

An appeal

- by -

Szado Fishing Ltd.
(“Szado”)

- 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: David B. Stevenson

FILE No.: 2014A/105

DATE OF DECISION: January 15, 2015

9. On December 11, 2014, Szado delivered its submission to the Tribunal. The submission contained no objection to the completeness of the “record” and, accordingly, the Tribunal accepts it as complete.
10. Consistent with the September 5, 2014, notice, I have reviewed the appeal, including the attachments submitted by Szado, and the “record”.
11. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal 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 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), which 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 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.*

12. If satisfied the appeal should not be dismissed under section 114(1) of the *Act*, the complainants will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious it will be dismissed under section 114(1) of the *Act*.

ISSUE

13. The issue being considered at this stage of the proceeding is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

14. Szado operates a tuna fishing boat. The complainants were hired from Fiji to work on the fishing boat during the 2012 fishing season. They came to Canada with the assistance of Mr. Szado who utilized an agency in Fiji to assist with the legal documents required for the complainants to travel to and work in Canada.
15. The Director found the employment offered to the complainants was as fishers aboard the “Midnight Mariner” and the agreed wage was to be 4% of the catch, although whether that amount was to be a gross or net 4% was not clarified. The complainants worked aboard the “Midnight Mariner” from August 1, 2012, to approximately October 22, 2012. The complainants returned to Fiji on October 29, 2012.
16. The complainants alleged Szado had failed to pay wages earned by them. The complainants alleged they were paid a total of \$70.00, plus a small advance, for their work and believed that Szado withheld their wages to offset the cost of bringing them to Canada and to pay for boat expenses incurred during the fishing season.

17. The Director found the complainants were fishers as that term is defined in section 1 of the *Employment Standards Regulation* (the “*Regulation*”).
18. The Director considered three issues in the Determination: what was the agreement for payment of wages; whether Szado withheld wages to cover the complainants’ personal expenses; and whether Szado required the complainants to pay any of the business expenses of the boat.
19. The Director found the wage agreement was to pay each of the complainants 4% of the gross value of the catch, which, based on evidence provided by Szado, the Director found to be \$87,777.52.
20. It does not appear that Szado seriously disputed there were wages earned by the complainants but argued it was “normal practice” in the industry and agreed to by the complainants that boat expenses are to be deducted from the value of the catch before the percentages are calculated and paid.
21. Szado also took the position that it was entitled to deduct certain expenses paid “on behalf” of the complainants. These expenses included plane fare to and from Fiji, agency fees, cash advances made to each complainant, medical, groceries, transportation to and from Nanaimo and Vancouver and a telephone bill for calls made by the complainants to Fiji. Szado argued to the Director that the resulting deductions and expenses totalled an amount greater than the wages earned by the complainants. The Determination indicates Mr. Szado provided little in the way of personal and business expense records or records showing cash advances were made by Szado to the complainants before and during their term of employment, although the complainants acknowledged being paid “a small advance they sent home to Fiji”.
22. The Determination notes that section 4 and section 21 of the *Act* prohibit employers from withholding, deducting or requiring payment of employees’ wages for any purpose and from entering into working arrangements that provide standards less than what is set out in the *Act* and *Regulation*.
23. The Director found Szado had required the complainants to pay business costs and expenses that properly belonged to Szado, being costs of doing business and, accordingly, had contravened section 21 of the *Act* by passing on those costs to the complainants.
24. The Director rejected Szado’s argument invoking “standard practice” in the fishing industry and found Szado was prevented by section 4 of the *Act* from seeking or relying on any agreement of the complainants to pay costs and expenses when that result was specifically prohibited by section 21(2) of the *Act*. The Director considered whether Szado had obtained “a written assignment of wages to meet a credit obligation” from the complainants and found it had not.

ARGUMENT

25. Szado submits the Director did not have all the facts relevant to the findings made in the Determination on the claims of the complainants.
26. Based on that position, the final appeal submission filed by Mr. Szado contains a considerable number of factual assertions and a substantial amount of material in support of these assertions. Some of the information and material was provided during the complaint investigation process, much of it was not. The appeal is grounded in additional evidence becoming available.

27. Fundamentally, however, the argument made by Szado is exactly the same as was made to the Director during the complaint investigation: that Szado should be able to deduct business costs, expenses and moneys paid out on behalf of the complainants from the complainants' share of the catch.

ANALYSIS

28. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.

29. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

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.*

30. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112 of the *Act*. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

31. Szado relies on evidence becoming available that was not available when the Determination was being made.

32. The Tribunal is given discretion to accept or refuse new or additional evidence. When considering this ground of appeal, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

33. There are two problems with the evidence Szado seeks to include with this appeal.

34. First, it is apparent that all of this evidence existed at the time the Determination was being made. The appeal does no more than re-state and provide documentary support for factual assertions made during the complaint investigation.

35. Second, the facts sought to be provided in the additional evidence represented with the appeal, as well as in the many assertions contained throughout the appeal submission, do little more than confirm facts that were before the Director when the Determination was being made.

36. Accordingly, I do not find any basis for allowing or considering the documents that are attached to the appeal filed by Szado and find there is no merit in this ground of appeal.
37. Except for one matter, I would dismiss this appeal in its entirety under section 114 of the *Act*. I appreciate there were unfortunate circumstances that affected the value of the catch in 2012 and my personal view is that had the fishing season provided a more typical return for that fishing season, these complaints may not have been made. They were made, however, and once made, it is not the “mutual understandings” prevailing in the fishing industry that govern the matter of the terms of the complainants’ employment, but the provisions of the *Act*. The provisions of the *Act* is socially beneficial legislation that, as part of the law of the province, has application regardless of whether Szado was aware of its requirement to comply with its provisions. In respect of the requirements of the *Act* and *Regulation*, the Director, for the most part, made no error in the factual findings and correctly applied the relevant legislative provisions to those findings in the Determination.
38. The one exception to my assessment of the Determination, and this appeal, involves the matter of the advances made by Szado to the complainants. The Determination indicates the complainants acknowledged, and the Director found, that each of the complainants was given a cash advance by Szado during their employment. That conclusion is clearly demonstrated in the Determination. The complainants referred to it as a “small advance” and the Director’s findings reflect this characterization: see the first paragraph on page R6 of the Determination. During the complaint investigation, Szado pegged the amounts of the advances as being \$900.00 to Mr. Leweni and \$800.00 to Mr. Burkema.
39. There is no consideration in the Determination of these advances, either in the context of whether the amounts paid to the complainants were as represented by Szado or were some other and “smaller amount” as characterized by the complainants or whether these advances should be considered “wages” paid to the complainants and be factored into the final calculation of the wages owed to each of them. I consider the failure to specifically address these considerations may amount to an error of law but I will not do so without hearing from the Director and the complainants.
40. In making this finding, I am not troubled by the failure of Szado to raise “error of law” or “natural justice” as grounds of appeal. It is apparent Szado disagrees it was not allowed to deduct these amounts from the share of the catch each complainant received. Applying the “common sense” approach endorsed by the Tribunal in *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03, and used in many subsequent decisions of the Tribunal, I choose to address the substance of the appeal, rather than confine it to its form.
41. Section 114 of the *Act* allows me to dismiss “*all or part of the appeal*” for any of the reasons listed. I dismiss all of this appeal except that relating to the advances made as I find no merit to any of it. In respect of the advances, I seek submissions from the complainants and the Director. From the complainants, I wish to be advised of the amount of these advances and that information should include confirmation by Western Union of the 4 transactions identified in the appeal submission by Szado – 82880335 and 55768151 – and from the Director, I wish to be advised whether these advances should or should not have been considered wages, and in either case, why.
42. If the complainants or the Director wish to make submissions on the timeliness of the appeal they may do so when responding to the above.

ORDER

43. Pursuant to section 115 of the *Act*, I order the appeal by Szado be dismissed in all respects except with respect to the characterization of the advances and, potentially, the resulting amount of the wages owed to the complainants.

David B. Stevenson
Member
Employment Standards Tribunal