



An appeal

- by -

Elite Furniture Ltd.
(“Elite”)

- 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.: 2015A/118

DATE OF DECISION: November 5, 2015

DECISION

SUBMISSIONS

Derek Liu

on behalf of Elite Furniture Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Elite Furniture Ltd. (“Elite”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 7, 2015.
2. The Determination found that Elite had contravened Part 3, sections 17, 18 and 27 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Bai Xiang Zhao (“Mr. Zhao”) and ordered Elite to pay wages to Mr. Zhao in the amount of \$11,714.62 and to pay administrative penalties in the amount of \$2,000.00. The total amount of the Determination is \$13,714.62.
3. This appeal is grounded in an assertion the Director erred in law. Elite seeks to have the Tribunal vary the Determination or remit it back to the Director.
4. This appeal was received by the Tribunal on September 10, 2015.
5. On September 15, 2015, the Tribunal acknowledged receipt of the appeal, requested the Director to produce the section 112(5) “record” (the “record”) and notified the other parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
6. The “record” was provided by the Director to the Tribunal. A copy has been delivered to Elite and it has been given the opportunity to object to its completeness. Elite has not objected to the completeness of the “record” and the Tribunal accepts it as complete.
7. On October 19, 2015, the Tribunal notified the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed.
8. Consistent with notice contained in correspondence from the Tribunal dated September 15, 2015, and October 19, 2015, I have reviewed the appeal, the appeal submission and the “record”.
9. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the reasons for Determination, the appeal, my review of the “record” that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

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.*

10. I am deciding whether the appeal should be dismissed under section 114(1)(f). If I decide all or part of the appeal should not be dismissed under section 114(1)(f), Mr. Zhao and the Director will be invited to file further submissions. On the other hand, if I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it will be dismissed under section 114(1) of the *Act*.

ISSUE

11. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

12. The facts relating to the issue under consideration are as follows:
1. Elite operates a custom furniture making and installation business in Burnaby BC;
 2. Mr. Zhao worked for Elite for a period from January 27, 2014 to October 2, 2014;
 3. Mr. Cheung filed a complaint in February 2015 alleging that he had not been paid all wages owed to him for a period from April 1, 2014, to October 2, 2014;
 4. The Director conducted a complaint hearing on July 7, 2015;
 5. Mr. Zhao attended and provided evidence and made submissions to the Director at the complaint hearing;
 6. Representatives of Elite attended the complaint hearing, provided some evidence, but did not submit documents for the complaint hearing;
 7. Elite did not keep a record of the days and hours worked by Mr. Zhao;
 8. Elite confirmed Mr. Zhao was not paid for all of the hours he worked;
 9. The Director accepted Mr. Zhao's record of days and hours worked and found he was owed regular and overtime wages in the amount set out in the Determination.

ARGUMENT

13. Elite submits the Director made an error in law by finding Mr. Zhao was an employee of Elite. Elite says Mr. Zhao was a sub-contractor. Elite does not deny it owes Mr. Zhao money and says it will pay \$500 a month until the amount owed is paid.

ANALYSIS

14. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
15. 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.*
16. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.
17. This appeal is grounded in a claim that the Director erred in law in making the Determination. 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.
18. I am completely satisfied there is no error of law in the Determination.
19. I reach this conclusion for two reasons.
20. First, in raising the status of Mr. Zhao under the *Act*, Elite does nothing more than baldly assert he was not an employee of Elite but a sub-contractor. Elite makes this assertion without providing a single argument, based either in law or in fact, why their position is correct and the Director was wrong.
21. As indicated above, the burden of showing error of law is on Elite and they have fallen far short of meeting this burden. There is nothing in the “record” or in the appeal that would show Mr. Zhao was not an employee of Elite applying the definitions of “employer” and “employee” under the *Act* to the circumstances of Mr. Zhao’s employment.

22. Second, the appeal seeks to challenge findings of fact made by the Director about Mr. Zhao's hours and days of work. As indicated above, the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. In this case there is no error of law shown. There is nothing perverse or inexplicable about the findings made by the Director; they are rational and firmly grounded in the evidence provided and accepted in the Determination, and included in the "record". The findings are unaffected by anything in the appeal.
23. In sum, an assessment of this appeal shows it has no prospect at all of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
24. I dismiss the appeal and confirm the Determination.

ORDER

25. Pursuant to section 115 of the *Act*, I order the Determination dated August 7, 2015 be confirmed in the amount of \$13,714.62, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal