

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Shounak Chakroborty
("Mr. Chakroborty")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE No.: 2023/069

DATE OF DECISION: September 7, 2023

DECISION

SUBMISSIONS

Shounak Chakroborty on his own behalf

OVERVIEW

1. This is an appeal by Shounak Chakroborty (“Mr. Chakroborty”) of a decision of the Director of Employment Standards (“Director”) issued against 1193489 B.C. Ltd. (“Employer”) on April 6, 2023 (“Determination”).
2. On March 5, 2021, Eduardo Machuca (“Employee”) filed a complaint under section 74 of the *Employment Standards Act* (“ESA”) with the Director alleging that the Employer contravened the ESA by failing to pay him regular and overtime wages (“Complaint”).
3. The Director followed a two-step process in investigating the Complaint and making the Determination. One delegate of the Director (“investigative delegate”) telephoned and corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report (“Investigation Report”) summarizing the results of the investigation and sent it to the parties for review and comment.
4. In the case of the Employer, the Investigation Report was sent to its registered and records office address at 128th Street, Surrey, British Columbia, and to the Employer’s director, Kirandeep Kaur (“Ms. Kaur”), at the same address delineated for her in the BC Registry Services search.
5. The Investigation Report was also sent by email to the contact email address for the Employer as noted in the investigative delegate’s notes in the section 112(5) record (“the record”). It is also the email address for Mr. Chakroborty who appears to be a representative of the Employer, although it is unclear in the record in what capacity Mr. Chakroborty is engaged or connected with the Employer. Mr. Chakroborty did have limited exchanges with the investigative delegate during the investigation of the Complaint informing the investigative delegate that wages were indeed owed to the Employee and the Employer had issued cheques to the Employee which were not delivered to the Employee nor picked up by the latter. When the investigative delegate attempted to assist the Employer with voluntary resolution of the Complaint, Mr. Chakroborty became unresponsive and the investigative delegate was given multiple reasons, over some time, why Mr. Chakroborty was unavailable to speak with him. As a result, the investigative delegate issued his Investigation Report and sent the same to the Employer and Ms. Kaur at the Employer’s registered and records office address and to Mr. Chakroborty’s email address. I note that the Investigation Report was also sent to the Employee. The parties were provided an opportunity to respond to the Investigation Report.
6. When neither the Employer nor the Employee responded to the Investigation Report, it was forwarded to a second delegate (“adjudicative delegate”) who assumed responsibility for reviewing it and issuing the Determination pursuant to section 81 of the ESA.
7. In the Determination, the adjudicative delegate found that the Employer contravened the ESA and the *Employment Standards Regulation* in respect of the employment of the Employee and ordered the Employer to pay the Employee \$3,680.00 in regular wages, \$1,380.00 in overtime wages, \$202.40 in

annual vacation pay and \$402.19 in accrued interest. The adjudicative delegate also levied two mandatory administrative penalties in the amount of \$500.00 each against the Employer for contravening sections 17 and 18 of the *ESA*. The total amount of the Determination is \$6,664.59.

8. The Employer was served the Determination by mail at its registered and records office address and by email. The Determination was also sent by mail to Ms. Kaur, the director of the Employer, at the address provided for her in the BC Registry Services search (i.e., the registered and records office address of the Employer) and to Mr. Chakroborty at his contact address in the record.
9. Subsection 112(1) of the *ESA* permits a person served with a determination to appeal the determination to the Tribunal on one or more of the grounds set out in subsections (a), (b) and (c). Mr. Chakroborty, as a person served with the Determination, sought to file his appeal of the Determination. While the deadline for filing the appeal of the Determination was 4:30 p.m. on May 15, 2023, as in the case of the Employer's appeal filed by Ms. Kaur, Mr. Chakroborty filed the appeal after 4:30 p.m. on May 15, 2023. According to section 5(3) of the *Tribunal's Rules of Practice and Procedures*, documents received outside of the Tribunal's business hours are filed as of the next business day. Accordingly, Mr. Chakroborty's appeal is considered received by the Tribunal on May 16, 2023, after the expiry of the appeal deadline.
10. Identical to the Employer's appeal, Mr. Chakroborty appeals the Determination on two statutory grounds of appeal; namely, that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
11. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I find it is unnecessary to seek submissions on the merits from the Employer, the Employee, or the Director.
12. My decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions of Mr. Chakroborty, and the Determination.

ISSUE

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

THE DETERMINATION AND THE REASONS

14. The Reasons for the Determination ("Reasons") show that the adjudicative delegate considered a single issue, namely, whether the Employee was owed any wages by the Employer.
15. In deciding this question, the adjudicative delegate considered the Investigation Report prepared by the investigative delegate and the relevant documents submitted by each party in the investigation of the Complaint. The adjudicative delegate noted that each party was afforded an opportunity to review the evidence and arguments presented by the opposing party during the investigation of the Complaint and to provide any clarification. However, neither party responded to the Investigation Report. As a result, the adjudicative delegate accepted the Investigation Report to be an accurate reflection of the parties' evidence and issues in the matter.

16. Having said this, the adjudicative delegate noted that it was unnecessary for her to recount, in detail, all of the evidence collected in the investigation of the Complaint. Instead, she would only make reference to the evidence that was necessary to reach the required findings and to apply the relevant legislation.
17. Based on the BC Registry Services search conducted on February 23, 2022, with a currency date of November 17, 2021, the adjudicative delegate noted that the Employer was incorporated in British Columbia on January 10, 2019, and Ms. Kaur its sole director. The Employer has no officers.
18. The Employer operates an appliance delivery business in Delta, British Columbia, and employed the Employee as a delivery driver. The parties disputed the dates of employment and the rate of pay.
19. On March 5, 2021, the Employee filed the Complaint.
20. The text messages exchanged between the Employee and the Employer demonstrate that the Employee was hired by the Employer on December 14, 2020, and his first day of work was December 15, 2020.
21. On average, the Employee began work at 7:00 a.m. While he said that he worked for 8 hours on some days, the Employee also claimed that he worked overtime on other days ranging from 10 hours to 16 hours a day. The Employer, however, disagreed with the Employee contending that he did not work any overtime. In the absence of clear evidence and based on the hours listed for the Employer's business - 8:30 a.m. to 5:00 p.m., the adjudicative delegate concluded that it is reasonable that the Employee's workday ended when the business from which he was delivering appliances closed. In the result, the adjudicative delegate found the Employee's hours of work were between 7:00 a.m. to 5:00 p.m.
22. The adjudicative delegate also found that based on the evidence in the form of text messages exchanged between the Employee and the Employer on Saturday, January 9, 2021, the Employee worked on that day. However, there was no evidence that the Employee performed work on other weekends. Accordingly, the adjudicative delegate concluded that the Employee (regularly) worked five days a week, from Monday to Friday. The adjudicative delegate also found that the Employee did not work on Wednesday, December 16, 2020, because he informed the Employer that he had a medical appointment.
23. While the Employee stated in the Complaint form that his last day of employment with the Employer was January 29, 2021, when the Employer stopped responding to his calls and messages, during the investigation of the Complaint he said his final day with the Employer was January 14, 2021. The final wage statement provided by the Employer showed that the Employee's last day of employment was on January 15, 2021, but it does not specify his daily hours worked. In the text messages exchanged between the parties, the adjudicative delegate observed that the last day was referenced as January 12, 2021, and in the Employee's text message of February 8, 2021, to the Employer, the Employee stated that "I haven't been paid for over 3 weeks." Based on the foregoing, the adjudicative delegate concluded, on a balance of probabilities, that the Employee's last day worked was Friday, January 14, 2021.
24. The adjudicative delegate next went on to consider the total hours the Employee worked for the Employer. Based on the evidence adduced by the parties, the adjudicative delegate concluded that the Employee worked a total of 184 regular hours and 46 overtime hours over the course of three pay periods as follows: 8 regular hours and 2 overtime hours between December 14 and 15, 2020; 96 regular hours and 24 overtime hours between December 16 and 31, 2020; and 80 regular hours and 20 overtime hours between January 1 and 15, 2021.

25. As concerns the wage rate of the Employee, the adjudicative delegate noted that while the Employer stated that the Employee's wage rate was \$160 per day, the Employee claimed it was \$164. According to the adjudicative delegate, there was insufficient evidence to make a finding in favour of the higher wage rate. Accordingly, the adjudicative delegate preferred the Employer's evidence of the daily wage rate over the Employee's and calculated the hourly wage rate of the Employee, based on an 8-hour workday, as \$20. Based on this wage rate, the adjudicative delegate determined that the Employee was owed \$3,680 (184 hours x \$20) in regular wages and \$1,380 (50 hours x \$30 (\$20 x 1.5) in overtime wages for a total of \$5,060.
26. The adjudicative delegate also awarded the Employee vacation pay of \$202.40 (\$5,060 x 4%) pursuant to section 58 of the *ESA* and interest of \$402.19 on the total amount owing pursuant to section 88 of the *ESA*.
27. The adjudicative delegate also levied two administrative penalties of \$500.00 each against the Employer for breaching sections 17 and 18 of the *ESA* for failing to pay all wages earned by the Employee at least semi-monthly, and within eight days of the last day of employment and failing to pay all wages owing to the Employee within 48 hours after the Employer terminated the Employee's employment respectively.

SUBMISSIONS OF MR. CHAKROBORTY

(i) request to extend the statutory appeal period

28. As indicated previously, since Mr. Chakroborty was served the Determination by mail, the deadline for him to file an appeal of the Determination was 4:30 p.m. on May 15, 2023, as specified in the Determination. However, the Tribunal received Mr. Chakroborty's appeal submission after 4:30 p.m. on May 15, 2023. Pursuant to section 5(3) of the Tribunal's *Rules of Practice and Procedures*, documents received by the Tribunal outside of the Tribunal's business hours are deemed to be filed as of the next business day. As a result, on May 17, 2023, the Tribunal, by email, requested Mr. Chakroborty to provide his request to extend the appeal period and reasons why he was unable to provide the appeal to the Tribunal before the expiry of the appeal period.
29. On May 25, 2023, Mr. Chakroborty submitted to the Tribunal the Contact Form, an incomplete copy of the Appeal Form and a single page of written reasons for the extension request.
30. In his submissions for the extension of the statutory appeal deadline, Mr. Chakroborty states: "I have been unable to keep up with the previous appeal deadline as I had an accident and has (sic) been going through [kinesiology] to deal with my pain." He also adds "I was late in submitting [my appeal] by 6 minutes last time" and "I am not an officer or any director of the company."

(ii) Mr. Chakroborty' submissions on the merits

31. In support of the merits of his appeal, Mr. Chakroborty submits that he would like to appeal the Determination because he is "not a part of the company ... as any director or officer" but he has been "implicated in [the] ... case as an officer or director" and he is neither. He says he was hired as a delivery driver "looking after loading of all the trucks." He is requesting the Tribunal to check the corporate registry as he is not in an authoritative position with the company and asks that his name be removed from the case.

ANALYSIS

32. Having reviewed the Determination, the section 112(5) record, and the submissions of the Employer, I find this is not a proper case for extending the appeal period and, in any event, this appeal is wholly without merit. My reasons for so concluding follow.

(i) Request to extend the statutory appeal period

33. In the present case, there is a preliminary issue of the late filing of the appeal. As previously indicated, the deadline for filing the appeal was 4:30 p.m. on May 15, 2023, but the Tribunal received Mr. Chakroborty's submission after 4:30 p.m. on May 15, 2023. As noted at section 5(3) of the Tribunal's *Rules of Practice and Procedures*, documents received outside of the Tribunal's business hours are filed as of the next business day. Accordingly, Mr. Chakroborty's submission is considered received by the Tribunal on May 16, 2023.

34. Section 109(1)(b) of the *ESA* provides that the Tribunal may extend the time for requesting an appeal.

35. The burden is on an appellant, Mr. Chakroborty in this case, to demonstrate the appeal period should be extended. In determining whether to extend the appeal period, the Tribunal considers the following inclusive factors: whether there is a reasonable and credible explanation for the failure to file the completed appeal on time; whether there has been a genuine and ongoing *bona fide* intention to appeal the determination; whether the respondent party and the Director have been made aware of the intention to appeal; whether the respondent party will be unduly prejudiced by granting the extension; the length of the delay; and whether there is a strong *prima facie* case in favour of the appellant (see, for example, *Niemisto*, BC EST # D099/96; *Patara Holdings Ltd.*, BC EST # RD053/08).

36. As I have said in my decision in the Employer's application for an extension of the statutory appeal period (which was similarly filed late after 4:30 p.m. on May 15, 2023), the delay of one (1) day in this case is most definitely not excessive. I do not see that the Employee (or any party) would be seriously prejudiced if the statutory appeal were to be extended given the relatively short duration of the delay. Of course, this is not to disregard the prejudice that the Employee has already suffered as a result of not having been paid for his work for over two-and-a-half years since the last day he worked on January 14, 2021. However, I find that Mr. Chakroborty has failed to provide a credible explanation for his failure to file a timely appeal. Mr. Chakroborty says he has "been unable to keep up with the previous appeal deadline" because he "had an accident and has been going through [kinesiology] to deal with [his] pain". He does not provide any corroborative evidence of the accident, when it occurred and how it interfered with his filing of the appeal. With respect, I am not persuaded with Mr. Chakroborty's reasons for the delay. I find Mr. Chakroborty has exhibited a pattern of excuses dating back to the investigation of the Complaint when, evidently, he wanted to get out of talking to the investigative delegate. His excuses then included: he had a dental surgery; he was observing Diwali celebration; he was experiencing a family emergency; he was unable to make contact with a bank representative; he was on a medical leave; and he was out of office due to sickness. On the balance of probabilities, I am not persuaded that his delay in filing the appeal was due to an accident or because he was undergoing kinesiology treatment for his pain, if indeed there was ever an accident, and he was undergoing kinesiology treatment. He could have produced evidence of both and how the alleged accident prevented him from filing the appeal on time, but he did not.

37. I also note that the record containing the notes of the investigative delegate and the latter's correspondence with the Employer, whether at Mr. Chakroborty's email address or by telephone, amply show that the investigative delegate was or tried to be in contact with the Employer and Mr. Chakroborty and the latter provided him with the Employer's evidence and documents which the investigative delegate included in his Investigation Report and sent the same by mail to the registered and records office address of the Employer and to Ms. Kaur, and to Mr. Chakroborty's email address. At all material times, Mr. Chakroborty was well aware of the Complaint proceedings.
38. Further, when the Determination was issued by the Director on April 6, 2023, as with the Investigation Report, it was sent to the registered and records office address of the Employer, to Ms. Kaur, and to Mr. Chakroborty. The deadline for filing an appeal, as well as information about the appeal process, is clearly set out in a text box at the bottom of the third page of the Determination. In the result, I am not persuaded that Mr. Chakroborty was not aware of the deadline for filing an appeal of the Determination or "unable to keep up with the ... appeal deadline". At no point did he mention that he was involved in an accident and needing an extension of time to file his appeal.
39. There is also no evidence whether the Employee and the Director were made aware of Mr. Chakroborty's intention to appeal before the expiry of the appeal deadline.
40. Lastly, and perhaps the determinative factor in my decision to deny Mr. Chakroborty an extension to appeal, there is not a strong *prima facie* case in favour of Mr. Chakroborty. I have reviewed Mr. Chakroborty's submissions, and they do not, in the slightest, concern with any determinations made against the Employer in the Determination. Instead, Mr. Chakroborty is appealing the Determination because he is "not a part of the company ... as any director or officer" but believes that he has been "implicated" as one. He says that he was hired as a delivery driver "looking after loading of all the trucks" and wants the Tribunal to investigate this matter and to remove his name from the case.
41. While Mr. Chakroborty has a standing to appeal the Determination because section 112(1) of the *ESA* allows "a person served with a determination" to appeal a Director's determination under one or more grounds set out in subsections (a), (b) and (c), Mr. Chakroborty appears to be under the impression that the Determination implicates him as a director or officer of the Employer. He appears to be concerned with the potential personal liability such a determination would attract. This may be because of the specific language of the Determination on pages 4 and 5. There is a Notice to Directors/Officers (the "Notice") followed by the text of section 96 of the *ESA* which sets out the corporate officer's liability for unpaid wages. In the preamble of the Notice, it states that "[y]ou are being provided with a copy of this determination because an online BC Registry Services search indicates you are a director or officer of this company." Midway on page 4, the Notice states "[i]f the Employment Standards Branch has difficulty collecting against the company, **proceedings will be commenced against directors and officers** of the company for the amount of their personal liability as set out in the Act." [bold in original] As indicated, Ms. Kaur, along with Mr. Chakroborty, were copied the Determination. However, it should be noted that the Determination is a corporate determination only against the Employer. The Determination is not against Mr. Chakroborty (or anyone else) under section 96 of the *ESA*. In other words, in the Determination, Mr. Chakroborty has not yet been found to be a director or officer of the Employer, whether *de facto* or otherwise. In the circumstances, Mr. Chakroborty's appeal is premature. The Tribunal has no authority to pre-emptively make the ruling Mr. Chakroborty is seeking - that is, he is not a director or officer of the Employer. In the result, I find the appeal submissions do not establish a strong *prima facie*

case in favour of Mr. Chakroborty. Therefore, I deny his application for an extension of the statutory appeal period.

42. Having said this, even if I had not declined to extend the appeal period on the basis that Mr. Chakroborty does not have a strong *prima facie* case, I would have dismissed the appeal on the merits for the following reasons.

(ii) The Merits of the Appeal

43. 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.

44. Section 114 (1) of the *ESA* provides that 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.

45. The burden is on an appellant, in this case, Mr. Chakroborty, to demonstrate a basis for the Tribunal to interfere with the determination. As previously indicated, Mr. Chakroborty has checked off two grounds of appeal in the Appeal Form, namely, the Director erred in law and breached the principles of natural Justice in making the Determination.

a. Error of law

46. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco*, BC EST # D260/03, in which the Tribunal adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 - Coquitlam), [1998] B.C.J. No. 2275 [B.C.C.A.]:

- 1. a misinterpretation or misapplication of a section of the *ESA*;
- 2. a misapplication of an applicable principle of general law;

3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

47. In the present appeal, while Mr. Chakroborty has checked off the error of law ground of appeal in the Appeal Form, as with the Employer's appeal of the Determination, there is nothing in the appeal materials of Mr. Chakroborty that speaks to this ground of appeal and I do not find there is any evidence of error of law as defined by *Gemex Developments Corp., supra*.

48. Accordingly, I find there is no basis for me to interfere with the Determination under the error of law ground of appeal.

b. Natural justice

49. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal explained 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 *B.W.I. Business World Incorporated* BC EST #D050/96).

50. The onus is on the party alleging a failure to comply with the principles of natural Justice to adduce some evidence in support of the allegation and, in the present case, Mr. Chakroborty (like the Employer in its appeal of the Determination) has failed to discharge its burden. While Mr. Chakroborty has checked off the natural justice ground of appeal in the Appeal Form, he has presented no evidentiary basis to substantiate this ground of appeal either. Notwithstanding, I have reviewed the section 112(5) record of the Director and I find there is nothing in the record that would remotely give rise to the natural justice ground of appeal.

51. Accordingly, I find there is no basis for me to interfere with the Determination under the natural justice ground of appeal.

ORDER

52. The application to extend the appeal period is refused. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued together with whatever further interest that has accrued, under section 88 of the *ESA*, since the date of issuance.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal