



EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Cheam Tours Ltd. carrying on business as Airport Link Shuttle  
(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:** James F. Maxwell

**FILE No.:** 2021/064

**DATE OF DECISION:** November 03, 2021

## DECISION

### SUBMISSIONS

Ferdinandusz Samuel	on behalf of Cheam Tours Ltd. carrying on business as Airport Link Shuttle
Carmen Back	on her own behalf
Cory T. LaBoucane	delegate of the Director of Employment Standards

### OVERVIEW

1. Cheam Tours Ltd. carrying on business as Airport Link Shuttle (the “Appellant”) has filed an appeal, pursuant to section 112 of the *Employment Standards Act* (the “ESA”), of a determination dated July 7, 2021 (the “Determination”), issued by a delegate of the Director of Employment Standards (the “Director”).
2. The Director held that the Appellant had breached sections 18, 21, 28, 45, 46 and 58 of the *ESA* in its treatment of Carmen Back (the “Employee”). The Director held that the Appellant was liable to pay the sum of \$43,265.12 to the Employee and assessed administrative penalties in the sum of \$3,000.00.
3. The Appellant appeals the whole of the Determination.

### ISSUES

4. The following issues arise in this appeal:
  - a. Did the Director err in law in the making of the Determination?
  - b. Did the Director fail to observe the principles of natural justice in making the Determination?
  - c. Has new evidence become available that was not available at the time that the Determination was made?

### FACTS

5. The Appellant is a corporation carrying on business as an airport shuttle service in Vancouver, British Columbia.
6. Until late September 2019, Narinder Johal (“Johal”) was the principal of the Appellant corporation. On or about October 1, 2019, the Appellant corporation was sold to Ferdinandusz Samuel (“Samuel”). Mr. Samuel is now the sole director, and Johal is the sole officer, of the Appellant.
7. The Employee was employed by the Appellant corporation between August 1, 2015 and October 16, 2019, at which time her employment was terminated by the Appellant, without cause. There is disagreement

amongst the Employee, Johal, and Samuel as to the exact nature of the Employee's employment and duties.

8. On October 17, 2019, the Employee filed a complaint with the Employment Standards Branch (the "Complaint"). The Complaint alleged that the Employee had not been paid all sums owing for regular wages, and that the Employee had not received all monies due as compensation for length of service. The Employee alleged that \$20,148.00 was owing.

### **The Investigation**

9. The Director undertook an investigation into the Complaint (the "Investigation"). In addition to an examination of documents tendered by the parties, the Director's Investigation consisted of the following:
  - a. telephone interviews, and exchange of email communications, with the Employee;
  - b. telephone interviews, and exchange of email communications, with Samuel;
  - c. telephone interviews of Johal;
  - d. telephone interview of AL, a former employee of the Appellant ("AL");
  - e. telephone interview of JC, a current employee of the Appellant ("JC").
10. The following summarizes the information supplied by the Employee:
  - a. The Employee stated that she began work for the Appellant in 2015 as a dispatcher. Her duties included: organizing bookings for clients; scheduling drivers; resolving scheduling problems. The Employee allegedly worked from home, seven days per week, 10 hours per day;
  - b. In July 2016, the Employee became a manager. Her duties in this capacity included: resolving problems with clients; maintain website; recruit, hire, train and dismiss drivers; scheduling drivers; bookkeeping and payroll management; fill in for drivers as required; marketing; managing advertising; research;
  - c. The Employee was paid \$1,900.00 per month, which was paid in two semi-monthly instalments of \$900.00 each, and \$100.00 in cash;
  - d. The Employee did not receive overtime pay during her employment and was not paid statutory holiday pay. She did not receive vacation pay;
  - e. The Employee was not required to keep track of hours worked. The Employee denied that she worked on a regular work schedule, and denied ever receiving a work schedule from the Appellant;
  - f. The Employee answered incoming telephone calls at any time during the day. The Employee provided documents that included text messages between herself and other employees, including a number that took place outside of regular work hours. The Employee claimed that after regular work hours incoming calls were re-directed to her cellular telephone. The Employee denied that the Appellant had a telephone-answering system that functioned after hours;

g. The Employee was dismissed on October 16, 2019.

11. The following summarizes the information supplied by Samuel:

- a. Samuel purchased the Appellant corporation on or about October 1, 2019. Prior to that, Samuel had been a driver employee of the Appellant;
- b. The Employee continued in her capacity as a manager after Samuel purchased the Appellant, until October 16, 2019, when her employment was terminated, and she was paid severance;
- c. According to Samuel, the Employee did not supervise other employees, and did not hire or terminate employees. The Employee did not create work schedules for other employees, did not exercise financial authority, and was not involved in decision-making;
- d. The Employee was scheduled to work 6 hours per day, between 9:30 a.m. and 4:30 p.m., Monday to Friday;
- e. At the end of the workday, the Employee was required to re-direct all incoming calls to the Appellant's automated telephone-answering system. The Employee was not expected to answer incoming calls after regular work hours and was not authorized to work any overtime hours. Samuel claimed that it was impossible, in fact, for the Employee to receive incoming business calls after regular working hours, due to the operation of the telephone-answering system. Samuel acknowledged that it was difficult for the Appellant to know what hours the Employee worked, as she operated from her own home;
- f. Samuel denied ever receiving, as an employee, copies of work schedules issued by the Appellant;
- g. Samuel had not been aware of the requirements of the *ESA* that an employer issue wage statements.

12. The following summarizes the information supplied by Johal:

- a. Johal stated that the Employee was originally hired as a dispatcher, pursuant to a verbal employment agreement;
- b. The Employee initially worked from the Appellant's office, three days per week, 9:00 a.m to 5:00 p.m. After about 2 years, the Employee began to work from home;
- c. By 2018, the Employee was expected to work 7 hours per day;
- d. Johal denied that the Employee was a manager, but acknowledged that she used that title to refer to herself. Johal denied that the Employee supervised any other employees, did not make financial decisions or exercise financial authority, and did not hire or dismiss other employees;
- e. Johal acknowledged that the Appellant did not require the Employee to keep track of hours worked. According to Johal, the Employee was expected to work no more than six hours per day, between 9:30 a.m. and 4:30 p.m., five days per week, in accordance with work schedules issued by the Appellant;

- f. Johal claimed that the Appellant had an automated telephone-answering system, and that the Employee was never instructed to handle incoming calls after regular working hours;
- g. Prior to October 2019, the Appellant did not issue wage statements, and was not aware of the requirements of the *ESA* regarding the recording of hours of work, vacation pay, and statutory holiday pay;
- h. Samuel purchased the Appellant corporation around October 1, 2019. All employees continued in the employ of the Appellant.

13. The following summarizes the information supplied by JC:

- a. JC commenced work with the Appellant in 2015 and continues in the Appellant's employ. JC works as a driver;
- b. JC stated that prior to October 2019, the Employee and Johal worked as dispatchers, scheduling drivers to pick up and drop off clients;
- c. JC frequently dealt with the Employee after regular working hours.

14. The following summarizes the information supplied by AL:

- a. AL worked as a driver for the Appellant between October 2017 and June 2018;
- b. During that time, both the Employee and Johal worked as dispatchers, though AL most frequently dealt with the Employee;
- c. AL claimed that he dealt with the Employee for work-related matters after regular work hours at least 5 days per week.

### **The Determination**

15. The Director considered the information provided by the Appellant and all of the other parties, and, on July 7, 2021, issued the Determination.

16. The Director addressed the following questions:

- a. Did the Employee work as a manager for the Appellant?
- b. What hours did the Employee work?
- c. What was the Employee's rate of pay? and
- d. What wages, if any, are owing to the Employee?

17. To determine whether the Employee qualified as a manager, the Director considered the work performed by the Employee. The Director noted that the Appellant's evidence on this point was inconsistent: Johal claimed that the Employee was never a manager, while Samuel claimed that the Employee was a manager. The Director concluded that the Employee did not qualify as a manager, as defined by the provisions of section 1 of the *Employment Standards Regulation*. The Director held that the Employee's principal employment responsibilities were not those of a manager. Rather, the Director found that the Employee

worked principally as a dispatcher. As a consequence, the Director concluded that the Employee was entitled to be paid overtime and statutory holiday pay during her employ.

18. Having concluded that the Employee was entitled to overtime pay for extra hours worked, the Director evaluated what hours the Employee did work. The Director noted that the Appellant had failed, contrary to the requirements of the *ESA*, to maintain a record of hours worked by the Employee. The Appellant asserted that work calendars prepared by Johal were evidence of the hours worked by the Employee. The Director found that the Appellant's evidence regarding work calendars was inconsistent: Johal claimed that the work calendars had been provided to employees in advance each month, while Samuel stated that he had been unaware (as an employee) of the existence of the calendars. The Employee stated that she had never seen the calendars prior to filing her Complaint. The Director held that the calendars did not constitute proof of the hours worked by the Employee.
19. The Appellant also asserted that it was not possible for the Employee to work outside of regular hours, because the Appellant's after-hours telephone-answering system redirected incoming calls to other company telephones. The Employee denied that the Appellant had such a system. The Director found that there was no evidence of the existence of such a system, and noted the documents supplied by the Employee which demonstrated that she answered calls and scheduled drivers outside of regular working hours. The Director also noted that JC and AL had stated that they regularly dealt with the Employee after hours for work purposes. The Director held that the Employee's assertion that she worked 10 hours per day was the most reliable evidence on this issue.
20. The Director held that the Employee's salary was insufficient to satisfy the minimum wage requirements of the *ESA* as she was working 10 hours per day. The Director thus held that the Employee was entitled to be paid the minimum wage prevailing during the 12-month wage recovery period specified by the *ESA*, including extra pay for overtime hours.
21. The Director calculated the amount owing in regular wages and overtime for the period from October 17, 2018 to October 16, 2019, as \$57,960.80. The Director found that the Employee was also entitled to receive statutory holiday pay during the wage recovery period, in the sum of \$1,970.00. The Appellant had failed to pay vacation pay to the Employee, and the Director calculated the amount owing to be \$2,893.18 during the wage recovery period. The Director also found that the Appellant had paid insufficient compensation for length of service in the sum of \$120.00 and had made unauthorized deductions in the sum of \$700.00. From those sums the Director subtracted the sum of \$22,410.00 representing the monies actually paid to the Employee during the wage recovery period and held that the balance of monies owing to the Employee was \$41,233.98.
22. The Director found that the Appellant had breached sections 18, 21, 28, 45, 46 and 58 of the *ESA*, by failing to pay the amounts owing. For these breaches of the *ESA*, the Director assessed administrative penalties in the sum of \$3,000.00. The Director also assessed interest payable on the foregoing sums.

### **The Appeal**

23. The grounds upon which the Appellant appeals the Determination are that the Director allegedly erred in law in making the Determination, that the Director failed to observe principles of natural justice in making

the Determination, and that new evidence has become available that was not available at the time that the Determination was made.

24. On July 22, 2021, the Appellant filed, within the statutory appeal period, an appeal of the Determination. Included in the filing were the completed Appeal Form, written reasons and arguments in support of the appeal, the Determination, and the Reasons for the Determination.
25. The office of the Tribunal requested that the Director provide a complete copy of the documentary record (the “Record”) which was before the Director at the time that the Determination was made. The Record was supplied by the Director and was cross disclosed to the Appellant and the Employee.

### **The Submissions**

#### *(i) The Appellant’s Submissions*

26. In the written argument presented by the Appellant, no mention is made of any alleged error of law made by the Director. Instead, the Appellant’s submissions are limited to the allegations that the director failed to observe the principles of natural justice, and new evidence has become available that was not available at the time that the Determination was issued.
27. With respect to the Appellant’s assertion that the Director failed to observe principles of natural justice, the Appellant presented the following arguments:
  - a. the Director failed to observe the principles of natural justice by:
    - i. preferring the evidence of the Employee over that of the Appellant, on the issue of the hours worked by the Employee, in light of the fact that the Employee had previously been interested in purchasing the Appellant company and has a financial interest in the outcome of this matter;
    - ii. failing to recognize that Samuel has a “lack of business understanding”;
    - iii. demonstrating bias in favour of the Employee by failing to understand that Samuel and Johal “are not tech savvy” enough to provide detailed information on the operation of the company’s telephone-answering system;
    - iv. failing to fully and impartially consider the information supplied by both the Employee and the Appellant; and
    - v. demonstrating bias in favour of the Employee by preferring the information of the Employee over that of Samuel.
28. On August 10, 2021, the Appellant made further, unsolicited submissions in the form of an email. Nothing in this further submission relates to the allegation that the Director erred in law, or failed to observe the principles of natural justice, in making the Determination.
29. With respect to the Appellant’s assertion that new evidence has become available that was not available at the time that the Determination was made, the Appellant presented no argument in its original submissions. Rather, appended to the Appellant’s Appeal Form were 4 pages of documents related to the

termination of the Employee's employment. In the Appellant's August 10, 2021, submission, reference is made to the possible existence of documents related to an allegation that the Employee cared for foster children during the time that she was employed by the Appellant. The Appellant states that it has been unable to obtain any of the said documents related to foster children.

(ii) *The Director's Submissions*

30. In response to this Appeal the Director made the following submissions:

- a. The four pages of documents appended to the Appeal do not constitute new evidence, as they were before the Director during the Investigation;
- b. The Appellant has failed to establish that the documents referred to in the Appellant's submission of August 10, 2021, were unavailable at the time that the Determination was made, and any such documents cannot therefore be considered to be new evidence;
- c. The Appellant has failed to provide any evidence to support the allegation that the Director exhibited bias in the Determination;
- d. The Director denies any bias or lack of impartiality in the assessment of the evidence provided by the parties. The Director fully examined the Appellant's work schedules, and weighed the evidence of the Employee and the Appellant regarding these records, and stated why the evidence of the Employee was preferred;
- e. The Director denies any bias arising from the Appellant's lack of business knowledge.

(iii) *The Employee's Submissions*

31. In response to this Appeal, the Employee made the following submissions:

- a. The Employee stated that her foster care responsibilities did not interfere with the work that she performed for the Appellant;
- b. The Employee denied that the Complaint was made as retaliation for her dismissal;
- c. The Employee alleges that she often worked more than the 10 hours per day she claims in this matter.

## ANALYSIS

32. The Appellant asserts that the grounds for the appeal of the Determination were that the Director erred in law, that the Director failed to observe the principles of natural justice, and that new evidence has become available that was not available at the time that the Determination was made.

33. Given that the Appellant is unrepresented by counsel and untrained in the law, I am guided by the decision of this Tribunal in *Re Triple S Transmission Inc.* BC EST #D141/03, wherein the Tribunal stated that a "large and liberal view" should be taken of the arguments advanced by an appellant:

While some appellants are represented by legal counsel or otherwise obtain legal advice prior to filing their appeal, the vast majority of appellants do not have any formal legal training and, in essence, act as their own counsel. ...



Although most lawyers generally understand the fundamental principles underlying the “rules of natural justice” or what sort of error amounts to an “error of law”, these latter terms are often an opaque mystery to someone who is untrained in the law. ...

... When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that **adjudicators should take a large and liberal view of the appellant’s explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.** [*emphasis added*]

34. While the Appellant has made no express argument in support of its position that the Director erred in law, I will nevertheless consider whether there is any *prima facie* indication of an error of law in the Determination.

***Did the Director err in law in making the Determination?***

35. This 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 applicable legislation;
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.

36. I find nothing on the face of the Determination that suggests that the Director misinterpreted or misapplied relevant legislation. On the contrary, I find that the Director correctly considered the relevant legislation, including the definition of “manager” in section 1 of the *Employment Standards Regulation*, the obligation to maintain records of hours worked, and the duty to make payment of minimum levels of wages, including overtime, statutory holiday pay, vacation pay, and compensation for length of service.

37. I find no evidence that the Director misapplied any principle of general law.

38. I do not find that the Director acted without any evidence. On the contrary, I find that the Director undertook a thorough and fulsome investigation and made a thoughtful assessment of the evidence arising therefrom.

39. I do not find that the Director acted on a view of the facts that could not reasonably be entertained.

40. I find that the Director’s method of assessment of the amounts owing was sound, fair, and correct in principle.

41. I find that the Director did not err in law in making the Determination.

***Did the Director fail to observe the principles of natural justice in making the Determination?***

42. In its appeal, the Appellant contends that the Director failed to observe the principles of natural justice in making the Determination.

43. In *Imperial Limousine Service Ltd.*, BC EST #D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies, as follows:

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 #D 050/96).

44. Natural justice thus requires the Director to provide certain procedural protections to both parties, and to conduct investigations in an unbiased and neutral manner.

45. I am satisfied that the manner in which the Director conducted the Investigation afforded the Appellant full opportunity to know the evidence and arguments of the Employee, and to respond thereto.

46. The Appellant contends that the Director demonstrated bias and lack of impartiality in making the Determination. More specifically, the Appellant contends that the Director exhibited bias by failing to appreciate that Samuel and Johal “are not tech savvy” enough to provide information on the operation of the company’s telephone-answering system, by failing to fully and impartially consider the information supplied by both the Employee and the Appellant, and by preferring the information of the Employee over that of the Appellant.

47. The Supreme Court of Canada stated, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992], 1 S.C.R. 623 at 636-37, that the test to assess whether an adjudicator has been unbiased is that of the ‘reasonably informed bystander’:

The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. ... As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

48. I am not satisfied that a reasonably informed bystander would find that the Director exhibited bias, or lack of impartiality, in the making of the Determination. The Director made it clear in the Determination how all of the information supplied by the parties had been examined. The Director fully explained why he preferred the evidence of the Employee over that of the Appellant, particularly in the face of inconsistencies in the evidence supplied by the Appellant. I find no evidence to support the suggestion that the Appellant’s lack of business knowledge or “tech savvy” in any way influenced the Director’s conclusions.

49. I am satisfied that the Director observed the principles of natural justice in making the Determination.

***Has new evidence come to light that was not available at the time that the Determination was made?***

50. The Appellant maintains that new evidence has become available that was not available at the time that the Determination was made. For the most part, the Appellant's submissions make no specific reference to any evidence which has come to light now that was not available at the time that the Determination was made.

51. This Tribunal, in *Re: Bruce Davies*, BC EST # D171/03, set out the test to be applied to allegedly new evidence that is sought to be admitted on appeal, as follows:

- (a) 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;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential 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 the material issue.

52. The 4 pages of documents appended to the original Appeal submissions do not constitute new evidence, as they formed part of the body of evidence that was considered by the Director when the Determination was made.

53. In the Appellant's August 10, 2021 submission, reference is made to documents that might exist related to the allegation that the Employee cared for foster children, and that this might have interfered with the performance of her work for the Appellant.

54. I find that the Appellant's allegation that there may be documents in existence related to the Employee's care of foster children does not satisfy the test for the admission of new evidence. There is nothing before me that establishes that such documents exist, that if they do exist, they were unavailable at the time that the Determination was made, that they are relevant to the issues in this appeal, or that they would have high potential probative value.

55. I dismiss this ground of appeal.

## **CONCLUSION**

56. I find that the Director committed no error of law in making the Determination. The Director conducted a thorough and complete investigation into the facts related to the Employee's Complaint, including interviews of the Employee, representatives of the Appellant corporation, and a current and former employee of the Appellant. I am satisfied that the Director observed the principles of natural justice in the making of the Determination. I am not satisfied that there is new evidence available that was not available when the Determination was made.

**ORDER**

57. Having reviewed the Determination, the parties' submissions, the Record, and the relevant legislative provisions, I dismiss this appeal, and confirm the Determination pursuant to section 115(1) of the *ESA*.

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**James F. Maxwell**  
**Member**  
**Employment Standards Tribunal**