notes are a personal *aide memoire* and as such are not created for the purpose of recording the entire proceeding for third parties. Second, there is a deliberative privilege concern, as such notes are closely linked with the deliberative process: see generally *Ellis-Don Ltd. v. Ontario Labour Relations Board*, [2001] 1 S.C.R. 221. There were no extraordinary circumstances that would have persuaded me to make such an order had this issue been pressed here, particularly since, as the employer here ultimately conceded, the key evidence of the parties is summarized in the Determinations themselves.

8. I adopt that comment here; I find no extraordinary circumstances have been identified that would persuade me an order compelling production of notes taken by the delegate at the complaint hearing is necessary or warranted.

9. I have accepted the notes of the fact-finding session and they shall be considered to be included in the record.

10. 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:*
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> *(a) the appeal is not within the jurisdiction of the tribunal;*
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> *(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.*

11. If satisfied the appeal or a part of it should not be dismissed, either in whole or in part, under section 114(1) of the *Act*, the Director and Mr. Sekhon will be invited to file submissions. On the other hand, if it is found the appeal, or any part of it, 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 all or part of the appeal has any reasonable prospect of succeeding.

ISSUE

12. The issue here is whether this appeal should be allowed to proceed, in whole or in part, or be dismissed under section 114(1) of the *Act*.

THE FACTS

13. MDC and the associated companies are all engaged in some way in the business of hauling aggregate and construction materials.

14. Mr. Sekhon was employed as a short-haul truck driver. He was terminated, without notice, on August 15, 2015. He was paid the equivalent of 45 hours, or one normal week, wages by MDC, on his final pay cheque, issued 10 days after his termination. Mr. Sekhon testified that in conversation with Darshan Dhaliwal ("Mr. Dhaliwal"), who is a director or officer of most of the associated entities, he was told the payment was compensation for length of service. For his part, Mr. Dhaliwal said it was an *ex gratia* payment made because he felt badly for Mr. Sekhon.

15. Mr. Sekhon filed a complaint with the Director on February 3, 2016, alleging his employer, which is identified in the complaint as Mainland Labour Contracting Ltd ("MLC"), had contravened the *Act* by failing to pay regular and overtime wages, statutory holiday pay, annual vacation pay and compensation for length of service.

16. The Director investigated the complaint and held a complaint hearing.

17. The identity of the employer became an issue. MLC said Mr. Sekhon never worked for them, but for Mainland Demo Contracting Ltd.

18. On March 2, 2016, the Director sent a Notice of Fact Finding Meeting and Demand for Employer Records to MLC and MDC.

19. On March 30, 2016, and in response to correspondence from MDC dated March 9, 2016, the Director notified MDC that as part of its investigation of the complaint it would examine whether MLC and/or MDC employed Mr. Sekhon and that such investigation could include a consideration of section 95 of the *Act*.

20. A fact-finding session was conducted by the Director on March 31, 2016. Persons representing MLC and MDC attended.

21. A complaint hearing was scheduled for June 13, 2016. On June 7, 2016, an adjournment request was made to the Director by MDC. The request was passed on to the delegate assigned to conduct the complaint hearing, who denied the request in correspondence dated the same day.

22. The complaint hearing was commenced on June 13, 2016, not completed that day, set to be continued on July 14, 2016, and completed on that day.

23. Following completion of the complaint hearing, the Director advised the parties of a preliminary finding that all of the companies named in the Determination were associated under a common purpose and control and that there appeared to be sufficient information to support a determination under section 95 of the *Act*. On July 19, 2016, the Director delivered a letter to each of the companies associated in the Determination, notifying each of the Director's intention to consider an association under section 95 and its consequences for each of the companies and seeking their response to the preliminary finding. A deadline for a response from the identified entities was given as August 12, 2016.

24. On the same date a Demand for Employer Records was sent to each of the companies.

25. Submissions were received on behalf of all of the companies being considered by the Director for association under section 95 of the *Act*.

26. The Determination identifies four issues that were to be considered in making the Determination:

1. The association of the companies under section 95 of the *Act*;
2. Mr. Sekhon's rate of pay;
3. What, if any, wages were owed to Mr. Sekhon; and
4. Whether Mr. Sekhon was entitled to compensation for length of service and, if so, in what amount.

27. The Director considered, and rejected, a preliminary argument by MDC that Mr. Sekhon had failed to file a complaint against it within the period allowed under section 74(3) of the *Act*.

28. The Director found the evidence and the circumstances supported and justified associating the companies under section 95 of the *Act*.

29. The Director made a finding on Mr. Sekhon's wage rate. That finding has not been appealed.

30. The Director found wages, in the amount set out in the Determination, were owed to Mr. Sekhon.

31. The Director found MDC had not shown there were grounds for terminating Mr. Sekhon without notice and he was therefore entitled to compensation for length of service in an amount that was based on his full period of employment with MDC and the associated companies, rather than on the last period of his employment, when he was shown on the payroll of MDC.

ARGUMENT

32. The appeal submission attaches approximately four hundred and sixty pages of documents. The ground of appeal set out in section 112(1)(c) is not raised by MDC and the associated companies. The record has been provided by the Director and supplemented by the addition of the notes of the delegate who conducted the fact-finding session on March 31, 2016. At first blush, the documents attached to the appeal reflect what is in the record and to that extent, are superfluous. The appeal submission does not indicate any of those documents are new to the process and have been included for consideration by the Tribunal in deciding the appeal. Accordingly, I will confine my consideration of documentary material to that which is found in the record. Any documents not found in the record will likely not be accepted or considered in this appeal.

33. I shall set out and later address the arguments made in the appeal in the order in which they are made.

34. The appeal submission provides a summary of "background facts". I find it unnecessary to apply that summary for three reasons: first, to the extent that summary conforms with the record and the outline of facts found in the Determination, I will rely on those sources; second, to the extent the summary differs from findings of fact made by the Director in the Determination, I am compelled to rely on the facts as found in the Determination unless those facts are shown to be errors of law; and third, to the extent the summary expands on the findings of fact made in the Determination, the burden is on MDC and the associated companies to persuade me such additional facts satisfy the conditions for accepting new or additional evidence in an appeal – see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. On this last point,

as I have previously indicated, MDC and the associated companies does not rely on section 112(1)(c) in advancing this appeal.

Errors of Law

35. Counsel for MDC and the associated companies submits the Director committed the following errors of law:

(a) incorrectly applying the "best evidence rule";

(b) incorrectly calculating the wages owed in at least three different ways, described as the "banked wages" error, the general overtime error and the resulting vacation pay error;

(c) providing insufficient reasons for finding cause;

(d) in awarding compensation for length of service; and

(e) in finding MLC is an associated employer.

36. On the "best evidence" argument, MDC and the associated companies submits the Director erred by not relying on the records of the employer, which were grounded on hours of work recorded on "Sales Slips" and "Work Reports", whose "authenticity and accuracy", it is submitted, was "undisputed".

37. Counsel for MDC and the associated companies says the error made by the Director in calculating wages owed Mr. Sekhon arose in three ways: from the Director failing to appreciate the "banked wages" amount paid to Mr. Sekhon in his last paycheque from the employer included a "10% adjustment for vacation pay, statutory holiday pay and pre/post trip inspection time"; from the Director incorrectly calculating overtime owed; and from a resulting error in calculating vacation pay.

38. Counsel for MDC and the associated companies says the Director erred in law and failed to observe principles of natural justice by failing to provide sufficient reasons on the "cause" issue.

39. As a result, counsel for MDC and the associated companies submits the Director erred in finding Mr. Sekhon was entitled to compensation for length of service, but even if Mr. Sekhon was entitled to compensation for length of service, the Director erred in finding his entitlement was based on six years of employment with MDC and the associated companies. Counsel for MDC and the associated companies argues Mr. Sekhon's entitlement is, firstly, dependent upon the correctness of the section 95 decision and, secondly, on whether his employment was "continuous" over the six-year period. It is submitted Mr. Sekhon's employment was disrupted by a period between an injury that was manifested in February 2013 and a return to work from that injury in December 2013.

40. Counsel for MDC and the associated companies submits the Director erred in law by associating the companies in the absence of a statutory purpose for doing so.

Natural Justice

41. Counsel for MDC and the associated companies submits the Director failed to observe principles of natural justice and created a reasonable apprehension of bias by:

i. providing insufficient reasons for finding cause;

ii. refusing to allow an adjournment;

iii. allowing Mr. Sekhon to present additional evidence during the complaint hearing;

iv. associating the companies, indicating no response had been received when there had; and

v. providing a differential amount of assistance to Mr. Sekhon.

42. It is submitted the Director failed to observe principles of natural justice by creating a reasonable apprehension of bias in deciding the complaint. The argument identifies and argues there were four areas through which the apprehension of bias was demonstrated: the acceptance of material provided late by Mr. Sekhon and the subsequent refusal to grant an adjournment to MDC and MLC; allowing Mr. Sekhon to submit additional evidence during the complaint hearing, while refusing to allow MDC and the associated companies to submit additional evidence; by stating the companies, other than MDC, had failed to respond to a request for documents; and by assisting Mr. Sekhon in advancing his case.

ANALYSIS

43. 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.*

44. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

45. 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.

46. 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.

47. 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.

Errors of Law

48. In answer to the "best evidence" argument made on behalf of MDC and the associated companies, I find the Director did not err in law on the findings relating to Mr. Sekhon's hours of work; there were deficiencies in the records required to be kept by MDC that justified a consideration of all the evidence relating to the hours worked by Mr. Sekhon. I reach this conclusion for the following reasons.

49. First, I categorically reject the contention in the appeal submission that the Director "found that MDC had not contravened section 28 of the *Act*". The best that can be said by MDC and the associated companies is that the Director did not make a specific finding in the Determination that MDC had contravened section 28,

which operated to their benefit, as such a finding would have required an additional administrative penalty to be imposed on MDC and the associated companies. However, any reasonable assessment of the findings made by the Director on Mr. Sekhon's hours of work reveals the Director found the hours of work records presented by MDC did not meet all the requirements of section 28 and were unreliable. The only, apparently complete record of hours worked that was kept by the employer – information recorded by Ms. Buttar on her dispatch sheets – were never produced to the Director.

50. Second, the Director specifically found the Sales Slips and Daily Driver Work Reports, upon which hours of work recorded in the payroll records were based, "do not capture pre & post trip inspection and travel time". The material in the record shows MDC did not record the overtime worked by Mr. Sekhon in the payroll records or provide the details of the "time bank" arrangement between MDC and Mr. Sekhon.

51. Third, the Director found the Sales Slips, and the Daily Driver Work Reports, indicated the hours for which the employer could bill the client, not actual work performed. The Director found the evidence of the employer concerning the absence of a record for pre & post trip prep and travel time to be internally inconsistent.

52. The Director's findings on the hours worked by Mr. Sekhon were reasonably grounded in the evidence provided and I find no error of law was made in the analysis of that evidence.

53. There is no particular magic to "the best evidence rule"; it is a rule of evidence, not a rule of law. It is applied to further the statutory objectives of fair treatment for employers who comply with the requirements of the *Act* and to provide efficiency in resolving disputes arising under the *Act*. The rule allows the Director, when deciding the hours worked by an employee, to rely on records which comply with the requirements of section 28 of the *Act* and, in the absence of such records, to consider and evaluate all the records and evidence that is made available, including an employee's records or their oral evidence concerning their hours of work, in making a reasoned decision on the hours worked by the employee and their entitlement (if any) to payment of wages.

54. This argument represents nothing more than a challenge by MDC and the associated companies to findings of fact made by the Director, findings which I have concluded were reasonably grounded in an evaluation of the evidence. As noted above, the *Act* does not provide for an appeal against errors of fact unless those findings are shown to be errors of law. MDC and the associated companies has the burden of establishing an error of law and they have not met that burden.

55. This argument has no reasonable prospect of succeeding and it is dismissed.

56. MDC and the associated companies argues the Director incorrectly calculated the wages owing. I am persuaded this matter should not be entirely dismissed under section 114(1), as some of the elements of this argument have, on first blush, merit.

57. Having said that, I will also note, and identify, that some of the arguments raised in this part of the appeal have no merit and are rejected.

58. I reject the argument that the monies paid to Mr. Sekhon as "Banked Wages" upon his termination included the 10% adjustment for vacation pay. There is no evidence in the record of that being the case nor was this argument raised at any point in the complaint proceedings. The final cheque provided to Mr. Sekhon included an amount for vacation pay, which is calculated on regular wages earned in the final pay period. It is apparent MDC was alert to the requirement to identify and pay Mr. Sekhon's outstanding vacation pay

entitlement on his final pay cheque. However, that pay cheque does not contain any reference to vacation pay entitlement as related to the "Banked Wages" payout. This omission is telling.

59. The argument also makes assertions about how many hours were banked by Mr. Sekhon between January 2, 2015, and August 15, 2015, that is not found in the material that was before the Director when making the Determination. Although much of that information is in the record, it does not provide a complete record for that entire period. There is a record of the hours banked by Mr. Sekhon during the wage recovery period – February 15, 2015, to August 15, 2015. There is also a record of hours banked by Mr. Sekhon from January 15, 2015, to February 14, 2015, which I point out, significantly exceeds the number of banked hours represented in the table at paragraph 43 of the appeal submission. This discrepancy renders the "calculations" made in the appeal submission dubious and unacceptable.

60. There is no evidence in the record, however, of the number of hours banked from January 2 to January 14, 2015. Evidence in the appeal submission relating to this period is new evidence, which MDC and the associated companies seeks to provide without meeting the conditions for introducing "new evidence" into an appeal: see section 112(1)(c) and *Davies and others (Merilus Technologies Inc.)*, *supra*. The attempt by MDC and the associated companies to advance new evidence through the back door is inappropriate; I do not accept nor will I consider any of this evidence.

61. MDC and the associated companies submits there are errors of law in the "general" overtime calculation. Three tables, each allegedly based on potentially different legal conclusions, have been developed and provided. The submissions relating to an analysis of the merits of each of these tables includes the comment: "it is not clear where the Delegate erred. What is clear, however, is that the Delegate did err." Quite apart from that statement not meeting the burden on MDC and the associated companies to demonstrate a reviewable error in the Determination and apart from the concern I will raise later about the overtime calculations made by the Director, I do not accept the assertion that the overtime calculation made in the Determination is unclear or wrong. I have considered the Determination and have no difficulty discerning the basis for the wage calculation performed by the Director. To the extent all of the findings relating to Mr. Sekhon's overtime entitlement are correct, it contains no error in methodology or in the resulting calculation.

62. I turn now to my concern with the overtime calculations. The Director, quite correctly, accepts the "Banked Wages" payment made to Mr. Sekhon as a conversion of the "overtime" hours worked from January 2, 2015, to August 15, 2015, into wages, calculated at straight time. The Director did not make this calculation from evidence of hours worked during this period, but from evidence of the wages paid, at straight time rates, for this period. The amount paid for this period was $6,005.23. Based on that evidence, the Director found the overtime payable on this amount to be $3,002.62, but does so without considering whether the statutory recovery period – found by the Director to be the period from February 15 to August 15, 2015 – has any effect on the amount of Mr. Sekhon's overtime entitlement, since on its face, approximately six weeks of overtime hours fall outside the statutory recovery period. In making the overtime calculation, was it the Director's view that section 42 of the *Act* bears on Mr. Sekhon's overtime entitlement in this case and, if so, how? That question needs to be addressed.

63. I will be seeking the position of the parties on this question.

64. MDC and the associated companies submits the Director erred in law by not providing sufficient reasons on the "just cause" question. It is also argued that this deficiency was a failure to observe principles of natural justice. I shall answer both aspects of this submission under the natural justice analysis.

65. MDC and the associated companies submits the Director erred in law in awarding Mr. Sekhon compensation for length of service based on six years of employment. To some extent this argument is related to the arguments against the section 95 decision and the decision on just cause, but more particularly, it is related to the contention that Mr. Sekhon's employment was not continuous with MDC and the associated companies, but was broken by his absence from work, for reasons relating to a work related long-term injury, from February 3, 2013, to December 9, 2013. The argument on this aspect of the Determination is that the Director erred in stating there was "no evidence" contradicting Mr. Sekhon's evidence of continued employment.

66. This argument ignores that the finding of "no evidence" was directed to whether there was evidence showing a break in Mr. Sekhon's employment with MDC and the associated companies, which includes the finding, at page R15, that "there was no break in service due to the medical leave in 2013 or otherwise". This finding is one of mixed law and fact, combining the application of a principle of law under the *Act* to the facts as found. The burden on MDC and the associated companies is to show either there was an error in the operating principle of law under the *Act* or that the findings of fact supporting that principle raise an error of law.

67. The argument made by MDC and the associated companies on this point refers to four pieces of evidence, three relating to his returning to work in December 2013 and one reciting evidence given by Mr. Dhaliwal, on behalf of MDC, at the complaint hearing that was unsupported by any objective evidence and not accepted by the Director. MDC and the associated companies says all this evidence points to the fact Mr. Sekhon's employment commenced December 9, 2013.

68. The central contention on this argument, which I do not accept, is that Mr. Sekhon's injury related absence from work was a "break" in his otherwise continuous employment with MDC and the associated companies. It is not specifically argued in that way, but it is implicit in the position advanced in the appeal.

69. This type of argument has long been rejected by the Tribunal, beginning with the decision in *Eva P. Reycraft (operating as Creative Embroidery West)*, BC EST # D236/97, where the Tribunal was dealing with an employee who was off for illness and receiving unemployment illness benefits. The Tribunal stated in that decision as follows:

> There is no dispute in the evidence that the reason why Ms. Mahil was not at work between April 18, 1995 and July 3, 1995 was that she was ill and under medical care. The ROE which was issued by Creative Embroidery at the time confirms that "illness or injury" was the reason for her absence from work. I received no evidence to suggest that Creative Embroidery treated her absence as anything other than a leave of absence due to illness.
>
> Section 1 of the *Act* defines an "employee" and includes *"...a person on leave from an employer."*
>
> For these reasons, I find that Ms. Mahil's employment was continuous, for purposes of the *Act*, from March 24, 1992 to July 26, 1996 and confirm the findings made by the Directors delegate in that respect

70. See also *MacNutt Enterprise Ltd.*, BC EST # D293/01, at pages 10 – 12, which dealt with a prolonged absence from work of a long-distance haul driver resulting from a work-related condition.

71. As with the above decisions, there is no dispute on the evidence of Mr. Sekhon's absence from work, or the reason for it. The question is whether that absence created a "break" in Mr. Sekhon's employment or whether, on an interpretation and application of the *Act*, Mr. Sekhon continued to be an employee during his injury related absence. MDC and the associated companies does not directly argue that the Director erred in applying the correct legal to the facts. If so, I dismiss that argument, as it does not conform to the definition of employee in the *Act*.

72. If MDC and the associated companies is advancing the argument on the basis of some error of law in the findings of fact, I am unable to accede to it. The Tribunal has no jurisdiction over allegedly erroneous errors of fact that does not convert the issue into an error of law and I am unable to extricate a question of law from the facts on which the Director based the conclusion about the period of Mr. Sekhon's employment.

73. Based on the findings of fact applied to the principles expressed in the above cases, I accept the Director did not err in law in finding Mr. Sekhon continued to be an employee during his injury related absence and his employment was, therefore, continuous through that period.

74. The argument challenging the finding that Mr. Sekhon's employment was continuous has no reasonable prospect of succeeding and it is dismissed.

75. MDC and the associated companies argues the Director erred in law in associating the companies under section 95 of *Act*, contending the Director was wrong in finding there a "statutory purpose" for association. The Tribunal, in *Invicta Security Systems Corp.*, BC EST # D349/96, said the following concerning this requirement:

> One of the purposes of the *Act* is to ensure employees in the province receive the basic standards of compensation and conditions of employment. The *Act* not only sets the basic standards of compensation and conditions of employment but also provides a comprehensive scheme for the enforcement of the *Act*, including some collection procedures such as claims of lien, court order enforcement and seizure of assets in appropriate circumstances. It is in the enforcement provisions of the *Act* where Section 95 has been placed. The statutory purpose requirement is met if the one employer determination is for the purpose of enforcing basic standards of compensation and conditions of employment.

76. The above excerpt completely answers the argument made in this appeal against the section 95 finding and it is, accordingly, rejected. The simple fact that associating the companies furthered the collection of unpaid wages, specifically providing Mr. Sekhon with length of service compensation for his entire period of employment, speaks conclusively to the presence of a statutory purpose.

77. MDC and the associated companies submits the Director failed to observe principles of natural in failing to provide sufficient reasons on the "just cause" issue. The Determination sets out the position and evidence of the parties on the question of "just cause". The evidence provided by MDC supporting "just cause" can be summarized as follows:

- an allegation that Mr. Sekhon had tampered with the GPS tracking system in one of the trucks driven by him;
- "numerous incidents" of misconduct, none documented, including an allegation Mr. Sekhon was "insubordinate" for threatening to quit if he was not assigned a shift on July 12, 2015;
- a report received by Mr. Dhaliwal from a "new driver" of truck #7 – who never gave evidence to the Director – that he felt "threatened" by Mr. Sekhon with respect of how to record hours; and
- information from two drivers, not identified, who confirmed Mr. Sekhon had been talking with drivers about how to record their hours.

78. The Director was not satisfied MDC had shown cause to terminate Mr. Sekhon's employment and found MDC had acknowledged the absence of cause by having paid Mr. Sekhon one weeks' wages at the time of his termination.

79. The principles that apply as to whether or not there was just cause for termination are well established and have been consistently applied by the Tribunal. They are expressed as follows in *Kenneth Kruger*, BC EST # D003/97):

> 1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
>
> 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
>
>   1. A reasonable standard of performance was established and communicated to the employee;
>
>   2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
>
>   3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
>
>   4. The employee continued to be unwilling to meet the standard.
>
> 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
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> 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

80. The Tribunal has adopted and applied a "functional context-specific approach" when assessing the sufficiency of reasons: see *Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc.*, BC EST # D089/10, *Worldspan Marine Inc. and 27222 Developments Ltd.*, BC EST # D005/12, and *Robin Bourne carrying on business as Agent 99 Express Services*, BC EST # D044/16. These decisions direct a reading of the Determination as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they are delivered: see *R. v. R.E.M.*, 2008 SCC 51, from paragraph 15. Every finding and conclusion need not be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned. In this case, the delegate has reached a result that is grounded in the evidence and the material provided by the parties.

81. On the above analysis and looking only at the "evidence" presented by MDC, which was comprised of allegations of minor misconduct unsupported by any objective evidence showing MDC was able to rely on these alleged incidents to justify the termination, characterizations of conduct by Mr. Sekhon – insubordinate, threatening – that were unsupported by any direct evidence and allegations of misconduct against Mr. Sekhon, unsupported by any evidence at all, it is apparent the case presented by MDC was woefully inadequate to satisfy the burden imposed in the *Act*. Based on that evidence, it was open to the Director to accept it and still conclude MDC had not met the burden of showing there was just cause for dismissing Mr. Sekhon. Taken as a whole, the Determination is reasonable and logical.

82. There is no reasonable prospect of this argument succeeding and it is dismissed.

83. MDC and the associated companies alleges the conduct of the delegate conducting the complaint hearing raised a reasonable apprehension of bias. In addressing this argument, I can do no better than to adopt the

principles expressed in and the analysis adopted and applied in *Tyrone Daum*, BC EST # D123/16, at paras. 30 – 35.

84. MDC and the associated companies have not, to the degree of probability required by the evidence, shown the delegate conducted herself in a way that raised a reasonable apprehension of bias. The allegations made here are subjective and impressionistic. There is no reasonable prospect of this argument succeeding and it is dismissed.

ORDER

85. Pursuant to section 114(1) of the *Act*, I order the appeal be substantially dismissed according to the above reasons.

86. The Director and Mr. Sekhon are invited to file submissions on the matter of the overtime calculation as applied to the period from January 2, 2015, to February 15, 2015. MDC and the associated companies shall be given the opportunity to reply to those submissions.

87. I continue to be seized of this appeal and following receipt and review of the submissions of the parties, if any, I shall finalize the appeal.

David B. Stevenson
Member
Employment Standards Tribunal