

An appeal

- by -

Jasmine Transport Ltd.
("Jasmine Transport")

- 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.: 2016A/75

DATE OF DECISION: August 5, 2016

DECISION

SUBMISSIONS

Gurbinder Sandhu

on behalf of Jasmine Transport Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Jasmine Transport Ltd. (“Jasmine Transport”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 13, 2016
2. The Determination found Jasmine Transport had contravened Part 3, sections 17, 18 and 28, and Part 7, section 58 of the *Act*, and section 37.3 of the *Employment Standards Regulation* in respect of the employment of Yohan Kwak (“Mr. Kwak”) and ordered Jasmine Transport to pay Mr. Kwak wages in the amount of \$3,565.96 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$5,065.96.
3. This appeal is based on the assertion by Jasmine Transport that evidence has become available that was not available when the Determination was being made. Jasmine Transport seeks to have the Determination cancelled.
4. In correspondence dated June 22, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, 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 Jasmine Transport, which has been provided with the opportunity to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts it as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material 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, for any of the reasons listed in the subsection, which reads:

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 any 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;*

(b) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Kwak will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

9. Jasmine Transport operates a trucking company in Surrey, BC.
10. Mr. Kwak filed a complaint with the Director alleging he had been employed by Jasmine Transport as a short haul truck driver from October 8, 2015, to November 6, 2015, at a rate of \$3,500.00 a month but had been paid no wages for the work he performed during that time.
11. In response to the complaint, Jasmine Transport took the position that while Mr. Kwak did work with Jasmine Transport during the claim period, he was not paid wages because he failed to provide necessary employment information. The Determination expresses the position of Jasmine Transport in the following excerpt from the Determination:

Mr. Kwak did work . . . and has not been paid any wages because he did not provide the necessary information (i.e. his SIN) to pay him and he did not provide his hours to [Jasmine Transport].

12. The Director conducted a complaint hearing. Mr. Kwak provided evidence, with the assistance of his daughter translating for him when necessary. Gurbinder Sandhu (“Mr. Sandhu”), who is the sole director and an officer of Jasmine Transport, gave evidence for Jasmine Transport.
13. The Director found Mr. Kwak had been employed by Jasmine Transport during the claim period, had performed work and was entitled to receive wages for the work, which included some training, performed during that period.
14. The Determination notes Jasmine Transport did not dispute that Mr. Kwak worked for Jasmine Transport during the claim period, explaining, as noted above, that he was not paid because he had not filled out an application form or provided the necessary information to pay him.
15. The Director found the training met the definition of work in section 1 of the *Act*, that Mr. Kwak had trained for six eight hour shifts, from October 19, 2015 had worked a regular shift of at least 8 hours a day and had worked some overtime hours during the claim period. Based on the findings made in the Determination, the Director concluded Mr. Kwak was entitled to the wages set out in the Determination. The Director also imposed three administrative penalties on Jasmine Transport.

ARGUMENT

16. In its appeal, Jasmine Transport submits Mr. Kwak was never employed by Jasmine Transport. The appeal submission makes the following points in support of the basic premise upon which the appeal is based:
- Jasmine Transport provides their drivers with all the forms they need to perform their job;
 - Jasmine Transport has no forms on record for Mr. Kwak;
 - All the forms Mr. Kwak provided as evidence are fake;
 - When Mr. Kwak answered the “Craigslist” ad placed by Jasmine Transport for drivers, he was told “up front” that any training is “free” and done on the driver’s own time;
 - Mr. Kwak trained for two weeks;
 - When he was sent on his own with a load, he damaged the truck and the customer’s property, about which Jasmine Transport can provide evidence; and
 - Mr. Kwak did not provide his SIN number.

ANALYSIS

17. 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.*

18. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
19. 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.
20. 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.
21. Jasmine Transport has grounded this appeal in evidence becoming available that was not available when the Determination was being made. This ground of appeal is commonly referred to as the “new evidence” ground of appeal.
22. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the

proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether 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. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

23. There are several reasons why this appeal does not satisfy the requirements of this ground of appeal and as a result is without merit.
24. Principally, Jasmine Transport has provided no “new” evidence. The appeal is based almost entirely on evidence that was provided to the Director at the complaint hearing.
25. The allegation that evidence submitted by Mr. Kwak was “fake” is a matter that was raised before the Director as an objection to evidence submitted by Mr. Kwak. The Director did not accept the validity of this objection and accepted the evidence as “the best evidence available” of the hours of work performed by Mr. Kwak. I find nothing in the appeal that would compel me to reject the Director’s view of this evidence. This allegation is entirely spurious. As in the complaint hearing, this allegation has, on any objective standard, no apparent basis in fact; it is rejected as “new evidence” without reservation because it is neither “new” nor is it capable of belief.
26. The assertion that evidence can be provided concerning damage done by Mr. Kwak to a truck and customer’s property has two significant problems as “new evidence”. First, once again, it is not “new”. This assertion was raised during the complaint process and was, justifiably, not given any consideration or effect by the Director. Second, such evidence, even if accepted, is completely irrelevant to the claim by Mr. Kwak for wages under the *Act*.
27. Jasmine Transport has shown no error in the Determination. There is nothing in the appeal that warrants consideration as “new evidence”. This appeal is nothing more than an attempt by Jasmine Transport to have the Tribunal review and “second guess” the Determination made and find some reason to cancel it.
28. I find no basis for setting aside the Determination, as requested by Jasmine Transport. The findings of fact made and the conclusions based on those findings were reasonably and logically grounded in evidence the Director was, on the face of the Determination and from the material in the record, entitled to accept and use. In such circumstances, those findings and conclusions may not be disturbed by the Tribunal on appeal: see *Britco Structures Ltd., supra*. The Director correctly applied the provisions of the *Act* defining “work” and properly rejected the submissions of Jasmine Transport that wage entitlement under the *Act* can be lost because an employee does not complete application forms to the satisfaction of the employer or, on the evidence in this case, can be reduced by damage alleged to have been caused by the employee.
29. Not only does this appeal have no reasonable prospect of succeeding, it is entirely without merit and has absolutely no chance of succeeding. The purposes and objects of the *Act* are not 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 May 13, 2016, be confirmed in the amount of \$5,065.96 together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal