

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

William Gibbens
("Mr. Gibbens")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/055

DATE OF DECISION: October 4, 2023

DECISION

SUBMISSIONS

William Gibbens on his own behalf

OVERVIEW

1. This is an appeal by William Gibbens (“Mr. Gibbens”) of a decision of a delegate of the Director of Employment Standards (“Director”) issued on April 6, 2023 (“Determination”).
2. On June 24, 2021, Mr. Gibbens filed a complaint under section 74 of the *Employment Standards Act* (“ESA”) with the Director alleging that All Battery Duncan Ltd. (“ABD”) contravened the *ESA* by failing to pay him any 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”) 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 which was sent to the parties for review and comment. Upon receiving the responses to the Investigative Report and any replies to those responses, the matter was sent to a second delegate (“adjudicative delegate”) who assumed responsibility for reviewing the responses and replies and issuing the Determination pursuant to section 81 of the *ESA*.
4. The Determination found that the *ESA* did not apply to the Complaint. Accordingly, pursuant to subsections 76(3)(b) and (i) of the *ESA*, the Director determined that no further action would be taken on the Complaint.
5. On April 6, 2023, the Determination was emailed to ABD at the email address of its sole director and officer, Jason Zimmel (“Mr. Zimmel”), and to Mr. Gibbens at his email address.
6. The deadline for Mr. Gibben’s appeal of the Determination was 4:30 p.m. on May 1, 2023. Mr. Gibbens filed his incomplete appeal by email on April 27, 2023, asking for an extension of the appeal deadline to June 15, 2023, to file his reasons and arguments for the appeal. Mr. Gibbens did not attach his reasons for requesting an extension of the appeal deadline, nor did he attach a copy of the Determination or a complete copy of the Reasons for the Determination (“Reasons”).
7. Mr. Gibbens has checked off all three grounds of appeal under section 112(1) of the *ESA* in the Appeal Form, namely, the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was being made.
8. 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 ABD or the Director.

9. 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. Gibbens, the Determination, and the Reasons.

ISSUE

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

THE DETERMINATION

Background

11. ABD operates a battery and e-bike sales and repair business.
12. Mr. Gibbens was employed with ABD from February 8 until at least February 12, 2021. The nature of his relationship with ABD after this point is in dispute.
13. Mr. Gibbens filed the Complaint on June 24, 2021, within the time period allowed under the *ESA*.
14. The adjudicative delegate identifies two issues before him in the Reasons:
- a. Was Mr. Gibbens an ABD employee after February 12, 2021?
 - b. If so, what hours did Mr. Gibbens work and what wages are owed to him for this work?
15. The adjudicative delegate also notes that during the investigation of the Complaint, ABD forwarded a cheque to the Employment Standards Branch (“Branch”) for \$576 in regular wages and \$23.04 in vacation pay, less statutory deductions.
16. The Branch deposited the funds in trust and on March 1, 2023, disbursed the funds to Mr. Gibbens by cheque.
17. The payment was for Mr. Gibbens’ hours worked in ABD’s store between February 8 and 12, 2021. Therefore, the adjudicative delegate concluded that Mr. Gibbens was paid all wages for when he worked in ABD’s store. The only matter that remained unresolved was Mr. Gibben’s relationship with ABD after he stopped working in the store.
18. In determining the unresolved issue, the adjudicative delegate relied on the Investigation Report, including copies of any relevant documents submitted by each party during the investigation and Mr. Gibbens’ response to the Investigation Report. It should be noted that both parties were afforded an opportunity to review the evidence and arguments of the other party in the Investigation Report and the adjudicative delegate accepted the Investigation Report to be an accurate reflection of the parties’ evidence and positions regarding the issue in question.
19. The adjudicative delegate then assessed the evidence of the parties and applied the relevant law to make his determination. In so doing, he first noted that the *ESA* provides minimum standards of employment for employees in British Columbia, and its protections do not extend to independent contractors and other self-employed persons.

20. In this case, the adjudicative delegate noted that the parties agreed that Mr. Gibbens was an employee of ABD while he worked in the latter's store between February 8 and 12, 2021. Mr. Gibbens also did not dispute ABD's evidence that his employment was terminated in the in-store position on February 12, 2021. It is also noteworthy that both parties did not dispute that ABD had a form of relationship with Mr. Gibbens after this date, however, the nature of the relationship between the parties was in dispute.
21. The adjudicative delegate also notes in the Reasons that Mr. Gibbens indicated that he had worked as an independent contractor in the past, and that he *would* have charged \$35 per hour for contract work and that he had a clear agreement with ABD. However, notes the adjudicative delegate, while the intention of the parties is one factor to consider when deciding if an individual is an employee under the *ESA*, the primary test is functional, applying the definitions in the *ESA* to the actual relationship between the parties.
22. The adjudicative delegate then refers to the definitions of "employee" and "employer" in section 1 of the *ESA*. More specifically he notes that this section defines an "employee" to include an individual performing work for another's benefit, or performing work normally done by an employee, while "employer" includes an individual with direction and control over an employee. He then notes the principle (enunciated by the Supreme Court in Canada in *Rizzo v. Rizzo Shoes*, [1998] 1 S.C.R. 27) that benefits conferring legislation like the *ESA* should be given a broad and liberal interpretation to extend its minimum standards to as many people as possible. However, he states, *ESA*'s protections must not be extended unreasonably to cover relationships which are clearly outside its intended scope. In the present case, he finds that Mr. Gibbens' relationship with ABD, after February 12, 2021, exhibited almost no indicators of an employment relationship.
23. More particularly, the adjudicative delegate explains that while Mr. Gibbens undertook to create a broad marketing strategy for ABD after February 12, 2021, the documentary evidence established that ABD engaged Mr. Gibbens only to produce a single marketing document. ABD exerted no control or direction over Mr. Gibbens' efforts, and set no deadlines or expectations for his work, other than to state at one point that the document may require two or three days of effort. Therefore, the adjudicative delegate concludes that ABD exerted no direction and control over Mr. Gibbens, and certainly not the level expected in an employment relationship.
24. The adjudicative delegate also notes that ABD is in the business of selling and repairing batteries and e-bikes, and there is no evidence to suggest that its employees routinely developed marketing materials. Mr. Gibbens' evidence was that he assisted customers, moved stock, learned the till, and repaired e-bikes when he worked in the store between February 8 and 12, 2021. After February 12, 2021, ABD agreed that Mr. Gibbens would produce a marketing document of some kind for ABD, and that he would be compensated for this work. ABD did not hire Mr. Gibbens as an employee after February 12, 2021, and he was not performing work normally performed by ABD employees after that date. Mr. Gibbens' marketing work was not in any way integral to ABD's business and was entirely out of ABD's control, as evidenced by the April 17, 2021 email of ABD expressing frustration with the out-of-scope activities undertaken by Mr. Gibbens and the length of time the marketing document was taking. While Mr. Gibbens submitted a great deal of documentation demonstrating work he did on the ABD's marketing project, he did not provide documentation or evidence indicating that he was doing the work at ABD's direction, either directly or indirectly. In the result, the adjudicative delegate concluded that Mr. Gibbens was not performing work as an employee of ABD after February 12, 2021.

25. Since ABD paid Mr. Gibbens' wages earned between February 8 and 12, 2021, the adjudicative delegate found that the dispute underlying that portion of his employment was resolved. As for the period after February 12, 2021, since the adjudicative delegate found that Mr. Gibbens was not an employee of ABD then, the adjudicative delegate concluded that the *ESA* did not apply to that portion of Mr. Gibbens' Complaint seeking wages after February 12, 2021. Pursuant to subsections 76(3)(b) and (i), the adjudicative delegate decided to take no further action with respect to Mr. Gibbens' Complaint and so ordered in the Determination.

EMPLOYEE'S SUBMISSIONS

26. As indicated above, on April 27, 2023, Mr. Gibbens filed his incomplete appeal with the Tribunal. While he checked off all 3 grounds of appeal - "error of law", "natural justice" and "new evidence" - available under section 112(1) of the *ESA* in his Appeal Form, he did not attach his reasons and arguments for the appeal. Instead, he asked for an extension of the appeal deadline to June 15, 2023, to submit his reasons and arguments. However, he did not provide any reasons in support of his application for an extension of the appeal deadline.
27. On April 28, 2023, the Tribunal contacted Mr. Gibbens by email to request that he provide the Tribunal with the documents that the Appeal Form stated were included in his submissions, namely the Determination and the Reasons.
28. On May 3, 2023, the Tribunal received an email submission from Mr. Gibbens attaching the Determination and the Reasons. In his email, Mr. Gibbens adds "I will be further reviewing this matter – including additional consultations and a review of your published precedents emanating from your apparatus in due course."
29. On May 4 the Tribunal contacted Mr. Gibbens by email to request he provide his written reasons and arguments for the appeal and any supporting documents by June 15, 2023.
30. On June 15, 2023, the Tribunal received an email submission from Mr. Gibbens. Included in the submission was a request for additional time to provide his reasons and argument for the appeal because he wanted to access unredacted notes, records, correspondence, and phone logs from the Branch. He also said that he required a further extension because "an opportunity arose on June 01" and he "chose to undertake" that opportunity and therefore, he is "booked everyday of the week through the entire month of June." He feels that the Branch has "taken their time for well over two years" to decide the Complaint "claiming they are understaffed and underfunded" only to be informed that the Complaint is not within the Branch's jurisdiction. Therefore, he too should be afforded the time he needs as he sees fit that the Branch "variously afforded" itself.
31. On June 19, 2023, the Tribunal contacted Mr. Gibbens by email with a final deadline to provide his written reasons and argument for the appeal and any supporting documents by 4:30 p.m. on July 17, 2023.
32. As of August 15, 2023, the Tribunal had not received any submissions, arguments, or additional documents in support of the appeal. The Tribunal sent a letter by email to Mr. Gibbens and the Director acknowledging the appeal and summarizing up-to-date exchanges between Mr. Gibbens and the Tribunal and informing the parties that the letter and enclosures were not being disclosed to ABD as the Tribunal

had not received confirmation from ABD of their current contact information. The Tribunal also requested the Director provide the Tribunal with the section 112(5) record (“Record”).

33. On August 16, 2023, the Tribunal received an additional submission from Mr. Gibbens explaining that he “was booked during the month of June” because of an opportunity he was presented with and therefore it conflicted with his original request for an extension of the appeal deadline. He also explained that in July and August 2023, he “met a number of standing (volunteer) commitments ... on Vancouver Island and also made a journey up the interior and down Lillooet, Pemberton and Squamish” for an ongoing project he is seeking to develop. This evidently caused him delay in filing his reasons and argument in the appeal. He says he only arrived back in Duncan on Tuesday morning (August 15) and the appeal is “high on [his] agenda.” The balance of his email sets out various grievances he has with government officials and government agencies on various matters and that he intends to pursue or investigate fires associated with ABD’s business and e-bike accidents, none of which relates directly or indirectly to the issues in the Determination. Therefore, I do not find it necessary to set out the contents here.
34. On September 8, 2023, the Tribunal sent Mr. Gibbens a copy of the Record received from the Director for review. Mr. Gibbens was given an opportunity to provide his written submissions on the completeness of the Record by September 21, 2021.
35. On September 14, 2023, the Tribunal received Mr. Gibbens’ email submission. I have reviewed the submission multiple times and find that it does not directly raise any objections to the completeness of the Record. Instead, in the submission, Mr. Gibbens:
- a. Identifies what he believes is another ongoing Tribunal or court case involving another party that “may likely reveal significant facts and arguments relevant ... to [his] claims and ultimately inform the substance of legal precedence and argument in [his] own case [the Appeal] to a significant degree”. He does not explain with any particularity how this yet to be determined case will assist him in the appeal.
 - b. Expresses his dissatisfaction with elected officials for failing or refusing to consider his concerns and requests for a “statements of law or public policy” with respect to employment and work from home during COVID-19. How this concern relates to the appeal is not explained by Mr. Gibbens.
 - c. Makes *ad hominem* attacks against Mr. Zimmel, the investigative delegate, and others at the Branch.
 - d. Advises that he will pursue or attend to various “fraudulent activities” that, allegedly, “Mr. Zimmel has laid out in his letter.”
36. Mr. Gibbens also says in the submission that the Tribunal is “well appointed [to] proceed forthwith based on existing documentation - without the need for a hearing, arguments or reference to [him] at this stage in this matter.”

ANALYSIS

37. Having reviewed the Determination, the Record and Mr. Gibbens’ submissions, 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

38. In the present case, there is a preliminary issue of whether to grant Mr. Gibbens' request to extend the appeal deadline (although in his email of September 14, 2022, Mr. Gibbens appears to say that there is no need for further arguments). As previously indicated, the deadline for filing the appeal was 4:30 p.m. on May 1, 2023. Mr. Gibbens filed his Appeal Form on April 27, 2023, but without his reasons and argument and without complete copies of the Determination and the Reasons. It was only on May 3, 2023, after the expiry of the appeal period, that the Tribunal received complete copies of the Determination and the Reasons. However, the Tribunal has never been provided with the substantive reasons and argument in support of the appeal. Mr. Gibbens has only made submissions asking for a further extension of the appeal deadline and other submissions unrelated to what I would think is the penultimate issue in his appeal, namely, the soundness of the Director's determination that Mr. Gibbens was not an employee of ABD after February 12, 2021, and that the *ESA* does not apply to his Complaint with respect to his engagement with ABD after February 12, 2021.
39. Section 109(1)(b) of the *ESA* provides that the Tribunal may extend the time for requesting an appeal.
40. The burden is on an appellant, Mr. Gibbens, 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 as well as 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).
41. While I do not conceive ABD (who is not participating in this appeal) would be seriously prejudiced if the statutory appeal were to be extended, Mr. Gibbens has not proffered any reasonable and credible explanation for failure to file the completed appeal on time. More specifically, I do not find the explanations in his email submissions to the Tribunal on August 16 and September 14, 2023, summarized in paragraphs 33, 35 and 36, reasonable or sufficient to justify an extension of the appeal period. He was admittedly preoccupied with other things or projects which caused the delay in filing his appeal. As concerns the delay or lack of any response he encountered from government officials or agencies regarding his various queries, I do not find they are at all material to the penultimate question on appeal; whether the Director correctly decided that Mr. Gibbens was not in an employment relationship with ABD after February 12, 2021.
42. While Mr. Gibbens filed an incomplete appeal in advance of the expiry of the appeal deadline, I am not sure whether the Director and ABD were made aware of his intention to appeal before the expiry of the appeal deadline. However, I do not think the latter factor is determinative, in this case, with respect to the question of whether an extension of the appeal period should be granted. Instead, I find it more determinative that there is *not* a strong *prima facie* appeal case in favour of Mr. Gibbens. I have reviewed Mr. Gibbens' submissions and they do not address or challenge what I have identified as the penultimate question on appeal, namely, the correctness of the Director's determination that Mr. Gibbens was not in ABD's employ after February 12, 2021.

43. Throughout the appeal process, Mr. Gibbens submissions and exchanges with the Tribunal only explain his reasons for seeking an extension or further extension of the appeal period and raise matters extraneous or not germane to the issue on appeal identified above. In the result, I find Mr. Gibbens 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).

44. Therefore, I decline to extend the appeal period.

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

(ii) The merits of the appeal

46. 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.

47. As previously indicated, Mr. Gibbens has checked off all three grounds of appeal in section 112(1) of the *ESA* in the Appeal Form - “error of law”, “breach of natural justice” and “new evidence” - but has provided no specifics in support of any ground of appeal.

48. In *Triple S Transmission Inc. o/a Superior Transmissions*, BC EST # D141/03, the Tribunal stated that a broad view should be taken of an appellant’s choice of grounds of appeal, particularly when that choice is made by persons untrained in the law. In keeping with the guidance of *Triple S Transmission*, I carefully examined whether there is any evidence in the Record, in the Reasons or in Mr. Gibbens limited submissions to substantiate any of the grounds of appeal he has checked off.

(a) Error of law

49. With respect to the error of law ground of appeal, this Tribunal has 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 CanLII 6466 (BCCA), [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*].
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.

50. I observe that in deciding Mr. Gibbens was not in an employment relationship with ABD after February 12, 2021, the adjudicative delegate noted that the primary test for determining whether one is an employee or not is functional and applied the definitions of “employee” and “employer” in the *ESA* to the evidence supplied by both parties and contained in the Investigation Report. I have reviewed the investigative delegate’s reasons (summarized above at paragraphs 21 to 24 inclusive) and I am satisfied that he correctly interpreted and applied relevant provisions of the *ESA*, and principles of general law regarding the determination of the status of Mr. Gibbens after February 12, 2021. I am also satisfied that the Director did not act without any evidence. On the contrary, the Director was fulsome in presenting and assessing the information supplied by the parties. I am satisfied that the Director’s conclusions were reasonable and his decision that Mr. Gibbens was not in an employment relationship with ABD after February 12, 2021, was correct.

(b) Natural justice

51. With respect to the natural justice ground of appeal, 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 *BWI Business World Incorporated*, BC EST # D050/96)

52. The onus lies with Mr. Gibbens to show that the adjudicative delegate or investigative delegate failed to observe any of the constituents of the principles of natural justice in making the Determination. In this case, Mr. Gibbens has simply made a bare assertion of a breach of natural justice by checking off the appropriate box on the Appeal Form and, in passing, made some *ad hominem* attacks against the adjudicative delegate stating that he does not have “Listening, Reading and Comprehensive skills.” I find these *ad hominem* attacks baseless and quite unhelpful. If Mr. Gibbens does not agree with anything in the Investigation Report, he was afforded ample opportunity to respond or present additional evidence, documentary or otherwise. In these circumstances, I find there is no basis whatsoever for me to interfere with the Determination on the natural justice ground of appeal.

53. Having said this, I note that the Complaint was filed by Mr. Gibbens on June 24, 2021, and the Determination was made on April 6, 2023, some 21 months later. While the Director, at this stage, was not asked to respond to the submissions of Mr. Gibbens who raises the question of delay in the Determination by the Director in context of his application for an extension of the appeal period, I am indeed very troubled with the unexplained delay in the investigation and final determination of the Complaint. It would appear that the Director failed to observe the spirit and letter of section 2(d) of the *ESA* which sets out one of several important purposes of the *ESA*, namely, “to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.” However, unlike in the Tribunal’s decision in *Westhawk Enterprises Inc.* (BC EST # D302/98), in this case, I am unable to find Mr. Gibbens suffered any prejudice due to the unexplained delay by the Director.

(c) New evidence

54. Finally, with respect to the “new evidence” ground of appeal, Mr. Gibbens has not adduced any “new evidence” within the meaning of the four-part test for admitting new evidence in an appeal delineated in *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03.
55. In the result, I find that there is no basis for this Tribunal to interfere with Determination under the new evidence or any other ground of appeal.

ORDER

56. 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 dated April 6, 2023, is confirmed as issued.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal