

An appeal

- by -

Advantage Trade Construction Ltd.  
(“Advantage”)

- 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.:** 2014A/63

**DATE OF DECISION:** July 4, 2014

## DECISION

### SUBMISSIONS

Zsolt Kiss

on behalf of Advantage Trade Construction Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Advantage Trade Construction Ltd. (“Advantage”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 2, 2014.
2. The Determination found that Advantage had contravened Part 3, sections 17 and 18, Part 4, section 40 and Part 7, section 58 of the *Act* in respect of the employment of Attila Verebélyi (“Mr. Verebélyi”) and Krisztina V. Voros (“Ms. Voros”) and ordered Advantage to pay wages to Mr. Verebélyi and Ms. Voros in the amount of \$3,929.35 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$5,429.35.
3. Advantage has filed this appeal on the ground that Director failed to observe principles of natural justice in making the Determination. Advantage seeks to have the Determination varied by reducing the amount found to be owed to the claimants. It will assist this decision to set out in their entirety the reasons and argument provided on the appeal by Advantage:
  - The Principle of Natural Justice has not been observed
  - Krisztina Voros was not on the job site
  - The claimant only worked for 1 month as opposed to the 2 months which director determined
  - The hours claimant stated were false and unprovable [sic]
  - I am appealing the amount that should be due
  - Payments have been made in cash and only six hours is due
  - Specifically also wrong is on page R-3 – claimant states that \$5000.00 was already owed, which is impossible as he was hired that week
  - Do not agree with 3x administrative penalty, only 1 occurrence [sic]
4. The appeal was filed late as a copy of the Director’s written reasons for the Determination – a statutory requirement for inclusion with an appeal: see section 112(2) (a)(i.1) – was delivered to the Tribunal outside of the statutory period for filing the appeal. Any delay would allow the Tribunal to dismiss the appeal under section 114(1)(b), but I choose to address the appeal under section 114(1)(f).
5. On May 15, 2014, the Tribunal acknowledged to the parties that an appeal had been received from Advantage, requested production of the section 112(5) record (the “Record”) from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.

6. The Record was provided to the Tribunal by the Director and a copy has been delivered to Advantage, who has been given the opportunity to object to the completeness of Record. There has been no objection and, accordingly, the Tribunal accepts it as complete.
7. Consistent with the May 15, 2014, notice, I have reviewed the appeal, including the reasons for appeal submitted by Advantage, and the Record.
8. The Tribunal has 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 appeal and my review of the Record that was before the Director when the Determination was being made. Under section 114, 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 subsection 114(1), 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.*

9. 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. Verebélyi and Ms. Voros will, and the Director may, be invited to file 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*.

## **ISSUE**

10. The issue to be considered at this stage of the proceeding is whether there is any reasonable prospect the appeal can succeed.

## **THE FACTS**

11. Advantage operates a construction and remediation business. Mr. Verebélyi and Ms. Voros complained to the Director that they had not been paid regular and overtime wages from Advantage for work performed.
12. Advantage responded to the claim by asserting Mr. Verebélyi and Ms. Voros were not employees under the *Act*, but were independent contractors and, in any event, both were paid in full, through cash payments made in May and June, 2013, for any work performed.
13. The Director conducted a complaint investigation. The position of Advantage was advanced through Zsolt Kiss (“Mr. Kiss”), the owner and sole director of Advantage. Mr. Kiss gave evidence on behalf of Advantage and presented two witnesses for its case. Mr. Verebélyi and Ms. Voros gave evidence on their own behalf and also provided two witnesses to assist their case.

14. The Director identified the issues in the complaint as being whether Mr. Verebélyi and Ms. Voros were employees under the *Act* and, if so, whether they were owed wages.
15. The Director found the complainants were employees and were owed wages in the amount calculated and set out in the Determination. In analyzing the evidence relating to the claims of wages owed, the Director accepted the records of hours worked provided by Mr. Verebélyi and Ms. Voros and rejected the evidence provided by Mr. Kiss on this issue, finding its “truthfulness” to be “questionable”. The reasons why the Director accepted the claimants’ evidence and rejected that of Mr. Kiss is fully detailed in the Determination and need not be repeated here.

## ARGUMENT

16. Advantage has provided no real argument in this appeal. I have set out, above, the complete “reasons and argument” submitted by Advantage. It consists of nothing more than a series of statements asserting errors or disputing findings made in the Determination.

## ANALYSIS

17. 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.
18. 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.*
19. 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.
20. 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.
21. This appeal is grounded in a claim that the Director failed to observe principles of natural justice in making the Determination, although Advantage 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 *BWT Business World Incorporated*, BC EST #D050/96.

22. It is clear from the Record that Advantage was afforded the procedural rights contemplated by the above statement, which, I note, are also statutorily protected by section 77 of the *Act*.
23. It does nothing for Advantage to reassert facts which the Director has rejected as being of questionable truthfulness without showing the Director's findings, on both the credibility of Mr. Kiss' evidence and the validity of the evidence accepted, were wrong and reviewable as an error.
24. In fact, the matter at issue here for Advantage does not relate to natural justice at all, but as indicated above, to Mr. Kiss' disagreement with findings of fact made by the Director.
25. On my view of the Determination and the material in the Record there was a more than adequate basis for the findings made by the Director. It would take a considerably stronger case than what has been presented by Advantage in this appeal to call into question the findings made by the Director, which are reasoned, reasonable and supported by the evidence.
26. Additionally, as indicated above, the statutory grounds of appeal in section 112 do not authorize the Tribunal to consider appeals that challenge findings of fact unless those findings are shown to be an error of law. The assertions made by Advantage in its argument do not come close to showing any such error has been made by the Director in this case.
27. There is some suggestion in the Tribunal's file that there is a timeliness issue relating to the filing of the appeal. I make no decision on whether there is either an issue or a delay in filing. Such a decision is unnecessary in order to dispose of this appeal.
28. Advantage has also challenged the imposition by the Director of three administrative penalties. This argument has no merit. The contraventions in this case are discrete, relating to separate and distinct obligations under the *Act*. It was open to the Director to impose a penalty in respect of each of the contraventions found to have occurred: see *537370 B.C. Ltd. operating as Ponderosa Motor Hotel*, BC EST # D011/06 at paras. 15-16.
29. For the reasons stated above, there is no possibility this appeal can succeed. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
30. I dismiss the appeal and confirm the Determination.

**ORDER**

31. Pursuant to section 115 of the *Act*, I order the Determination dated April 2, 2014, be confirmed in the amount of \$5,429.35, together with any interest that has accrued under section 88 of the *Act*.

---

**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**