Citation: Absolute Building Science Strata Engineering Inc. and
Vitacore Industries Inc. (Re)
2024 BCEST 39

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Absolute Building Science Strata Engineering Inc. and Vitacore Industries Inc.
("Strata Engineering" and "Vitacore")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NOS.: 2024/013 and 2024/014

DATE OF DECISION: April 30, 2024

DECISION

SUBMISSIONS

Ib S. Petersen	counsel for Absolute Building Science Strata Engineering Inc. and Vitacore Industries Inc.

OVERVIEW

1. This decision addresses two appeals filed under section 112 of the *Employment Standards Act* (*"ESA"*), one by Absolute Building Science Strata Engineering Inc. ("Strata Engineering"), and the other by Vitacore Industries Inc. ("Vitacore"), collectively the "Appellants," of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards ("deciding Delegate"), on December 22, 2023 ("Determination").

2. The Determination found the Appellants were one employer for the purposes of the *ESA* and had contravened sections 17, 18, 28 and 46 of the *ESA* in respect of the employment of Christine Kanno ("Ms. Kanno"). The Determination ordered the Appellants to pay Ms. Kanno wages in the total amount of $51,941.82, an amount that included vacation pay and interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of $2,000.00. The total amount of the Determination is $53,941.82.

3. Strata Engineering and Vitacore have each appealed the Determination alleging the deciding Delegate erred in law and failed to observe principles of natural justice in making the Determination. The grounds for the appeal, the facts relating to each appeal, and the submissions supporting the appeals are identical. Both appeals can be addressed in a single decision.

4. In correspondence dated February 15, 2024, the Tribunal, among other things, acknowledged having received the appeals, requested the section 112(5) record ("record") from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to the Appellants, in care of their legal counsel of record, and to Ms. Kanno. Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from either the Appellants or from Ms. Kanno.

6. The Tribunal accepts the record is complete.

7. I have decided these appeals are appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *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.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Ms. Kanno will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION AND REASONS

10. Strata Engineering operates an engineering consulting business. Vitacore operates a medical equipment manufacturing business. Both businesses operate in Burnaby, BC.

11. Ms. Kanno was employed under a contract of employment with Vitacore, initially as Human Resources Coordinator and later as Human Resources Manager, from September 13, 2021, to June 26, 2022, and by Strata Engineering as Human Resources Manager from June 27, 2022, to August 10, 2022, when she was terminated for reasons related to the economic circumstances of the business. At the time of her termination Ms. Kanno was earning $90,000 a year and 7% annual vacation pay.

12. Ms. Kanno filed a complaint under the *ESA* alleging Strata Engineering and Vitacore had contravened the *ESA* by failing to pay wages for additional hours worked.

13. The complaint was investigated by a delegate of the Director ("investigating Delegate"), who produced an Investigation Report ("IR") that was provided to the Appellants and to Ms. Kanno. All were provided with the opportunity to respond to the IR. Ms. Kanno filed a response, neither of the Appellants did.

14. The reasons for Determination note the IR was accepted by the deciding Delegate as an accurate reflection of the parties' evidence and position.

15. While there were aspects of Ms. Kanno's claim that were not seriously challenged by either of the Appellants, key elements of her claim could not be resolved in the complaint process: who was responsible for the wages Ms. Kanno claimed, and in what amount.

16. The reasons for Determination identified two issues:

1. Are Strata Engineering and Vitacore associated employers; and
2. Is Ms. Kanno owed wages?

17. The deciding Delegate found the Appellants were associated employers and should be treated as one employer under section 95 of the *ESA*. The consequence of that finding was that Strata Engineering and Vitacore "were jointly and severally liable for all wages found owing" to Ms. Kanno.

18. In assessing whether Strata Engineering and Vitacore should be declared one employer, the deciding Delegate made the following findings:

i. Strata Engineering and Vitacore are separate legal entities;
ii. they shared resources; Vitacore operated out of Strata Engineering's office and used their resources;
iii. the circumstances indicated the Appellants viewed Ms. Kanno's working relationship with both entities as 'continuous';
iv. the Appellants were jointly carrying on their respective undertakings;
v. two individuals were directors of both entities; and
vi. there is a statutory purpose for the associated employer declaration.

19. On the issue of wages, the deciding Delegate found the spreadsheet provided by Ms. Kanno as the best evidence of the hours she worked. The deciding Delegate found Ms. Kanno's annual salary was to cover 40 hours of work per week and additional, or 'overtime' hours were to be reimbursed separately.

20. The deciding Delegate found Ms. Kanno did not fall within the statutory definition of 'manager' in the *Employment Standards Regulation* (*"Regulation"*) and was therefore owed overtime wages according to section 40 of the *ESA*.

21. The deciding Delegate found Ms. Kanno was owed annual vacation pay at the rate, and in the amounts, set out in the Determination.

22. The deciding Delegate also found the Appellants had contravened four provisions of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

23. The Appellants argue the deciding Delegate erred in law in interpreting section 95 of the *ESA* and the definition of "manager" in section 1(a) of the *Regulation*.

Associated Employer

24. The submission of the Appellants acknowledges the decision of the Tribunal in *Invicta Security Systems Corp*., BC EST #D349/96 (*"Invicta"*), which identifies four preconditions to an application of section 95 to the circumstances of any matter before the director:

1. There must be more than one corporation, individual, firm, syndicate or association;
2. Each of these entities must be carrying on a business, trade or undertaking;
3. There must be common control or direction; and
4. There must be some statutory purpose for treating the entities as one employer.

25. The Tribunal elaborated on those preconditions in the following excerpts from *Invicta*:

> The reference to "corporation, individual, firm, syndicate or association" in the first precondition is sufficient to capture any legal vehicle through which a business may be conducted. The second precondition requires the entities sought to be included in a Section 95 determination to be "carrying on" a business, trade or undertaking, in the sense that the entity is not defunct or completely withdrawn from the business, trade or undertaking which would bring them into a Section 95 determination. The third precondition is directed toward the manner in which the various entities inter-relate within the common enterprise. One entity may have financial control, another may have operational control and yet another may have de facto control through majority shareholding or control of the Board of Directors. These examples are not meant to be exhaustive, but illustrative of how control may be demonstrated. Similarly, direction may be demonstrated in a variety of ways, but generally it will normally be found in an entity which makes significant decisions respecting how the business, trade or undertaking has been, is, or will be, run.
>
> . . . The statutory purpose requirement is met if the one employer determination is for the purpose of enforcing basic standards of compensation and conditions of employment.

26. The Appellants do not dispute that the first precondition has been met.

27. The Appellants submit the deciding Delegate erred in law on the second and third preconditions and, as a result, could not rationally find a statutory purpose for associating two separate entities.

28. The Appellants say the deciding Delegate erred by associating Strata Engineering and Vitacore, finding a common enterprise between two entities that "were incorporated at different times . . . have different boards of directors . . . [and] are engaged in very different businesses."

29. With respect to the third precondition, the Appellants submit the finding of the deciding Delegate was simply based on the overlap of two directors between the two entities during Ms. Kanno's employment; that finding contained no analysis of any of the factors discussed in *Invicta*, *supra*, or in *0708964 B.C. Ltd*,

BC EST # D015/11, such as financial control, operational control, shareholding, boards of directors, and the overlap was not a basis for finding control or direction were established.

30. In the alternative, the Appellants submit the deciding Delegate committed a reviewable error – either an error of law or a failure to observe principles of natural justice – by ignoring, failing to consider and/or mischaracterizing the evidence and, in the further alternative, the investigating Delegate committed a reviewable error by ignoring or failing to consider relevant evidence presented by the Appellants during the complaint process.

Manager Status

31. The Appellants say the deciding Delegate erred in law by failing to assess Ms. Kanno's status in the context of the entirety of her work responsibilities considered against the entirety of the definition of manager in the *Regulation*. The Appellants argue the deciding Delegate failed to consider "whether Ms. Kanno's principal employment responsibilities consisted of supervising or directing, or both supervising and directing, human or other resources." (emphasis included). The Appellants also assert the deciding Delegate ignored that at all material times Ms. Kanno was the senior human resources employee in her employment with both Strata Engineering and Vitacore.

32. Finally, the Appellants contend the deciding Delegate committed a reviewable error by ignoring provisions in the second employment contract between Ms. Kanno and Vitacore, dated October 13, 2021, that described her duties and, in the alternative ignored, failed to consider and/or mischaracterized evidence provided by the Appellants during the complaint process.

ANALYSIS

33. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> *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:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was being made.*

Associated Employer

34. Section 95 of the *ESA* reads:

> *95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*
>
> *(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of the Act, and*

> *(b) if so, they are jointly and severally liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.*

35. The first condition is acknowledged by the Appellants. In my view, the fourth precondition, while challenged in the appeals, is self-evident. I will address the argument of the Appellants on that point, below.

36. The Tribunal has adopted the following principles regarding the interpretation and application of section 95 of the *ESA*. First, the Supreme Court of Canada's decisions in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 support the principle that employment standards statutes should be interpreted in a broad and generous manner and that ambiguities regarding their scope should be resolved in favour of employees. The legislative purposes set out in section 2 of the *ESA* justify an interpretation . . . that extends protection to employees . . . over an interpretation that does not.

37. Second, the purpose of section 95 is to ensure that employees are not unfairly disadvantaged where business is conducted through separate legal entities: see *0708964 B.C. Ltd.*, *supra.*, at para. 27. The caution and limitation attached to that statement, found in para. 28 of that decision – as well as several other decisions of the Tribunal – is that section 95 was not intended to extend liability to unrelated parties. A section 95 declaration cannot be made against an entity that was completely independent from the business to whom the employee provided services. There must be at least two entities that are carrying on a "business, trade or undertaking" and there must be evidence of "common control or direction" of those entities.

38. Third, control or direction is not limited in its application to direct financial or corporate control. The totality of the business and the inter-relationships of the entities must be examined: see *Invicta, supra*. Section 95 does not require commonality of directors or officers; to require the formality of the common appointment of directors as a prerequisite to showing common control or direction is to render section 95 impotent.

39. The question of whether entities can be associated under section 95 of the *ESA* is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles developed under the *ESA*. I find the deciding Delegate has set out the correct legal test and analysis for assessing whether different entities can and should be associated for the purposes of the *ESA*. The Appellants acknowledge the deciding Delegate applied the correct legal test.

40. The Appellants accept the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and that the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusions than was made by the Director unless the Director's factual findings raise an error of law, either because the Director acted without any evidence or acted on a view of the evidence that cannot reasonably be entertained: see *Britco Structures Ltd.*, BC EST # D260/03.

41. The Appellants say the deciding Delegate erred in finding the second and third preconditions for finding an associated employer were met, arguing, in respect of the second precondition, the deciding Delegate failed to recognize there was no 'common enterprise' – that Strata Engineering and Vitacore were

"engaged in very different businesses" (para 39 of the appeal submissions) – and in respect of the third precondition, that there was an insufficient evidentiary basis to support a finding of common control or direction.

42. I do not accept the arguments made by the Appellants demonstrates any error of law in the interpretation and application of associated employer provisions.

43. In respect of the arguments relating to the second precondition, I find they do not accord with the evidence that was before the deciding Delegate.

44. As stated in the Reasons for Determination, there was "no dispute that Vitacore and Strata Engineering shared resources."

45. While it is not essential for the deciding Delegate to recite every piece of evidence, it is appropriate here to further detail some of the evidence provided during the complaint process and which supports the decision to associate the Appellants as one employer for the purposes of the *ESA*.

46. At page 9 of the IR, page 128 of the record, the following information, attributed to Ms. Kanno, is recorded:

> Ms. Kanno describes the Respondents as being in the same ownership group and closely related. During the Covid pandemic the owners of Strata Engineering saw a business opportunity and created Vitacore to manufacture medical masks. She says the revenues from Vitacore were covering Strata Engineering's operations. The Respondents shared staff and resources and regularly "charged back" wages and expenses from one company to the other. Ms. Kanno understood that eventually the hours she worked for Strata Engineering would be charged back to Vitacore and she would be paid.
>
> Ms. Kanno said there were no boundaries between the Respondents. For instance, even though she was hired for Vitacore, her office was located at the Strata Engineering location at #408 - 4621 Canada Way. In the complaint form, she described her job as being the "sole HR provider" for both the [Strata Engineering and Vitacore]. She estimated Strata Engineering had between 25 to 30 employees, and Vitacore had 50 to 60 workers (employees and contractors) at the beginning of her employment, and at its highest, had 100 workers. 90% of the workers at Vitacore worked on the floor of the manufacturing facility. She estimates she onboarded about 50 workers for the [Strata Engineering and Vitacore] during her employment.

47. The Appellants were provided with the IR; they neither commented nor disputed the above statements.

48. The following information attributed to Mikhail Moore ("Mr. Moore"), representing Vitacore, is found in the IR at page 14, page 133 of the record:

> Mr. Moore described Strata Engineering as consultants and that it was the lead in creating Vitacore in conjunction [sic] Health Canada and others to manufacture N95 masks. He says Vitacore was sort of like Strata Engineering's "child".
>
> Vitacore first operated out of Strata Engineering's offices and used Strata Engineering's staff. Vitacore hired Ms. Kanno as Vitacore was separating from Strata Engineering. Ms. Kanno was hired to "build out" Vitacore and create its own Human Resources apart from Strata Engineering.

> She was involved in transferring employees from Strata Engineering to Vitacore. Mr. Moore says that any work she would have done for Strata Engineering would have been related to Vitacore.

49. The following attributed to Yang Fei ("Mr. Fei"), representing Strata Engineering, is found in the IR at page 12, page 131 of the record:

> Mr. Fei says he was not privy to discussions between Ms. Kanno and Mr. Moore when she was hired but agrees that while working at Vitacore she was to assist with "discreet" issues for Strata Engineering. This was because Strata Engineering was using Vitacore's resources at the time, and it did not have someone dedicated to human resources. Rather, he, the accountant and the division managers took on some of the human resources work. He estimates Strata Engineering had 18 to 20 employees during the entirety of Ms. Kanno's employment with the Respondents. He says the parties verbally agreed that any additional hours Ms. Kanno performed would need approval.

50. In my view, the evidence clearly shows the Appellants were engaged in a joint endeavour, namely, the initial establishment, and subsequent operation and funding, of Vitacore. The two entities shared staff and resources and regularly "charged back" wages; expenses were shared between the two entities. The two entities were in a symbiotic relationship. The notion, asserted by the Appellants, that the two entities were not engaged in a 'common enterprise' is not a tenable assertion based on the evidence. It is a reasonable conclusion that although the Appellants were separately incorporated at different times, during the relevant period the two entities were closely linked in a joint initiative to manufacture N95 masks during the Covid pandemic.

51. The words in section 95 refer to *"businesses, trades or undertakings carried on by or through"* two or more entities. There is a statement found in *0708964 B.C. Ltd*., *supra*, (also reflected in the Reasons for Determination) which states, at para 32, that:

> . . . the entities must be jointly carrying out some business, trade or other activity although the business, trade or activity in question need not necessarily be the only one that each entity is carrying on; . . .

52. The implication in the argument of the Appellants that the deciding Delegate was required – as a precondition to associating the Appellants – to identify a 'common enterprise' is not supported by the language of section 95, or by its purpose. What is required is that the deciding Delegate examine the totality of the endeavour and the inter-relationships of the entities and reach conclusions from the evidence relating that endeavour.

53. In respect of the matter of 'care or control', a central point made in *Invicta* is that care or control can be exhibited in any number of ways. The point to be taken from the many decisions of the Tribunal addressing the matter of 'care or control' is that the factors which are frequently mentioned do not provide an exhaustive list of relevant factors.

54. Also, as indicated above, the *ESA* does not require that the commonality of control or direction be perfect, in the sense that the same persons must be involved in all of the entities. Consistent with the nature of the *ESA*, the concept of control or direction referred to in section 95 should be applied in a way that gives effect to the broad remedial nature of the legislation.

55. I reject the contention the deciding Delegate found common control or direction based on simple overlap of two directors. There is other evidence, set out in the Reasons for Determination, that clearly show Mr. Moore and Mr. Fei were making key decisions relating to the control and direction of the two entities, including creating Vitacore, and sharing resources, facilities, and employees, including Ms. Kanno.

56. Nothing in the appeal submissions shows that the decision of the deciding Delegate on control or direction is an error of law.

57. In sum, I find the deciding Delegate did what was required in making the decision to associate the Appellants under section 95 and made no error of law in doing so.

58. There are alternate, and additional, arguments under the 'Associated Employer' heading alleging failure by the deciding Delegate who ignored, failed to consider, and/or mischaracterized the evidence and ignored or mischaracterized relevant evidence presented by the Appellants. The same arguments are made in respect of the decision on the 'manager' issue and I will respond to both later in this decision.

Manager Status

59. I agree with the submission of the Appellants that the question of whether a person is a manager for the purposes of the *ESA* is one of mixed fact and law, requiring an application of the facts about what the employee actually does against the definition of 'manager' in the *Regulation.*

60. Two additional points should be added here: first, an assessment of the person's status depends upon a total characterization of that person's duties; and second, the definition of 'manager' must consider the remedial nature and the purposes of the *ESA*.

61. As expressed above, the grounds of appeal do not provide for an appeal based on errors of fact and the test for establishing that findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

62. The finding that, on the evidence presented, Ms. Kanno was not a manager for the purposes of the *ESA* was a finding of fact. The deciding Delegate was alert to the definition of 'manager' and her reasons touches on all of the elements of the definition that were applicable to her analysis: "supervising or directing" and "supervising and directing." The deciding Delegate was also aware Ms. Kanno was (at least for a period of her employment) the senior human resources person and supervised an assistant, although she found there was no evidence such supervision was a core responsibility.

63. Viewing the analysis of the deciding Delegate in the context of all the information that was presented – or not presented, as the case may be – I find no support for the contention of the Appellants that the deciding Delegate ignored or missed relevant evidence.

64. The facts as found reasonably support the conclusion reached by the deciding Delegate.

65. In sum, the simple answer to this aspect of the appeals is that the Appellants have not shown any of the findings of the deciding Delegate on the 'manager' issue are an error of law. While professing to

appreciate the Tribunal does not accept appeals that challenge findings of fact, *simpliciter*, or seek to have the Tribunal re-weigh the evidence before the deciding Delegate, the arguments made here attempt to do both without demonstrating either the factual findings made or the weighing of the evidence are reviewable errors.

66. The Appellants say the deciding Delegate erred by failing to "consider the entirety of the definition of manager," more particularly, by failing to address whether Ms. Kanno's principal employment responsibilities consisted of supervising and/or directing "other resources".

67. In *Frontier-Kemper Constructors UCL*, BC EST # D078/12, the Tribunal accepted the term "resources," in the phrase "other resources," related to aspects of the business pertaining to the economic, or financial, elements of the enterprise. The information provided by Mr. Fei and Mr. Moore indicate Ms. Kanno's role was to handle human resources matters for the Appellants and this was addressed by the deciding Delegate. There is not a scintilla of evidence in any information provided by the Appellants, or by Ms. Kanno, during the complaint process suggesting Ms. Kanno had any role in supervising or directing the financial resources of the Appellants. Neither the investigating nor the deciding Delegate was required to go chasing butterflies, addressing matters or issues that did not arise on the information and evidence provided during the complaint process.

68. There is no merit to this argument.

69. The additional and alternative arguments made by the Appellants, on both the associated employer and 'manager' issues, which allege a violation of principles of natural justice, are rejected. I have found the deciding Delegate did not ignore, miss, or mischaracterize evidence relating to either the associated employer issue or the 'manager' issue. No foundation for these arguments exists.

70. The Appellants have argued the deciding Delegate could not rationally find a statutory purpose for associating two separate entities. That argument is based on the contention the deciding Delegate erred in law on the second and third preconditions for associating entities under section 95. This argument has not been successful. As stated in *Invicta*, the statutory purpose requirement is met if the one employer determination is for the purpose of enforcing basic standards of compensation and conditions of employment; on the facts, that clearly expresses the circumstances of this case, and I find no merit to the argument that the statutory purpose has not been met.

71. I find there is no apparent merit to these appeals and no reasonable prospect they will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to these appeals and they are, accordingly, dismissed.

ORDER

72. Pursuant to section 115(1) of the *ESA*, I order the Determination dated December 22, 2023, be confirmed in the amount of $53,941.82, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson

Member
Employment Standards Tribunal