

Citation: Newton Whalley Hi Way Taxi Ltd. (Re)  
2023 BCEST 37

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Newton Whalley Hi Way Taxi Ltd.  
("Newton Whalley")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** David B. Stevenson

**FILE No.:** 2022/199

**DATE OF DECISION:** May 30, 2023

## DECISION

### SUBMISSIONS

Simon Joo

counsel for Newton Whalley Hi Way Taxi Ltd.

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*ESA*”) by Newton Whalley Hi Way Taxi Ltd. (“Newton Whalley”) of a determination issued by Michael Thompson, a delegate (the “deciding Delegate”) of the Director of Employment Standards (the “Director”), on October 17, 2022 (the “Determination”).
2. The Determination found Newton Whalley had contravened Part 3, sections 17 and 21, and Part 8, section 63 of the *ESA* in respect of the employment and termination of Davinder Kainth (“Mr. Kainth”) and ordered Newton Whalley to pay Mr. Kainth the amount of \$4,528.66, an amount that included concomitant annual vacation pay under section 58 of the *ESA* and interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$6,028.66.
3. Newton Whalley filed an Appeal Form with the Tribunal on November 10, 2022, indicating the appeal was grounded on an allegation the Director erred in law and that evidence had come available that was not available when the Determination was being made.
4. The Appeal Form contained no submissions or documents relating to the chosen grounds of appeal, but did contain a request for an extension of the appeal deadline – which was November 10, 2022 – to November 24, 2022. The reasons provided for the requested extension were stated to “include”:
  - a.) An ongoing BC Supreme Court proceeding between Mr. Kainth and Newton Whalley that, “has produced or otherwise made available further evidence which speak to the issues of the Determination, specifically the issue of whether the relationship of the parties was that of employment; and
  - b.) Gurminder Singh has been a point of contact for the Appellant company, but he will be leaving the company early next week, and there has not been sufficient time for communication to occur between the company and legal counsel. . . ”
5. On November 24, 2022, the Tribunal received correspondence from Simon Joo (“Mr. Joo”), legal counsel for Newton Whalley, seeking a further extension of the appeal period – to December 1, 2022 – “to finalize and submit the written arguments and supporting documents”. The Tribunal granted the request, advising Mr. Joo that “[t]he Appellant’s written arguments for appeal and supporting documents must be provided to the Tribunal . . . **no later that 4:30 pm on December 1, 2022**” (emphasis included).
6. On December 1, 2022, Mr. Joo requested yet another extension. In response the Tribunal advised it was granting “a final opportunity to make the requested document submission to the Tribunal . . . **no later**

**that 4:30 pm on December 6, 2022”** (emphasis included). The Tribunal also advised that if that deadline was not met, it may close the file without notice.

7. By December 8, 2022, the Tribunal had received no additional materials from Mr. Joo or Newton Whalley and in correspondence of that date advised Mr. Joo that in the absence of appeal documents the Tribunal was unable to process an appeal and, accordingly, the file was closed.
8. On March 7, 2023, the Tribunal received correspondence from Mr. Joo expressing a wish to re-open the appeal and attaching 58 pages of “new evidence”, which Mr. Joo submitted was critical to the question of whether Mr. Kainth was an employee of Newton Whalley or an independent contractor. Mr. Joo submitted the Tribunal should re-open the appeal because the question of the status of Mr. Kainth decided in the Determination raised what was “effectively a jurisdictional issue” of whether the Director could rule on any dispute between Mr. Kainth and Newton Whalley.
9. In correspondence dated March 16, 2023, the Tribunal, among other things, acknowledged having received an appeal, requested the section 112(5) record (the “record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
10. The above correspondence also noted the March 7, 2023 correspondence from Mr. Joo was an application to re-open the appeal and that no submissions were being sought from any party on that matter.
11. The record has been provided to the Tribunal by the Director and a copy has been delivered to each of the parties. Both have been provided with the opportunity to object to the completeness of the record.
12. Neither of the parties has raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.
13. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal, my review of the material that was before the Director when the Determination was being made, and any additional material allowed to be added to and considered in the appeal. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

*114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*

- (a) the appeal is not within the jurisdiction of the tribunal;*
- (b) the appeal was not filed within the applicable time limit;*
- (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) there is no reasonable prospect the appeal will succeed;*

- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112 (2) have not been met.*

14. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Kainth will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the request to re-open the appeal should be allowed, whether the appeal should be dismissed for the failure to file the appeal in the time allowed in section 112 of the *ESA*, whether the appeal should be dismissed as a result of the failure by Mr. Joo, in his capacity as legal counsel for Newton Whalley, to diligently pursue the appeal or to comply with an order of the Tribunal, and whether, in any event, there is any reasonable prospect the appeal will succeed.

## ISSUE

15. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

## THE DETERMINATION

16. Newton Whalley operates a taxi service in Surrey, BC. Mr. Kainth drove a Newton Whalley taxi as an owner-operator from March 2019. In June 2020, Newton Whalley suspended Mr. Kainth and removed his dispatch privileges, effectively stopping his ability to drive a taxi – for Newton Whalley or any other company. Shortly after, Mr. Kainth filed a complaint under the *ESA* alleging Newton Whalley had contravened the *ESA* by failing to pay regular wages owed. When the suspension was lifted, in August 2020, Mr. Kainth returned to driving a taxi for Newton Whalley.
17. At the time of the investigation of the complaint there was ongoing litigation brought by Mr. Kainth against Newton Whalley and its board of directors. Neither party, however, provided any documents or details relating to that litigation.
18. The complaint was investigated by a delegate of the Director (the “investigating Delegate”), who produced an Investigation Report that was provided to Newton Whalley and Mr. Kainth. The Determination notes each party was provided the opportunity to review the Investigation Report and respond to it. Mr. Kainth acknowledged having received the Investigation Report and provided a response to it. Newton Whalley provided no response to the Investigation Report.
19. The deciding Delegate found each party had the opportunity to review the evidence collected during the investigation and the arguments submitted by the other party, and to provide any clarification.
20. The deciding Delegate identified three issues: whether the complaint should be dismissed under section 76(3) of the *ESA*; if not, whether Mr. Kainth was an employee of Newton Whalley or an independent contractor; and if he was an employee, whether he was owed wages and if so, in what amounts.
21. The deciding Delegate noted that section 76(3) of the *ESA* allowed the Director to cease investigating a complaint if there was a parallel proceeding concerning the same subject matter before another decision-

making body. The deciding Delegate found there was no evidentiary basis for concluding section 76(3) applied and that an investigation of the complaint should cease.

22. The deciding Delegate found Mr. Kainth was an employee of Newton Whalley for the purposes of the *ESA* and that Newton Whalley had failed to pay Mr. Kainth all regular wages he had earned for March 2020 and, as well, had contravened section 21 of the *ESA* by deducting an amount of \$800.00 from Mr. Kainth's September 2019 earnings.
23. The deciding Delegate also found Newton Whalley had terminated Mr. Kainth's employment on June 1, 2020, when it removed his dispatch privileges, and that Mr. Kainth was entitled to compensation for length of service under section 63 of the *ESA* in the amount set out in the Determination.
24. Based on the conclusions reached, the deciding Delegate found Newton Whalley had contravened sections 17, 21, and 63 of the *ESA* and imposed administrative penalties for those contraventions.

## ARGUMENTS

25. Newton Whalley says there is new evidence that has become available which shows the deciding Delegate erred in law in finding Mr. Kainth was an employee of Newton Whalley.
26. Counsel for Newton Whalley says the decision of the deciding Delegate that Mr. Kainth was an employee was "effectively a jurisdictional issue" and because, it is argued, new evidence shows Mr. Kainth was not an employee of Newton Whalley, the deciding Delegate had no jurisdiction to rule on the case. As indicated above, the "new evidence" comprises a Petition and supporting affidavit filed by Mr. Kainth in a Supreme Court action, and a copy of Mr. Kainth's Taxi Driver ID agreement. The first two documents were date stamped by the Supreme Court Registry on January 17, 2023; the last document is dated November 20, 2018 and is not evidence that was unavailable at the time the Determination was being made.
27. The submission of Newton Whalley refers to paragraphs on page 4 of the petition, paragraph 29 of the affidavit, and the Taxi Driver ID which, it says, express Mr. Kainth's view that he retains a right to drive a taxi for Newton Whalley and cannot be terminated which suggests he was in a relationship with Newton Whalley that was something other than an employment relationship.

## ANALYSIS

28. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
  - 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
    - (a) *the director erred in law;*
    - (b) *the director failed to observe the principles of natural justice in making the determination;*
    - (c) *evidence has become available that was not available at the time the determination was being made.*

29. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
30. For several reasons, I deny the request to re-open the appeal process and dismiss the appeal.
31. The request to re-open the appeal process requires that I grant an extension of the statutory appeal period, which includes an assessment of the *prima facie* strength of the appeal, admit the additional evidence provided with the March 7 submission, and ignore that Mr. Joo, acting for Newton Whalley, failed to diligently pursue the appeal and was non-responsive to the directions of the Tribunal relating to the need to address deficiencies in the appeal.
32. The *ESA* imposes a deadline on appeals to ensure they are dealt with promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST #D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:
- Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
33. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST #D099/96. The following criteria must be satisfied to grant an extension:
1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
  2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
  3. The responding party and the Director have been made aware of the intention;
  4. The respondent party will not be unduly prejudiced by the granting of an extension; and
  5. There is a strong *prima facie* case in favour of the appellant.
34. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST #D132/97.
35. Newton Whalley made a number of requests, on November 10, 2022, November 24, 2022, and December 1, 2022, to extend the appeal period. At the time of each of those requests, Newton Whalley had failed to provide written reasons or supporting documents for the appeal. Newton Whalley was advised of the deficiencies in their appeal and provided with additional time by the Tribunal to submit the material necessary for the Tribunal to process their appeal. A final extension deadline of December 6, 2022 came and went. On December 8, 2022, the Tribunal advised Newton Whalley that the Tribunal was “unable to

process the appeal based on the documents received November 10, 2022” and notified Newton Whalley it was closing the file.

36. Nothing further was heard from Newton Whalley until correspondence from Mr. Joo was received by the Tribunal on March 7, 2023, which requested the appeal be re-opened and provided a submission and supporting documents on the merits of the appeal. It appears this correspondence was, in large part, generated by a decision of the Director to issue Determinations against the Directors of Newton Whalley. This correspondence was delivered to the Tribunal nearly four months after the expiration of the statutory appeal period and nearly 3 months after Newton Whalley was advised the file on their appeal had been closed.
37. Newton Whalley has satisfied none of the criteria that would operate in favour of granting an extension of the appeal period.
38. The March 7 correspondence does not address the delay or provide an explanation for it. Accordingly, there is no basis upon which I can assess whether there is a reasonable and credible reason for what amounts to an excessive delay.
39. The facts do not allow for a conclusion that Newton Whalley had an ongoing and *bona fide* intention to appeal the Determination. As stated above, from appearances, the request to re-open the appeal file was only made when the Director issued Determinations against the directors and/or officers of Newton Whalley. Logically, if there was an ongoing intention to appeal the Determination, Newton Whalley would have followed the directions given by the Tribunal in November and December 2022 and provided the required material.
40. No party was made aware that Newton Whalley had any intention to seek a re-opening of the appeal file until the request was made to the Tribunal on March 7, 2023.
41. There is always a prejudice to the beneficiary of a determination where the Tribunal grants an extension. The longer the delay, the greater the prejudice. The delay here is excessive.
42. I find there is no *prima facie* case in favour of Newton Whalley in the appeal. I shall elaborate on this conclusion, as my findings on this criterion will also direct my conclusion on whether the appeal has any reasonable prospect of succeeding.

## **The Grounds of Appeal**

### **(a) New Evidence**

43. Newton Whalley has grounded the appeal in evidence becoming available that was not available when the Determination was being made. This ground of appeal is colloquially described as the “new evidence” ground of appeal. The material submitted as “new evidence” is described above. Newton Whalley seeks to have the documents considered in their appeal and relies exclusively on these documents in their argument on the merits of the appeal.

44. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03.
45. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.
46. For the reasons stated below, I do not find the documents provided satisfy the conditions for allowing for allowing them as “new evidence”.
47. First, the only documents that have been submitted with the request to re-open the appeal that are, on their face, “new evidence”, in the sense that they were created after the Determination was issued and were thus not reasonably available when the Determination was being made, are the Petition and accompanying affidavit.
48. The Taxi Driver ID document is not new. If Newton Whalley felt this document was relevant to its position on the status of Mr. Kainth under the *ESA*, it should have been submitted to the investigating Delegate during the investigation of his complaint. The failure to do so is fatal to the attempt to introduce it at this stage.
49. Second, in respect of the Petition and the supporting affidavit, I find these documents have not been shown to be relevant to the issue raised in the appeal. They were created for an entirely different purpose than deciding whether Mr. Kainth was an employee of Newton Whalley for the purposes of the *ESA*. The Petition sets out allegations relating to a shareholder complaint brought under section 227 of the *Business Corporations Act*, R.B.C. 2002, Chapter 57 by Mr. Kainth.
50. Third, I do not find the documents to be probative on the issue framed by the appeal. The submission made on behalf of Newton Whalley asserts that statements on page 4 of the Petition are “Mr. Kainth’s own acknowledgement and view that he was self-employed and not an employee of Newton Whalley”. With respect, that is simply not so. The only part of the statements made on that page of the Petition that allude to Mr. Kainth’s view of his relationship with Newton Whalley is at paragraph 1 of the Factual Basis section, which reads:
1. That D. Kainth is an owner/operator of a taxi with the Company and as such **works or is self-employed . . .** (emphasis added)
51. That is hardly an acknowledgement by Mr. Kainth that he is not an employee of Newton Whalley under the *ESA*.



52. Newton Whalley also refers to paragraph 29 of the supporting affidavit as supporting its argument and reasoning. That paragraph reads:

29. All share owners, including myself, are legal owners of their cabs, pay dispatch fees to the Company, pay for insurance coverage, cost of repairs, and miscellaneous costs. Furthermore, I, like other owner/operators, set our own work schedule.

53. While the document containing this statement is new, the information in that statement is not. It repeats information that is found in the record, the salient parts of which are outlined in the Investigation Report and referred to in the Determination. It adds nothing new to the factual matrix that was before the deciding Delegate and considered in making the Determination; it cannot possibly be capable of affecting the conclusion reached by the deciding Delegate.

54. In sum, Newton Whalley has failed to satisfy the burden on it to demonstrate there is new evidence which should be accepted in the appeal and I exercise my discretion and refuse to accept the documents submitted with the appeal under this ground of appeal.

55. Based on my decision to refuse to accept the documents provided as “new evidence”, the ground of appeal alleging error of law evaporates. The “new evidence” was the entire basis for the error of law argument. Absent this “new evidence” there is no basis for an argument that such evidence should have led to a different conclusion than was made in the Determination. The appeal will be addressed and decided on the facts found in the Determination unless those findings raise an error of law.

**(b) Error of Law**

56. An error of law may arise from a misinterpretation or misapplication of the *ESA* or the general law, through an error on the facts – acting without evidence or on a view of the facts that cannot reasonably be entertained – or by adopting a method of assessment that is wrong in principle.

57. The deciding Delegate made no error in applying the appropriate statutory principles or the general law to the issue of the status of Mr. Kainth under the *ESA*.

58. There is nothing in the March 7 submission that alleges the deciding Delegate made any error of law on the facts and, based on my assessment of the facts in the record and as found in the Determination, there is no basis for alleging the deciding Delegate made such an error.

59. The appeal provides no other basis for challenging the Determination.

60. I find Newton Whalley has not shown there is a strong *prima facie* case.

61. As none of the criteria that would operate in favour of extending the statutory appeal period are found in the facts of this case, I decline the requested extension of time and find the appeal was not filed within the applicable time period.

62. The application to re-open the appeal is denied.

63. The above conclusion is sufficient to dispose of this appeal.

64. Even if I had been inclined to extend the statutory appeal period, I would still dismiss this appeal as, for the same reasons as I found Newton Whalley has shown no strong *prima facie* case in their favour, I find there is no merit to the appeal and no reasonable likelihood it would succeed.
65. I am also of the view that I could have dismissed the appeal under section 114(1)(e) – that Newton Whalley failed to diligently pursue the appeal. Mr. Joo, acting for Newton Whalley, was advised by the Tribunal on November 24 and again on December 1, 2022, that he needed to provide written argument and supporting documents in order for the Tribunal to proceed with the appeal. Mr. Joo failed to comply with this direction, not only failing to provide the requested material, but also failing to notify the Tribunal that he either could not or would not meet the requirements placed on him or to even provide an explanation for not responding to the Tribunal’s directions, then, nearly three months later, seeking to resurrect a file the Tribunal had warned him might be closed for not providing submissions and documents required by the Tribunal to proceed with the appeal.
66. For all of the above reasons, this appeal is dismissed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it.

#### **ORDER**

67. Pursuant to section 115 of the *ESA*, I order the Determination dated October 17, 2022 be confirmed in the amount of \$6,028.66, together with any interest that has accrued under section 88 of the *ESA*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**