



An appeal

- by -

Co-Par Investments Ltd.
("Co-Par")

- 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.: 2017A/120

DATE OF DECISION: December 6, 2017

DECISION

SUBMISSIONS

Karen Kostron

on behalf of Co-Par Investments Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Co-Par Investments Ltd. (“Co-Par”) has filed an appeal of a Determination issued by Janko Pedrovic, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on August 10, 2017.
2. The Determination found Co-Par had contravened Part 3, sections 17, 18 and 27 and Part 4, section 40 of the *ESA* in respect of the employment of Tyler Jo Betts (“Mr. Betts”) and section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The Determination ordered Co-Par to pay Mr. Betts wages in the amount of \$6,150.49 and to pay administrative penalties in the amount of \$2,500.00. The total amount of the Determination is \$8,650.49.
3. This appeal is grounded in evidence becoming available that was not available when the Determination was being made.
4. The appeal was delivered to the Tribunal on October 6, 2017; nearly one month after the statutory time period for filing an appeal had expired. The Appeal Form was not accompanied by any request to extend the time period for filing the appeal and no reason has been provided for the failure to meet the statutory time period.
5. In correspondence dated October 13, 2017, the Tribunal acknowledged having received an appeal, 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.
6. The record has been provided to the Tribunal by the Delegate. A copy has been delivered to Co-Par and Mr. Betts and 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.
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 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 other evidence allowed to be added to the appeal. 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 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 the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Betts 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 here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

10. Co-Par operated an electrical services company, incorporated in Alberta and carrying on some of its business in this province. A search of the Alberta Corporate Registration System showed Co-Par was registered on July 17, 2012, and that Steven Barry (“Mr. Barry”) and Ross Kostron (“Mr. Kostron”) were listed as the directors and voting shareholders of the company.
11. Mr. Betts was employed as an electrician from January 16, 2017, to March 17, 2017. He terminated his employment with Co-Par on March 18, 2017, and filed a complaint with the Employment Standards Branch (the “Branch”) alleging Co-Par had failed to pay all overtime wages, annual vacation and statutory holiday pay owing to him and had failed to issue him proper wage statements.
12. Copies of the complaint and a Demand for Employer Records were sent to Co-Par, Mr. Barry, and Mr. Kostron. While the mail to Mr. Barry was returned unclaimed, the other mailings were tracked and confirmed as having been delivered. There were email communications between the Delegate and Mr. Barry in June and discussions concerning possible resolution of the complaint. Mr. Barry was aware of the complaint. The Demand for Employer Records was ignored.
13. The Delegate conducted a complaint hearing by teleconference on July 19, 2017. No representative of Co-Par participated in the complaint hearing, although notified, nor did Co-Par provide any documents or submissions at or in advance of the complaint hearing.

14. The Determination outlines the largely unsuccessful efforts of the Delegate and other delegates of the Director to obtain from either of Co-Par's directors a meaningful response to the complaint and their participation in the complaint process and hearing. Included in the outline is reference to a discussion with Mr. Kostron on June 27, 2017, in which he advised the Delegate that he was no longer a director of Co-Par and would not be representing Co-Par any longer.
15. Mr. Betts provided evidence to the complaint hearing that was accepted by the Delegate.
16. The Delegate found Mr. Betts was owed wages in the amount set out in the Determination, that Co-Par had contravened several provisions of the *ESA* and had contravened section 46 of the *Regulation*.

ARGUMENT

17. Co-Par has grounded this appeal in evidence becoming available that was not available when the Determination was being made. Included with the appeal are approximately fifty-five documents that Co-Par seeks to rely upon in the appeal. Several of those documents are included in the record. While not entirely fleshed out, the appeal seems to disagree with some of the facts provided by Mr. Betts to the Delegate, and accepted, during the complaint process and the complaint hearing.

ANALYSIS

18. 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.*

19. 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.
20. 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.
21. 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.

22. Co-Par 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.
23. 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*.
24. I find the evidence provided by Co-Par with the appeal does not meet the considerations for accepting and considering new evidence.
25. The proposed evidence is not “new”; it was available and could, applying a reasonable degree of diligence, have been provided to the Director during the complaint process had Co-Par opted to participate in that process.
26. The evidence in this appeal is limited to that found in the record. There is nothing in the appeal that shows the findings made by the Director were an error of law and thus reviewable by the Tribunal.
27. In my view this appeal also fails on the principle expressed in *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
28. The arguments advanced by Co-Par on appeal, is one which could have been advanced to the Director. A party is not permitted to refuse or fail to participate in the complaint process and, subsequent to a Determination being issued, seek to advance a case to the Tribunal on appeal, when the facts should have been advanced to the Director during the complaint process. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. In my view, the Director cannot be said to have “erred” in a fact-finding process, when Co-Par failed to participate in that process.
29. The facts of this case are similar to those in *Kaiser Stables, supra*, where the concerted efforts of a delegate to have an employer participate in the investigation of a complaint were ignored by the employer. Following a Determination with which the employer did not agree, an appeal was filed that sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Tribunal stated it “will not to allow an employer to completely ignore the Director’s investigation and then appeal its conclusions”.

30. The very limited response of Co-Par, Mr. Scott, and Mr. Kostron to the efforts of the Director seek their participation in the complaint process persuades me that the Tribunal should not be allowed to challenge the Determination in this appeal.
31. Based on all of the above, I find this 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*.
32. I will add one further comment. While I have not fully addressed the delay in filing an appeal, it is doubtful, based on the failure to provide an explanation for the delay and the absence of a strong case on appeal, that an extension of time would be granted.

ORDER

33. Pursuant to section 115 of the *ESA*, I order the Determination dated August 10, 2017, be confirmed in the amount of \$8,650.49, together with any interest that has accrued under section 88 of the *ESA*.

David Stevenson
Member
Employment Standards Tribunal