

Citation: Rene Rahi and Shahab Rahi (Re)  
2019 BCEST 15

An appeal

- by -

Rene Rahi and Shahab Rahi carrying on business as Diamond MGD  
("Diamond MGD")

- of a Determination issued by -

The Director of Employment Standards

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

**PANEL:** Maia Tsurumi

**FILE NO.:** 2018A/124

**DATE OF DECISION:** February 6, 2019

## DECISION

### SUBMISSIONS

Rene Rahi  
on behalf of Rene Rahi and Shahab Rahi carrying on  
business as Diamond MGD

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Rene Rahi and Shahab Rahi, carrying on business as Diamond MGD (“Diamond MGD”) have filed an appeal of a determination (the “Determination”) issued by Joy Archer, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on October 31, 2018. In the Determination, the Delegate found that Diamond MGD contravened sections 17, 18, 45, and 63 of the *ESA* and section 46 of the *Employer Standards Regulation* (the “*Regulation*”).
2. Diamond MGD appeals the Determination on the ground that the Delegate failed to observe the principles of natural justice in making the Determination. Diamond MGD seeks to have the Determination varied by striking the administrative penalties imposed.
3. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without hearing, for any of the following reasons:
  - 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.
4. Pursuant to sub-section 114(1), I dismiss the appeal and confirm the Delegate’s Determination.
5. This decision is based on the submissions made by Diamond MGD in its Appeal submission, the sub-section 112(5) record (the “Record”), the Determination, and the Reasons for the Determination (the “Reasons”).

### ISSUE

6. The issue before the Tribunal is whether all or part of this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

## ARGUMENT

7. Diamond MGD submits that the Delegate failed to observe principles of natural justice because she disregarded Diamond MGD's arguments in response to the Complaint filed by Danielle Wozney (the "Complainant"). Specifically, Diamond MGD says that:
  - a. There was no evidence that the Complainant was terminated instead of resigning;
  - b. The Delegate did not take into account Diamond MGD's submissions that the Complainant was negligent in performing her work duties; and
  - c. The Delegate did not take into account Diamond MGD's submissions that the Complainant engaged in time theft.
8. Diamond MGD wants the Tribunal to review the Determination and Decision and find that the Complainant's alleged behaviour (her resignation and theft of work time) was the cause of the dispute.
9. Diamond MGD is not asking for a cancellation of the Determination. It is asking that the Determination be varied to strike the administrative penalties because it did not ask for a hearing and a decision.

## THE FACTS AND ANALYSIS

### Background

10. Rene Rahi and Shahab Rahi carrying on business as Diamond MGD is a general partnership registered with BC Registry Services; Rene Rahi and Shahab Rahi are the listed partners. Diamond MGD is a glassworks installation company in Coquitlam.
11. The Complainant was employed by Diamond MGD as an administrative assistant from March 6, 2017, to November 27, 2017. She filed a complaint with the Employment Standards Branch on January 22, 2018.
12. On March 19, 2018, Diamond MGD submitted a cheque, without a wage statement, to the Director in payment of the Complainant's wages in the amount of \$697.50. The notation on the cheque states, "Nov 10, 2017 to end of work \$14.40 an hour + \$0.60 vacation pay = \$15.00 per hour." The Director disbursed the \$697.60 to the Complainant on May 18, 2018.

### Issues Before the Delegate

13. The issues before the Delegate were whether the Complainant was owed: (1) regular wages; (2) statutory holiday pay; (3) compensation for length of service; and or (4) vacation pay.

### Evidence and Submissions at the Hearing

14. The Complainant submitted wages statements for March to August 2017. These statements showed that at the beginning of her employment, her wage rate was \$15.00/hour, and in May 2017, her rate of pay increased to \$16.00/hour. She was paid twice a month: on the 15th and at the end of the month. Where the Complainant was missing wage statements for a particular month, she submitted her bank statements with cheque deposits highlighted. The Complainant also provided her calendar of hours worked from November 10-27, 2017. This calendar shows that during this period, she worked 85.5 hours.
15. On October 31, 2017, the Complainant gave Diamond MGD two weeks' notice that she was terminating her employment. Her last day of work was to be November 8, 2017, however, prior to this date, the Complainant asked Diamond MGD if they would keep her on and Diamond MGD agreed to do so. Diamond MGD asked the Complainant to sign a written employment contract, but the Complainant testified that she refused to do so. This contract stipulated that if the Complainant resigned before February 1, 2018, she would have to "donate" her last pay cheque to Diamond MGD.
16. Diamond MGD continued the Complainant's employment.
17. On November 15, 2017, the Complainant was offered a job with a different employer. The Complainant accepted this position and gave Diamond MGD three weeks' notice of the end of her employment, to be effective December 8, 2017.
18. The Complainant had a personal notebook that she used in her work running Diamond MGD's office. The notebook was only used for work, and in it she wrote all of the information she needed for her day-to-day work. This information included Diamond MGD's company credit-card information. The fact that she was authorized to use the card for work purposes was not disputed.
19. On November 27, 2017, the Complainant and another employee were in Diamond MGD's office doing data entry. The Complainant determined that the software they were using needed an upgrade and so she asked Rene Rahi to come in and approve this purchase. In anticipation of Rene Rahi agreeing to the purchase, the Complainant had her notebook open on her desk to the page with Diamond MGD's credit card information. After Rene Rahi arrived at the office, he began speaking to the Complainant about the upgrade. However, shortly after this, without saying anything, he took the Complainant's notebook and tore the page with the credit-card information out of it. The Complainant said that when she asked Rene Rahi why he had done that, he became angry and started yelling at her and called her "stupid". According to the Complainant, he then told her to leave the office and never come back.
20. On November 28, 2017, the Complainant returned to Diamond MGD's office at 8:00 a.m. to pick-up her personal belongings and her outstanding pay. At the office, she spoke with Rene Rahi about her final wages. Rene Rahi called Shahab Rahi and asked him about this. Rene Rahi then told the Complainant that she would be paid her final wages on November 30, 2017. The Complainant left the office, leaving Diamond MGD's cell phone and office keys. According to Diamond MGD, the Complainant took her employee file with her at this time. However, according to the Complainant, she did not take her employee file with her, and she did not know that she had an employee file.

21. Over the next couple of days, the Complainant communicated with Diamond MGD regarding her final wages via text messages. Shahab Rahi told her that her wages would be mailed to her on November 30, 2017, and asked her for a final tally of the hours she had worked. The Complainant agreed to be paid on November 30, 2017.
22. The Complainant provided her mailing address and her timesheet to Diamond MGD, but Diamond MGD questioned the hours on the Complainant's timesheet and berated her for submitting her full hours. Shahab Rahi told her that he would not pay her the full hours as she had often left work early and took longer than 30 minutes for lunch. The Complainant said that she was shocked at these allegations and explained to Diamond MGD that this was not the case. Diamond MGD stopped responding to her telephone calls, e-mails, and text messages.
23. Later, the Complainant called Diamond MGD from her new work place and spoke to Shahab Rahi. He told her that he did not owe her any wages because she did not keep her promise of staying until February 1, 2018, as per the employment contract. He then hung up on her.
24. Diamond MGD agreed with much of the Complainant's description of what happened, however, there were three main points of disagreement with her version of events. First, it said that the Complainant did sign the employment contract. Second, it said that the Complainant had an employee file and took this file with her when she left the office on November 27, 2017. This was the reason that Diamond MGD gave for why it could not produce the signed version.
25. Third, Diamond MGD also had a different version of the events of November 27, 2017. According to it, the Complainant provided its credit-card information to the other employee in the office that day, although only the Complainant was authorized to have this information. When Rene Rahi came into the office that day, he asked the Complainant why she had given the credit-card information to the other employee when she was the only one authorized to use it. She raised her voice and refused to accept that she had done anything wrong. She was upset, said that she was leaving and quitting, and left work. Diamond MGD said that Rene Rahi told her that if she left work, she was quitting, as her shift was not done.
26. Diamond MGD confirmed that it did not pay the Complainant her final wages or vacation pay. However, it said that it did not pay her because it disagreed with the hours she claimed to have worked in her final pay period. She wanted wages for 85.5 hours, but Diamond MGD felt that these hours were inflated as she often left early for doctors' appointments and took long lunches.
27. Diamond MGD does not have a formal method for tracking its employees' hours. Shahab Rahi stated that he just knew the hours the Complainant worked from when he was sitting in the office. He also said that he kept a daily record of her hours worked in his notebook and that she only worked 46.25 hours. He did not provide his notebook or a copy of it for the hearing. Diamond MGD also did not submit any payroll records. At the hearing, Shahab Rahi confirmed that he read and understood the Demand for Employer Records from the Branch, but he said that he did not feel it was necessary to submit the payroll records because the Complainant submitted her records.

### Delegate's Findings and Analysis

#### *Regular wages*

28. The Complainant submitted that she was owed wages from November 10 – 27, 2017.
29. The Complainant submitted her calendar of hours showing the hours she worked for a total of 85.5 hours. The Complainant had provided the calendar to Diamond MGD, at its request, shortly after her employment ended. The calendar indicates where she left early for medical appointments. The Delegate found that this calendar was the best evidence available regarding the hours worked by the Complainant from November 10 – 27, 2017. Diamond MGD itself relied on the Complainant's records instead of submitting its own records. Further, the Delegate did not find Shahab Rahi's testimony at the hearing about his tracking the amount of the Complainant's hours credible. He first said that he just knew her hours from sitting in the office. Then he said that he kept a daily record in a notebook, but he never produced this notebook.
30. Also, regarding the Complainant's hourly wage, Diamond MGD's March 19, 2018, cheque showed the wage rate as \$15.00/hour with vacation pay embedded. However, the Complainant's wage statements showed that she was paid \$16.00/hour from May 2017 onwards. As Diamond MGD was content to rely on the records submitted by the Complainant instead of submitting its own payroll records, the Delegate found that her rate of pay was \$16.00/hour.
31. The Delegate found that she was owed regular wages in this time period in the amount of \$670.50. This calculation was based on the following:
- a. November 10 – 23, 2017 – 73.5 hours worked at \$16.00/hour = \$1,176.00;
  - b. November 24 – 27, 2017 – 12 hours worked at \$16.00/hour = \$192.00; and
  - c. \$697.50 paid by Diamond MGD by cheque dated March 19, 2018, and submitted to the Employment Standards Branch.
32. As a result of the wages owed to the Complainant, the Delegate found that Diamond MGD contravened sections 17 and 18 of the *ESA*.
33. Section 17 requires an employer to pay all wages earned in a pay period at least semi-monthly and within eight days after the pay period ends. Although Diamond MGD did pay \$697.50, it did not pay all the wages the Complainant earned in the November 10 – 23, 2017, pay period and thus violated section 17 and was subject to a mandatory \$500 administrative penalty.
34. Section 18 requires all wages owed to an employee be paid within 48 hours of termination of employment. As the Complainant's final wages remained outstanding, the Delegate found that Diamond MGD violated section 18 of the *ESA* and was subject to a mandatory \$500 administrative penalty.

#### *Statutory holiday pay*

35. The Complainant's record of hours shows that she did not work on Remembrance Day in 2017. While Diamond MGD paid some of her outstanding regular wages for November 10 – 23, 2017, the Delegate

found that there was no evidence that she was paid an average day's pay of \$128.00 (8 hours x \$16/hour) for Remembrance Day. Thus, Diamond MGD contravened section 45 of the *ESA* and was subject to a mandatory \$500 administrative penalty.

#### *Compensation for length of service*

36. Turning to the issue of compensation for length of service, the Delegate explained that section 63 of the *ESA* requires employers to compensate employees for length of service upon termination. If an employer can show that the employee was given proper written notice of termination or equivalent wages, or a combination of both, or that the employee quit, retired or was terminated for cause, then an employer is not required to pay compensation for length of service: see *ESA*, sub-section 63(3).
37. The Delegate noted that under the *ESA*, the onus is on the employer to show that at least one of the circumstances in sub-section 63(3) occurred. There must be clear and unequivocal facts to support a conclusion that an employee has quit. The test has both subjective and objective elements: (1) subjectively, the employee must have formed an intention to quit; and (2) objectively, the employee must carry out an act inconsistent with her continued employment.
38. Diamond MGD submitted that the Complainant resigned her position by walking out of the office on November 27, 2017, after the argument with Rene Rahi. The Delegate found that Diamond MGD did not establish unequivocally that the Complainant quit on November 27, 2017, and therefore it could not rely on sub-section 63(3) of the *ESA*. On the one hand, the only evidence to support Diamond MGD's position that the Complainant quit was the second-hand testimony of Shahab Rahi, who was not present during the event in question. On the other hand, the evidence to support the Complainant's version of events was her first-hand testimony. The Delegate determined that, on the whole, she preferred the Complainant's evidence and testimony over the evidence of Shahab Rahi.
39. Although Diamond MGD did not allege that it had just cause to terminate the Complainant's employment, the Delegate considered this possibility and found that there was no just cause. The fact that the Complainant had Diamond MGD's credit-card information on an open page of her notebook where another employee may have seen the number was not reason to summarily dismiss an employee for cause.
40. The Delegate calculated that the Complainant was entitled to one week's pay as compensation for length of service under sub-section 63(4) of the *ESA* and this totalled \$640.00. Also, as section 63 of the *ESA* was violated, the Delegate imposed a mandatory administrative penalty of \$500.

#### *Annual vacation pay*

41. The Delegate noted that Diamond MGD agreed at the hearing that the Complainant was owed vacation pay for the duration of her employment. The Delegate calculated this entitlement, that formed part of the Complainant's final wages, as follows:
- a. \$17,103.29 (YTD earnings) + \$640.00 (compensation for length of service) + \$697.50 (regular wages paid) + \$670.50 (regular wages outstanding) + \$128.00 (statutory holiday pay) = \$19,239.29; and

- b. \$19,239.29 x 4% vacation pay = \$769.57.

#### *Payroll records*

42. The Delegate found that Diamond MGD contravened section 46 of the *Regulation*. Section 46 states that a person who is required to produce or deliver records to the Director “must produce or deliver the records as and when required.” The Demand for Records delivered to Diamond MGD specified that all payroll records for the Complainant were due at the Branch on or before 4:00 p.m. on March 29, 2018. Diamond MGD did not provide the records. The violation of section 46 of the *Regulation* resulted in a mandatory \$500 administrative penalty.

#### Analysis

43. Diamond MGD first asks the Tribunal to vary the Determination and put aside the mandatory administrative penalties because it did not ask for a hearing or a decision. I have no jurisdiction under the *ESA* to vary a determination or mandatory administrative penalties on this basis. Once a complainant is made, the procedures set out in the *ESA* and its regulations govern the complaint process.
44. Diamond MGD also submits that the Delegate failed to observe principles of natural justice because:
  - a. There was no evidence that the Complainant was terminated instead of resigning;
  - b. The Delegate did not take into account Diamond MGD’s submissions that the Complainant was negligent in performing her work duties; and
  - c. The Delegate did not take into account Diamond MGD’s submissions that the Complainant engaged in time theft.
45. In essence, Diamond MGD is asking me to review the same evidence that was before the Delegate and come to the opposite conclusion as her – that the Complainant was terminated and did not work the hours she said she did. However, an appeal is not a re-hearing of the matter and is not another opportunity to give one’s version of the facts. Sub-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.

#### *Error of law*

46. Even though Diamond MGD did not rely on an error in law in this appeal, I have considered whether there was any such error.
47. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal’s determination. In this context, an error of law occurs in the following situations:



- a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
- b. a misapplication by the decision-maker of an applicable principle of general law;
- c. where a decision-maker acts without any evidence;
- d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
- e. where the decision-maker is wrong in principle.

48. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

49. I find that the Delegate did not err in law.

50. In relation to the question of whether she was owed compensation for length of service, the Delegate considered the applicable legal tests for voluntary resignation (see e.g. *Burnaby Select Taxi Ltd. & Zoltan T. Kiss*, BC EST # D091/96) and for dismissal with cause (see e.g. *3 Sees Holdings Ltd.*, BC EST # D041/13, or *Randy Chamberlin and Sandy Chamberlin*, BC EST # D374/97). The Delegate's Determination was reasonable: she applied the appropriate legal tests to her findings of fact and these facts were grounded on the evidence before her.

51. The issue of the amount of regular wages owing to the Complainant was not one that involved a legal test: both parties agreed that she was owed regular wages for her final days of work, the question was how many hours she worked in the November 10 – 27, 2017, period. Similarly, the vacation pay issue did not require a legal test. I find that the Delegate did not act without any evidence and her Determination was reasonable on the facts before her.

52. Finally, regarding the Delegate's imposition of mandatory administrative penalties, under the *ESA* and the *Regulation*, once a contravention has been found, these penalties are mandatory. A Delegate has no discretion not to impose them.

#### *Breach of natural justice*

53. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them, and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.

54. There is nothing in the Appeal submission, Record, Determination, or Reasons that indicates there was a breach of natural justice. Diamond MGD knew the complaint against it, had an opportunity to reply to this complaint, and had their case heard by an impartial decision-maker.

*New evidence*

55. In its Appeal submission, Diamond MGD made further evidentiary submissions through notes it put on the Reasons. For example, in a number of places, Diamond MGD wrote “not true” on the Reasons or otherwise provided its version of events. I cannot take these submissions as evidence.
56. An appeal is decided on the record before the Delegate unless there is evidence that has become available after the Determination that was not available at the time the Determination was being made: *ESA*, sub-section 112(1)(c). The Tribunal in *Bruce Davies et al.* provided guidance on how the Tribunal applies sub-section 112(1)(c):
- This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence...[The evidence] must meet four conditions:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) the evidence must be relevant to a material issue arising 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, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue
- (*Bruce Davies et al.*, BC EST # D171/03 at p. 3).
57. None of Diamond MGD’s submissions in its Appeal submission meets the Tribunal’s test for admitting fresh evidence. The submissions are a reiteration of Diamond MGD’s version of events that it already put before the Delegate at the hearing.
58. In summary, I find that Diamond MGD’s appeal has no reasonable prospect of succeeding and therefore I dismiss it under sub-section 114(1)(f) of the *ESA*. Further, regarding Diamond MGD’s request that I vary or cancel the administrative penalties, because it did not ask for a hearing or a decision, I also dismiss this portion of the appeal under sub-section 114(1)(a), as I have no jurisdiction in this regard.

**ORDER**

- <sup>59.</sup> Pursuant to sub-section 115(1)(a) of the *ESA*, I order the Determination, dated October 31, 2018, confirmed in the amount of \$4,776.87, together with any interest that has accrued under section 88 of the *ESA*.

---

**Maia Tsurumi**  
**Member**  
**Employment Standards Tribunal**