

An appeal

- by -

Rapid Leasing Ltd.
("Rapid")

- 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: Shafik Bhalloo

FILE No.: 2016A/95

DATE OF DECISION: October 13, 2016

DECISION

SUBMISSIONS

Jugraj Singh Barring on behalf of Rapid Leasing Ltd.
Harvinder Barring on behalf of Rapid Leasing Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Rapid Leasing Ltd. (“Rapid”) has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 16, 2016.
2. The Determination found that Rapid had contravened Part 3, sections 17 (pay days) and 18 (payment of wages if employment is terminated) of the *Act* and section 46 (production of records) of the *Employment Standards Regulations* (the “*Regulation*”) in respect of the employment of Surinderjit Singh Bains (“Mr. Bains”) and ordered Rapid to pay wages to Mr. Bains in the amount of \$1,020.84 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$2,520.84.
3. Rapid has filed this appeal on the ground that the Director erred in law. Rapid seeks to have the Determination referred back to the Director.
4. The appeal was delivered to the Tribunal on July 22, 2016, three days prior to the expiry of the appeal period in the Determination. The appeal did not, as required by subsection 112(2) of the *Act*, include a copy of the Director’s written reasons for the Determination. It also contained an incomplete copy of the Determination, with only three (3) of the six (6) pages included with the appeal.
5. On July 22, 2016, the same date after receiving Rapid’s appeal, the Tribunal informed Rapid that the appeal was incomplete and the *Act* and the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) required the written reasons for the Determination to be delivered to the Tribunal within the appeal period. The Tribunal provided Rapid with a deadline of July 25, 2016, to perfect the appeal. In response to this correspondence, on July 25, 2016, Rapid replied to the Tribunal enclosing a complete copy of the Determination and informed the Tribunal that it did not have a copy of the reasons for the Determination because it was late in requesting them from the Director.
6. On July 28, 2016, the Tribunal notified the parties that an appeal had been received from Rapid, 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.
7. On August 10, 2016, the Director delivered the “record” to the Tribunal. On August 22, 2016, the Tribunal sent a copy of the “record” to Rapid, and advised the latter of its right to object to the completeness of the “record” by September 6, 2016.
8. On September 6, 2016, Harvinder Barring (“Mr. H. Barring”) submitted objections to the completeness of the “record” on behalf of Rapid. His submissions are, in form and in substance, the same as those made by Jugraj Singh Barring (Mr. Barring”), a director of Rapid, on the merits of the appeal and filed with the Appeal

Form on July 22, 2016. The latter submissions are reproduced below under the heading Submissions of Rapid.

9. On September 7, 2016, the Tribunal disclosed Mr. Barring's objection to the completeness of the "record" to the Director and provided the latter an opportunity to provide a written response to those objections by September 21, 2016.
10. On September 19, 2016, the Director submitted a response to Mr. Barring's objections to the completeness of the Record. I have read the Director's response and I find the response persuasive, that is, the "record" is a complete copy of the information that was before the delegate at the time the Determination was made and Mr. H. Barring's objections are not relevant to the completeness of the "record" but speak to the merits of the appeal. I note Mr. Barring has responded to the Director's response by way of his letter of September 30, 2016, which, again, focuses on the merits of Rapid's appeal and primarily reiterates his earlier submissions. As indicated, I will deal with the merits of Rapid's appeal below. Having said this, I find the "record" adduced by the Tribunal in this appeal to be complete.
11. Consistent with the Tribunal's correspondence of July 28, 2016, I have reviewed the appeal, including Rapid's written submissions, and the "record". I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess this appeal based solely on the Determination, the Appeal Form, the written submissions of Rapid, 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 the 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). If I decide all or part of the appeal should not be dismissed under section 114(1), Mr. Bains will, and the Director may, be invited to file further submissions.

ISSUE

12. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

13. The facts relating to the issue under consideration in this appeal are as follows:
 - a. Rapid operates a trucking business in lower mainland British Columbia.
 - b. Jugraj Singh Barring is listed as Rapid's sole director and officer in the BC Company Summary maintained by BC Registry Services.
 - c. The complaint of Mr. Bains was filed with the Director on March 29, 2016.
 - d. Mr. Bains' complaint states that he worked "on & off" as a truck driver for Rapid for a few years and his last day of employment was November 12, 2015.
 - e. Mr. Bains claimed in his complaint that his wage rate was \$23.00 per hour and Rapid failed to pay him regular wages for the period October 2015 to November 12, 2015, and vacation pay for the period January 1, 2015, to November 12, 2015.
 - f. The "record" shows that the delegate of the Director first called Mr. Bains' supervisor named in the complaint, Binder Birring ("Mr. Birring"), on April, 2016, at 9:01 a.m. and the latter said he knew nothing of Mr. Bains' final pay and would call the delegate back as there was a bad telephone connection.

- g. The delegate telephoned Mr. Birring again at 2:49 p.m. on April 26, 2016, and discovered Mr. Birring's voicemail was full.
- h. The "record" shows a couple of more unsuccessful attempts by the delegate to call Mr. Birring on April 27 and April 28, 2016.
- i. On April 29, 2016, a Notice of Complaint Hearing ("Notice of Hearing") and a Demand for Employer Documents (the "Demand") were sent to Rapid, by registered and regular mail, at its registered and records office address at Ottawa Street, in Port Coquitlam. Copies of both documents were also sent to Rapid's director and officer, Mr. Barring, at the address provided for him in the BC Corporate registry search, which is the same address as Rapid's registered and records office.
- j. The "record" contains a Canada Post document that shows the Notice of Hearing and the Demand sent by registered mail to Rapid was unclaimed.
- k. The "record" does not show any response from Rapid to the Demand.
- l. The Director received evidence from Mr. Bains on his claim and copy of the same (about 33 pages of driver's logs) was delivered to Rapid on May 18, 2016.
- m. It is unclear whether the complaint hearing, which was scheduled for May 26, 2016, either did not take place or proceeded in Rapid's absence.
- n. The Determination was issued on June 16, 2016, without reasons, and sent by registered mail to the registered and records office of Rapid and to both Mr. Barring and Mr. Bains.
- o. On July 22, 2016, three (3) days before the appeal period expired, Rapid filed an incomplete appeal as the appeal was missing a complete copy of the Determination and no written reasons for the Determination.
- p. The Tribunal requested Rapid to provide a complete copy of the Determination, including the written reasons for the Determination by July 25, 2016.
- q. Rapid delivered to the Tribunal a complete copy of the Determination on July 25, 2016, but failed to provide the written reasons for the Determination stating that it was late in requesting the reasons from the Director.
- r. The Determination states:

"[a] person named in a Determination may make a written request for reasons for the Determination. Your request must be delivered to an office of the Employment Standards Branch within seven days of being served with this Determination. You are deemed to be served eight days after the Determination is mailed, so your request must be delivered by July 4, 2016."

SUBMISSIONS OF RAPID

14. Rapid's written submissions, filed with the Appeal Form, are brief and set out verbatim below:

In regards to a [sic] Determination received, we totally disagree with it. There are [sic] few reasons for this and [sic] are as follows:

1. The Director acted without full evidence that the hours listed was [sic] correct.

Attached are sheets that were issued to us as hours worked. Out of the 33 sheets, 12 did not have any evidence of work. They had no signature from customer/supervisor or anyone that can say it was for day

worked. Drivers are to get signatures on slip to show they worked on a particular job. Anyone can make a sheet, sitting at home to claim day worked – this is not what we entertain. Please see slips attached that say no signature.

2. The Director acted on a view of facts which could not be reasonably entertained.

As a professional driver in BC, they are required to keep daily logbook for hours worked. Even though Surinder Bains is aware of this, he failed to provide it as evidence for days worked. The logbook is a legal document, informing that it is the only hours, he has worked or not. This allows them to be within the legal 70 hours per 7 day cycle and also taking 36 hours off completely to reset. This was not provided and director ignored this.

3. The Director adopted a method of assessment which is wrong.

The director had not sent out hearing dates by registered mail, or cannot provide evident of receipt. We had no notice delivered or received to show hearing dates. The administrative penalty is applied without us being available to defend ourselves. Without all and any clear evident [*sic*] presented for days work and verified, we should not be liable. The director ignored logbooks (which is requirement of National Safety Code as evidence) and chose to make decision based on slips that cannot be verified.

15. It should be noted that the same submissions made by Rapid are repeated in its objections to the completeness of the “record” received by the Tribunal on September 6, 2016, and further submissions on September 30, 2016, which I do not find necessary to repeat here.

ANALYSIS

16. The grounds of appeal under the *Act* are statutorily limited to those found in section 112(1):

Appeal of director’s determination

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.

17. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds of review in section 112(1).

18. In this case, Rapid’s 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.):

- a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
- a misapplication of an applicable principle of general law;
- acting without any evidence;
- acting on a view of the facts which could not reasonably be entertained; and

- adopting a method of assessment which is wrong in principle.

19. While the headings used in Rapid's appeal submissions incorporate the language in *Gemex* that define error of law, I am sufficiently satisfied that Rapid has not adduced cogent evidence to show there is an error of law in the Determination, as defined in *Gemex*. However, it is abundantly transparent in Rapid's appeal submissions, particularly those set out in the first two numbered paragraphs above, that it is attempting to adduce evidence and make arguments, for the first time, which it could have presented to the Director during the investigation stage or at the Hearing but before the Determination was made. Therefore, I find the evidence and arguments of Rapid in the appeal neither establish an error of law within the meaning of *Gemex, supra*, nor qualify as "new evidence" under the first of the four part test for admitting "new evidence" delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03).
20. I also note that the delegate made numerous attempts to obtain Rapid's evidence in response to Mr. Bains' complaint before scheduling a hearing date. The delegate also sent the Notice of Hearing and the Demand but Rapid was unresponsive. As indicated by the Tribunal in *Tri-West Tractor Ltd.* (BC EST # D268/96), the purpose of section 112 of the *Act* is not to provide a dissatisfied appellant a complete re-examination of the complaint or to use the appeal procedure "to make the case that should have and could have been given to the delegate in the investigative process". I find this case squarely falls within the spirit and letter of the very instructive language of *Tri-West Tractor Ltd., supra*. Rapid should have and could have adduced all of its appeal evidence and arguments, in the first instance, in the investigation stage or at the hearing but before the Determination was made. Instead, it sat idly and only appeared from the weeds after an unfavourable Determination was made against it. Therefore, I find it inappropriate to allow Rapid to adduce the evidence it now seeks to adduce in the appeal. To do otherwise would be to act inconsistently with the purpose of the *Act* set out in section 2(d), namely: "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."
21. Turning to the requirements for filing an appeal, section 112(2) of the *Act* sets out the requirements for filing an appeal as follows:

Appeal of director's determination

112 ...

- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) *must*, within the appeal period established under subsection (3),
- (a) deliver to the office of the tribunal
- (i) a written request specifying the grounds on which the appeal is based under subsection (1),
- (i.1) a copy of the director's written reasons for the determination, and
- (ii) payment of the appeal fee, if any, prescribed by regulation, and
- (b) deliver a copy of the request under paragraph (a)(i) to the director. [emphasis added].

22. The requirements of subsection 112(2)(a) are mandatory as the legislature prefaces them with the word "must". Therefore, the appellant is required, along with specifying the grounds upon which the appeal is based, to provide a copy of the director's reasons for the determination when submitting an appeal. These materials have to be delivered to the Tribunal before the end of the appeal period - "30 days after the date of service of the determination if the person was served by registered mail" (section 112(3)(a) of the *Act*).

23. In this case, Rapid filed its appeal on July 22, 2016, three (3) days before the expiry of the appeal period. While the Tribunal requested Rapid to submit, among other things, the written reasons for the Determination by July 25, 2016, Rapid failed to do so. Rapid advised the Tribunal on July 25, that it was unable to comply with the Tribunal's request, as it was late in making the request. Rapid does not indicate when, if ever, it requested the reasons. I note, at page 2 of the Determination, it states “[a] **person named in a determination may make a written request for the reasons for the Determination**” and that request “must be delivered to an office of the Employment Standards Branch **within seven days of being served with this Determination**”. The Determination also states that “[y]ou are deemed to be served eight days after the Determination is mailed, so **your request must be delivered by July 4, 2016**” [boldface in original]”. Therefore, at the time Rapid filed its appeal on July 22, 2016, it was already out of time for requesting the reasons by eighteen (18) days.
24. Having said this, I find Rapid's failure to provide the reasons for the Determination with its appeal means that Rapid's appeal has not been perfected. Section 114(1)(h) of the *Act* affords the Tribunal the discretion to dismiss an appeal where the appellant has failed to meet one or more requirements of section 112(2) of the *Act*. In failing to provide the reasons for the Determination with its appeal, I find that Rapid has failed to meet the requirements of section 112(2)(a)(i.1) of the *Act* and I find this alone is sufficient reason to dismiss Rapid's appeal.
25. Finally, I note that Rapid argues that it did not receive Notice of Hearing of the complaint the delegate sent by registered mail and there is also no “receipt” showing proof that Rapid received any notice. Therefore, Rapid contends that it could not attend at the hearing to make submissions to defend itself against Mr. Bains' complaint.
26. I note Rapid does not dispute the accuracy of the address on the Notice of Hearing which shows the Ottawa Street, Port Coquitlam address. This is the same address provided in the corporate search of Rapid as its registered and records office address and the address of Rapid's director, Mr. Barring. It is also the very same address that Rapid subsequently used in its appeal form and on its letterhead in the written appeal submissions. It is also the same address at which both Rapid and Mr. Barring were later sent the Determination by registered mail and regular mail respectively. I note Rapid seems to have received the Determination at the said address without any issue as is evident from its subsequent (incomplete) appeal of the Determination filed with the Tribunal on July 22, 2016. In the circumstances, I am not persuaded that Rapid did not receive the Notice of the Hearing.
27. For all of the reasons set out above, I find Rapid has failed to establish, on a balance of probabilities, any reviewable error in the Determination. Pursuant to section 114(1)(f) and (h) of the *Act*, I dismiss Rapid's appeal of the Determination.

ORDER

28. Pursuant to section 115 of the *Act*, I confirm the Determination, made on June 16, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal