

Citation: Source Concrete Pumping & Placing Ltd. (Re)  
2023 BCEST 109

EMPLOYMENT STANDARDS TRIBUNAL

An appeal  
pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

- by -

Source Concrete Pumping & Placing Ltd.  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Brandon Mewhort

**FILE No.:** 2023/049

**DATE OF DECISION:** December 8, 2023

## DECISION

### SUBMISSIONS

Satinder Dhaliwal	counsel for Source Concrete Pumping & Placing Ltd.
Carrie H. Manarin	delegate of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Source Concrete Pumping & Placing Ltd. (“Appellant”) of a determination issued by Carrie H. Manarin, a delegate (“Adjudicating Delegate”) of the Director of Employment Standards (“Director”), dated March 27, 2023 (“Determination”). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
2. In the Determination, the Adjudicating Delegate found that a former employee of the Appellant (“Employee”) was owed outstanding regular wages, overtime wages and vacation pay, plus interest, totalling \$19,109.79. The Adjudicating Delegate also imposed penalties on the Appellant in the amount of \$2,000.00.
3. The Appellant submits that, in making the Determination, the Adjudicating Delegate erred in law and that the principles of natural justice were not observed.
4. This matter was initially assigned to a different panel of the Tribunal (“Previous Panel”) but was reassigned to me because of that panel’s unavailability. For the reasons discussed below, I order that the Determination be confirmed pursuant to section 115(1) of the *ESA*.

### ISSUES

5. The issues to be determined are whether: (1) the Adjudicating Delegate erred in law in making the Determination; and (2) there was a failure to comply with the principles of natural justice.

### THE DETERMINATION

6. The Employee was employed with the Appellant, which operates a concrete pumping and placing business, from June 1, 2020, to February 21, 2021. The Employee filed a complaint on August 2, 2021, alleging that the Appellant contravened the *ESA* by failing to pay regular and overtime wages and statutory holiday pay. Another delegate of the Director (“Investigating Delegate” and, together with the Adjudicating Delegate, “Delegates”) completed an investigation of the complaint and issued an investigation report on January 4, 2023 (“Investigation Report”).
7. The Adjudicating Delegate considered two main issues in the Determination. The first issue was whether the Employee drove as part of his employment duties with the Appellant. The parties agreed that the Employee’s primary employment duties were those of a laborer and concrete placer, but they disagreed about whether he also drove the Appellant’s concrete pump truck and pickup truck as part of his duties.

The Adjudicating Delegate considered the sometimes conflicting evidence of the parties regarding this issue and explained why she preferred the evidence of the Employee. The Adjudicating Delegate determined there was an agreement between the parties that the Employee would receive \$200.00 per month from the Appellant as an incentive to drive a pump truck to and from his home to job sites and, while enroute, pick up and drop off some of his co-workers. The Adjudicating Delegate found, under that agreement, the Employee was owed \$200.00 a month for nine months, totalling \$1,800.00, plus 4% vacation pay.

8. The second issue the Adjudicating Delegate considered was whether the Employee was owed regular or overtime wages or statutory holiday pay. The Adjudicating Delegated determined the Employee was owed outstanding regular and overtime wages and vacation pay. However, the Adjudicating Delegate determined that the Employee did not work on statutory holidays, so statutory holiday pay was not owed by the Appellant.

## ARGUMENTS

9. In its original submissions, the Appellant argues that the Adjudicating Delegate erred in law by acting on a view of the facts which could not reasonably be entertained when determining there was an agreement between the parties for the Employee to drive a pump truck as part of his duties. The Appellant says the Adjudicating Delegate relied on text messages in making her determination, but there were no relevant text messages on the record, and the Employee's testimony, on its own, was not enough to support the finding there was an agreement for the Employee to drive a pump truck.
10. The Appellant also takes issue with the Adjudicating Delegate's statement in the Determination that the Appellant's sole director, Kuljit Singh Dulai ("Mr. Dulai"), "refused to explain why he texted the [Employee] with the addresses for the job sites." The Appellant says the addresses for the job sites had to be texted to the Employee so that he would know where the next job sites were.
11. Regarding the regular and overtime wages, the Appellant takes issue with the Adjudicating Delegate's reliance on the Employee's hours recorded in his notebook, which corresponded with text messages sent by an individual named Sukhi, who the Employee describes as his foreman and another employee of the Appellant. The Appellant says that it has never employed someone with the name or nickname "Sukhi," and that the Determination is flawed because it relies on correspondence between Sukhi and the Employee.
12. Given the uncertainty about the identity of Sukhi, the Appellant requested this Tribunal to refer the matter back to the Director for further investigation before considering the appeal, pursuant to section 114(2)(a) of the *ESA*, and it offered to disclose all relevant employment documents to confirm Sukhi was never employed by the Appellant. The Previous Panel invited the Appellant to disclose those documents, as well as to make submissions regarding sections 112(1)(c) (new evidence) and 109(1)(b) (extension of appeal deadline) of the *ESA*, given that those documents were not before the Adjudicating Delegate when making the Determination and the appeal deadline had passed.
13. In response, the Appellant submitted payroll and tax documents to confirm it has never employed someone named or nicknamed "Sukhi." The Appellant explained that "Sukhi" is a typical nickname given

to someone with a Sikh legal name, such as Sukhpreet, Sukhjinder, Sukhminder, Sukhdeep, Sukhmeet, etc. The Appellant did not make any submissions regarding sections 112(1)(c) or 109(1)(b) of the *ESA*.

14. The Previous Panel then invited submissions from the Employee and the Director regarding the Appellant's request for this Tribunal to refer the matter back to the Director for further investigation before considering the appeal.
15. The Employee did not provide any submissions in response. In her submissions, the Adjudicating Delegate argues that Mr. Dulai failed to participate in the investigation. For example, the Adjudicating Delegate said that Mr. Dulai claimed he picked up the Employee and drove him to the job sites, but when the Investigating Delegate asked why, then, he would text the Employee the addresses of the job sites, Mr. Dulai responded that it was a "stupid question," accused her of trying to "complicate things" and hung up on her. The Investigating Delegate emailed Mr. Dulai after that call trying to obtain further information, but Mr. Dulai never responded.
16. The Adjudicating Delegate also argued that the Appellant, including Mr. Dulai, was given a copy of the Investigation Report, which included the Employee's evidence regarding his hours worked and his evidence regarding Sukhi. The Appellant submitted wage statements for the Employee in response to the Investigation Report, but it did not address any other evidence, such as the evidence regarding Sukhi. The Adjudicating Delegate argued that the identity of Sukhi, if it was in issue, should have been raised by the Appellant when given the opportunity before the Determination was issued.
17. The Adjudicating Delegate went on to discuss the evidence on the record regarding Sukhi, including text messages sent from Sukhi to the Employee. Notably, when the Employee was asked about why Mr. Dulai sent text messages with the job site addresses to Sukhi and not directly to the Employee, the Employee stated that "[Sukhi] was brother of [Mr. Dulai's] best friend and was like a foreman of the company and had to let everyone know where they were going" (Record, page 138). The Adjudicating Delegate suggested that the Appellant likely knows the identity of Sukhi but is refusing to acknowledge it. The Adjudicating Delegate submitted that the Appellant should not be given another opportunity to challenge the evidence on the record, given that the Appellant refused or failed to participate in the investigation on several occasions, which were outlined in the Adjudicating Delegate's submissions.
18. The Previous Panel then invited the Appellant to submit a final reply regarding its request for this Tribunal to refer the matter back to the Director for further investigation. In response, the Appellant reiterated some of its previous submissions and argued that it would not be prejudicial to either party for the matter to be referred back to the Director to determine the identity of Sukhi or to obtain evidence directly from Sukhi. The Appellant also argued that when the Appellant was initially contacted to provide evidence in the investigation, it did not properly understand the nature or potential consequences of the investigation (at least partly because Mr. Dulai speaks English as a second language), and it did not retain counsel at the time. The Appellant argued that the Delegates did not act fairly, and the decision-making process was unreasonable, because they failed to confirm the credibility of evidence related to Sukhi or even the existence of that person.
19. The Adjudicating Delegate responded to the Appellant's submission because she took issue with the assertion that Mr. Dulai was unable to properly understand the nature or potential consequences of the investigation, because he speaks English as a second language. The Adjudicating Delegate says that both

she and the Investigating Delegate had conversations with Mr. Dulai, and he appeared to have no difficulty understanding and speaking in English.

20. The Previous Panel then advised the parties that it declined to exercise its discretion to grant the Appellant's request to refer the matter back to the Director for further investigation before considering the appeal. The Previous Panel invited the Employee and Director to provide submissions on the merits of the appeal, specifically whether:
- (a) the Adjudicating Delegate erred in law in her determination there was an agreement the Employee would be compensated for driving the pump truck;
  - (b) the Adjudicating Delegate erred in law in her determination that the Employee was owed overtime wages; and
  - (c) the Delegates failed to observe the principles of natural justice.
21. The Employee did not provide any submissions in response. In her submissions, the Adjudicating Delegate relied on her previous submissions regarding the agreement for the Employee to be compensated for driving the pump truck. The Adjudicating Delegate reiterated that there would have been no reason for Mr. Dulai to text the Employee the addresses of the job sites if he picked up the Employee and drove him to those job sites, as the Appellant suggests, particularly when in some cases Mr. Dulai would text the Employee the addresses more than once a day. In any event, the Adjudicating Delegate said she did not solely rely on the Employee's testimony in reaching her determination. For example, there was also a photograph of the Employee with the pump truck, which he sent to Mr. Dulai by text message after being asked to wash the truck he was driving and take a photograph of it. There was also evidence from the Employee's landlord that they allowed the Employee to park the pump truck at their residence overnight. The Adjudicating Delegate then explained why she preferred the evidence of the Employee over the evidence provided by the Appellant, which led her to find, on a balance of probabilities, that there was an agreement for the Employee to be compensated for driving the pump truck.
22. Regarding the alleged error of law made by the Adjudicating Delegate in determining the Employee was owed overtime wages, the Adjudicating Delegate said that the Appellant misinterpreted the Determination in its submissions. The Adjudicating Delegate did not consider the Employee's record of his hours, along with the text messages from Sukhi, to be "irrefutable evidence that those must be accurate hours." Rather, the Adjudicating Delegate found that the Employee's record of his hours was the best evidence available and therefore she relied on it, among other things, in making the Determination.
23. Regarding the alleged failure to observe the principles of natural justice, the Adjudicating Delegate noted that the Appellant's allegation was only raised in its last submission regarding its request to have the matter referred back to the Director. As for the merits of this issue, the Adjudicating Delegate relied on previous submissions she made about Sukhi, particularly that Mr. Dulai failed to participate in the investigation despite being given the opportunity, and that the Appellant was given an opportunity to respond to the evidence regarding Sukhi in the Investigation Report, but it never did so.
24. The Previous Panel then invited the Appellant to make final reply submissions on the merits of the appeal, but the Appellant did not provide any such submissions to the Tribunal.

## ANALYSIS

25. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.
26. The appellant has the burden to demonstrate a basis for the Tribunal to interfere with a determination: see *Tejinder Dhaliwal (Re)*, 2021 BCEST 34 at para 13.
27. In this case, the Appellant has alleged that the Director erred in law and that the Director failed to observe the principles of natural justice in making the Determination. I will address both of those grounds of appeal in turn.

### ***Alleged errors of law***

28. This Tribunal has adopted the following factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA), as reviewable errors of law:
- (a) A misinterpretation or misapplication of a section of the *ESA*;
  - (b) A misapplication of an applicable principle of general law;
  - (c) Acting without any evidence;
  - (d) Acting on a view of the facts which could not reasonably be entertained; or
  - (e) Exercising discretion in a fashion that is wrong in principle.
29. In this case, the Appellant argues the Adjudicating Delegate acted on a view of the facts which could not be reasonably entertained. The test for establishing such an error of law has been described as follows (see e.g., *C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para 52, quoting *Delsom Estates Ltd. v. Assessor of Area #11 - Richmond/Delta*, 2000 BCSC 289 at para 18 (CanLII), citations omitted):
- ... 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” ...
30. In this case, the Appellant argues two errors of law were made because the Adjudicating Delegate acted on a view of the facts which could not reasonably be entertained, particularly regarding her determinations that: (1) there was an agreement the Employee would be compensated for driving the pump truck; and (2) the Employee was owed overtime wages. However, in both instances, I am unable to

find that the determination made by the Adjudicating Delegate was based on a view of the facts which could not reasonably be entertained.

31. In my view, there is evidence on the record that would allow the Adjudicating Delegate to reasonably conclude both that there was an agreement that the Employee would be compensated for driving the pump truck and that the Employee was owed overtime wages. For example, in the former case, there was oral evidence of the Employee himself, corroborating text messages (including those with Sukhi), a photograph of the Employee with the pump truck after having washed it, and evidence from the Employee's landlord that they allowed the Employee to park the pump truck at their residence overnight. In the latter case, there was the Employee's notebook in which he recorded his hours, the Employee's evidence that he told the Appellant his hours that were recorded in his notebook, and text messages with Sukhi showing the hours recorded in case anyone ever accused the Employee of inflating them.
32. It is not the function of this Tribunal to reweigh the evidence with a view to reaching an independent determination. In my view, while there was conflicting evidence regarding these issues, the Adjudicating Delegate provided reasonable explanations for why she preferred certain evidence. It cannot be said that the evidence on the record provides no rational basis for the determinations made by the Adjudicating Delegate. In other words, I am satisfied the determinations reached by the Adjudicating Delegate were reasonable based on the evidence presented. The alleged uncertainty regarding the identity of Sukhi does not change my assessment in that regard.
33. I therefore dismiss this ground of appeal.

***Alleged failure to comply with the principles of natural***

34. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, this Tribunal discussed 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 to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST #D050/96.

35. As noted by the Adjudicating Delegate in her submissions, it is unclear what the Appellant is referring to when it states that the Delegates failed to observe the principles of natural justice. The first and only time the Appellant raised this ground of appeal was in its last submission regarding its request to have the matter referred back to the Director. Although the Appellant does not explain why the Delegates allegedly failed to observe the principles of natural justice, its argument seems to suggest it is because the Delegates failed to confirm the identity of Sukhi and, perhaps, interview them.
36. I first note there is, in fact, evidence on the record regarding the identity of Sukhi. As noted above, when the Employee was asked about why Mr. Dulai sent text messages with the job site addresses to Sukhi and not directly to the Employee, the Employee stated that, "[Sukhi] was brother of [Mr. Dulai's] best friend

and was like a foreman of the company and had to let everyone know where they were going” (Record, page 138). As noted by the Adjudicating Delegate, the Appellant has not specifically addressed this evidence in its submissions.

37. In my view, the Delegates did not fail to comply with principles of natural justice because they did not confirm the identity of Sukhi. As pointed out by the Adjudicating Delegate, the Appellant had an opportunity to raise this issue if it was a concern before the Determination was made, including in response to the Investigation Report, but it chose not to. The fact the Appellant was not represented by counsel at that point is not a reason to have not raised the issue.
38. The text messages to and from Sukhi speak for themselves in that they show, among other things, addresses of job sites and photos of the Employee’s notebook in which he recorded his hours. The Appellant does not take issue with the substance of those text messages; rather, the Appellant appears to argue that the text messages are not sufficient evidence upon which to conclude there was an agreement to drive the pump truck or corroborate the Employee’s overtime hours. However, as explained above, the Adjudicating Delegate did not only rely on those text messages in making her determinations. The Adjudicating Delegate weighed that evidence together with the other evidence on the record and provided an explanation of why she made her determinations.
39. While it may have been helpful to understand Sukhi’s perspective of why they exchanged those text messages with the Employee, I note that, as discussed by this Tribunal in *Whitaker Consulting Ltd.*, BC EST # D033/06, a delegate is not responsible for seeking out and obtaining all possible evidence. In my view, it was not necessary for the Delegates to interview Sukhi to comply with the principles of natural justice. Again, the Appellant was aware of the evidence regarding Sukhi before the Determination was issued, but it did not raise any concerns in that regard to either of the Delegates.
40. In my view, the Delegates took reasonable steps to gather the relevant evidence and they did not fail to observe the principles of natural justice by not interviewing or confirming the identity of Sukhi as argued by the Appellant. I find that, in this case, the Delegates gave each party the opportunity to know the case being made and the opportunity to respond, and there was a full and fair consideration of the evidence and issues.
41. I therefore dismiss this ground of appeal.

## **ORDER**

42. I order that the Determination be confirmed pursuant to section 115(1) of the *ESA*.

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**Brandon Mewhort**  
**Member**  
**Employment Standards Tribunal**