

Citation: Taste of Hangzhou Catering Ltd. (Re)
2022 BCEST 34

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Taste of Hangzhou Catering Ltd. carrying on business as Cloud Café
("THC")

- 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: Shafik Bhalloo

FILE No.: 2022/097

DATE OF DECISION: June 16, 2022

DECISION

SUBMISSIONS

Weibo Zhuang on behalf of Taste of Hangzhou Catering Ltd. carrying on business as Cloud Café

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Taste of Hangzhou Catering Ltd. carrying on business as Cloud Café (“*THC*”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “*Director*”) on February 16, 2022 (the “*Determination*”).
2. The *Determination* found that *THC* contravened Part 3, section 18 (wages); Part 4, section 40 (overtime wages); and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Peiyuan Jin (“*Mr. Jin*”).
3. The *Determination* ordered *THC* to pay *Mr. Jin* wages in the total amount of \$1,404.85 including accrued interest.
4. The *Determination* also levied two administrative penalties against *THC* of \$500 each under the *Employment Standards Regulation* (the “*ESR*”) for breach of sections 18 and 28 of the *ESA*.
5. The total amount of the *Determination* is \$2,404.85.
6. *THC* appeals the *Determination* on the “natural justice” ground of appeal under section 112(1)(b) of the *ESA*.
7. The deadline to file the appeal of the *Determination* was 4:30 p.m. on March 28, 2022. On March 28, 2022, the Tribunal received *THC*’s appeal submission from Weibo Zhuang (“*Mr. Zhuang*”), *THC*’s manager. The appeal submission consisted of *THC*’s Appeal Form and written reasons for requesting an extension of the statutory appeal period to May 13, 2022.
8. On April 5, 2022, the Tribunal corresponded with the parties advising them that it had received *THC*’s appeal of the *Determination* and application to extend the statutory appeal period pursuant to section 109(1)(b) of the *ESA*. The Tribunal also informed *Mr. Jin* and the *Director* that, at this time, no submissions were being sought from them on *THC*’s request to extend the appeal period and on the merits of the appeal.
9. In the same correspondence, the Tribunal requested *THC* to provide its “additional reasons and arguments for the appeal and additional supporting documents **by no later than 4:30 p.m. on May 13, 2022**” and that this deadline “is not an extension to the statutory appeal period but is a deadline to provide the requested documents to the Tribunal”. It also noted that the Panel assigned to decide the appeal will also decide *THC*’s request for an extension of the appeal period.

10. The Tribunal also requested the Director, pursuant to section 112(5) of the *ESA*, to provide the record (“the record”) that was before the Director at the time the Determination was made.
11. On April 19, 2022, the Tribunal received the record from the Director. A copy of the same was sent to THC and Mr. Jin and both parties were provided an opportunity to object to its completeness by May 31, 2022. Neither THC nor Mr. Jin objected to the completeness of the record and the Tribunal finds it is complete.
12. On June 2, 2022, the Tribunal informed the parties that the appeal is assigned to a panel, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from Mr. Jin and the Director on the merits of the appeal.
13. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based solely on THC’s appeal submissions, the record, and the Reasons for the Determination (the “Reasons”). Under section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any reasons listed in the subsection. If satisfied the appeal or part of it should not be dismissed, the Director and Mr. Jin will be invited to file submissions. On the other hand, if the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case I will consider whether there is any reasonable prospect that the appeal will succeed.

ISSUE

14. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

Background

15. Based on the B.C. Online Corporate Registry search conducted by the delegate of the Director on November 23, 2021, with a currency date of September 7, 2021, THC was incorporated in British Columbia on March 1, 2019, and Hong Du (“Ms. Du”) is its sole Director.
16. THC operates a restaurant in White Rock, British Columbia.
17. The parties dispute the nature of their relationship but agree that the relationship ended in January 2020.
18. On April 21, 2020, Mr. Jin filed a complaint against THC under section 74 of the *ESA* alleging that THC contravened the *ESA* by failing to pay him all wages (the “Complaint”).
19. A delegate of the Director of Employment Standards (“investigating delegate”) completed an investigation of the Complaint and another delegate (“adjudicating delegate”) conducted a review of all information on the file, which included the investigating delegate’s report summarizing the information collected from the investigation issued on December 21, 2021. The adjudicating delegate made the Determination on February 16, 2022.

The Reasons

20. In the Reasons, the adjudicating delegate notes that she considered the following two issues:
- a. Was Mr. Jin an employee as defined by the ESA?
 - b. If so, is he entitled to wages?
21. The adjudicating delegate meticulously summarizes the evidence of both parties in the Reasons.
22. In the case of Mr. Jin, the adjudicating delegate notes that the latter testified he applied for a job as a chef with THC through an advertisement posted on the website Vansky.com. He spoke with THC's director, Ms. Du, on January 8, 2020, regarding starting employment as a chef. Subsequently, he exchanged numerous text messages with her about establishing menu items and purchasing ingredients before his phone interview with Ms. Du on January 14, 2020.
23. After he had his phone interview with Ms. Du on January 14, 2020, Mr. Jin met with her in person and prepared some dishes for her at the restaurant as part of the interview process. Ms. Du then hired him as a chef for the restaurant and they negotiated a salary of \$22.50 per hour and \$200 for bus transportation.
24. Mr. Jin said his first day of work was January 16, 2020, and his duties included shopping for ingredients, preparing food, creating dishes for the menu, and helping to set up for the restaurant's health inspection. He said he worked 9 hours per day on January 16, 18, 23, 24, 25 and 26 at varying times from 9:30 a.m. to 6:30 p.m., 10:00 a.m. to 7:00 p.m., and 11:00 a.m. to 8:00 a.m., without taking a meal break
25. Mr. Jin submitted text messages between himself, and Ms. Du communicated on a messaging app called WeChat between January 11 and 26, 2020. The messages were in Cantonese and translated to English by Mr. Jin's niece. The messages show a series of conversations around establishing a menu for the restaurant, purchasing ingredients, and scheduling Mr. Jin for work. Evidently, the messages were material and instructive for the adjudicating delegate in determining the relationship between the parties and they are as follows:
- On January 11, 2020, [Ms. Du] sent a message that stated, "Chef-Jin, you worked so hard" and referred to menu items saying, "Chef Jin, we should jus[t] keep our menu simple, its easy to prep". [Mr. Jin] responded, "Its totally up to you to decide on menu."
- On January 12, 2020, [Ms. Du] sent two messages asking, "Shall we start on Saturday?" and "Could you please add this item into our menu[?]" There is no response from [Mr. Jin] to these messages.
- On January 13, 2020, [Ms. Du] sent messages regarding working with two sous chefs. [Mr. Jin] responded with, "we can start on Tuesday and Wednesday, we have a lot to do before the grand opening".
26. The adjudicating delegate also notes that the text messages continued on January 13, 2020, with Ms. Du asking Mr. Jin if she needed to pay him for purchasing ingredients. Mr. Jin responded that "sometimes we will have to work after work time which still should be considered working hours." Ms. Du responded "I thought you have so much passion for this job. But [I'm] not asking you to spend a lot of time on this."

27. In another message on January 13, 2020, Ms. Du stated: “I was so happy to have you, till I feel hurt when you said, its taking an (sic) advantage from (sic)you, cuz we did not pay the time you go buy some other ingredients, we will pay your salary and your transportation fee all (sic), however if we ask you to buy some ingredients which cost your time, we can pay you for more tips instead to cover those few hrs you had worked extra”.
28. On January 17, 2020, Ms. Du sent Mr. Jin a text message stating “I can’t get hold of you ...can you work tomorrow?” Mr. Jin responded “yes.” She then sent a further message to Mr. Jin stating that she had a conversation with the health inspector regarding an upcoming health inspection at the restaurant and “[w]e should purchase all food after inspection, try to avoid too mess [sic] it the pantry. Tomorrow we can discuss about the food menu, procedure, and detailing.” Mr. Jin responded with “ok”. Ms. Du then asked what time he would be in the restaurant the next day, to which he replied “around 11 am”.
29. On January 21, 2020, Ms. Du texted Mr. Jin about a list of food ingredients and advised him that all food would be received by Thursday. She then asked, “[w]hen can I call friends to come test (sic) the food menu? Friday?” Mr. Jin replied, “we should be able to be ready by Thursday, so I assumed (sic) you can invite them to come on Friday or Saturday.” He also said “[he] will do the prep and processing it (sic) at the same time.”
30. On January 23, 2020, Ms. Du sent a text message stating, “Chef Jin, you work so hard, have you got home yet?” Mr. Jin responded, “Just arrived?” She then informed him that there are two reservations for the next day, one for a group of 12 people and another for a group of 6 people.
31. On January 24, 2020, Ms. Du texted Mr. Jin and said: “Get some rest. Chef Jin, tomorrow is our grand opening, we need to prep all ingredients from the menu.” Mr. Jin replied that he understood and informed Ms. Du that some ingredients were missing from his list such as “tiger shrimps and Hangzhou marinated meat.”
32. On January 26, 2020, Mr. Jin sent a message to Ms. Du advising: “I can possibly work till Jan 31, 2020” to which Ms. Du responded “Ok.”
33. The adjudicating delegate observes in the Reasons that while in the Complaint Mr. Jin states he was fired, he clarified to the investigating delegate that he quit his employment on January 26, 2020, after Ms. Du was disrespectful and verbally unkind to him. He then did not speak with Ms. Du or her husband, Mr. Zhuang, because they claimed they never hired him.
34. The adjudicating delegate also notes that Mr. Jin submitted a letter (“Demand Letter”) prepared by Deniz Ozensoy (“Mr. Ozensoy”), a law student with the Law Students’ Legal Advice Program, that was sent on his behalf to THC on February 26, 2020, asking THC to pay him \$1,264.50 for 54 hours he worked at the restaurant and \$49.50 in transportation costs failing which he would file a complaint with the Employment Standards Branch. When THC did not respond, Mr. Jin filed the Complaint.
35. With respect to THC’s evidence in the investigation, the adjudicating delegate notes that THC was afforded an opportunity to provide payroll records of Mr. Jin but failed to do so. THC also did not respond to the investigating delegate’s report.

36. The adjudicating delegate notes that Mr. Zhuang, who was Ms. Du's husband and operated the restaurant with her, contended that while Mr. Jin interviewed for the position of chef on January 24 or 25, 2020, he was never employed by THC.
37. Mr. Zhuang admits that the parties exchanged texts for a few days before the interview, but this was because he needed to establish that Mr. Jin had proper knowledge to source ingredients from vendors in the area and the required skills to cook as a chef. Only after exchanging text messages, Mr. Zhuang says he was ready to interview Mr. Jin.
38. He said the interview took about 6 hours to complete consisting of 2 hours for preparation work including shopping for ingredients and 4 hours for cooking in the kitchen. However, during the interview process, he and Ms. Du determined that Mr. Jin was not experienced as a chef and unable to prepare the dishes he claimed he was capable of cooking. As a result, at the end of the interview process, they informed him that he was not successful.
39. Mr. Zhuang added that the restaurant obtained a permit to operate from Fraser Health on January 23, 2020, and a business license effective on January 24, 2020. The restaurant also received its first payment from a customer on January 27, 2020.
40. He explained that the text messages provided by Mr. Jin were problematic for a few reasons including: (i) they were not complete, (ii) inaccurately translated and (iii) in an incorrect order. However, he was unable to provide any of the missing text messages because he changed phones and no longer had access to the messages. He contended that Mr. Jin's text messages show conversations that pertain to the interview process and whether he had the capacity to be a chef and source fresh ingredients at a fair price. He argued that Mr. Jin was asked to attend the restaurant and cook two or three dishes as a final step in the interview process. He said that the missing messages would have made it clear that Mr. Jin was only a potential candidate and not an employee.
41. While Mr. Zhuang did not provide his own translation of the text messages in question, he provided Ms. Du's responses to some of the messages. The gist of Ms. Du's explanation was that, at all material times, Mr. Jin was only a candidate for the advertised chef position undergoing an interview process, but never hired.
42. Mr. Zhuang also pointed out that when he and Ms. Du received the Demand Letter they spoke with Mr. Ozensoy and informed him that Mr. Jin was not being truthful because the text messages between the parties show he was only a potential candidate. As a result, Zhuang says that Mr. Ozensoy said he would not continue to help Mr. Jin further.
43. Having summarized the evidence of both parties, the adjudicating delegate then reviewed the same in context of the definitions of "employee", "employer" and "work" in the *ESA*. In concluding that Mr. Jin was an employee of THC for the period January 16 to 26, 2020, inclusive, the adjudicating delegate reasoned as follows:

The Complainant stated his interview and demonstration of cooking ability occurred on January 14, 2020. However, the text message from Du to the Complainant on January 11 praising his "work" seems to indicate that the Complainant attended the restaurant prior to January 14, 2020. Accordingly, I find that the text from Du to the Complainant on January 11, 2020 relates to the

demonstration of cooking that he did during the job interview/suitability assessment itself. I also find that the text message sent to the Complainant on January 13 regarding expectations for being compensated for purchasing ingredients relate to ongoing discussions about compensation prior to him starting employment.

The Complainant's position is that he started employment on January 16, 2020, and that he quit his employment on January 26, 2020.

I find it unreasonable that an interview process or pre-hiring assessment process for employment as a chef would involve the job applicant being tasked over a period of more than a week with purchasing food, preparing food, and being consulted over various things like the menu, getting ready for the restaurant opening and whether cleaners should attend the restaurant in advance of a public health inspection. The text messages supplied by the Complainant are clear that Du was praising the Complainant for working. The Respondent claims that the Complainant was only interviewed for the job of chef on January 24 or 25 but I find this is not so in light of what was being discussed in the text messages prior to and on January 24.

The Complainant's information that he began working as an employee on January 16, 2020 is simply more persuasive. Accordingly, I find that, as of that date, all cooking, food purchases, and assistance provided for the opening of the restaurant as it related to menu development and getting the restaurant ready for a health inspection, was work performed in the context of an employment relationship. I simply do not accept that a chef job interview or an assessment of suitability as a chef involves donated or free labour of the type the Complainant performed for days. I find, therefore, that the Complainant was, in fact, hired as an employee and began his employment on January 16, 2020.

... The Complainant provided information that his last working day was January 26, 2020. The Respondent's position is that they had discussions with the Complainant prior to January 26 about the impending health inspection and that the Complainant could "join them" after the inspection. I have already found and it is clear that the Complainant had already begun working for the Respondent as an employee prior to the health inspection. The Complainant's record of days and hours worked show only two days of work before a gap of no work after January 18 until January 23. Accordingly, I find it reasonable that the Complainant did come back to work on January 23 after Fraser Health had cleared the restaurant for opening. Du did not challenge the content of most of the Complainant's text messages between him and her between January 23 and January 26. I find it reasonable that the Complainant did, in fact, work for a couple of days prior to the Fraser Health inspection and then again on January 23 through to January 26, and that his last day worked was January 26 before he quit. This further reinforces that he was not interviewed for the job of chef on January 24 or 25 at Zhuang claims. The text messages are clear evidence that the employment relationship between the Respondent and the Complainant was ongoing before and after the Fraser Health inspection.

44. Having determined that there was an employer-employee relationship between the parties, the adjudicating delegate next went on to determine the wages Mr. Jin was owed by THC. Since THC denied there was an employment relationship, and did not provide any payroll records, the adjudicating delegate relied on Mr. Jin's evidence which she found reasonable and concluded as follows:

I find that a chef working for six days in an 11 day stretch for 9 hours per day to facilitate getting a restaurant up and running for business is a conservative tally of the hours one would reasonably expect a new chef to put into the opening of a restaurant and, therefore, I find that the

Complainant's claim of 54 hours worked on 6 days over an 11 day period is reasonable. After all, Du had praised the Complainant over text for his hard work more than once. Accordingly, in the absence of records from the Respondent regarding the Complainant's hours of work, I find that the Complainant worked on 6 days for 9 hours each day.

The Complainant's information is that his rate of pay was \$22.50 per hour. While the Respondent disputed that the Complainant was an employee, the Respondent did not allege that such a wage for a chef was unreasonable. Accordingly, in the absence of any information from the Respondent about the Complainant's wage rate, I find that the Complainant's rate of pay was \$22.50 per hour.

The Complainant alleged that there was an agreement to pay him \$200 for bus transportation, and claims less than that amount as still owing. The cost of commuting to work does not constitute wages and I decline to award bus transportation costs.

45. In the result, the adjudicating delegate concluded that Mr. Jin was owed a total of \$1,333.80 for regular wages, overtime pay, and vacation pay. She also levied two administrative penalties of \$500 each against THC for contravening sections 18 (failure to pay all wages after employment terminates) and 28 (failure to keep payroll records) of the *ESA*.

SUBMISSIONS OF THC

46. In its Appeal Form, filed on March 28, 2022, THC has checked-off the "natural justice" ground of appeal and asks the Tribunal for an extension of time until May 13, 2022, to provide additional reasons and arguments and additional documents in support of its appeal. However, it should be noted that THC failed to deliver the Tribunal any additional reasons, arguments, or documents by May 13, and has not done so at the writing of this decision.
47. In the brief written submissions filed with the Appeal Form, Mr. Zhuang, provides two reasons why THC requires an extension of time to provide additional reasons, arguments, and documents. He states, the restaurant was closed until March 23, 2022, and when he went to "reopen the business" that day he only then found the Determination in the mailbox. He also says that THC needs "time to find the Chinese speaking student in the Law Student (sic) Advise(sic) Program" so that he could obtain from him "all the text information" which they sent him when he was acting for Mr. Jin in February 2020. He says that THC "lost the text information since the phone was broken at the end of 2020". Once he obtains the information in question, he says: "[w]e will complete the reason[s] and argument[s]".
48. With respect to the merits of the appeal, Mr. Zhuang contends that the Director breached the principles of natural justice in making the Determination because:
- a. The Director made the Determination based only on the "Chinese texts with a terrible translation" provided by Mr. Jin;
 - b. The Director "turned a blind eye to [THC's] reasons" and believed Mr. Jin without "checking [Mr. Jin's] intentionally mistranslated [text messages]";
 - c. THC "asked for a Chinese interpreter to participate in the communication" or to communicate with someone in the department who could speak Chinese and the investigating delegate said "YES by phone, but it never happened";

- d. The adjudicating delegate was wrong in concluding that Mr. Jin’s interview had completed on January 14, when Mr. Jin said he went to the restaurant to prepare some dishes because this is not true as there was construction ongoing at the restaurant before January 20th, 2020, including January 14, and he (Mr. Zhuang) has a copy of an email he received from a representative of the construction company on January 14, 2020, that proves there was ongoing construction (which he has submitted in the appeal);
- e. Mr. Jin’s representative at the Law Student Legal Advice Program, after speaking Mr. Zhuang (and presumably Ms. Du) and receiving their “communication information with Mr. Jin” decided not to represent him because “Mr. Jin did not tell the truth”;
- f. If Mr. Jin was THC’s employee, then he should have been in charge of the restaurant inspection by Fraser Health, but Mr. Jin did not appear during the inspection and approval of the menu;
- g. Mr. Jin was working in other restaurants during the same period, and it is impossible for him to have worked 9 hours a day for THC during this period and the Director failed to investigate this;
- h. Based on the salary level in Chinese restaurants, “Mr. Jin’s salary should be 16.5-17.5 yuan/hour, not 22.5 yuan/hour”; and
- i. The Complaint was filed on April 21, 2020, but the first call THC received from the Director was on August 14, 2021, which he questions as unusual delay.

ANALYSIS

49. The grounds of appeal under the *ESA* are set out in section 112(1):

Appeal of director's determination

- 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.

50. The Tribunal has consistently held that 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, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).

51. Section 112(1) does 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.

52. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.
53. Having delineated some of the relevant principles applicable to appeals, as previously noted, THC has checked off the “natural justice” ground of appeal in the Appeal Form. However, this Tribunal in *Re Flour Child Bakeries Corp.*, BC EST # D094/06, adopted the view of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, that in adjudicating an appeal, the Tribunal should not “mechanically adjudicate an appeal based solely on the particular ‘box’ that an appellant has checked off”. More particularly, the Tribunal in *Triple S Transmission Inc.* stated:
- 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.
54. Adopting the view expressed in *Triple S Transmission Inc.*, and based on the written submissions of Mr. Zhuang, the Reasons, and the record, I have reviewed THC’s appeal under all three available grounds of appeal in section 112 of the *ESA*. I am not persuaded with the merits of THC’s appeal, and I dismiss it for the reasons set out below.

Natural Justice

55. The often-quoted decision of the Tribunal in *607730 B.C. Ltd. (English Inn & Resort) (Re)*, 2005 CanLII 93852 (BC EST) explains that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.
56. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice 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 respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST # D050/96)
57. There is nothing in the record nor in Mr. Zhuang’s submissions that suggests an infringement of THC’s natural justice rights in the investigation or adjudication of the Complaint. The onus is on the party alleging a failure to comply with principles of natural justice to provide some evidence in support of that allegation and, in this case, THC has failed to do so in its written submissions of March 28, 2022.

58. It is evident from Mr. Zhuang's submissions that THC does not share the adjudicating delegate's conclusions of fact that Mr. Jin was in an employment relationship with THC and the latter owes him wages. The adjudicating delegate weighed the evidence of both parties, which of necessity will result in the adjudicating delegate preferring the evidence of one party over the other. In this case, the adjudicating delegate preferred the evidence of Mr. Jin over THC's. This, without more, does not a breach of natural justice make.
59. As for requiring participation of a Chinese interpreter to communicate with the investigating delegate in the investigation of the Complaint, I do not find anything in the record that suggests that Mr. Zhuang had any difficulty communicating with the investigating delegate. There is ample evidence in the form of email exchanges between Mr. Zhuang and the investigating delegate that demonstrate that Mr. Zhuang very ably communicated THC's position and evidence to the investigating delegate. I do not find any natural justice concerns arising just because there was not a Chinese interpreter employed or engaged during the investigation of the Complaint.
60. There is also evidence in the record that THC was afforded an opportunity to respond to the Investigation Report which the investigating delegate sent to Mr. Zhuang and Ms. Du by email on December 21, 2021, but neither responded to the investigating delegate by the deadline of January 4, 2022, or any time before the Determination was made.
61. If THC had issues with any part of the Investigation Report including the interpretation of the text messages exchanged between Mr. Jin and Ms. Du which THC contends were mistranslated or missing in some cases or not in proper order, it is THC's obligation to provide the investigating delegate with its own translations of any disputed messages or produce the missing messages or submit the messages in proper order. While Mr. Zhuang provided Ms. Du's view of some of the text exchanges and the adjudicating delegate had the benefit of Ms. Du's views about the messages, she evidently preferred Mr. Jin's evidence and interpretation of the messages which is her right to do as an adjudicating delegate. I do not find THC's concerns about the text messages engage any natural justice issues or concerns here.

Error of law

62. I am also mindful that the statutory grounds of appeal do not provide for an appeal based on errors of fact, *simpliciter*, 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.
63. The Tribunal has, time and again, said that the test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a "palpable and overriding error on the facts". In this case, to establish the Director committed an error of law on the facts, THC would be required to show the findings of fact and the conclusions and inferences reached by the adjudicating delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. (Jonathan's Restaurant) (Re)*, 2013 CanLII 148504 (BC EST), at paras. 26 – 29.

64. Considering the above definition against the arguments THC advances (as summarized in paragraph 48 above), I find THC has failed to demonstrate the Director or the adjudicating delegate has made any error of law.

New Evidence

65. I also note that the contractor's email adduced by THC in its appeal (which is referred to in paragraph 48 d. above) would not be admissible in this appeal based on the tests for admitting new evidence on appeal set out in *Davies (Re)*, 2003 CanLII 89192 (BC EST). More particularly, the email in question existed at the time of the investigation and could have, with the exercise of due diligence, been discovered and presented to the Director before the Determination was made. In addition, the email also does not 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 any material issue. Just because there was ongoing construction work or construction workers present at the restaurant on January 14, 2020, does not mean that Mr. Jin was prevented from completing the interview process and preparing the dishes he said he prepared at the restaurant to demonstrate his cooking ability.

Application for an extension of the statutory appeal period

66. The deadline for THC to file its Appeal was on March 28, 2022. On the same date, THC filed an appeal seeking an extension of the statutory appeal period to May 13, 2022, to provide additional reasons, arguments, and documents in its appeal. In its correspondence to the parties on April 5, 2022, the Tribunal asked THC to provide its written reasons and argument for the appeal and any additional supporting documents by no later than 4:30 p.m. on May 13, 2022. However, THC failed to comply with this direction. At the time of writing this decision, no additional submissions, arguments or documents have been received.

67. While the question of the extension of the statutory period for filing THC's appeal is likely moot at this stage, I would not have granted THC's extension application based on Mr. Zhuang's submissions. My reasons follow.

68. Section 109(1)(b) of the *ESA* provides that the Tribunal may exercise a discretion to extend the deadline to file an appeal notwithstanding that the statutory time period has expired.

69. 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.

70. In *Re Niemisto*, BC EST #D099/96, the Tribunal defined the criteria that must be satisfied by an appellant for that discretion to be exercised. These criteria include:

- 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.

71. While I find criteria listed at points 2,3, and 4 in *Re Niemisto* above do not factor significantly into whether an extension ought to be given to THC, I find criteria 1 and 5 particularly important and determinative in this case.
72. With respect to criteria 1, I am not persuaded with, nor do I find Mr. Zhuang's reasons for seeking an extension credible or reasonable. He and Ms. Du were sent the Determination on February 16, 2022, by regular mail, at the registered and records office address of THC which is also the business address of THC. They were also sent the Determination, on the same date, by email to the address containing Ms. Du's name which Mr. Zhuang used throughout his dealings with the investigating delegate during the investigation of the Complaint. The email address is also the same one the investigating delegate sent her Investigation Report to THC and Ms. Du on December 21, 2021. Mr. Zhuang says he only discovered the Determination in the mailbox on March 23, 2022, when he "reopen[ed] the business". Mr. Zhuang and Ms. Du were aware of the Complaint and participated in the investigation of the Complaint and should have been vigilant and prudent in checking THC's mailbox for the Determination. Failure to check the mailbox in a timely fashion, in my view, is imprudent and not a reasonable reason to ask for an extension of time to appeal.
73. I also do not find THC's reason for asking an extension of appeal credible. More particularly, I am not convinced that Ms. Du and Mr. Zhuang were unaware of the Determination very shortly after it was issued on February 16, 2022, as they were sent the Determination at the email address Mr. Zhuang used during the investigation to communicate with the investigating delegate. THC does not say anything in its appeal about not receiving the emailed Determination. I find it is more probable than not that they received the Determination by email.
74. As for the second reason for the extension of the appeal period, namely, THC requires to connect with the law student who represented Mr. Jin, Mr. Ozensoy, to obtain "all the text information" in order to be able to "complete the reason[s] and argument[s]", THC and Mr. Zhuang do not indicate what efforts, if any, have been made to date to retrieve the "text information". During the investigation, Mr. Zhuang mentioned the same, that is, the text messages provided by Mr. Jin were not translated accurately and some were missing but he could not retrieve them because the phone with the text messages "was broken at the end of 2020. If, as he claims in the appeal submissions, he provided the text messages to Mr. Ozensoy in February 2020, when the latter was representing Mr. Jin, why did Mr. Zhuang or THC not ask Mr. Ozensoy for the text messages during the investigation or before the Determination was made or at any time thereafter? Also, why has Mr. Zhuang not produced the text messages and additional reasons and arguments in THC's appeal by May 13, 2022, the date THC proposed in its Appeal Form and one which the Tribunal set out in its correspondence on April 5, 2022?

75. I find THC has failed to provide any reasonable and credible explanation for this Tribunal to extend the statutory appeal period for THC to provide additional documents, reasons, and arguments in its appeal to May 13, 2022 (a date that came and went over a month ago). I also find THC, in its limited written submissions, has not made out a strong *prima facie* case in its favour.
76. In the circumstances, to extend the appeal period, if I had been so inclined, would only have subverted the purposes and objectives of fairness, finality and efficiency set out in subsections 2(b) and (d) of the *ESA*.
77. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

78. Pursuant to section 115 of the *ESA*, I order the Determination dated February 16, 2022, be confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal