

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Thomas P.D. Tumbach carrying on business as LocalMotive Organic Delivery  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Brandon Mewhort

**FILE NO.:** 2023/047

**DATE OF DECISION:** August 10, 2023

## DECISION

### SUBMISSIONS

Thomas P.D. Tumbach on his own behalf, carrying on business as LocalMotive Organic Delivery

### OVERVIEW

1. This is an appeal by Thomas P.D. Tumbach, carrying on business as LocalMotive Organic Delivery (“Appellant”), of a determination issued by Sheri Bor, a delegate (“Adjudicating Delegate”) of the Director of Employment Standards (“Director”), dated January 20, 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 Leanne Megli, a former employee of the Appellant (“Employee”), was entitled to outstanding wages and vacation pay. The Adjudicating Delegate also imposed three administrative penalties.
3. Section 114(1) of the *ESA* provides that 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, among other things, there is no reasonable prospect the appeal will succeed.
4. For the reasons discussed below, I dismiss this appeal pursuant to section 114(1) of the *ESA*, because there is no reasonable prospect it will succeed.

### ISSUE

5. The issue is whether this appeal should be dismissed pursuant to section 114(1) of the *ESA*.

### THE DETERMINATION

6. The Employee filed a complaint on May 21, 2021, alleging that the Appellant contravened the *ESA* by failing to pay wages and annual vacation pay. Another delegate of the Director (“Investigating Delegate”) completed an investigation of the complaint and issued an investigation report on November 28, 2022.
7. The Employee was employed as a salesperson with the Appellant, which operates a grocery business in Okanagan Falls, from March 26, 2021, to May 7, 2021. The Employee worked from home and received instructions regarding the work she was to complete from the Appellant by text message and email throughout the employment relationship. The Employee maintained a handwritten record of her hours worked. The Appellant did not monitor or record the hours worked by the Employee.
8. At some point, the Employee was instructed by the Appellant to work on the business’ website. When the Employee submitted her hours for that work, the Appellant disputed them, not because she did not actually work the hours, but because he asserted that the number of hours worked was not commensurate with the quality of the work.

9. The Adjudicating Delegate accepted the Employee's record of her hours worked, because it was the best and only evidence available in that regard. The Appellant did not dispute the number of hours worked – he only took issue with the quality and quantity of work, which are not relevant factors regarding the wages owed to the Employee.
10. The Adjudicating Delegate found that the Employee was entitled to \$778.29 in outstanding wages and \$39.64 in outstanding vacation pay, plus interest. The Adjudicating Delegate also imposed three administrative penalties for contraventions of sections 18, 28, and 58 of the *ESA* in the total amount of \$1,500.

## **ARGUMENT**

11. The Appellant submitted his appeal form on April 12, 2023, and requested an extension of the appeal period to “gather evidence pertaining to the investigation that was not submitted in the Reason [*sic*] for the Determination by the officer in charge of the investigation.” When asked in the appeal form to select his grounds of appeal, the Appellant indicated that evidence has become available that was not available at the time the Determination was being made. In a one-page submission accompanying his appeal form, the Appellant argued that the Investigating Delegate failed to include relevant evidence from phone conversations they had in their report, but the Appellant did not elaborate on what that evidence was.
12. On April 14, 2023, the Tribunal granted the Appellant's request and advised the Appellant that he must provide any additional arguments and supporting documents by no later than May 1, 2023; however, the Appellant did not provide any additional arguments or supporting documents by that deadline.
13. On May 9, 2023, the Tribunal requested that the Director provide the record for the Determination, which the Director provided on May 18, 2023. After the Tribunal solicited comments from the parties about the completeness of the record, the Employee submitted numerous emails and documents that were not included in the original record. In its response, the Director confirmed that all the documents provided by the Employee could be added to the record and it also provided one additional email.
14. On June 22, 2023, the Tribunal invited the Appellant and Employee to submit a final reply on the completeness of the record. The next day, on June 23, 2023, the Appellant submitted a two-paragraph email alleging that his side of the story was not considered properly and that “the context of the situation with the civic lockdowns and keeping tabs on staff working remotely were not given due consideration for an employer that was just trying to give a job opportunity to someone.”

## **ANALYSIS**

15. 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.

16. An 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) and, in my view, the Appellant has failed to meet that burden in this case. The Appellant argued that relevant evidence from phone conversations during the investigation were not properly considered by the Adjudicating Delegate; however, the Appellant did not elaborate on what evidence he was referring to in his original appeal submission, nor did he provide further details when he was given another opportunity to do so.
17. The Appellant also argued that the pandemic related lockdowns and difficulty of monitoring employees working remotely was not given due consideration; however, the Appellant did not provide any supporting details regarding this argument, and, on a review of the record, I find nothing to support it. To the contrary, in my view, the Appellant was given an opportunity to know the case against him and to present his evidence, including the difficulty of monitoring employees working remotely, which was appropriately considered by the Adjudicating Delegate in making the Determination.
18. Accordingly, I find that the Appellant has failed to demonstrate a basis for the Tribunal to interfere with the Determination, and I dismiss the appeal under section 114(1)(f) of the *ESA* as there is no reasonable prospect it will succeed.

#### **ORDER**

19. 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**