



EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Cheam Taxi Ltd.  
("Cheam Taxi")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2022/098

**DATE OF DECISION:** June 14, 2022

## DECISION

### SUBMISSIONS

Dustin G. Ellis

legal counsel for Cheam Taxi Ltd.

### INTRODUCTION

1. On March 14, 2022, Jennifer Redekop, a delegate of the Director of Employment Standards (the “delegate”), issued a Determination ordering the present appellant, Cheam Taxi Ltd. (“Cheam Taxi”), to pay its former employee, Bryson Wyborn (the “complainant”), a total sum of \$2,194.11 including interest. This Determination was issued pursuant to section 81 of the *Employment Standards Act* (the “ESA”). The delegate issued her “Reasons for the Determination” (the “delegate’s reasons”) concurrently with the Determination.
2. Further, and also by way of the Determination, the delegate levied four separate \$500 monetary penalties (see section 98) against Cheam Taxi based on its contraventions of sections 40, 45, and 63 of the *ESA* and section 46 of the *Employment Standards Regulation*. Accordingly, the total amount payable under the Determination is \$4,194.11.
3. In its Appeal Form filed with the Tribunal on March 31, 2022, Cheam Taxi indicated that it was appealing the Determination on all three statutory grounds – i) the delegate erred in law; ii) the delegate failed to observe the principles of natural justice in making the Determination; and iii) evidence has become available that was not available when the Determination was being made (see subsections 112(1)(a), (b), and (c) of the *ESA*).
4. In my view, this appeal has no prospect of succeeding and, accordingly, must be dismissed under section 114(1)(f) of the *ESA*. My reasons for reaching that conclusion now follow.

### SERVICE OF THE DETERMINATION AND THE SUBSEQUENT APPEAL

5. In a text box set, found at the bottom of the third page of the Determination, certain “Appeal Information”, as well as the applicable appeal deadlines (depending on mode of service), presumably calculated in accordance with section 122 of the *ESA*, is set out. It appears that the Determination was served on Cheam Taxi by electronic mail, and on its two directors/officers by ordinary mail. A determination served by electronic mail “is deemed to have been served 3 days after it is transmitted” (section 122(3)); a determination served by ordinary mail “is deemed to have been served 8 days after it is mailed” (section 122(2)).
6. The deadlines for appealing a determination to the Tribunal are set out in section 112(3) – “30 days after the date of service of the determination, if the person was served by registered mail”, and “21 days after the date of service of the determination, if the person was personally served or served under section 122(3).” Accordingly, Cheam Taxi’s appeal was required to have been filed 24 days after it was served by electronic mail (i.e., by April 7, 2022).

7. On March 31, 2022, Cheam Taxi filed an Appeal Form, but it did not attach any reasons and argument in support of its three asserted grounds of appeal. On the Appeal Form, prepared by Cheam Taxi's legal counsel, Cheam Taxi indicated that it would provide its reasons for appealing the Determination by April 7, 2022. On April 7th, Cheam Taxi's legal counsel contacted the Tribunal to advise that he would not likely submit his reasons to support the asserted grounds of appeal by the end of that day. On April 8th, counsel submitted a 121-page document including some statutory materials, but the bulk of the submission consists of what appear to be various Cheam Taxi internal records. The April 8th submission did not include any submissions supporting the asserted grounds of appeal. Counsel explained that this omission was caused by a pressing matter that he was required to address in the B.C. Supreme Court. Counsel indicated that his full appeal submissions would be filed by no later than 4:30 PM on April 11, 2022. On April 14, 2022, counsel filed the requisite appeal submissions.
8. Since I do not find it necessary to hear from either the complainant or the Director of Employment Standards, I am adjudicating this appeal based solely on the submissions filed by Cheam Taxi, as supplemented by the section 112(5) record and, of course, my review of the Determination and the delegate's reasons.

## THE DETERMINATION

9. On February 24, 2020, the complainant filed a complaint against Cheam Taxi, claiming that he had worked for the firm as both a dispatcher and a taxi driver. He claimed overtime pay, statutory holiday pay, and reimbursement for a \$100 "towing a vehicle" charge. The complaint was investigated and on March 14, 2022, the Determination was issued.
10. In her reasons, the delegate addressed six separate matters relating to the complainant. First, she determined – rejecting Cheam Taxi's position – that while working as a taxi driver, the complainant was an employee, not an independent contractor. Second, she determined that the complaint was filed within the statutory 6-month limitation period. Third, she determined that the complainant was not entitled to any overtime pay with respect to his work as a taxi driver, but was entitled to some overtime pay for his work as a dispatcher (\$112.71). Fourth, the delegate determined that the complainant qualified for statutory holiday pay in relation to six separate statutory holidays, and was owed \$828.80 on that account. Fifth, the delegate rejected the complainant's \$100 unlawful wage deduction as not having been proven. Sixth, the delegate held that the complainant, who had been away from work due to a work-related injury, but had been cleared to return by WorkSafeBC, was never recalled after he advised Cheam Taxi that he was ready to return to work. Since Cheam Taxi could not prove that it had just cause to dismiss the complainant, or that the complainant voluntarily quit his employment, he was entitled to two weeks' wages as compensation for length of service payable under section 63 of the *ESA* (\$1,048.00).
11. Finally, since the evidence before the delegate demonstrated that Cheam Taxi failed to pay the complainant earned overtime pay (section 40), statutory holiday pay (section 45), and compensation for length of service (section 63), she levied a \$500 monetary penalty in relation to each of those statutory contraventions. In addition, Cheam Taxi failed to comply with a demand for production of certain employment records, and thus was subject to a fourth \$500 monetary penalty for its contravention of section 46 of the *Employment Standards Regulation*. Accordingly, a total of \$2,000 in monetary penalties were assessed against Cheam Taxi.

## REASONS FOR APPEAL

12. As previously noted, Cheam Taxi’s Appeal Form indicated that it was appealing the Determination on all three statutory grounds. Unfortunately, its subsequent submissions do not set out with any degree of clarity the specific arguments it advances under each ground. Accordingly, I will endeavour to extract what appear to be the relevant arguments under each statutory ground of appeal.

### *Errors of Law*

13. Cheam Taxi says that the complainant, while working as a taxi driver, was an independent contractor and that the delegate erred in determining that he was an employee while working as such.
14. Cheam Taxi also appears to assert that the complainant was not dismissed from his employment but, rather, he was not permitted to return to work following a motor vehicle accident that resulted in his medical leave because Cheam Taxi “was concerned about the Complainant [*sic*] condition, wellbeing, and underlying health” as well as “public safety”.
15. Finally, Cheam Taxi says that the delegate erred in finding that the complaint was not time-barred.

### *Natural Justice*

16. Cheam Taxi says that the delegate breached section 77 of the *ESA* (“If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond”), particularly with respect to the delegate’s failure to consider certain information that was provided after a deadline given for providing further information during the course of an investigation into the complaint.
17. Cheam Taxi also says that it was “unfairly surprised” by the delegate’s section 63 compensation for length of service award, since it was never advised that the complainant was advancing a section 63 claim. Cheam Taxi asserts that “[t]his introduction of a new claim in the Reasons and Determination...violated Cheam’s right to procedural fairness”.
18. More generally, Cheam Taxi appears to be saying, but does not expressly argue, that the delegate’s reasons fail to pass the “transparent, intelligible and justified” standard (see, for example, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65): “The [delegate’s] Reasons provide no indication of how conclusions are arrived at with respect to which party bears an onus or whether conclusions were arrived at on a balance of probabilities.” I will address this assertion as a “natural justice” issue.

### *New Evidence*

19. Cheam Taxi’s submission filed April 14, 2022, includes numerous documents which were identified as “Employment Records 1805-1904” and “(Cheam) Trip Log for [the complainant]”. The former are said to be “payroll statements for pay issued to the Complainant while in his position as a dispatcher”. The latter are described as “a record of trips generated by software that distributes caller inquiries with rides taxi drivers provide to customers”.

20. While some of these documents (for example, some wage statements) are included in the section 112(5) record that was before the delegate, most of the documents are not. All of the payroll and related documents that Cheam Taxi appended its April 14th submission should have been delivered in accordance with the Director of Employment Standards' section 85 demand for employment records, which Cheam Taxi essentially ignored.

## FINDINGS AND ANALYSIS

21. I will separately address Cheam Taxi's arguments in support of its asserted grounds of appeal commencing with the "new evidence" ground of appeal.

### *New Evidence*

22. New evidence is admissible in an appeal in accordance with the Tribunal's decision in *Davies et al.*, 2003 CanLII 89192, a decision that, surprisingly, Cheam Taxi did not mention in its submissions. New evidence is admissible based on the following criteria:
- i) 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;
  - ii) the evidence must be relevant to a material issue arising from the complaint;
  - iii) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - iv) 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.

23. Cheam Taxi did not specifically address the *Davies* criteria in its submissions; indeed, it did not even specifically identify the "new evidence" it wished to submit on appeal. I am presuming that the "new evidence" consists of all of the documents appended to Cheam Taxi's April 14th submission. However, these documents *were* available, and could have been submitted to the Director of Employment Standards within the stipulated time frame for submission – Cheam Taxi simply failed to do so. As set out in the delegate's reasons (at pages R2-R4), Cheam Taxi did not comply with a section 85 demand for employment records. Cheam Taxi was specifically invited to provide a detailed response to a preliminary investigation report, but failed to do so within the time stipulated for a response. Had Cheam Taxi complied with the section 85 demand and/or provided a timely response to the investigation report, perhaps some, if not all, of these documents would have been submitted within a timely manner during the investigation (along with an explanation as to their relevance). Further, it is not clear that these documents are probative – and Cheam Taxi's submission does not explain how or why they are highly probative – in light of the issues raised in this appeal. In my view, these documents do not satisfy the *Davies* criteria and, as such, are not admissible in these appeal proceedings.

### *Errors of Law*

24. The complainant worked for Cheam Taxi in two separate roles – dispatcher and taxi driver. While seemingly conceding that the complainant was an employee as defined in the *ESA* while working in the

former role, Cheam Taxi says that once he stopped working as a dispatcher and transitioned to being a taxi driver, he ceased to be an employee. In my view, the delegate properly instructed herself as to the governing legal principles, and her determination that the complainant was an employee while working as a taxi driver (pages R7-R8) was appropriately grounded in the evidence before her. I consider her finding that the complainant was an employee while working as a taxi driver was entirely reasonable in light of the evidence and the applicable statutory provisions.

25. With respect to the section 63 compensation for length of service award, the original complaint clearly raised an issue with respect to the termination of employment – “I went off on WCB leave because I got rear ended and he is *refusing to let me return to work after I have finished all of my treatment and have proven I can work*. He will not respond to me or WCB sometimes even when we try to contact him.” [*sic*; my *italics*] These assertions raised a possible section 66 deemed dismissal claim (which would, in turn, entitle the complainant to section 63 compensation). Although invited to respond directly to the complaint during the investigation, Cheam Taxi never did so in a meaningful manner until after it filed this appeal. There is no credible evidence before me that Cheam Taxi had just cause for dismissal, or that the complainant abandoned his employment. I adopt the delegate’s reasons regarding the section 63 compensation issue, found at pages R12-R13 of her reasons.
26. As for the timeliness of the original complaint, I am satisfied that the complaint was not filed outside the 6-month limitation period. I reach this conclusion largely for the reasons set out in the delegate’s reasons, at page R8. There is no credible evidence that the complainant’s employment with Cheam Taxi was terminated after he ceased working as a dispatcher (as is now asserted by Cheam Taxi) and transitioned to a new position as a taxi driver. Although there was a fundamental change in the complainant’s work duties when he ceased being a dispatcher and became a taxi driver, the underlying employment relationship between the parties continued uninterrupted by this transition.

#### *Natural Justice*

27. As discussed above, I am not persuaded that there was a breach of section 77 in this case. Cheam Taxi knew, or should have known, that the complainant would be seeking compensation arising from his dismissal since he was, effectively, constructively dismissed. This issue was raised in the original complaint (which was provided to Cheam Taxi as an attachment to the investigation report and was also discussed in the investigation report provided to Cheam Taxi). Further, the complainant’s claims for overtime and statutory holiday pay were specifically set out in the complaint, and Cheam Taxi was invited to respond to them prior to the Determination being issued.
28. Finally, and with respect to the delegate’s reasons – which consist of 13 single-space pages in which the relevant *ESA* provisions and the evidence before the delegate are set out, as well as the delegate’s analysis of the evidence in light of the statutory scheme – I consider the delegate’s reasons to be entirely transparent and intelligible. In my view, the delegate’s calculations with respect to the complainant’s overtime and statutory holiday pay awards are entirely intelligible, and the delegate’s findings were properly justified in the light of the (admittedly, less than pristine) evidence that was before her. I should note that a major share of the fault in this latter regard lies with Cheam Taxi, since it failed to comply with a lawful demand for employment records.
29. In light of the delegate’s findings, each of the four \$500 monetary penalties was properly assessed.

*Summary*

30. I am not satisfied that any of the asserted grounds of appeal has a reasonable prospect of succeeding. That being the case, this appeal must be dismissed under section 114(1)(f) of the *ESA*.

**ORDER**

31. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of \$4,194.11, together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**