



Citation: Steven J. Moxness (Re)  
2021 BCEST 63

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Steven J. Moxness carrying on business as Amplified Audio Visual Solutions

- 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:** Jenny Ho

**FILE NO.:** 2021/006

**DATE OF DECISION:** July 14, 2021

## DECISION

### SUBMISSIONS

Steven J. Moxness	on his own behalf carrying on business as Amplified Audio Visual Solutions
Hannah Etta J. Cohen	on her own behalf
Mitchell Dermer	delegate of the Director of Employment Standards

### OVERVIEW

1. This is an appeal filed pursuant to section 112 of the *Employment Standards Act* (the “ESA”), by Steven J. Moxness, carrying on business as Amplified Audio Visual Solutions (“Amplified Audio”), of a determination that was issued on December 17, 2020 (the “Determination”) by a delegate of the Director of Employment Standards Branch (the “Director”).
2. The Director determined that Amplified Audio owed wages and interest in the amount of \$16,630.14. The Director found that Amplified Audio had contravened sections 8, 17, 18, 21, 27, 40, 45, 58, and 63 of the *ESA*, and imposed nine \$500.00 administrative penalties for the contraventions. The total found to be payable in the Determination is \$21,130.14, plus any interest accrued.
3. Amplified Audio appeals the Determination on all three grounds, “error of law,” “natural justice,” and “new evidence,” under section 112(1)(a), (b), and (c) of the *ESA*.
4. On February 18, 2021, the Employment Standards Tribunal (the “Tribunal”) received the record pursuant to section 112(5) of the *ESA* (the “Record”).
5. On February 19, 2021, the Tribunal provided a copy of the Record to Amplified Audio and Hannah Etta J. Cohen (the “Employee”), requesting submissions on its completeness. On May 20, 2021, the Employee confirmed that the Record is complete. Amplified Audio did not object to its completeness. The Tribunal accepts the Record as complete.
6. This decision is based on the appeal submission of Amplified Audio, the Determination and Reasons for Determination, the Appeal Form, and the Record.

### BACKGROUND

7. Amplified Audio operates an audio-visual consultancy and sales business in Vancouver.
8. The Employee started working for Amplified Audio on April 18, 2018, as an executive assistant, bookkeeper, and client care coordinator, pursuant to an employment agreement dated April 4, 2018.

9. The employment agreement contains the following terms relevant to this appeal:
  - (a) the Employee's monthly salary was \$4,200.00, for 40 hours per week;
  - (b) the Employee was entitled to a 3-week vacation per year; and
  - (c) any part-time work would be pro-rated to the time spent.
10. It is not a disputed fact that the Employee worked from home.
11. The parties disagreed on Amplified Audio's regular office hours. The Director found that the regular office hours were from 8:30 a.m. to 5:00 p.m.
12. Amplified Audio was aware that the Employee worked outside of the regular office hours. Amplified Audio contends that the Employee was told, on a number of occasions, that no overtime was required.
13. On September 21, 2018, the Employee started working for another company, Walsh Business Growth ("Walsh"), a long-time client of Amplified Audio, both during and outside her regular office hours for Amplified Audio. The exact details of the working and pay arrangements were in dispute. The Director found that the agreement between Amplified Audio and the Employee was: (1) the Employee's regular wages at Amplified Audio would be reduced by the hours she worked for Walsh during regular office hours; and (2) the Employee would pay Amplified Audio 50% of the wages the Employee earned at Walsh for work done outside of the regular office hours (the "Walsh agreement").
14. For the pay periods of April 18, 2018 to October 31, 2018, Amplified Audio paid the Employee \$2,100.00 semi-monthly, less statutory deductions, based on 40 hours per week of work. From October 30, 2018, to the termination of employment, deductions were made by Amplified Audio from the Employee's wages for apparent overpayments in previous periods.
15. On January 14, 2019, Amplified Audio terminated the Employee's employment, without cause.
16. On February 6, 2019, the Employee filed a complaint under section 74 of the *ESA* claiming that Amplified Audio failed to pay regular wages, overtime, vacation pay, statutory holiday pay, compensation for length of service, and business expenses (the "Complaint").
17. The Employee submitted documents with her Complaint comprised of an employment contract, a termination letter, telephone bills, receipts and credit card statements for business expenses, bank statements showing debits deposited from Amplified Audio, a record of employment, paystubs, and "time cards" showing overtime the Employee claimed she worked.
18. Amplified Audio produced a list of documents including copies of an employment contract, a record of employment, a termination letter, electronic transfers printouts, payroll statements, and invoices from the Employee to Walsh.
19. A mediation was scheduled but did not occur. It is unclear from the Record why the mediation did not occur. The Record contains a summary of a telephone call on March 26, 2019 between the Director and Amplified Audio. In that telephone record, it contains a reference, "go to hearing – requests in person" (p. 93 of the Record). The hearing was scheduled and proceeded on June 5, 2019.

20. On June 6, 2019, after the hearing took place, the Director requested submissions from the parties on the issue of overtime. The Employee produced to the Director 382 pages of documents containing emails and text messages to and from Amplified Audio outside regular office hours to support her claim for overtime. By way of a letter dated July 1, 2019, Amplified Audio made submissions to the Director in reply to the documents produced by the Employee.
21. On February 27, 2020, the Director requested further submissions in relation to business expenses. Both parties made further submissions and were provided with the opportunity to file a further reply.
22. The Determination was issued on December 17, 2020.

### ISSUES

23. Has Amplified Audio demonstrated to the Tribunal that:
- (a) the Director had erred in law;
  - (b) the Director had failed to observe the principles of justice in making the Determination; and that
  - (c) evidence that was not available at the time the Determination has become available?

### ARGUMENTS

24. In the appeal form, Amplified Audio checked off all three grounds of appeal under section 112(1) of the *ESA*.
25. In this appeal, Amplified Audio argues that:
- (a) the payroll slips submitted by the Employee should not have been admitted as evidence;
  - (b) the Employee was not entitled to overtime pay because overtime was, either never requested, or not authorized by Amplified Audio;
  - (c) no statutory holiday pay was owed to the Employee;
  - (d) the calculation for vacation pay is incorrect;
  - (e) the deductions made from the Employee's wages were allowed by the Walsh agreement;
  - (f) it was not given an opportunity through Investigation, Education, Mediation, Complaint Hearing and Adjudication;
  - (g) section 80 of the *ESA* which came into effect on May 30, 2019, should not apply in this case as the Complaint was filed on January 21, 2019;
  - (h) interest charged were not justified due to the length of time it took for the issuance of the Determination;
26. Amplified Audio also appeals the administrative penalties.

## ANALYSIS

27. Section 112(1) of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:
- (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.
28. The onus is on the appellant to show that the determination is flawed based on one or more of the grounds of appeal set out in section 112(1) of the *ESA*.
29. An appeal to the Tribunal is not a *de novo* proceeding (i.e. a new trial). It is not open to the Tribunal to reconsider the positions and the evidence that were put forth by the parties leading up to the issuance of a determination of the Director. The Tribunal will not disturb the Director's finding of facts unless those findings amount to an error of law.

### 1. Error in law

30. 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.):
- (a) a misinterpretation or misapplication of a section of the *Act*;
  - (b) a misapplication of an applicable principle of general law;
  - (c) acting without any evidence;
  - (d) acting on a view of the facts which could not reasonably be entertained; and
  - (e) adopting a method of assessment which is wrong in principle.

#### *Wages, overtime, statutory holiday pay*

31. Amplified Audio submits that all statutory holiday pay, vacation pay, and compensation for length of service were paid to the Employee. Amplified Audio contends that a letter was provided to the Employee at termination, which sets out what the Employee was owed.
32. Amplified Audio argues in the appeal that the Employee is not entitled to overtime pay because the Employee was never requested to work overtime, and that the overtime hours were never approved by Amplified Audio.
33. In relation to the contravention of section 27 of the *ESA*, Amplified Audio argues that, as the bookkeeper, the Employee was responsible for preparing wage statements. Because the Employee did not keep up with the bookkeeping responsibilities, wage statements were not prepared on paydays.
34. During the complaint process, Amplified Audio and the Employee each submitted wage statements supporting their respective positions regarding the hours the Employee worked and her wages. However,

the Director found that the statements were of little assistance as they did “not accord with one another,” and they were generated by the Employee and Amplified Audio after the termination of the employment. The Director found the text messages and emails produced by the Employee to be more reliable in determining the hours the Employee worked for Amplified Audio.

35. The Director found that Amplified Audio knew that the Employee was working outside of the regular business hours from the texts and emails.

36. The Director found that an employer cannot derogate their responsibilities to comply with statutory duty.

37. Under section 35 of the *ESA*, an employer has an obligation to pay an employee for overtime “if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.”

38. A review of the Record, Amplified Audio’s appeal submissions, and supporting documents fail to show that statutory holiday pay, vacation pay, and compensation for length of service were in fact paid to the Employee.

39. Without reliable wage statements from Amplified Audio, I find it reasonable for the Director to rely on the Employee’s records to determine what wages, if any, were owed.

#### *Deductions*

40. Amplified Audio argues the deductions made from the Employee’s wages were allowed by the Walsh agreement.

41. With respect to the deductions made by Amplified Audio from the wages the Employee earned at Walsh, the Director found that section 21 of the *ESA* had been contravened. There was disagreement between the Employee and Amplified Audio with respect to the pay arrangements and the deductions arising from the Walsh agreement. Amplified Audio had produced emails that show the Employee agreed to the Walsh agreement. The Employee denied entering into this agreement willingly.

42. The Director found that, although the Employee’s version of events was not credible, the deductions were nonetheless in contravention of section 21 of the *ESA*.

43. With respect to the deductions, I find that the Director did not err in law in finding that Amplified Audio contravened section 21 of the *ESA*.

#### *Vacation pay*

44. Amplified Audio submits that “[a] person who is employed for less than one year is not entitled to take vacation, but must be paid 4% vacation pay on termination of employment.”

45. Sections 57 and 58 of the *ESA* provide the minimum statutory obligations of employers and protection of employees. It does not preclude any agreements between an employer and employee that exceed the minimum standards provided by in the *ESA*. The Director found that the entitlement of three-week

vacation in the employment agreement equates to 6% of vacation pay. The Director determined that the Employee is owed \$2,746.48 of vacation pay by multiplying 6% to the Employee's total wage including regular wages, statutory holiday pay and overtime wages, and compensation for length of service.

46. Amplified Audio's submissions are based on its disagreement with the Director's assessment of evidence, and somewhat on its misunderstanding of the statutory obligations under the *ESA*. While disagreement is reasonable, it is not a basis for this ground of appeal. The onus is on Amplified Audio to show that the Director erred.

47. Based on the review of the evidence, I am satisfied that the Director did not err in law in determining the vacation pay owing to the Employee.

*Amendment to Section 80(1) of the ESA*

48. Amplified Audio argues that the amendment to section 80(1), which changed the limit on the amount of wages required to be paid from 6 months to 12 months, should not apply in this case because the termination of employment was January 14, 2019, prior to the amendment coming into effect.

49. To determine whether the amendment should apply to complaints filed prior to that date, the starting point of the analysis is whether the wording in the legislation can be construed as having retrospective application (see *Matejka (Re)*, 1984 CanLII 755 (BCCA)).

50. Section 80(1) of the *ESA*, as amended by section 29 of the *Employment Standards Amendment Act, 2019*, provides that, the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning (a) in the case of a complaint, 12 months before the earlier of the date of the complaint or the termination of the employment.

51. Section 80(1.1) of the *ESA* also contains a provision for complaints that were delivered before May 30, 2002, where the amount payable is 24 months.

52. Furthermore, section 80(3) of the *ESA* provides that the Director, on its discretion, may extend the 12 months referred in section 80(1) to 24 months.

53. Section 40(1) of the *Employment Standards Amendment Act, 2019*, which amended section 80 of the *ESA*, contains the following transitional provisions with respect to section 80(1) relevant to this appeal:

40 (1) In this section, "**finally adjudicated**" means, with respect to a complaint, a complaint to which one of the following applies:

...

(b) a determination is made under the *Employment Standards Act* and, in relation to the determination, all reconsiderations and appeals under that Act, and reviews and appeals under any other enactment, have been heard and decided or the time limit for making the reconsiderations, appeals and reviews has expired.

(2) Subject to subsection (3), the following transition rules apply with respect to a complaint that, on the date a provision of this Act comes into force, has been

delivered under section 74 (2) of the *Employment Standards Act* but has not yet been finally adjudicated:

(a) if the provision of this Act amends a provision of the *Employment Standards Act*, the provision of the *Employment Standards Act*, as it read immediately before the provision of this Act came into force, applies with respect to the complaint;

...

(3) If, on the date this Act receives Royal Assent, a determination under section 76 (3) or 79 of the *Employment Standards Act* has not been made with respect to a complaint that has been delivered under section 74 (2) of the *Employment Standards Act*, section 80 of the *Employment Standards Act* as amended by section 29 of this Act applies to the complaint.

54. From a review of the provisions in section 80 of the *ESA*, and section 40 of the *Employment Standards Amendment Act, 2019*, it is clear that Parliament intended that the new wage period of 12 months should apply to complaints that were filed prior to May 30, 2019, but where no determinations had been issued. I find the Director was correct in applying the new amendment to this complaint.

## 2. Breach of natural justice

55. Amplified Audio argues that the Director failed to observe the principles of natural justice and that it is unfair that the complaint went straight to a hearing, without the mediation, and that the steps to resolution, as described in the “Factsheet” provided by the Director, were not followed.

56. Principles of natural justice are procedural rights that ensure the parties know the case being made against them, are given the opportunity to respond, and have the right to have their case heard by an impartial decision maker.

57. The obligation that relates to the principles of natural justice is partly captured in section 77 of the *ESA*. The section provides that, “[i]f an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.”

58. A hearing did proceed on June 5, 2019. Amplified Audio was given ample opportunity to reply to the submissions made by the Employee before the hearing, and twice after the hearing where the Director requested further submissions.

59. In relation to Amplified Audio’s argument that it is unfair the steps to resolution were not followed, I must point to section 78(1)(a) of the *ESA* which gives the Director the discretion to assist the parties in settling a complaint. While I appreciate the reasons for Amplified Audio to feel it was unfair that the complaint went directly to a hearing, it does not constitute a breach of natural justice.

60. Based on the review of the record, I am satisfied that the Director did not fail to observe the principles of natural justice.



### *Delay*

61. Amplified Audio contends that the Determination was released more than 18 months after the hearing which took place on June 5, 2019.
62. After the hearing, the Director twice requested further submissions from the parties. The latter request was made on February 27, 2020. The Employee and Amplified Audio submitted further submissions, on March 12, 2020 and April 10, 2020, respectively. A 40-page Determination was issued more than eight months after the last submission was received from Amplified Audio.
63. Delay, in itself, does not constitute a breach of duty of fairness. In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), the Supreme Court of Canada held that, to constitute a breach of duty of fairness, the delay must be “unacceptable to the point of being so oppressive as to taint the proceedings” (*Blencoe at para. 121*), and there must be evidence of prejudice flowing from that delay.
64. Amplified Audio has not shown prejudice that flowed from the length of time it took the Director to issue the Determination. In my view, given the voluminous nature of and contradicting evidence that the Director had to assess, the delay in this case was not unacceptable.

### **3. Has new evidence become available?**

65. Amplified Audio also appeals the Determination on the ground in section 112(1)(c).
66. This ground of appeal is not intended to allow an appellant to submit more evidence to supplement what was already provided to the Director during the complaint process. In order to succeed in this ground of appeal, an appellant must demonstrate that 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 (*Re: Merilus Technologies Inc. (BC EST # D171/03)*).
67. Amplified Audio’s submission provided in this appeal contains mostly arguments that had been raised before the Director. The evidence submitted with this appeal contains documents that were provided to the Director, or documents that could have been made available during the complaint process. For these reasons, I find that Amplified Audio has failed to meet the requirements for this ground of appeal.

### **4. Penalties pursuant to section 98(1) of the ESA**

68. With respect to the penalty imposed as a result of the contraventions of section 8, 17, 18, 21, 27, 40, 45, 58, and 63 of the *ESA*, Amplified Audio provides no basis for canceling these administrative penalties. The Director did find Amplified Audio contravened these sections. I find that the administrative penalties were imposed in accordance with section 98(1) of the *ESA*.

**ORDER**

- <sup>69.</sup> Pursuant to section 115(1) of the *ESA*, I order that the Determination, issued on December 17, 2020, be confirmed.

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**Jenny Ho**  
**Member**  
**Employment Standards Tribunal**