

Citation: Miral & Arash Enterprises Ltd.(Re)
2024 BCEST 91

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Miral & Arash Enterprises Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Warren Insell
SUBMISSIONS: Farhad Nazari, on behalf of Miral & Arash Enterprises Ltd.
FILE NUMBER: 2024/056
DATE OF DECISION: October 15, 2024

DECISION

OVERVIEW

1. This is an appeal by Miral & Arash Enterprises Ltd. carrying on business as Blenz on Seymour & Robson St (“Appellant”) of a decision of a delegate of the Director of Employment Standards (“Director”) issued on April 22, 2024 (“Determination”).
2. The Determination found the Appellant contravened Part 3, section 18 of the *Employment Standards Act (ESA)* in respect of the employment of Joohee Han (“Employee”) and ordered the Appellant to pay Ms. Han wages in the total amount of \$70.42, interest under section 88 of the ESA in the amount of \$4.64, and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$1,075.06.
3. On May 30, 2024, the Tribunal received the Appellant’s initial appeal submission, including the Appeal Form, in which the Appellant checked off a box indicating that the appeal was based on section 112(1)(b) of the *ESA* (the Director failed to observe the principles of natural justice in making the Determination).
4. In correspondence dated May 31, 2024, the Tribunal granted the Appellant additional time to provide their reasons and arguments and supporting documents for their appeal.
5. In correspondence dated June 20, 2024, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (“Record”) from the Director, invited the parties to file any submissions on personal information or circumstances disclosure, and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.
6. The Record has been provided to the Tribunal by the Director and the Director confirms that a copy has been delivered to the Appellant and to the Employee. 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.
7. I accept the Record is complete.
8. I have decided that the appeal should be considered under section 114(1) of the *ESA*. Under section 114(1), the Tribunal may dismiss all or part of any appeal 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.

9. At this stage, I will assess the appeal based on my review of the Record, the Determination and Reasons for the Determination, and the appeal submissions. In this appeal, I will consider whether there is any reasonable prospect that the appeal can succeed.

ISSUE

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

BACKGROUND FACTS

11. On May 20, 2023, Ms. Han filed a complaint under section 74 of the *ESA* with the Director alleging that the Appellant had contravened the *ESA* by failing to pay wages for work performed while training.
12. A delegate of the Director (“investigating delegate”) investigated the complaint by gathering evidence from the parties and issuing an Investigation Report (“Report”) on February 26, 2024. A second delegate (“adjudicating delegate”) issued the Determination after reviewing the Report and responses from the parties.
13. The adjudicating delegate found that the Appellant contravened section 18 of the *ESA* by failing to pay the Employee wages for work completed. The Director determined that the Employee was entitled to wages and accrued interest in the amount of \$75.06.
14. The adjudicating delegate also found that the Appellant contravened section 46 of the *Employment Standards Regulation (ESR)* by failing to produce records upon demand.
15. The Director imposed two separate \$500 penalties for the contraventions of the *ESA* and *ESR*. The Appellant’s total liability under the determination is \$1,075.06.

ARGUMENT

16. The Appellant selected a box on the Appeal Form to indicate their ground for appeal was 112(1)(b) of the *ESA*, namely, that the Director failed to observe the principles of natural justice in making the Determination.
17. The Appellant’s appeal submission includes an undated witness statement and a copy of the Employee’s resume. The witness statement, written by an employee of the Appellant, speaks of events that occurred in April, 2023. Although not indicated on the Appeal Form as a ground of appeal,

I infer that the Appellant has submitted both documents as new evidence as neither document is included in the Record.

ANALYSIS

Natural Justice

18. As noted above, the Appellant alleges that the Director failed to observe the principles of natural justice in making the Determination.
19. 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: see *607730 B.C. Ltd. (English Inn & Resort) (Re)*, BC EST # D055/05.
20. The Appellant did not make any submissions relating to the principles of natural justice or to suggest that the Director was procedurally unfair. A party alleging a breach of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a Honda North*, BC EST # D043/99. The Appellant's submissions instead reargued the merits of the case and asked the Tribunal to make findings of fact that differ from those in the Determination.
21. I found no evidence in the Record to support a finding that the Appellant was not provided the opportunities required by the principles of natural justice.
22. Accordingly, I find that there is no basis for challenging the Determination on natural justice grounds.

New Evidence

23. In *Davies et al. (Merilus Technologies inc.)*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four-part test before accepting and considering any new evidence:
1. The evidence must not, with the exercise of due diligence, have been discoverable or presentable to the Director before the Determination;
 2. The evidence must be relevant to a material issue arising from the complaint;
 3. The evidence must be reasonably capable of belief; and
 4. The evidence must have high potential probative value, in the sense that it could, if believed, have led the Director to a different conclusion on the material issue
24. A failure to satisfy any one of the four parts will render that evidence inadmissible.
25. I find that the Appellant has failed the first part of that test, as I will explain below.
26. On February 5, 2024, the Appellant was given a Demand for Records ("Demand") from the investigating delegate. The Appellant was required to provide the investigating delegate with payroll records for the Employee, including "Communication, notes and documents relating to the interviewing, training, or hiring of the Complainant" and "job posting, and any policies and procedures relating to interviewing, training and hiring."

27. The Appellant did not respond to the Demand or provide the investigating delegate with any of the requested records.
28. The investigating delegate provided the Appellant with the Report on February 26, 2024. The Appellant was given until March 11, 2024, to respond to the information in the Report or provide additional information.
29. The Appellant did not provide any additional information to the investigating delegate.
30. The Appellant did not make any submissions with their appeal to explain why the witness statement or the Employee's resume could not have been sent to the Director prior to the Determination. The Appellant had two separate opportunities to provide those items to the investigating delegate.
31. The Tribunal has said on many occasions that an employer cannot lie in the weeds, fail to properly participate in an investigation, and seek to adduce evidence on appeal which should have been presented to the investigative delegate during the investigation: *Tri-West Tractor*, BC EST # D268/96.
32. The new evidence fails the first part of the *Davies et al.* test because, with the exercise of due diligence, the evidence would have been discoverable or presentable to the Director before the Determination was made.
33. The new evidence is inadmissible.

CONCLUSION

34. Based on all the above, I conclude that there is no reasonable prospect that the appeal will succeed.

ORDER

35. I dismiss the appeal pursuant to section 114(1)(f) of the *ESA*. I order the Determination be confirmed pursuant to section 115(1)(a) of the *ESA*.

/S/ Warren Insell

Warren Insell
Member
Employment Standards Tribunal