

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Tikal Construction Ltd.  
(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:** Mona Muker

**FILE No.:** 2021/015

**DATE OF DECISION:** May 28, 2021

## DECISION

### SUBMISSIONS

Shiro Olson

on behalf of Tikal Construction Ltd.

### OVERVIEW

1. Tikal Construction Ltd. (the “Appellant”) has filed an appeal under section 112 of *the Employment Standards Act* (the “ESA”) of a determination issued by a delegate of the Director of the Employment Standards (the “Director”), on February 5, 2021 (the “Determination”).
2. The Director found that the Appellant contravened sections 28 and 40 the *ESA*, and accordingly owed its former employee, Mr. Robert Foreman (the “Complainant”), overtime pay.
3. The Determination ordered the Appellant to pay the Complainant \$1,530.83. Pursuant to section 29(1) of the *Employment Standards Regulation* (the “ESR”), the Determination also imposed two administrative penalties of \$500 each. The total amount payable under the Determination is \$2,530.83.
4. The Appellant appealed the Determination alleging the “new evidence” ground of appeal under section 112(1)(c) of the *ESA*.
5. The Appellant made one supplemental appeal submission past the statutory appeal deadline.
6. In correspondence dated March 22, 2021, the Employment Standards Tribunal (the “Tribunal”) notified the Complainant and the Director that it had received the Appellant’s appeal and it was enclosing the same for informational purposes only. They were further notified that no submissions on the merits of the appeal were being sought from them at this time. The Tribunal also requested the Director to provide a copy of the section 112(5) record (the “Record”).
7. On April 13, 2021, the Tribunal received the Record from the Director and forwarded a copy to the Appellant and Complainant. Both parties were provided an opportunity to object to the completeness of the Record. Neither party objected. Accordingly, the Tribunal accepts the Record as complete.
8. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without a hearing or seeking submissions from the other parties or the Director, if it decides that the appeal does not meet certain criteria.
9. This appeal is appropriate to be considered under section 114(1) of the *ESA*. After reviewing the appeal submissions, I find it unnecessary to seek submissions from the Complainant or the Director.
10. Accordingly, this decision is based on the Determination, the reasons for the Determination (the “Reasons”), the Appellant’s appeal submissions, the Record that was before the Director when the Determination was made, and any other new evidence allowed to be submitted with this appeal.

## ISSUE(S)

11. The issue is whether, according to section 112(1) of the *ESA*, new evidence became available that was not available at the time the Determination was made.

## THE DETERMINATION

### Background

12. The Appellant was incorporated in British Columbia (“BC”) on March 16, 2001. Maryanne Olson and Norman Olson are listed as the corporation’s directors and officers.
13. The Appellant operates a construction business in Mission, BC. It operates its projects around the lower mainland.
14. The Complainant was employed as a construction site supervisor and oversaw one construction site in Mission, BC. They were paid a semi-monthly salary, at a rate of \$60,000 annually. The Complainant did not have a written employment contract.
15. The Complainant worked from November 29, 2018, to March 29, 2019, when the Complainant quit their employment.
16. On September 24, 2019, the Complainant filed a complaint (the “Complaint”) at the Employment Standards Branch, claiming the Appellant failed to pay them overtime wages and did not allow them to take breaks.
17. In the investigation, the Director identified three issues:
  - (i) was the Complainant a manager under the *ESR* and thus excluded from overtime provisions under the *ESA*?
  - (ii) if the Complainant was not a manager, what was the overtime amount owed?
  - (iii) did the Appellant prevent or hinder the Complainant’s ability to take breaks during the workday?
18. The Director received evidence from the Complainant and the Appellant during the investigation of the Complaint before making the Determination. I will only set out those aspects of the factual background directly relevant to the issue on appeal.

### Reasons

19. The principal issue before the Director was whether the Complainant was a “manager” as defined in section 1 of the *ESR*. Under section 34(f) of the *ESR*, “managers” are excluded from the hours of work and overtime provisions of the *ESA* (Part 4).
20. In the Reasons, the Director noted that the Complainant made the following assertions and provided the following evidence in the investigation of the Complaint: their employment responsibilities included

opening and closing the worksite, recording (daily) every trade person's hours, picking up supplies, dealing with delivery issues, and sending trades home if there was no work. The Complainant also coordinated work between the worksite and the office, provided daily and weekly progress reports, and was responsible for the safety of workers and visitors at the worksite.

21. The Complainant agreed to working 40 hours per week; Monday to Friday, from 7:00 a.m. to 3:30 p.m., with a break during the day.
22. The Complainant did not have hiring or firing authority but could make recommendations to the project manager, who had the authority and approved payrolls. The Complainant was allowed to make purchases on the Appellant's suppliers' account.
23. The Complainant recorded their hours of work at the same time as they filled out the trades' hours. This information was sent to the Appellant's administrator, on a bi-weekly basis for payroll calculations.
24. The Director noted that the Appellant made the following assertions and provided the following evidence in the investigation of the Complaint: the Appellant employs site supervisors, office staff, and labourers. The size of its staff varies but can be between five (5) and fifteen (15) people. The Appellant provided a sample employment contract of an employee who had a similar position as the Complainant.
25. The Appellant stated that the site supervisor was responsible for the project at the worksite. The site supervisor coordinated the work between the worksite, the trades, and the office. The site supervisor also read blueprints and construction drawings, oversaw change orders, and was the contact person with the Appellant's clients. The site supervisor supervised other employees; the scope, however, depended on the worksite's needs. The site supervisor could schedule trades and could schedule them for overtime, if needed. They could also control the labourer's hours.
26. The Appellant affirmed that the hiring and firing of employees was done in coordination with the office, but the site supervisor could provide recommendations. The Appellant further stated that the Complainant did not have hiring or firing authority over trades. However, the Complainant did have that authority over casual labourers. The Complainant exercised that authority as he laid off three labourers and sought to hire one.
27. The Appellant stated that site supervisors had the discretion to take days off, work early or late (dependent on the project), and when to take breaks.
28. The Appellant did not keep track of the Complainant's hours, nor did they require them. Regardless, the Complainant still provided them. The Appellant stated that there were discrepancies in the hours the Complainant recorded, for there were allegations made against the Complainant for not being on site or leaving early on certain days.
29. The Director identified the two branches of the "manager" definition found in the *ESR*:
  - (1) if the employee's principal employment responsibilities consist of supervising or directing, or both supervising and directing human or other resources, or
  - (2) if the employee is employed in an executive capacity.
30. The Director stated that whether an employee meets the definition of a "manager" requires looking at the character of the employee's duties and responsibilities.

31. The Director found that the Complainant did not meet either branch of the “manager” definition:
- [The Complainant’s] employment responsibilities involved both directing or supervising human and other resources (managerial tasks) and non-managerial tasks. [The Complainant’s] authority in terms of [their] managerial tasks, however, was a fettered one. [The Complainant’s] hiring and firing authority were limited to labourers and even then, both [the Complainant] and [the Appellant] agree that any such decision had to be done in consultation with the head office.
32. The Director found that the Complainant had several non-managerial tasks, such as record keeping, carpentry work, picking up and receiving supplies, and coordinating between the worksite and the office. They also had managerial tasks, but their ability to exercise them seemed quite fettered. The Complainant also did not appear to exercise them with any consistency.
33. The Director also noted:
- The scope—both in terms of time and ambit—of [the Complainant’s] supervisory responsibility is also unclear. Neither [the Complainant] nor [the Appellant] provided a clear picture as to how much of [the Complainant’s] time was spent on directing or supervising human and other resources and on non-managerial tasks. [The Appellant] indicated that the level of supervision a site supervisor exercises varied depending on the site and the needs of the project.
34. The Director found that while the Complainant did not have a limit to their spending authority, they had to do price comparisons for large items. The Appellant did not challenge the Complainant’s assertion that the Complainant did not have authority to make financial decisions about the project. The Director stated that such authority is usually reserved for an executive team member.
35. The Director did not accept that the Complainant’s employment responsibilities primarily involved directing or supervising human and other resources. Nor did the Director accept that the Complainant was employed in an executive capacity, given the constraints placed on their financial authority.
36. The Director determined that the Complainant was not a “manager” and, accordingly, awarded them overtime pay.
37. The Director also determined that the Complainant had no basis for their claim that the Appellant prevented them from taking breaks by scheduling trades to work during times when he took his breaks; given that the Complainant had the authority to schedule trades and labourers, and when to take breaks.
38. Lastly, the Director determined that the Appellant violated the *ESA* by not keeping a record of the Complainant’s hours.

## **ARGUMENT(S)**

39. The Appellant appeals the Determination on the “new evidence” ground of appeal.
40. The Appellant submits that they are now aware that they are being challenged to prove that the Complainant was a “manager”. They state that the Complainant was hired as a manager, recognized as a manager, and paid as a manager. They further submit that they are a small business, and as a result all

employees wear several “hats”. The Appellant lists the site manager’s duties that they previously provided to the Director during the investigation of the Complaint.

41. The Appellant submits that the Complainant had hiring and firing authority. They assert that the Complainant hired their relative(s), other labourers (that they recommended to the office), and fired three labourers. They have submitted testimonies and pay stubs from two of the fired labourers to that effect.
42. The Appellant further submits that the Complainant had authorization to purchase with all their suppliers. They have submitted emails and invoices as proof of the Complainant’s purchases.
43. The Appellant also submits that they do not understand the Complainant’s allegations of not being permitted to go on breaks. The Appellant says that the Complainant was in charge of their own schedule. They have submitted a testimony from a tradesperson to that effect.
44. The Appellant also says that the Complainant’s hours were irregular for they were dependent on the project’s needs; and that there are several inconsistencies with the Complainant’s hours.
45. The Appellant also submits the following evidence:
  - employment offer letter and testimony of the Appellant’s administrative book-keeper;
  - two answered questionnaires from two of the Appellant’s site supervisors, regarding their (managerial) opinion of their position;
  - job postings and descriptions of: (i) C3M Construction’s Site Supervisor; and (ii) McDonald’s Guest Experience Manager.

## **ANALYSIS**

46. Section 114(1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of any appeal if the Tribunal determines that any of the following apply:
  - (a) the appeal is not within the jurisdiction of the tribunal;
  - (b) the appeal was not filed within the applicable time limit;
  - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
  - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
  - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
  - (f) there is no reasonable prospect the appeal will succeed;
  - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
  - (h) one or more of the requirements of section 112 (2) have not been met.

47. Section 112(1) of the *ESA* allows a party to appeal a determination on the following grounds:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;
  - (c) evidence has become available that was not available at the time the determination was being made.
48. The Tribunal has consistently held that an appeal is not another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the Appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).
49. In this case, the Appellant appeals the Determination on the basis of the “new evidence” grounds of appeal.
50. The Appellant made one supplemental appeal submission forty-two minutes past the statutory appeal deadline. I have the discretion to accept this late evidence, despite there being no request to extend the deadline. I accept this late supplemental appeal submission.
51. I am not persuaded with the merits of the ground of appeal. Accordingly, I dismiss the appeal for the reasons set out below.

### **New Evidence**

52. The Tribunal has the discretion whether to accept fresh evidence. In *Re Merilus Technologies* (BC EST # D171/03), the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing;
  - (b) the evidence must be relevant to a material issue in the appeal;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) the evidence must have high 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 a material issue.
53. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see subsections 2(b) and (d) of the *ESA*.
54. Much of the Appellant’s ground of appeal is an attempt to re-argue the facts already considered by the Director. None of the evidence the Appellant submits is “new”. All of it existed at the time the Determination was being made. As indicated above, this ground of appeal is not intended to give a party a second chance to present evidence that they should have and could have, with some degree of diligence,

provided during the investigation. The Appellant provided no explanation as to why they were not submitted earlier during the investigation of the Complaint.

55. As a result, the Appellant’s “new evidence” fails on the first prong of the four-part test in *Re Merilus* for admitting fresh evidence. The Appellant was not duly diligent in obtaining this evidence and submitting it to the Director during the investigation, after they reviewed the Director’s investigation report, or before the Determination was made.
56. The Appellant’s “new evidence” also fails on the fourth prong of the four-part test, for none of the evidence has high probative value, that if believed, would have led the Director to a different conclusion on the issue of whether the Complainant was a “manager”.
57. Much of the evidence the Appellant submits was testified to during the investigation. The Director already considered this evidence in determining the Complainant’s authority with respect to hiring and firing of labourers, and authorization to purchase. In fact, much of the Appellant’s “new evidence” corroborates the Director’s findings in their Reasons.
58. It may well be that the Complainant exercised, to a limited extent, some of the authority that is generally ascribed to “managers”. However, job titles, job descriptions, and one’s own opinion are not determinative of whether one is a “manager” under the *ESR*. The totality of the individual’s functions and duties must be considered in meeting the legal definition of a “manager”.
59. The Director’s Reasons find support in the evidence that was before them in the Record. The Director’s Determination is not patently unreasonable.
60. While failing to meet one of the requirements in the *Re Merilus* test is sufficient to disqualify the admission of evidence; in this case, the Appellant’s “new evidence” fails on two requirements – the first and fourth prongs of the *Re Merilus* test.
61. The Appellant also submits evidence in support of the Complainant’s discretion to take breaks; when the Director, in fact, found in favour of the Appellant. Accordingly, this issue on appeal is moot.
62. I am not persuaded to exercise my discretion to accept or consider any of the “new evidence”. I find the circumstances do not satisfy the conditions that would justify allowing new evidence to be entered with this appeal. The Appellant is only attempting to re-argue their case on appeal.
63. Accordingly, I find no basis for this ground of appeal and thus reject the Appellant’s ground of appeal. Pursuant to section 114(1)(f), there is no reasonable prospect that this appeal will succeed.



**ORDER**

- <sup>64.</sup> The appeal is dismissed under section 114(1)(f) of the *ESA*. Pursuant to section 115(1) of the *ESA*, the Determination dated February 5, 2021, is confirmed.

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**Mona Muker**  
**Member**  
**Employment Standards Tribunal**