Citation: Yue Qing Lu (Re)
2021 BCEST 13

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Yue Qing Lu
("the Complainant")

- 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.: 2020/160

DATE OF DECISION: February 2, 2021

DECISION

SUBMISSIONS

Yue Qing Lu	on his own behalf
Shannon Corregan	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Yue Qing Lu (the "Complainant") has filed an appeal of a determination (the "Determination") issued by Shannon Corregan, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on October 26, 2020. The Delegate determined that Zhang's Cubic Estates Holdings Ltd. and Grand Long Holdings Canada Ltd. (the "Employers") contravened sections 17 (paydays), 18 (wages owing after termination), 28 (payroll records) and 58 (vacation pay) of the *ESA*.

2. The Complainant appeals the Determination on the grounds that the Delegate erred in law and failed to observe principles of natural justice.

3. For the reasons set out below, I dismiss the appeal pursuant to sub-section 114(1)(f) of the *ESA*, as it has no reasonable prospect of success.

4. My decision is based on the submissions made by the Complainant in the Appeal Form, the sub-section 112(5) record and its cover letter (the "Record"), the Determination, and the Reasons for the Determination.

ISSUE

5. The issue before the Employment Standards Tribunal (the "Tribunal") is whether this appeal should be allowed or dismissed pursuant to sub-section 114(1)(f) of the *ESA*.

THE DETERMINATION

Background

6. The Complainant filed the Complaint on July 24, 2019. The Delegate issued the Determination on October 26, 2020.

7. The Employers each operate project development and construction businesses in Vancouver, British Columbia. Zhang's Cubic Estates Holdings Ltd. ("ZCEHL") is a British Columbia company. Grand Long Holdings Canada Ltd. (GLHCL") is also a British Columbia company.

8. The Complainant was employed by the Employers as a construction project manager starting October 1, 2018. His employment was terminated on March 30, 2019, effective April 15, 2019.

Issues Before the Delegate

9. The issues before the Delegate were whether:

a. ZCEHL and GLHCL were associated employers;

b. the Employers misrepresented the type of work the Complainant was hired to perform;

c. the parties agreed the Complainant would receive a raise;

d. the Complainant was a manager or was entitled to overtime wages;

e. the Complainant paid any of the Employers' business costs; and

f. the Complainant was owed vacation pay.

10. The Delegate determined that: (1) the Employers were associated employers under section 95 of the *ESA*; (2) the allegation of misrepresentation was filed out of time; (3) the Complainant's wage rate was $5,000 per month for October through December 2018 and $5,500 per month thereafter; (4) the Complainant was a manager under the *ESA* and therefore not entitled to overtime wages; (5) the Complainant was fully paid for the Employers' business expenses; and (6) the Complainant was owed vacation pay.

11. Below, I summarize the Determination. However, as the Complainant only appeals the Delegate's conclusions regarding the misrepresentation and overtime claims, I only summarize the evidence and decision relating to those two issues.

Evidence Before the Delegate

12. In 2018, the Complainant was a site coordinator. He told the Delegate he wanted to add a high-rise project to his portfolio so based on an advertisement (the "Advertisement"), he applied for a "*highrise construction project manager*" position with the Employers. He had an interview for this position with Jane Liang ("Ms. Liang") and Emily Yang ("Ms. Yang").

13. According to the Complainant, Ms. Liang and Ms. Yang told him the Employers needed a project manager for a high-rise building under development. The Complainant, Ms. Yang and Ms. Liang all said the Complainant was told that because Hong Qing Zhang ("Mr. Zhang"), a director and sole officer of ZCEHL, lived in China, the Complainant would sometimes have to work late to participate in telephone calls to China. Ms. Yang and Ms. Liang said the Complainant told them he could adjust his working hours to accommodate this. Ms. Yang and Ms. Liang said the Complainant was not given any information about the specific projects. The Complainant said they gave him general information about the position, but he was not told the address of the project or the wage rate and hours of work.

14. The Complainant said that after the interview, Ms. Lang called him and said he was hired as the project manager for the high-rise project and that the hours of work would generally be from 9:00 a.m. to 5:00 p.m., 40 hours per week. Ms. Yang told the Delegate it was assumed that the Complainant would work "*normal*" or "*nine to five*" hours, but she did not mention specific hours of work to the Complainant because it was a management position.

15. The Employers said the Complainant was not told that he would work solely as the project manager for the high-rise project, either during the interview or when offered the project manager position. Ms. Yang and Ms. Liang said that at the interview, they told the Complainant that the Employers had two projects, the high-rise and townhouse, and that he would be the project manager for both projects. Ms. Liang said the Complainant was hired as a manager.

16. The Delegate asked Ms. Yang and Ms. Liang why the Advertisement specified "*highrise construction project manager.*" Ms. Yang said the Employers wanted to attract people with experience with high-rise projects. Both Ms. Yang and Ms. Liang said that someone with high-rise experience would likely also be able to manage a townhouse or other projects. Ms. Liang also said that at the time the Advertisement was posted, the Employers expected the townhouse project would soon be completed and the high-rise project would be the main project.

17. There was no employment contract or written description of the Complainant's job responsibilities.

18. On his first day of work, the Complainant said he attended a meeting with Mr. Zhang and others. He was told the high-rise project was delayed. During his first two weeks of work, the Complainant worked at the Employers' office on the high-rise project reviewing documents and drawings. He said he met with some contractors for that project at the office. He also went to look at the Employers' townhouse project in Richmond.

19. After his first or second week of work, Ms. Yang told the Complainant the townhouse project was delayed and asked him to check on it. Because the high-rise project was not busy, the Complainant began working on the townhouse project and Ms. Yang asked him to go to that job site two to three days a week. Shortly after that, Mr. Zhang asked the Complainant to go to the townhouse project job site every day and report on its progress. The Complainant was no longer kept updated about the high-rise project and after October, the Complainant no longer went into the office. Ms. Yang told the Delegate that because there was not very much work to do on the high-rise project at that time, the Employers sent the Complainant to work at the townhouse project to test his abilities. Ms. Liang said the Employers sent him to the townhouse project to supervise and manage the general contractor as a test of the Complainant's abilities.

20. From October 2018 to April 2019, the Complainant worked only on the townhouse project. He was the only employee of the Employers working there. and he said he usually arrived at 9:00 a.m. and left at 5:00 p.m., but he took phone calls about the project outside of these hours and was at the site sometimes on weekends. Ms. Yang said the Complainant was not required to work on weekends, but because some work happened on weekends he did sometimes work then. She estimated the Complainant worked two or three weekends in total. The Complainant claimed he worked overtime every week, but he was inconsistent in his estimates about how much overtime. The Complainant admitted he did not track his hours of work. He said he did not mind working overtime because he believed he would soon be working on the high-rise project. The parties agreed the Employers did not tell the Complainant what hours he was supposed to work every day or week and they did not track his hours. Ms. Yang said this was because the Complainant was in a management position. The Complainant said the Employers were aware he was working a lot. He acknowledged that he never told the Employers how many hours he was working, but one Family Day weekend when he was out of town the Employers told him he should have been at the townhouse site. The Employers said they knew the Complainant was working because he left them text or voice messages.

21. The Complainant said his work was that of a labourer or security guard and not a project manager. In contrast, Ms. Yang said the Complainant was responsible for managing the site and making sure the construction manager was doing everything correctly.

22. The parties agreed the Complainant gave instructions to contractors and corrected their work, but he did not have the ability to hire or fire them; he merely reported the quality of the contractors' work to the Employers. Ms. Yang and Ms. Liang said the Complainant did not have to hire any contractors because they were already hired when he started work. The Complainant said that once he told the general contractor that a sub-contractor had done a bad job and the general contractor fired them. Ms. Liang said the Complainant reviewed the sub-contractor's work at the request of the general contractor and if the Complainant deemed the work complete, he submitted the request for payment to her. The Complainant told the Delegate he could not stop payments to contractors. Ms. Liang said that sometimes the Complainant asked her to cease payment for certain contractors who did not do a good job. The Complainant could make small purchases, such as tools and materials, and was reimbursed for these, but he did not make large purchases and did not have the ability to make large budgetary decisions.

23. The Employers also submitted evidence from Kenneth Kwan ("Mr. Kwan") who was a consultant to the Employers on the townhouse project. Mr. Kwan said the Complainant was supposed to report to Ms. Yang and had the ability to fire and hire workers through the general contractor, Richard Zhang. Mr. Kwan said the Complainant had the ability to withhold payment from contractors.

24. Ms. Liang sent the Complainant a notice of termination on March 30, 2019. The Complainant worked until April 15, 2019, at the townhouse site and did not go into the office.

The Delegate's Decision

25. As I noted above, the Delegate concluded that:

a. the Employers were associated employers under section 95 of the *ESA*;

b. the allegation of misrepresentation was filed out of time;

c. the Complainant's wage rate was $5,000 per month for October through December 2018 and $5,500 per month thereafter and so he was owed $1,942.31 in wages;

d. the Complainant was a manager under the *ESA* and therefore not entitled to overtime wages;

e. the Complainant was fully paid for the Employers' business expenses;

f. the Complainant was owed vacation pay of $170.00.

26. The Complainant was also entitled to $109.86 in interest on the amounts owing under section 88 of the *ESA*.

27. The Delegate imposed mandatory administrative penalties of $500 for each violation of sections 17 (paydays), 18 (wages owing after termination), 28 (payroll records) and 58 (vacation pay) of the *ESA*. This amounted to $2,000.

28. The following is a summary of the Delegate's determination regarding the issues under appeal: misrepresentation and overtime pay.

Misrepresentation

29. The Delegate stated that section 8 of the *ESA* says that an employer must not induce, influence or persuade a person to become an employee or to work or be available for work by misrepresenting the availability of a position, the type of work, the wages, or the conditions of employment. She explained that a "*misrepresentation*" is a word or action not in accordance with the facts. Whether the misrepresentation is intentional or not is irrelevant. What is key are whether the misrepresentation of a condition of employment affected the employee's decision to accept employment and whether the employee suffered a loss because of it.

30. The Delegate found the Employers misrepresented the type of work the Complainant was being hired to do. The Advertisement clearly specified the Employers were seeking a high-rise construction project manager, and at the very least, the Employers failed to ensure that the Advertisement accurately described the type of work the Employers anticipated the employee would do. Further, the Employers said they sent the Complainant to work on the townhouse site because they wanted to test his abilities. Thus, they had an obligation to tell him before he was hired that he would not be managing the high-rise project until they were satisfied with his abilities, but there was no evidence that they did so. The Delegate took this omission as evidence that the Employers failed to clearly communicate with the Complainant about his terms of employment.

31. The Delegate next considered sub-section 74(4) of the *ESA*, which requires complaints about a violation of sections 8, 10 or 11 of the *ESA* be made within six months of the contravention and not within the six months of the last day of employment, like for other alleged violations of the *ESA* under sub-sections 74(3). If a complaint is filed outside the time limitation in the *ESA*, a delegate must consider whether to refuse to investigate the complaint under sub-section 76(3). That provision gives the Director, or delegate, the discretion to refuse to accept, review, mediate, investigate or adjudicate a complaint or to stop reviewing, mediating, investigating or adjudicating a complaint if it is not made within the six-month time limit.

32. The Delegate concluded that the section 8 part of the Complaint was filed out of time. It had to be made within six months of the misrepresentation. The Complaint was filed on July 24, 2019, so the misrepresentation had to have occurred no earlier than January 25, 2019. However, the misrepresentation occurred from October 1, 2018, when the Complainant was first hired until the end of November 2018, by which time he knew, or should have known, that he was being instructed to perform work outside of the high-rise project manager position. While it may have been reasonable in October and November for the Complainant to believe the delay in the high-rise project was merely temporary, by the end of November it should have been clear to him that he was consistently doing work on the townhouse project and was not working on a high-rise building.

33. The Delegate exercised her discretion not to continue to investigate the misrepresentation aspect of the Complaint. Sub-section 2(d) of the *ESA* states that one purpose of the *ESA* is to provide fair and efficient procedures for resolving disputes over its application and interpretation. The six-month time limit was one way to achieve this purpose and provides all parties with a consistent and reasonable time to deal

with complaints. Section 74 is a mandatory six-month time limit so the Director, or a delegate, only exercises discretion to proceed with late-filed complaints in exceptional circumstances that provide a compelling reason to do so. The Complainant did not provide any evidence of exceptional circumstances and so there was no compelling reason to continue the investigation.

Overtime wages

34. The other issue under appeal is the Delegate's determination that the Complainant was a manager and so was not entitled to overtime wages.

35. To decide this issue, the Delegate had to determine whether the Complainant was a "*manager*" under the *ESA* and *Employment Standards Regulation* (the "*Regulation*"). This was because sections 34 and 36 of the *Regulation* provide that Parts 4 (Hours of Work and Overtime) and 5 (Statutory Holidays) do not apply to managers. As a result, managers are not entitled to overtime wages or statutory holiday pay. While the Determination at page R20 states "[s]ections 34 and 35.1 of the Regulation provide that Parts 4 and 5 o the Act do not apply to managers," the Delegate explained in her cover letter with her submission of the Record in this appeal that the reference to section 35.1 was a mistake and should have said "*section 36.*"

36. The definition of a manager is a person whose principal employment responsibility consist of supervising or directing, or both supervising and directing, human or other resources or who is employed in an executive capacity: *Regulation*, s. 1.

37. The Delegate first concluded that the Complainant was not employed in an executive capacity. The evidence from all parties was that he could not hire or fire contractors or make large budgetary decisions and there was no evidence that he had the authority to develop business plans or put them into effect.

38. The Delegate then considered whether the Complainant's principal responsibilities consisted of supervising and/or directing human or other resources. She found that they did. The Complainant's evidence was that he monitored the progress of the construction, coordinated contractors' work schedules, gave contractors instructions, recorded mistakes and deficiencies in their work and corrected contractors if they were doing something wrong. The Delegate found these tasks were supervision and direction of human resources. The Delegate rejected the Complainant's submission that because he also did work that was administrative or organizational in nature, he was not a manager. The question was not whether the Complainant performed tasks other than supervising or directing human resources, but whether his principal employment responsibilities were the supervision and/or direction of human resources. Also, the Complainant was hired as a manager and knew the Employers expected him to perform the work of a manager.

ARGUMENT

39. The Complainant submits that the Delegate erred in finding the misrepresentation part of the Complaint was made out of time and in finding the Complainant was not owed overtime wages.

40. According to the Complainant, the misrepresentation occurred on March 30, 2019, because that was when:

a. the Employers officially said the Complainant would not be the project manager for the construction of a high-rise building; and

b. the misrepresentation had progressed to a certain stage or the Complainant could no longer be deceived by it.

41. The Delegate found the Complainant was a manager under sections 34 and 36 of the *Regulation* and therefore was not entitled to overtime wages.

42. The Complainant submits that the Delegate's conclusion on overtime wages was wrong because:

a. section 35.1 of the *Regulation* did not apply to the question of whether the Complainant was owed overtime wages;

b. section 34 and Part 4 of the *Regulation* say that managers are not guaranteed minimum wages; and

c. Part 5 of the *Regulation* did not apply to the question of whether the Complainant was owed overtime wages.

43. The Complainant also says that the Delegate erred because the job he was actually hired for (project manager of the townhouse project) resulted in a substantial increase in work scope and duties from the job he believed he was hired for (project manager of a high-rise project). Furthermore, the Complainant says he was not working under an averaging agreement and so is owed overtime under section 40 of the *ESA*.

ANALYSIS

44. 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 any 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.

45. Although the Complainant says the Delegate did not observe principles of natural justice, the Appeal Form does not contain any basis on which to find a breach of natural justice. The Complainant was accorded procedural fairness.

Misrepresentation

46. For the reasons that follow I find the Delegate did not err in finding that she should stop investigating the misrepresentation part of the Complaint.

47. A challenge to the Delegate's exercise of discretion under sub-section 76(3) of the *ESA* is a claim that the Delegate has erred in law: see e.g. *Re: Mark Bridge*, BC EST # D091/07 (reconsideration denied in RD#044/09). In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined questions 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:

1. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
2. a misapplication by the decision-maker of an applicable principle of general law;
3. where a decision-maker acts without any evidence;
4. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
5. 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. In *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553, the Court of Appeal held that the Director has a residual discretion to accept and review untimely complaints. The Director must accept and review all complaints and, insofar as a particular complaint may be out of time, he or she must consider whether the complaint should nonetheless be more thoroughly investigated or adjudicated.

50. When the Tribunal receives an appeal of the Director's exercise of discretion regarding sub-section 76(3), the Tribunal must determine whether the complaint should have been accepted and reviewed having regard for the factors it considers properly bears on the exercise of the delegate's discretion. The threshold for overturning the Director's exercise of discretion is very high. The Tribunal will not interfere unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of his or her authority, there was a procedural irregularity, or the decision was unreasonable: *Jody L. Goudreau et.al.* (BC EST #D066/98. Unreasonable in this context means, *"…a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and is often said, to be acting unreasonably.*" Absent any of these considerations, the Director even has the right to be wrong: *Re: Ted N. Hunt*, BC EST # D089/11, para. 42.

51. As discussed by the Delegate, in deciding how to exercise discretion under sub-section 76(3), the Director considers whether the complainant has provided a compelling reason to excuse the delay in filing. What is compelling is primarily determined in light of the *ESA*'s purpose to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*: *ESA*, ss. 2(d). In exercising his discretion, the Director is not required to presume there may be relevant information that has not been included in the complaint: *Re: Jolly Binuhe*, BC EST # D081/14; *Re: Gregorgina Bahiwal*, BC EST # D082/14. It is the primary responsibility of a would-be complainant to set out sufficient details to show the substantive basis for their complaint.

52. Here, the Complainant did not provide any evidence, or even make any argument, that there were exceptional circumstances that justified the Delegate exercising her discretion to continue investigating the misrepresentation aspect of the Complaint. I note that misunderstanding the time limit or being unaware of it is not a compelling reason to accept the complaint: *Re: Zeljko Dragicevic*, BC EST # D132/15; *Fara Ghafari (Re)*, 2018 BCEST 79.

53. The Complainant submits that the misrepresentation continued until March 30, 2019, because this was when he was "*officially*" told that he would not be the high-rise project manager and was when he could no longer be deceived by the misrepresentation.

54. As explained by the Delegate, a misrepresentation is an untrue statement that affects an employee's decision to accept employment and results in a loss to the employee because of that decision: see also *Jeff Parsons (Re)*, BC EST # D110/00, p. 6. The misrepresentation occurred prior to October 1, 2018, when the Complainant understood he was hired as a project manager on a high-rise project. However, the misrepresentation only persisted for as long as the Complainant continued his employment because he believed that he would be a high-rise project manager. On the evidence, the Delegate found that after the end of November 2018, two months after the Complainant was hired and about six weeks after he had been working full-time at the townhouse job site and had had no further discussions with the Employers about the high-rise project, the Complainant knew, or should have known, that he was not in fact hired to be a project manager for a high-rise project. In other words, after the end of November 2018, the misrepresentation had progressed to such a stage that the Complainant could no longer be deceived by it, even if the Employers did not officially tell him he was not the high-rise project manager.

55. I conclude that the Delegate properly applied the applicable legal principles, acted on the evidence before her and acted on a view of the facts that could reasonably be entertained.

Overtime

56. The Complainant appeals the Delegate's determination that he was not owed overtime.

57. The Complainant does not appeal the Delegate's finding that he was a manager. However, the Delegate's conclusion that the Complainant was a manager was determinative of whether or not he was owed overtime under the *ESA*. Thus, I first review the Delegate's finding that the Complainant was a manager. On the basis of the evidence and reasoning of the Delegate I set out earlier in this decision, I find no error of law in this aspect of the Determination. The Delegate: properly interpreted and applied the *ESA*; acted on the basis of the evidence; made a decision that could reasonably be entertained on the facts; and was not wrong in principle.

58. With respect to the Complainant's argument that the *ESA* and *Regulation* did not prevent him, as a manager, from earning overtime, this appears to result from an unfortunate typographic mistake in the Reasons and from the Complainant's misunderstanding of the Reasons.

59. Turning first to the typographic mistake, at page R20 of the Reasons, the Delegate said she relied on sections 34 and 35.1 of the *Regulation*. However, the applicable sections were 34 and 36. The Delegate states in her cover letter with the record of the proceedings (together, the Record), that she mistakenly wrote "*section 35.1*" in her Reasons and that she should have said "*section 36.*" I accept this submission,

but in any event, it is clear from the Reasons that the Delegate meant to write "*section 36*" and not "*section 35.1*." It is also clear from a review of the *Regulation* that this was the case. First, as noted by the Complainant, section 35.1 relates to election workers and has nothing to do with determining the Complaint and does not relate to anything in the Delegate's analysis of the overtime issue. Second, the Reasons state that "[s]*ections 34 and 35.1 of the Regulation provide that Parts 4 and 5 of the Act do not apply to managers*" (emphasis added) and section 36 of the *Regulation* says, "*Part 5 of the Act does not apply to a manager*," while sections 34 and 35.1 only say Part 4 of the Act does not apply.

60. Once the Delegate found the Complainant was a manager, sections 34 and 36 the *Regulation* mandated a finding that he was not entitled to overtime.

61. Regarding the Complainant's misunderstanding of the Reasons, he argues on appeal that Parts 4 and 5 of the *Regulation* do not prevent him from being entitled to overtime. However, as the Delegate said in her Reasons, it is not Parts 4 and 5 of the *Regulation* that do not apply, but Parts 4 and 5 of the *ESA*. Part 4 of the *ESA* sets out minimum standards for hours of work and overtime, including section 40, and Part 5 of the *ESA* sets out minimum standards for statutory holidays. Because the Complainant was a manager, he was not entitled to overtime under the *ESA*; section 40 did not apply.

62. Finally, I find no merit in the submission that the Delegate erred in her determination about overtime because the job the Complainant was actually hired for was a substantial increase in the scope of work and duties from the job he believed he was hired for. As noted above, the determination about overtime hinged on whether the Complainant was a manager. Whether or not there was a misrepresentation about the work required or not was irrelevant to whether overtime was owed.

ORDER

63. Pursuant to sub-section 114(1)(f) of the *ESA*, this appeal has no reasonable prospect of success and pursuant to sub-section 115(1)(a) of the *ESA*, I confirm the Determination, dated October 26, 2020.

Maia Tsurumi
Member
Employment Standards Tribunal