

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Glimmer Films Inc.  
(the “Appellant”)

- 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:** James F. Maxwell

**FILE No.:** 2020/080

**DATE OF DECISION:** November 20, 2020

## DECISION

### OVERVIEW

1. Glimmer Films Inc. (the “Appellant”) has filed an appeal of a determination dated April 3, 2020 (the “Determination”), issued by a delegate of the Director of Employment Standards (the “Director”), pursuant to the *Employment Standards Act* (the “ESA”). The Director held that the Appellant had breached the ESA by failing to pay to Sebastian Lopez Fernandez (the “Employee”) sums for regular wages, overtime wages, annual vacation pay, and other amounts, together with interest accrued thereon. In addition, the Director assessed administrative penalties in the sum of \$500.00. The Director concluded that the total amount payable by the Appellant was \$1,137.86.
2. The Appellant has filed an appeal submission with the office of this Tribunal and has requested an extension to the statutory deadline for filing an appeal.

### ISSUES

3. The following issues arise in this appeal:
  - (a) Is the appellant entitled to an extension to the time for filing an appeal of the Determination?
  - (b) Did the Director violate the rights of the Appellant under the *Canadian Charter of Rights and Freedoms*?
  - (c) Did the Director err in law in the making of the Determination?
  - (d) Did the Director fail to observe the principles of natural justice in making the Determination?

### FACTS

4. The Appellant is a corporation engaged in the business of event photography.
5. On or about April 1, 2019, the Employee began work for the Appellant. The employment relationship came to an end on April 28, 2019.
6. On June 22, 2019, the Employee filed a complaint with the Employment Standards Branch (the “Complaint”). The Complaint alleged that the Appellant had failed to pay to the Employee all sums owing pursuant to the employment relationship. The Employee alleged that the Appellant had failed to pay sums owing for regular wages, as well as a sum for reimbursement of expenses. The Employee alleged that he was owed \$533.00.
7. On January 8, 2020, the Director conducted a Complaint Hearing, by teleconference. In the oral hearing, the Director heard evidence from Mr. Corey Ogilvie, the owner of the Appellant company, and from 4 individuals who provided services to the Appellant company. The Director also heard evidence from the Employee, and from one witness on behalf of the Employee.

8. One of the key issues before the Director was the question of whether the Employee was, in fact, an employee, or was an independent contractor, as the Appellant contended. The Director considered the parties' evidence, and the evidence of their witnesses. The Director concluded that the relationship was one of employer and employee. The Director found that the Appellant had not paid all wages owing to the Employee, including amounts for regular wages, overtime, annual vacation pay, and expenses. The Director concluded that the Employee was owed a total of \$637.86, plus accrued interest.
9. The Director found that the Appellant had breached section 18 of the *ESA*, by failing to pay the amounts owing to the Employee within 6 days of the last day of employment. For this breach of the *ESA*, the Director assessed an administrative penalty in the sum of \$500.00.
10. On March 27, 2020, the Director issued a determination (the "First Determination") setting out the Director's findings. The Director advised the Appellant that the deadline to appeal from the First Determination was May 4, 2020.
11. On March 31, 2020, the Appellant filed, within the statutory appeal period, an appeal of the First Determination. Included in the filing were the completed Appeal Form, written reasons and arguments in support of the appeal, the First Determination, and the Reasons for the First Determination.
12. On or about April 3, 2020, the Director discovered that there were mistakes in the First Determination, with respect to the naming of the parties. Due to these errors, the Director cancelled the First Determination and issued the Determination which gives rise to the within appeal. The Director advised the Appellant that the deadline to appeal from the Determination was May 11, 2020.
13. On May 13, 2020, two days after the deadline for appealing from the Determination, the office of this Tribunal advised the Appellant that when the First Determination was cancelled, the appeal file had been closed. The Tribunal advised the Appellant that it would have to file a new appeal of the Determination. The office of the Tribunal afforded the Appellant until May 22, 2020, to file materials in support of an appeal of the Determination, and told the Appellant that it would have to request an extension to the statutory deadline for appealing the Determination, and provide reasons and argument in support of that request.
14. On May 14, 2020, the Appellant filed the following materials: the appeal form; written reasons and argument in support of the appeal; written reasons for requesting an extension of the appeal deadline to May 16, 2020; the Determination; and the Reasons for the Determination.
15. In the appeal form, the Appellant indicated that its grounds for the appeal of the Determination were that the Director erred in law, and that the Director failed to observe the principles of natural justice, in making the Determination.
16. Included in the Appellant's appeal submissions was a document from Corey Ogilvie, owner of the Appellant company, setting out the Appellant's written reasons and argument for the appeal. In this document, the Appellant sets out the following arguments:
  - (a) The Director erred in law by violating the Appellant's right, pursuant to the *Canadian Charter of Rights and Freedoms*, to examine witnesses;

- (b) The Director failed to observe the principles of natural justice by violating the Appellant's right to examine witnesses, and by describing the oral hearing as "ridiculous", both contrary to the Appellant's rights pursuant to the *Canadian Charter of Rights and Freedoms*.

17. Also, included in the Appellant's appeal submissions were written reasons and argument in support of the Appellant's request for an extension to the statutory appeal period. The Appellant explained that when it was told that the First Determination had been cancelled, and the Determination issued, it was not told that a new appeal would have to be filed. When the Appellant learned that a new appeal was necessary, the deadline for filing that appeal had already passed.

## ANALYSIS

### *Is the appellant entitled to an extension to the time for filing an appeal of the Determination?*

18. The Legislature has established a limitation on the time period for appealing a Determination. The relevant time periods are set out in section 112(3) of the *ESA*. A person served with a determination has 30 days from the date of service of a determination in which to file an appeal if the determination was served by registered mail.
19. In the present case, the Director sent the First Determination to the Appellant by registered mail on March 27, 2020.
20. The First Determination advised the Appellant as follows:
- Should you wish to appeal this Determination, your appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on May 4, 2020.
21. On March 31, 2020, the Appellant delivered an appeal of the First Determination to the office of the Tribunal.
22. On May 13, 2020, after the deadline had passed to appeal the Determination, the Appellant was advised that it was necessary to file a new appeal of that Determination, as the file related to the First Determination had been closed. The Appellant was told that because the appeal deadline had passed, it would have to request an extension to the deadline and provide reasons and argument in support of this request.
23. In filing the appeal of the Determination, the Appellant requested an extension of the statutory appeal deadline to May 16, 2020.
24. Section 109(1)(b) of the *ESA* provides that this Tribunal may exercise a discretion to extend the deadline to file an appeal notwithstanding that the statutory time period has expired.
25. In *Niemisto* (BC EST # D099/96), the Tribunal identified a non-exhaustive list of criteria that are to be satisfied by an appellant for that discretion to be exercised. These criteria include:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

26. I am satisfied that in this case there is a reasonable and credible explanation for the Appellant failing to file this appeal within the time limit. When the Appellant filed its appeal of the First Determination, it did not know that that First Determination would be cancelled, and the appeal file closed. When the Determination was issued, the Appellant was not told that it would be necessary to file a new appeal, fundamentally the same as the original appeal. When the Appellant was told that a new appeal from the Determination was necessary, the deadline for filing that appeal had already passed.
27. I am satisfied that the Appellant had a genuine and on-going *bona fide* intention to appeal.
28. Neither the respondent nor the Director has argued that they would be unduly prejudiced by the granting of an extension. On the facts of this case, and given that the Appellant filed the appeal of the within Determination the day after having been notified that it would be necessary to do so, I cannot see that the respondent or the Director would be prejudiced by an extension to the appeal period.
29. There are circumstances in which it will not be necessary for an appellant to satisfy all of the *Niemisto* criteria (see for example *Re: Aquilini et al*, 2020 BCEST 90). I am satisfied that on the facts of this case, and given that the Appellant has satisfied three of the *Niemisto* criteria, it would be an injustice to deny the Appellant an extension, and I exercise my discretion to grant the requested extension.

***Did the Director violate the rights of the Appellant under the Canadian Charter of Rights and Freedoms?***

30. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.
31. In the present case, the appeal form filed by the Appellant contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
32. In its written argument, the Appellant contends that the Director's error of law, and failure to observe the principles of natural justice, violated the Appellant's rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11*. The Appellant states that the Director "explicitly threatened my fundamental Canadian Charter Right of 'the right to examine witnesses'". The Appellant also alleges that the Director violated the Appellant's

*Charter* rights by characterizing the hearing as “ridiculous”. The Appellant makes specific reference to section 10 of the *Canadian Charter of Rights and Freedoms*.

33. Section 45 of the *Administrative Tribunals Act*, SBC 2004, c.45, provides that:

45 (1) The Tribunal does not have jurisdiction over constitutional questions relating the *Canadian Charter of Rights and Freedoms*.

34. Section 103 of the *ESA* applies section 45 of the *Administrative Tribunals Act* to this Tribunal:

103 The following provisions of the *Administrative Tribunals Act* apply to the tribunal:

...

(e) section 45 [*tribunal without jurisdiction over Canadian Charter of Rights and Freedoms issues*];

35. Ordinarily, then, I do not have the jurisdiction to rule on an appeal that is based upon an allegation of a violation of the *Canadian Charter of Rights and Freedoms*.

36. However, a closer examination of the Appellant’s appeal discloses that the section of the *Canadian Charter of Rights and Freedoms* referred to by the Appellant has no application in this appeal. Section 10 of the *Charter* affords certain rights upon arrest or detention, including the right to retain counsel. Clearly, as the Appellant was not subject to either arrest or detention, section 10 of the *Charter* has no application in the present case.

37. I find nothing else in the *Canadian Charter of Rights and Freedoms* that bears upon the Appellant’s appeal in this case, or that affords the Appellant rights that it contends were violated in this case.

38. In *Triple S Transmission Inc. o/a Superior Transmissions*, BC EST # D141/03, this Tribunal stated that a broad view should be taken of an appellant’s choice of grounds of appeal, particularly when that choice is made by persons untrained in the law. While the Appellant has referred to alleged violations of rights under the *Charter* that simply do not apply in this case, the Appellant has nevertheless referred to grounds that are within my jurisdiction, namely alleged error of law and alleged breach of natural justice. In keeping with the guidance of *Triple S Transmission*, I will examine whether the Appellant’s submissions establish a breach of these statutorily permitted grounds of appeal.

#### ***Did the Director err in law in making the Determination?***

39. In its appeal submissions the Appellant alleges that the Director committed an error of law in making the Determination. More specifically, the Appellant alleges that the Director “threatened my fundamental *Canadian Charter* Right of the ‘right to examine witnesses’”. The Appellant alleges that during the hearing, after two witnesses had already testified on behalf of the Appellant, the Director threatened to disallow further witnesses, and stated that “if what I get is what I heard from the last two, then I’m gonna shut it down.”

40. Ultimately, the Director permitted four witnesses, and the Appellant’s representative, to present evidence on behalf of the Appellant.

41. This Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

42. The only legislation referred to by the Appellant in support of the allegation that the Director erred in law is the *Canadian Charter of Rights and Freedoms*. As discussed above, the *Charter* did not afford the Appellant the right to examine witnesses in the hearing, and I find that the *Charter* does not apply to the within appeal.

43. I do not find that the Director misinterpreted or misapplied any other applicable legislation in making the Determination.

44. Similarly, I do not find that the Director misapplied any principle of general law.

45. I do not find that the Director acted without evidence. In the Determination, the Director thoroughly outlined the evidence presented by both parties at the hearing, including four witnesses and Mr. Ogilvie on behalf of the Appellant. The Director fully explained the assessment of that evidence, and the conclusions reached.

46. I find that the Director’s assessment of the facts was reasonable.

47. I find that the Director’s evaluation of the amount owing by the Appellant was correct in principle.

48. Based upon the foregoing, I do not find that the Director erred in law in making the Determination, and I dismiss this ground of appeal.

***Did the Director fail to observe the principles of natural justice in making the Determination?***

49. In its appeal, the Appellant alleges that the Director failed to observe the principles of natural justice in making the Determination.

50. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies, as follows:

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 #D 050/96).

51. Natural justice thus requires the Director to provide certain procedural protections to both parties, and to conduct investigations in an unbiased and neutral manner.
52. The Supreme Court of Canada stated, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992], 1 S.C.R. 623 at 636-37, that the test to assess whether an adjudicator has been unbiased is that of the ‘reasonably informed bystander’:
- The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. ... As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
53. The Appellant submits that the Director committed two acts that breached the principles of natural justice: first, the Director allegedly threatened to disallow testimony from a third and fourth witness in support of the Appellant, if the testimony of those witnesses was fundamentally the same as the prior witnesses; and second, the Director allegedly stated that “[t]his is a ridiculous hearing. It is absolutely ridiculous that this is going to a hearing.”
54. In its written submissions, the Appellant alleges that the Director’s “threat” to refuse to allow additional witnesses “caused me to change my questions and be in a state of confusion and fear for the remainder of the hearing.”
55. The Director, in reply submissions, responds to the allegations that the Director threatened to refuse further witness testimony, stating that “I deny telling the Employer that I would not permit his witnesses to give testimony that corroborated his testimony. I advised the Employer that in my view, he did not need to call four witnesses (in addition to himself) *if* they were all going to say the same thing.” [Emphasis in original]
56. In those same reply submissions, the Director further comments on the allegation that the Director described the hearing as “ridiculous”, stating that “[t]he Delegate also denies the Employer’s claim that the Delegate characterized the hearing as ‘ridiculous’ and therefore made up her mind in advance of the hearing. ... With respect to the Employer’s assertion that the Delegate made up her mind before hearing all of the evidence, I submit that the Determination stands on its own merits.”
57. In response to the Director’s reply submissions, the Appellant purported to tender a 59 second recorded audio file, apparently made during the hearing. The Appellant had not previously tendered this file in support of its appeal and had not made the Tribunal or the other parties aware of its existence.
58. In reply to the presentation of the audio file tendered by the Appellant, the Director advises that “[a]t the hearing of this matter, I advised both parties that the Branch did not record hearings and that parties were



not permitted to do so .... Nevertheless Mr. Ogilvie recorded all or part of the proceedings without my knowledge ....”

59. I know nothing of the provenance of the audio file tendered by the Appellant. There is no evidence before me that establishes that this short excerpt was, in fact, from the hearing, or that the excerpt is unmodified. I know nothing of the broader context of the content of the audio file. Moreover, I consider it improper that the Appellant surreptitiously recorded the proceedings of the hearing without disclosing to the parties that he was doing so, after having been told not to. For these reasons, I decline to consider this audio file.
60. I will, nevertheless, examine whether the comments of the Director, if they were in fact made as alleged by the Appellant, constitute a failure to observe principles of natural justice.
61. The seminal decision of this Tribunal regarding allegations of unfairness or bias is the decision in *Re: Milan Holdings Inc.*, BC EST # D559/97. In that case, the Director issued a determination following a hearing. In that determination, the Director described ongoing investigations into the conduct of other employers. The Director indicated that, based upon those other investigations, he was satisfied that “...there are at least the equivalent of 500 full-time non-union workers that at the time the audit began were not receiving overtime or other minimum’s [sic] set out in the [Act].” The Director went on to state that “[a]t the time the audit began, there was almost complete non-compliance with the overtime provisions of the [Act] in the non-union side of the industry.”
62. The Tribunal in *Milan* questioned whether the Director’s comments in the determination regarding the conduct of other employers gave rise to a reasonable apprehension of bias on the part of the Director. The Tribunal stated:
- In my view, a reasonable person, having read the above statements, all reproduced from the Determination, might well conclude that the Director’s delegate had determined, on the basis of other information disclosed during the course of a much wider investigation, that non-union firms (such as Milan) were regularly avoiding their obligations under the *Act* and were able to do so because their employees would not complain for fear of retaliation. ...
- In my opinion, a reasonable person might well conclude that the Director’s delegate approached the Woodley complaint with something less than a fully open mind. Woodley’s claims was for, *inter alia*, unpaid overtime wages. Woodley’s alleged employer, Milan, was a non-union contractor in the concrete placing and finishing industry. The Director’s delegate had, apparently, already concluded that such contractors virtually never complied with the overtime provisions of the *Act* and that would-be complainants had “well-grounded” fears of retaliation. In these circumstances, I am satisfied that Milan had a reasonable apprehension as to the neutrality of the Director’s delegate.
- I wish to reiterate that I am not satisfied that there was actual bias on the part of the Director’s delegate; his failing, if one chooses to characterize is as a failing, was in the use of intemperate language – language that could give rise to a reasonable concern as to his neutrality.
63. If, as the Appellant alleges, the Director used language suggesting that no further witnesses would be permitted, I do not find that this language rises to the level of “language that could give rise to a reasonable concern as to his neutrality”, as described by this Tribunal in *Milan*. There was nothing in the

Director's language that suggests prejudgment in favour of either party. I do not believe that a reasonable person would perceive bias on the part of the Director.

64. It must also be noted that in the end the Director permitted the testimony of all of the Appellant's proposed witnesses. I am satisfied that the Director properly considered and weighed the evidence of all of those witnesses in reaching the Determination.
65. I turn now to the allegation that the Director described the hearing as "ridiculous". The Appellant alleges that the Director stated that "[t]his is a ridiculous hearing. It is absolutely ridiculous that this is going to a hearing." The Director does not deny using the term "ridiculous" but argues that use of the term does not demonstrate that the Director had prejudged the matter. Unfortunately, neither the Appellant nor the respondent has provided me with sufficient context to appreciate why the term was used. Whatever reason the Director had for using the term "ridiculous" to describe the hearing, I do not consider this to be appropriate language for a trier of fact. The Director was acting in a quasi-judicial capacity, and ought to have demonstrated the respect that was due to the hearing process. Nevertheless, I do not believe that a reasonable person would perceive that this demonstrated bias on the part of the Director, and I do not find that the Director's use of this language constituted a breach of the principles of natural justice.
66. I am satisfied that the Director afforded sufficient opportunities to the Appellant to know the case against it and the right to present its evidence. The Director conducted a thorough hearing and afforded both the Appellant and the Employee the opportunity to present evidence, including the evidence of witnesses. Following the hearing, the Director weighed the evidence presented by both parties, and rendered a reasonable Determination based upon that evidence. I am satisfied that the Director's comments, though intemperate, do not disclose a bias in favour of either party. Consequently, I do not find that the Director failed to observe the principles of natural justice in making the Determination, and I dismiss this ground of appeal.

## CONCLUSION

67. On the facts of this case, I am prepared to exercise my discretion to extend the deadline for the filing of the within appeal.
68. The *Canadian Charter of Rights and Freedoms* does not apply, as alleged by the Appellant, to the facts of this appeal.
69. I do not find that the Director committed an error of law in making the Determination.
70. I do not find that the Director failed to observe the principles of natural justice in making the Determination.

**ORDER**

71. Having reviewed the Determination, the Appellant's submissions filed with the appeal, the Director's response, and the parties' counter-submissions, I dismiss this appeal, and confirm the Determination pursuant to section 115(1)(a) of the ESA.

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**James F. Maxwell**  
**Member**  
**Employment Standards Tribunal**