

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Emerge Canada Inc.
("Emerge")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson
SUBMISSIONS: Desmond Alvares, on behalf of Emerge Canada Inc.
FILE NUMBER: 2024/086
DATE OF DECISION: October 23, 2024

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act (ESA)* by Emerge Canada Inc. (“Emerge”) of a determination issued by John Dafoe, a delegate of the Director of Employment Standards (“deciding Delegate”), on May 31, 2024 (“Determination”).
2. The Determination found Emerge had contravened Part 3, sections 17 and 18 of the *ESA* in respect of the employment of Peter Todd Riley and ordered Emerge to pay Mr. Riley wages, including vacation pay, in the total amount of \$104,644.31, interest under section 88 of the *ESA* in the amount of \$4,922.44, and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$110,566.75.
3. Emerge has appealed the Determination on the ground that new evidence has come available that was not available when the Determination was being made.
4. On July 8, 2024, the Tribunal received an Appeal Form from Emerge. The Appeal Form attached a submission, which reads in its entirety:

I would like to clarify that the amount outstanding as owed to Todd includes 3 weeks to cover him to the end of September, when his last day with Emerge was September 8, 2023.

Also three days of vacation were also taken in January.

In addition for 2023 his expenses were paid and taxes and withholding amounts of \$195.30 have been paid for Todd as advised on his updated T4.
5. The Appeal Form also attached three documents, an email dated December 29, 2022, a Record of Employment with an issuance date of October 31, 2023, and an amended T4 for Mr. Riley for the year 2023, all of which Emerge seeks to have this panel of the Tribunal consider as new evidence.
6. In correspondence dated July 23, 2024, the Tribunal, among other things, acknowledged having received the appeal, provided information about the appeal process, 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 from them at that time.
7. The Director has provided a copy of the record to the Tribunal and a copy has also been delivered to Emerge and to Mr. Riley. These parties have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from either party.
8. The Tribunal accepts the record is complete.
9. I have decided this appeal is appropriate for consideration under section 114 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 with the appeal, any new evidence added to the record, and

my review of the material that was before the deciding Delegate 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 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 the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Riley 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 there is any reasonable prospect the appeal can succeed.

ISSUE

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

BACKGROUND FACTS

12. Emerge operates a financial investment firm and employed Mr. Riley as the Director Investment Management Services in British Columbia from February 1, 2022, to September 29, 2023.
13. Mr. Riley filed a complaint alleging Emerge had contravened the *ESA* by failing to pay regular wages, commissions, bonuses, expenses, annual vacation pay, and compensation for length of service.
14. In response to the complaint, Emerge acknowledged Mr. Riley was owed wages.
15. The complaint was investigated by a delegate of the Director (“investigating Delegate”) who issued an Investigation Report (IR) which was delivered to each party, who were provided the opportunity to respond to it. Both parties provided responses to the IR.

16. The deciding Delegate accepted wages were owing and calculated the amount of wages owing as that which is set out in the Determination.
17. The deciding Delegate imposed two administrative penalties.

ARGUMENTS

18. In its appeal, Emerge seems to question the wage calculation in the Determination in three respects.
19. First, whether the deciding Delegate calculated Mr. Riley’s wage entitlement to September 29, 2023, rather than September 8, 2023.
20. Second, whether, in calculating Mr. Riley’s vacation pay, the deciding Delegate should have taken account of three days vacation it alleges were taken by Mr. Riley in January 2023.
21. The third seems to relate to an amended T4 which Emerge says shows “taxes and withholding amounts” on Mr. Riley’s expenses have been paid on his behalf.

ANALYSIS

22. 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.
23. 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.
24. The ground of appeal raised by Emerge is the “new evidence” ground of appeal – section 112(1)(c).
25. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations: 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.

26. New 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 *ESA*.
27. The “evidence” which Emerge seeks to introduce is not “new.”
28. This material existed while the investigation was being conducted and the Determination was being made. It was not presented by Emerge in any submission or discussion with the investigating Delegate, nor is there any reference to it in the IR or in the reasons for Determination. In fact, the IR, at page IR10, and states:
- A Demand for Employer Records was issued to [Emerge] on January 3, 2024, with a deadline of 8:00 am, January 10, 2024. No payroll records, other documents, or response of any kind have been received.
29. Applying the test for admitting “new evidence” on appeal, I find there is no merit to this ground of appeal; it has not been made out and I will not exercise my discretion to accept it.
30. The request for clarification requires no detailed analysis to answer.
31. The amount of wages found by the deciding Delegate to be owed is clearly summarized in the Determination and is based on a wage recovery period from February 1, 2022 to September 29, 2023. The deciding Delegate found Mr. Riley’s last day of employment was September 29, 2023, that he was entitled to wages to that date, and calculated wages and commissions outstanding for a period from December 9, 2022, to September 29, 2023. Each of those matters represent a finding of fact that Mr. Riley’s employment with Emerge continued until September 29, 2023.
32. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
33. If the request for clarification is intended to be an indirect challenge to the finding that Mr. Riley’s employment with Emerge continued until September 29, 2023, it has not established that finding is an error of law and, accordingly, there is no basis under section 112(1) for such challenge.

CONCLUSION

34. For the above reasons, I find there is no reasonable prospect this appeal will succeed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to. The appeal is, accordingly, dismissed.

ORDER

35. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated May 31, 2024, be confirmed in the amount of \$110,566.75, together with any interest that has accrued under section 88 of the *ESA*.

/S/David B. Stevenson

David B. Stevenson
Member
Employment Standards Tribunal