

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Henry Chiang  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Brandon Mewhort

**FILE NO.:** 2023/152

**DATE OF DECISION:** April 29, 2024

## DECISION

### SUBMISSIONS

Henry Chiang	on his own behalf
Kamila Suchomel	on her own behalf
Sarah McCurrach	on her own behalf
Teneal Gagnon	delegate of the Director of Employment Standards

### OVERVIEW

1. A delegate of the Director of Employment Standards (“Delegate”) issued a determination against Red Academy Inc. (“Company”) on March 17, 2022 (“Corporate Determination”), which found outstanding regular wages, commission wages, annual vacation pay and compensation of length of service were owing to 18 former employees (collectively, “Complainants”) of the Company.
2. The Delegate then issued a determination against Henry Chiang (“Appellant”) dated August 31, 2023 (“Director Determination”), finding that, as a director of the Company, he was personally liable for up to two months’ unpaid wages of the Complainants. The Appellant appeals the Director Determination pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
3. For the reasons discussed below, I find that the Delegate erred when determining the effective date of the Appellant’s resignation as a director of the Company. I refer the matter back to the Delegate to determine whether and to what extent any adjustments are required regarding the wages payable to the Complainants, given my finding that the Appellant’s resignation was effective as of 3:33 am on March 5, 2020. I confirm the remaining aspects of the Director Determination that have been appealed.

### ISSUE

4. The issue in this appeal is whether the Delegate erred in determining the Appellant’s liability for up to two months’ unpaid wages of the Complainants pursuant to section 96 of the *ESA*.

### THE DETERMINATIONS

5. The Corporate Determination concerns the Company, which operated post-secondary technology schools in Canada and the United Kingdom, one of which was in Vancouver. The Vancouver school closed on March 27, 2020, which led to various claims from the Complainants, including owed wages, commissions, vacation pay, and compensation for length of service.
6. The Delegate made numerous findings in the Determination, including that:
  - a. The Complainants that worked under independent contract agreements were employees of the Company within the meaning of section 1 of the *ESA*;

- b. Certain Complainants were owed regular wages in various amounts;
  - c. Certain Complainants were owed commissions in various amounts;
  - d. Section 65(1)(d) of the *ESA* did not excuse the Company from paying compensation for length of service;
  - e. Certain Complainants were owed compensation for length of service in various amounts; and
  - f. Certain Complainants were owed vacation pay in various amounts.
7. The Delegate held that the Company owed the Complainants unpaid wages, vacation pay, compensation for length of service and interest, in the total amount of \$153,045.78. The Delegate also imposed administrative penalties on the Company in the amount of \$1,500.00 for breaches of the *ESA*.
8. No parties have appealed the Corporate Determination.
9. In the Director Determination, the Delegate summarized the corporate registry searches of the Company. The search results indicated that the Appellant became a director of the Company as of August 27, 2019, and he ceased to be a director of the Company as of March 5, 2020.
10. The Delegate also considered evidence from the Appellant suggesting he was only a director of the Company from and including November 9, 2019, to March 4, 2020. The Delegate considered that evidence and held:
- Although the BC Registry Services Search above indicates Mr. Chiang was a director as of August 27, 2019, I prefer Mr. Chiang's information and dated email submission that indicate he began his director tenure on November 9, 2019. Moreover, I am satisfied that Mr. Chiang was a director up to and including March 5, 2020, rather than his information that he ceased to be a director on March 4, 2020. This is supported by the email dated March 5, 2020, whereby Mr. Chiang informed the Employer of his immediate resignation as director.
- Therefore, I find Mr. Chiang was a director of Red Academy Inc. between November 9, 2019 and March 5, 2020 (Mr. Chiang's tenure), when some of the Complainants' wages were earned or should have been paid. As a director, Mr. Chiang is personally liable for up to two months' unpaid wages for each employee during his tenure.
11. The Delegate determined that, pursuant to section 96 of the *ESA*, the Appellant was liable to the Complainants for a total of \$28,658.36, including interest. As for the administrative penalties, the Delegate determined that there was insufficient evidence that the Appellant authorized, permitted, or acquiesced in the contraventions of the *ESA* and he was therefore not liable for the administrative penalties.

## ARGUMENTS

### The Appellant's submissions

12. When asked in the appeal form to select his grounds of appeal, the Appellant indicated that the Director erred in law in making the Determination. In his submissions, the Appellant makes several arguments, which I summarize as follows:
- a. **Effective date of the Appellant's resignation:** The Appellant was only a director from November 9, 2019, to March 4, 2020, because he resigned via email at 3:32 [sic] am on March 5, 2020, so he is only liable for wages earned or wages that should have been paid between November 9, 2019, to March 4, 2020;
  - b. **Set-off of post-termination payments:** Many of the Complainants received between \$1,000 and \$2,000 from the Company after their termination, which should be set off against any wages owing for the beginning of March 2020. In accordance with normal accounting and payroll practice, the payments should be applied first to the Complainants' earliest wages earned during the March 1 to 27 period – i.e., the wages earned between March 1 and March 5;
  - c. **When a certain commission was earned by Deborah Simons:** The commission owed to Ms. Simons was not earned as of March 31, 2020, because it was the Company's policy that commissions were not be earned until after students finished their courses, which did not occur by then. The Appellant relies on a communication dated April 4, 2020, in which the Company said the commission payment was officially documented and on hold pending a board decision on funding. Accordingly, the Appellant argues that he was not liable for Ms. Simons' commission.

13. After reviewing the Appellant's submissions, I invited submissions from the individual respondents and from the Director on the merits of the appeal. I specifically asked that, when addressing the Appellant's liability for wages that were earned or should have been paid on March 5, 2020, the parties address section 128 of the *Business Corporations Act*, SBC 2002, c 57 ("BCA") and any relevant authorities. I also asked parties to address, if the Appellant was not liable for wages that were earned or should have been paid on March 5, 2020, whether the Appellant was liable for the commission owed to Ms. Simons, given the Delegate determined in the Corporate Determination that the commission payment was owed as of March 5, 2020 – see the section 112(5) record ("Record") at page 498. I summarize the submissions received below.

### The Delegate's submissions

14. Regarding the issue of the effective date of the Appellant's resignation, the Delegate argues that, in accordance with section 128(2)(a) of the *BCA*, a director's resignation takes effect when their written resignation is provided to the company or its lawyer. The Delegate says that the evidence submitted during the investigation includes an email from the Appellant sent to another director of the Company ("Other Director") at 3:33 am on March 5, 2020, in which the Appellant resigned; however, the Delegate says that resignation was not effective, because it was not sent to the Company or the Company's lawyer (as discussed below, it appears the Company's lawyer was, in fact, copied on that email).

15. The Delegate points to an email attached to the Appellant's submission, which was not included in the Record, that the Other Director sent to the Appellant at 7:10 am on March 5, 2020, instructing him to communicate his resignation to the Company, specifically the Company's chief executive officer. The Other Director then sent another email to the Appellant later that morning at 8:23 am where he provided the Appellant with the Company lawyer's contact information.
16. The Delegate argues that the email the Appellant sent to the Company in which he resigned with immediate effect was sent at 7:33 pm on March 5, 2020, so the Appellant's period of wage liability includes March 5, 2020, up to 7:33 pm. Accordingly, the Delegate submits that no wages found owing in the Determination should be reduced.
17. Regarding the issue of the set-off of post-termination payments, the Delegate refers to section 18 of *ESA* and argues that all outstanding wages must be paid within 48 hours of termination. The Delegate says that these post-termination payments were taken into consideration when determining the total wages owing to the Complainants, and they were reduced accordingly where applicable. The Delegate also says that to retroactively apply the post-termination payments to a specific pay period to offset the Appellant's liability would not be in accordance with the purposes of the *ESA*.
18. Regarding the issue of when Ms. Simons' commission was earned, the Delegate says she relied on an email dated March 5, 2020, to determine the total amount of Ms. Simons' commission payment in the Corporate Determination, but that is not the date the commission payment crystallised. Rather, the commission payment should have been paid to Ms. Simons within six days of when she resigned on January 28, 2020, while the Appellant was still a director. The Delegate also points to an earlier email from the Company to Ms. Simons dated March 4, 2020, stating that the commission payment was on hold pending a board decision on funding and that the commission payment was "officially documented to be a pending payment." The Delegate says the Appellant also appears to have referred to that email in his submissions, but mistakenly said it was dated *April 4, 2020*.

#### **Kamila Suchomel's submissions**

19. In her submissions, Ms. Suchomel argues that the Director Determination is correct and there is no basis for it to be appealed. Ms. Suchomel says that, according to the investigation, the Appellant resigned as a director of the Company on March 5, 2020, but he was still involved in what seemed a directorial capacity until at least March 11, 2020, including attending a campus visit.

#### **Sarah McCurrach's submissions**

20. In her submissions, Ms. McCurrach also argues that the Director Determination is correct and there is no basis for it to be appealed. Ms. McCurrach notes that, if the Director Determination is confirmed, she will receive a fraction of the total amount that was owing to her after two years of employment with the Company. Ms. McCurrach further states that the other directors of the Company were equally responsible for the Company's insolvency.

### The Appellant's further submission

21. Despite being invited to provide one, the Appellant did not submit a final reply, but he did file a short submission that was received by the Tribunal shortly after the Delegate filed her submissions on the merits of the appeal. The Appellant explained that he sent his resignation email when in China at 3:33 am (Vancouver time) on March 5, 2020. The Appellant included in his submission an email chain with the Company's lawyer, which was included in the Record at page 177. That email chain shows that the Appellant's original resignation email at 3:33 am (Vancouver time) on March 5, 2020, was sent to the Other Director and it was copied to several others, including the Company's lawyer. Shortly after, the Appellant forwarded that email to the Company's lawyer at 3:39 am asking that he confirm receipt, to which the Company's lawyer replied at 8:39 am confirming that he did, in fact, receive the 3:33 am email.

### ANALYSIS

22. Subsection 96(1) of the *ESA* states that (emphasis added): "A person who was a director or officer of a corporation **at the time wages of an employee of the corporation were earned or should have been paid** is personally liable for up to 2 months' unpaid wages for each employee."
23. In *Notel-Steeves*, BC EST # D007/16 at para 48, this Tribunal held:
- Absent extraordinary circumstances, in an appeal of a director/officer determination issued under subsection 96(1) of the *Act*, the only issues that may be properly raised concern the appellant's status as a director or officer of the employer firm, whether any particular subsection 96(2) defence applies, or whether the individual's personal liability "for up to 2 months' unpaid wages for each employee" has been correctly calculated...
24. In this case, the Appellant argues the Delegate erred in law in determining he was a director on March 5, 2020, and that she did not correctly calculate the wages owing, because post termination payments should have been set-off of against wages owing and Ms. Simons' commission was not earned while the Appellant was a director.
25. This Tribunal has adopted the following definition of an error of law, which was set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA):
1. A misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the Assessment 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.
26. I will address each of the errors that the Appellant alleges in turn.

### Effective date of the Appellant's resignation

27. Subsection 128(1) of the *BCA* states, in part: "A director ceases to hold office when ... the director dies or resigns." Subsection 128(2) of the *BCA* states (emphasis added):
- (2) A resignation of a director takes effect on the later of
    - (a) **the time that the director's written resignation is provided to the company or to a lawyer for the company, and**
    - (b) if the written resignation specifies that the resignation is to take effect at a specified date, on a specified date and time or on the occurrence of a specified event,
      - (i) if a date is specified, the beginning of the specified date,
      - (ii) if a date and time is specified, the date and time specified, or
      - (iii) if an event is specified, the occurrence of the event.
28. In this case, in determining when the Appellant's resignation became effective, the Delegate relied on corporate registry searches of the Company and an "email dated March 5, 2020, whereby Mr. Chiang informed the Employer of his immediate resignation as director." However, she did not refer to the time of the March 5, 2020, email she was relying on, nor is there any indication she turned her mind to section 128(1) of the *BCA* in determining when the Appellant's resignation became effective.
29. In my view, the Record is clear that the Appellant sent a resignation email at 3:33 am on March 5, 2020, to the Other Director and it was copied to several others, including the Company's lawyer. The Appellant then forwarded it to the Company's lawyer at 3:39 am to confirm he received the email, to which the Company's lawyer responded at 8:39 am that same day confirming receipt. Accordingly, it is clear the Appellant's written resignation was provided to the Company's lawyer at 3:33 am on March 5, 2020, so I find that is when his resignation took effect in accordance with section 128 of the *BCA*.
30. In my view, the Delegate erred in law in making her finding about when the Appellant resigned, because it was based on a view of the facts which could not reasonably be entertained based on the Record when properly applying section 128 of the *BCA*.
31. Accordingly, I allow the appeal and cancel the Director Determination as it relates to the effective date of the Appellant's resignation as a director of the Company. I refer back to the Director the issue of whether and to what extent any adjustments should be made to the wages payable to the Complainants given that the Appellant's resignation was effective as of 3:33 am on March 5, 2020.

### Set-off of post-termination payments

32. The question of whether the post-termination payments were earned or should have been paid while the Appellant was a director of the Company is, in my view, a question of fact. The grounds of appeal listed in section 112(1) of the *ESA* do not provide this Tribunal with jurisdiction over questions of fact, unless the matter involves errors on findings of facts that amount to an error of law. In such a case, the onus is on the appellant to demonstrate that the Director made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish an error of law: see e.g., *Tamara Kirk (Re)*, 2023 BCEST 59 at para 45; see also *Britco Structures Ltd.*, BC EST # D260/03.

33. In this case, I agree with the Delegate’s submission that the post-termination payments were taken into consideration when determining the total wages owing to the Complainants in the Corporate Determination, and, if applicable, those wages were reduced accordingly – see e.g., the Record at pages 509 and 510. In my view, the Appellant has not been able to show any “palpable and overriding error” or that the Delegate was “clearly wrong” in how the post-termination payments were taken into consideration when determining the Appellant’s liability. The Appellant merely refers to “normal accounting and payroll practice” for why the post-termination payments should have been treated differently, which, in my view, is not persuasive in this case.

34. Accordingly, I find the Appellant has failed to meet his burden to demonstrate a basis for the Tribunal to interfere with the Director Determination as it relates to the post-termination payments, and I confirm the Director Determination in that regard.

#### **When Ms. Simons’ commission was earned**

35. The question of whether Ms. Simons’ commission became payable before the Appellant ceased being a director of the Company is also a question of fact. Therefore, as discussed above, the onus is on the Appellant in this case to demonstrate that the Delegate made a “palpable and overriding error” or that she was “clearly wrong” in determining Ms. Simons’ commission became payable before the Appellant ceased being a director of the Company.

36. In arguing that Ms. Simons’ commission was neither earned nor should have been paid at the time he was a director of the Company, the Appellant relies on a communication dated April 4, 2020, in which the Company said the commission payment was officially documented and on hold pending a board decision on funding. The Delegate says the Appellant is mistaken about the date of that communication, which was actually dated *March 4, 2020*.

37. It seems to me that the Appellant may not have been mistaken and may be referring to an email that was described in the Corporate Determination as follows (the Record at page 497): “an April 4, 2020 email from Agnes Tseng (unknown position) informing Ms. Simon that payment of her commissions for the fourth quarter of 2019 was on hold pending the board of director’s decision on funding.”

38. However, in any event, and as relied on by the Delegate, there is also an email on the Record dated March 4, 2020, which essentially says the same thing – that is, Ms. Simons’ commission was officially documented to be a pending payment and on hold while the board of directors’ decision on funding was being made (Record at page 687). Therefore, there is evidence on the Record to support the finding that Ms. Simons’ commission was a pending payment – i.e., it was earned or should have been paid – while the Appellant was still a director of the Company on March 4, 2020. The Appellant has not been able to show any “palpable and overriding error” or that the Delegate was “clearly wrong” in how the Delegate treated Ms. Simons’ commission in the Director Determination.

39. Accordingly, I find the Appellant has failed to meet his burden to demonstrate a basis for the Tribunal to interfere with the Director Determination as it relates to Ms. Simons’ commission, and I confirm the Director Determination in that regard.

**ORDER**

40. Pursuant to section 115(1)(b) of the *ESA*, I order that the Director Determination, as it relates to the effective date of the Appellant's resignation as a director of the Company, is cancelled and I refer it back to the Director to determine whether and to what extent any resulting adjustments are required regarding the wages payable to the Complainants given the Appellant's resignation was effective as of 3:33 am on March 5, 2020.
41. I confirm the remaining aspects of the Director Determination that have been appealed.

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**Brandon Mewhort**  
**Member**  
**Employment Standards Tribunal**