

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Jin-Sik Hong  
("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:** Richard Grounds

**FILE No.:** 2021/010

**DATE OF DECISION:** May 04, 2021

## DECISION

### SUBMISSIONS

Jin-Sik Hong on his own behalf

### OVERVIEW

1. This is an appeal by Jin-Sik Hong (the “Appellant”) pursuant to section 112 of the *Employment Standards Act* (the “ESA”) regarding a Determination issued on January 15, 2020, by Kuo-Hao (George) Lee, a Delegate of the Director of Employment Standards (the “Delegate”). The Appellant had brought a complaint against Thomson Technology Power Systems ULC (the “Employer”) for vacation pay.
2. The Delegate determined that the Appellant was owed vacation pay for a lesser period of time than claimed. The Employer voluntarily paid the vacation pay owed to the Appellant. Once this was paid, the Delegate concluded that the dispute that caused the complaint was resolved and that no further action would be taken.
3. The Appellant appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination.
4. Submissions on the merits of the appeal were not requested from the parties.
5. For the reasons that follow, the Appellant’s appeal is dismissed, and I confirm the Determination.

### ISSUE(S)

6. The issue to decide is whether or not the Delegate failed to observe the principles of natural justice in making the Determination.

### THE DETERMINATION

7. The Delegate identified the following four issues:
  1. Was the Appellant an independent contractor or an employee?
  2. Was the Appellant a professional engineer as defined in the *Regulation*?
  3. Was the Appellant a high technology professional as defined in the *Regulation*?
  4. Is the Appellant owed wages?
8. The Delegate considered evidence received from the Appellant and from the Employer.
9. The Employer is an extra-provincial company which operates an electrical system and electrical power management system development business. The Appellant was employed as a New Product Engineer under three separate one year contracts starting from July 25, 2016. The contracts provided that the agreement could be terminated with 14 days’ advance notice in writing. The Appellant was hired for a

single large project and reported to a Vice-President of the Employer. The Appellant had a set hourly rate and did not supervise other employees. The Appellant worked in British Columbia, in South Korea and from his home in Saskatchewan.

10. The Appellant was an engineer in training with the Association of Professional Engineers and Geoscientists of British Columbia from 2016 until the end of December 2018 / beginning of January 2019 when he became a member of the Association of Professional Engineers and Geoscientists of Saskatchewan.
11. In mid-June 2019, a supervisor verbally advised the Appellant that the Employer wanted to end the employment contract early at the end of June 2019 instead of at the end of July 2019. The Appellant did not expect this and submitted his written resignation on June 14, 2019, giving the Employer his two weeks' notice.
12. The Appellant asked the Employer about vacation pay and was advised that he was not entitled to vacation pay because he was a contractor. On June 28, 2019, the Appellant filed a complaint under section 74 of the *ESA* for vacation pay.
13. The Delegate reviewed the employment contracts and information related to the Appellant's association membership as a professional engineer. The Delegate considered in detail the employment relationship between the Appellant and the Employer and concluded that the Appellant was an employee. Accordingly, the provisions of the employment contracts relating to the Appellant being an independent contractor had no effect.
14. The Delegate considered the Appellant's membership status as an engineer in training with the Association of Professional Engineers and Geoscientists of British Columbia (APEGBC) from 2016 until the end of December 2018 / beginning of January 2019. The Delegate concluded that the Appellant was excluded from the *ESA* during this time frame pursuant to section 31(f) of the *Regulation* because he was both an engineer in training and a member of the APEGBC. The Delegate concluded that once the Appellant was no longer a member of the APEGBC (when he became a member of the Saskatchewan Association), he was no longer exempted under the *Regulation*.
15. The Delegate considered whether or not the Appellant was a "high technology professional" under section 37.8(1)(a) of the *Regulation*, which would exclude him from claiming overtime. The Delegate concluded that the Appellant was primarily engaged in applying his specialized knowledge to design, develop or engineer a technological product and was not employed to provide basic operational technical support. Accordingly, the Delegate concluded that the Appellant was a "high technology professional" so part 4 of the *ESA* did not apply to him and he was not entitled to overtime wages.
16. The Delegate considered the evidence relating to compensation for length of service including that the Employer advised the Appellant that it wanted to end his contract a month early. In response, the Appellant gave his own two weeks' notice. The Delegate relied on this to conclude that the Employer was not liable to pay compensation for length of service.

17. The Delegate considered the Appellant's claim for vacation pay and concluded that he was owed 4% vacation pay based on his wages for the period when he was no longer excluded under the *Regulation* as an engineer in training, i.e. when he was no longer a member of the APEGBC starting in approximately January 2019. The Delegate calculated the overtime owed as \$1,839.54 which amount the Employer agreed to pay to the Appellant. Once this payment was made, the Delegate concluded that the dispute that caused the complaint had been resolved so he exercised his discretion to stop investigating the complaint.

## ARGUMENTS

18. The Determination was issued on January 15, 2020. The Delegate determined that the Appellant was an employee of the Employer and that he performed engineering work. The Delegate determined that the Appellant was a "high technology professional" defined by the *Employment Standards Regulation* (the "*Regulation*") and, thus, was not entitled to overtime. The Delegate determined that the Appellant terminated his employment and was not entitled to compensation for length of service. The Delegate determined that the Appellant was entitled to vacation pay for a lesser period of time than claimed and, once voluntarily paid by the Employer, that no further action would be taken.
19. The Appellant submits that he cannot accept two conclusions reached by the Delegate, the first relating to his status as a registered professional engineer and the second relating to his termination. On the first point, the Appellant submits that the Employer did not require an engineer for his position and did not know whether or not he was registered as a professional engineer. On the second point, the Appellant submits that the Employer first verbally terminated his employment before he quit his employment.

## ANALYSIS

20. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
21. The Appellant submits that the Delegate failed to observe the principles of natural justice in making the Determination. The Appellant disputes the Delegate's findings related to his status as a professional engineer because this was not a requirement of the job and the Employer did not know whether or not he was a member of the APEGBC. In addition, the Appellant disputes the Delegate's finding about compensation for length of service because the Employer first verbally informed him of the termination.
22. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

23. The Appellant was provided with notice of the issues and was provided an opportunity to provide evidence in support of the claim. The Delegate considered the evidence related to the Appellant's membership in the APEGBC including the evidence from the Appellant and the Employer about the Appellant's membership and job duties, the provisions in the employment contracts and the application of section 31(f) of the *Regulation*. There is no indication that the Delegate did not consider the relevant evidence, was biased or acted unfairly in reaching his conclusion.
24. In regard to his resignation, the Appellant submits that he was first verbally told by the Employer that it wanted to end the employment contract a month early and that this is what prompted him to provide his two weeks' notice. The Appellant also submits that it was a supervisor of the Employer who told him this and not the Vice-President that he reported to.
25. Section 63(2) of the *ESA* provides that an employer's liability for compensation for length of service is 2 weeks' wages for an employee that has been employed more than 12 months but less than 36 months. The Appellant was employed for approximately 35 months so the Employer's liability would have been limited to 2 weeks' wages. Section 63(3) of the *ESA* provides that the liability is discharged if an employee is given 2 weeks' written notice or if the employee terminates the employment.
26. It is apparent that the Employer was intending to provide the Appellant with the required 2 weeks' written notice of termination, but the Appellant resigned before it could do so. The Delegate reasonably relied on this evidence to conclude that the Employer was not liable for compensation for length of service. The Appellant was afforded an opportunity to provide evidence about his termination / resignation. There is no indication that the Delegate was biased or acted unfairly in reaching the conclusion that the Employer was not liable for compensation for length of service because the Appellant resigned.
27. Even if the Appellant had not resigned, it is likely that the Employer would have provided the Appellant with two weeks' written notice as a follow up to the verbal notice. This action would have met the Employer's obligation for compensation for length of service under the *ESA*.
28. The fact that the Appellant does not agree with the Delegate's findings about the application of the *Regulation* and about his termination / resignation does not itself amount to a breach of natural justice. There must be something more than this to support a finding that the Delegate breached the principles of natural justice in making the Determination. There is no reasonable basis to conclude that the Delegate failed to observe the principles of natural justice in making the Determination.
29. The Delegate's decision to stop investigating the complaint once the Employer voluntarily paid the vacation pay owed to the Appellant was a matter of discretion. It was within the Delegate's discretion to conclude that the dispute that caused the complaint had been resolved. There is no evidence to support that the Delegate's exercise of discretion to take no further action breached the principles of natural justice.

**ORDER**

30. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1) of the *ESA*.

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**Richard Grounds**  
**Member**  
**Employment Standards Tribunal**