

An appeal

- by -

Rizzuto Construction Ltd.
("Rizzuto")

- 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/74

DATE OF DECISION: August 5, 2016

DECISION

SUBMISSIONS

Garth Rizzuto

on behalf of Rizzuto Construction Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Rizzuto Construction Ltd. (“Rizzuto”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 19, 2016
2. The Determination found Rizzuto had contravened Part 3, section 21 of the *Act* in respect of the employment of Codty Gray (“Mr. Gray”) and ordered Rizzuto to pay Mr. Gray wages in the amount of \$2,805.32 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$3,305.82.
3. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination. Rizzuto seeks to have the Determination cancelled.
4. In correspondence dated June 29, 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 Rizzuto, 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;*
- (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 should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Gray 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.
8. In correspondence dated July 25, 2016, Garth Rizzuto (“Mr. Rizzuto”), who is representing Rizzuto in this appeal, has recorded his objection to the Tribunal’s decision to consider this appeal without conducting an oral hearing.
9. As indicated above, under section 114 of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal without a hearing **of any kind**. That is clear from the opening words of subsection (1) of that provision. I have decided this is an appeal that is appropriate for consideration under section 114(1) of the *Act* and that no hearing is required in order to conduct an assessment of the appeal under this provision.
10. If I decide this appeal should not be dismissed under section 114(1) of the *Act*, the other parties will be invited to file submissions. As part of the submission process, the Tribunal will decide what type of hearing is appropriate for the appeal. An oral hearing is not conducted only because one of the parties wishes it. The Tribunal has the discretion to choose the type of hearing for deciding the appeal. Much depends on the Tribunal’s view of whether an oral hearing is the only process through which the appeal can be adjudicated and for ensuring the purposes of the *Act* can be met. Appeals are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral hearing and may choose any combination of written, electronic and oral hearing; see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*.
11. Before that discretion is exercised, however, the Tribunal must be satisfied this appeal is one that has a reasonable prospect of succeeding.

ISSUE

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

THE FACTS

13. Rizzuto operates a construction business.
14. Mr. Gray was employed by Rizzuto as an apprentice carpenter from February 26, 2015, to January 29, 2016, when his employment was terminated.
15. Following his termination, Mr. Gray filed a complaint with the Director alleging Rizzuto had contravened the *Act* by making unauthorized deductions from his wages and failing to pay compensation for length of service.
16. The Director conducted a complaint hearing by telephone.
17. Mr. Gray did not attend the complaint hearing, notwithstanding the Director giving him ample notice and opportunity to do so. Mr. Rizzuto attended on behalf of Rizzuto and provided evidence. Three other persons attended the complaint hearing and also provided evidence on behalf of Rizzuto.

18. The Director found Rizzuto had contravened section 21 of the *Act* by deducting amounts from Mr. Gray's wages without there being the written assignment of wages contemplated by section 22(4) of the *Act*.
19. The evidence relating to this claim, and the conclusions of the Director on that evidence, can be briefly summarized.
20. Mr. Gray operated a personal truck which he used to get himself to and from work. The truck broke down on two occasions. Rizzuto paid the cost of repairs on each occasion. There was a verbal agreement between Mr. Gray and Mr. Rizzuto allowing Rizzuto to deduct an amount from Mr. Gray's wages to cover the costs paid by Rizzuto. There was no written assignment from Mr. Gray authorizing Rizzuto to deduct the repair costs from his wages. Mr. Gray had signed a work order with one of the repair shops that had performed repairs on the truck. The Director found this signed work order could not be construed as a written assignment of wages for the purposes of section 22(4) of the *Act*. The reasons for this finding are set out in the Determination.
21. The Director found Mr. Gray was not entitled to length of service compensation.

ARGUMENT

22. Rizzuto submits the Director has erred in law and failed to observe principles of natural justice by not giving effect to the evidence provided by Mr. Rizzuto and the witnesses proffered by Rizzuto, that Mr. Gray had verbally agreed to allow the cost of repairs to be deducted from his wages, and by ordering Rizzuto to pay Mr. Gray the wages it had taken as repayment for incurring the cost of the repairs.
23. Rizzuto argues its Charter rights have been violated, that Mr. Gray has not told the truth and that he may have committed fraud.

ANALYSIS

24. 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.*

25. 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.
26. 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.
27. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

28. 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.
29. Rizzuto has grounded this appeal in error of law and failure to observe principles of natural justice in making the Determination.
30. I am not persuaded there is any error in the Determination.
31. As a matter of law, the exceptions set out in section 22 of the *Act* to the prohibitions found in section 21 against deducting amounts from an employee's wages have been given a strict construction by the Tribunal. The burden is on the employer, Rizzuto in this case, to show that the amount sought to be deducted falls within the exceptions in section 22. Where the exception provided in section 22(4) is relied upon, the Tribunal has indicated the *Act* requires a clear and specific written authorization by the employee to allow the assignment of any portion of wages to satisfy a credit obligation: see, for example, *The French Room Art De Coiffures Ltd. carrying on business as Richard Jeha Hair Company*, BC EST # D118/06.
32. I agree with the finding of the Director that Mr. Gray's signature on the repair shop work order does not meet the requirements of that provision. As indicated by the Director, the work order cannot be viewed as anything more than a confirmation of labour and services received from the repair shop; it is a document prepared for the benefit of the repair shop, not Rizzuto. Nothing in that document indicates Mr. Gray is granting authority for Rizzuto to deduct the amount of the work order from his wages.
33. The Director did not ignore the evidence of there being an oral agreement between Mr. Gray and Mr. Rizzuto to repay the cost of repairs to the truck paid by Rizzuto from his wages. There are several references in the Determination to such an agreement and no indication such evidence was not viewed by the Director as truthful. Such agreement is, however, irrelevant to the administration of section 22(4) because the statute clearly requires an assignment of wages, which is defined in section 1 of the *Act*, to be a written authorization to pay a credit obligation from wages and, as I have indicated above, the Director made no error in law in finding there was no written authorization.
34. Neither the Director nor the Tribunal have the authority to ignore the words section 22(4) of the *Act* in order to give effect to an agreement that is not recognized within that provision. I am sympathetic toward Mr. Rizzuto, whose generosity to Mr. Gray seems to have been betrayed, but the *Act* does not allow what Rizzuto seeks in this appeal.
35. The burden of showing a failure to comply with principles of natural justice is on Rizzuto. Meeting that burden requires evidence demonstrating a breach of natural justice. Rizzuto has not satisfied that burden.
36. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

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)

37. It is clear that Rizzuto was afforded the procedural rights captured within the above statement.
38. I find no other circumstances indicating a failure to observe principles of natural justice has been shown in this case.
39. Natural justice does not require the Director to accept the evidence and arguments that a party advances in support of its position, particularly as in this case where such evidence and argument does not accord with the provisions of the *Act*. Nor do principles of natural justice prohibit the Director from reaching a conclusion on all of the evidence that might be inconsistent with the position of one of the parties, so long as reasons are provided for that conclusion and it is based on relevant considerations, which I find to be the case here.
40. Rizzuto has not shown its Charter rights have been violated or that Mr. Gray has engaged in a deception or a fraud on the statutory system created by the *Act*.
41. In sum, I find there is no basis in the *Act* for this appeal and it has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

42. Pursuant to section 115 of the *Act*, I order the Determination dated May 19, 2016, be confirmed in the amount of \$3,305.32, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal