

An appeal

- by -

Easywood Flooring Inc.  
(“Easywood”)

- 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:** Shafik Bhalloo

**FILE No.:** 2012A/138

**DATE OF DECISION:** February 20, 2013

## DECISION

### SUBMISSIONS

Jeong Soo Kim

on behalf of Easywood Flooring Inc.

### OVERVIEW AND FACTS

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Easywood Flooring Inc. (“Easywood”) has filed an appeal of a determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on October 7, 2011 (the “Determination”).
2. On June 5, 2009, Young Don Lee (“Mr. Lee”) filed a complaint under section 74 of the *Act* alleging that Easywood contravened the *Act* by failing to pay him regular wages, statutory holiday pay, annual vacation pay and compensation for length of service (the “Complaint”). A delegate investigated the Complaint and, during her fact-finding session, she contacted Jeong Soo Kim (“Mr. Kim”), a Director and Officer of Easywood. Mr. Kim provided the delegate with some evidence and information, including witness statements, which the delegate considered in her investigation.
3. Thereafter, on February 10, 2011, the delegate sent a letter to Easywood, to the attention of Mr. Kim, setting out her preliminary findings against Easywood, and invited Easywood or Mr. Kim to provide a response to her preliminary findings by February 28, 2011. However, neither Easywood nor Mr. Kim responded. As a result, on October 7, 2011, the delegate issued the Determination against Easywood, finding the latter to have contravened sections 40 (overtime), 45 and 46 (statutory holiday pay), and 58 (annual vacation pay) of the *Act*. The delegate ordered Easywood to pay Mr. Lee wages and accrued interest in the amount of \$11,684.25. The delegate also imposed on Easywood six (6) administrative penalties in the amount of \$500.00 each for a total of \$3,000.00 for contraventions of sections 18, 27, 28, 40, 45 and 46 of the *Act*.
4. The delegate sent the Determination to Easywood and Mr. Kim by registered mail to the 108\*\*\* (redacted for privacy) address in Surrey, which address Mr. Kim provided to the Employment Standards Branch (the “Branch”) on June 11, 2011, during the investigation of the Complaint. The Director’s record in this appeal contains a Canada Post Registered Mail Trace Sheet showing that the Determination was indeed sent by registered mail on October 7, 2011, to both Easywood and Mr. Kim at the 108\*\*\* (redacted for privacy) address in Surrey. It was not sent to the Registered and records office address of Easywood which had dissolved voluntarily on March 19, 2009, according to the Director’s corporate search of June 9, 2009. I note there is no confirmation from Canada Post, whether the registered mail was successfully delivered to either Easywood or Mr. Kim.
5. The Determination expressly set out the deadline for appealing the Determination as 4:30 p.m. on November 14, 2011. However, Easywood filed its appeal on November 20, 2012, in excess of twelve (12) months after the expiry of the appeal date. Easywood has grounded its appeal as a failure by the Director to observe the principles of natural justice.
6. By way of remedy, Easywood is seeking the Employment Standards Tribunal (the “Tribunal”) to cancel the Determination.
7. Section 114(1) of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provide that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the

Director, if it decides the appeal does not satisfy or meet certain requirements. I have decided that this appeal is an appropriate case for consideration under section 114(1) of the *Act* and Rule 22 of the *Rules*. Accordingly, I will assess the appeal based solely on the Determination; Easywood's written positions presented by its Director and Officer, Mr. Kim; and the section 112(5) "record" before the Director when the Determination was being made. If the Tribunal is satisfied that Mr. Kim's appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal may invite Mr. Lee and the Director to file a reply to the question of whether to extend the deadline for Easywood to file its appeal. In such case, Easywood would be given an opportunity to make a final reply to the submissions.

## ISSUE

8. Did the Director breach the principles of natural justice in making the Determination?

## ARGUMENT

9. As indicated previously, Easywood has grounded its appeal of the Determination as a failure by the Director to observe the principles of natural justice. In his submissions on behalf of Easywood, Mr. Kim has included Easywood's bank record from Sharon's Credit Union from September 2007 to February 2009 with some highlighted entries, which appear to correspond to previously-produced history of bank account of Easywood in the investigation of the Complaint. Mr. Kim has also disclosed a letter of employment dated May 9, 2007, on Easywood's letterhead addressed to Mr. Lee, which document was also produced during the investigation of the Complaint. Mr. Kim has also included in the Appeal T4 Statements of Remuneration paid to Mr. Lee from 2007 to 2009 inclusive. In the Director's record in this appeal, I note that Easywood had previously produced in the investigation of the Complaint T4 Statements for Mr. Lee for 2007 to 2008 inclusive, but not 2009. I also note that Mr. Kim, on behalf of Easywood, supplements the above-mentioned documents with a brief written submission in which he states that Easywood closed its operations on March 1, 2009, and paid Mr. Lee fully the salary referred to in the Labour Market Opinion from Service Canada. He submits the Labour Market Opinion documents.
10. I also note that in his written submissions, Mr. Kim denies receiving the Determination and states that it was never delivered to his "registered mailing address" or to his "lawyer's registered mailing address" and, therefore, he was not in a position to respond or appeal the Determination. Mr. Kim asks for proof that the Determination was sent to his, or his lawyer's, mailing address, and provides both those addresses. He states that his address, at the time the Determination was made, was 166\*\*\* (redacted for privacy) in Surrey and his lawyer's address was 711 Columbia Street, New Westminster.
11. I also note that Mr. Kim has submitted correspondence between the Tribunal and himself, as well as his correspondence with the Branch. I do not need to set out in any great detail that correspondence here except to say that the correspondence relates to Mr. Kim's request for the written Reasons for the determination, as the delegate only issued the Determination without written Reasons, but included with the Determination a copy of section 81 of the *Act* which allows a person named in a determination to request from the Director written Reasons within seven (7) days of being served with the Determination. However, in this case, Mr. Kim's request for written Reasons on behalf of Easywood came in over a year after the period for requesting Reasons expired, and the Branch therefore rejected his request.
12. Finally, I note that Mr. Kim has also included with the appeal submissions, a copy of the Restoration Application for Easywood dated September 20, 2011. He does not make any submissions in respect of this document, however, I note that in the Director's record, there is a company search for Easywood which

indicates that Easywood voluntarily dissolved on March 19, 2009, and was then again fully restored on September 20, 2011, and then again voluntarily dissolved on February 28, 2012.

## ANALYSIS

13. Easywood's appeal is based on the alleged failure of the Director to observe the principles of natural justice in section 112(1)(b) of the *Act*:

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:

...

(b) the director failed to observe the principles of natural justice in making the determination;

14. Natural justice is an administrative law concept referring to procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent-decision maker (see *Re: 607730 B.C. Ltd. c.o.b. English Inn & Resort*, BC EST # D055/05).

15. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal elaborated on the principles of natural justice as follows:

The 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 *BWT Business World Incorporated*, BC EST #D050/96.

16. The onus is on the appellant, Easywood in this case, to show that the Director breached the principles of natural justice in making the Determination. However, I do not find anything in Easywood's submissions or the Director's record that supports the natural justice ground of appeal. The record amply shows that the delegate provided Easywood with the particulars of the Complaint. The record also shows that Mr. Kim, on behalf of Easywood, participated in the delegate's fact-finding process during the investigation and made submissions. However, in her letter of February 10, 2011, when the delegate invited Mr. Kim or Easywood to respond to her preliminary findings by February 28, 2011, neither responded, and she then proceeded with her Determination. In the circumstances, there is nothing in the appeal submissions of Easywood that establishes a breach of natural justice on the part of the delegate in making the Determination.

17. Having said this, I note that Mr. Kim has raised the matter of Easywood not receiving the Determination the delegate sent by registered mail to both Mr. Kim and Easywood. This does raise a potential natural justice issue, namely, the inability of Easywood to appeal the Determination in a timely fashion because Easywood never heard about it before the expiry of the time limit for appealing the Determination. As indicated previously, the Director's record contains a Canada Post Registered Mail Trace Sheet showing that the Determination was sent by registered mail on October 7, 2011, to both Easywood and Mr. Kim at the 108\*\*\* address in Surrey. While there is no Canada Post record showing that either Mr. Kim or Easywood received the Determination, the Determination was sent at the last known address for both which Mr. Kim, on June

11, 2011, (about 4 months before), provided to the Director. If there was a change in Easywood's or Mr. Kim's address since that time, the onus is on them to inform the Director of the change of address. I find it was reasonable for the Director to have sent the Determination to Easywood's and Mr. Kim's last known address. In the circumstances, I do not find there was any breach of natural justice on the delegate's part.

18. I also find it suspect that neither Easywood nor Mr. Kim would make any enquiry for months if they did not receive the Determination when they were well aware of the investigation of the Complaint and participated in the investigation. Easywood and Mr. Kim should have reasonably expected that the Director would be making a determination in due course after the investigation was completed. There was a preliminary findings letter that was sent to Easywood to the attention of Mr. Kim which neither Mr. Kim nor Easywood denied receiving and that letter set a deadline for Easywood to respond by February 28, 2011, failing which a determination would be issued. I find it incredible that in the face of such a letter Mr. Kim and Easywood, if they did not receive the Determination, would not make any enquiry with the Director of the outcome of the Complaint sooner than over a year after the Determination when the Director issued a Director's Determination.
19. In the circumstances, I am not persuaded that there is a reasonable prospect that the appeal of Easywood will succeed. Additionally, I also find that the appeal is not filed within the applicable time limit.

## **ORDER**

20. Pursuant to section 114(1)(b) and (f) of the *Act*, I dismiss the appeal of Easywood Flooring Inc. on the grounds that it is not filed within the applicable time limit and there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated October 7, 2011, is confirmed as issued.

---

**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**