

An appeal

- by -

Grizzco Camp Services Inc.

(“Grizzco”)

- 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:** Carol L. Roberts

**FILE No.:** 2013A/47

**DATE OF DECISION:** September 25, 2013

## DECISION

### SUBMISSIONS

M. Shane Dugas

counsel for Grizzco Camp Services Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Grizzco Camp Services Inc. (“Grizzco”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 19, 2013. In that Determination, the Director ordered Grizzco to pay its former employee, Dwayne Marchand, \$8,156.88 in compensation for length of service, overtime, vacation pay, and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for Grizzco’s contravention of sections 40 and 63 of the *Act*, for a total amount payable of \$9,156.88.
2. Grizzco appeals the Determination contending that the delegate erred in law and failed to comply with principles of natural justice in making the Determination. Grizzco also says that evidence has become available that was not available at the time the Determination was being made.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based on Grizzco’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

### FACTS AND ARGUMENT

5. Briefly, the facts and argument before the delegate are as follows.
6. Dwayne Marchand was employed as a maintenance worker for Grizzco from November 22, 2011, to June 7, 2012. Mr. Marchand filed a complaint with the Employment Standards Branch alleging that Grizzco had failed to pay him overtime wages and compensation for length of service.
7. A delegate of the Director held a hearing into Mr. Marchand’s complaint on November 27, 2012. Mr. Dugas appeared for Grizzco, Mr. Marchand represented himself.
8. At issue before the delegate was whether or not Grizzco had just cause to terminate Mr. Marchand’s employment; and whether Grizzco owed Mr. Marchand overtime wages.

#### Termination

9. On March 12, 2013, while driving a van that belonged to a friend, Mr. Marchand was in an automobile accident. Mr. Marchand was arrested because the insurance on the van had expired. The RCMP discovered a roll of cable in the back of the van and suspected Mr. Marchand had stolen it. Mr. Marchand provided a statement to the RCMP stating that the cable belonged to a subcontractor, GNS, and that GNS was aware the cable was in the van.

10. The day following the accident, Mr. Marchand told GNS about the accident and advised them to contact the RCMP to confirm his story. Mr. Marchand testified that his supervisor at Grizzco, “Shawn”, was aware that he stored cable and other supplies in this van. All charges against Mr. Marchand were ultimately dropped, and on June 4, 2012, Mr. Marchand spoke to the RCMP about arranging for the cable to be returned to the worksite. Mr. Marchand asserted that it was only after the charges were dropped that his troubles with Grizzco began.
11. On June 5, 2012, the RCMP contacted Grizzco’s owner, Douglas Milner, regarding the incident. This was the first time Mr. Milner heard of the incident. Grizzco contended that the roll of cable belonged to Grizzco and terminated Mr. Marchand’s employment on June 7, 2012.
12. Grizzco took the position that it had just cause to terminate Mr. Marchand’s employment because he was in possession of Grizzco property in contravention of both his employment agreement and Grizzco’s Code of Ethics.
13. Grizzco’s Human Resources Manager, Darrell Ross, testified that Mr. Marchand “was expecting [his dismissal] and tried to explain his way out of the situation”. Mr. Ross also argued that the theft of cable was serious on its own, but “equally disturbing was Mr. Marchand’s failure to inform the Employer”. (I infer this statement by the delegate is meant to mean that Mr. Marchand failed to inform the Employer of the accident.)
14. Mr. Marchand testified that his first obligation was to inform GNS about the incident as the cable belonged to them. When asked why he had not asked anyone at GNS to testify on his behalf, Mr. Marchand said that the RCMP had already done a thorough investigation and had dropped all charges. Mr. Marchand acknowledged that Grizzco’s senior executives likely did not know about the accident.
15. The delegate noted Grizzco had not established that the cable belonged to Grizzco rather than GNS, as asserted by Mr. Marchand. The delegate noted that there was no evidence Mr. Marchand had been charged with any criminal offence. The delegate also noted that Grizzco had provided no evidence that it had conducted any investigation into the incident between finding out about it and terminating Mr. Marchand’s employment. The delegate concluded Grizzco had not established just cause to terminate Mr. Marchand.

#### Overtime

16. Mr. Marchand worked 10 hours per day. He testified that, in addition, he was required to be available for work 24 hours per day and was not allowed to leave the camp at which he was assigned even when off shift. However, Mr. Marchand conceded in cross-examination that he had sought, and received, permission to leave the camp. Mr. Marchand also said that the regular shift rotation consisted of 28 days of work followed by seven days off, but that he frequently worked as many as 38 consecutive days. He asserted that he was entitled to overtime wages as he was not a manager and was not subject to any averaging agreement. Mr. Marchand acknowledged that his employment agreement provided that any overtime had to be pre-authorized by Grizzco. He also acknowledged that he had agreed to work 38 straight days on one occasion so that other employees could spend Christmas with their families.
17. Mr. Marchand called two witnesses; Michael Devoy and Alf Channell, both of whom were also Grizzco maintenance workers. Mr. Devoy testified that as a maintenance worker for Grizzco, he not only worked 10 hour per day, he was required to do call-outs at night and that he was not allowed to leave the site.

18. Mr. Channell testified that he worked 10 hours per day and would be expected to work additional hours as necessary but was never paid for this work. He also testified that maintenance employees were not allowed to leave the camp during shifts - which varied from 21 days on and 7 days off to 28 days on with 14 days off.
19. Mr. Ross took the position that while maintenance workers, including Mr. Marchand, were scheduled for a 10 hour day, on most days it would be hard to find six hours of work to do. Nevertheless, Mr. Ross asserted that Mr. Marchand was always paid for 10 hours per day. Mr. Ross testified that Mr. Marchand never requested approval for overtime and never entered any overtime on his timesheets.
20. The delegate found that Mr. Marchand worked 10 hours each day worked. He further found that the employment agreement between the parties did not constitute an averaging agreement under section 37 of the *Act* and as such, determined that Mr. Marchand was entitled to overtime pay in the amount of \$6,975.09.

*Argument*

21. Grizzco's counsel made the following submissions on appeal:
  1. the delegate erred in calculating the amount paid to Mr. Marchand as the documents submitted at the hearing did not include the total amount paid to Mr. Marchand;
  2. the delegate erred in law in finding that Grizzco did not have an averaging agreement in place;
  3. Grizzco owned the cable removed by Mr. Marchand and that the RCMP file relating to the investigation was not available at the time of the hearing. Grizzco contends that Marchand's allegation that the cable belonged to GNS "should be properly addressed with the RCMP file and proper viva voce evidence of the individuals referred to by Marchand";
  4. Mr. Marchand testified that he was a maintenance man and that "this appears to be inaccurate". Counsel contends that Mr. Marchand was not employed as a maintenance man for a lengthy period of time and that "the proper evidence was not before the delegate and it was not possible to address the alteration in the evidence at the hearing. Additional viva voce evidence will be necessary to address the deficiency in the evidence before the tribunal";
  5. Grizzco offered Mr. Marchand severance, which was refused; and
  6. the evidence was that Mr. Marchand was required to seek approval for all overtime worked, and that Mr. Marchand did not seek approval at any time.
22. Grizzco's appeal was filed July 29, 2013. In a covering letter, counsel indicated that he had not received a copy of the RCMP file but that it would be provided immediately upon receipt.
23. On July 30, 2013, the Tribunal's manager of appeals, Stephany Herzog, wrote to Mr. Dugas, indicating that it appeared he was seeking an extension of time in which to file additional supporting documentation and asked that he provide the Tribunal with a time estimate of when he would provide those documents. Ms. Herzog also asked Mr. Dugas to advise when he requested those documents and the anticipated relevance of those documents.
24. On July 31, 2013, Mr. Dugas wrote to the Tribunal as follows:

*We have not received a copy of the RCMP investigation file and will provide a copy immediately upon receipt. We expect to be able to provide the Tribunal with these documents within the next 7 days. Our client has been in direct contact with*

*the RCMP and requested the documents several weeks ago. We understand that the RCMP agreed to provide the documents near the end of July:*

*The documents are relevant to address the issue of just cause for dismissal. The employee was terminated for cause relating to the theft of wire and the RCMP conducted an investigation. There are statements and documents in the file that would have been of assistance to the parties at the initial hearing and the documents were unavailable.*

25. The Tribunal did not receive any additional documents from Grizzco's counsel at any time.

## **ANALYSIS**

26. Section 114 of the *Act* provides that 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, 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.

27. Having reviewed the Section 112 record and Grizzco's submissions, I dismiss the appeal.

28. Section 112(1) of the *Act* provides that a person may appeal a determination on 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 made.

29. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I conclude that Grizzco has not met that burden.

30. I will address each of Grizzco's arguments according to the statutory grounds of appeal although there is some overlap.

### Natural Justice

31. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

32. There is nothing in counsel's submission that addresses this ground of appeal. Having reviewed the record, I am not persuaded that Grizzco did not know what the allegations were or were denied the opportunity to

reply. The record indicates that Grizzco was issued a Demand for Employer records including payroll records and all documents relating to Mr. Marchand's termination. All documentation relied upon by the parties was exchanged prior to the hearing. Grizzco's counsel knew, or ought to have known, that the burden of showing just cause was on the Employer.

33. I find no basis for this ground of appeal.

#### Error of Law

34. Grizzco contends that the delegate erred in calculating Mr. Marchand's wage entitlement and in determining that there was no Section 37 averaging arrangement in place. I am not persuaded the delegate erred in his conclusions on these issues.

35. Counsel was aware of the requirement to bring all relevant documents to the hearing. Indeed, those documents were the subject of the Demand for Employer records. If any relevant documents were not before the delegate at the time of the hearing, it was because Grizzco failed to provide them. Any calculation errors the delegate may have made, of which there is no evidence, are due to Grizzco's failure to provide them at first instance. As the Tribunal has repeatedly stated, an appeal is not an opportunity for an appellant to present evidence that ought to have been provided to the delegate during the hearing.

36. Section 37 of the *Act* provides, in part, as follows:

(1) Despite sections 35, 36(1) and 40 but subject to this section, an employer and employee may agree to average the employee's hours of work over a period of 1, 2, 3 or 4 weeks for the purpose of determining the employee's entitlement, if any, to overtime wages under subsections (4) and (6) of this section and wages payable under subsection (8) or (9) (b).

(2) An averaging agreement under subsection (1) is not valid unless

(a) the agreement

(i) is in writing;

(ii) is signed by the employer and employee before the start date provided in the agreement;

(iii) specifies the number of weeks over which the agreement applies;

(iv) specifies the work schedule for each day covered by the agreement;

(v) specifies the number of times, if any, that the agreement may be repeated; and

(vi) provides for a start date and an expiry date for the period specified under subparagraph (iii).

37. There is no evidence of any averaging agreement between the parties, either in the record before the delegate or submitted on appeal. I find no merit in counsel's submissions on this point.

38. Grizzco asserts that Mr. Marchand testified that he was a maintenance man and that "this appears to be inaccurate." Counsel says that "the proper evidence was not before the delegate..."

39. The Employment Agreement between the parties, which forms part of the record, provided, in part, as follows:

1. Your employment began on Nov. 22, 2011.

2. Your title is “Maintenance Man.” Your duties and expectations will be described below.

...

40. Had there been any evidence Mr. Marchand was not a maintenance man, that evidence, whatever its relevance to the issues before the delegate, ought to have been presented in evidence at the hearing. The responsibility for any deficiencies in the evidence rests with counsel, not the delegate. I find no evidence the delegate erred in law on this point.

41. Grizzco’s counsel further submits that it offered Mr. Marchand severance, which was refused.

42. The record contains a letter to Mr. Marchand from Mr. Ross dated June 7, 2012, which states “this termination is for just cause and no severance, or other remunerations will be paid past your termination date of June 7<sup>th</sup>, 2012.” There was no evidence before the delegate that Mr. Marchand was offered severance and I find no error in this conclusion.

43. I find no merit in counsel’s arguments on this ground of appeal.

#### New Evidence

44. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

45. The RCMP file Grizzco contends is relevant to establishing just cause was available at the time of the hearing on November 27, 2012, had counsel exercised due diligence. There is no evidence Grizzco attempted to obtain that evidence until after the Determination was issued. Furthermore, although counsel submits that the report is relevant to the issues before the delegate, it does not appear that counsel has any information on what the report contains or how that might affect the outcome of the Determination.

46. Furthermore, Grizzco’s counsel failed to provide any “new evidence” on appeal even though he indicated that the information would be available by the end of July. Counsel failed to supply any information by September 13, 2013, to the Tribunal.

47. I conclude that Grizzco has not met the test for new evidence.

**ORDER**

- <sup>48.</sup> Pursuant to Section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, the Determination, dated June 19, 2013, is confirmed in the amount of \$9,156.88, together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**