

Citation: Judge Trucking & Imports Inc.
2024 BCEST 116

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Judge Trucking & Imports Inc.
("Judge Trucking")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Alysha Bennett
SUBMISSIONS: Puneet Riar, legal counsel for Judge Trucking & Imports Inc.
FILE NUMBER: 2024/080
DATE OF DECISION: December 19, 2024

DECISION

OVERVIEW

1. This is an appeal by Judge Trucking & Imports Inc. (“**Judge Trucking**”) of a determination issued by a delegate (the “**Delegate**”) of the Director of Employment Standards (the “**Director**”), dated May 23, 2024 (the “**Determination**”).
2. In the Determination, the Delegate found that Judge Trucking had contravened the *Employment Standards Act (ESA)* in respect of the employment of Akshdeep Singh Gill. The Delegate ordered Judge Trucking to pay Mr. Gill outstanding wages, overtime, annual vacation, and interest. The Delegate also levied a number of administrative penalties against Judge Trucking.
3. In its appeal, Judge Trucking submits that new evidence has become available that was not available at the time the Determination was made.
4. For the reasons below, I conclude that this appeal has no reasonable prospect of success. The evidence sought to be admitted by Judge Trucking does not meet the requirements for new evidence.
5. I therefore dismiss this appeal pursuant to section 114(1)(f) of the *ESA*.

ISSUE

6. Has Judge Trucking shown a reasonable prospect of success in arguing that new evidence has become available that was not available at the time the Determination was made?

BACKGROUND FACTS

7. Judge Trucking operates a trucking and transportation services business in Surrey, British Columbia.
8. Mr. Gill was employed as an administrative assistant for Judge Trucking from April 18, 2022, to January 12, 2023. At the time of his termination, Mr. Gill’s rate of pay was \$23.10 per hour.
9. Following his termination, Mr. Gill filed a complaint under section 74 of the *ESA*, alleging Judge Trucking had contravened the *ESA* by failing to pay proper wages for all hours worked. The complaint was filed on March 11, 2023, within the time period allowed under the *ESA*.
10. A delegate of the Director (the “**Investigator**”) was assigned to the complaint and requested evidence and submissions from the parties. The Investigator prepared a report that summarized the evidence and arguments provided by Judge Trucking and Mr. Gill, including copies of the relevant documents submitted by each party, if any, during the investigation (the “**Investigation Report**”).
11. The Investigation Report was provided to Judge Trucking and Mr. Gill, and each party had the opportunity to review it and indicate whether it contained any errors or required clarification. Neither party provided a response.

12. On May 23, 2024, the Delegate issued the Determination. In the Reasons for the Determination, the Delegate identified two issues:
- (a) Was the complaint within provincial jurisdiction?
 - (b) Was Mr. Gill owed wages and, if so, how much?
13. On the first issue, the Delegate found Judge Trucking fell within the provincial jurisdiction of the *ESA*. In coming to this conclusion, the Delegate relied on the fact there was no dispute that Judge Trucking did not drive trucks from one province to another and, due to insurance coverage, never proceeded more than 160 km from its office in Surrey, British Columbia.
14. On the second issue, the Delegate found Mr. Gill was entitled to outstanding wages, overtime pay, vacation pay, and interest in the amounts set out in the Determination.
15. The Delegate also imposed three administrative penalties for contraventions of sections 18, 28, and 40 of the *ESA* in the total amount of \$1,500.
16. Judge Trucking filed the appeal on the July 2, 2024 – the deadline for filing the appeal. Judge Trucking’s counsel requested additional time to provide the Tribunal with supporting documents and the Tribunal granted an extension until August 2, 2024. Judge Trucking did not provide additional documents by this deadline.
17. On September 6, 2024, the Tribunal requested the parties review the *ESA* section 112(5) record (the “**Record**”) and provide submissions on its completeness by September 20, 2024. Neither party responded by the deadline. After this deadline, Judge Trucking’s counsel was granted several further extensions, but failed to provide submissions on the completeness of the Record by the new deadline.
18. Since the Tribunal has not received any objections to the completeness of the Record, the Tribunal accepts the Record as complete.

ARGUMENTS

19. Judge Trucking submits on the Appeal Form that new evidence has become available that was not available at the time the Determination was being made.
20. Judge Trucking’s written submissions consist of an introductory statement that new evidence has come to light since the Determination, and a summary of the purported evidence of Sundeep Kaur and Ashnoor Garcha.
21. As to the purported evidence of Ms. Kaur, Judge Trucking submits that Ms. Kaur was hired as a bookkeeper in January 2023, and that she replaced Mr. Gill after his termination. Judge Trucking states that “[a]lthough she had never worked with [Mr. Gill], Ms. Kaur is able to corroborate other witnesses’ evidence.” The remainder of Judge Trucking’s submissions in respect of Ms. Kaur largely repeat the evidence provided by Judge Trucking’s other witnesses during the investigation.

22. As to the purported evidence of Mr. Garcha, Judge Trucking’s submissions state that “[t]hese submissions provide a more detailed and thorough recounting of Mr. Garcha’s evidence, especially his first-hand observations of [Mr. Gill].” Mr. Garcha provided substantive evidence to the Investigator on behalf of Judge Trucking multiple times throughout the investigation, and the Delegate considered his evidence in making the Determination. Again, Judge Trucking’s submissions in respect of Mr. Garcha largely repeat and elaborate on the evidence that Mr. Garcha and other witnesses provided to the Investigator during the investigation.
23. Judge Trucking’s submissions also include one paragraph stating that “[Judge Trucking] has added that he may have access to payroll slips showing what he paid [*sic*] and what hours [Mr. Gill] worked.” The paragraph includes a footnote asking for additional time to provide the Tribunal with supporting documents because Judge Trucking was unable to provide these documents earlier as they had just put their mind to those documents today. Judge Trucking did not provide the supporting documentation, despite the Tribunal granting the extension and providing Judge Trucking multiple opportunities to do so.

ANALYSIS

24. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.
25. As noted above, Judge Trucking alleges that new evidence has become available that was not available at the time the Determination was being made.
26. 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. In *Bruce Davies et al.*, BCEST # D171/03 (“**Bruce Davies**”), the Tribunal set out the following requirements for introducing new evidence on appeal:
- (a) the evidence could not reasonably have been discovered and presented to the Director during the investigation or adjudication of the complaint;
 - (b) the evidence must be relevant to a material issue 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 make a difference and lead to a different conclusion in the Determination.
27. The requirements above are conjunctive and the Tribunal will rarely accept evidence on appeal that does not satisfy each of the requirements.

28. The new evidence 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.
29. The time and place to submit information is during the initial investigation and determination. The jurisprudence is clear that the introduction of new evidence at the appeal stage, that could and should have been introduced previously at the investigation or adjudication stage, will generally result in the dismissal of the appeal.
30. In this case, Judge Trucking does not submit any explanation for why the new evidence could not reasonably have been discovered and presented to the Director during the investigation or adjudication of the complaint. Nor has Judge Trucking explained how the alleged new evidence meets any of the other factors.
31. On its face, there is no indication that the proposed “new evidence” (i.e., the statements of Ms. Kaur and Mr. Garcha) could not have been provided to the Investigator. To the contrary, I find that the evidence of Ms. Kaur and Mr. Garcha was available during the investigation and adjudication of the complaint and ought to have been submitted at that time.
32. Judge Trucking’s submissions in respect of Ms. Kaur’s evidence effectively repeats much of the same evidence provided by Judge Trucking’s other witnesses during the investigation. Furthermore, Judge Trucking’s submissions indicate that Ms. Kaur had been in its employ for several months before Mr. Gill filed the complaint. I therefore find that Ms. Kaur’s statement could and should have been reasonably discovered and presented to the Investigator during the investigation. Accordingly, I refuse to consider Ms. Kaur’s statement in the appeal as new evidence.
33. Similarly, Judge Trucking’s submissions in respect of Mr. Garcha’s evidence restates the same evidence he and other witnesses provided to the Investigator during the investigation. Mr. Garcha provided substantive evidence to the Investigator on behalf of Judge Trucking multiple times during the investigation, and the Delegate considered his evidence in making the Determination. Judge Trucking’s own submissions indicate that Mr. Garcha’s evidence is simply a “more detailed and thorough recounting of Mr. Garcha’s evidence” given during the investigation. To the extent that his statement includes any “new” evidence, I find that Mr. Garcha had the opportunity to provide such evidence to the Investigator during the investigation, and should have done so. Accordingly, I refuse to consider Mr. Garcha’s statement in the appeal as new evidence.
34. I also note that a review of the Record shows that Judge Trucking had many opportunities to produce the evidence it now seeks to produce in the appeal. The Tribunal has consistently stated 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 delegate during the investigation process: *Tri-West Tractor*, BCEST # D268/96. Judge Trucking does not explain why it did not adduce the evidence during the investigation of the complaint when it had numerous opportunities to do so, including when invited by the Investigator to respond to the Investigation Report.
35. While I find Judge Trucking’s appeal fails based on the first criteria of the *Bruce Davies* test and I am not required to consider the other elements of the test, I also find the proposed new evidence lacks

high probative value. As noted above, much of the information contained in Judge Trucking's submissions was provided to the Investigator during the investigation. Judge Trucking essentially resubmits arguments made during the initial investigation and determination stage. In my view, the new evidence, if believed, could not make a difference or lead to a different conclusion in the Determination.

36. In the circumstances, I find that the evidence sought to be admitted is not evidence that has become available that was not available at the time the Determination was being made. It is not, therefore, new evidence that should have been considered. Moreover, in my opinion, the evidence submitted is not of high probative value. Accordingly, I find Judge Trucking's submissions do not meet the requirements for new evidence.
37. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.
38. I find there is no reasonable prospect the appeal will succeed, and dismiss the appeal.

ORDER

39. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

/s/ Alysha Bennett

Alysha Bennett
Member
Employment Standards Tribunal