

An appeal

- by -

Mortgagestogo.ca Inc.
(“Mortgagestogo”)

- 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.: 2014A/101

DATE OF DECISION: October 9, 2014

DECISION

SUBMISSIONS

Paul Izzard

on behalf of Mortgagestogo.ca Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Mortgagestogo.ca Inc. (“Mortgagestogo”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 4, 2014.
2. The Determination found that Mortgagestogo had contravened Part 3, section 18 of the *Act* in respect of the employment of Renee Dalglish (“Ms. Dalglish”) and ordered Mortgagestogo to pay wages to Ms. Dalglish in the amount of \$406.93 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$906.43.
3. Mortgagestogo has filed an appeal of the Determination on the ground that the Director failed to observe principles of natural justice in making the Determination in finding Ms. Dalglish was entitled wages and seeks to have the Determination cancelled.
4. On August 15, 2014, the Tribunal acknowledged to the parties that an appeal had been received from Mortgagestogo, requested production of the section 112(5) “record” from the Director and notified the parties, among other things, that no submissions were being sought from the other parties 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” was provided by the Director to the Tribunal and a copy was sent to Mortgagestogo, who has been given the opportunity to object to its completeness. There has been no objection and, accordingly, the Tribunal accepts it as complete.
6. Consistent with the August 15, 2014, notice, I have reviewed the appeal, including the reasons for appeal submitted by Mortgagestogo, and the section 112(5) “record”.
7. 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 appeal and my review of the section 112(5) “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, 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 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.*

8. 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*, Ms. Dalgleish will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

9. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

THE FACTS

10. The facts of this appeal are relatively brief.
11. Mortgagestogo operates a mortgage business in the province, having an office in Victoria, BC. Ms. Dalgleish had been employed and worked as an administrative assistant for Mortgagestogo from December 5, 2013, to December 7, 2013, and Mortgagestogo had contravened the *Act* by failing to pay wages for the period she worked.
12. The Director conducted a complaint hearing and received evidence and argument respecting the complaint from both parties.
13. The Director identified three issues that were required to be considered and decided:
1. Did Ms. Dalgleish perform work for the employer;
 2. If so, what was her wage rate; and
 3. What, if any, wages are owing under the *Act*.
14. The Director found Ms. Dalgleish had trained with Mortgagestogo on December 5 and 6, 2013, from 8:00 am to 5:00 pm on each of those two days and, based on the definition of “employee” in the *Act*, which includes a person being trained for an employer’s business, was an employee who performed work and was entitled to wages.
15. The Director heard evidence from Ms. Dalgleish, Connie Wiebe (“Ms. Wiebe”), who was the person leaving the position for which Ms. Dalgleish was being trained, and Paul Izzard (“Mr. Izzard”), the sole director of Mortgagestogo and the person who hired Ms. Dalgleish to the position.
16. Ms. Dalgleish contended her wage rate for the two days she worked was \$25.00 an hour; Mr. Izzard asserted the wage rate for the training period was minimum wage. Ms. Wiebe gave evidence supportive of a wage rate of \$25.00 an hour.
17. The Director found the wage rate to be \$25.00 an hour.
18. The Director found Ms. Dalgleish worked for 16 hours and wages were owed for that work at a rate of \$25.00 an hour for a total amount of wages owing of \$400.00.

ARGUMENT

19. Mortgagestogo argues the decision is completely wrong; that it is coloured by the biases of the delegate acting on behalf of the Director; supported by a disgruntled former employee with “her own agenda”; and brought by a person who accepted the position on false pretences, for “nefarious” reasons and wasted two “precious” training days. While not specifically making the submission, the clear inference from the appeal and supporting submission is that no wages at all are owing to Ms. Dalgleish.

ANALYSIS

20. When considering an appeal under section 114 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.

21. 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.*

22. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal. An appeal to the Tribunal under section 112 is not intended simply as an opportunity to resubmit the evidence and argument that was before the Director in the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

23. 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.

24. While the appeal purports to be grounded in natural justice concerns, in reality the appeal does nothing more than attack the integrity of the delegate acting on behalf of the Director, challenge the Director’s finding of fact in respect of the wage rate and, in the process, insult Ms. Dalgleish and Ms. Wiebe. None of these matters raise natural justice considerations and the Tribunal has no authority to consider any of the matters that are raised under section 112(1) of the *Act*. The appeal is completely devoid of merit.

25. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

26. I dismiss the appeal under section 114(c) and (f) of the *Act* and confirm the Determination.

ORDER

27. Pursuant to section 115 of the *Act*, I order the Determination dated July 4, 2014, be confirmed in the amount of \$906.93, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal