

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

1193489 B.C. Ltd.
("Employer")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/070

DATE OF DECISION: September 7, 2023

DECISION

SUBMISSIONS

Kirandeep Kaur

on behalf of 1193489 B.C. Ltd.

OVERVIEW

1. This is an appeal by 1193489 B.C. Ltd. (“Employer”) of a decision of the Director of Employment Standards (“Director”) issued 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. Neither party responded to the Investigation Report, and 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.
5. In the Investigation Report, the investigative delegate notes that the Employer submitted the Employee worked a total of 13 days: 6 days between December 15 and 31, 2020, and 7 days between January 1 and 15, 2021. The investigative delegate also notes that while the Employer acknowledged the Employee had not received wages for both periods worked (gross amounts of \$1,164.80 and \$998.40 respectively), the Employer contended that it issued the Employee a wage statement and cheques for the wages, but he did not pick them up. The investigative delegate also notes that following his initial contacts with the Employer, the latter become unresponsive.
6. 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.
7. The Employer was served the Determination by mail and the deadline for filing its appeal of the Determination was 4:30 p.m. on May 15, 2023. The Employer filed its 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, the Employer’s appeal is considered received by the Tribunal on May 16, 2023, after the expiry of the appeal deadline.

8. The Employer 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.
9. 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 Employee or the Director.
10. 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 the Employer, and the Determination.

ISSUE

11. 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

12. 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.
13. 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.
14. 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.
15. 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.
16. 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.
17. On March 5, 2021, the Employee filed the Complaint.
18. 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.
19. 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.

20. 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.
21. 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.
22. 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.
23. 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.
24. 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*.
25. 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 THE EMPLOYER

(i) Employer's request to extend the statutory appeal period

26. As indicated previously, since the Employer was served the Determination by mail, the deadline for the Employer to file its appeal of the Determination was 4:30 p.m. on May 15, 2023, as specified in the Determination. However, the Tribunal received the Employer's appeal submission after 4:30 p.m. on May 15, 2023. The Appeal Form shows both Ms. Kaur and the Employer as appellants. 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 Ms. Kaur to clarify the appellant's name and for the latter to provide the Tribunal with their request to extend the appeal period and reasons why the appellant was unable to provide the appeal to the Tribunal before the expiry of the appeal period.
27. On May 25, 2023, Ms. Kaur submitted to the Tribunal the Contact Form, an incomplete copy of the Appeal Form and written reasons for the extension request. It appears from these submissions that the Employer is the appellant and Ms. Kaur, a director of the Employer, is acting in a representative capacity when filing the Appeal Form and submissions.
28. In her submissions on behalf of the Employer for the extension of the appeal deadline, Ms. Kaur states: "I have been unable to keep up with the previous appeal deadline as I was not aware of the matter till date (sic)." She adds that she was "late in submitting [the Appeal] by 13 minutes last time" and that she had "a family emergency and ... was out of town."

(ii) Employer's submissions on the merits

29. In support of the merits of the Employer's appeal, Mr. Kaur submits that the Employee's case "is baseless" as the Employer has the cheques it issued in the Employee's name along with his paystub. She states that she "never received a call from [the Employee] about his cheque" and attaches copies of the same as "proof" and is "willing to send it to [the Employee] or to the [T]ribunal for resolution." She also states that she has "never been contacted by the B.C. employment standard (sic)." She also contends that the Employee and the investigating delegate have not provided "any proof" but she has "the proof of [the Employee's] time on the truck and his cheque issued and paystub ... to disperse" and requests a call back from the Tribunal for the purpose.

ANALYSIS

30. 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

31. 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 the Employer'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, the Employer's submission is considered received by the Tribunal on May 16, 2023.

32. Section 109(1)(b) of the *ESA* provides that the Tribunal may extend the time period for requesting an appeal.
33. The burden is on an appellant, the Employer 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).
34. The delay of one (1) day in this case is most definitely not excessive. I do not see that the Employee would be seriously prejudiced if the statutory appeal were to be extended given the relatively short duration of the delay. 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 the Employer has failed to provide a credible explanation for its failure to file a timely appeal. The Employer's director, Mr. Kaur says, "I have been unable to keep up with the previous appeal deadline as I was not aware of the matter till date (sic)" and she had "a family emergency and ... was out of town." I also note that in her initial submissions on the merits, she says she has "never been contacted by the B.C. employment standard (sic)".
35. I find it incredulous for Ms. Kaur to say that she has "never been contacted by B.C. employment standard[s]" before the Determination was made or that she was "not aware of the matter till date (sic)." The section 112(5) record containing the notes of the investigative delegate and his correspondence with the Employer amply show that the investigative delegate was in contact with the Employer by email or telephone and received evidence and documents from the Employer. The investigative delegate also summarized this evidence in his February 7, 2023, Investigation Report and sent the same to the registered and records office address of the Employer and to Ms. Kaur (who has the same address according to the online BC Registry Services search). Neither responded to the Investigation Report.
36. 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 and to Ms. Kaur at the same address. The deadline for filing an appeal, as well as information about the appeal process, was 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 Ms. Kaur, or the Employer, were unaware of the "matter" or that they were not contacted by the Employment Standards Branch.
37. I am also not persuaded with Ms. Kaur's submission that she had "a family emergency and ... was out of town" at or around the time of the Determination or the appeal of the Determination. She provides no corroborative evidence in support of her assertions.
38. There is also no evidence whether the Employee and the Director were made aware of the intention to appeal before the expiry of the appeal deadline.

39. Lastly, and perhaps the determinative factor in my decision to deny the Employer an extension to the statutory deadline to appeal, there is not a strong *prima facie* case in favour of the Employer. I have reviewed Ms. Kaur's submissions on behalf of the Employer and find that she is rearguing the submissions made by the Employer in the investigation of the Complaint. She is simply reiterating that the Employer issued the Employee a wage statement and cheques for the amounts owed but the Employee did not pick them up. She also appears to be disputing the findings of facts made by the adjudicative delegate concerning the regular and overtime hours worked by the Employee as she says that she has "the proof of [the Employee's] time on the truck" and not the Employer or the adjudicative delegate.
40. It is important to note that section 112(1) of the *ESA* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. I find the Employer (in Ms. Kaur's submissions above) is doing just that - rearguing and challenging factual findings of the adjudicative delegate. In the result, I find the Employer does not have a strong *prima facie* case to appeal the Determination. It is contrary to the purposes of the *ESA* for the efficient and timely resolution of appeals to prolong cases with little merit (see *0388025 B.C. Ltd. (cob as Edgewater Inn)*, BC EST # D019/12, and *U.C. Glass Ltd.*, BC EST # D107/08).
41. Therefore, I decline to extend the appeal period.
42. Having said this, even if I had not declined to extend the appeal period on the basis that the Employee does not have a strong *prima facie* case, as shown below, I would have dismissed the appeal on the merits.

(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, the Employer, to demonstrate a basis for the Tribunal to interfere with the determination. As previously indicated, the Employer 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 the Employer has checked off the error of law ground of appeal in the Appeal Form, there is nothing in the appeal materials 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 on 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, the Employer has failed to discharge its burden. As with the error of law ground of appeal, the Employer has checked off the natural justice ground of appeal in the Appeal Form but presented no evidentiary basis to substantiate this ground of appeal. Notwithstanding, I have reviewed the section 112(5) record of the Director and I find there is nothing in the record that would remotely suggest an infringement of the Employer’s natural justice rights by either the investigative delegate during the investigation of the Complaint or by the adjudicative delegate in making the Determination. To the contrary, there is substantial evidence that the Employer was amply

afforded opportunity to participate in the investigation of the Complaint and to respond to the evidence adduced by the Employee and contained in the Investigation Report. I also find that the investigative delegate accommodated the Employer's representatives on several occasions during the investigation when they were, for one or another reason, unavailable to communicate with him. I also find that there is no evidence of the adjudicative delegate straying in any way and violating the Employer's natural justice rights in making the Determination.

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.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal