

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Anisa Mihailoff

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Ryan Goldvine

**FILE No.:** 2023/096

**DATE OF DECISION:** October 25, 2023

## DECISION

### SUBMISSIONS

Anisa Mihailoff on her own behalf

### OVERVIEW

1. This is an appeal by Anisa Mihailoff (“Ms. Mihailoff”) of a determination issued by Kirsten Dzavashvili, delegate (“Delegate”) of the Director of Employment Standards (“Director”), on June 12, 2023 (“Determination”). The appeal is filed pursuant to section 112(1)(a) of the *Employment Standards Act* (“ESA”).
2. In the Determination, the Delegate was not persuaded that Golden Base Contracting Ltd. (“Employer”) had failed to pay Ms. Mihailoff for overtime hours worked.
3. Ms. Mihailoff says the Delegate erred in law in making the Determination.
4. The appeal was filed within the statutory appeal period.
5. I have concluded that this case is appropriate to consider under section 114 of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made (“Record”).

### ISSUE

6. Did the Delegate err in law in reaching the conclusion that the Employer had not contravened the overtime provisions of the *ESA*?

### THE DETERMINATION

7. Ms. Mihailoff claimed that in the spring of 2020 she was advised that she should no longer be working overtime. She says that, after this, she was told she could work overtime and bank it to be taken when needed as time off. In her complaint, she says she asked to be paid out the overtime she had banked but had not been able to take and the Employer did not respond to her request.
8. In the Determination, the Delegate found that there were many inconsistencies in the records and calculations provided by Ms. Mihailoff, and instead accepted that the time sheets submitted by the Employer represented the most reliable evidence of the hours Ms. Mihailoff worked. In making this finding the Delegate found that the Employer had not contravened section 40 of the *ESA* and took no further action with respect to the complaint.

## ARGUMENTS

9. Although Ms. Mihailoff indicates on her appeal form that she alleges the Director erred in law in issuing the Determination, she does not appear to provide a basis for this assertion in her reasons provided in support of her appeal.
10. Instead, Ms. Mihailoff indicates that she was asked to track any extra hours worked in her day planner and send scans or photos of those to the Employer, along with her timesheet on a bi-weekly basis. She also indicates the reason she was banking her time was that her workload was always more than 40 hours per week, and that she had many verbal conversations with the Employer about this.
11. Ms. Mihailoff also attached to her appeal a number of documents, most of which were already before the Director when the Determination was made. Ms. Mihailoff also attached the Employer's workplace violence and harassment policy and reiterates her assertion that she was harassed and bullied while at work; however, she does not indicate how this could relate back to her appeal regarding her allegations of unpaid overtime.

## ANALYSIS

12. Under section 114(1) of the *ESA*, 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 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 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.
13. The grounds of appeal are statutorily limited to those found in section 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.

14. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
15. 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.
16. As noted, Ms. Mihailoff indicated on her appeal form that she is seeking to have the Determination overturned on the basis that the Director erred in law.
17. The Tribunal has recognized the following ways in which an “error of law” may be found to have occurred, as 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 (BC CA) (*Gemex*):
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.
18. Apart from disagreeing with the conclusions reached by the Delegate, Ms. Mihailoff does not point to any of the above to support her assertion that an error of law occurred.
19. I am satisfied on a review of all of the material before me that the Delegate considered all of the material before her and reached a conclusion based on a weighing of the evidence. I am not persuaded anything in the materials before me demonstrates that an error of law occurred.
20. Accordingly, I dismiss the appeal pursuant to section 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding.

## **ORDER**

21. The appeal is dismissed, and the Determination is hereby confirmed pursuant to section 115(1) of the *ESA*.

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**Ryan Goldvine**  
**Member**  
**Employment Standards Tribunal**