

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Jia Ning Gan  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** John Chesko

**FILE NO.:** 2023/176

**DATE OF DECISION:** March 11, 2024

## DECISION

### SUBMISSIONS

Jia Ning Gan on his own behalf

### OVERVIEW

1. Jia Ning Gan (“Appellant”) appeals a determination issued on October 27, 2023 (“Determination”), by a delegate (“Delegate”) of the Director of Employment Standards (“Director”).
2. In the Determination, the Delegate dismissed the Appellant’s complaint made under section 74 of the *Employment Standards Act* (“ESA”) alleging the Appellant’s former employer, Yamato Trading Co. Ltd. (“Employer”), had failed to pay the Appellant wages, overtime, and compensation for length of service contrary to the *ESA*.
3. The Appellant appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination and that new evidence has become available since the Determination was being made.

### BACKGROUND

4. The Employer operates a wholesale food and beverage company that falls within the jurisdiction of the *ESA*.
5. The Appellant was employed as a driver and warehouse helper by the Employer from September 1, 2004, to sometime in June 2022, when the Appellant gave an ultimatum to the Employer and refused to attend work after June 15, 2022, unless the Employer responded positively to the Appellant’s requests. When the Employer did not agree to all the Appellant’s requests, the Appellant did not return to work and requested a Record of Employment.
6. The Appellant filed the Employment Standards complaint on July 8, 2022, alleging the Employer had contravened the *ESA* by failing to pay the Appellant wages, overtime, and compensation for length of service. The Appellant submitted the Employer owed the Appellant eight weeks of wages and cancelled benefits estimated at \$8,448 because the Employer had stopped allowing the Appellant to use a company vehicle for commuting purposes in 2020. The Appellant also submitted certain amounts were owed for overtime. The Appellant further submitted that the Employer had intended to dismiss the Appellant, and the removal and subsequent refusal to reinstate the use of the company vehicle for commuting purposes resulted in the constructive dismissal and termination of the Appellant under the *ESA* for which compensation for length of service was owed.

### Investigation of Complaint

7. Following receipt of the Appellant’s complaint, an investigative delegate (“Investigative Delegate”) contacted the parties and investigated of the complaint. During the investigation, the Appellant and the

Employer's representatives were interviewed and provided information and evidence relevant to the complaint. The Appellant and the Employer's representatives responded to the Investigative Delegate's questions, put forward their sides of the story and were given the opportunity to present and review the evidence and make submissions. I note that aspects of the Appellant's complaint related to overtime were resolved during the investigation.

8. After receiving submissions and evidence, the Investigative Delegate submitted an investigation report to the parties on August 2, 2023, and invited further submissions.
9. When no further submissions were provided by either the Appellant or the Employer, the investigation report and the evidence were submitted to the Delegate for a determination.

### **Determination**

10. The Determination was issued to the parties October 27, 2023.
11. The Determination dismissed the Appellant's complaint, finding that there was no breach of the *ESA* by the Employer.
12. The Determination held the Appellant was not entitled to the wages claimed for loss of the use of the company vehicle for commuting purposes in 2020.
13. The Determination also held the Appellant quit and did not qualify for compensation for length of service under the *ESA*. The Determination held the loss of the company vehicle for commuting purposes in 2020 did not, in all the circumstances, amount to a deemed termination pursuant to section 66 of the *ESA*.
14. The Determination also noted in the alternative that the complaint was filed in 2022 and would be outside the time limits of the *ESA* for the Appellant's claims relating to the changes made in 2020.

### **ARGUMENTS**

15. On the appeal form, the Appellant submits the Director failed to observe the principles of natural justice in making the Determination and that new evidence has become available since the Determination was made.
16. The Appellant seeks to submit new evidence that the Employer wanted the Appellant to resign so that it could hire lower cost employees who held working holiday visas.
17. The Appellant submits that findings of fact in the Determination are incorrect. The Appellant submits the Employer representatives' evidence concerning the changes in work conditions and negotiations was not credible.
18. Finally, the Appellant submits there should be exemption from the time limits in the *ESA* because of the impact of the covid 19 pandemic.
19. The Appellant submits the Determination should be set aside.

## ANALYSIS

20. These reasons are based on the written submissions of the Appellant, the Determination, and the Record.
21. On receiving the Appellant's appeal, the Employment Standards Tribunal ("Tribunal") requested the section 112(5) record ("Record") from the Director. The Tribunal provided the Record to the parties and sought submissions on the completeness of the Record. As the Tribunal did not receive any objections to the completeness of the Record, the Tribunal accepts the Record as complete.

### Appeal of Determination

22. 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.
23. An appeal is limited to the specific grounds set out in the *ESA*. It is considered an error correction process and is not a new hearing of the case. Nor is it an opportunity to reargue an appellant's case or 'try again' with repackaged facts and arguments.

### Failure to Observe Principles of Natural Justice

24. On the appeal form, the Appellant alleges the Director failed to observe the principles of natural justice in making the Determination.
25. Natural justice has been described as the right to a fair procedure. Natural justice includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05).
26. A party alleging failure to comply with natural justice must provide evidence in support of the allegation. It isn't enough to simply allege a failure of natural justice. There needs to be specific evidence or argument about how the determination procedure did not meet any of the requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).
27. I have reviewed the Record and considered the Appellant's submissions. I find there is no basis for the Appellant's argument on this ground nor is there any basis on the Record for concluding the Director failed to observe the principles of natural justice. The Appellant does not point to any specific deficiencies in the procedure, but basically resubmits facts and arguments.
28. The evidence is clear that the Appellant was aware of the case to be made and took part in the investigation of the complaint. The Record indicates the Investigative Delegate conducted an investigation of the issues raised in the complaint. I note also that the Investigative Delegate addressed language concerns with the Appellant. The Record shows the parties were fully involved in the investigation process

and were given every opportunity to respond and provide evidence and submissions. In sum, the Appellant has not shown the Director failed to observe the principles of natural justice in making the Determination.

29. I find there is no merit in this ground of appeal, and it is dismissed.

### **New Evidence**

30. The Appellant alleges new evidence has become available since the time the Determination was being made. In particular, the Appellant submits the Employer wanted the Appellant to resign so that he could be replaced with lower cost employees who held working holiday visas.

31. Appeals are generally based on the evidence in the Record, with only narrow exceptions. In *Davies et al.*, BC EST # D171/03, the Tribunal set out the following requirements for introducing new evidence:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion in the Determination.

32. To introduce new evidence, each of the above requirements need to be met. Parties are expected to present all relevant evidence during the investigation and determination stage of complaints. The introduction of new evidence at appeal that could have been introduced prior to determination will generally not be accepted and could result in the dismissal of the appeal.

33. The Appellant's submissions do not meet the requirements for new evidence. The Appellant's own materials make it clear the evidence of the Appellant's replacements existed at the time of the investigation and the determination. The Appellant even submits other examples of similar evidence that existed well before his resignation. The relevance of the proposed evidence is also tangential and speculative at best where the main issues in the Determination related to the Appellant's claim for wages and his resignation. Also, I note the probative value of the proposed evidence does not weigh heavily, if at all, on the main issues in the Determination concerning the Appellant's claim for wages and the claim for compensation for length of service.

34. I find there is no merit in this ground of appeal, and it is dismissed.

### **Tribunal may consider alternative grounds**

35. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc., dba Superior Transmissions*, BC EST # D141/03).

36. While not specifically noted on the appeal form, the Appellant's submission appears to allege the Director erred in law in dismissing the claims for wages and compensation for length of service.
37. To show an error of law, the Appellant has the burden to show a material legal error in the decision. A disagreement with a finding of fact does not amount to an error of law. Examples of errors of law may include: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion that is inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466).
38. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate.
39. I have reviewed the Determination and the evidence in the Record and do not find an error of law in the Determination.
40. In the Determination, the Delegate came to findings consistent with the law and supported on the evidence. Although the Appellant may not agree with the Determination, I find there was evidence the Delegate could rely on to make findings of fact and conclude that the use of the company vehicle for commuting purposes was not compensable wages under the *ESA* (see *Lombnes*, BC EST # D665/01; *Seel Forest Products Ltd.*, BC EST # D233/99; *Skeena Valley Guru Nanak Brotherhood Society*, BC EST # D361/00, Reconsideration of BC EST # D470/99 and BC EST # D150/00).
41. On the issue of compensation for length of service, the Delegate considered the Appellant's evidence and submissions. The Delegate considered the legal principles that apply and held that the Appellant was not constructively dismissed or terminated pursuant to section 66 of the *ESA*. The law is clear that not every change in conditions of employment will support a deemed termination under section 66 of the *ESA*. The changes must be significant enough to result in what has been described as substantial or fundamental change in the employment relationship. In certain cases, the employee's continuation with the new conditions may be a factor considered (see *Gordon*, BC EST # D399/02; *Majer*, BC EST # D043/04). The Determination and the Record supports that the Delegate applied the proper test to the facts and came to a reasoned conclusion that there was no deemed termination under section 66 of the *ESA* (see *Isle Three Holdings Ltd. (Thrifty Foods)*, BC EST # D084/08, confirmed on reconsideration, BC EST # RD124/08; *Kyah Development Corporation*, 2020 BCEST 112; *Patricia Whelpton*, 2022 BCEST 78).
42. I find the conclusions in the Determination were supported by evidence and the law and it is not open to this Tribunal to rehear the case. Absent an error of law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate. Accordingly, I find there is no error of law and would dismiss this ground of appeal also.

### Summary dismissal

43. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal where there is no reasonable prospect it will succeed.

44. As set out above, I find there is no reasonable prospect this appeal would succeed.

**ORDER**

45. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.

46. Pursuant to section 115(1) of the *ESA*, I confirm the Determination.

---

**John Chesko**  
**Member**  
**Employment Standards Tribunal**