Employment Standards TRIBUNAL

An appeal

- by -

Grand Construction Ltd.
("Grand")

- 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.: 2012A/101

DATE OF DECISION: November 13, 2012

DECISION

SUBMISSIONS

Trish Warren — on behalf of Grand Construction Ltd.

OVERVIEW

1. Grand Construction Ltd. ("Grand") has filed an appeal under Section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 3, 2012.

2. The Determination found that Grand had contravened Part 3, section 18 of the *Act* in respect of the employment of Ian Graham ("Graham") and ordered Grand to pay Graham an amount of $5,363.53, an amount that included wages and interest under section 88 of the *Act*.

3. The Director also imposed an administrative penalty under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $500.00.

4. The total amount of the Determination is $5,863.53.

5. In its appeal, Grand alleges the Director failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled. Grand has also grounded the appeal on new evidence coming available that was not available when the Determination was being made.

6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act* and, at this stage, I am assessing this appeal based solely on the Determination, Grand's written submissions and my review of the section 112(5) "record" that was before the Director when the Determination was being made. Under that provision, 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) and, before considering an appeal, to refer the matter back to the Director for further investigation or recommend an attempt be made to settle the matter. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Graham will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114 of the *Act*.

BACKGROUND

7. Graham was employed by Grand as site supervisor on a construction project in Prophet River from June 7, 2011, to October 12, 2011. In late December 2011 he filed a complaint alleging Grand had failed to pay expenses accrued by him during his employ, living out allowance, overtime wages, statutory holiday, vacation pay and wages for travel time. The claim for expenses, overtime wages, statutory holiday pay and annual vacation pay were resolved during the compliant process with the assistance of an Employment Standards Branch mediator. Graham withdrew his claim for living out allowance. The claim for wages for travel time was not voluntarily resolved, was adjudicated by the Director and was the primary subject of the Determination. An ancillary issue in the Determination was whether Graham was a "manager" under the *Act* and, accordingly, whether he was entitled to have any wages found to be owed calculated at overtime rates. The Director found Graham was a "manager" for the purposes of the *Act*. The finding has not been appealed and I will not address that part of the Determination relating to it in this decision.

8. In his travel time claim, Graham alleged he commenced working at the construction project on June 22, 2011. Initially, he stayed at a Ramada hotel in Fort Nelson and commuted to the construction site in Prophet River and back to Fort Nelson, a trip the Director found to have taken 70 minutes each way. Two other employees of Grand, Dan Graham and Shawn Derbyshire, also initially stayed at the same hotel. Graham alleged, and the Director found, that he transported these two employees to the construction site on each of the working days they all stayed at the Ramada. The Director considered whether Graham was performing "work" when he was transporting the two employees and found that as he was "performing a service for the direct benefit of the employer", he was performing work as that term is defined in the *Act*.

9. The Director found that Graham and the two employees stayed at that hotel for 44 working days, Graham moving to another hotel upon his return from holidays that he took between August 4 and 14, 2011, and the two employees moving to a trailer near Prophet River sometime between August 4 and August 15, 2011. Graham asserted, and the Director found, that while he, Dan Graham and Mr. Derbyshire resided at the Ramada, Graham drove them to and from the construction site each day – a total of 88 trips (44 days x 2 trips per day).

10. Graham also alleged he made a further 58 trips between Fort Nelson and Prophet River picking up materials and supplies for which he was owed wages. The Director found, on the available evidence and applying a balance of probabilities, that Graham actually made 35 trips to suppliers, that all but 8 of these trips were made during the time he was transporting Dan Graham and Mr. Derbyshire to or from the construction site and that he was performing "work" on those 8 trips.

11. In sum, the Director found Graham performed "work" on a total of 96 trips between Fort Nelson and the construction site and was entitled to wages for each of those trips, based on 70 minutes a trip at a rate of $45.00 an hour, as well as vacation pay and interest on that amount.

THE REASONS FOR THE APPEAL

12. As indicated above, Grand says the Director failed to observe principles of natural justice in making the Determination. Grand has also grounded its appeal on new evidence coming available that was not available when the Determination was being made. A substantial amount of information and material has been submitted with the appeal, but my assessment of that information and material reveals that most of it – all of the supporting documents in any event – were provided to the Director and are included in the section 112(5) "record".

13. At its core, the appeal represents little more than a disagreement with the findings and conclusions of fact made by the Director.

14. Grand has structured the appeal on a day by day analysis of Graham's hours of work using expense receipts for which Graham was reimbursed and contends these receipts ought to have raised several concerns about Graham's claim for travel time. Grand says this material demonstrates two things: firstly, that Graham was frequently in Fort Nelson at a time when, based on his assertions and representations (and the findings of the Director in the Determination), he should have been travelling between Fort Nelson and Prophet River; and secondly, the "trips" he made to suppliers were in most cases shown by the receipts to have been undertaken during hours Graham showed in his daily records that he was working and for which he has already been paid.

ANALYSIS

15. Based on my assessment of the appeal, I am unable to dismiss it under section 114 of the *Act*. The appeal has presumptive merit. Further submissions are required. I am particularly intrigued to understand how, in the face of the material provided during the complaint process, included in the section 112(5) "record" and analyzed in the appeal, the Director was able to make the findings reached concerning Graham's entitlement to the travel time that was awarded in the Determination.

16. While the appeal is framed in natural justice and new evidence, it is apparent that the issue for Grand is how the Director, as a matter of law, could find Graham entitled to travel time. In the appeal, Grand states:

> Ian was not asked to drive employees from Fort Nelson to prophet River job site – employees had their own trucks. . . .

17. In addition, Grand contends the facts, properly analyzed, show Graham was paid for all or substantially all of the travelling he did on any day for materials and supplies.

18. In making this decision, I am mindful that 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. However, two principles presumptively operate in the circumstances of this appeal.

19. First, the definition of "error of law" adopted by the Tribunal includes cases where the Director is found to have acted without any evidence or to have acted on a view of the facts which could not reasonably be entertained; and second, that as a general proposition, a failure by the Director to consider relevant evidence is a breach of natural justice as well as an error in law and can result in a setting aside of the Determination: see *D. Kendall & Son Contracting Ltd.*, BC EST # D107/09.

20. I will add to the above a concern about why, as a matter of law, the decision of Graham, Dan Graham and Mr. Derbyshire to commute to the construction site in one vehicle should be considered work as it relates to Graham. The Determination correctly notes that employees are not entitled to wages for commuting to and from work unless the commute can be considered as work. It appears the conclusion by the Director that Graham was performing work was based solely on the finding that Dan Graham and Mr. Derbyshire rode with Graham from Fort Nelson to the construction project and back for 44 days and that action was considered by the Director to have been a "service" performed by Graham for Grand.

21. For the above reasons, I find this is not an appropriate case for dismissal under section 114 of the *Act*. The parties will be invited to file submissions on the appeal, bearing in mind the concerns with the Determination that I have expressed above.

ORDER

22. I order this appeal to proceed under section 112 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal