

An appeal

- by -

Evans Bay Contracting Ltd.  
(“EBC”)

- 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.:** 2015A/135

**DATE OF DECISION:** December 10, 2015

## DECISION

### SUBMISSIONS

David Graham

on behalf of Evans Bay Contracting Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Evans Bay Contracting Ltd. (“EBC”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 4, 2015 (the “Determination”).
2. The appeal was received by the Tribunal on October 20, 2015, although the deadline to file the appeal was October 13, 2015, and the appeal is dated October 13, 2015. EBC explains in the appeal submissions that it, first, sent the appeal to the Employment Standards Branch (the “Branch”) to the attention of the delegate who made the Determination instead of the Employment Standards Tribunal (the “Tribunal”). Subsequently, on October 19, 2015, a representative from the Branch advised EBC’s representative that the Appeal should be filed with the Tribunal. As a result, EBC then filed the appeal with the Tribunal on October 20, 2015. While EBC has not specifically checked off the appropriate box on its Appeal Form requesting an extension of the appeal period, there is an issue regarding the timeliness of the appeal.
3. The Determination found that EBC contravened Part 3, section 18 (payment of wages after employer terminates employment); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Terrance Barry, Lise Batcheller, John Boyd, Al Clark, Colleen Guthrie, William Hanuse, Hal Hewett, Keith Jr. Lazell, Keith Sr. Lazell, Micky Mowat, Clint Roberts, Kay Uzell, Ty Warman and Stu Wood (the “Employees”), and ordered EBC to pay the Employees’ wages in the amount of \$108,825.06, inclusive of accrued interest under section 88 of the *Act*, and levied an administrative penalty of \$500.00 under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) for contravention of section 18 of the *Act*. The total amount of the Determination is \$109,325.06.
4. EBC appeals the Determination, alleging the Director erred in law and breached the principles of natural justice in making the Determination. EBC seeks to have that portion of the Determination pertaining to the award made to the Employees for liability resulting from length of service under section 63 of the *Act* canceled.
5. In correspondence, dated October 21, 2015, the Tribunal informed the parties, among other things, that no submissions were being sought from the parties pending review of EBC’s appeal by the Tribunal and that, following such review, all, or part of, the appeal might be dismissed. The Tribunal also informed the parties that if the Tribunal Member does not dismiss all of the appeal or does not confirm all of the Determination, the Tribunal will invite the Employees and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merit of the appeal. EBC would then be given an opportunity to make a final reply to the submissions, if any.
6. On October 29, 2015, the Tribunal received the section 112(5) “record” (the “Record”) from the Director, and a copy was delivered to EBC on October 30, 2015. There was no objection to the Record taken by EBC, and, accordingly, the Tribunal accepts the Record as complete.

7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the Appeal Form and written submissions made on behalf of EBC by its director, David Graham (“Mr. Graham”), and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) 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 that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite the Employees and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. EBC will then be given an opportunity to make a final reply to the submissions, if any.

### ISSUE

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

### THE FACTS

9. EBC operated a logging business in British Columbia. Pursuant to a BC Online: Registrar of Companies – Corporation Search conducted by the delegate on May 22, 2015, EBC was incorporated on June 22, 2010. Mr. Graham is listed as its sole director and officer.
10. Between May 21, 2015, and August 13, 2015, three (3) of the Employees filed complaints under section 74 of the *Act*, alleging that EBC contravened the *Act* by failing to pay all wages pursuant to the *Act*.
11. It should be noted that the claims for outstanding wages in the individually filed complaints are not all identical and include a variety of claims including unpaid regular wages, vacation pay, overtime and compensation for length of service.
12. Based on the initial investigation of the filed complaints, the delegate expanded her mandate and investigated the payroll records of all employees of EBC including those who never filed formal complaints. More particularly, in a letter to Mr. Graham dated May 27, 2015, the delegate requested EBC to provide payroll records for *all* employees who worked for EBC in the last six (6) months before EBC ceased operating.
13. In a follow up letter to Mr. Graham, dated July 2, 2015, the delegate repeated her request for payroll records for all employees. The preamble to the said letter refers to the delegate’s correspondence of May 27, 2015, and her subsequent telephone message to Mr. Graham of June 30, 2015, advising him that the Branch had received complaints from EBC’s former employees. The delegate then goes on to explain in the letter her understanding that EBC had laid off all employees, and requested Mr. Graham to provide a detailed breakdown of outstanding wages owed by EBC to each employee up to and including the last day each employee worked for EBC. Attached to the delegate’s letter was a Demand for Employer Records of same date requesting disclosure and production of the following specific records for *all* employees of EBC for the period March 1, 2015 to May 16, 2015:
1. [A]ny and all payroll records relating to wages, hours of work and conditions of employment as specified in Section 28 of the Employment Standards Act
  2. Copies of the Record of Employment (for each employee)
14. Thereafter, the Record shows several pieces of correspondence between EBC’s accountant, Laurie Beldam (“Ms. Beldam”), of Triumbari & Beldam, commencing with two (2) faxes from Ms. Beldam to the delegate

on July 7, 2015. The first fax from Ms. Beldam contained Records of Employment for twelve (12) of the Employees, and the second contained printouts called Batch Paycard Listing by Employer for all of the Employees.

15. Subsequent faxes from Ms. Beldam to the delegate dated August 11, 2015, and August 13, 2015, in response to further requests for information from the delegate, contained a summary breakdown of the outstanding wages and more payroll records pertaining to all of the Employees.
16. Based on her investigation, the delegate concluded that EBC, due to financial reasons, terminated or laid off all of the Employees on May 16, 2015, and was unable to pay them wages.
17. In the Reasons, the delegate notes that EBC did not dispute that wages were owed to the Employees, and that the employer records were generally consistent with the claims of those employees who submitted records in support of their individual complaints.
18. Based on the employer records, the delegate then went on to award regular wages, vacation pay and compensation for length of service to both, the employees who filed individual complaints under section 74 and those who did not but were part of the delegate's expanded mandate in the investigation.
19. The delegate also levied an administrative penalty of \$500.00 against EBC for contravention of section 18 of the *Act* because EBC failed to pay all wages owing to the Employees within 48 hours after their employment was terminated by EBC.

### **SUBMISSIONS OF EBC**

20. As indicated previously, in the Appeal Form, EBC has invoked the error of law and breach of natural justice grounds of appeal.
21. In his written submissions in support of EBC's appeal, Mr. Graham states that EBC disputes the award of compensation for length of service in the Determination because it "flowed from a denial of natural justice" because EBC was "not advised before the award was made that compensation for length of service was being considered". Therefore, "the resulting award under that head was an error in law", argues Mr. Graham.
22. Mr. Graham also submits "[w]e think it fair to say none of the employees ever expected to receive such compensation, nor should it be payable in any event". He further adds that EBC was not in business before 2013 and "none of the employees have any significant length of service". He also states that employees are subject to seasonal layoffs intrinsic to the logging business.
23. Finally, Mr. Graham argues that based on section 65(1)(d) of the *Act*, the Employees are not entitled to compensation for length of service. More particularly, he states that although EBC is not in receivership or insolvency, EBC is "unable to continue in operation due to a breach of contract by the company (International Forest Products Ltd.)" which effectively brought an end to EBC's work, and put EBC in financial distress which was not foreseeable. Otherwise, he argues, EBC would have "given notice to its employees long before the events which overtook it had a chance to occur".

## ANALYSIS

24. This Tribunal has consistently stated that an appeal under the *Act* is intended to be an error correction process, with the burden being on the appellant, in this case, EBC, to persuade the Tribunal there is an error in the determination under one of the statutory grounds identified in section 112 of the *Act*.

25. As indicated previously, EBC relies on two (2) of the three (3) available grounds of appeal under section 112(1) of the *Act*, namely, the error of law and natural justice grounds of appeal. I will review these grounds of appeal separately below.

### (i) *Natural Justice*

26. A party advancing a failure to observe principles of natural justice bears the burden of establishing such a breach. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal summarized the natural justice concerns that typically operate in context of this ground of appeal as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWT Business World Incorporated* BC EST #D050/06)

27. Having reviewed the Record, I am not persuaded that EBC was denied natural justice in respect of any award made in the Determination including particularly the award made to the Employees for compensation for length of service. I will set out the basis for my decision below.

28. When the delegate, pursuant to section 76(1) of the *Act*, commenced her review and investigation of those complaints filed pursuant to section 74, EBC had notice of the type of unpaid wage claims that the complainants were advancing. Two (2) out of the three (3) filed complaints expressly delineated, among other claims, a claim for compensation for length of service. Therefore, when the delegate, pursuant to her authority under section 76(2) of the *Act*, sought to expand her mandate to investigate the payroll records of EBC pertaining to *all employees* and gave notice of such intention to Mr. Graham in her first letter to him on May 27, 2015, and then again in her follow up letter to him dated July 2, 2015, containing the Demand for Employer Records pertaining to *all employees*, one would have thought that EBC would have been reasonably alerted to the nature of all claims under consideration, including compensation for length of services. In the circumstances, I find Mr. Graham's submission that EBC did not know that "length of service was being considered" by the delegate somewhat incredulous. In the circumstances, I am not persuaded there was any breach of natural justice on the part of the delegate.

29. Notwithstanding my conclusion above, I have considered both substantive arguments Mr. Graham has advanced in the appeal to dispute the Director's award of compensation for length of service to the Employees and find both arguments without any merit.

30. Mr. Graham's first argument is that "none of the employees ever expected to receive such compensation" and that "none of the employees have any significant length of service". I do not find this to be a meritorious basis for denying the Employees an award of compensation for length of service. An employee's entitlement to compensation for length of service under section 63 of the *Act* is *not* contingent on whether or

not the employee expects to receive such compensation but rather on the length of the employee's service with the employer (where the termination of the employee's employment is without cause as in this case).

31. I also do not find persuasive Mr. Graham's second argument that section 65(1)(d) of the *Act* is engaged in this case. More particularly, I am not persuaded that the alleged breach of contract by International Forest Products Ltd. with EBC is an unforeseeable event that has rendered it impossible for EBC to perform its contracts with the Employees. A business failure of the employer caused by a cancellation or a termination of a contract between the employer and a customer could indeed result in an employer not being able to provide continued employment to employees in the workplace. However, such an event is considered to be part of the normal business cycle and cannot be viewed as "unforeseen" within the meaning of section 65(1)(d) and, therefore, would not discharge an employer's obligation to provide individual compensation for length of service under section 63 of the *Act*.

**(ii) Error of Law**

32. The Tribunal has adopted the following definition of error of law delineated 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.

33. Having reviewed the submissions of Mr. Graham, the Record and the Reasons, I am not persuaded that the delegate, in making the award for compensation for length of service to the Employees, erred in law within the meaning of the definition of "error of law" set out in *Gemex, supra*.

34. In these circumstances, I find that there is no possibility this appeal can succeed, and I dismiss it under section 114(1)(f) of the *Act*.

**ORDER**

35. Pursuant to section 115 of the *Act*, I order the Determination, dated September 4, 2015, be confirmed in the amount of \$109,325.06, together with any interest that has accrued under section 88 of the *Act*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**