

An appeal

- by -

0969447 B.C. Ltd. coba Don Rogers Construction (a dissolved corporation) and
Donald Rogers, aka Don Rogers coba Don Rogers Construction
("DRC")

- 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.: 2017A/85

DATE OF DECISION: August 21, 2017

DECISION

SUBMISSIONS

Don Rogers on behalf of 0969447 B.C. Ltd. coba Don Rogers Construction (a dissolved corporation) and Donald Rogers, aka Don Rogers coba Don Rogers Construction

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 0969447 B.C. Ltd. coba Don Rogers Construction (a dissolved corporation) and Donald Rogers, aka Don Rogers coba Don Rogers Construction (“DRC”) have filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 23, 2016 (the “Determination”).
2. The Determination found that DRC had contravened Part 3, section 18 (wages); Part 4, section 40 (overtime); and Part 5, section 45 (annual vacation pay) of the *Act* in respect of the employment of Jordan R. Game, Douglas T. Ortloff, Cam P. A. Schellenberg, Neil D. Schellenberg and Ryan Tinkler (the “Complainants”) and ordered DRC to pay wages to the Complainants in the total amount of \$50,192.15 inclusive of accrued interest. The Determination also levied three administrative penalties against DRC in the total amount of \$1,500.00 for breach of sections 17, 18 and 27 of the *Act*. The total amount of the Determination is \$51,692.15.
3. DRC’s appeal is grounded in an assertion that the Director failed to observe the principles of natural justice in making the Determination. DRC seeks the Tribunal to refer the Determination back to the Director for a “rehearing in compliance with the principles of natural justice”.
4. The deadline to file the appeal of the Determination was January 30, 2017. On June 21, 2017, the Tribunal received DRC’s appeal submission by email but some attachments were unreadable and therefore, the Tribunal requested DRC to resubmit its appeal submissions. On the same date the Tribunal received a further email from DRC that also contained unreadable attachments. A staff representative of the Tribunal contacted DRC or its principal, Don Rogers (“Mr. Rogers”), by telephone and requested that DRC fax its appeal submission to the Tribunal. When the Tribunal did not receive the requested documents from DRC by June 26, 2017, by correspondence of same date the Tribunal requested “a clear, readable copy of the Appeal Form (2 pages) and written reasons and argument for appeal (2 pages) no later than 4:00 pm on July 4, 2017.” The Tribunal also requested a complete copy of the Determination as the one previously provided did not include any “calculation sheets” showing wage awards made to each Complainant. Subsequently, on July 4, 2017, the Tribunal received some of the requested appeal documents from DRC. The appeal submission, however, did *not* include a copy of the Director’s written reasons for the Determination, which is a statutory requirement for inclusion with an appeal (see subsection 112(2)(a)(i.1)) of the *Act*) nor the calculation sheets.
5. On July 5, 2017, the Tribunal corresponded with the parties advising them that it had received DRC’s appeal including DRC’s request for an extension of deadline to file the appeal. The Tribunal reminded DRC that it had not complied with the Tribunal’s earlier request, namely, to provide a complete copy of the Determination, including calculation sheets. The Tribunal requested DRC to provide the missing documents no later than July 19, 2017. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) “record” (the “Record”) and notified the other parties that no submissions were being sought

from them pending a review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed.

6. The Record was provided by the Director to the Tribunal on July 18, 2017. A copy of the same was sent by the Tribunal to DRC on July 21, 2017, and the latter was given the opportunity to object to its completeness. DRC has not objected to the completeness of the Record and the Tribunal accepts it as complete.
7. On August 10, 2017, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. Consistent with the notice contained in the correspondence from the Tribunal dated July 5, 2017, I have reviewed the appeal, the appeal submissions and the Record. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal solely on the Determination, the Appeal Form, written submissions of DRC 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 the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that section 114(1). 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. DRC will then be given an opportunity to make a final reply to those submissions, if any.

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. As there are no reasons for the Determination, I am left to rely upon the Record to determine the facts and the steps leading to the Determination.
10. The Record shows that the Complainants filed their individual complaints against DRC or one or another of the constituents of DRC between May 3, 2016, and July 5, 2016, claiming they were not paid all their wages while employed by DRC at construction projects in the capacity as a carpenter or a labourer (the "Complaints").
11. A delegate of the Director commenced her investigation into the Complaints by conducting a B.C. Online: Registrar of Companies – Corporation Search of Don Rogers Construction Inc. ("DRC Inc.") (who is not a named party in the Complaints or the Determination). The search indicates that DRC Inc. is an active company and was incorporated on June 10, 2011. The search also shows that DRC Inc.'s registered and records office address is at Esquimalt Street in Victoria, B.C. It also shows that Mr. Rogers is its sole director with an address at Herbate Road, Victoria, B.C.
12. The Record also contains a corporate search of 0969447 B.C. Ltd. (a constituent of DRC) on June 27, 2016. The search shows that this company dissolved on October 26, 2015, for failure to file its annual report. The search also shows that the registered and records office address of the company is at same address on Esquimalt Road, Victoria, B.C. as DRC Inc.'s registered and records office. Furthermore, the search shows Mr. Rogers as the company's sole director with an address at the same location on Herbate Road, Victoria, B.C. as his address in the DRC Inc. corporate search.

13. The Record also contains evidence of the Complainants which the delegate collected during her investigation of the Complaints. I have reviewed this evidence and do not find it necessary to delineate it here.
14. The Record also contains a letter dated May 26, 2016, from the delegate to DRC Inc. sent by registered mail to the attention of Mr. Rogers at the Herbate Road, Victoria B.C. address, which, as previously indicated, is the address provided for Mr. Rogers in the corporate searches of both DRC Inc. and 0969447 B.C. Ltd. The letter was also sent to the registered and records office address of DRC Inc. at Esquimalt Road, Victoria, B.C. The letter pertains to the complaint of one of the Complainants, Douglas Ortloff, against DRC. In the letter, the delegate informs DRC and Mr. Rogers that the Employment Standards Branch (the “Branch”) has received complaints filed by Douglas Ortloff which are attached. Mr. Ortloff is claiming wages owed to him and she is investigating his claim. She states she has been unable to reach him (Mr. Rogers) by phone and asks him to contact her at the telephone number provided to discuss Mr. Ortloff’s complaints and how they can be resolved. She encloses fact sheets on Paying Wages, Hours of Work and Overtime, and Annual Vacation. She notes if wages are owed, then he should provide cheques payable to Mr. Ortloff and any other employees who have not received outstanding wages by Thursday June 9, 2016. Alternatively, if payment is not made then she states that DRC should provide payroll records for all employees who worked in the last six months before DRC ceased operating no later than June 9, 2016, and encloses a Demand for Employer Record with the letter. She warns Mr. Rogers and DRC that failure to provide records will result in a mandatory penalty.
15. There appears to be no response from DRC or Mr. Rogers to the May 26 letter. The letter was also addressed to the Esquimalt Street, Victoria, B.C. address and appears to have been successfully delivered. The Esquimalt Street address is of a law office that acted as a registered and records office of DRC Inc. The record contains correspondence from the law office, dated June 16, 2016, advising the delegate that DRC Inc. “does not exist any further” and confirms that it (the law office) does not have instructions to take any steps in the matter.
16. The Record also contains a letter from the delegate, dated September 27, 2016, sent by registered mail to 0969447 B.C. Ltd. c/o Don Rogers Construction at the Park Avenue, Honeymoon Bay, B.C. address and copied to the Esquimalt Road and Herbate Road, Victoria, B.C. addresses. The letter is sent to the attention of Mr. Rogers and it shows he was also emailed at two email addresses that are provided for him by the Complainants in their Complaints. The letter sets out in unequivocal terms that the Branch has received complaints under the *Act* from the Complainants and summarizes the nature of the claims advanced by each complainant. The delegate adds in the letter that if the Complainants are correct then Mr. Rogers should contact her by October 14, 2016, to discuss voluntary resolution. If, however, DRC has evidence to dispute the Complainants’ allegations then it should forward in writing its reasons by October 14, 2016, along with copy of the payroll records and any other supporting documents relating to the Complainants. Attached to the letter is a Demand for Employer records pertaining to all Complainants.
17. The Canada Post –Track Result Detail documents in the record show that the September 27, 2016, letter was successfully delivered to the Herbate Road, Victoria, B.C. address and signed for by “don rogers”. A copy of Mr. Roger’s signature image that was recorded by Canada Post for online viewing is provided and forms part of the Record.
18. As with the May 26, 2016, letter of the delegate, DRC and Mr. Rogers did not respond to the September 27, 2016, letter. However, the legal counsel whose law office is at the Esquimalt Street Victoria, B.C. appears to have received the September 27 letter and responded to it in his letter of September 29, 2016, advising the delegate that he is of “the understanding that Mr. Rogers has filed for bankruptcy.” He also adds that he has had “no communication with Mr. Roger[s] for at least two years and my file has been closed”. He does not

explain how he came to understand Mr. Rogers has filed for bankruptcy but he adds that he has “no contact information and cannot get any instructions with respect to this matter.”

19. On December 5, 2016, the Delegate sent a further letter containing additional evidence of the Complainants to DRC and Mr. Rogers at the Park Avenue, Honeymoon Bay, B.C. address and copied it to both the Esquimalt Road and Herbate Road, Victoria, B.C. addresses by regular mail. The delegate also emailed the letter to both email addresses she previously emailed Mr. Rogers at. As with the previous letters, the delegate afforded DRC an opportunity to provide any evidence to dispute the Complainants’ allegations. In this instance, the delegate afforded Mr. Rogers and DRC until December 12, 2016, to provide a response in writing along with payroll records of the Complainants previously demanded. She also notified DRC and Mr. Rogers that if voluntary resolution of the Complaints is not achieved or if her letter is not responded to she may issue a determination based upon the best available evidence before her.
20. This letter too went without response from Mr. Rogers and DRC.
21. On December 23, 2017, the delegate made the Determination against DRC as set out in paragraph 2 above.
22. As indicated in paragraph 4 above, on June 21, 2017, the Tribunal received DRC’s appeal submission by email but some attachments were unreadable and the Tribunal attempted to get readable copies of documents that were unreadable. On July 4, 2017, the Tribunal received readable copies of some documents it requested but they did *not* include a copy of the Director’s written reasons for the Determination. The submissions also did not contain a complete copy of the Determination, including the calculation sheets. None of these missing documents were provided to the Tribunal in this appeal.
23. I note that with respect to the missing reasons for the Determination, on or about June 14, 2017, DRC’s or Mr. Rogers’ counsel requested the reasons from the delegate but the latter refused to produce them. Mr. Rogers may also have attempted to obtain the reasons a bit earlier in June 2017 as indicated in DRC’s submissions delineated below. While the Record does not contain the delegate’s correspondence setting out her reasons for refusing production of the reasons, I note the Determination provides that a written request for the reasons for the determination must be delivered to an office of the Branch within seven days of being served with the determination. It also states that “[y]ou are deemed to be served eight days after the determination is mailed” and in this case identifies that the request “must be delivered by January 9, 2017” which evidently DRC or Mr. Rogers failed to do.

SUBMISSIONS OF DRC

24. Accompanying the Appeal Form of DRC are written submissions of Mr. Rogers. The submissions on the merits and extension of time to file the appeal are intermingled and I propose to set out relevant parts of the submissions verbatim below:

...

The Appellant requests an appeal of the Determination, as well as an extension of the appeal period under s. 109(1)(b) of the *Employment Standards Act* ("ESA"). The facts relating to the extension are also related to the appeal, and are given below.

The Appellant never received any information relating to the Complaint, the investigation into the Complaint (the "Investigation"), or the Determination. He had no opportunity to present facts or evidence in his own defence, or to defend the investigation at all.

The first the Appellant heard of the Investigation or the Determination was when he was contacted by a court bailiff who was attempting to seize and sell his property pursuant to a writ of seizure and sale that had been issued against him (the "Writ").

The Appellant immediately contacted the Employment Standards Branch to learn more about the Determination and the Writ. He spoke with an employee of the ESB's Collection Department, Elizabeth Gibbs, on June 1, 2017. Ms. Gibbs sent him a copy of the Determination via email that same day. The Determination was dated December 23, 2016. It gave January 9, 2017 as the due date for requesting written reasons, and it gave January 30, 2017 as the due date for appealing the Determination.

The Appellant requested written reasons from the Director's delegate who made the Determination, Kristine Booth, within one week of receiving the Determination, on June 8, 2017. He indicated that he had not been properly served and that he would be filing this appeal. Ms. Booth refused the request, relying on the January 9 due date.

The Appellant requests an extension of the Appeal Period on the basis that he was never served with the Investigation or the Determination until June 1. The Appellant has made every effort to comply with Section 112 of the *ESA* and the Appeal Period, starting from June 1 when he received the Determination via email. The Appellant requests that the Tribunal treat the Appeal Period as having started on June 1 when the Determination was served, and not December 23 when it was issued.

The Appellant, appeals on the grounds that the Director failed to observe the principles of natural justice in making the Determination, as described above in paragraphs 1 to 6. In particular:

- a. The Director failed to Inform the Appellant that the Complainants had made any complaints;
- b. The Director failed to inform the Appellant that it was making the investigation;
- c. The Director failed to provide any of the documents related to the Investigation, including any documents or evidence relied on by the Complainants;
- d. The Director failed to give the Appellant any opportunity to reply to the allegations of the Complainants;
- e. The Director issued the Determination without any input or defence from the Appellant;
- f. The Determination, made without the knowledge or input of the Appellant, was improperly made;
- g. The improperly made Determination should be submitted back to the Director for reconsideration in compliance with the principles of natural justice;
- h. The Writ, issued pursuant to a Determination not served upon the Appellant and of which the Appellant had no knowledge, was improperly issued;
- i. The improperly issued Writ has caused inconvenience and distress to the Appellant and has interfered with his rights under Sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*.

The Appellant requests the Employment Standards Tribunal to refer the Determination back to the Director of Employment Standards for rehearing in compliance with the principles of natural justice.

The Appellant requests the Employment Standards Tribunal to order the Director to supply to him the written reasons for the Determination and all the documents related to the complaints of the Complainants and the Investigation which would have been served upon him if the Director had complied with the principles of natural justice in receiving the Complaint, performing the Investigation, and making the Determination.

ANALYSIS

25. Section 112(1) of the *Act* states that a person served with a determination may appeal the determination on three grounds, including that “[t]he director of Employment Standards failed to observe the principles of natural justice in making the Determination” – the ground of appeal invoked by DRC in this case.

26. Section 112(2) of the *Act* sets out the requirements for filing an appeal:
- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) *must*, within the appeal period established under subsection (3),
 - (a) deliver to the office of the tribunal
 - (i) a written request specifying the grounds on which the appeal is based under subsection (1),
 - (i.1) *a copy of the director's written reasons for the determination*, and
 - (ii) payment of the appeal fee, if any, prescribed by regulation, and
 - (b) deliver a copy of the request under paragraph (a)(i) to the director. [emphasis added]
27. The use of the word “must” in section 112(2) indicates that the requirements of subsection (2) are mandatory, that is, an appeal must both specify the grounds on which the appeal is based *and* include a copy of the director’s written reasons for the determination. These materials are required to be delivered to the Tribunal before the end of the appeal period – “30 days after the date of service of the determination if the person was served by registered mail” (s. 112(3)).
28. As indicated previously, DRC filed its appeal about five months after the expiry period for filing its appeal. While DRC has requested an extension of time to appeal (which application I need not decide here), it has failed to include a copy of the Director’s written reasons for the Determination with its late appeal.
29. Having said this, I note that the Determination provides, at page 2, in bold, that “[a] person named in a **Determination may make a written request for reasons for the Determination**” and that request “must be delivered to an office of the Employment Standards Branch **within seven days of being served** with this Determination.” The Determination also states that “[y]ou are deemed to be served eight days after the Determination is mailed, so **your request must be delivered by January 9, 2017.**” The failure of DRC to comply with the requirements of section 112(2)(a)(i.1) of the *Act* to provide the Director’s reasons for the determination is due to its failure to request them within the time limit specified in the Determination – January 9, 2017. At the time DRC or Mr. Rogers requested the reasons for the Determination, DRC was almost a four months past the expiry date for requesting the reasons from the Branch and it would appear the Director’s delegate, therefore, denied DRC’s request for the reasons.
30. Notwithstanding the issue of the late appeal which I am not deciding here, I find that DRC’s failure to include a copy of the Director’s written reasons for the Determination means that DRC’s appeal has not been perfected. Pursuant to section 114(1)(h) of the *Act*, the Tribunal has discretion to dismiss an appeal where the appellant has failed to meet one or more of the requirements of section 112(2) of the *Act*. DRC, by failing to submit the Director’s reasons for the Determination, has failed to meet the requirements of section 112(2)(a)(i.1) of the *Act*. Therefore, I dismiss DRC’s appeal.
31. In the alternative, if I am wrong in dismissing DRC’s appeal under section 114(1)(h) of the *Act*, I also find that DRC’s appeal has no reasonable prospect of succeeding pursuant to section 114(1)(f) of the *Act*. As indicated above, DRC invokes the “natural justice” ground of appeal in section 112(1)(b) of the *Act*.
32. With respect to the natural justice ground of appeal, it is important to understand that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05).

33. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

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)

34. The onus is on DRC, as the appellant, to demonstrate, on a balance of probabilities, a violation of its natural justice or procedural rights. Having reviewed the Determination including particularly the Record and the written appeal submissions of Mr. Rogers, I am convinced that there is no basis whatsoever for the natural justice ground of appeal. I find that the Director afforded sufficient opportunities to DRC and Mr. Rogers to know the case against them and the right to present their evidence. I note particularly the three pieces of correspondence from the Director's delegate to DRC and Mr. Rogers on May 26, September 27 and December 5, 2016, which were sent to various addresses for them including the Herbate Road, Victoria, B.C. address, which is the address indicated for Mr. Rogers on the corporate searches for DRC Inc. and 0969447 B.C. Ltd. It is also the same address at which the Canada Post Track result document shows Mr. Rogers signed for the September 27, 2016, letter. In the circumstances, I find it probable that DRC and Mr. Rogers were aware of the Complaints and the investigation of the Complaints but "sat in the weeds" disinterested in participating in the investigation or responding to the correspondences from the delegate before the Determination was made. It was only when the bailiff contacted Mr. Rogers when attempting to execute a writ of seizure and sale connected with the Determination that the latter became interested to come out of the weeds to file an appeal of the Determination. I find no evidence to support a finding of a breach of natural justice in this case.
35. Pursuant to section 114(1)(f) and (h) of the *Act*, I dismiss DRC's appeal of the Determination.

ORDER

36. Pursuant to section 115 of the *Act*, I confirm the Determination made on December 23, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal