

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Dumont Tire Ltd.
("Dumont Tire")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE No.: 2024/015

DATE OF DECISION: May 23, 2024

DECISION

SUBMISSIONS

Rose Dumont on behalf of Dumont Tire Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Dumont Tire Ltd. (“Dumont Tire”) of a determination issued by Felisa Friesen, a delegate of the Director of Employment Standards (“deciding Delegate”), on December 27, 2023 (“Determination”).
2. The Determination found Dumont Tire had contravened Part 4, section 40 of the *ESA* in respect of the employment of Steven Colin Knowles (“Mr. Knowles”) and ordered Dumont Tire to pay Mr. Knowles the amount of \$5,354.92, an amount that included concomitant vacation pay and interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$5,854.92.
3. On February 5, 2024, the Tribunal received an Appeal Form from Dumont Tire. On the same day, the Tribunal notified Dumont Tire that the appeal was not complete and also advised Dumont Tire that if a complete appeal could not be filed before the expiry of the statutory appeal period, they needed to request an extension of the appeal period and provide reasons why the appeal could not have been filed on time.
4. In response, the Tribunal received a request from Dumont Tire to extend the appeal period by thirty business days, and they also provided an explanation for the delay in filing a complete appeal. A second email from Dumont Tire provided additional reasons.
5. In correspondence dated February 7, 2024, the Tribunal advised Dumont Tire it was providing an extension to the end of the working day on March 19, 2024, to provide “written reasons and arguments and any supporting documents” on the appeal. The correspondence noted the granting of an extension for the stated purpose was not an extension of the statutory appeal period.
6. On March 19, 2024, the Tribunal received correspondence from Dumont Tire comprising four paragraphs expressing the reasons for appeal the Determination; no supporting documents were provided with the submission, although there was reference in the submission to a ‘log’ of money borrowed and paid back by Mr. Knowles during his employment.
7. Dumont Tire has appealed the Determination on all of the grounds available under section 112(1) of the *ESA*: error of law; failure to observe principles of natural justice in making the Determination; and new evidence becoming available that was not available at the time the Determination was being made.
8. In correspondence dated March 25, 2024, the Tribunal, among other things, acknowledged having received an appeal, requested the section 112(5) record (“record”) from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought at that time.

9. The record has been provided to the Tribunal by the Director and a copy has been delivered to the parties. They have been provided with the opportunity to object to the completeness of the record.
10. None of the parties has raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.
11. I have decided this appeal is appropriate for consideration under section 114(1) of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed on the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), 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 any 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.*
12. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Knowles will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the appeal should be dismissed for the failure to file the appeal in the time allowed in section 112 of the *ESA* and whether, in any event, there is any reasonable prospect the appeal will succeed.

ISSUE

13. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION AND REASONS

14. Mr. Knowles filed a complaint under the *ESA* alleging Dumont Tire had contravened the *ESA* by failing to pay regular and overtime wages, vacation pay, and compensation for length of service.

15. The complaint was investigated by a delegate of the Director (“investigating Delegate”), who produced an Investigation Report that was provided to Dumont Tire and to Mr. Knowles.
16. The Reasons for Determination provides the following background information:
- Dumont Tire operates a tire sales and mechanic shop in Sooke, BC.;
 - Mr. Knowles was employed as a Service Writer from March 23, 2020, to June 3, 2022;
 - Dumont Tire kept time card records; overtime hours worked by Mr. Knowles were banked at straight time;
 - Mr. Knowles was paid 41.85 hours of vacation time on his final pay cheque and, notwithstanding the allegation in Mr. Knowles’ complaint, there was no dispute about vacation pay or statutory holiday pay; and
 - There was agreement Mr. Knowles’ overtime bank was reduced on two occasions during his employment; other possible deductions were in dispute.
17. The deciding Delegate identified three issues:
1. What is Mr. Knowles wage rate;
 2. Is Mr. Knowles owed overtime wages, and if so, in what amount; and
 3. Is Mr. Knowles owed compensation for length of service, and if so, in what amount?
18. On the first issue, the deciding Delegate found Mr. Knowles wage rate was \$28.00 an hour.
19. On the second issue the deciding Delegate found Mr. Knowles was entitled to overtime wages in the amount set out in the Determination. In reaching her decision on Mr. Knowles’ overtime claim, the deciding Delegate relied substantially on records provided by Dumont Tire, which established the following:
1. Mr. Knowles worked overtime;
 2. The practice of Dumont Tire was to pay Mr. Knowles regular wages for 40 hours a week and credit any overtime hours to a time bank;
 3. Dumont Tire provided no records showing an overtime bank meeting the requirements of section 42 of the *ESA* had been created;
 4. The overtime bank was invalid, and Mr. Knowles was entitled to payment of overtime as required by section 17 of the *ESA*;
 5. The timecard records of Dumont Tire reflected the hours worked by Mr. Knowles and the deciding Delegate accepted Mr. Knowles’ evidence that all breaks he took were recorded by a clock out;
 6. Dumont Tire’s time records were the ‘best evidence’ of Mr. Knowles’ hours of work; and
 7. Dumont Tire’s calculation of overtime hours was not accepted, “as they have improperly deducted time and converted minutes into hours incorrectly”: reasons for Determination, page R8.

20. On the third issue the deciding Delegate found that Mr. Knowles was not entitled to compensation for length of service as Dumont Tire had discharged its obligation to pay compensation for length of service by establishing that Mr. Knowles was dismissed for just cause.
21. Based on the conclusions reached, the deciding Delegate found Dumont Tire had contravened section 40 of the *ESA* and imposed an administrative penalty for that contravention.

ARGUMENTS

22. As indicated above, the argument of Dumont Tire is brief and can be distilled into the following points:
- i. An apparent disagreement with the deciding Delegate accepting Mr. Knowles had ‘paid back’ money he borrowed from Dumont Tire and did not borrow any further money;
 - ii. A disagreement with the overtime calculations made by the deciding Delegate; and
 - iii. An assertion that the deciding Delegate erred concerning the Revenue Canada demand letter, incorrectly referring to dates in 2023 which should be for a period in 2022.

ANALYSIS

23. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, 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.*
24. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is 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.

Failure to file within the statutory appeal period

25. I shall first address the failure of Dumont Tire to file its appeal within the statutory appeal period, as this failure allows me to summarily dispose of this appeal: see section 114(1)(b).
26. The *ESA* imposes a deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions

should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

27. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:
1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
 2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 3. The responding party and the Director have been made aware of the intention;
 4. The respondent party will not be unduly prejudiced by the granting of an extension; and
 5. There is a strong *prima facie* case in favour of the appellant.
28. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal.
29. I find it unnecessary to address, and make no findings on, the first four criteria listed above. I choose to address this appeal on the fifth criteria: whether there is a strong *prima facie* case in favour of Dumont Tire in the appeal.
30. I point out here that except to the extent necessary to determine whether there is a strong *prima facie* case that might succeed, the Tribunal does not consider the merits of an appeal when deciding whether to extend the appeal period. This is not dissimilar to making a finding under section 114(1)(f), that an appeal has no reasonable prospect of succeeding, except such a finding will involve a consideration and decision on the merits of the appeal.
31. My conclusion on this criterion would not justify an extension of the statutory appeal period, as I find the appeal lacks the merit necessary to warrant extending the statutory appeal period. As I will affirm later in this decision, it is also my view this appeal should be dismissed under section 114(1)(f).
32. I shall address the merits of the appeal.
33. Dumont Tire has raised all three grounds of appeal.

Error of Law

34. The following principles apply to this ground of appeal in the circumstances of this case.
35. Dumont Tire does not allege the deciding Delegate made any error on Mr. Knowles' wage rate or in finding he was not entitled to compensation for length of service. Their concern revolves around the loans provided to Mr. Knowles and the overtime calculations.

36. An error of law may arise from a misinterpretation or misapplication of the *ESA* or the general law, through an error on the facts – acting without evidence or on a view of the facts that cannot reasonably be entertained – or by adopting a method of assessment that is wrong in principle.
37. There is no suggestion in the submission filed by Dumont Tire that the deciding Delegate misinterpreted or misapplied the *ESA* or the general law; my assessment of the reasons provided by the deciding Delegate in the Determination confirm that the correct law and principles were applied when addressing the loan question and the overtime claim made by Mr. Knowles.
38. The argument by Dumont Tire relating to the paying back of loans misconceives the scope of an examination of a complaint under the *ESA*.
39. The deciding Delegate accurately describes the effect of section 22, which requires an assignment of wages to meet credit obligations – in this case, the loans made to Mr. Knowles – to be in writing and for an employer to prove the assignment of wages was authorized. The deciding Delegate found the requirements of section 22 were not met and, absent the statutory requirements being met, the deciding Delegate was correct in stating those credit obligations – whether or not Mr. Knowles was believed about having ‘paid back’ the loan – could not, applying relevant provisions of the *ESA*, be deducted from wages.
40. While Dumont Tire disagrees with the conclusion reached by the deciding Delegate on Mr. Knowles’ overtime claim, nothing in their expression of disagreement is shown to be an error of law. Effectively, the appeal does no more than quarrel with the overtime calculations of the deciding Delegate. Those calculations were based on the facts presented during the complaint process and were primarily grounded on records created and maintained by Dumont Tire.
41. A finding of fact is only reviewable by the Tribunal as an error of law on the facts in limited circumstances. The test for establishing findings of fact constitute an error of law is stringent. Based on my assessment of the facts in the record and as found in the Determination, Dumont Tire has not met the test. The calculations of the deciding Delegate were adequately supported on the material before her; there is no basis for alleging, or finding, that the deciding Delegate made an error on the facts.
42. There did appear to be a factual dispute about whether Mr. Knowles recorded all of the breaks he took, but on the evidence, the deciding Delegate was not able to find Mr. Knowles took breaks without clocking out and accepted the accuracy of the timecard records on that question. That is a finding of fact the deciding Delegate was entitled to make on the evidence. As above, nothing in the appeal raises that finding of fact to an error of law.
43. I accept the indication in the submission of Dumont Tire that the references in the reasons for Determination to 2023 – instead of 2022 – are incorrect. It is obvious however, from the context, including several references surrounding that error that correctly refer to 2022, that the error is typographical or inadvertent; the error is nothing more than a technical irregularity which, applying section 123 of the *ESA*, has no effect on the Determination. More particularly, it does not indicate an error of law by the deciding Delegate.
44. In sum, there is nothing in the appeal that demonstrates, or raises any aspect of the Determination to, an error of law.

Natural Justice Concerns

45. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
46. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, are given the opportunity to reply, and have the right to have their case heard by an impartial decision maker.
47. The Tribunal has confirmed on many occasions that the content and scope of procedural fairness is highly contextual. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this matter, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the 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 *BWI Business World Incorporated*, BC EST # D050/96.
48. The above statement succinctly incorporates and expresses both the common law duty of fairness and the statutory duty of fairness that operate in the context of the natural justice ground of appeal in this case.
49. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Dumont Tire was provided with the opportunity required by principles of natural justice. I am satisfied Dumont Tire was accorded the procedural rights required under the *ESA*. There is nothing in their appeal submission which suggests otherwise.
50. The appeal does not present a case for challenging the Determination on natural justice grounds.

New Evidence

51. The simple response to this ground of appeal is that Dumont Tire has submitted no additional evidence at all in support of their appeal, let alone evidence that might qualify as new evidence under the ground of appeal set out in section 112(1)(c).
52. I find Dumont Tire has failed to show there is a strong *prima facie* case in favour of this appeal and as stated above, I do not consider it appropriate to allow an extension of the appeal period. This decision is sufficient to dispose of this appeal.

53. Even if the statutory time period were ignored and the merits of the appeal were considered, it would still fail. For the same reasons I have provided on the timeliness question, I find there is no merit to the appeal and no reasonable likelihood it would succeed.
54. For all of the above reasons, this appeal is dismissed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it.
55. I shall add one further comment, which relates to the submission of Dumont Tire concerning monies said to be owed to Revenue Canada by Mr. Knowles and which are apparently subject to an order from Revenue Canada. The Tribunal has no authority over such a matter; the Tribunal will not be speaking with Revenue Canada, as suggested by Dumont Tire, and have no responsibility relating to the distribution of the wages found to be owed under the Determination. Dumont Tire has apparently paid the amount of the Determination to the Employment Standards Branch. They should seek to coordinate the distribution of those monies with Revenue Canada and Employment Standards.

ORDER

56. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated December 27, 2023, be confirmed in the amount of \$5,854.92, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal