Employment Standards TRIBUNAL

Citation: Jong Woo Park (Re)
2023 BCEST 97

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Jong Woo Park
("Mr. Park")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2023/021

DATE OF DECISION: November 9, 2023

DECISION

SUBMISSIONS

Jong Woo Park — on his own behalf

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*"ESA"*) by Jong Woo Park ("Mr. Park") of a determination issued by Leslie Tubrett, a delegate of the Director of Employment Standards ("deciding Delegate"), on February 1, 2023 ("Determination").

2. The Determination found the *ESA* did not apply to Mr. Park and that no further action would be taken on his complaint.

3. Mr. Park has appealed the Determination on the grounds the Director failed to observe principles of natural justice in making the Determination. The appeal was received by the Tribunal on February 27, 2023, which was within the statutory appeal period.

4. In section 8 of the Appeal Form, Mr. Park requested extra time to file additional reasons and arguments.

5. In correspondence sent to Mr. Park on March 8, 2023, the Tribunal granted the request for extra time, setting June 30, 2023, as the deadline to provide the additional written reasons and arguments. On June 28, 2023, the Tribunal received a request from Mr. Park to extend the June 30, 2023, deadline, "1 or 2 months", citing a death in the family and the need to check official records as the reasons for needing more time.

6. The Tribunal granted an additional 30 days – to August 14, 2023 – to make his submission. On August 14, 2023, the Tribunal received the additional written reasons and argument from Mr. Park for his appeal, along with several supporting documents attached as exhibits.

7. In correspondence dated August 16, 2023, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record ("record") from the Director, requested submissions on information disclosure, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.

8. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Park and the respondent company, 1067216 B.C. Ltd. Both have been provided with the opportunity to object to the completeness of the record.

9. No objection to the completeness of the record has been received from any party and, for the purposes of this appeal, the Tribunal accepts it as being complete.

10. 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 with 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 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.

11. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and the respondent employer 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 there is any reasonable prospect the appeal can succeed.

ISSUE

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

BACKGROUND FACTS

13. Mr. Park filed a complaint with the Employment Standards Branch on July 12, 2021, alleging 1067216 B.C. Ltd. had contravened the *ESA* by failing to pay regular wages and annual vacation pay over a period of 17 months.

14. By way of background, the Determination notes that 1067216 B.C. Ltd., operating under the name Canhan Trading and/or Can Han Cosmetics and Kitchenware ("Canhan"), operated a cosmetics business in Surrey, BC and that Mr. Park was the Purchasing Manager from 2016 to July 12, 2021.

15. The complaint was investigated by a delegate of the Director ("investigating Delegate"), who produced an Investigation Report ("Report").

16. The Report, which is dated August 5, 2022, was sent to Mr. Park and to 1067216 B.C. Ltd., its director, and its legal representative.

17. Both parties were given an opportunity to address the findings made in the Report.

18. The Report sets out the following matters that are identified as "[a]greed-upon facts":

> 1067612 B.C. Ltd. [*sic*] carrying on business as Canhan Trading.
>
> Jong Woo Park (Mr. Park or the Complainant) brought the idea of a cosmetics business to his brother-in-law, Sean Choi (Mr. Choi), in 2016. The business, which would become Canhan Trading, was one of several businesses operated within the legal entity 1067612 B.C. Ltd. (1067612 or the Respondent) [*sic*]. Canhan Trading bought cosmetic products from South Korea and sold them in Canada. The business relationship between Mr. Park and the Respondent was terminated on July 12, 2021.

19. The Report outlined the positions and evidence of each party. Both parties filed responses to the Report. The responses from Mr. Park are extensive, challenging most of the statements of fact contained in the report and containing extensive commentary on many of the documents attached to the Report.

THE DETERMINATION

20. The deciding delegate found Mr. Park was a "controlling mind" of the business during the period July 12, 2020 to July 12, 2021 – which was identified as the statutory recovery period. In making that finding, the deciding Delegate set out the following in the Determination (p. R4):

> … There is no dispute that the Complainant was one of two initial investors that started Canhan in 2016 while the Complainant lived in South Korea and his partner/brother-in-law, Sean Choi (Choi), lived in British Columbia, Canada. The parties agree they started Canhan when the Complainant brought cosmetic samples from South Korea to Choi's home. There is sufficient evidence to show that the Complainant invested his own funds to purchase products, made decisions independently for Canhan, and received profits when the business was dissolved in 2021.

21. As an aside, Mr. Park now says he no longer agrees with what is contained in the above excerpt from the Determination.

22. The deciding Delegate addressed submissions and documents submitted for the purpose of showing an employment relationship and found Mr. Park had failed to establish he was an employee of Canhan.

23. The deciding Delegate acknowledged that while the information and documents presented would normally be demonstrative of an employment relationship, other facts militated against finding an employment relationship had been created.

24. That evidence included the following:

- an agreement between the parties to create the appearance of an employment opportunity for Mr. Park with Canhan for the purpose of facilitating immigration to Canada for Mr. Park;
- making an application to Services Canada in support of that agreement which was grounded in what appears from an assessment of the material in the record to have been manufactured information;

- issuing a 2020 and 2021 T4 falsely reporting wages were paid to Mr. Park in those years; and
- preparing and signing a written offer of employment and employment contract whose terms were never followed and which, on the evidence, gave no appearance they were ever intended to be followed or to create a binding employment relationship.

25. The deciding Delegate found the employment documents presented lacked credibility and they were given no weight. That is an assessment with which I do not disagree.

26. The deciding Delegate recognized that a person found to be a "controlling mind" of a business bears the burden of showing he should, notwithstanding that finding, be considered an employee for the purposes of the *ESA* and found Mr. Park had not met that burden. The analysis on that matter is found at pages R5-R6 of the reasons for the Determination.

27. I note here that the evidence described in that analysis is supported on the record.

ARGUMENT

28. The arguments made by Mr. Park in his submission that accompanied the appeal received by the Tribunal on February 27, 2023, can be summarized as follows:

- The delay in processing his complaint was excessive and, in the circumstances, detrimental to his claim;
- Findings of fact have been made without a hearing and are based on one-sided claims that have not been debated and proved;
- The Determination was decided using the "extra-ordinary" legal principle of Mr. Park being a 'de facto director' and no supporting reasons were provided for using that principle; and
- The expiry of Mr. Park's temporary working visa has not allowed him to effectively deal with his claim;

29. The appeal submission delivered to the Tribunal over the signature of Mr. Park on August 14, 2023, contains the following arguments, which again I shall summarize:

- The deciding Delegate applied the concept of "controlling mind" in a confusing and contradictory way that used an "overlapping and excessive" legal and evidentiary standard that operated unfavourably for Mr. Park, and appears to be an error resulting from a misinterpretation of the *ESA*;
- The deciding Delegate erred in law and fact in finding Mr. Park was a "controlling mind" of Canhan;
- The finding in the Determination that it was not disputed Canhan was a company jointly established by Mr. Park and Mr. Choi and that Mr. Park was one of two co-investors was "a hasty conclusion and is not true" for the reasons listed in the appeal submission;

- The deciding Delegate erred in finding "the contract for the joint venture was formed at the time of the dissolution" and made many other errors in the findings of fact and the conclusions reached on those facts;
- The deciding Delegate erred in law and fact in concluding Mr. Park was not an employee for the purposes of the *ESA*;
- The deciding Delegate did not adequately and properly address all the facts that ought to have been considered in determining whether an employment relationship existed between Mr. Park and Canhan;
- The deciding Delegate failed to consider the purposes and objects of the *ESA*, which have indicated the objective of the *ESA* is to protect as many workers as possible and that the evidence should be weighed to favour that result in determining whether Mr. Park should be considered an employee for the purposes of the *ESA*;

30. On October 11, 2023, the Tribunal received correspondence from Mr. Park requesting "the full copy of the Business registry of [two entities] allegedly connected with the 1067216 B.C." The submission does not identify how this information bears on the natural justice, or any other, issue in this appeal.

ANALYSIS

31. 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.

32. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

33. 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.

34. A party alleging a failure to comply with principles of natural justice, as Mr. Park has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99. I find nothing in the appeal that would support a finding the deciding Delegate failed to comply with principles of natural justice.

35. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> 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).

36. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Mr. Park was provided with the opportunity required by principles of natural justice to present his position to both the investigating and the deciding Delegates. Mr. Park has provided no objectively acceptable evidence showing otherwise.

37. There is nothing in the reasons, record, appeal forms, or submissions showing that the investigating Delegate or the deciding Delegate failed to comply with the principles of natural justice (or with the requirements of section 77 of the *ESA*) in making the Determination. The record, containing a substantial amount of material and extensive submissions from Mr. Park, shows that he was aware of the position taken by Canhan on his complaint and that he was given a full opportunity to respond before the Determination was made.

38. The matters raised in his initial appeal submission do not demonstrate a failure to observe principles of natural justice.

39. As a general response to the many points made in the appeal submissions, none of those points, which include references to a delayed process, no argument on issues, and no residence in Canada, are evidence of a failure by the investigating and/or deciding Delegates to observe principles of natural justice.

40. While it is not raised as a ground of appeal, the substance of this appeal is that the deciding Delegate made several errors of law in making the Determination.

41. The 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] 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.

42. For completeness, I shall assess whether the appeal shows any error of law in the Determination.

43. The submissions received from Mr. Park argues the deciding Delegate misinterpreted the *ESA* in finding Mr. Park was not an employee, misapplied a general principle of law in addressing the concept of the 'controlling mind', made numerous errors on the facts, principally acting on a view of the evidence that could not reasonably be entertained, and adopted a method of assessment that was wrong in principle in finding Mr. Park was not an employee under the *ESA*.

44. The following principles are engaged in this appeal.

45. First, the central conclusions being challenged in this appeal – whether Mr. Park was a "controlling mind" of Canhan and whether he should be considered an employee for the purposes of the *ESA* – are questions of mixed law and fact. In B*ritco Structures*, 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.

46. Second, the grounds of appeal under the *ESA* do 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 factual findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03. 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.

47. The test for establishing that findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

48. To expand the above point, it is not sufficient for Mr. Park to simply deny facts or assert a version of the facts that are not in accord with the findings of the deciding Delegate; in order to seek a change in the findings of fact made in the Determination, Mr. Park is required to show the findings of fact and the conclusions and inferences reached by the deciding Delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26-29.

49. The statutory framework of the *ESA* under which this appeal arises was explored in *Re Barry McPhee*, BC EST # D183/97. The facts of that case are very similar to the facts as found by the deciding Delegate in this case. Mr. McPhee was involved in a business with two other persons. During the period relevant to his wage claim, Mr. McPhee continued to be one of the decision makers and managers of the business. He had ceased to be a director or officer of the company, but he retained a partnership interest and a significant element of control over the business of the partnership. He made decisions relating to the running of the business.

50. Against that backdrop, the question which arose was whether Mr. McPhee should be considered an employee for the purposes of the *ESA*. The Tribunal said 'no'; the following excerpt from that decision, at page 5, sets out the principle governing such circumstances and has application to this case:

> The *Act* exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed. A key purpose is to ensure the application of minimum standards of compensation and conditions of employment, including hours of work, overtime pay, leaves of absence, annual and statutory holidays and holiday pay and length of service compensation for termination without notice, for those employees. Despite the broad language used to define who is an employee, it is not a reasonable interpretation of that language, taking into account the scope, purposes and the over-all objectives of the *Act,* to conclude it is intended to embrace the controlling minds of the company. The evidence shows McPhee one of the controlling minds of the company. He was largely responsible for his own terms of engagement with Matco. He and Youngberg decided he would be hired, decided when he would be hired, what his salary would be, including that it would be paid without deduction, and decided his position. Once employed at Matco, McPhee decided what the scope of his authority would be, assumed control of the day to day operations, withheld payment of wages from employees and terminated the office manager. None of these comments are intended to denigrate the services McPhee performed for the company, they merely emphasize the degree to which McPhee had control over his relationship with the company.
>
> For these reasons, I find McPhee is not an employee under the *Act*.

51. The critical factors that persuaded the deciding Delegate that Mr. Park was a controlling mind of Canhan included the following:

- Mr. Park was one of two initial investors of Canhan in 2016;
- Mr. Park invested his own funds into Canhan to purchase products, made decisions independently for Canhan, and received profits when the business was dissolved in 2021;
- For the purpose of facilitating immigration, Mr. Park and Mr. Choi created the *appearance* of an employment opportunity for Mr. Park with Canhan;
- Mr. Park and Mr. Choi created employment documents – an offer of employment and an employment agreement – that were never followed in practice nor intended to create a binding contract of employment;
- Canhan, with Mr. Park's knowledge, created T4s for the years 2020 and 2021, falsely reporting wages there were wages paid to Mr. Park in those years; and
- In 2021, Mr. Park and Mr. Choi negotiated the terms under which the business of Canhan would be dissolved, which included Mr. Park receiving 75% of the equity from the closure and having the money that was paid by Canhan in payroll taxes arising from the false T4 reporting and the service fees paid to Service Canada for the Labour Market Impact Assessment deducted from his equity share.

52. The facts relied on by the Director in finding Mr. Park was a controlling mind of Canhan strongly support that finding. There was no error of law in the finding made and the result is perfectly consistent with the approach taken by the Tribunal to the status of the "controlling mind" of a corporation under the *ESA*, which was first enunciated in the *Barry McPhee* decision and has been applied in several decisions since.

53. The concept of 'controlling mind' under the *ESA* has been developed and applied for the purposes of the *ESA*. To answer one of the arguments made by Mr. Park, how that concept is addressed and applied in other contexts, demonstrated by those cases cited in his submissions, has no particular application in the context of this appeal.

54. The deciding Delegate did not apply a wrong principle to the complaint or misinterpret the *ESA*. The deciding Delegate provided a correct legal principle to the actual relationship between Mr. Park and Canhan and made a decision on the facts and in accordance with the provisions of, and for the purposes of, the *ESA*.

55. Nor was the deciding Delegate wrong in stating that, having determined he was a controlling mind of Canhan, there was an onus on Mr. Park to establish his status as an employee for the purposes of the *ESA*. That result is supported in the following comments from *Barry McPhee*, at pages 5-6:

> . . . in such a case (as it is in this one), the onus would be on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, the authority by which the company is able to establish the relationship with that person, the services to be performed for the "salary" to be paid and the capacity in which the person is performing the services. It will be seldom a controlling mind of a company will be found to be an employee under the *Act*. Additionally, Adjudicators for the Tribunal are not required to park their practical common sense and experience of business affairs at the door of the hearing room. The Tribunal must carefully consider the context in which a company director, officer, owner or manager seeks to claim employee rights and to pay particular attention to the purposes and over-all objectives of the *Act*.

56. The following factors were considered relevant to the question of whether Mr. Park should be found to be an employee under the *ESA*:

- The lack of credibility in the employment documents;
- The work he performed for Canhan was not separate or distinct from the work he performed in his role as its controlling mind;
- The work he performed for Canhan in Canada was no different from the work he performed for Canhan in South Korea, where the evidence showed he was exercising all of the authority and responsibility for the running of the business;
- In all the time he was 'working' for Canhan in Canada (more than 17 months), Mr. Park was never paid a wage, and no evidence there was ever an expectation of receiving wages; and
- Mr. Park independently tracked his expenditures for the business, had an intimate knowledge of how Canhan operated, and was aware his days and hours worked were not being tracked.

57. In my view, the decision of the deciding Delegate on the status of Mr. Park considered factors that were relevant to that question and was made within the legal framework of the *ESA*. Based on my review of the Determination and the salient parts of the record, I find the findings and conclusions of fact made by the deciding Delegate are firmly supported by the evidence provided.

58. Mr. Park has not shown that the findings, conclusions and inferences reached by the deciding Delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record or that there is no rational basis for the conclusions reached and so they are perverse or inexplicable. In reality, he seeks only to have the evidence re-evaluated and the factual findings changed.

59. In sum, I am not persuaded the deciding Delegate committed an error of law on the facts and an argument on this ground of the appeal would not succeed.

60. I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

61. Pursuant to section 115(1) of the *ESA*, I order the Determination dated February 1, 2023, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal