

An appeal

- by -

Athwal Truck & Trailer Repair Ltd.
(“Athwal Truck”)

- 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/106

DATE OF DECISION: November 5, 2014

DECISION

SUBMISSIONS

Harnek Athwal

on behalf of Athwal Truck & Trailer Repair Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Athwal Truck & Trailer Repair Ltd. (“Athwal Truck”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 14, 2014.
2. The Determination found that Athwal Truck had contravened Part 4, section 40 and Part 5, section 46 of the *Act* in respect of the employment of Ravinder Singh Toor (“Mr. Toor”) and ordered Athwal Truck to pay wages to Mr. Toor in the amount of \$5,110.64 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$6,110.64
3. Athwal Truck has filed this appeal on the ground the Director erred in law in making the Determination. Athwal Truck seeks to have the Determination varied by reducing the amount owing to Mr. Toor.
4. On August 22, 2014, the Tribunal acknowledged to the parties that an appeal had been received from Athwal Truck, 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 Athwal Truck, who was advised of their right to object to the completeness of the section 112(5) “record”. There has been no objection and, accordingly, the Tribunal accepts it as complete.
6. Consistent with the August 22, 2014, notice, I have reviewed the appeal, including the reasons for appeal submitted by Athwal Truck, 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 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 subsection 114(1), 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;*
- (b) *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*, Mr. Toor 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 proceeding is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

10. Athwal Truck is a trucking company; Mr. Toor was employed by Athwal Truck in two periods between October 19, 2012, and October 5, 2013. The first period was from October 19, 2012, to May 15, 2013, when he quit working for Athwal Truck. He returned to work for Athwal Truck on August 7, 2013, and worked until October 5, 2013, when he again quit his employment with Athwal Truck.
11. Mr. Toor filed a complaint with the Director on November 7, 2013, claiming he had worked 786 hours of overtime without receiving overtime pay, was not paid statutory holiday pay and worked on some statutory holidays, but was paid only his regular wages for hours worked on those days. Mr. Toor presented his time cards in support of his claim.
12. Mr. Athwal, representing Athwal Truck, confirmed the time cards provided by Mr. Toor were correct. He acknowledged Mr. Toor was not paid overtime or statutory holiday pay and was paid regular wages for working on statutory holidays.
13. The Determination notes there was agreement on hours of work and the amount of wages paid to Mr. Toor during his employment. There was a minor dispute on the wage rate; the Director found Mr. Toor's regular wage rate was \$11.00 an hour until January 13, 2013, and \$12.00 an hour from February 1, 2013, onward.
14. The Director addressed the matter of the recovery period for unpaid wages, referring to section 74 and section 80 of the *Act*, finding Mr. Toor could recover unpaid wages for both periods of employment as his complaint was filed in a timely manner relative to both of them. The Director found the wage recovery period for the first period of employment was December 16, 2012, to June 15, 2013, and the wage recovery period for the second period of employment was from August 6, 2013, to October 5, 2013.
15. The Director calculated overtime pay based on the overtime hours worked during the two wage recovery periods. Mr. Toor did not work every statutory holiday. The Director found he was entitled to statutory holiday pay for five statutory holidays and premium pay for three statutory holidays worked during the two recovery periods.
16. The Director found Mr. Toor was entitled to receive annual vacation pay on all wages earned during the both periods of employment.

ARGUMENT

17. I shall set out the appeal submission in its entirety:

Ground for our appeal to this determination is that the Director of Employment Standards erred in law. They ordered us to pay \$3196.54 for Overtime, \$908.60 for Statutory holiday pay, \$892.13 for Annual vacation pay and \$113.37 as an accrued interest. We are agreed with all other calculations except Overtime calculation. My understanding is that legally employee can go back for only 6 months overtime period. But, your calculations are beyond 6 months. He started work with us in Oct 2012 and quits job in June 2013. Then, he came back in August 2013 with the same terms and conditions. Finally, he left the job in Oct 2013. We are ready to pay overtime from May 2013 to Oct 2013.

ANALYSIS

18. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the relative merits of an appeal, 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.
19. 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.*
20. 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.
21. Athwal Truck alleges the Director erred in law. Generally, the Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
22. This appeal clearly raises a question of law as it challenges the interpretation and application by the Director of sections 74 and 80 of the *Act* in the circumstances of this case.
23. Not all of section 74 comes into play in this case. The relevant part of section 74 for this appeal is subsection 74(3), which states:
- 74** (3) *A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.*

24. The other provision referred to and relied upon by the Director was section 80, particularly subsection 80(1), which states:

- 80 (1) *The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*
- (a) *in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of employment, and*
 - (b) *in any other case, 6 months before the director first told the employer of the investigation that resulted in a determination.*

25. In the circumstances of this case, I agree with the interpretation of section 74 and 80 of the *Act* applied by the Director. There is nothing in either provision that limits either the statutory time limit for filing a complaint or the recovery period to one period of employment.

26. In this case, the section 112(5) “record” confirms Mr. Toor filed his complaint with the Director on November 7, 2013, which was within the statutory time limit for both periods of employment. Mr. Toor had two discreet periods of employment that were terminated by his quitting. Factually, there is no basis for considering the two periods of employment to be one continuous period of employment. The two Records of Employment issued by Athwal Truck for Mr. Toor identify two periods of employment, one Record of Employment, issued on June 21, 2013, identifies Mr. Toor’s last day paid as June 15, 2013, the other, issued October 16, 2013, states his last day paid as October 5, 2013.

27. The Director’s interpretation is consistent with applicable principles of statutory interpretation of employment standards legislation that have been endorsed and adopted by the Supreme Court of Canada: As a matter of statutory interpretation the Tribunal has accepted and followed the view expressed in Court decisions such as *Machtiger v. HOJ Industries Ltd.* [1992], 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491 and *Re Rizzo & Rizzo Shoes* [1998], 1 S.C.R. 27, finding that employment standards legislation such as the *Act*, is benefits conferring legislation, and must be construed in a broad, generous and purposive manner, with any doubt arising from statutory construction to be resolved in favour of claimants. The Tribunal prefers an interpretation which encourages employers to comply with the minimum requirements of the *Act* and so extends its protection to as many employees as possible, over the one that does not.

28. The interpretation of sections 74 and 80 expressed in the Determination applies overtime benefits at issue in this case broadly and does not produce an absurd result. Accordingly, it is to be preferred over an interpretation that limits the recovery of overtime in the manner argued by Athwal Truck.

29. I am not persuaded there is any reasonable prospect this appeal can succeed. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

30. The appeal is dismissed.

ORDER

31. Pursuant to section 115 of the *Act*, I order the Determination dated July 14, 2014, be confirmed in the amount of \$6,110.64, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal