

An appeal

- by -

Dhillon Fashions & Fabrics Ltd.  
(“DFF”)

- 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:** Robert C.P. Walker

**FILE No.:** 2012A/120

**DATE OF DECISION:** December 13, 2012

## DECISION

### SUBMISSIONS

Gurvinder Dhillon on behalf of Dhillon Fashions & Fabrics Ltd.

Kathleen Demic on behalf of the Director of Employment Standards

### INTRODUCTION

1. Dhillon Fashions & Fabrics Ltd. (“DFF”) appeals pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards issued September 18, 2012, together with accompanying Reasons for Determination of the same date. The Determination requires DFF to pay its employee Jasvir Grewal (“Grewal”) the sum of \$2,022.85 for statutory holiday pay, annual vacation pay, compensation for length of service and accrued interest. It also imposes administrative penalties for DFF’s first-time breaches of sections 17, 45, 58, and 63 of the *Act*; and section 46 of the *Employment Standards Regulation* totalling \$2,500.
2. This matter has been forwarded to me for consideration under section 114 of the *Act*. At this stage the parties have not made written submissions other than the Appellant’s written argument accompanying its Appeal. No party has sought an oral hearing. I have determined that this matter may be decided at this stage based upon the filed Appeal documents, including the Determination and Reasons for Determination, and the Record filed by the Director.
3. DFF’s Appeal Form dated October 25, 2012, states as its sole ground of appeal that the Director of Employment Standards failed to observe the principles of natural justice in making the determination. However, the basis of DFF’s five appended arguments might better interpreted as arguments that the Director erred in law (at times, an error in law might also be seen as a breach of natural justice). Therefore, consistent with the Tribunal’s decision in *Triple S Transmission Inc.* (BC EST # 141/03) I will endeavour to consider all relevant arguments in the appellant’s material as they may relate to a breach of natural justice or error of law.

### BACKGROUND FACTS

4. DFF operates a clothing and fabric retail store in Surrey, BC. Part of the operation includes the purchase of cloth and dyeing it for sale and use in traditional Indo-Canadian garments. Grewal commenced employment with DFF in October of 2007. Part of her duties included the dyeing of the cloth. On December 6, 2011, a Record of Employment was filed by DFF indicating Grewal was terminated because of shortage of work and her last day for which she was paid was August 22, 2011.
5. Grewal filed a complaint under section 74 of the *Act* alleging that DFF contravened the *Act* by failing to pay her regular wages, statutory holiday pay, annual vacation pay and compensation for length of service.
6. DFF’s employment and payroll records were requested by the Director but those that were produced were either incomplete, did not conform to the requirements of the *Act* or its regulations, or were made after the complaint was filed. The delegate Kathleen Demic held a hearing by telephone on May 16, 2012, at which time the parties and other witnesses testified and were cross examined. Grewal’s daughter assisted her in cross examining on her behalf. She also gave evidence and made submissions because of her mother’s

language issues. Mr. Gurvinder Dhillon testified, conducted cross examination and called Mr. Satish Sharma, DFF's accountant, as a witness particularly in regard to payments made to Grewal and the corporate financial records he had in order to prepare payroll cheques. Dhillon also made submissions on behalf of DFF. The delegate thoroughly canvassed and considered the various legal issues, weighed the evidence, made findings of credibility and committed her decisions to writing in her sixteen page Reasons for Determination dated September 18, 2012.

## ANALYSIS

7. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides:

- 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; and
  - (c) evidence has become available that was not available at the time the determination was being made.”

8. Section 114 of the *Act* 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 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.
- (2) Before considering an appeal, the tribunal may
- (a) refer the matter back to the director for further investigation, or
  - (b) recommend that an attempt be made to settle the matter.
- (3) If the tribunal dismisses all or part of an appeal the tribunal must inform the parties of its decision in writing and give reasons for that decision.”

## NATURAL JUSTICE and ERROR OF LAW

9. Usually, a denial of natural justice argument is framed as a failure by the Director to inform a party of the case against them, or failure to allow a full and open opportunity to respond; whether or not a formal hearing is held.

10. However, the legal definition of a denial of natural justice has also been interpreted to include, for example, if the decision maker has misapplied a law or statutory provision. Such action has also been described as an error of law. Similarly, if a decision maker has not considered, or ignored, relevant evidence a breach of natural justice or error of law may have occurred. As well, if evidence is relied upon by the decision maker that does not support a conclusion or finding a breach of natural justice or error of law may have occurred.
11. I move now to the five written arguments filed by DFF with its appeal form that might be described as falling within the error of law category (s.112(1)(c) of the statutory grounds of appeal).
12. DFF's first written argument relates to the award of statutory holiday pay. DFF merely repeats the two arguments it made before the delegate arguing firstly that it doesn't have to pay anything because the employee was given the day off. This argument was determined by the delegate to be contrary to the applicable legislation. It also argues (inconsistently) the pay was included in the employee's gross earnings. There is no new evidence adduced or new argument made. At page R13 (and following) in the Reasons for Determination the delegate previously considered all of the above arguments, the applicable legislation, the available payroll and oral evidence and found statutory holiday pay was payable. There is no legal or evidentiary basis to find an error in law on the record.
13. DFF's second written argument states that annual vacation pay was actually included in each pay cheque. Again, this is repetition of an argument made before the delegate who, at page R14 (and following) of the Reasons for Determination reviewed the evidence before her, including that of DFF's accountant and made a finding of credibility against the evidence of Mr. Dhillon. There is no new legal or evidentiary basis to find an error in law on the record.
14. DFF's third written argument relates to the award of compensation for length of service. It is in two parts. As to the first part DFF argues that the employee quit and is not entitled to compensation. At page R9 and following of the Reasons for Determination the delegate thoroughly reviewed the evidence and the legal principles regarding the onus of proving a quit is on the employer; and made findings of credibility regarding the oral testimony of the witnesses. She found the employee had not quit; and was entitled to notice. DFF has repeated this first part of the argument but has offered no factual or legal basis to vary or cancel the finding.
15. It has added a second "new" argument in the third written argument stating, in part, ".she [Grewal] was taking more than four weeks off every time therefore we were considering her a new hire". This argument was not raised at the hearing; and there is no evidentiary or legal basis to support it.
16. The fourth and fifth written arguments relate to the penalties imposed.
17. The fourth written argument refers to section 17 of the *Act* (payment of wages at least semi-monthly to an employee). DFF argues the penalty should be waived because "the employer gives advances to his employees some of them accept and some of them do not want to have". This argument does not raise an appealable issue. It does indicate that DFF does not appear to understand its wage payment obligations under the *Act*.
18. The fifth written argument relates to penalties imposed because statutory holiday pay and vacation pay were not paid to the employee. If I was to vary or cancel the Determination of the Director the arguments may apply. However, for the following reasons I am dismissing all of the appeal and the Determination will not be varied or cancelled.

19. DFF has the burden to persuade the Tribunal there is an error in the Determination under one or more of the statutory grounds set out in section 112(1): see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99, and *AM-PM Work Force Ltd*, BC EST # D009/11. DFF has alleged it was denied natural justice (or perhaps there was an error in law). But, as noted above, DFF has not identified any evidentiary or legal basis to support its arguments. Substantively, the arguments mirror those made before the delegate.
20. Section 114(1)(f) of the *Act* provides that the Tribunal may dismiss all or part of an appeal if there is no reasonable prospect that the appeal will succeed. In my opinion I am satisfied that there is no reasonable prospect that the appeal would succeed based upon a denial of natural justice or error of law and I dismiss this appeal on that basis. In my opinion DFF has not met its onus of proof; and there is no reasonable basis that any of the arguments would succeed.
21. Further the Tribunal has previously held that a “frivolous” appeal as described in section 114(1)(c) is one in which no justiciable question has been presented and which is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed: see, for example, *Greg Brewer operating Smallbone Millwork & Design*, BC EST # D476/98, and *AM-PM Work Force Ltd, supra*. In my opinion this appeal is also a frivolous appeal and should be dismissed.

## **ORDER**

22. I Order that this appeal be dismissed pursuant to section 114 of the *Act*.

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**Robert C.P. Walker**  
**Member**  
**Employment Standards Tribunal**