

An appeal

- by -

Parminder Dhési  
(“Mr. Dhési”)

- 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:** Marnee Pearce

**FILE No.:** 2017A/96

**DATE OF DECISION:** October 16, 2017

## DECISION

### SUBMISSIONS

Parminder Dhese on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Parminder Dhese (“Mr. Dhese”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 9, 2017.
2. The Determination found that Mr. Dhese had contravened Part 3, section 17 and 18 of the *ESA* with respect of the employment of Balbir Singh Sandhu (“Mr. Sandhu”) and ordered Mr. Dhese to pay Mr. Sandhu wages in the amount of \$6,789.99 (including interest) and to pay administrative penalties in the amount of \$1,000.00.
3. The total amount of the Determination was \$7,789.99.
4. This appeal is grounded in new evidence becoming available that was not available at the time the Determination was made. Mr. Dhese requests that the Determination be cancelled.
5. In correspondence dated July 21, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any party pending a review of the appeal by the Tribunal and, following this review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was forwarded to Mr. Dhese and Mr. Sandhu on September 15, 2017, allowing the opportunity to object to its completeness. No objection has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
7. 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 the Determination, the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the 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 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 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.

8. If satisfied that the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, Mr. Sandhu and the Director 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 can succeed.

## ISSUE

9. The issue at this stage is whether the appeal shows there is any reasonable prospect it will succeed.

## THE FACTS

10. Mr. Sandhu filed a complaint with the Director alleging he had not been paid all wages owed for the work he performed as a construction labourer.
11. The Determination set out two issues – who employed Mr. Sandhu, and what hours were worked and what wages are owed to Mr. Sandhu?
12. The Director conducted an investigation, including a December 8, 2016, fact-finding meeting, and heard evidence from Mr. Sandhu, Mr. Dhesi, and a representative of RDG Creekside Development (“RDG”) at the fact-finding meeting.
13. Based on the evidence presented at the fact-finding meeting and the definition of employee in the *ESA*, Mr. Dhesi was confirmed as an independent contractor. Mr. Dhesi, in his capacity as an independent contractor, was hired under a construction management contract by RDG, and this contract specified that Mr. Dhesi was responsible for all costs associated with any of his employees.
14. In his capacity as an independent contractor working in the construction industry, Mr. Dhesi hired Mr. Sandhu as a labourer from March 21, 2016, to May 16, 2016, to work at the rate of \$15.00 per hour.
15. Mr. Dhesi had paid Mr. Sandhu \$1,500.00 for work performed between March 21, 2016, and May 16, 2016.
16. At the December 8, 2016, fact-finding meeting Mr. Sandhu’s handwritten journal detailing the work performed and hours worked, including travel and break times, was used as a basis for reaching agreement between Mr. Sandhu and Mr. Dhesi regarding the hours worked by Mr. Sandhu between March 21, 2016, and May 16, 2016. The parties and the Director reviewed the records for each day, and at the end of the meeting both parties agreed that Mr. Sandhu worked 519.21 hours between March 21, 2016, and May 16, 2016.
17. On January 8, 2017, Mr. Dhesi submitted a record of hours indicating Mr. Sandhu had only worked 276.50 hours, significantly less than the hours agreed to at the meeting a month previous, and less than an earlier, May 30, 2016, email from Mr. Dhesi stating that Mr. Sandhu had worked 294.5 hours. The Director found that he preferred the evidence of the parties agreed to in the fact-finding meeting concerning the hours worked by Mr. Sandhu between March 21, 2016, and May 16, 2016, and provided his rationale for this within the Determination.
18. The Director found that based on the best evidence of hours worked by Mr. Sandhu, Mr. Sandhu had worked 274.20 hours at regular time (\$15.00 per hour), 157.67 hours of overtime (\$22.50 per hour) and 8 hours of

double-time (\$30.00 per hour). Total wages earned, including annual vacation pay, between March 21, 2016, and May 16, 2016, was \$8,099.60. Mr. Sandhu had received wages of \$1,500.00 from Mr. Dhesi. Mr. Dhesi owed Mr. Sandhu a further \$6,789.99 in wages, including accrued interest.

## ARGUMENT

19. Mr. Dhesi submits that there is “new” evidence that shows Mr. Sandhu had not worked 519.21 hours as found by the Director, nor 276.50 hours as he had previously submitted to the Director, but 294.5 hours. The change was due to a calculation error.
20. By way of an August 1, 2017, email, Mr. Dhesi writes: “I’d like to add that I am owed some gas money for the 48 days I picked up and dropped off Balbir Sandhu. \$10 per day.”
21. Mr. Dhesi further denies that he agreed at the December 8, 2016, fact-finding meeting to the evidence supporting that Mr. Sandhu had worked 519.21 hours between March 21, 2016, and May 16, 2016.

## ANALYSIS

22. 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 being made.
23. 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.
24. 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 that there is an error in the Determination under one of the statutory grounds.
25. 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.
26. Mr. Dhesi has grounded this appeal in evidence becoming available that was not available when the Determination was made. This ground of appeal is commonly described at the “new evidence” ground of appeal.
27. This appeal is not grounded in an error of law, although that ground of appeal is implicit in the primary point being advanced in this appeal – that the Director erred in finding Mr. Sandhu worked a specified number of hours during the period he was employed by Mr. Dhesi as an employee. 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.

28. In the circumstances of this appeal, unless Mr. Dhesi can show the Director made an error of law, this appeal cannot possibly succeed.
29. In respect of the chosen ground of appeal, 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 the material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of resulting in a different conclusion than what was found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence that 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*.
30. I find this evidence is not “new”; indeed, a version of this evidence was provided to the Director. The Determination Reasons review the discrepancy between the hours of 294.5 submitted by Mr. Dhesi prior to the December 8, 2016, fact-finding meeting, the ‘corrected’ hours of 276.5 hours provided in January 2017 by Mr. Dhesi, and provides the rationale for accepting the fact-finding evidence of hours worked as the most reliable evidence. [Determination Reasons, page R8]
31. Mr. Dhesi’s request for adjustments to the amount owing Mr. Sandhu to reflect gas money owing to him is not new, as it was available and could have been presented during the investigation.
32. This ground of appeal is without merit and is denied.
33. My conclusion on the “new” evidence leaves only Mr. Dhesi’s allegation that the Director erred in determining that the December 8, 2016, fact-finding meeting resulted in an agreed upon calculation of the hours worked by Mr. Sandhu during the period in question.
34. The Director’s findings on the hours worked by Mr. Sandhu were reasonably grounded in the evidence provided, including the hand-written notes taken during the December 8, 2016, fact-finding meeting, showing a daily breakdown of both recorded and agreed upon hours worked by Mr. Sandhu.
35. This argument represents nothing more than a challenge by Mr. Dhesi to the findings of fact made by the Director, findings that I have concluded were reasonably grounded in an evaluation of the evidence. As noted previously, the *ESA* does not provide for an appeal against errors of fact unless those findings are

shown to be errors in law. Mr. Dhési has not remotely met the burden of establishing an error of law in the Determination.

36. This argument has no reasonable prospect of succeeding and it is dismissed.
37. There is no error in this Determination. I find there is no basis in the *ESA* for this appeal and it has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other party to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

### **ORDER**

38. Pursuant to section 115 of the *ESA*, I order the Determination dated June 9, 2017, be confirmed in the amount of \$7,789.99, together with any interest that has accrued under section 88 of the *ESA*.

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**Marnee Pearce**  
**Member**  
**Employment Standards Tribunal**