

An appeal

- by -

Thompson River Veneer Products Ltd.  
(“TRVP”)

- 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.:** 2015A/92

**DATE OF DECISION:** August 24, 2015

## DECISION

### SUBMISSIONS

Doug W. Webb

on behalf of Thompson River Veneer Products Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Thompson River Veneer Products Ltd. (“TRVP”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 20, 2015.
2. The Determination found that TRVP had contravened Part 8, section 63 of the *Act* in respect of the employment of Bradley Hall (“Mr. Hall”) and ordered TRVP to pay wages to Mr. Hall in the amount of \$2,296.74 and to pay an administrative penalty in the amount of \$2,500.00, as the contravention was the second occurrence for TRVP within three years. The total amount of the Determination is \$4,796.74.
3. TRVP has appealed on the ground that evidence has become available that was not available when the Determination was being made.
4. In correspondence dated July 2, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that 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 TRVP, who has been given the opportunity to object to its completeness. TRVP has made no objection to the completeness of the “record” and the Tribunal therefore accepts it as being complete.
6. I have 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 reasons for the Determination, the appeal and the written submission filed with the appeal by TRVP, my review of the material that was before the Director when the Determination was being made and any additional evidence allowed to be introduced with the appeal. 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, 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 that 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 has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Hall will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at whether there is a reasonable prospect the appeal will succeed: section 114(1)(f).

## ISSUE

8. 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

9. TRVP operates a veneer mill in Kamloops, BC. Mr. Hall was employed as a forklift operator from September 20, 2011, to December 18, 2014, when he was terminated without notice or compensation in lieu of notice.
10. Mr. Hall filed a complaint claiming length of service compensation. TRVP took the position it had just cause to terminate Mr. Hall and, accordingly, was relieved of its statutory obligation to pay him length of service compensation.
11. The Director conducted a complaint hearing on April 13, 2015.
12. At the hearing TRVP took the position that Mr. Hall was terminated due to a major breach of TRVP policy and safety protocol. The factual allegation supporting the decision to terminate Mr. Hall was that he had threatened two other TRVP employees, Deborah Rainey (“Ms. Rainey”) and Jessica Sage (“Ms. Sage”), while operating a 10,000 pound forklift. TRVP concluded during its investigation of the incident that Mr. Hall’s actions were premeditated. Mr. Hall was offered an opportunity to consider remedial treatment in the form of anger counselling, but refused and was terminated.
13. TRVP presented nine witnesses and a witness statement from another in support of its position. The summary of the witnesses’ evidence is set out in the determination and need not be repeated in detail in this decision. Briefly, two of the witnesses testified to the incident that led to Mr. Hall being terminated. Other witnesses gave evidence going to statements made by Mr. Hall prior to the incident, to previous incidents involving Mr. Hall and to Mr. Hall’s character; one witness gave evidence going to the investigation and termination of Mr. Hall. The witness statement included a “note to file” relating to a meeting between Charlie Tate (“Mr. Tate”), who prepared the statement, and Mr. Hall on November 25, 2015.
14. The Director made the following findings on the evidence provided:
  - the evidence did not support a characterization of the incident as a “premeditated action intended to intimidate Ms. Rainey over a perceived slight” that “placed Ms. Rainey and Ms. Sage in physical danger due to Mr. Hall’s aggressive driving of a 10,000 pound forklift.”
  - Ms. Rainey’s description of the event was not credible;
  - TRVP did not prove that Mr. Hall threatened either Ms. Rainey or Ms. Sage with the forklift;
  - Ms. Rainey did not feel intimidated by Mr. Hall’s behaviour and did not formally report the incident until Mr. Tate requested her to do so;

- the evidence established that Mr. Hall spoke angrily to Ms. Rainey regarding his concerns with her walking through the “green end” of the veneer plant, and that he had resolved to speak with her after an unpleasant encounter with her a day or two before;
- the evidence did not support a finding that Mr. Hall was “verbally aggressive with an intention to intimidate or humiliate Ms. Rainey”;
- Ms. Rainey testified she was not, in fact, intimidated by Mr. Hall;
- Mr. Hall had not previously been disciplined for angry or intemperate interactions with his co-workers;
- the November 21 incident did not represent “such a serious breach of TRVP’s safety and harassment policies” as to provide TRVP with just cause for dismissal;
- Mr. Hall’s angry tone toward Ms. Rainey was possibly misconduct warranting some form of discipline but termination was a disproportionately harsh response;
- TRVP had contravened section 63 of the *Act* by dismissing Mr. Hall;
- The termination of Mr. Hall in contravention of section 63 of the *Act* was the second contravention of section 63 within a three year period; and
- Mr. Hall was entitled to three weeks’ wages as compensation for length of service.

## ARGUMENT

15. TRVP submits new evidence has come available. The appeal submission says the evidence was not available to present at the complaint hearing as it “was been [sic] garnered and prepared by the Office of the Employers’ Advisors’ Office for a WorkSafe BC Discriminatory Complaint” and argues the evidence pertains directly to Mr. Hall’s complaint, is factual and credible and if presented and considered by the Director could have led the Director to a different conclusion than what is found in the Determination.
16. The “new evidence” comprises a summary of TRVP’s position on the WorkSafe BC Discriminatory filing by Mr. Hall prepared on its behalf by the Employers Advisors office. I will note here that the summary is not “evidence”. On its face it is no more than TRVP’s argument in the WorkSafe BC process.

## ANALYSIS

17. When considering an appeal under section 114(1)(f) of the *Act*, the Tribunal looks at its relative merits, 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. A review of decisions of the Tribunal reveals certain principles applicable to appeals 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. It is well established that 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. 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 that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
22. TRVP has not alleged or argued error of law or natural justice as grounds of appeal although clearly this appeal cannot succeed unless I find the Director committed a reviewable error in the findings of fact or in some other way. My view is that this appeal depends entirely on whether the Tribunal will admit and accept evidence submitted with the appeal that was not provided to the Director during the complaint process and on the basis of that evidence order another review of Mr. Hall's claim. The evidence submitted with the appeal is described above.
23. The ground of appeal relied on by TRVP is generally referred to as the "new evidence" ground of appeal. The admission of "new evidence" is discretionary. The Tribunal has established that appeals based on this ground require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
24. In this appeal, as indicated above, the evidence submitted is not "evidence", but rather a summary made on behalf of TRVP setting out their position in the WorkSafe BC Discriminatory Complaint. The assertions of fact set out in the summary are many of the same facts that were presented to the Director in the complaint hearing and addressed in the Determination. In several areas, statements made in the summary do not accord with findings made by the Director in the Determination. Two clear examples will serve to illustrate this point. First, the summary describes Mr. Hall acting in a "potentially violent and improper manner". The finding of the Director, however, (which is based on Ms. Sage's evidence) was that he "approached her on his forklift, but not in a manner which placed her at any risk" and that while Mr. Hall spoke angrily to Ms. Rainey, he did not speak "improperly" in the sense of being "verbally aggressive with an intention to intimidate". Second, the summary contends Mr. Hall "acted out on the two staff members out of spite". The Director did not find "this characterization of the incident supportable on the evidence".
25. Other assertions of fact made in the summary may have had relevance to the WorkSafe BC proceeding, but do not address the issue with which the Director was dealing, which was whether TRVP was able to prove it had just cause for terminating Mr. Hall. I do not find the "new evidence" TRVP seeks to introduce with the appeal to be credible, probative or entirely relevant to the issue decided by the Director and are not admitted. I choose not to allow this material to be included or considered in the appeal.

26. As a result of this “new evidence” failing to satisfy the requirements for being admitted in this appeal, TRVP is left with an appeal that simply disagrees with the Determination.
27. While there are some aspects to the issue of just cause for termination that involve matters of law, the issue typically and predominantly revolves around findings of fact. No question of law arises in this appeal; it is challenging findings of fact, and in that context TRVP has not shown any reviewable error in the findings of fact made by the Director. The findings and the conclusions of the Director are rationally grounded in the evidence and an analysis of that evidence. TRVP was given a fair opportunity to present its evidence and argument in response to Mr. Hall’s claim.
28. The above expresses the insurmountable problem for TRVP with its appeal – it would require the Tribunal to interfere with findings and conclusions of fact made by the Director without there being any reviewable error in respect of those facts being demonstrated. As indicated above, the authority of the Tribunal in respect of appeals challenging findings of fact or seeking to have the Tribunal re-visit and alter findings of fact is limited. Accordingly, the Tribunal defers to the findings of fact made by the Director in this case.
29. In sum, on an assessment of this appeal I am satisfied it has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it and it is dismissed under section 114(1)(f) of the *Act*.

## **ORDER**

30. Pursuant to section 115 of the *Act*, I order the Determination dated May 20, 2015, be confirmed in the amount of \$4,796.74, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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