

An appeal

- by -

Robert G. Heltman
(“Mr. Heltman”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards ESA R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2017A/100

DATE OF DECISION: October 3, 2017

DECISION

SUBMISSIONS

Leah Brisson

on behalf of Robert Gordon Heltman

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Robert Gordon Heltman (“Mr. Heltman”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 21, 2017.
2. The Determination found there was insufficient evidence to prove Mr. Heltman’s complaint and decided no further action would be taken on his complaint.
3. This appeal is grounded in the assertion that new evidence has become available that was not available when the Determination was being made. Mr. Heltman seeks to have the matter referred back to the Director.
4. In correspondence dated August 2, 2017, the Tribunal acknowledged having received an appeal and, among other things, requested the section 112(5) record (the “record”) from the Director, notified the parties 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 record has been provided to the Tribunal by the Director; a copy has been delivered to Mr. Heltman and to Leah Brisson (“Ms. Brisson”), Mr. Heltman’s representative in the appeal. An opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. 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 *ESA*, 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 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), the Director and Community Roofing Co. Ltd. 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 here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. Mr. Heltman filed a complaint with the Director claiming he had worked as a labourer for two weeks for Community Roofing Co. Ltd. (“CRCL”) and had not been paid for this work.
10. The Director investigated the complaint, speaking with representatives of CRCL, Mr. Heltman, and Ms. Brisson. The Director attempted to contact Dustin Heltman, who is Mr. Heltman’s brother and was identified by Mr. Heltman as being the person who had hired him to work at CRCL and knew of his employment, but efforts to communicate with him were unsuccessful.
11. The Director also asked Ms. Brisson to have Dustin Heltman call, but no communication or information was received from him.

ARGUMENT

12. Mr. Heltman submits there is new information that can be provided by Dustin Heltman that he was unable to provide during the investigation because he was incarcerated. The appeal states Dustin Heltman has now been released and can properly communicate to the Director concerning Mr. Heltman’s complaint.

ANALYSIS

13. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, 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 made.*

14. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
15. 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.

16. Mr. Heltman has grounded this appeal in evidence becoming available that was not available when the Determination was made. This ground of appeal is commonly described as the “new evidence” ground of appeal.
17. The burden on Mr. Heltman is to show the new evidence demonstrates a probable error in the Determination and warrants the Tribunal returning the matter to the Director for further investigation.
18. 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 *ESA*.
19. I do not accept there is any “new evidence” that satisfies the conditions outlined above.
20. The appeal does not provide the Tribunal with any indication of the “evidence” that would be provided by Dustin Heltman, but based on the circumstances of the matter, it is obvious this “evidence” was available before the Determination was made.
21. The Determination indicates Dustin Heltman was identified during the complaint process as a person with some information concerning Mr. Heltman’s claim of employment with CRCL. It is apparent from the Determination and the record that Dustin Heltman had been released from his incarceration before the complaint process was completed – contradicting the assertion in the appeal submission that his incarceration was the reason for not providing this “new evidence” during the complaint process – and that the Director had sought unsuccessfully to contact him to obtain whatever information he might provide regarding Mr. Heltman’s claim.
22. As well, there is no indication in the appeal that satisfies the obligation on Mr. Heltman to demonstrate this “new evidence” is credible or probative.
23. Based on the above, I find the “new evidence” ground of appeal has not been made out and the appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

24. Pursuant to section 115 of the *ESA*, I order the Determination dated June 21, 2017, be confirmed.

David Stevenson
Member
Employment Standards Tribunal