

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Man Ho Yuen
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

FILE No.: 2023/030

DATE OF DECISION: June 26, 2023

DECISION

SUBMISSIONS

Man Ho Yuen on his own behalf

OVERVIEW

1. Man Ho Yuen (the "Appellant") appeals a determination issued on March 17, 2023 (the "Determination"), by a delegate (the "Delegate") of the Director of Employment Standards (the "Director").
2. In the Determination, the Delegate held the Appellant's complaint under section 74 of the *Employment Standards Act* (the "ESA") against the Appellant's former employer, Bowen Road General Store Ltd. (the "Employer"), was 'resolved' and no further action would be taken pursuant to section 76 of the *ESA*.
3. The Appellant appeals on the ground the Director erred in law in making the Determination to stop the investigation.

BACKGROUND

4. The Employer operates a gas station and convenience store that falls within the jurisdiction of the *ESA*.
5. The Appellant was employed as a Store Manager from December 22, 2021, to January 17, 2022.
6. The Appellant resigned his employment with the Employer by email and the last day worked was January 17, 2022.
7. The Employer made payment to the Appellant in January and confirmed to the Appellant all wages owed had been paid. The Appellant received the payment January 26. The Appellant advised the Employer on January 27 the payment was \$1 per hour less than previously agreed and requested the Employer pay the total amount owing of \$204.75 "by tomorrow 10am". The Employer acknowledged the error and advised it would issue the cheque for the shortfall in the next cheque run on February 2, 2022.
8. The Appellant also filed a complaint with the Employment Standards Branch on January 27, 2022.
9. The Appellant did not pick up the cheque after it was issued nor did the Appellant provide a forwarding address or make arrangements to otherwise receive the cheque. The Employer eventually re-issued the cheque for the Appellant and forwarded it to the Employment Standards Branch where the Appellant picked it up.
10. When contacted by a delegate (the "Investigative Delegate") of the Director, the Appellant refused to withdraw the complaint.
11. The Investigative Delegate prepared a report for the Appellant and the Employer dated February 22, 2023, summarizing the information provided by the Appellant, the Employer and witnesses and including a list

of relevant records and documents (the "Investigation Report"). The Appellant and the Employer were requested to review the Investigation Report and provide a response within a deadline.

12. The Investigative Delegate did not make any findings in the Investigation Report. As noted above, the Investigation Report summarized the information provided by the parties. The Investigation Report set out that the question to be answered was whether the dispute that caused the complaint was resolved.
13. When no further submissions were provided by either the Appellant or the Employer, the Investigation Report and the evidence were submitted to the Delegate for a determination.
14. The Delegate issued the Determination dated March 17, 2023, finding that the dispute that caused the complaint was resolved and that pursuant to section 76(3)(i) of the *ESA* the Director would stop the investigation.
15. The Determination held the Appellant's wage complaint was effectively resolved as the Employer had acknowledged and paid the outstanding wages and the Appellant received the outstanding wages. As stated by the Determination:

During the course of the investigation, the [Employer] delivered a cheque to the Employment Standards Branch office for the amount in dispute. The [Appellant] did not dispute the cheque amount satisfied his outstanding wage complaint at any point during the investigation, including after he picked up the cheque.

...

The [Employer's] failure to pay the [Appellant's] wages was the cause of the dispute. As the [Employer] has paid the outstanding wages prior to the issuance of a determination, and as the [Appellant] provided no indication that the payment did not fully satisfy the outstanding wages owed to him (not including his argument that interest be applied to the wages) I find that the dispute that caused the complaint has been resolved.

16. I note also the Determination sets out that the parties were provided with the Investigation Report and were specifically requested to carefully review and provide further submissions on any errors, omissions or clarifications. Where the parties did not provide further submissions on the Investigation Report, the Determination states that the Delegate will accept the Investigation Report as an accurate reflection of the parties' evidence and positions on the issues.

ARGUMENTS

17. On the appeal form, the Appellant submits the Director erred in law in making the Determination.
18. The Appellant submits that the Determination does not address the Appellant's concern that the Employer failed to pay all final wages within the time limits set out at section 18(2) of the *ESA*.
19. The Appellant notes that he quit on January 17, 2022 and was still owed \$204.75 on January 23 or 6 days after he quit.

20. The Appellant further notes that the Employer did not submit the wages to the Employment Standards Branch within 60 days pursuant to section 19 (1.1) of the *ESA*.
21. While the Appellant does not directly address the decision to stop the investigation, the Appellant submits the decision was an error of law and that interest and administrative penalties should have been assessed against the Employer.

ANALYSIS

22. These reasons are based on the written submissions of the Appellant, the Determination, and the Record.
23. On receiving the Appellant's appeal, the Employment Standards Tribunal (the "Tribunal") requested the section 112(5) record (the "Record") from the Director for purposes of the appeal. The Tribunal provided the Record to the parties and sought submissions on the completeness of the Record. As the Tribunal did not receive any objections to the completeness of the Record, the Tribunal accepts the Record as complete.

Appeal of Determination

24. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

An appeal is limited to the grounds set out in the *ESA*. It is not a new hearing of the case. Nor is it an opportunity to reargue an appellant's facts and 'try again'.

Error of Law

25. On the appeal form, the Appellant alleges the Director erred in law in making the Determination.
26. To show an error of law, the Appellant has the burden to show a material legal error in the decision. A disagreement with a finding of fact does not amount to an error of law. Examples of errors of law may include: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion that is inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466).
27. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate.

The Section 76 determination

28. As set out in the Determination, the Delegate considered and applied section 76 of the *ESA* and held the complaint was resolved and the investigation of the complaint should be stopped.
29. Section 76 sets out that the Director has the discretion and **may** stop or postpone an investigation in certain circumstances.
30. Section 76(3)(i) provides:
- (3) The director may stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if . . .
 - (i) the dispute that caused the complaint is resolved...
31. In reviewing the Director's decision under section 76, the Tribunal is required to give a deferential view to the decision. The Tribunal cannot interfere with the Director's exercise of discretion unless the evidence indicates an abuse of power or a clear procedural or legal error (see *Godreau and Demarais* BC EST # D066/98; *McGillis* BC EST #RD039/09, reconsideration refused). An appellant has the onus to show on the evidence that there was an abuse of power or a clear procedural or legal error in the Director's exercise of discretion. The Tribunal cannot interfere with the Director's section 76 exercise of discretion simply because an appellant disagrees with it. Where there is some evidence to support the Director's decision, the Tribunal will not re-hear nor second-guess the section 76 decision, even if it might have come to a different conclusion (see *Michel Mizrach and Juan Carlos Quintana (Re)* 2020 BCEST 105; *Karbalaeiali v BC (Employment Standards)* 2007 BCAA 553).
32. In considering the Appellant's appeal, as required, I have taken a deferential approach and given a sympathetic reading to the Director's decision to stop the investigation. As noted, the Appellant has the onus to show the decision to stop the investigation was an abuse of process, or clear evidence of a procedural or legal error. I find the Appellant has not met the required onus.
33. I find there was evidence the Delegate could rely on in finding the Appellant's wage complaint was "resolved" under section 76(3)(i) of the *ESA* and to stop the investigation. In particular, I note the evidence was clear the Employer quickly responded and issued payments to the Appellant in response to the complaint. Where there was an issue about the wage rate, the Employer acknowledged and responded within days to address the issue. As set out in the Investigation Report, the Employer and Appellant acknowledged the issue and the Employer made payment that was received by the Appellant.
34. I find there was evidence such that it was reasonable for the Delegate to find that the wage complaint was essentially resolved when the Employer acknowledged and issued payments to the Appellant, and the Appellant received and cashed the wage payment cheques.
35. Even though the Appellant now submits that there should be some interest on the wages and administrative penalty levied against the Employer, it is established in decisions of the Tribunal and the Court that complaints may be resolved - and often are resolved - where one party does not receive everything they believe they may be entitled to under the *ESA* (see *Bellman*, BC EST # RD 003/04; upheld *Bellman v. HMTQ et al.*, 2006 BCSC 426).

36. As noted in the *ESA* and decisions of the Tribunal, the fair and efficient resolution of complaints is one of the *ESA*'s purposes and is in the interests of employers and employees. I also note that the quick resolution of complaints by Employers to avoid the risk of administrative penalties is further conducive to and consistent with the purpose of the *ESA* to efficiently resolve complaints.
37. Considering all of the circumstances, I find there is no evidence of abuse of process, nor error in the procedure or law. I find the conclusions in the Determination were supported by evidence and the law pursuant to section 76(3)(i) and it is not open to this Tribunal to retry the evidence and arguments.
38. Absent an error of law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate. Accordingly, I find there is no error of law and would dismiss the appeal.

Summary dismissal

39. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.
40. I find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

ORDER

41. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.
42. Pursuant to section 115(1) of the *ESA*, I confirm the Determination.

John Chesko
Member
Employment Standards Tribunal