



An appeal

- by -

Robert Krausz
("Mr. Krausz")

- 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/74

DATE OF DECISION: July 5, 2017

DECISION

SUBMISSIONS

Robert Krausz

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Robert Krausz (“Mr. Krausz”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 11, 2017.
2. The Determination found Yorkville Education Company ULC carrying on business as Yorkville University (“YU”) had contravened Part 10, section 83 of the *Act* in respect of Mr. Krausz’ employment and imposed an administrative penalty of \$500.00 on YU. The Determination found hiring or reinstatement was not an appropriate remedy in the circumstances and that the evidence did not show Mr. Krausz had incurred a loss of wages or incurred expenses as a result of the contravention by YU.
3. This appeal is grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. Mr. Krausz seeks to have the Determination varied to provide an award for lost wages.
4. In correspondence dated May 25, 2017, the Tribunal acknowledged receiving the appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and advised that following such review, all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Krausz, who has been provided an opportunity to object to its completeness. He does not object to its completeness, but has suggested a minor clarification to the description of one item listed in the record. The suggestion has been noted, but does not affect this decision.
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 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 should not be dismissed under section 114(1), the Director and YU 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 will succeed.

ISSUE

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

THE FACTS

9. YU operates an accredited, private, non-denominational university specializing in online university degree programs. Mr. Krausz applied for a position as an online faculty instructor. His application was proceeding, with a probability of succeeding, when an issue arose between Mr. Krausz and YU concerning payment for a faculty training workshop he was required to complete as part of the hiring process. As a result, his candidacy for a position with YU was considered by them to be “withdrawn”.
10. Mr. Krausz filed a complaint with the Director.
11. In his complaint, Mr. Krausz sought, as a remedy, that his candidacy be reinstated, that he be recognized as a newly appointed faculty member and that he be allowed to do the training workshop, with fair remuneration for it.
12. The Director found the actions of YU contravened section 83 of the *Act*.
13. The Director considered possible remedies for the contravention, finding ordering YU to reinstate Mr. Krausz’ candidacy or hire Mr. Krausz would not be appropriate remedies. The Director considered an order for compensation, but concluded Mr. Krausz had not experienced a loss of wages as a consequence of the lost employment opportunity and had not identified any other loss or expense caused by the contravention that warranted an award of compensation. In reaching the conclusion on wage loss, the Director examined a period from January 24, 2017, to the end of December 2017. The Director conducted an analysis that made a finding on what Mr. Krausz would have earned as part of the faculty of YU during this period and set that off against evidence provided by Mr. Krausz of what he would have earned from tutoring in the period, concluding tutoring earnings more than offset any loss of wages.
14. An administrative penalty was imposed on YU.
15. The appeal does not challenge any aspect of the Determination other than the conclusion Mr. Krausz had experienced no wage loss resulting from the lost employment opportunity.

ARGUMENT

16. Mr. Krausz submits the Director “misunderstood” his evidence of his self-employment tutoring work, apparently not appreciating this was work he had been doing before he applied to join the faculty of YU and that he would continue to do in addition to whatever work he received from YU. He says the Director was wrong to set off potential self-employment tutoring income against potential wage loss from the YU position, when one did not replace the other.
17. Mr. Krausz also disagrees with the time frame used by the Director when calculating his wage loss from the contravention. He submits there is no explanation given by the Director for not considering a longer time-frame for calculating his wage loss.

ANALYSIS

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. 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.
20. 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.
21. 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] BCJ No. 2275 (BCCA):
- 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.
22. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. d.b.a Honda North*, BC EST # D043/99.

23. The grounds of appeal 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.
24. Applying the above principles, I am not persuaded this appeal has any reasonable prospect of succeeding.
25. At the core of this decision is the limited authority of the Tribunal to review findings of fact made by the Director in a Determination.
26. No error of law is shown.
27. On the compensation calculation, the only possible basis for arguing error of law is that the Director acted on a view of the facts that could not reasonably be entertained. The "facts" referred to in this part of the definition are those presented to the Director during the complaint process and appear in the Determination, as part of the record or, in some circumstances, are allowed to be included in the appeal under section 112(1) (c). This appeal does not seek to rely on this ground to introduce new, or additional evidence. In any event, it would be doubtful that the assertions upon which this appeal is based would meet the conditions for allowing new evidence.
28. There is nothing in the Determination or in the record indicating Mr. Krausz gave evidence that he intended to do his tutoring work in addition to any work he received from YU. Mr. Krausz has included some new material with the appeal, but it does not relate to his tutoring work. There is no relevant new evidence on this point. It cannot be said the Director "misunderstood" evidence that was not presented during the complaint process.
29. It is not a function of the Tribunal to receive evidence on matters that an appellant feels, after reading and reflecting on the Determination, were not adequately presented to the Director. It may seem unfair to Mr. Krausz that he must bear the consequences of the case he presented, but this conclusion conforms to the statutory objectives of efficiency and finality in resolving disputes that are reflected in section 2 and to the scope of the authority of the Tribunal reflected in section 112(1) of the *Act*.
30. In respect of the time frame used by the Director when calculating potential wage loss, Mr. Krausz has not shown this choice was an error law. Based on the circumstances, I am unable to accept the decision of the Director to consider a period of more than 11 months in assessing the financial impact of the opportunity lost by the contravention of YU as unreasonable and, as a matter of law, unacceptable.
31. Mr. Krausz argues failure to comply with principles of natural justice. The burden of showing a failure to comply with principles of natural justice is on Mr. Krausz. Meeting that burden requires evidence demonstrating a breach of natural justice. The appeal does not show Mr. Krausz has satisfied that burden.
32. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, 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)

33. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. In this case, a complaint hearing was conducted by the Director. The Determination sets out that both parties were given the opportunity to present their evidence and make submissions. Reasons for the decision reached in the Determination were given. Mr. Krausz was afforded the procedural rights captured within the above statement. Mr. Krausz does not agree with the final result, there is nothing in the appeal or the appeal submissions that identifies where the natural justice issue arises or establishes any of his natural justice protections were denied.
34. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

35. Pursuant to section 115 of the *Act*, I order the Determination dated May 11, 2017, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal