

An appeal

- by -

Ken Eng  
(the “Employee”)

- 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:** Yuki Matsuno

**FILE No.:** 2008A/10

**DATE OF DECISION:** April 30, 2008

## DECISION

### SUBMISSIONS

Ken Eng	on his own behalf
Sam Anderson	for the Employer, 0698094 B.C. Ltd. carrying on business as Anderson by Design
Ed Wall	for the Director of Employment Standards

### OVERVIEW

1. The Employee, Mr. Eng, appeals a Determination of the Director of Employment Standards (the “Director”) issued January 21, 2008 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). A delegate of the Director (the “Delegate”) issued the Determination, which decided a complaint filed by Mr. Eng with the Employment Standards Branch on October 25, 2007 (the “Complaint”). After completing an investigation, the Delegate found that the *Act* had not been contravened and therefore no wages were outstanding.
2. There is some indication in his appeal submission that Mr. Eng thinks an oral hearing is necessary. I have reviewed the file and considered this request. Since a finding of credibility is not required to dispose of the appeal and no other viva voce evidence is needed, I will decide this appeal on the basis of the submissions of Mr. Eng, the Employer, and the Director, as well as the Record provided by the Director. I have reviewed and carefully considered these documents in coming to my decision.

### BACKGROUND

3. The Determination outlines the following information: The Employer operates a construction company falling under the jurisdiction of the *Act*. Mr. Eng was employed as a lead carpenter with the Employer at a construction site from July 26 to October 24, 2007. On October 16, 2007, Mr. Eng was injured in an automobile accident and did not work the next day. He returned to work on October 18 but was having difficulty walking. On October 19 Mr. Anderson told Mr. Eng to leave the work site and not return until he had a doctor’s note. On October 23, 2007 Mr. Eng provided a doctor’s note to Mr. Anderson indicating that he was fit to work. The Employer terminated Mr. Eng’s employment later that day.
4. In his Complaint, Mr. Eng alleges that the Employer failed to give him notice or pay in lieu of notice upon terminating his employment and ignored a medical note indicating he was fit to work. By letter dated November 21, 2007, the Delegate asked Mr. Eng to provide a written submission outlining his argument regarding his complaint along with any supporting evidence. By letter dated December 1, 2007 (the “Letter”), Mr. Eng replied by setting out details regarding his claim. Of note among the details was the Employer’s “three-strike” rule, which was explained to Mr. Eng at a safety orientation on July 26, 2007. According to Mr. Eng, the rule provided that “employee cannot be dismissed because of one infraction” but rather, only three “infractions” will lead to a dismissal from employment. He complained that the rule was not applied to him. Mr. Eng also complains in the Letter that the “Employer discriminated against and made other businesses refuse me work” and cites section 83 of the *Act*.

5. In the Determination, the Delegate found that the *Act* had not been contravened and that as a consequence, no wages were outstanding. In the Reasons for Determination, the Delegate characterized the issues in dispute as: “Is Mr. Eng entitled to compensation for length of service, annual vacation pay or hourly wages? If so, in what amounts?” However, in the Reasons, the Delegate provided detailed reasons only with respect to the issue of compensation for length of service. The Delegate stated that Mr. Eng’s claim for compensation under section 63 failed for two reasons: (1) he was employed for less than three months, the minimum amount of time necessary to for entitlement under section 63; and (2) he was employed by an employer whose principal business is construction, thus exempting him from compensation.
6. With respect to the issue of whether the Employer owed Mr. Eng annual vacation pay or hourly wages, the Delegate outlined the evidence before him on these matters in the Determinations but made no express findings of fact and expressed no specific conclusions on these matters. The Delegate concludes generally that the *Act* was not contravened and no wages are outstanding, and from this the reader is left to infer that the Delegate found that Mr. Eng was not owed annual vacation pay or hourly wages.
7. Mr. Eng now appeals the Determination on all three grounds available under Section 112 of the *Act*.

## ISSUES

1. Did the Delegate err in law in making the Determination?
2. Did the Delegate fail to observe the principles of natural justice in making the Determination?
3. Should the appeal be allowed on the basis that evidence has become available that was not available at the time the Determination was being made?

## ARGUMENT AND ANALYSIS

8. As the party bringing the appeal, Mr. Eng has the burden of showing that the Determination is wrong and should be varied, cancelled, or referred back to the Director. The parties advanced numerous arguments; I will refer only to those that are relevant to each ground of appeal.

### *Error of Law*

9. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal outlined its general understanding 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)*, [1988] B.C.J. No. 2275 (B.C.C.A.):
  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 reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).
10. Many of Mr. Eng's submissions dispute facts that were expressly or impliedly found in or could be inferred from the Determination. Generally, the Tribunal does not have the jurisdiction to determine questions of fact alone. However, if a finding of fact was made on no evidence, or on a view of the evidence that could not reasonably be entertained, then an error of law may be made out. Mr. Eng makes several arguments that are relevant to ascertaining whether the Delegate erred in law.
11. **First and last days of work:** Mr. Eng says that the Delegate was wrong to conclude that his first day of work was July 26 and his last day of work was October 24. He says that his first day was July 25 and his last day was October 25. In reply, the Delegate submits that that Mr. Eng stated in his Complaint that he began work on July 26 and his last day worked was October 24. He also says that Mr. Eng provided no evidence to substantiate the July 25 and October 25 dates. I find that the Delegate had some evidence before him to conclude that Mr. Eng worked from July 26 to October 24, namely the Complaint. I infer from the Determination that the Delegate found this evidence more compelling than the reasons and evidence submitted by Mr. Eng in the December 1 Letter for why the proper start and end dates were otherwise. I find that the Delegate did not make an error of law with respect to this matter.
12. **July vacation pay:** Mr. Eng argues that the Delegate erred when he did not find that vacation pay was owing to him for wages earned in July 2007. Mr. Eng also points out that no interest has been paid with respect to the July vacation pay. In reply, the Delegate says that the Employer has paid the vacation pay owing. The Employer's submission includes information that indicates some time after the Determination was issued, the Employer realized that Mr. Eng had not been paid vacation pay for July and sent him a cheque dated February 26, 2008 for the amount owing (\$29.92). In my view, the Delegate's reply on this point is inadequate. It can be inferred from the Determination that the Delegate found that no vacation was owed to Mr. Eng for July. However, there was no pay statement for July in the evidence before the Delegate. The Delegate had pay statements only for August, September and October and specifically referred to them in the Determination. I conclude that by finding that no vacation pay was owed to Mr. Eng for July, the Delegate committed an error of law in that he acted without any evidence.
13. **Final pay statement:** Mr. Eng argues that the Delegate erred when he found no errors in Mr. Eng's final pay statement. The Delegate says that during the investigation, Mr. Eng did not provide any information about how his final pay statement was in error. I note that besides the two final pay statements (one dated October 25 and one dated October 31, both indicating the same number of hours worked) there was no evidence placed before the Delegate about what hours Mr. Eng worked in October 2007. I find that the Delegate did not commit an error of law in finding that no hourly wages were owing to Mr. Eng at the conclusion of his employment. It cannot be said that the Delegate was acting without any evidence, or on a view of the facts which could not reasonably be entertained.
14. **Three-strike rule:** Mr. Eng submits that the Delegate erred when he did not find that Mr. Eng's dismissal was unjustified because the Employer did not apply the "three-strike" rule before terminating his employment. In reply, the Delegate points out that the Tribunal jurisprudence on just cause is not applicable to Mr. Eng because he is not entitled to compensation under section 63. Mr. Eng's arguments suggest that his understanding is that an employer can only terminate the employment of an employee for just cause. In fact, employers may dismiss employees for reasons other than just cause, subject to constraints imposed by contract, such as collective agreements or employment contracts. Employers who

dismiss employees, however, may face statutory or common law liabilities. Under the *Employment Standards Act*, employers are liable in some circumstances for compensation for length of service under section 63 when they dismiss an employee. In the case of Mr. Eng, the Delegate found that his term of employment exempted him from the section 63 entitlement. Given this conclusion, it was not an error of law for the Delegate not to have made a finding regarding the applicability of the “three-strike” rule.

### ***Failure to Observe the Principles of Natural Justice***

15. In order to show that the Delegate failed to observe the principles of natural justice, the appellant must prove that the Delegate made an error in procedure, amounting to unfairness, in how carrying out the investigation or making the Determination. Among Mr. Eng’s arguments, the following are relevant to this ground of appeal.
16. **Cancelled Mediation Session:** Mr. Eng suggests that it was unfair that the “hearing” (which in fact was a mediation session) booked for this matter was cancelled, especially after he had made arrangements to attend. The Delegate explains in reply that a tentative date (December 5) had been set for a mediation session; however, the Employer indicated that it was a construction company and that it did not believe that a mediation session would be productive. The Delegate wrote to Mr. Eng on November 21, advising him the Delegate was conducting an investigation and inviting written submissions; Mr. Eng responded with the Letter. Under the *Act*, a delegate has a number of procedural tools (investigation, adjudication, and mediation among them) to use in resolving a complaint. The Delegate had the discretion to choose what he considered to be the most appropriate procedure for this complaint, i.e. an investigation. He gave Mr. Eng sufficient notice of the change in procedure. No breach of natural justice principles is apparent.
17. **Bias:** At several points in his submissions, Mr. Eng alleges bias on the part of the Delegate. An allegation of bias is serious and must be addressed. In *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of EST #D101/98), the Tribunal adopted the comments of Newbury, J.A. in *Finch v. The Association of Professional Engineers and Geoscientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (B.C.C.A.):

The test for determining whether a reasonable apprehension of bias arises is well-known and clear: Cory, J. for the Court in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992) 4 Admin. L.R. (2d) 121 (S.C.C.) formulated it this way:

It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.

To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
18. Nothing in the Determination or Record provides any evidence of bias. In my view, a reasonably informed bystander could not reasonably perceive bias on the part of the Delegate. I note in particular that it is not an indication of bias where the Delegate makes findings with which one party or another disagrees. I find that there was no bias, or reasonable apprehension of bias, arising from the Delegate’s investigation and Determination.

### ***Human rights***

19. In his submissions, Mr. Eng refers to his human rights having been violated. As a member of this Tribunal, I cannot adjudicate this particular complaint because the Tribunal has no jurisdiction to apply the *Human Rights Code: Administrative Tribunals Act*, section 46.3.

### ***Section 83***

20. Mr. Eng says that the Delegate was wrong not to address his complaint that the Employer breached section 83 of the *Act*, which provides:

83 (1) An employer must not

- (a) refuse to employ or refuse to continue to employ a person,
- (b) threaten to dismiss or otherwise threaten a person,
- (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
- (d) intimidate or coerce or impose a monetary or other penalty on a person,

because a complaint or investigation may be or has been made under this *Act* or because an appeal or other action may be or has been taken or information may be or has been supplied under this *Act*.

21. Mr. Eng had raised the issue in the Letter, as follows:

“(1) Section 83 – Employer discriminated against and made other businesses refuse me work

- a) 3 subtrade stations – unable to find employment there as employer threatened their work.
- b) Employment in town – people were uncomfortable to offer me employment.
- c) Harassment in town – employer’s employee harrassed [*sic*] and assaulted me in a public establishment.”

22. In spite of the issue being raised by Mr. Eng, however, the Determination contains no reference to section 83 or to Mr. Eng’s complaints about the Employer’s alleged conduct. In reply to Mr. Eng’s appeal, the Delegate states: “Mr. Eng alleges the employer contravened Section 83 [*sic*] however, no specifics from which such a conclusion could reasonably be drawn were provided. Mr. Eng may not now pursue this avenue when he has been given an opportunity to do so during the investigation. In his written submission Mr. Eng makes general allegations but provides no specific evidence.”

23. Contrary to the Delegate’s assertions, Mr. Eng did “pursue this avenue” during the investigation by raising the issue in the Letter and providing some examples, albeit vague, of the allegedly discriminatory behaviour. The problem occurred when the Delegate did not investigate Mr. Eng’s allegations regarding section 83. There is no indication the Delegate interviewed or otherwise followed up with Mr. Eng to get more information about the allegations, nor does it appear that he put Mr. Eng’s allegations to the Employer for a response. In fact, one can only conclude from the Determination that the Delegate never turned his mind to the issue. There is no indication in the submissions or the Record to indicate otherwise.

24. The Tribunal has found that for a delegate, in a determination, to fail to address an issue raised by a party in defence of a complaint was a fundamental error: *Island Scallops Ltd.*, BCEST #198/02. In the same vein, I find that the Delegate's failure to address Mr. Eng's substantial complaint regarding the alleged breaches of section 83 in the Determination amounted to a failure to observe the principles of natural justice. While not every detail of every complaint needs to be mentioned or decided in a determination, natural justice is surely not served where a party raises a serious issue such as an alleged breach of section 83 and the delegate does not investigate the matter or address it in a determination.

### *New Evidence*

25. Mr. Eng also appeals on the ground that there is evidence which has become available that was not available at the time the Determination was being made. However, it is not clear from Mr. Eng's submissions what the new evidence is. The information contained in the submissions appears for the most part to be information that was available at the time the Determination was made. There are some vague references to events that took place after the Determination, but they do not constitute evidence which would be admissible under the test in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03.

### *Conclusion*

26. I find that the Delegate erred in law by finding that no vacation pay was owing to Mr. Eng for July 2007. I also find that the Delegate failed to observe the principles of natural justice when he failed to address, in the Determination, Mr. Eng's complaint about possible section 83 breaches. As a result, Mr. Eng's appeal is allowed in part.

### **ORDER**

27. Pursuant to Section 115 of the *Act*, I order that Mr. Eng's complaint regarding possible breaches of section 83 of the *Act* be referred back to the Director of Employment Standards for investigation and determination. I also order that the Determination be varied to indicate Mr. Eng's entitlement to vacation pay for July 2007 in the amount of \$29.92, along with any interest payable under section 88(1), with the date of payment deemed to be February 26, 2008. I order that the Determination be confirmed in every other respect.

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**Yuki Matsuno**  
**Member**  
**Employment Standards Tribunal**