

An appeal

- by -

Dustin Winston Shields and Michael John Paul Dymond carrying on business as  
Automotive-Aide Auto Repair (An Appeal by Dustin Winston Shields)  
("Mr. Shields")

- 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/92

**DATE OF DECISION:** August 31, 2016

## DECISION

### SUBMISSIONS

Dustin Winston Shields on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Dustin Winston Shields (“Mr. Shields”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) against Dustin Winston Shields and Michael John Paul Dymond carrying on business as Automotive-Aide Auto Repair (“Automotive-Aide”) on June 10, 2016.
2. The Determination found Automotive-Aide had contravened Part 3, sections 18 and 27 and Part 5, section 45 of the *Act* and section 46 of the *Employment Standards Regulation* in respect of the employment of Mike A. Sinnott (“Mr. Sinnott”) and ordered Automotive-Aide to pay Mr. Sinnott wages in the amount of \$6,428.73 and to pay administrative penalties in the amount of \$2,000.00. The total amount of the Determination is \$8,428.73.
3. This appeal is made by Mr. Shields and is based on the ground that evidence has become available that was not available when the Determination was being made.
4. In this appeal, Mr. Shields submits his partnership with Mr. Dymond in Automotive-Aide was dissolved March 31, 2015, and that he ceased to be involved in the business at that time; he seeks to have the Determination varied to exclude his name from the business of Automotive-Aide and from the process, effectively cancelling the Determination as against him.
5. In correspondence dated June 19, 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.
6. The section 112(5) record (the “record”) has been requested from the Director and it has been provided to the Tribunal; a copy has been delivered to Mr. Shields. He has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. 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, my review of the material that was before the Director when the Determination was being made and any additional evidence allowed to be added to the appeal. 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 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 the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director, Michael John Paul Dymond and Mr. Sinnott 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**

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

### **THE FACTS**

10. Automotive-Aide operates an automotive repair business. As of October 26, 2015, Automotive-Aide was registered in British Columbia as a general partnership comprising Mr. Shields and Michael John Paul Dymond (“Mr. Dymond”).
11. Mr. Sinnott was employed by Automotive-Aide as a service technician from March 9, 2015, to September 24, 2015, at a rate of \$44.00 an hour. He quit his employment and, following its termination, complained that Automotive-Aide had contravened the *Act* by failing to pay all wages owed. He claimed regular wages, overtime wages, statutory holiday pay and annual vacation pay.
12. The Director conducted a complaint hearing over two days, February 23 and March 10, 2016. Mr. Shields, Mr. Dymond and Kate Hadland (Ms. Hadland) appeared for Automotive-Aide. Mr. Sinnott appeared on his own behalf; he provided evidence in support of his claim and presented two other witnesses to support his claim.
13. Mr. Shields, Mr. Dymond and Ms. Hadland provided evidence for Automotive-Aide in response to the claim by Mr. Sinnott.
14. Only Mr. Shields has appealed the Determination. His contention is the Director erred by finding he was liable, as one of the partners in the business, for Mr. Sinnott’s wage claim. He argued at the complaint hearing that he had left the partnership.
15. The thrust of Mr. Shield’s evidence was that he was only involved with Automotive-Aide for “the first five weeks’ of operation up to the middle of June 2015”: Determination page R6. He said he had verbally notified Mr. Dymond and Ms. Hadland of his intention to leave the partnership and left it to them to complete the necessary paperwork. He said he signed the paperwork in late August or early September 2015 and does not know why the change was not recorded in the corporate registry.
16. The Determination records that Mr. Shields also gave some evidence regarding substantive aspects of Mr. Sinnott’s claim.

17. There is also reference on page R5 of the Determination to evidence from one witness about recalling Mr. Shields “leaving the business around April 2015”.
18. Ms. Hadland gave evidence that as of the hearing dates – February and March, 2016 – Mr. Shields was a signatory on the partnership banking account.
19. Mr. Dymond testified to recalling a document being completed in September 2015 to changing Automotive-Aide to a limited company and dissolving the partnership. No document relating to this change was provided to the Director.
20. The Determination was issued against the partnership.

## ARGUMENT

21. Mr. Shields submits he had ceased to be a partner of Automotive-Aide as of March 31, 2015. In support of this assertion he has submitted a “Dissolution or Change of General Partnership Registration”, issued by BC Registry Services.
22. The document shows, for Registry purposes, a date of dissolution of April 5, 2016 and that the person submitting the Dissolution or Change Form (“the Form”) was Mr. Shields. The document indicates the Form showed a date of dissolution of March 31, 2015. No correspondence or other documents are provided with the appeal. The document provided by the Registry certifies that it contains the information provided in the Form at the time it was filed; it does not certify the veracity of that information.

## ANALYSIS

23. 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.*

24. 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.
25. 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.
26. 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.

27. Mr. Shields 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.
28. 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 these conditions will rarely be accepted.
29. 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. Mr. Shields seeks to change the Determination and bears the burden of showing the “new” evidence should be accepted and should produce the result sought. If he is unable to satisfy the Tribunal this evidence should be accepted and that it should compel a variance in the Determination, this appeal cannot succeed.
31. For the reasons stated below, I find this appeal does not satisfy the requirements of this ground of appeal and as a result is without merit.
32. I am not persuaded the Registry document contains any “new” evidence. The Registry document does no more than reassert the general position taken by Mr. Shields at the complaint hearing: that he had left the partnership and was therefore not responsible for Mr. Sinnott’s wage claim. The new evidence is not “evidence” that Mr. Shields left the partnership or that it was dissolved March 31, 2015. It only speaks to the fact that Mr. Shields filed a Dissolution or Change of General Partnership Form in April 2016. There was evidence provided at the complaint hearing on Mr. Shield’s position that the partnership had been dissolved; the Director was not persuaded to accept this evidence.
33. Also, I note that although the Registry document submitted in support of the appeal was generated after the completion of the complaint hearing – it contains an April 6, 2016, date at the bottom and a dissolution date of April 5, 2016 – it was likely available before the Determination was issued on June 10, 2016. While I make no firm finding on this point, it was entirely probable this document was available to Mr. Shields at the time the Determination was being made and could have been provided to the Director. There is no indication Mr. Shields ever sought to provide the Director with this document when it was received by him.
34. The Registry document is based in information provided by Mr. Shields. No other documents are provided with this appeal. In particular there appears to be no support anywhere in the record, including the reasons for Determination, for the date of March 31, 2015, as the date of dissolution of the partnership.
35. In any event, I do not find the “new” evidence submitted by Mr. Shields to be particularly credible.
36. The appeal is based almost entirely on the general assertion made to the Director by Mr. Shields at the complaint hearing, where he gave evidence that he had left the partnership and it had been dissolved, although his evidence pointed to his leaving the partnership having taken place mid-June 2015, not March 31,

2015. The evidence recorded in the Determination is not consistent with the assertion made in this appeal on the date of dissolution.
37. Other evidence recorded in the Determination, suggesting Mr. Shields left the business “around” April 2015 and that documents to dissolve the partnership were created in September 2015, as well as the evidence that Mr. Shields was still a signatory on the business’s banking documents at the time of the hearing, adds to the inconsistency of the evidence relating to a dissolution of the partnership.
38. The General Partnership Summary, generated at the request of the Director on November 2, 2015, showed Mr. Shields was registered as a partner in Automotive-Aide as of October 26, 2015.
39. Based on the totality of the evidence available, the Director was entitled to rely on the document filed with the Corporate Registry and to issue the Determination against both registered partners. I can find no basis for concluding there was any error made by the Director in making the Determination.
40. This appeal has no reasonable prospect of succeeding. The appeal on its face is devoid of merit. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.
41. 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 June 10, 2016, be confirmed in the amount of \$8,428.73, together with any interest that has accrued under section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**