Citation: Joseph Theriault (Re)
2021 BCEST 106

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Joseph Theriault
(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: Ryan Goldvine

FILE NO.: 2021/079

DATE OF DECISION: December 23, 2021

Employment Standards Tribunal
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British Columbia

DECISION

SUBMISSIONS

Joseph Theriault	on his own behalf
Colin Gelinas	delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the "*ESA*") by Joseph Theriault (the "Appellant") of a determination made by Colin Gelinas, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on August 23, 2021 (the "Determination").

2. The Determination found that the Appellant was not an employee of the respondent, Harcharan Sekhon (the "Respondent"), and ceased investigating pursuant to section 76(3) of the *ESA*.

3. The Tribunal received the appeal on September 13, 2021 (the "Appeal"), seeking to overturn the Determination on the bases that the Director erred in law; that the Director failed to observe the principles of natural justice; and that evidence has become available that was not available at the time the Determination was being made.

4. The Appeal was filed within the statutory appeal period.

5. The Tribunal sought, and received, submissions from the Director in response to the Appeal, and also received a reply submission from the Appellant.

ISSUES

6. The issues before the Tribunal are as follows:

    a. Did the Delegate err in law in issuing the Determination concluding that the Appellant was not an Employee under the *ESA*?

    b. Did the Delegate fail to observe the principles of natural justice in the manner in which the investigation was conducted, and the Determination issued?

    c. Has the Appellant presented "new evidence" that was not available at the time the Determination was made that could have led to a different conclusion on a material issue in the Determination?

THE DETERMINATION

7. The Determination resulted from an investigation by the Delegate following a complaint by the Appellant that, contrary to the *ESA*, the Respondent failed to pay him wages, overtime, and also made unauthorized

deductions (the "Complaint"). In the Determination, the Delegate found that the Appellant was not an employee, and thus, was not entitled to redress under the *ESA*.

8. The Respondent did not participate in the investigation of the Complaint, and in fact refused service of all documents. Accordingly, the Determination is based entirely on the evidence of the Appellant, and the Delegate's assessment thereof. The Respondent also refused service of the Tribunal's correspondence related to this Appeal.

9. In his complaint submission, the Appellant initially indicated he was to be paid $35 hourly but was "[o]nly paid minimal amounts", claiming to be owed $30,000 in wages. He then asserted later in the complaint submission that he was "[h]ired on a cash deal agreement at the rate of $20 hourly including rent and meals."

10. The Delegate first spoke to the Appellant by phone on April 26, 2021, during which the Appellant clarified that the hourly rate he put on the complaint submission was not actually what had been agreed to between himself and the Respondent. Instead, he asserted that he was to be paid a "contractor rate" which he clarified on a later call to mean that there was an agreement he would be paid one half of the profit upon the Respondent's sale of the property.

11. The Appellant's work for the Respondent came in two phases. The engagement began with work repairing flood damage, which included the assistance of a labourer ("N.L.") and which was followed by a more extensive renovation of the property. The Appellant confirmed that the work relating to the flood repair was completed and fully paid, and was not related to the present Complaint, and that N.L. ceased working at the property prior to the renovations commencing.

12. Although the Delegate acknowledged that the Appellant later revised his position to assert that he was in fact to have been paid an hourly rate of $35 per hour, the Delegate found the former assertions to be more consistent with the rest of the submissions from the Appellant, including the fact that the Appellant filed for, and renewed, a Builder's Lien against the property in the amount of $60,000.00, and the fact that the documentary evidence submitted by the Appellant included an email exchange with a real estate agent, attaching comparables for other recently sold properties in the Logan Lake area.

13. The Appellant's own written submissions dated April 29, 2021, also indicate "[the Respondent] would split the house valuation profit once it's sold." He then continues: "Renovations evaluated by Jody Johnston REMAX increase the house value of $145,000.00 Dollars. Business wage agreement to split the profit 50/50 which equals to $72,500.00 dollars for my wages rate."

14. The Delegate also confirmed that although the Appellant temporarily relocated to Logan Lake while he was engaged in the renovations for the Respondent, he normally resided in Merritt and intended to return once the renovations were complete.

15. The Delegate confirmed through his discussions with the Appellant and the Appellant's written submissions that for the most part, the Appellant determined the days he worked and his start and end times, subject to specific requests from the tenants at the property. The Delegate also determined that the Appellant decided how and in what order to perform the renovations, sometimes subject to the weather, and other times subject to the availability of materials being delivered by the Respondent.

16. The Delegate also confirmed through his discussions with the Appellant and the Appellant's written submissions that most of the tools that were used belonged to the Appellant. The Delegate notes an exception to this being a tile cutter which the Respondent purchased for the use of the Appellant. The Delegate confirmed that the Appellant purchased many of the less expensive materials such as "painters tape and paint brushes, screws, liquid nails, [etc.]", many of which were reimbursed by the Respondent. while the Respondent purchased the larger and more expensive materials and fixtures.

17. The Delegate found that where the Appellant was not qualified to perform the specific work required, he would contact trades and coordinate the dates and times of their work.

18. In October 2019, the Appellant was invited to move into the property he was renovating after the tenants left, and he remained living in the property until January 2020. He did not pay rent, nor did he pay for utilities while living in the property.

19. In February 2020, the Appellant filed a Builder's Lien against the property, and renewed the Lien in 2021.

20. The Delegate reviewed and considered all of the materials provided by the Appellant. Although the Appellant offered to provide photos and witness testimony to verify the work performed, the Delegate found this to be unnecessary, as there was no dispute as to the nature or extent of the work performed.

21. The Delegate determined that an employment relationship, as defined by the *ESA*, must exist for the *ESA* to apply. The Delegate examined the entire context of the working relationship, along with the definitions in the *ESA*, in order to determine whether the relationship between the Appellant and Respondent was one that the Employment Standards Branch has jurisdiction over.

22. The Delegate looked at a number of factors which typically indicate whether someone is more likely to be an employee (covered by the *ESA*) or an independent contractor (not covered by the *ESA*). These include: whether the worker provides their own equipment or supplies; how compensation is established; whether the individual's compensation carries the chance of profit or risk of loss; whether the service is being provided on a short-term limited basis or ongoing; and whether the individual provides similar services to other parties.

23. The Delegate acknowledged that no single factor was determinative, but that the factors must all be looked at together, in context.

24. Although the Appellant's evidence regarding his compensation did not remain consistent throughout, the Delegate accepted his earlier evidence, which was that the agreement negotiated between himself and the Respondent was that they would share, 50/50, the profit from the sale of the house after the renovations were complete. The Delegate noted that, had an hourly rate instead been what was negotiated, there would have been no reason for the Appellant to reach out to a real estate agent for the purpose of valuing the property. The Delegate found this to be clear evidence of a chance of profit or risk of loss on the part of the Appellant at all material times.

25. As indicated above, the Delegate also accepted the Appellant's evidence that his work in Logan Lake for the Respondent was temporary in nature, and that he planned to return to Merritt once the work was complete.

26. The Delegate also accepted the Appellant's evidence that many of the tools to do the work were his own from his previous contracting business.

27. The Delegate also found that the fact that the Appellant filed a Builder's Lien against the property to be indicative of how the Appellant perceived the relationship between the parties, consistent also with his agreement to share in the profits of the sale of the property.

28. Based on all of these factors together, the Delegate determined that the Appellant was not an employee as that term is defined in the *ESA*.

ARGUMENTS

Appellant's Appeal Submissions

29. The Appellant submits that the Determination should be overturned on the bases that:

    a. The Director erred in law;

    b. The Director failed to observe the principles of natural justice; and

    c. Evidence has become available that was not available at the time the Determination was made.

The Director erred in law

30. The Appellant submits that he was first hired at an hourly rate of $35 per hour for flood repair, and subsequently at $70 per hour to complete the entire home renovations. The Appellant asserts that the documents provided indicating a record of his hours worked confirms this.

31. The Appellant asserts that the Director erred in law by determining he was not an employee "in the absence of any documentary evidence." The Appellant refers to section 81 of the *ESA* and asserts that there is no jurisdiction to "cancel the investigation and declare me self-employed without concrete evidence." The Appellant also asserts that in some fashion the Determination was "influenced by third party Work Safe BC investigators."

32. The Appellant asserts that the Director failed to apply the common law test relating the definition of "Employee", stating that: "The Legislation and other Acts stipulates that who ever works in British Columbia must get paid."

33. The Appellant's submission also makes a number of assertions with respect to the findings of fact, disagreeing with the Delegate's conclusions with respect to the direction of work, ownership of tools, and chance of profit and risk of loss, and asserting there was no evidence to support these findings.

34. The Appellant asserts that the Director has misinterpreted or misapplied sections 81, 1 and 8 of the *ESA*; performed a biased investigation; and acted without any evidence.

35. It appears on the face of the Appellant's submissions that section 81 was breached rests on his allegation that there was no jurisdiction to discontinue the investigation once the Delegate concluded the Appellant was not an employee.

36. The Appellant's assertion that section 1 was misinterpreted or misapplied rests on his assertion that the Delegate failed to apply the proper test for the definition of "employee" on the facts before him.

37. While the Appellant also asserts that section 8 of the *ESA* has been misinterpreted or misapplied, section 8 simply prohibits an employer from making false representations. He asserts this section was breached by "disputing uncontested evidence." It is unclear how the Appellant asserts this section applies to the Respondent, as there do not appear to be allegations of false representations by the Respondent made out in the Complaint.

38. The Appellant also makes reference to a claim for employment insurance benefits, asserting that: "Mr. Gelinas and the Director strikes down Employment Insurance decision and contradicts the Employment Insurance Act. Mr. Gelinas and the Director have no authority or jurisdiction to oppose/defy/contradict the Employment Insurance decision that declared me employee of the Sekhon's. They are breaching federal jurisdiction."

39. I interpret this submission to be asserting that the Appellant had been declared to be an employee for the purposes of the *Employment Insurance Act*, and accordingly should be deemed to be an employee in this forum as well. The Appellant has not provided any documents, either to the Delegate or to this Tribunal, relating to any claims in other forums.

The Director failed to observe the principles of natural justice

40. The Appellant asserts that the Director failed to observe the principles of natural justice by failing or refusing to contact certain potential witnesses and failing to review certain evidence in reaching the Determination.

41. Specifically, the Appellant asserts that the Delegate failed to interview "key witnesses" including the former tenants who lived at the property, and the Respondent's wife.

42. The Appellant also asserts, in his final reply to the Tribunal, that the Delegate failed to interview various contractors, who he says would confirm that it was the Respondent who hired them, and not the Appellant.

Evidence has become available that was not available at the time the Determination was being made

43. The Appellant asserts in a submission subsequent to the original appeal, that he "will provide [a] letter of demand made to the Director of Employment Standards and letter of demand made to Work Safe BC Board, Work Safe BC Wage Unit and Work and Work Safe Wage Unit Investigator. Third party influence the Determination Report requesting to stop the Investigation (Work Safe BC Investigator)."

44. Accompanying the Appellant's appeal submission are a fax cover sheet and letter to the Employment Standards Branch which, on its face, purports to be a freedom of information request relating to

interactions between the Employment Standards Branch and WorkSafe BC relating to the Appellant's claim.

45. I note the Appellant has not provided any documents relating either to WorkSafe BC registration or a claim under their jurisdiction.

46. The Appellant also provided with his appeal a typewritten version of the Appellant's record of hours worked dated April 29, 2021, that had previously been provided to the Delegate.

Delegate's Response Submissions

Error of law

47. The Delegate asserts that all evidence was considered, evaluated, and weighed, and that findings of fact were made based on the evidence provided.

48. The Delegate directs this Panel to case notes and correspondence from the Appellant to support the factual basis for his findings, contrary to the Appellant's assertions that these facts were false.

49. The Delegate asserts that he considered the broad nature of the definitions of employee and employer, both under the *ESA* and in various common law tests, and asserts that his finding that the Appellant was not an employee was correct at law.

50. In reviewing the Determination again, the Delegate conceded that a "worker" can file a Builders Lien, and that this factor "does not necessarily have relevance." He confirms, however, that this factor was not determinative in reaching his conclusion, and that there was significant other evidence set out in the Determination supporting the finding that the Appellant was not an employee for the purposes of the *ESA*.

Natural Justice

51. In response, the Delegate confirms and points to his several attempts to get in touch with the Respondent, including by phone and regular and registered mail.

52. As it was undisputed that the Appellant performed the work at issue, namely the renovations at 182 Ponderosa Ave., the Delegate determined that it was unnecessary to contact the tenants or confirm that he performed the work.

53. The Delegate asserts that he made all attempts to gather the information necessary for him to complete the investigation, and observes that the Appellant was given numerous opportunities to give evidence, both orally and in writing, which he availed himself of.

54. Although the Appellant asserts that the Delegate was biased, the Delegate submits that there is no evidence provided by the Appellant to support this assertion. The Delegate confirms that all evidence was considered objectively and without bias.

New Evidence

55. The Delegate draws my attention to the test for admitting new evidence on appeal set out in *Davies et al.*, BC EST # D171/03.

56. The Delegate confirms he received a request from WorkSafe BC, but deferred any response to the request to Tyler Siegmann, a Regional Manager at the Employment Standards Branch. The Delegate confirms that he made no disclosures to WorkSafe BC, nor did he respond to any inquiries from them. He also asserts that no matters relating to WorkSafe BC were considered as part of his Determination.

57. The Delegate also points out that the Appellant sought to introduce new evidence at several points within his Appeal submission, wherein he made assertions of fact that were either not made prior to the Determination being issued, or which directly contradict the evidence given during the Delegate's investigation. He provides an example of this as the Appellant's assertion that he was hired to perform the renovation work at an hourly rate of $70.00 per hour. This conflicts with both the oral and written evidence provided by the Appellant during the investigation.

58. The Delegate asserts that the new evidence set out in the Appeal submission that seeks to contradict the evidence set out in the Determination, is evidence the Appellant could have provided during the investigation but did not. The Delegate submits that an appeal such as this is not an opportunity to present additional or different evidence that could have been submitted during the investigation, and, accordingly, such evidence cannot be considered.

Appellant's Reply Submissions

59. The Appellant asserts that the Delegate's "case notes and phone conference are not documentary evidence or written submission. The case notes taken by [the Delegate] have never been disclosed has [*sic*] evidence to me and to EST. Time limitation to submit case notes his [*sic*] long overdue and inadmissible."

60. The Appellant asserts that he does not agree with the Delegate's interpretation of the evidence as set out in the Determination, and asserts that there is no documentary evidence that he is contradicting his own evidence. The Appellant asserts that the findings of fact made by the Delegate demonstrate his bias against him.

61. The Appellant points to the Delegate's findings with respect to how and in what order the work was performed, and how the hours and days of work was scheduled and indicates that his September 13, 2021 letter (the Appeal) "indicates the opposite." He asserts that had the Delegate interviewed the tenants, they would have "confirmed that [he] did set [his] work schedule with them with the approval of [the Respondent]."

62. The Appellant disputes the Delegate's submission that he used the common law test for determining employee status, asserting that "In order to declare me not an employee there must be signed written contract. No documentary evidence that I did sign contract."

63. The Appellant highlights the Delegate's concession that his reference to the filing of a builders lien was not necessarily relevant, and submits that the Delegate did, indeed, place great emphasis on this factor.

64. The Appellant then reiterates the importance of the Delegate's failure to interview certain witnesses. The evidence he submits would have been discovered or confirmed through further interviews would have included the following:

a. That the Respondent (and not the Appellant) hired [R.H] to replace the hot water tank;

b. That the Respondent personally knows and hired the electricians to install certain light fixtures (and that the Appellant did not hire them);

c. That an agreement was made with the tenants as to the work schedule and that the Appellant did not set his own work schedule without consulting with them;

d. That the neighbours would have confirmed that the Appellant did all of the renovations inside, and that the Respondent hired others to dispose of waste, install gutters, and paint the exterior of the property;

e. That the value of the house increased by almost $150,000.00.

65. In response to the Delegate's assertion that the Appeal is the first time the Appellant is seeking to assert that his hourly rate was $70.00 per hour, the Appellant recounts a phone conversation in which the Delegate advised that he could not "breakdown the builder's lien in hourly rates, [he] can not do that under the [*ESA*]." The Appellant asserts that the $35.00 hourly rate related to the flood renovations, and that "[t]he $60,000 dollars builder's lien equals to hourly rates of $70 dollars hourly (did not calculate overtime and vacation pay)" and asserts "[t]his his [*sic*] fair rate that represents the type of work accomplished and justified by the increase of the house value."

66. With respect to the WorkSafe BC correspondence and privacy concerns raised, the Appellant relies on the Delegate's confirmation that he received a letter from WorkSafe BC and the fact that this letter was received before the Determination was issued, to infer that it was a factor in the decision-making.

67. The Appellant's submission goes on to make several factual assertions relating to written correspondence and other communication between himself, the Employment Standards Branch, and WorkSafe BC; however, it is not clear what conclusions should be drawn from these, nor how they relate to the Determination itself or his grounds of appeal other than to assert that he is "very suspicious that Work Safe BC Field officer influenced the Determination report."

68. In conclusion, the Appellant asserts "[he] think[s] [the Delegate] his [*sic*] lying and withheld evidence" and asks this Panel to order $60,000.00 for unpaid wages plus interest, and $15,000.00 for lost personal effects and tools. He then asserts that "[the Delegate's] investigation his [*sic*] wrongfully based on the presumption that [he] had a contract, indicated in his November 24, 2021 letter."

ANALYSIS

69. I find I must first address the Appellant's assertions with respect to the section 112(5) Record (the "Record"), and, specifically, the Delegate's case notes. I accept that these are notes taken by the Delegate

contemporaneously with his phone conversations with the Appellant, and have no reason to believe they do not accurately reflect what was said.

70. Although the Appellant asserts that these are “not documentary evidence or written submission,” he does not provide any basis for this proposition. He asserts that these “have never been disclosed” and that the “[t]ime limitation to submit case notes his [*sic*] long overdue and inadmissible.”

71. Respectfully, I cannot agree with this assertion. The Delegate’s case notes form part of the Record that was disclosed to the Appellant on October 14, 2021.

72. The Tribunal’s covering letter invited submissions on the completeness of the record from the Appellant and gave him until October 28, 2021 to respond.

73. The Appellant responded on October 14, 2021, confirming receipt of the documents. He goes on in his email confirmation that he takes issue with “recording [their] conversation without [his] consent” and “taking 50 % of [his] wages on section B page 2 plus no allowance for overtime and statutory holidays.”

74. The Appellant made no further submissions regarding the completeness of the record, nor did he assert at that time that any of the records of his conversations with the Delegate were incomplete or inaccurate.

75. Accordingly, I find no basis to either exclude or discount the accuracy of the workflow notes taken by the Delegate during his investigation.

Error of law

76. The 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 CanLII 6466 (BC CA), [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.

77. The Appellant identifies sections 1, 8 and 81 of the *ESA* that he says were improperly applied by the Delegate.

78. The Appellant points to section 81 and asserts that there was no jurisdiction to “cancel the investigation … without concrete evidence.” Section 81, however, simply sets out the notice requirements relating to a determination once it is made. This section does not speak to jurisdiction, nor to any requirements relating to an investigation under the *ESA*.

79. The Appellant also asserts that section 8 has been misapplied. Section 8 prohibits employers from inducing someone into employment through misrepresentations relating to the work. The Appellant asserts this section was breached by "disputing uncontested evidence."

80. It is unclear how the Appellant asserts this section applies to the Respondent, as there do not appear to be allegations of false representations by the Respondent made out in the Complaint, nor was this section canvassed by the Delegate.

81. In my view there is no basis for an assertion that this section has been misapplied, or is in any way relevant to the Complaint.

82. In the present matter, it is the Delegate's Determination with respect to section 1, and his determination that the Appellant was not an employee under the *ESA*, that underlies this appeal.

83. Section 1(1) of the *ESA* contains the following definitions:

> **"employee"** includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;
>
> **"employer"** includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;

84. The Appellant says the Delegate did not apply the common law test for whether he was an employee or an independent contractor. He takes the position that the Delegate "made up fictional evidence" and notes that "[m]any of the of the statements made in the Determination report are wrong/false." The Appellant says that the Delegate challenged "indisputable evidence." He further concludes that "[t]he Legislation and other Acts stipulates that who ever works in British Columbia must get paid."

85. While the Appellant clearly disagrees with the conclusions of the Delegate in the Determination, much of the basis for this is founded on his disagreement with many of the Delegate's findings of fact. As the Respondent did not participate, the only bases the Delegate had on which to make these findings of fact were on the evidence provided by the Appellant himself.

86. In reaching his conclusion that the Appellant was not an employee, the Delegate appropriately looked to the definitions in the *ESA*, and the various factors set out in various common law tests for determining the question of whether one is an employee or independent contractors.

87. The Appellant's underlying argument, which he has articulated more than once, is essentially that he did the work, and should be paid for that work. The Appellant reiterated this position in a July 5, 2021 email to the Delegate, in which he asserted that "any working in BC either Worker or Independent Contractor must get paid."

88. In *Cove Yachts (1979) Ltd.*, BC EST #D421/99 ("*Cove Yachts*"), the Tribunal listed a number of factors as being potentially relevant to determining whether a person is an employee or an independent contractor:

- the actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- right to work for more than one "employer";
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term

89. The Appellant's reference to *North Delta Real Hot Yoga Ltd.*, BC EST # D026/12, and the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983 (*Sagaz*) and subsequent submissions, suggests he does not disagree with the various factors set out, only with how they were applied by the Delegate.

90. The factors considered by the Delegate in the Determination included several of those enumerated in *Cove Yachts*, consistent with the non-exhaustive list from *Sagaz*, including whether the worker provides their own equipment and supplies; how the worker's pay is set; whether the worker's compensation includes a chance of profit or risk of loss; whether the worker is providing a specific short-term service or there is an ongoing relationship; and whether the worker provides similar services to other parties.

91. The Delegate accepted the evidence of the Appellant that he owned the majority of the tools and equipment, though certain items including a tile saw, as well as fixtures and major supplies, needed to be purchased by the Respondent.

92. The Delegate found that after the Appellant's own renovation business closed, the Appellant completed a number of short-term jobs for various persons, including the renovation work for the Respondent. He accepted the Appellant's evidence that he was engaged by the Respondent to renovate the Ponderosa Ave. property in anticipation of it being sold. Although the Appellant in his submissions suggests the work was "ongoing" he did not suggest that once the renovations were complete, there would be other work to be performed for the Respondent elsewhere. The Delegate also noted that the Appellant advised that he had anticipated that once the work for the Respondent was complete, he would return to Merritt.

93. The Delegate found that there was very little control or direction by the Respondent over the work of the Appellant. He found that the Appellant made decisions around what work to complete, how to complete it and when to complete it. The Delegate observed that "[w]hen [the Respondent] would have a suggestion about a certain aspect of how to complete the work, they would have a discussion about what to do and would make a decision together."

94. The Delegate did, however, accept that on occasion the hours of work and order in which the work was being performed, was affected by other factors, including the weather, specific requests of the tenants, and by when the Respondent was able to deliver materials.

95. Finally, the Delegate accepted the initial evidence that the agreement between the Appellant and Respondent was that the Appellant would be paid approximately half of the profit once the renovated property was sold. This is supported not only by the Appellant's own assertions, but also the evidence that the Appellant sought out a realtor to assist with valuing the renovated property for sale. From this, the Delegate concluded that the Appellant took a substantial risk in agreeing to this structure of compensation. The Delegate concluded that "[t]his type of compensation agreement is indicative of two parties entering a joint venture, trying to profit off of the renovation of a property, where [the Appellant] provided the skill and knowledge and [the Respondent] the finances."

96. The *ESA* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

97. As indicated above, the Appellant disputes many of the findings of fact made by the Delegate. For example, the Appellant asserts on appeal that he was hired "to complete entire house renovations $70 dollars hourly." The Appellant disputes the finding that he set his own hours of work and work schedule on the basis that he required the consent of both the tenants and the Respondent in order to perform the work. I note this is not inconsistent with the Delegate's findings that, with certain exceptions, the hours of work and order in which it was performed were largely up to the Appellant.

98. The Delegate's notes of his June 9, 2021 conversation with the Appellant, who the delegate refers to as "C", are also consistent with his findings, and not necessarily inconsistent with the Appellant's underlying assertions:

> C decided his work schedule, start and end time
> If it was up to him he would have worked 12 to 14 hour days to complete the reno faster, less time = more $$, new job

> out of respect to the tenants C only worked about 8 to 10 hr days. Some days he did not work at all when tenants requested – 2 days of peace/quiet.
>
> Did not need to consult/seek permission from Sekhon of when to work, up to him
>
> C decided which part/task of the project he would work on. Sekhon didn't tell him the order or when to do a certain task. This included when there was inclimate weather or C wanted to take a break from 1 task but not to stop working altogether
>
> C decided when to take a day off. Sekhon never told him when and when not to work.

99. The Appellant asserts that he did not provide "all the tools" for the renovations and seeks to emphasize the nature and extent of the tools and equipment provided by the Respondent; though he does not dispute that he brought tools with him from his previous company, Trojan Roofing & Exteriors Inc.

100. The Delegate's notes of his June 9, 2021 conversation with the Appellant sets out with some specificity that "[a]ll tools used belonged to C (Dewalt and Makita drills, saws, safety gear for roofing, hammer, nail gun, compressor) except for the tile cutter/wet saw. Sekhon bought that used."

101. The Appellant asserts that his wage rate was/should have been $70.00 per hour. The Delegate instead found that the payment arrangement agreed upon between the Appellant and Respondent was that he would share in the profits resulting from the ultimate sale of the house after the renovations were complete. The Delegate's finding in this regard was not fabricated, but was instead taken directly from his conversations and correspondence with the Appellant.

102. Although later in the investigation process the Appellant asserted that there was an agreed-upon hourly rate of $35.00 per hour, both the notes taken by the Delegate, and the Appellant's written submission dated April 29, 2021, assert that "[the Respondent] would split the house valuation profit once it's sold." A selection of the notes of the Delegate's telephone conversations indicate the following:

April 26, 2021:	- there was no agreement to pay you an hourly rate, rather was to be paid a contractor rate upon completion of the renovation and sale of the property ***did not define "contractor rate" other than it could be as much as half the increase in value - Says pay was not agreed upon, but complaint form says $35/ hr and $20 per hour plus room and board
May 13, 2021:	Agreed to share profits with C. C insists he is entitled to his share of increase to market value
June 9, 2021:	Never was an hourly rate discussed, 50/50 was discussed at Ponderosa the 1st time they went to Ponderosa Wrote $35/hr on complaint b/c was not in a good state of mind, fearful, angry, confusion due to threats of harm from Sekhon and others. The $35/hr nor the $20 plus meals and rent was ever agreed to. Only $20/hr for Lamb $35/hr was during flood repairs only, After Lamb was fired then agreement changed to 50/50. C – confused about timing and chronology.

103. The Appellant disagrees that there was an opportunity for profit or loss on the basis that "[t]here was no signed contract/document between [the Appellant] and the [Respondent] for profit sharing arising the selling of the rental house. Based upon no documentary evidence the Delegate and the Director presumed [the Appellant] add profit or loss during [his] employment." (*sic*)

104. In weighing the evidence, the Delegate acknowledged the inconsistencies between the Appellant's earlier evidence above, and his later assertions that his wage rate was either $35.00 per hour or $70.00 per hour as calculated by dividing the number of hours asserted into the $60,000.00 the Appellant claims he should have received. I also accept that to the extent that the Appellant sought to have the Delegate determine his wage rate by dividing the share of profit into the hours worked, and the Delegate rejected this method of calculation, such a retrospective method of calculation of wages is not an appropriate method of determining a wage rate under the *ESA*.

105. In his final submissions, the Appellant again reiterates his view that "[i]n order to declare [him] not an employee there must be signed written contract." The Appellant does not provide any support for this assertion, nor do I find a written contract to be a prerequisite for making a determination under the *ESA* as to whether someone is an employee or an independent contractor.

106. I do not find that the Delegate altered any facts or reached any conclusions without evidence to support them. I accept that the Determination clearly sets out the findings of fact made by the Delegate, and the bases for them are present in the Record. It is clear from the Determination that the Delegate applied those facts to the relevant factors accepted by this Tribunal in determining whether someone is an employee under the *ESA*.

107. The Delegate did concede that he considered "one factor that does not necessarily have relevance." In the Determination, the Delegate made the following finding:

> Lastly, Mr. Theriault filed, and renewed, a Builder's Lien against Mr. Sekhon, which is a process in place for contractors to place liens against another for breach of a contract. As per the Builders Lien Act, its purpose is to provide statutory protection for payment for work and material provided on a construction project. By filing the lien, I find Mr. Theriault portrayed himself to be a contractor, owed payment for services and materials. Again, while this is not determinative, it is yet another indication of how Mr. Theriault perceived the relationship between the parties as not being an employment relationship. The compensation claimed on the lien is also consistent with the amount Mr. Theriault says he was owed as part of the agreement to split the profits.

108. The Delegate confirmed in his submissions to this Panel that he "became aware that the reference to the use of the Builder's Lien Act as being indicative of a contractual relationship was not entirely correct," recognizing that a worker can, in fact, file a builders lien. The Delegate submits, nevertheless, that this was one of several factors considered, and clearly noted in the Determination that this factor was not determinative.

109. I agree that while the Delegate may have made an assumption with regard to this factor that is not necessarily required by the *Builders Lien Act*, that the remaining factors, as reviewed and applied in the Determination, were appropriately considered and sufficient to support the conclusion that was reached, namely, that the Appellant was not an employee under the *ESA*.

110. While I appreciate the Appellant's perspective, that "any working in BC either Worker or Independent Contractor must get paid," only work performed as an employee under the *ESA* is work that the Employment Standards Branch, and this Tribunal, have jurisdiction over. This is not to say the Appellant has no redress to be compensated for the work he has done, only that this is not the forum in which he can pursue that redress.

111. Having reached this conclusion, I will nevertheless address the remaining two grounds of appeal before me.

Natural Justice

112. The Appellant asserts that the investigation by the Delegate was biased. The Appellant also argues he has been denied natural justice on the basis that a number of individuals, "key witnesses", including the Respondent's wife, were not interviewed.

113. It is clear from the Determination, and the Record, that several attempts were made to involve the Respondent in the process. On the face of the Determination, the Delegate confirmed the following:

> Numerous attempts were made to include Mr. Sekhon in the complaint resolution process to no avail. Specifically, on May 5, 2021 attempts were made by telephone to the numbers on file. Letters were also sent on May 6, 2021 by way of registered mail and June 3, 2021 by regular mail to the addresses known.
>
> One of the purposes of the Act is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the act. Therefore, in the absence of any supporting evidence from Mr. Sekhon, I am issuing this Determination based on the information contained in the file and that provided by Mr. Theriault.

114. With respect to the Delegate's decision not to interview the former tenants of 182 Ponderosa Ave., the Delegate submits that it was undisputed that it was the Appellant who performed the work, and so the evidence the tenants would have given was not necessary to support the findings that were made.

115. As noted above, the Delegate submits that he "determined the necessary information required to complete the investigation and made all attempts to gather that information. [The Appellant] was provided with numerous opportunities to give his evidence, both in writing and orally."

116. To this last point, I note that the Appellant does not suggest he was not given sufficient opportunity to present his evidence or put his case forward.

117. Further, although the Appellant identifies others who were not interviewed by the Delegate, none of the evidence he says they would have provided would have materially impacted the Determination.

118. For example, the Appellant says: "The neighbors would have confirmed that I did all the renovations (Inside) and confirmed that Mr. Sekhon hired other individuals/worker's with dump trailer to dispose the waste" (*sic*). As noted earlier, there was no dispute that the Appellant performed the renovations.

119. The Appellant's April 29, 2021 submission to the Delegate sets out a list of individuals with contact information for most. The Appellant also indicates in his submission the reason for their inclusion on the list.

120. The Appellant indicates for most that they would provide evidence that the Appellant performed the renovations. Specifically: (summarized)

> Natural Gas Agent: Friends of Mr. Sekhon he can confirm I did all the renovations.
>
> Electrician: Most unprofessional trades I have ever seen in they blame the wire shortage on me (I can provide picture). … They charge Sekhon $3,500.00 for one day of work.
>
> Technical Safety BC: The neighbour called the safety authorities on me. Everything was rectified. Mr. Sekhon wanted to cut corners and not hire electrician or other professional trades.
>
> Previous Tenants: She visited the house when renovations are almost completed…She does not want to provide her contact information to your office.
>
> My current Landlord: … witness that I went to work everyday for Mr. Sekhon. … visited the house located 182 Ponderosa Ave., Logan Lake BC in December 2019. Witness of my entire renovation job.
>
> RCMP: The tenants called the police on the exterior painter this is how I met constable [x].
>
> Next Door Neighbours are also witness to my renovations.

121. Given that the fact the Appellant performed the work was not in dispute, no opportunity to present his case has been lost, and no unfairness has arisen from the Delegate's decision not to interview the individuals involved. Further, although the Appellant disputes the assertion of the labourer N.L. that he did not perform any work, I find that nothing turns on this dispute with respect to the determination that the Appellant was not an employee under the *ESA*.

122. The Appellant asserts that "[the Delegate] and the Director failed to obtain critical evidence in making the Determination" but does not identify what that evidence would have been, or how it would have supported a finding that the Appellant was an employee.

123. With respect to the direct allegations made by the Appellant that the Delegate was biased against him, I agree with the Delegate that there has been no evidence of bias presented.

124. Accordingly, I find that there has been no failure to adhere to the principles of natural justice in the present case.

New Evidence

125. This Tribunal has established guidance for this ground of appeal in *Davies et al.*, *supra*. The Tribunal has said "[t]his 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."

126. The Tribunal has established that the test "is a relatively strict one and 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.

127. As noted above, the Appellant asserts in his submission that he "will provide a letter of demand made to the Director of Employment Standards" and alleges "[t]hird party influence".

128. The Appellant attached a fax cover sheet and letter to the Employment Standards Branch which, on its face, purports to be a freedom of information request relating to interactions between the Employment Standards Branch and WorkSafe BC relating to the Appellant's claim.

129. This letter is dated August 30, 2021, post-dating the Determination; however, it was written by the Appellant, and it is unclear how, if at all, the letter would support a determination that the Appellant was an employee under the *ESA*. The letter also references a call he made to the Office of the Information and Privacy Commissioner regarding what he asserts was a "Work Safe BC illegal third party request"; however, no further information has been provided regarding this assertion or its relevance to this appeal.

130. I note as well, that the Appellant has not provided any documents relating either to WorkSafeBC registration or a claim under their jurisdiction. The Appellant also does not provide the "letter of demand" he asserts was sent from WorkSafe BC to the Employment Standards Branch.

131. The Delegate provided an answer to the general allegations relating to WorkSafe BC acknowledging that he received a request from WorkSafe BC but did not respond to the request, and did not consider any matters relating to WorkSafe BC in his investigation or in the Determination.

132. As there are no documents relating to WorkSafe BC on the file, I am unable to determine whether or to what extent they may be relevant to the Complaint; however, the onus is on the Appellant to present such evidence and demonstrate its potential probative value. In this appeal, the Appellant has not met this onus.

133. Apart from the absence of any "new" documentary evidence, the Delegate also points to "new evidence throughout [the Appellant's] appeal submissions" in the form of new or contradictory assertions of fact.

134. Even if I were to accept the relevance, credibility and probative value of these new or contradictory assertions of fact, I agree with the Delegate that none of these assertions could not have been "discovered and provided" during the investigation.

135. Accordingly, I am unable to find that any new evidence has been presented that meets the test set out in *Davies et al.* above.

CONCLUSION

136. In conclusion, I am satisfied that the Director conducted an appropriate investigation into the Complaint. In the absence of any evidence from the Respondent, the Determination was based solely on the evidence provided by the Appellant and where that evidence was internally inconsistent, findings of fact were appropriately made.

137. The Appellant was given ample opportunity to give and clarify his evidence with respect to his claims, and all evidence was considered objectively. Further, the Appellant has provided no evidence that would support a claim that the investigation, or the Determination, were in any way biased.

138. The legal test under the *ESA* for determining whether the Appellant was an employee as defined therein was appropriately followed based on the facts available, and although one factor that was considered may or may not have been relevant to the Appellant's own understanding of his working relationship with the Respondent, the remaining factors that were assessed were nevertheless sufficient to support the conclusions reached.

139. Finally, although the Appellant asserted in his Appeal that new evidence had become available that was not available at the time the Determination was made, I am unable to find that any of the Appellant's submission in this regard met the appropriate test for consideration.

140. Based on all of the foregoing, the Appeal is dismissed.

ORDER

141. Pursuant to section 115 of the *ESA*, I order the Determination dated August 23, 2021, be confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal