

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Ctour Holiday (Canada) Ltd.
("Ctour")

- 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.: 2021/043

DATE OF DECISION: September 1, 2021

DECISION

SUBMISSIONS

Ib S. Petersen and Nico Fong on behalf of Ctour Holiday (Canada) Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Ctour Holiday (Canada) Ltd. (“Ctour”) of a Determination issued by Sarah Vander Veen, a delegate of the Director of Employment Standards (the “Director”), on April 23, 2021. The date for delivering an appeal of the Determination to the Tribunal was May 21, 2021.
2. The Determination found Ctour had contravened Part 3, sections 17, 18, and 27, Part 4, section 40, Part 5, section 46, Part 7, section 58 and Part 8, section 63 of the *ESA* in respect of the employment of Wei (Larry) Huang (“Mr. Huang” or the “complainant”) and ordered Ctour to pay wages to Mr. Huang in the amount of \$21,276.79, an amount which included concomitant vacation pay and interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$3,500.00. The total amount of the Determination is \$24,776.79.
3. Ctour filed an appeal of the Determination on May 17, 2021, on the ground that evidence had come available that was not available when the Determination was being made. The appeal also sought an extension of time to December 31, 2021. Ctour explained the extension was required because Covid-19 caused the layoff of employees who would be able to provide required documents and some of the business documents that would be provided in support of the appeal had to be acquired from third parties and might require some time to collect.
4. On May 20, 2021, the Tribunal acknowledged receipt of the extension request and asked for a submission clarifying aspects of the grounds of appeal. A deadline of June 4, 2021, was set. On June 3, 2021, the Tribunal received correspondence from legal counsel for Ctour, advising he had just been retained relative to the matter and instructed to respond to the Tribunal’s correspondence; he asked for a brief extension, which was granted by the Tribunal.
5. On June 11, 2021, the Tribunal received a submission filed on behalf of Ctour which was an application for an extension of time to file an appeal of the Determination and a submission that provided reasons and argument in support of the application. Accompanying the submission were several documents that Ctour said were relevant to the merits of the appeal. The extension requested on May 17, 2021, was modified to an extension for a period of two months following the Tribunal decision on whether to grant any extension.
6. In correspondence dated June 16, 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 request to extend the statutory appeal period and the merits of the appeal were not being sought at that time.

7. 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.
8. Ctour has filed submissions on the completeness of the record, indicating that one of the documents in the record was missing pages. The Director has responded, acknowledging an error in copying the document to the record; the error has been rectified and the missing pages have been included. Apart from this omission, there are no objections to the completeness of the record, and I accept it as now being complete.
9. 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.
10. 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 the request to extend the statutory appeal period should be allowed or dismissed under section 114(1)(b). In this context, I am primarily assessing the relative strength of the appeal and also whether it has any reasonable prospect of succeeding.

ISSUE

11. The issue in this appeal is whether the request to extend the statutory appeal period should be granted, and the appeal allowed to proceed, or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

12. Ctour operates multi-day bus tours for Chinese tourists. Mr. Huang began working for Ctour on May 1, 2017. He worked as a tour guide and Fleet Manager until June 15, 2018; he worked only as a tour guide from June 16, 2018 until the end of his employment. His last day of work was August 30, 2020.
13. Mr. Huang filed a complaint under the *ESA* alleging Ctour had contravened the *ESA* by failing to pay regular wages, commission wages, overtime wages, statutory holiday pay, annual vacation pay, compensation for length of service and a \$522.57 “advance payment”.
14. The Determination is lengthy and addresses eight issues identified by the Director:
1. Was Mr. Huang owed the “advance payment”;
 2. What amounts claimed or paid to Mr. Huang formed part of his “wages” as that term is defined in the *ESA*;
 3. How much did Mr. Huang earn in commissions;
 4. How much did Mr. Huang earn in regular and overtime wages;
 5. How much did Mr. Huang earn in statutory holiday pay;
 6. Was Mr. Huang entitled to compensation for length of service and, if so, to what amount was he entitled;
 7. How much vacation pay did Mr. Huang earn; and
 8. How much, if anything, was Mr. Huang owed?
15. Both parties presented their respective positions to the Director.
16. The Director found the wage recovery period, found in section 80 of the *ESA*, to be from August 27, 2018 to August 30, 2019.
17. On the above issues, the Director made the following findings:
1. Mr. Huang was paid the “advance payment” and it was not owed;
 2. The Director reviewed the character of amounts received by Mr. Huang as compensation for his employment in the context of the definition of “wages” and “work” in the *ESA*. The following are types of compensation received by Mr. Huang and the Director’s findings and conclusions on them:
 - i. **Mandatory Service Fees**

Each tourist paid a daily service fee of \$10.00; \$5.50 of that service fee was paid to the tour guide. For the purposes of this appeal, that was Mr. Huang. Ctour argued that amount formed part of Mr. Huang’s “wages”; Mr. Huang argued these amounts were tips. On the evidence, the Director found the amounts fell within the definition of “gratuity” in section 1(1) of the *ESA*, specifically subsection (c) of the definition, which says:

“gratuity” means

. . .

(c) a payment of a service charge or similar charge imposed by an employer on a customer in circumstances in which a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees, . . .

The Director noted the definition of wages in the *ESA* excludes gratuities and, accordingly, the service fees were not wages. This conclusion is challenged in the appeal.

ii. Base Pay

The Director found Mr. Huang’s base pay was wages and the base pay was a daily flat rate. These conclusions are not challenged in the appeal.

iii. Product Commissions

Product commissions were amounts paid to Ctour and its tour guides by vendors based on sales made by the vendor to the tour groups brought to their business. The Director found the product commissions were not payable by Ctour for work performed by Mr. Huang for Ctour or as an incentive related to hours of work, production, or efficiency and, accordingly, did not fall within the definition of wages. The rationale for this finding is at pages R16 – R17 of the Determination. This conclusion is challenged in the appeal.

iv. Ticket Commissions

Ticket commissions are an amount paid to the tour guides on the sale of attraction tickets, based on the difference between the wholesale prices at which Ctour purchased the tickets and the retail prices at which the tickets were sold to persons in the tour group by the tour guides. The Director found these commissions were wages, as they were paid or payable as an incentive for the tour guides to sell the attraction tickets. This conclusion is not challenged in the appeal. There was an issue about whether Mr. Huang had been correctly paid all the ticket commissions he had earned. The Director found Mr. Huang was owed commissions from the sale of attraction tickets. The calculation of the amounts owing related to this finding is not challenged in the appeal.

v. Meal Commissions

These amounts are described as a payment by restaurants to encourage tour guides to bring their tour group to a particular restaurant. The Director found Mr. Huang was not paid meal commissions. The Determination does not speak to whether these amounts would fall within the definition of wages. This conclusion is challenged in the appeal.

3. The Director calculated the regular and overtime wages earned by Mr. Huang. Based on the dispute over what amounts were included in Mr. Huang’s “wages” these calculations, by inference, are disputed.

4. The Director found Mr. Huang was owed statutory holiday pay and calculated the amount owing. For the same reason as expressed above, and while it is not specifically raised in the submissions made by Ctour for an extension of the appeal period, there is likely to be some disagreement with the calculations.
 5. The Director found Mr. Huang was entitled to compensation for length of service. There is no challenge to his finding in the appeal, although once again, there might be an issue with the calculation of the amount owing.
 6. The Director found Mr. Huang could recover annual vacation pay that remained payable during the recovery period and calculated that amount. There is no challenge in the appeal to the finding on how much annual vacation pay Mr. Huang could recover and no direct challenge to the calculations.
 7. The Director calculated the wages owing to Mr. Huang and detailed those calculations in the Determination. By inference, these calculations are being challenged in the appeal.
18. The Director found Ctour had committed seven contraventions of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENT(S)

19. In the Appeal Form received by the Tribunal on May 17, 2021, Ctour has identified the ground of appeal as being evidence coming available that was not available when the Determination was being made, colloquially described as the “new evidence” ground of appeal. The appeal submissions, however, are more focused on the request for an extension of the statutory appeal period. The submission delivered on May 17, 2021, sets out two reasons for the requested extension: difficulties gathering appeal documentation because of Covid-19 staff layoffs and the operational closure in the business; and potential problems in acquiring relevant documents from vendors and restaurants concerning commission agreements and arrangements. That submission does not address the “new evidence” ground of appeal at all.
20. A supplementary submission from counsel for Ctour, on June 11, 2021, says, “Ctour appeals the findings in the Determination with respect to Product Commissions and Meal Commissions and “mandatory service fees”. Ctour says that these should have been found to be “wages” under the *ESA*. The supplementary submission is also primarily focussed on the requested extension.
21. I appreciate that while both submissions were focussed on the request to extend the statutory appeal period, the supplementary submission does address the merits of the appeal and I am entitled to accept the arguments addressing the relative strength of Ctour’s appeal have fully expressed all the areas of disagreement and the reasons for the appeal. Having said that, it does appear some of the argument provided in the supplementary submission identify at least the possibility that the error of law ground of appeal is being advanced, suggesting an error was made by the Director in the interpretation and application of the definitions of “wages”, “work” and “gratuity” in section 1(1) of the *ESA*. I shall address this possibility after I have addressed the “new evidence” arguments.

The Extension Request

22. By way of background, the *ESA* imposes a deadline on appeals to ensure they are dealt with promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST #D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

23. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST #D099/96. The following criteria must be satisfied to grant an extension:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

24. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.

25. While this case involves a request to extend the appeal period which was made before the appeal period expired, the considerations are substantially the same.

26. Ctour argues the criteria in *Niemisto*, *supra*, are satisfied.

27. As indicated above, Ctour primarily relies on the effects of the Covid pandemic as satisfying the first criterion. Ctour says the restrictions imposed on their business as a result of the pandemic and the consequences of those restrictions have detrimentally affected their ability to locate and provide documents and statements relevant to the complaint, citing the layoff of staff and tour guides, relocation of their office (during which some documents were misplaced) and difficulty in contacting vendors – whose operations have also been limited or closed by pandemic restrictions – for information and documents. Ctour also refers to language difficulties.

28. Ctour says the facts show an ongoing intention to appeal and that the Director and the complainant were made aware of this intention.

29. Ctour submits the requested extension will not unduly prejudice the complainant.

30. Lastly, Ctour argues there is a strong *prima facie* case in their favour.

New Evidence

31. Ctour says the “new evidence” submitted with the supplementary submission demonstrates the Director erred on the facts, arguing these documents show clearly the Product Commissions were wages because Mr. Huang was performing “work” for Ctour when the commissions were earned. Ctour submits the Product Commissions are part of the business of Ctour and operate as an incentive for tour guides to encourage purchases by the tour group at the vendors’ businesses.

32. While not advanced as “new evidence”, Ctour alleges some of the evidence provided to the Director by Felex Liu was not given effect by the Director in favour of evidence given by Tammy Tang (“Ms. Tang”), the owner of one of the restaurants to which tour groups were taken. I note here that the Director found “Ms. Tang’s testimony to be highly credible”. Ms. Tang said that her restaurant never paid the tour guides commissions or any other money.

33. Ctour asserts it “intends to show” Mr. Huang did receive meal commissions and that they formed part of his wages.

34. Ctour’s position on the mandatory service fees is that these were not gratuities but were part of the revenue of Ctour that it shared with tour guides and should be considered “wages”.

35. There is also reference to other evidence and testimony that “will be” presented by and on behalf of Ctour if the requested extension is granted and a brief description of that evidence and testimony is given.

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.

New Evidence

38. Ctour relies on the new evidence ground of appeal.

39. 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 section 2(b) and (d) of the *ESA*.
40. Ctour seeks to have five documents added to the record and considered in the appeal. They also say there is more information that will be acquired and submitted. These five documents are the only objective “new evidence” provided with the appeal.
41. I do not accept the material provided as satisfying the conditions for allowing them as “new evidence”, for several reasons.
42. First, the proposed evidence is not “new”; they are documents that existed when the investigation was being conducted and, if relevant, could – and should – have been provided to the Director during the complaint process. I find there is no satisfactory reason for Ctour’s failure to provide this information to the Director. The documents appear to have been extracted from their own records and, in my view, with reasonable diligence could have been uncovered and provided to the Director.
43. Second, the relevance of these documents to the factual issue of whether vendors paid Product Commissions directly to tour guides is dubious at best. There is nothing in these documents which show they relate to Mr. Huang’s employment during the recovery period. There is no dispute in either submission made by or on behalf of Ctour with the fact that prior to January 1, 2018, Ctour treated its tour guides as “independent contractors”. On their face, all of the documents submitted speak to a period when the tour guides were considered “independent contractors”. This proposed “new evidence” does not show the understandings and agreements expressed in those documents continued to be applied in the same way after January 2018, when the tour guides were considered to be “employees”.
44. In fact, the Determination indicates otherwise, and the suggestion contained in the argument for allowing these documents conflicts with a statement attributed to Ctour in the Determination, which records, when describing the Product Commissions, Ctour stating that it “*allowed the [vendors] to give the [Product Commissions] to [the tour guides] directly and issue T4As at the end of the year*”: Determination page R6. The foregoing statement is also consistent with the evidence of Mr. Huang, who provided a document from Ctour, issued when tour guides began to be treated as employees, titled, “The reimbursement guidelines for tour guides and drivers”, in which tour guides were told to register with vendors directly, receive commissions from them directly, and get T4A slips from them at the end of the year: Determination pages R10 – R11. To the extent Mr. Liu contradicts this evidence, the Director rightly ignored his evidence.

45. Neither do the documents show that Mr. Huang was performing work for Ctour when he was earning the Product Commissions at the vendors' businesses.
46. Third, this material is not "credible"; it does not show Mr. Huang was not being paid Product Commissions directly from a vendor in circumstances where he ought to receive a T4A from that vendor.
47. 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.
48. Based on my decision to refuse to accept the documents provided as "new evidence", I find the argument made by Ctour on the *prima facie* strength of their appeal must be addressed on the facts found in the Determination.
49. The assertions by Ctour in the supplementary submission that two vendors will confirm no T4As were issued, that two tour guides will testify vendors do not provide T4As to tour guides and that Ctour is not aware of any T4A being issued from a vendor to a tour guide does not assist Ctour in its argument. If such evidence exists, it should have been provided to the Tribunal in a form that would allow for it to be assessed for compliance with the considerations expressed in *Davies and others, supra*. Otherwise, I shall treat these assertions as being what they are: bald assertions lacking any objective evidentiary foundation; they are not "evidence" at all.
50. Absent "new evidence" on which to ground the arguments provided in the supplementary submission, the substance of the appeal appears to be nothing more than a challenge to findings of fact made by the Director.

Error of Law

51. As I have indicated above, there are aspects of the appeal that suggest an error of law was made by the Director in deciding certain components of Mr. Huang's earnings were not "wages". The Director found, on an assessment of the available facts, that "mandatory service fees" and Product Commissions were not "wages" and Mr. Huang received no meal commissions. Ctour disputes these findings and any findings and calculations that are dependent on them. Out of an abundance of caution, I shall provide an analysis of the potential merit such argument might have.
52. It is well established that 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.
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 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 (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”
55. The findings being challenged in this appeal are simple findings of fact. There are no challenges to the Determination that invoke elements of any other error of law that might arise from the other prongs of the *Gemex* test: an error in the interpretation and application of provisions of the *ESA*; a misapplication of a principle of general law; or by adopting a method of assessment which is wrong in principle.
56. The submissions made by Ctour do 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.
57. I find the facts supported the conclusion reached. There is no apparent merit to any argument that the Director committed a reviewable error on the facts. There was evidence on which it was both logical and reasonable for the Director to find: the service fees were a gratuity, as that term is defined in the *ESA*; that Mr. Huang performed no work for Ctour to earn the Product Commissions paid to him by the vendors and the amount paid was not an “incentive that related to hours of work, production or efficiency”; and that Mr. Huang received no meal commissions. On the evidence before the Director, it cannot be argued that such findings were perverse or inexplicable.
58. As indicated above, an appeal is an error correction process, with the burden of showing an error on one of the three statutory grounds of appeal being on the appellant. Even accounting for the possibility that the error of law ground might be advanced, Ctour has not shown there is a strong *prima facie* case in its favour.
59. The failure of Ctour to satisfy this criterion is fatal to their request for an extension of the appeal period, and it is denied. I need not express my views on whether the other criteria have been satisfied.
60. Absent an extension of the appeal period, the appeal is dismissed as being out of time.

61. I add that even if the appeal period was extended, the appeal has no reasonable prospect of succeeding and would be dismissed on that basis. On a review of the Determination, the record and the submissions that have been made by Ctour touching on the merits of their case, I find nothing in the appeal that warrants finding there was any reviewable error in the Determination. The purposes and objects of the ESA would not be served by seeking further submissions or by requiring the other parties to respond to it.

ORDER

62. Pursuant to section 115 of the *ESA*, I order the Determination dated April 23, 2021, be confirmed in the amount of \$24,776.79, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal