

An appeal

- by -

Malaspina Coach Lines Ltd.
("Malaspina")

- 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: Shafik Bhalloo

FILE No.: 2016A/39

DATE OF DECISION: May 4, 2016

DECISION

SUBMISSIONS

Stanley Chiu

counsel for Malaspina Coach Lines Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Malaspina Coach Lines Ltd. (“Malaspina”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 27, 2016 (the “Determination”).
2. The deadline for filing an appeal of the Determination was 4:30 p.m. on March 7, 2016. Malaspina’s Appeal Form was received ten (10) days later on March 17, 2016, together with the written submissions of Malaspina’s counsel, Stanley Chiu (“Mr. Chiu”), on the merits of the appeal and Malaspina’s request for an extension of time to file its submissions.
3. The Determination concluded that Malaspina contravened Part 3, section 18 (wages); Part 4, section 40 (overtime); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act*, and ordered Malaspina to pay Dorothy Jane Corbett, Karen Kimball, Douglas McLeod (“Mr. McLeod”), James Walsh (“Mr. Walsh”) and Gladys Wray (collectively, the “Complainants”) wages in the amount of \$16,340.81 and to pay administrative penalties under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00 for breaches of sections 17 and 18 of the *Act* and section 46 of the *Regulation*, for a total amount of \$17,840.81.
4. Malaspina’s late appeal disputes the overtime awarded to Mr. McLeod and Mr. Walsh, totalling \$7,171.35.
5. The sole ground of Malaspina’s appeal is that the Director erred in law in making the Determination and seeks the Employment Standards Tribunal (the “Tribunal”) to change or vary or cancel the Determination as it relates to the overtime awarded.
6. In correspondence, dated March 18, 2016, the Tribunal sent Malaspina’s appeal to the Complainants and to the Director for informational purposes only. The Tribunal advised the Complainants and the Director that no submissions were being requested from them at this time. In the same letter, the Tribunal requested the Director to provide the section 112(5) “record” (the “Record”) to the Tribunal. The Tribunal also requested Malaspina to provide the written Reasons for the Determination (the “Reasons”) no later than April 5, 2016.
7. On April 4, 2016, the Director sent the Record to the Tribunal.
8. On April 7, 2016, the Tribunal disclosed the Record to Malaspina, and afforded the latter an opportunity to object to its completeness. However, no objection as to the completeness of the Record was received from Malaspina and, therefore, the Tribunal considers the Record as complete.
9. On April 5, 2016, by email, Mr. Chiu sent a copy of a medical letter from the treating physician of Ali Ismail (“Mr. Ismail”), a director and officer of Malaspina, explaining Mr. Ismail’s condition. This letter was tendered by counsel support of Malaspina’s application for an extension of time to file its appeal. In the same email, Mr. Chiu indicated to the Tribunal that he was unable to obtain a copy of the Reasons from Mr. Ismail but he was making an effort to obtain a copy from the Employment Standards Branch (the “Branch”).

10. Mr. Chiu informed the Tribunal, by email dated April 11, 2016, that he was unsuccessful in obtaining the Reasons from the Director and attached a copy of the letter of the Director refusing Malaspina's request for the Reasons. The Director's letter explained that Malaspina failed to request the Reasons within the time limit set out in the Determination, namely, within seven (7) days of being served with the Determination. The Director also noted that the appeal period for the Determination expired on March 7, 2016.
11. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Appeal Form submitted by Malaspina with accompanying written submissions of counsel and my review of the Record 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. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite the Complainants and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. Malaspina will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

12. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

13. The Complainants filed their complaints under section 74 of the *Act*, alleging variously that Malaspina contravened the *Act* by failing to pay them regular wages, statutory holiday pay and annual vacation pay, and compensation for length of service (the "Complaints").
14. The delegate of the Director investigated the Complaints and attempted to contact Malaspina, and particularly the latter's directors and officers, Mr. Ismail and Rita Colleen Ismail ("Ms. Ismail") by email, by telephone, and by registered mail, but to no avail. The delegate also issued a Demand for Employer Records to Malaspina which went unanswered. As a result, the delegate relied upon the Complainants' unchallenged evidence to make the Determination.
15. As concerns Mr. Walsh and Mr. McLeod, they worked as bus drivers for Malaspina. The Record contains, *inter alia*, Mr. McLeod's Driver's Daily Logs, and Mr. Walsh's personal summary of trips he made for Malaspina. The delegate relied upon this evidence to determine that Mr. McLeod was owed regular wages, overtime pay, statutory holiday pay and annual vacation totalling \$4,669.71 and Mr. Walsh was owed regular wages, overtime pay, statutory holiday pay, annual vacation pay and compensation for length of service, totalling \$5,898.17.
16. As indicated, Malaspina has appealed the Determination as it relates to overtime wages awarded to both Mr. Walsh and Mr. McLeod.

SUBMISSIONS OF MALASPINA

17. In his written submissions, dated March 16, 2016, counsel has presented submissions in support of Malaspina's request for an extension of time to file its appeal, and on the merits of the appeal. While I have reviewed both submissions in their entirety, at this juncture, I do not find it necessary to delineate counsel's

submissions in support of the request of an extension of time to file the appeal, as I am able to dispose of the appeal under section 114(1) of the *Act*, based on my review of the merits of the appeal.

18. On the merits of the appeal, counsel has checked off the “error of law” ground of appeal on the Appeal Form.
19. In support of the error of law ground of appeal, counsel submits as follows:

Malaspina operated a road transportation service that involved crossing provincial and international borders, in specific, between British Columbia and Alberta, and between British Columbia and the United States. As such, Malaspina rightfully falls within federal jurisdiction under the *Canada Labour Code* (the ‘code’) and the *Canada Labour Standards Regulations* (‘Regulations’), as opposed to provincial jurisdiction. We note that the determination with respect to overtime was made pursuant to section 40 of the *Employment Standards Act*.

20. In addition to challenging the jurisdiction of the Director to award overtime to Mr. Walsh and to Mr. McLeod, counsel submits that both these individuals “did not claim overtime pay in their complaints” and reiterates “overtime pay is not applicable where transportation companies fall under federal jurisdiction”.
21. Counsel further submits that Mr. Ismail informs him that he had discussed the matter of the jurisdiction with the delegate responsible for making the Determination after the Determination was made.
22. In these circumstances, counsel requests that the Determination be varied or cancelled as it relates to the overtime awards made to Mr. McLeod and to Mr. Walsh.

ANALYSIS

23. Pursuant to section 3(1) of the *Act*, the *Act* applies to all employees within provincial jurisdiction. However, employees whose work falls under the jurisdiction of the federal government are outside the jurisdiction of the province’s *Act*. In particular, section 91 of the *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.) sets out some areas of exclusive federal jurisdiction, which include interprovincial and international highway transport systems.
24. In this case, Mr. Chiu is arguing that Malaspina’s business is a federal work or undertaking, as Malaspina “operated a road transportation service that involved crossing provincial and international borders, in specific, between British Columbia and Alberta, and between British Columbia and the United States”. This assertion in counsel’s submissions is unaccompanied with any corroborating evidence. It is no more than a bare assertion of counsel.
25. Further, no evidence was adduced by Malaspina’s counsel of the above assertion during the investigation of the Complaints. It would appear that Malaspina sat in the weeds, failing to participate or cooperate with the Director’s delegate during the investigation of the Complaints and now, in the appeal of the Determination, seeks to make submissions it should have made during the investigation stage. As indicated by the Tribunal in *Tri-West Tractor Ltd.*, BC EST # D268/96, the purpose of the appeal provision in section 112 of the *Act* is not to afford the appellant a complete re-examination of the complaint or to use the appeal procedure “to make the case that should have and could have been given to the delegate in the investigative process.”
26. Having said this, I have had the opportunity to look at the Record and I find that Mr. Chiu’s assertion that Malaspina falls within federal jurisdiction is not only without any evidentiary foundation but there is evidence to suggest that the work both Mr. McLeod and Mr. Walsh did as bus drivers for Malaspina falls squarely

within the provincial jurisdiction. More particularly, Mr. McLeod's Driver's Daily Log and Mr. Walsh's personal summary of trips indicated clearly that all their bus trips for Malaspina took place within the province, from Powell River to Vancouver and back, and other ferry locations within the province. There is no evidence whatsoever that Mr. McLeod's or Mr. Walsh's work for Malaspina took them cross-border to Alberta or to the United States.

27. In these circumstances, I find that Malaspina has failed to discharge its burden to show that the Director acted without jurisdiction in this case.
28. Also, counsel's submission that Mr. McLeod or Mr. Walsh did not claim overtime pay and the related suggestion that, therefore, they should not have been awarded overtime pay, is without merit. While neither individual's Complaint Form shows a specific claim for overtime pay, during the delegate's investigation of their complaints, sufficient evidence was presented by both to show that Malaspina owed each of them overtime pay. Had Malaspina participated in the investigation, it would have been in a position to make the argument it now makes or present its dispute with the overtime claim.
29. For all the above reasons, I find Malaspina's appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

30. Pursuant to section 115 of the *Act*, I order the Determination, dated January 27, 2016, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal