



Citation: Morrissey Creek Building Supplies Ltd. (Re)
2024 BCEST 3

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Morrissey Creek Building Supplies Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2023/113

DATE OF DECISION: January 18, 2024

DECISION

SUBMISSIONS

Erica Boyko and Mike Combs

on behalf of Morrissey Creek Building Supplies Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Morrissey Creek Building Supplies Ltd. (“Appellant”) of a determination made by Matthew Osborn, a delegate (“Delegate”) of the Director of Employment Standards (“Director”), on June 21, 2023 (“Determination”).
2. The Determination found that the complainant, Jeffrey May (“Complainant”), was owed compensation for length of service (“CLOS”) along with vacation pay and imposed a mandatory \$500 fine for the contravention.
3. The appeal was initially filed July 31, 2023, the day set as the deadline for filing an appeal but was incomplete and included 21 blank pages. The Appeal Form indicated that the basis for the appeal was that new evidence was available that had not been available when the Determination was made.
4. Although the Tribunal wrote to the Appellant advising of the incomplete appeal, nothing further was received and on August 15, 2023, the Tribunal closed the file as it was unable to proceed with the appeal based on the documents received on July 31, 2023.
5. On August 17, 2023, the Appellant reached out in response and advised that more time was required to perfect the appeal and on August 21, 2023, the Tribunal granted the Appellant until October 2, 2023, to do so. The Appellant then provided documents and submissions to the Tribunal on September 28, 2023.
6. The Appellant claims they did not receive much of the correspondence from the Employment Standards Branch (“Branch”) regarding the Complaint, claiming to have moved from one address many years ago, and denying receipt of much of the correspondence sent to the other addresses on record. Although not indicated on the Appeal Form, I infer from this that the Appellant is alleging a lack of procedural fairness resulting from the Determination being issued without any input by the Appellant in response to the Complaint.
7. The Appellant says the Complainant was not fired or laid off but instead resigned his employment through his actions of not inquiring about his schedule and not showing up to work when scheduled. The Appellant seeks to introduce documents and testimony to appeal the Determination.
8. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made.
9. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 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.

10. If satisfied that the appeal meets any of the criteria set out in section 114(1), it is liable to be dismissed.

11. While the submissions and documents were received significantly after the deadline for filing the appeal, I have nevertheless reviewed them in their entirety and for the reasons that follow, dismiss the appeal under section 114(1)(f) as having no reasonable prospect of success.

ISSUES

12. Did the Director fail to observe the principles of natural justice in issuing the Determination in the absence of a response to the Complaint by the Appellant?

13. Do the documents and testimony provided with the appeal represent new evidence that has become available that was not available at the time the Determination was issued.

THE DETERMINATION

14. In his Complaint, the Complainant alleged the Appellant terminated his employment without cause, and without payment of CLOS. The Appellant failed or refused to participate in the investigation into the Complaint and on June 21, 2023, the Delegate issued the Determination without reasons.

15. After receiving a request from Mike Combs, director of the Appellant, on July 6, 2023, the Delegate subsequently issued reasons for the Determination.

16. In the absence of any documents or submissions from the Appellant, the Delegate accepted the evidence and allegations presented by the Complainant.

17. The Determination confirmed that the Appellant employed the Complainant from June 1, 2015, until March 4, 2021, with a temporary layoff between December 2020 and January 2021.

18. The Delegate accepted the Complainant's evidence that upon returning from a brief layoff in January 2021, he began receiving fewer scheduled hours from the Appellant. The Delegate also accepted that in early March 2021, the Complainant discovered he was not on the schedule for the following week.
19. In the absence of any evidence from the Appellant, the Delegate concluded that the Complainant was terminated when his pay was reduced to nothing, with no further hours scheduled, and based on the Complainant's assertion that there was no communication from the Appellant regarding his employment status.
20. The Delegate concluded that there was no evidence the Complainant quit his employment, or that he was terminated for cause, and, pursuant to section 63 of the *ESA*, awarded the Complainant five weeks' pay as CLOS. In the absence of accurate records of the hours of work the Complainant received during the eight weeks before the temporary layoff, the Delegate calculated the Complainant's average wage based on his 52-week earnings from January to December 2020. The Delegate also awarded vacation pay on that amount, as well as interest pursuant to section 88 of the *ESA*.
21. The Delegate also imposed a \$500 mandatory administrative penalty for the Appellant's contravention of section 63 of the *ESA*.

ARGUMENTS

22. The Appellant claims to have not received any correspondence from the Branch or from the Complainant prior to March 31, 2023. The Appellant acknowledges that correspondence was sent to an address in Aldergrove, BC, but claims that was a personal address for Mr. Combs at which he has not lived since April 2014.
23. The Appellant also denies receiving a letter sent to Mr. Combs' current home address in Christina Lake, BC.
24. On the merits of the Complaint, the Appellant submits timesheets and pay stubs for the Complainant, and a Record of Employment that indicates that he resigned his employment in March 2021.
25. The Appellant also provides written testimony that, contrary to the Complainant's assertions that he was not scheduled, he was, in fact, scheduled, but did not call in to learn of his schedule, nor did he show up for his scheduled shifts.
26. The Appellant also says the reason there was no "commissionable" work from January to March 2021 was that there were very few special orders, and those that did come in were on days that the Complainant did not work.

ANALYSIS

27. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:
- 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.

28. As noted above, I infer from the Appellant's submissions that they take issue with the fact that the Determination was issued without any information in response from the Appellant.
29. Section 77 of the *ESA* requires the Director to "make reasonable efforts to give a person under investigation an opportunity to respond."
30. The Investigation Report, which the Appellant acknowledges receiving, confirms that the delegate conducting the investigation ("Investigating Delegate") sent the Appellant a notice of investigation, as well as a demand for records, to the Appellant's registered and records addresses in the Corporate Registry. These were also sent to Mr. Combs, as the only listed director, at the address registered with the Corporate Registry.
31. After those letters were all returned by Canada Post as unclaimed, the Investigating Delegate then attempted to send those letters by email, which was also returned as undeliverable, and ultimately by registered mail to Mr. Combs' correct home address in Christina Lake, although this, too, was returned as unclaimed.
32. Notwithstanding the obligation on a corporation and its director(s) to maintain accurate corporate records with the Government, it would have nevertheless been incumbent on the Appellant to reach out to the Branch after receiving the Investigation Report in order to provide any response to the allegations and information set out therein.
33. The Appellant indicates that "upon reading the [Investigation Report] I do not believe Jeff should be awarded severance pay as he didn't show up for work or check to see when he was to work." This notwithstanding, the Appellant did not make any efforts to dispute the findings in the Investigation Report until after receiving the Determination and filing the appeal.
34. The Appellant does not assert they were in any way prevented from or unable to provide a response to the Investigation Report. Accordingly, I cannot fault the Investigating Delegate in any way for their significant efforts in attempting to provide the Appellant with opportunities to respond to the Complaint.
35. As a result, I do not find the Appellant has been denied any procedural fairness because of the Determination having been issued without any response by the Appellant.
36. With respect to the new evidence the Appellant seeks to introduce, I note that the appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al.*, BC EST # D171/03. The test requires that:
- (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.

37. Further to my findings above, given that the Appellant acknowledged receipt of the Investigation Report issued prior to the Determination, and the absence of any basis put forward by the Appellant to suggest the information set out in the appeal was not available at the time the investigation and adjudication of the complaint was underway, I am not persuaded this is a case in which this new evidence should be admitted.
38. This notwithstanding, I am also not persuaded that the evidence provided has high potential probative value. Although the Appellant claims the Complainant was scheduled for work after March 4, 2021, and that this could contradict the Complainant's assertion that he was not, the Appellant has not provided any corroborating evidence to support this claim, such as a schedule for the time period in question.
39. For all of these reasons, I dismiss the appeal pursuant to section 114(1)(f) as having no reasonable prospect of success.

ORDER

40. The appeal is dismissed.
41. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed along with whatever further interest has accrued pursuant to section 88 of the *ESA*.

Ryan Goldvine
Member
Employment Standards Tribunal