

An appeal

- by -

Li Xiang Xu

- 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: Carol L. Roberts

FILE No.: 2016A/123

DATE OF DECISION: October 31, 2016

11. The delegate sought RMH's response to Mr. Xu's complaint. RHM's Vice-President informed the delegate that RMH, and its associated company, Canadian Rockies Mining Group Ltd., had not operated for three years and that it had never employed Mr. Xu. RHM's Vic-President also advised the delegate that it operated mainly as a moving company.
12. The delegate noted that, after filing a complaint against Bismark, Mr. Xu later stated that he had not heard of, or worked for this company. During a subsequent conversation with the delegate, Mr. Xu identified a different employer. The delegate determined that Mr. Xu had failed to provide any evidence that he worked for RMH such as wage statements or hiring documentation, which the delegate did not find surprising given the brief duration of his employment.
13. In the absence of any evidence, the delegate was unable to conclude that Mr. Xu had demonstrated he was owed wages by any identifiable employer.
14. Mr. Xu submitted new evidence on appeal. He said that "Hung" recruited three individuals to work at an apartment in Langley and that he worked there for four days. Mr. Xu identified the telephone number for "Hung" and provided the telephone numbers for two witnesses. Also attached to Mr. Xu's appeal are several documents in entirely Chinese characters except for the name "Happy Moving Ltd.", a copy of a yp.ca map of Reno Maple Home Inc. identifying it as a general contractor with an address and telephone number, and a document with a title "Innovative Flooring and Design Centre" with the names and contact information for several individuals, one of whose names is circled.

ANALYSIS

15. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
16. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission Inc.*, (BC EST # D141/03), while

most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

17. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not Mr. Xu has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that Mr. Xu has not met that burden.

18. Section 76(3)(e) of the *Act* provides as follows:

Investigations

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

...

(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

...

(e) there is not enough evidence to prove the complaint;

19. The Tribunal will not interfere with the delegate's exercise of discretion unless it can be shown the exercise was an abuse of power, the delegate made a mistake in construing the limits of his authority, there was a procedural irregularity or the decision was unreasonable.

20. Mr. Xu has not demonstrated that the delegate's decision to stop investigating the complaint was unreasonable. I find no evidence of misinterpretation or misapplication of any part of the *Act*, including, in particular, section 76(3)(e), on the part of the delegate.

21. I also do not find that the delegate misapplied any principles of general law, or acted without any evidence in exercising his discretion to stop investigating the Complaint. Mr. Xu originally identified two different employers to the delegate, neither of which appeared to be correct. Mr. Xu provided no written documentation to the delegate, and the verbal information he provided was incomplete, incorrect or unreliable.

22. Therefore, I find there was no error of law.

23. On appeal, Mr. Xu provides yet another name of an employer as well as names and telephone numbers of potential witnesses.

24. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

25. I am not persuaded that the new information meets the Tribunal's test for new evidence. This evidence was clearly available during the delegate's investigation of the complaint had Mr. Xu exercised due diligence. Even if this "new evidence" was presented to the delegate during the investigation, I am not persuaded that it would have led the delegate to a different conclusion. In fact, it makes Mr. Xu's complaint less reliable given that it identifies yet another employer and suggests that Mr. Xu worked four days instead of the original two identified in his original complaint. Furthermore, Mr. Xu provides no written documentation of any kind, nor does he provide any statements from the "witnesses" about the information they have.
26. An appeal is not an opportunity for a party to, in effect, re-argue their case with material they ought to have provided the delegate during the investigation. I find no basis for this ground of appeal.
27. I am not persuaded there is any reasonable prospect this appeal can succeed. The purposes of the *Act* would not be served by requiring the other parties to respond to it.

ORDER

28. Pursuant to section 115 of the *Act*, I order the Determination dated July 25, 2016, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal