

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Noor Investments Ltd.

("Noor")

- 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: David B. Stevenson

FILE No.: 2021/023

DATE OF DECISION: June 1, 2021

DECISION

SUBMISSIONS

Shiraz Chatur	on behalf of Noor Investments Ltd.
Leif Jensen	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 Noor Investments Ltd. (“Noor”) of a determination issued by Leif Jensen, a delegate of the Director of Employment Standards (the “Director”), on January 25, 2021 (the “Determination”).
2. The Determination found Noor had contravened Part 3, sections 17, 21, and 28, Part 7, section 58 and Part 8, section 63 of the *ESA* in respect of the employment of Kanwaljeet Ahluwalia (“Ms. Ahluwalia” or the “complainant”) and ordered Noor to pay wages to Ms. Ahluwalia in the amount of \$18,980.71, an amount which included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$2,500.00. The total amount of the Determination is \$21,480.71.
3. Noor has appealed the Determination on all of the allowable grounds set out in section 112(1) of the *ESA*: error of law; failure to observe principles of natural justice; and evidence coming available that was not available when the Determination was being made.
4. In correspondence dated March 3, 2021, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (“the record”) from the Director, invited the parties to file any submissions on personal information or circumstances disclosure and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to each of the parties. Both have been provided with the opportunity to object to the completeness of the record.
6. Noor has filed submissions on the completeness of the record, identifying several documents it says are missing from the record and requesting they be added to it. The submissions from Noor also include an additional submission on the merits of the appeal. The Director has responded to those elements of the submissions that address the completeness of the record (as opposed to the merits of the appeal) and has taken the position the record is complete. Some of the documents referred to by Noor are found in a different part of the record and the Director submits other documents are not found in the Employment Standards Branch (the “Branch”) file and, as a result, were not placed in the record. Presumably, although the Director does not say so directly, material not found in the Branch file would not have been before the Director at the time the Determination was being made: see section 112(5) of the *ESA*.
7. The submission of the Director is followed by a further submission from Noor, dated May 11, 2021, requesting the Tribunal make what would amount to a “summary judgement” cancelling the Determination “due to lack of integrity, impartiality and a sense of balance in the process”. The balance

of the submission does not speak to the completeness of the record, but to a perceived unfairness in the Director's response to Noor's submission about the record, a continuing complaint about how the record has been organized, an objection to Noor's response to the complaint being included in the record and any part of the exhibits provided by Noor in its initial response to the complaint being used by the Director "in any of his arguments". These matters will be addressed later, but the request for an immediate cancellation of the Determination is rejected.

8. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made and any additional material allowed to be added to the appeal. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) 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.*

9. If satisfied the appeal or parts of it has some presumptive merit and should not be dismissed under section 114(1), the Director and the complainant will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

10. The issue in this appeal is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

11. Noor operates a wholesale food services business. Noor was incorporated March 6, 2003. Until August 1, 2016, the directors of Noor are listed as Shiraz Chatur ("Mr. Chatur") and Shirin Chatur. As of August 1, 2016, the complainant became a director of Noor and Shirin Chatur ceased being a director.

12. The complainant commenced employment with Noor on June 9, 2003. The complainant and Noor entered into an employment agreement on or about December 31, 2004; the agreement described her responsibilities and the terms of employment, which included her compensation and a provision granting her a 7% interest in Noor after five years of service, for which the complainant gave up two years vacation entitlement.
13. In July 2016, the complainant and Noor entered into an agreement (the “MOU”) for the complainant to purchase an additional 43% of Noor, acquiring a resulting 50% shareholding in the business. The complainant paid \$120,000.00 for the additional shares. Mr. Chatur held the other 50% of the shares. The Determination identifies other aspects of the MOU. The Director noted that the provision in the MOU for the complainant to become signatory to the bank accounts of Noor was never implemented. The Determination identifies several elements of the relationship between the Complainant and Mr. Chatur from August 1, 2016 until April 22, 2019, when the complainant ceased working for Noor.
14. The Determination is lengthy and addresses four issues identified by the Director:
 1. Was the complainant an employee for the purposes of the *ESA*;
 2. Was the complainant a manager, as that term is defined in the *Employment Standards Regulation*, for the purposes of the *ESA*;
 3. Is the complainant entitled to unpaid regular wages, unpaid overtime and/or unpaid vacation pay; and
 4. Is the complainant entitled to length of service compensation?
15. The Determination notes there were other matters raised by each of the parties that were not addressed by the Director as they were considered to be matters which fell outside of the jurisdiction of the Director. Nothing in the appeal challenges the Director’s view on those matters.
16. Both parties presented their respective positions to the Director.
17. The Director dealt with allegations of bias, both systemic and specific, that were made by Noor and dismissed them. The Director also addressed aspersions made by Mr. Chatur, who acted for Noor throughout the process, on the character of the complainant, finding they were not helpful to a determination of the issues and were not considered.
18. The Director found the complainant was an employee for the purposes of the *ESA*, notwithstanding she was a director and shareholder of Noor. In reaching this finding, the Director considered principles in the *ESA* and statutory considerations that have a bearing on that question in such circumstances. The Determination sets out an extensive examination of factors the Director considered relevant to the status of the complainant, as a director of Noor, under the *ESA*, noting a director can be an employee under the legislation unless that person is part of the “controlling mind” of the business. As applied the facts of the case, these factors included: the complainant was also a shareholder of the company; there was a profit-sharing agreement; on some occasions the complainant, in her role as director, had agreed to reduce her pay; the complainant had some involvement in meetings relating to the management of Noor and had access to financial documents; the complainant had no signing authority for Noor accounts and consequently no access to, or control over, Noor’s financial assets; the complainant was denied access to

the accounting records of Noor by Mr. Chatur; and the complainant had no input into decisions that significantly affected her financial compensation for the work she was performing.

19. The Director considered the tasks being performed by the complainant fell comfortably within the definition of “work” in the *ESA* and that the complainant, by operation of the MOU and consistent with the definition of “employee”, was entitled to receive wages for this work. Based on the evidence, the Director found the employment agreement signed in late 2004 was in effect even after the MOU was signed. There was evidence that Mr. Chatur continued to operate the business after April 22, 2019 without any input from the complainant and threatened to unilaterally close the business.
20. The Director found that while some factors pointed to the complainant being a “controlling mind” of the business, other factors pointed to her being an employee and that, overall, the complainant had little actual control over the business of Noor and performed a function more akin to that of manager than a controlling mind.
21. The Director found the complainant was a manager for the purposes of the *ESA*.
22. The Director found the complainant was entitled to unpaid regular wages but not to additional wages for unpaid overtime.
23. The Director found the complainant was terminated without cause and was entitled to length of service compensation.
24. The Director found the complainant was entitled to unpaid vacation pay comprising an additional 2% of wages for the period June 9, 2016 to June 15, 2018 and 6% of wages for the period June 16, 2018 to April 22, 2019.
25. The Director found Noor had committed five contraventions of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

26. Noor has raised all of the allowable grounds of appeal. I shall outline the arguments for each ground in the order they appear in the appeal submission.

Natural Justice

27. Noor argues the Determination is “partial and lacks balance”. The argument on this ground provides several examples of where Noor alleges the Director distorted numerous pieces of information to muddy the true narrative, extracted and blended submissions and evidence to cloud the judgement of a “neutral party”, incorrectly recorded an important timeline, disregarded the position of Noor that the complainant was disingenuous and needed to be seriously challenged, and did not engage in clear comprehensive investigative work.

Error of Law

28. Noor says the Director erred in finding the complainant was an employee for the purposes of the *ESA*. On this point, Noor submits: “A working partner who is a director and officer of Noor; who gets all kinds of perks, cannot be considered an “Employee” for the purposes of the Act.” Noor notes the MOU provides for the payment of certain allowances and benefits, and say that “even though the Complainant’s vehicle was not used for any work-related activity, she was entitled to get reimbursement for gas and auto insurance”.
29. The argument made by Noor on whether the complainant was an employee under the *ESA* revisits several facts set out in the Determination, suggesting they were ignored or not accorded sufficient weight, asserting: “The following are worthy of note and must be taken into account”.
30. Flowing from the position that the complainant was not an employee for the purposes of the *ESA*, Noor submits she was not entitled to unpaid wages, vacation pay or length of service compensation.
31. In any event, Noor challenges the calculations of wages owing and vacation entitlement; Noor submits the complainant was not, in any event, entitled to length of service compensation because she had abandoned the business and her position.
32. On the vacation pay calculation, Noor says that recently acquired payroll information shows the complainant was paid vacation pay on December 31, 2016, March 31, 2017, December 31, 2017 and December 31, 2018. This information is attached to the appeal submission and offered as “new evidence”. This material will be dealt with below when summarizing the arguments on the “new evidence” ground of appeal.
33. Noor submits the error of law on the issue of the complainants’ status under the *ESA* has resulted in the Director wrongly imposing administrative penalties.

New Evidence

34. Noor has submitted payslips relating to three pay periods which is described as “limited payroll information relating to vacation pay of the Complainant” and submits this information shows the complainant was paid vacation pay at certain times during her period of working for Noor.
35. Noor says it was unable to access these records because PayWorks, who had been preparing payroll for Noor, cancelled Noor’s access to the payroll records without Mr. Chatur’s knowledge. Noor says the Director was advised of this. Noor says it has only recently been able to obtain limited access relating to vacation pay paid to the complainant.

ANALYSIS

36. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) *the director erred in law:*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was being made.*

37. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on an appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

Natural Justice

38. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.

39. There appears to be two aspects to how Noor has developed this ground of appeal: that the Director and the process was biased against Noor; and the Director both distorted the evidence and failed to give proper consideration to important evidence.

40. The allegations of bias are both general – made against the Branch and the process – and personal – made against the Director. Noor alleges the Branch is systemically biased against employers and in favour of finding employment relationships and the Director’s investigation was not conducted in an impartial, and neutral, way.

41. Noor has presented no real evidence for their allegation against the Branch of systemic bias in the process or the principles upon which the Determination is grounded. The examples tendered by Noor are not real evidence; they are subjective and impressionistic statements which cannot satisfy the test for bias. Noor’s allegations are based on their failure, or refusal, to recognize the nature of the complaint process and that in every material respect, that process met the requirements of natural justice and complied with section 77 of the *ESA*. Such concerns as expressed by Noor are frequently voiced by the party against whom a Determination is made and reflect nothing more than a disagreement with the result; that is obviously insufficient support for an allegation of bias, and I dismiss the allegation.

42. Further, as it was the Director, not the Branch, that made the Determination, the issue must be whether Noor has established a reasonable apprehension of bias against the Director.

43. A personal allegation of bias is a serious matter which should not be made lightly or speculatively. The Appellant bears the onus of demonstrating bias on sufficient evidence that a reasonable and informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that the decision maker did not decide the matter fairly. The threshold for finding bias is high; a real likelihood or probability of bias must be demonstrated.

44. In that regard, Noor cites a long litany of complaints and disagreements with the Determination and the process by which it was reached. It is excessive and unnecessary in the circumstances of this matter to address individually all of the many assertions made by Noor in alleging bias against the Director.

45. I have reviewed the material referenced by Noor in support of their allegations and considered that material and their arguments and find they do not meet the burden necessary for establishing this allegation. Nothing Noor has submitted, either by way of reference to the material in the record or in their arguments, has persuaded me the Director was biased against Noor.
46. In sum, I find nothing in the appeal that establishes the necessary evidentiary foundation to support a finding of bias, systemic or otherwise, in the Branch or by the Director in the complaint process. I find Noor has not demonstrated bias on the part of either the Branch or the Director in the present case and I dismiss these allegations.
47. Additionally, the Tribunal has summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.
48. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination.
49. Viewed as a whole, I find the process before the Director was procedurally fair. The Determination and the record reveal that Noor was provided with the opportunity required by section 77 of the *ESA*, and the applicable principles of natural justice, to know the case they had to meet, present their position, including providing evidence to support that position, and to respond to the positions presented by the complainant and the evidence provided by her to support that position.
50. Noor may have some legitimate minor complaints about the investigation process overall, but has not shown there was anything in the investigation conducted by the Director that fundamentally undermined or denied them the procedural protections provided by principles of natural justice and section 77 of the *ESA*.
51. It is not a breach of principles of natural justice, or evidence of bias, for the Director to make a finding on the evidence with which one of the parties disagrees.
52. There is no merit to this ground of appeal.

Error of Law

53. 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] 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.

54. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

55. The Tribunal has held that findings of fact are reviewable as errors of law under prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal has noted that the test for establishing an error of law on this basis is stringent, citing the reformulation of the third and fourth *Gemex* factors in *Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11- Richmond/Delta)*, [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18:

... that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could"....

56. The principal conclusion being challenged in this appeal – whether Ms. Ahluwalia was an employee of Noor for the purposes of the *ESA* – is a question of mixed law and fact. In *Britco Structures Ltd.*, the Tribunal considered the application of the *Gemex* test to questions of mixed fact and law, and concluded that "error of law" should not to be applied so broadly as to include errors of mixed law and fact which do not contain extricable errors of law.

57. The proper approach to deciding the question is to determine whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *ESA*. This is done, in large part, by determining whether the nature of her relationship with Noor, as a director and shareholder of Noor, would make it inappropriate for her to be entitled to the protections afforded by the *ESA*. I find the Delegate engaged in an appropriate legal analysis of that question.

58. In the Determination, the Director provided an extensive factual analysis of the relationship between the complainant, as a "controlling mind" of Noor, and made a decision on the issue on the facts and in accordance with, and for the purposes of, the *ESA*. I find that Noor has not shown an error of law in the Director's analysis. Effectively, the appeal does no more than quarrel with the conclusions reached by the Director in the Determination from the facts as found, seeking either to have those conclusions ignored or to apply those facts toward a different conclusion.

59. The appeal does not present a significant case for challenging the findings of fact made by the Director as errors of law. To reiterate, disagreement with findings of fact and inferences drawn therefrom does not provide a ground for appeal under section 112 of the *ESA* unless an error of law on the facts can be shown.
60. I find the facts supported the conclusion reached. There is no apparent merit to this ground of appeal or in the allegation that the Director erred in law in finding Ms. Ahluwalia to be an employee of Noor. As an employee, the complainant was entitled to file a complaint seeking rights found in the *ESA*.
61. Much of the remainder of Noor's appeal simply contains more challenges to findings of fact – relating to the calculation of wages owed – without showing such findings amounted to error of law. There was evidence on which the findings of the Director could be made, and such findings were not perverse or inexplicable.
62. I find no merit in this ground of appeal.

New Evidence

63. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. 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*.
64. Noor seeks to have three payslips added to the record and considered in the appeal.
65. I would not accept there is any merit in this ground of appeal, as I do not accept the material as “new evidence”, for several reasons.
66. First, the evidence is not “new”; it contains information that existed when the investigation was being conducted and could have been provided to the Director during the complaint process. I do not accept the reason given by Noor for their failure to acquire and provide this information to the Director. In my view, with reasonable diligence, it could have been acquired from PayWorks and provided to the Director. Noor has not explained how the circumstances, which allowed them, “after pleading with an Official at Payworks [sic]”, to get copies of the payslips for the purpose of an appeal, would not have allowed them to acquire those payslips during the complaint process.
67. Second, the evidence is not relevant to the question of vacation pay entitlement; the first two payslips show payment of an amount of vacation pay at 4%. That part of the Determination addressing the pay periods to which these payslips applied, December 2016 and the last two weeks of March 2017, found the

complainant *was* paid vacation pay at 4%, but that it should have been paid at 6%. These payslips only confirm the correctness of that finding; they do not relate to the contention for which they are presented in the appeal or the decision actually made by the Director. The third payslip also shows a vacation pay *entitlement* calculated at 4%; it records no payment of that entitlement.

68. Third, this material is not “credible”; it does not show Noor met its obligations to pay the complainant vacation pay to which she was entitled. Particularly, as indicated immediately above, the third payslip merely shows a vacation amount owing; the payslip does not indicate any amount of vacation pay was paid.
69. Fourth, in light of the foregoing, I do not find this information to be particularly “probative”, in the sense of being capable of resulting in a different conclusion than what is found in the Determination.

Administrative Penalties

70. There is no basis for disturbing the mandatory administrative penalties imposed.
71. In sum, I find there is no apparent merit to the appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other party to respond to it. The appeal is, accordingly, dismissed.

ORDER

72. Pursuant to section 115 of the *ESA*, I order the Determination dated January 25, 2021, be confirmed in the amount of \$21,480.71, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal