

An appeal

- by -

Gary Johal Holding Inc. (also known as Gary Johal Holdings Inc.)  
carrying on business as Husky Energy  
("Johal")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2008A/143

**DATE OF DECISION:** January 27, 2009

## DECISION

### SUBMISSIONS

Gary Johal	on behalf of Gary Johal Holdings Inc.
Kathleen Demic	on behalf of the Director of Employment Standards
Marina Adams	on her own behalf

### OVERVIEW

1. This is an appeal by Gary Johal Holdings Inc. carrying on business as Husky Energy (“Johal”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued October 23, 2009.
2. Marina Adams filed a complaint against Johal for compensation for length of service. A delegate of the Director held a hearing into Ms. Adams’ complaint on September 25, 2008. Mr. Johal did not attend the hearing. After considering Ms. Adams’ evidence, the delegate concluded that Johal had contravened section 63 of the Act in failing to pay Ms. Adams compensation for length of service. The delegate determined that Ms. Adams was entitled to compensation and annual vacation pay in the total amount of \$961.24. The delegate also imposed an administrative penalty in the amount of \$500.00 for the employer’s failure to provide employer records in contravention of section 46(1) of the *Employment Standards Regulation* and a further \$500 for the contravention of section 63 of the Act.
3. Johal’s appeal is on the grounds that evidence has become available that was not available at the time the Determination was being made.
4. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is adjudicated on the section 112(5) “record”, the submissions of the parties and the Reasons for the Determination

### ISSUE

5. Did the delegate err in determining that Ms. Adams was entitled to compensation for length of service?

### FACTS AND ARGUMENT

6. The facts and evidence set out by the delegate are as follows.
7. Mr. Johal was the sole officer and director of Johal, which operated a gas station and restaurant. Ms Adams held a number of positions at the restaurant between October 2, 2007 and June 25, 2008.

8. After receiving Ms. Adams' "Self Help" kit, Mr. Johal called Ms. Adams to discuss her claim. Ms. Adams explained to him that she was entitled to compensation for length of service because she had not been allowed to work out her notice period. Although she invited Mr. Johal to confirm that information with the Branch, Mr. Johal told her he had no intention of paying her anything further and ended the call. Ms. Adams filed her complaint with the Employment Standards Branch on July 22, 2008.
9. Mr. Johal did not appear at the hearing. Staff at the Branch made a number of unsuccessful attempts to contact Mr. Johal to determine whether he was going to appear.
10. The delegate determined that Mr. Johal had notice of the hearing. She noted that he had been sent a Notice of Hearing by registered mail on August 14, 2008 setting out the date, time and location of the hearing. A Canada Post tracking search confirmed that the notice was delivered on August 15, 2008.
11. The delegate further noted that Mr. Johal had been contacted by the Branch and offered mediation services and chosen not to participate. She concluded that Johal was aware of the allegations and given the opportunity to respond and commenced the hearing in the absence of any representation on the employer's behalf.
12. Ms. Adams' evidence was that she was initially hired as a part time cook. When Mr. Johal told her that the restaurant was not profitable, she and Mr. Johal entered into an agreement in which she would manage the restaurant for one year, following which she would assume the lease.
13. In late February, 2008, Ms. Adams took over some of the restaurant management duties. She applied for a business licence for May 1, 2008, and she and Mr. Johal agreed that would be a good date for her to assume management duties full time. Ms. Adams was to be paid \$4,000 per month. Ms. Adams said that she understood she would have total autonomy in operating the restaurant for one year to determine whether she could operate it at a profit.
14. Within a few weeks, the relationship between the parties deteriorated and Ms. Adams decided to quit. After giving Mr. Johal a letter indicating that her last day of work would be July 15, 2008, she returned to the kitchen. Within a short time, another staff member quit, effective immediately. Faced with a staff shortage, Ms. Adams asked Mr. Johal if she could call in another employee. He told her just to close the restaurant.
15. Shortly after she did so, Mr. Johal called Ms. Adams into his office and gave her a cheque in the amount of \$1318.68 which he said was payment of wages up to and including that day. When Ms. Adams asked him if she should return to work the following day, Mr. Johal said no. When she asked whether she was to return at all, Mr. Johal said no.
16. The delegate found, on the evidence before her, that Ms. Adams had an employment relationship and that her employment had been terminated on June 25, 2008. Accordingly, she determined that Ms. Adams was entitled to one week's compensation for length of service.
17. The delegate further noted that a Demand for Records was sent to Johal along with the Notice of Complaint hearing and that those records had not been provided to the Branch. She determined that the employer's failure to provide the records had frustrated the Director's ability to ensure that complainants receive their entitlement to wages. She determined that Mr. Johal had contravened section 46 of the *Regulation* in failing to produce records as required.

18. On October 17, 2008, Mr. Johal contacted the Branch to advise them that he no longer owned the business and provided a new mailing address. A BC Corporate Registry search showed that Gary Johal Holding Inc. was no longer in good standing.
19. Mr. Johal's appeal submission is that, in essence, Ms. Adams gave false evidence at the hearing. He takes issue with her evidence on whether she was given authority to hire and fire, what shifts she was to work, how she performed her work as well as other issues unrelated to the claim. Mr. Johal also asserts that Ms. Adams "asked him for a favour and asked if I can give her cheque the same day. We were closed for ten days and after that she never came to work. Now she is trying to screw me".
20. The delegate submits that Mr. Johal had notice of the hearing and the opportunity to respond and participate in both mediation and the hearing. She says that in spite of these opportunities, Mr. Johal failed to provide payroll records or any other evidence and did not appear at the hearing. She submits that although Mr. Johal says he has new evidence, his appeal letter simply refutes Ms. Adams' allegations. She submits that the appeal should be dismissed.
21. Ms. Adams contends that Mr. Johal's statements are incorrect and suggests that the appeal has no merit.
22. In response, Mr. Johal raises additional arguments, including the submission that Ms. Adams was not an employee, that she gave fraudulent evidence and that she was responsible for the fact he had to shut the restaurant down for two weeks. He contends that he closed the restaurant for evenings when there was insufficient staff and that he gave her a cheque because she asked him for one.

## ANALYSIS

23. Section 112(1) of the *Act* 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; or
  - (c) evidence has become available that was not available at the time the determination was being made
24. Mr. Johal has the burden of establishing the grounds for his appeal.
25. Mr. Johal does not dispute that he had knowledge of the date, time and location of the hearing. His appeal submission contains no explanation about why he was unable to appear or why he failed to provide payroll records to the delegate when he was required to do so. There is no suggestion, or evidence, that Mr. Johal was denied an opportunity to appear at the hearing and present the arguments he now makes on appeal.

26. An appeal is not an opportunity to made arguments or submissions that ought to be made before the delegate. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
  5. Exercising discretion in a fashion that is wrong in principle
27. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
28. The Tribunal must defer to the factual findings of a delegate unless Mr. Johal can demonstrate that the delegate made a palpable or overriding error. Many of Mr. Johal’s submissions are largely irrelevant to the issue of whether Ms. Adams is entitled to compensation for length of service while others are unsubstantiated by any evidence. In short, nothing that Mr. Johal has submitted with his appeal persuades me that the delegate erred in her conclusion that Ms. Adams was entitled to compensation for length of service.
29. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
  - the evidence must be relevant to a material issue arising from the complaint;
  - the evidence must be credible in the sense that it is reasonably capable of belief; and
  - 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 on the material issue.
30. The “new evidence” Mr. Johal submits is a letter dated June 25, 2008. It is the letter referred to at the hearing in which Ms. Adams gives her employer three weeks notice of her last day of employment. I find that the “new evidence” is not new, as it was referred to by Ms. Adams and relied upon by the delegate at the hearing even though the letter was not before her. Even if it had been before the delegate I am unable to find it would have caused the delegate to come to a different conclusion.
31. The appeal is denied.

**ORDER**

- <sup>32.</sup> I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 23, 2008, be confirmed together with whatever interest may have accrued since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**