



Citation: Andres Figueroa and 1140668 B.C. Ltd. (Re)  
2023 BCEST 82

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Andres Figueroa and 1140668 B.C. Ltd.  
("Appellants")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** David B. Stevenson

**FILE No.:** 2023/077

**DATE OF DECISION:** October 4, 2023

## DECISION

### SUBMISSIONS

Andres Figueroa on his own behalf and on behalf of 1140668 B.C. Ltd.

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Andres Figueroa (“Mr. Figueroa”) and 1140668 B.C. Ltd. (“1140668”), collectively the “Appellants”, of a determination issued by Mathew Osborn, a delegate (“deciding Delegate”) of the Director of Employment Standards (“Director”), on November 7, 2022 (“Determination”).
2. The Determination found 1140668 formerly known as Penticton Horizon Development Ltd. had contravened Part 3, sections 18, 21, and 28 of the *ESA* in respect of the employment of Timothy Cole (“Mr. Cole”) and ordered 1140668 to pay Mr. Cole the amount of \$8,156.92, an amount that included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$9,656.92.
3. On May 19 and 29 and June 6, 2023, the Tribunal received correspondence from Mr. Figueroa, who in subsequent communications identified himself as a director and officer of 1140668. The correspondence did not comply with the requirements of the *ESA* for filing an appeal and on June 23, 2023, the Tribunal communicated with Mr. Figueroa advising him the Tribunal was unable to accept the correspondence he had provided for the reasons set out in that correspondence. The Tribunal also noted there were potentially two determinations which Mr. Figueroa sought to appeal. The Tribunal instructed Mr. Figueroa he needed to identify the determinations being appealed, identify the entities and/or persons who were seeking to appeal those determinations, and meet the requirements for filing an appeal – which were set out in the correspondence.
4. Mr. Figueroa was given a deadline for requesting an appeal of the determinations.
5. It has transpired that Mr. Figueroa has filed two (2) appeals on different determinations. This decision addresses the appeal filed on behalf of 1140668, to which Mr. Figueroa has added his name as a director and officer of 1140668. While technically Mr. Figueroa has no standing to appeal the determinations, the Tribunal has included his name in the appeal by 1140668 since, as a director/officer of 1140668, he will be affected by the decision.
6. On July 10, 2023, the Tribunal received nine (9) separate submissions from Mr. Figueroa by email in a format that is not accepted by the Tribunal. On July 12, 2023, the Tribunal requested Mr. Figueroa resubmit the documentation in an accepted format. On July 19, 2023, Mr. Figueroa contacted the Tribunal to request an extension of time to provide the requested documentation for each appeal.
7. On July 24, 2023, the Tribunal received documentation from Mr. Figueroa, seeking to appeal the Determination. The material indicated Mr. Figueroa and 1140668 sought to appeal the Determination on the ground set out in section 112(1)(a) of the *ESA*: that the Director erred in law in the Determination.

8. The statutory appeal period for filing an appeal of the Determination expired on December 15, 2022. The Appeal Form and supporting submissions and documents were received by the Tribunal more than seven (7) months after expiry of the appeal period.
9. In its June 23, 2023 correspondence, the Tribunal requested 1140668 to provide a “request to extend the appeal period and reasons why the appeal could not be filed before the expiry of the appeal period.” Notwithstanding that request, the Appeal Form submitted on July 24, 2023 contained no request for an extension of the appeal period nor did the documentation accompanying the Appeal Form provide any reason for the delay in seeking to file this appeal.
10. In correspondence dated August 2, 2023, the Tribunal, among other things, acknowledged having received an appeal, requested the section 112(5) record (“record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
11. The record has been provided to the Tribunal by the Director and a copy has been delivered to the parties. They have been provided with the opportunity to object to the completeness of the record.
12. None of the parties has raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.
13. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
  - 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 that 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.*
14. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Cole will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the appeal

should be dismissed for the failure to file the appeal in the time allowed in section 112 of the *ESA* and whether, in any event, there is any reasonable prospect the appeal will succeed.

## ISSUE

15. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

## THE DETERMINATION

16. By way of background, the Determination recites the corporate information relating to 1140668, which indicates the formation of a company under the name Penticton Horizon Developments Ltd. was incorporated in November 2017, existed, and operated, under that name until June 2020, when it was dissolved for failure to file documents, and was restored as an active corporation in December 2021, changing its name to 1140668 B.C. Ltd. and adding Mr. Figueroa as a director.
17. In this decision, I shall refer to both the business operating under the name Penticton Horizon Developments Ltd. and the entity subsequent to the name change, 1140668 B.C. Ltd., as 1140668.
18. Mr. Cole filed a complaint in March 2020 alleging 1140668, operating under its previous name, had contravened the *ESA* by failing to pay wages owed and by taking unauthorized deductions from wages.
19. During the period of time relevant to the complaint, 1140668 operated a construction business.
20. Mr. Cole worked for 1140668, operating under its previous name, for periods of time in 2018, 2019, and 2020 as a labourer and finishing carpenter on various construction projects on which 1140668 was involved.
21. The deciding Delegate found his last period of work for 1140668 was from September 16, 2019 to February 21, 2020 and also found, applying section 74(3) of the *ESA*, that this last period was the only period to which a claim by Mr. Cole under the *ESA* could apply.
22. The complaint was investigated by a delegate of the Director (“investigating Delegate”), who produced an Investigation Report that was provided to 1140668, Rose Ester Roja Pino, who was listed as a director of both Penticton Horizon Developments Ltd. and 1140668 B.C. Ltd., and to Mr. Cole.
23. Mr. Figueroa represented 1140668 throughout the complaint process.
24. The deciding Delegate identified three issues:
1. Did Mr. Cole work for 1140668 as an “employee” within the meaning of the *ESA* during the claim period;
  2. If so, was he owed wages, and in what amount; and
  3. If Mr. Cole was an employee, did 1140668 make unauthorized deductions from his wages?

25. On the first issue, the deciding Delegate found Mr. Cole was an employee of 1140668 under the *ESA*. In reaching this finding, the deciding Delegate considered the purposes of the legislation, identified the applicable statutory provisions, made findings of fact, and within the context of the statutory purposes and provisions, and facts as found, analyzed and assessed the factors arising in the circumstances.
26. The deciding Delegate was persuaded to find Mr. Cole was an employee of 1140668 by the amount of control and direction 1140668 exercised over the work performed by Mr. Cole, the extent of which indicated Mr. Cole was performing work that was not his own but was for, and was integral to, the business of 1140668. In fact, the material before the investigating and deciding Delegates did not show Mr. Cole had any business independent of the work he performed for 1140668. Mr. Cole said he worked exclusively for 1140668 and the timelines set by 1140668 to complete the work assigned to him by Mr. Figueroa left no opportunity for him to do any work other than the assigned tasks.
27. On the second and third issues the deciding Delegate found that Mr. Cole was owed wages, including annual vacation pay, in the amounts set out in the Determination and was entitled to be reimbursed for unauthorized deductions made to his wages.
28. Based on the conclusions reached, the deciding Delegate found 1140668 had contravened sections 18, 21, and 28 of the *ESA* and imposed administrative penalties for those contraventions.

## ARGUMENTS

### Error of Law

29. The Appellants disagree with the central finding of the deciding Delegate, that Mr. Cole was an employee of 1140668 for the purposes of the *ESA*. Their argument incorporates most of the elements of the arguments they made during the complaint process adding the assertion that the fact “Mr. Cole gave up the right to the status of employee when he became a Solo Proprietorship” was not addressed.

## ANALYSIS

30. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.*
31. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

### Failure to file within the statutory appeal period

32. I shall first address the failure of 1140668 to file its appeal within the statutory appeal period, as this failure allows me to summarily dispose of this appeal: see section 114(1)(b). I will note here that while Mr. Figueroa has been recognized as one of the Appellants, as alluded to earlier in this decision, he stands in no different position than 1140668 on any aspect of this appeal.
33. The *ESA* imposes a deadline on appeals to ensure they are dealt with promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:
- Section 109 (1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
34. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST #D099/96. The following criteria must be satisfied to grant an extension:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - ii) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
  - iii) the respondent party (*i.e.*, the employer or employee) as well as the Director, must have been made aware of this intention;
  - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - v) there is a strong *prima facie* case in favour of the appellant.
35. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. In fact, no criteria at all have been advanced or addressed by 1140668.
36. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.
37. I find, on the material before me, 1140668 has satisfied none of the criteria that would operate in favour of granting an extension of the appeal period.
38. I note once more that 1140668 has neither requested an extension of the appeal period nor provided any explanation for a delay of more than seven months to file an appeal.
39. The facts do not allow for a conclusion that 1140668 had an ongoing and *bona fide* intention to appeal the Determination. From their submission, it appears the impetus for this appeal was the action of the Director against the bank account of a director/officer of 1140668.

40. There is nothing in the record or appeal submission that would indicate any other party was made aware of any intention to appeal the Determination.
41. There is always a prejudice to the beneficiary of a determination where the Tribunal grants an extension. The longer the delay, the greater the prejudice. The delay here is excessive.
42. I find there is no *prima facie* case in favour of 1140668 in the appeal.
43. I point out here that except to the extent necessary to determine whether there is a strong *prima facie* case that might succeed, the Tribunal does not consider the merits of an appeal when deciding whether to extend the appeal period. This is not dissimilar to making a finding under section 114(1)(f), that an appeal has no reasonable prospect of succeeding.
44. My conclusion on this criterion, even if 1140668 had requested an extension of the appeal period, militates strongly against any extension of the appeal period, as I find the appeal lacks the merit necessary to warrant extending the statutory appeal period.
45. Examining the merits of the appeal, 1140668 asserts an error of law was made.
46. The following principles apply to this ground of appeal in the circumstances of this case.
47. An error of law may arise from a misinterpretation or misapplication of the *ESA* or the general law, through an error on the facts – acting without evidence or on a view of the facts that cannot reasonably be entertained – or by adopting a method of assessment that is wrong in principle.
48. There is no suggestion in the submission filed by 1140668 that the deciding Delegate misinterpreted or misapplied the *ESA* or the general law; my assessment of the reasons provided by the deciding Delegate in the Determination confirm that the correct law and principles relating to whether an individual is an employee within the meaning of the *ESA* were applied.
49. While 1140668 disagrees with the conclusion reached by the deciding Delegate on whether Mr. Cole was an employee for the purposes of the *ESA*, the argument made by them does little more than reassert the contentions that were insufficient to persuade the deciding Delegate on that question. As well, their assertion that the deciding Delegate did not address the effect of Mr. Cole becoming a sole proprietorship is wrong: see page R11 of the Determination.
50. The deciding Delegate correctly noted that whether 1140668 treated Mr. Cole as an independent contractor, or I would add, even if Mr. Cole agreed that he would become an independent contractor, is not determinative of Mr. Cole's status under the *ESA*. As the deciding Delegate indicated, who is an employee for the purposes of the *ESA* is determined by a consideration of the definitions and objectives of the legislation, bearing in mind the *ESA* is intended to be remedial legislation and, as such, should be given such large and liberal that will best ensure its objects and purposes are met. I agree entirely with the observation of the deciding Delegate that whether a person is an employee and thus entitled to the benefits and standards provided in the *ESA* cannot be waived or compromised by private agreements.

51. The principal conclusion being challenged in this appeal – whether Mr. Cole was an employee of 1140668 for the purposes of the *ESA* – is a question of mixed law and fact. In *Britco Structures Ltd.*, BC EST # 260/03, the Tribunal considered the application of the *Gemex* test to questions of mixed fact and law, and concluded that “error of law” should not be applied so broadly as to include errors of mixed law and fact which do not contain extricable errors of law.
52. The proper approach to deciding the question is to determine whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *ESA*. This is done, in large part, by determining whether the nature of Mr. Cole’s actual relationship with 1140668 would make it inappropriate for him to be entitled to the protections afforded by the *ESA*.
53. In the Determination, the deciding Delegate provided a thorough legal and factual analysis of the actual relationship between Mr. Cole and 1140668 and made a decision on his status on the facts and in accordance with the provisions of, and for the purposes of, the *ESA*. I find that 1140668 has not shown an error of law in the Director’s analysis either on the law or the facts.
54. The appeal does not present a significant case for challenging the Determination.
55. Effectively, as indicated above, the appeal does no more than quarrel with the conclusions reached by the deciding Delegate applying the law to the facts as found, seeking either to have those conclusions ignored or to apply those facts toward a different conclusion.
56. A finding of fact is only reviewable by the Tribunal as an error of law on the facts in limited circumstances. The test for establishing findings of fact constitute an error of law is stringent. Based on my assessment of the facts in the record and as found in the Determination, 1140668 has not met the test. The conclusions of the deciding Delegate were adequately supported on the material before him; there is no basis for alleging, or finding, that the deciding Delegate made an error on the facts. Findings of fact made by the deciding Delegate require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.
57. There is no merit to the appeal and no reasonable likelihood it would succeed.
58. Returning to the matter of timeliness, as none of the criteria that would operate in favour of extending the statutory appeal period are found in the facts of this case, I would not consider it appropriate to allow an extension of the appeal period. This decision is sufficient to dispose of this appeal.
59. Even if the statutory time period were ignored and the merits of the appeal were considered, it would still fail.
60. For all of the above reasons, this appeal is dismissed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it.



**ORDER**

- <sup>61.</sup> Pursuant to section 115(1) of the *ESA*, I order the Determination dated November 7, 2022 be confirmed in the amount of \$9,656.92, together with any interest that has accrued under section 88 of the *ESA*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**