



An appeal

- by -

Ke “Michael” Ma
 (“Mr. Ma”)

- 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.: 2014A/126

DATE OF DECISION: December 4, 2014

DECISION

SUBMISSIONS

Ke “Michael” Ma

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Ke “Michael” Ma (“Mr. Ma”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 20, 2014.
2. The Determination found that Mr. Ma’s former employer, Right Trucks Sales & Service Ltd. (“Right Trucks”), had contravened Part 8, section 63 of the *Act* in respect of the termination of his employment and ordered Right Trucks to pay wages to Mr. Ma in the amount of \$892.44 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$1,392.44.
3. Mr. Ma has filed this appeal on the grounds the Director failed to observe principles of natural justice in making the Determination and evidence has come available that was not available when the Determination was being made. Mr. Ma seeks to have the Determination varied to allow his claim for lost wages in the amount of \$21,750.00 and other expenses in the amount of \$415.00.
4. On September 22, 2014, the Tribunal acknowledged to the parties that an appeal had been received from Mr. Ma, requested production of the section 112(5) record (the “record”) from the Director and notified the 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.
5. The “record” was provided by the Director to the Tribunal and a copy was sent to Mr. Ma, who was advised of his right to object to the completeness of the “record”. On October 9, 2014, the Tribunal received a submission from Mr. Ma, indicating there were five pieces of correspondence missing from the “record”. The Director responded, indicating the material referred to by Mr. Ma in his submission was not before the Director when the Determination was being made. Mr. Ma has made a final reply to the Director’s submission. I am not persuaded the “record” is incomplete. The Director has stated none of the documents referred to by Mr. Ma were before the Director or considered at the time the Determination was being made. A review of the correspondence referred to by Mr. Ma does not suggest this was material which should have been before the Director at the time the Determination was being made or included in the “record”. I accept the “record” as submitted by the Director as being complete.
6. Consistent with the September 22, 2014, notice, I have reviewed the appeal, including the submissions supporting the appeal submitted by Mr. Ma, and the “record”. I will also consider any additional evidence that is allowed to be added to the material in the file.
7. 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 appeal and 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 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 has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Right Trucks 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(1) of the *Act*.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

10. My view of the facts is based on the findings made in the Determination.
11. Mr. Ma filed a complaint alleging Right Trucks had contravened section 54 of the *Act* by failing to return him to his former position following parental leave.
12. Mr. Ma was employed by Right Trucks as an accountant from February 22, 2012, to September 9, 2013, at a rate of \$20.00 an hour.
13. Mr. Ma went on parental leave on December 17, 2012. One month prior to the end of his leave, Mr. Ma was notified that his hours would be reduced by 40% upon his return. The parties differed over what motivated the reduction in hours. The Director found the reduction in hours was not motivated by the parental leave, apparently accepting the position of the employer that the reduction was motivated by an effort to reduce costs in the business.
14. The Director did find, however, the reduction in hours was a substantial alteration in the conditions of Mr. Ma's employment and was deemed to be a termination which, in the absence of written notice or compensation in lieu of notice, gave rise to entitlement to length of service compensation.

ARGUMENT

15. Mr. Ma argues the Director failed to observe principles of natural justice in making the Determination. He alleges the process and the Determination was bias against him. In respect of the first allegation, Mr. Ma directs his argument against the mediation session conducted by Robert Krell ("Mr. Krell"), another delegate of the Director, and against that delegate. He says some of the comments made by the Mr. Krell during the

mediation showed a bias in favour of the employer which continued after Mr. Krell “took over as the main liaison” for the case. He says Mr. Krell would not allow him to use “an important part” of his evidence because it included statements made by Right Trucks’ representative in the mediation session. Mr. Ma also submits an adjournment and two postponements of the complaint hearing are further evidence of the bias against him in the process.

16. Mr. Ma says that during the complaint hearing, Right Trucks presented “brand new evidence through reckless lies” and “used tactics such as sensationalism, character assassination and equivocation”. After the hearing he sought to submit additional evidence, sending e-mails to two delegates of the Director, one of them his “original contact” at the Branch. He was contacted within a few days by Mr. Krell, who apparently told him any additional evidence would delay the process. Mr. Ma also notes Right Trucks had asked to be allowed to submit additional evidence but never did. Mr. Ma says he was intending to use the financial statements Right Trucks wished to submit to prove the employer had lied. Mr. Ma complains about the delay of four months between the complaint hearing and the Determination.
17. Mr. Ma argues there is a bias in the Determination which flows, it appears, from the reliance by the Director on two pieces of evidence provided by Right Trucks and accepted by the Director but which Mr. Ma says was false and misled the Director. He also says the Director ignored evidence in making the Determination and lists twelve points of evidence that were “ignored”.
18. To bolster his appeal, Mr. Ma has submitted additional evidence. This additional evidence includes that “evidence” taken out by Mr. Krell before the first scheduled hearing and the information he would have submitted after the hearing but did not after speaking with Mr. Krell. This information speaks to the question of “reduction of staff level” and the “historical fluctuation” of the position held by Mr. Ma. He submits the evidence provided by Right Trucks on these two matters at the complaint hearing was false. His appeal outlines his reasons for this submission.
19. His appeal submission includes a statement of his original complaint, several pages identified as “other evidence presented at the hearing”, Mr. Ma’s closing argument and five e-mails, all of which pre-date the Determination.

ANALYSIS

20. 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.
21. 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.*

22. 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.
23. It is well established that 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. 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 that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
24. Mr. Ma has grounded his appeal in allegations of failure to observe principles of natural justice and "new" evidence.
25. The natural justice ground of appeal alleges bias in the process and the Determination. This allegation incidentally alleges bias against Mr. Krell and the delegate making the Determination.
26. An allegation of bias must be proven on the evidence. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact. Also:
- . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.
27. An allegation of bias cannot be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.
28. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:
- Regardless of the precise words used to describe the test (of bias or apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the *personal* integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)
29. As well, the Tribunal has adopted the view that allegations of bias against a delegate, as has been done here against two delegates, must be considered in light of the fundamental nature of the statutory process within which a delegate functions.

30. In summary, the burden of proving actual, or a reasonable apprehension of, bias is high and demands “clear and convincing” objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias.
31. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances, would conclude the object of the allegation was biased against him.
32. The allegations made by Mr. Ma falter on the evidence. There is nothing in the appeal, and specifically there is no evidence of any kind, indicating a “real likelihood or probability” there was any bias against him and in favour of Right Trucks during the process or in the Determination. The accusation is premised on nothing more than subjective, and totally unsupported, impressions.
33. The allegations relating to the mediation process simply fail to appreciate or accept the purpose and importance of that process to resolving complaints and ensuring communications and information conveyed in the process is confidential, or “without prejudice”, thus encouraging an open dialogue aimed at settlement. To briefly summarize, mediation is frequently used by the Branch in the complaint process to attempt an early resolution of the complaint. In order to accomplish that objective, the parties must be assured their efforts to compromise in a mediated setting will not be used to undermine the position they may wish to formally take in response to a claim, either during an investigation or at a complaint hearing. Mr. Krell was not incorrect, and was not exhibiting any bias toward Mr. Ma, by informing him that he could not use comments and information from the mediation session in the complaint hearing.
34. In my view of the appeal, Mr. Ma’s allegation of bias in the Determination is nothing more than an expression of his disagreement with the findings of fact made by the Director.
35. The burden that is on Mr. Ma in making these allegations has not been met; there is no clear objective evidence from which it can reasonably be found Mr. Krell or the delegate deciding the Determination was disposed to hold an adverse view of Mr. Ma or his complaint.
36. I find there is no basis upon which the natural justice ground of appeal can succeed.
37. Mr. Ma seeks to include additional evidence in this appeal. In respect of this ground of appeal, commonly described as the “new evidence” ground of appeal, the Tribunal has established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that 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. All of the foregoing conditions must be satisfied before “new evidence” will be admitted into an appeal. The evidence sought to be admitted into this appeal does not remotely resemble the kind of evidence that would be considered as acceptable. The “new evidence” sought to be introduced in this appeal was reasonably capable of being provided during the complaint process and is not *shown* to be credible or probative. In short, it does not satisfy several of the conditions necessary to be allowed and considered as “new evidence” under that ground of appeal.
38. There is no merit to this ground of appeal.

39. An assessment of the appeal as a whole indicates this appeal is about nothing more than a disagreement with the conclusions reached by the Director in the Determination. At its core, it simply challenges findings of fact and conclusions drawn from those findings. A substantial part of the appeal submission re-submits Mr. Ma's evidence and argument presented at the complaint hearing in the hope, apparently, the Tribunal will take a different view of those facts and provide a different result. As indicated above, the Tribunal has no authority to consider an appeal based on challenges to findings of fact in the Determination unless those findings raise an error of law. Error of law is not argued in this appeal and, clearly, no error of law arises on the facts as found in the Determination. The findings in the Determination were reasonable and were based on the evidence provided.
40. In sum, Mr. Ma has not demonstrated there is any merit at all to the appeal. It would be inconsistent with the purposes and objectives of the *Act* to require the other parties to the Determination to respond to an appeal that has no likelihood of succeeding.
41. The appeal is, accordingly, dismissed and the Determination confirmed.

ORDER

42. Pursuant to section 115 of the *Act*, I order the Determination dated August 20, 2014, be confirmed in the amount of \$1,392.44, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal