

An appeal

- by -

Matias Riesco  
(the “Appellant”)

- 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:** Robert C.P. Walker

**FILE No.:** 2013A/026

**DATE OF DECISION:** July 3, 2013

## DECISION

### REPRESENTATIVES

Matias Riesco on his own behalf  
Megan Roberts on behalf of the Director of Employment Standards

### INTRODUCTION:

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Matias Riesco (the “Appellant”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on April 10, 2013.
2. The delegate held that the Appellant was employed as an assistant manager at the Cedars Inn in Gibsons, BC, from June 15, 2012, to September 14, 2012, when he was terminated without notice. Upon a review of all the evidence the delegate awarded the Appellant regular wages for June 15, overtime wages not paid throughout the employment period, concomitant vacation pay and accrued interest totalling \$810.15.
3. The Appellant’s Appeal Form dated May 15, 2013, states as the sole ground of appeal that evidence has become available that was not available at the time the determination was being made. The new evidence is appended to the appeal in the form of a Facebook entry dated June 14, 2013, from the Appellant’s Facebook site.

### BACKGROUND FACTS

4. This matter has been forwarded to me for consideration under section 114 of the *Act*. At this stage the parties have not made written submissions other than the Appellant’s written argument accompanying its Appeal. No party has sought an oral hearing. I have determined that this matter may be decided at this stage based upon the filed Appeal documents, including the Determination and Reasons for Determination, and the record filed by the Director.
5. The Appellant is seeking to introduce the “new” evidence in order to prove his first day of employment was June 14, 2013, and, as a result, he is also entitled to compensation for length of service under section 63 of the *Act* because he would have been employed for more than three consecutive months.
6. The delegate held a hearing on March 18, 2013, that included oral and documentary evidence from the parties and a number of independent witnesses. The issue of the actual date of the Appellant’s first day of work was front and center at the hearing. After a review of all the evidence, including numerous Facebook entries from the Appellant’s site, the delegate determined June 15, 2013, was the Appellant’s first day of work.

### ANALYSIS

7. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides, in part:

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:

...

(c) evidence has become available that was not available at the time the determination was being made.

8. Section 114 of the *Act* states:

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.

(2) Before considering an appeal, the tribunal may

- (a) refer the matter back to the director for further investigation, or
- (b) recommend that an attempt be made to settle the matter.

(3) If the tribunal dismisses all or part of an appeal the tribunal must inform the parties of its decision in writing and give reasons for that decision.

## NEW EVIDENCE

9. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chillimack operating as Alano Club Coffee Bar*, BC EST # D094/05.

10. The Appellant must establish that:

- (i) 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 a Determination being made.
- (ii) the evidence must be relevant to a material issue arising from the complaint.
- (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
- (iv) 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.”

11. Further, the Appellant has the burden to persuade the Tribunal there is an error in the determination under one or more of the statutory grounds set out in section 112(1): see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99, and *AM-PM Work Force Ltd*, BC EST # D009/11.

12. The Appellant seeks to introduce new evidence that obviously could have been found if the Appellant exercised due diligence by reviewing and presenting all relevant entries in his Facebook pages. He provides no explanation as to why the evidence was not found before; or not introduced prior to the adjudication. In my respectful opinion he has not met the burden of proof as required by the Tribunal.
13. Further, it is not clear that the “new” evidence would have a high potential probative value such that it could lead the delegate to different conclusion; particularly when the Appellant had already given oral evidence stating he commenced work on June 14; but other independent witnesses and documents heard and considered by the delegate did not corroborate his position.
14. Section 114(1)(f) of the *Act* provides that the Tribunal may dismiss all or part of an appeal if there is no reasonable prospect that the appeal will succeed. It is clear to me that there is no reasonable prospect that the appeal would succeed because the introduction of the “new” evidence would not be permitted.

### **ORDER**

15. I Order that this appeal be dismissed pursuant to section 114 of the *Act*. Accordingly, the Determination dated April 10, 2013, is confirmed in the amount of \$1,810.15 together with whatever further interest that has accrued under section 88 since the date of issuance.

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**Robert C.P. Walker**  
**Member**  
**Employment Standards Tribunal**