

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Douglas Linfitt
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

SUBMISSIONS: Douglas Linfitt, on his own behalf
Jisho Titus Kappen, on his own behalf
Shane O'Grady, delegate of the Director of Employment Standards

FILE NUMBER: 2024/018

DATE OF DECISION: July 25, 2024

DECISION

OVERVIEW

1. Douglas Linfitt (“Appellant”) appeals a determination issued by a delegate of the Director of Employment Standards (“Director”) on May 30, 2023 (“Determination”), pursuant to section 112 of the *Employment Standards Act* (“ESA”).
2. Jisho Titus Kappen (“Complainant”) filed a complaint with the Director alleging that the Appellant had contravened the *ESA* in failing to pay him outstanding wages.
3. A delegate of the Director (“Investigating delegate”) investigated the Complainant’s complaint and issued an Investigation Report (“Report”), which was provided to the parties for response on April 3, 2023. A second delegate (“Adjudicating delegate”) reviewed the information produced during the investigation, the Report, and the responses of the parties to that Report before issuing the Determination.
4. The Adjudicative delegate determined that the Appellant had contravened sections 17/18, 40, 45/46 and 58 of the *ESA* in failing to pay the Complainant wages, overtime wages, statutory holiday pay, and vacation pay under the *ESA*. The Director determined that the Complainant was entitled to wages plus accrued interest in the total amount of \$30,180.98.
5. The Director also imposed five \$500 administrative penalties for the contraventions of the *ESA* for a total amount owing of \$32,680.98.
6. The Tribunal received the Appellant’s appeal on February 14, 2024. Attached to the appeal were several documents, including a notification about the Appellant’s disability assistance, copies of two January 29, 2024, Government of Canada cheques, two invoices which were unreadable and unidentified and a Royal Bank Investigations Group email money transfer record.
7. Contained in the Determination, in a bolded box, was a notice setting out the deadline for filing an appeal of the Determination. That deadline was 4:30 p.m. on June 23, 2023, if the Determination was served by email, and 4:30 p.m. on July 7, 2023, if the Determination was served by ordinary or registered mail.
8. On February 21, 2024, the Tribunal’s Registry Administrator emailed the Appellant setting out the details of an earlier telephone conversation in which she confirmed receipt of the faxed appeal on February 14, 2024, as well as her advice that the Appellant could submit additional documents by fax or email. The Registry Administrator requested that the Appellant submit additional information regarding his reasons for filing a late appeal, the confirmation of his representative, if any, and also requested that the Appellant submit legible pages as several had not transmitted adequately.
9. On February 23, 2024, the Appellant emailed the Tribunal indicating, among other things, that he had difficulty using email and computers, expressing concern that the Tribunal’s fax machine was unable to produce readable copies, and contending that he had never been served with the Determination.

10. On March 8, 2024, the Tribunal received a letter from the Appellant, which was also copied to the British Columbia Minister of Labour, indicating, among other things, that he was not aware his appeal was late. The Appellant also made references to, among other things, an Indigenous Court, human rights violations, a fair trial, lack of privacy, previous claims he had with the Employment Standards Branch, his status as a “permanently disabled old age indigenous pensioner” not an Appellant, hate crimes, senior abuse, as well as comments about the Complainant. I understand from the Appellant’s submission that he is seeking an extension of time in which to file the appeal.
11. The Director provided the Tribunal and the parties with the section 112(5) record; that is, the material that was before the Director at the time the Determination was made. The Tribunal invited the parties to indicate whether the record was complete after receiving it. Neither party challenged the completeness of that record, and I am satisfied it is complete.
12. Section 114(1) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions and the record, I sought submissions from the Complainant and the Director.
13. This decision is based on the record, the appeal submissions, the submissions of the Complainant and the Director, and the Reasons for the Determination.

BACKGROUND

14. The Complainant is a temporary foreign worker. In his complaint, he alleged that he responded to a Facebook advertisement for a labourer, and that he communicated with, and was hired by, the Appellant. The Complainant contended that he understood the Appellant had a company called DEL Custom Ventures.
15. The Complainant claimed that he began working around the Appellant’s mobile home in June 2021. He received e-transfers as payment for that work, but no taxes were deducted from his wages. The Complainant stated that the Appellant asked him to form a sole proprietorship. Although the Complainant ultimately did so, he did not take that step until February 2022.
16. The Complainant contended that, sometime in mid-June 2021, he began renovation work on a housing complex owned by a third party, Tom Bercic (“Bercic”), and submitted screen shots of text messages he exchanged with the Appellant in support of his complaint.
17. According to the Determination, the Complainant asserted that the Appellant told him that he would pay him for that work. When the Appellant failed to do so, the question of payment became an issue between them. The dispute was the subject of several text messages between the parties between July 2021 and January 2022. The Complainant spoke to Bercic, who told him that he had paid the Appellant for the renovation work. In December 2021, the Complainant went to an Employment Standards Branch office in Prince George with the Appellant, where he filed a complaint against Bercic for unpaid wages. The Complainant contended that the Appellant told him what to write on the complaint form, including who to identify as the employer.

18. The Appellant denied that he was an employer. He took the position before the delegate that the Complainant was, like him, a contractor who performed work for Bercic.
19. The Determination notes that the Investigating delegate made many attempts to obtain information and documentation from the Appellant regarding the issue of whether he was an employer, and whether the Complainant was an independent contractor. The Adjudicating delegate noted that although the Appellant took the position that he was not an employer, he submitted no response to the issues in dispute. Although the Appellant provided some information to the Investigating delegate, much of it was irrelevant to the complaint, including comments regarding the Complainant's health, religious beliefs, and personal situation. The Appellant also expressed confusion about the process and what he was being asked to respond to.
20. The record discloses that the communications between the Appellant and the Investigating delegate became acrimonious and ultimately, the Appellant told her not to contact him further and that he would seek assistance from the Native Court Worker's office. The Director received no communications from the Native Court Workers on the Appellant's behalf.
21. The Adjudicating delegate noted that neither party responded to the Report and made a Determination based on the information in that Report.

Argument

22. The Appellant contends, in essence, that he was denied natural justice, that the Adjudicating delegate erred in law in determining that he was an employer. He also argues that he does not owe the Complainant any money.
23. In his appeal submission, the Appellant says that he is 70 years old and lives in a semi-remote area without internet service and minimal cellular service. He asserts that he has experienced the effects of the residential school system and was expected to work at the age of 9 and was kicked out of his family home at the age of 14. As a result, he says that he has little formal education and that the Investigating delegate took advantage of his lack of education and limited ability to use online services
24. The Appellant says that he is disabled and that he has been unable to drive for approximately 20 years. He says he does not own a vehicle and has no business license. The Appellant acknowledged that he had a corporation called DEL Custom Ventures over 25 years ago but that he ceased operating the company over 25 years ago following heart surgery. He denied that he operated a renovation business.
25. The Appellant asserts that he did not provide the Investigating delegate with any documents because there were none to provide. He says that because the Complainant was paid by the hour, there was nothing to provide other than proof that he had paid him. He acknowledged that he attempted to assist the Complainant recover money for renovation work he performed, and asked a clerk at the Employment Standards Branch to arrange for an interpreter to assist the Complainant in completing the complaint.

26. The Appellant contends that because he did not drive or have a vehicle, the Complainant picked him up at his house every day to take him to work for his friends, his customers, or other people, and drive him home at the end of the day. The Appellant also contends that because of his physical condition, he is unable to work more than six hours a day. He also says that the Complainant also held down a full-time job at a restaurant and it was not possible for the Complainant to have worked the hours he alleged.
27. The Appellant further contends that both he and the Complainant worked for Bercic, and that Bercic did not pay either of them the wages they were entitled to.
28. The Appellant submitted records, as new evidence, showing that he paid the Complainant a total of \$14,517.41, consisting of bank drafts, e-transfers, and cash.

ISSUES

29. The issues on appeal are whether I should extend the time for the Appellant to file his appeal, and whether the Appellant has demonstrated an error in the Determination, and specifically, whether the Appellant is an employer, as defined by the *ESA*.

ANALYSIS

Extension of time in which to file the appeal

30. The deadline for filing an appeal of the Determination was July 7, 2023.
31. The Tribunal has the power to extend the time period for requesting an appeal (section 109(1)(b)). The Tribunal will not grant extensions of time as a matter of course; it will only do so where there are “compelling reasons” (see *Re: Wright*, BC EST # D132/97). The onus is on an appellant to show that the time period should be extended (see *Moen & Sagh Contracting Ltd.* BC EST # D298/96).
32. Appellants seeking to extend the time period in which to file an appeal from decisions of the Director should satisfy the Tribunal that:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.
- (see *Niemisto* (BC EST # D099/96))

33. These criteria are not exhaustive. There may be other factors that ought to be considered and not all the above factors may be applicable in determining whether to grant an extension.

34. I find there is a reasonable and credible explanation for the Appellant's failure to file the appeal within the prescribed time limit. The record, as well as correspondence with the Tribunal, makes it clear that the Appellant has some difficulty with internet connectivity and receiving documents by email, as he repeatedly asked the Investigating delegate to provide information in hard copy, by regular mail. As is evidenced by some of the correspondence between them, he also had difficulty submitting evidence, specifically text messages, and asked the Investigating delegate for assistance in providing them to her.
35. Although the Appellant denied being served with the Determination, the record confirms that he obtained a copy by way of an email from the Branch on May 30, 2023. Section 122(1)(b) of the *ESA* provides that a determination is deemed to have been served if it is transmitted by email to the person's last known email address. Furthermore, on June 2, 2023, the Branch received an email from the Appellant complaining about the Determination, which confirms that the Appellant received and read it.
36. Given the June 2, 2023, email to the Branch, I find that the Appellant had a genuine and *bona fide* intent to appeal the Determination, and that the Director was aware of this intention. In that email, the Appellant contended that both he and the Complainant were employees of Bercic and that a simple call to "City Hall" would have resolved the question of who took out permits and hired and fired employees. I conclude that the Appellant believed that, through this email, he was appealing the Determination. The Branch did not respond to the Appellant or inform him that if he wished to appeal it, that appeal had to be made to Tribunal rather than the Branch. Although the Appellant does not indicate why he did not make his appeal to the Tribunal for approximately seven months after the June 2, 2023, complaint to the Branch, I can only infer that he did not understand that it was necessary to appeal the Determination to a different body - that is, the Tribunal, rather than the Branch.
37. While I find that there may be some prejudice to the Complainant by the granting of an extension, I am not persuaded that the prejudice is undue.
38. Finally, I find that there is a strong *prima facie* case in favour of the Appellant for the reasons set out below.
39. I grant the extension of time in which to file the appeal.

Appeal

40. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

41. The Appellant checked all three grounds of appeal on the Appeal Form. The Tribunal has acknowledged most appellants do not have any formal legal training and act as their own counsel. The Tribunal therefore takes a liberal view of the grounds of appeal, addressing the arguments as necessary to ensure that all parties receive “fair treatment” (see *Triple S Transmission*, BC EST # D141/03).

Failure to observe the principles of natural justice

42. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. The Appellant appears to suggest that the Director failed to observe the principles of natural justice by not affording him the right to respond. He asserts that both delegates “took advantage” of his lack of education, age, and lack of computer skills, among other things.
43. The record indicates that, although he did occasionally respond to emails, the Appellant requested that the Investigating delegate mail hard copies of documents as he was not able to make sense of the email correspondence.”
44. The Appellant informed the Investigating delegate that he had copies of text communication between himself and Bercic but was not sure how to forward that information to her. When the Appellant asked her for assistance, she suggested that he google “how to screenshot” for his phone’s model and send those screen shots to her. She also informed the Appellant that Bercic denied hiring the Complainant as an employee, and that Bercic told her he would provide her with copies of email correspondence between himself and the Appellant. Despite informing the Appellant that she would forward those emails to him for a response, Bercic did not provide any of those emails to the Investigating delegate.
45. The record discloses that the Appellant disputed Bercic’s assertions that he did not hire the Complainant and that the Appellant, rather than Bercic, was responsible for the Complainant’s wages. He also questioned why the Investigating delegate did not follow up on Bercic’s assertions and inquire with “City Hall” about the veracity of his response.
46. The Adjudicating delegate made the Determination based on the record and the Investigation Report, noting that neither party had responded to the Report. The Appellant indicated that he did not respond to the Report because he wasn’t sure what he was supposed to respond to. He said that, had he been given an opportunity, he would have gone to the local Branch office to discuss the contents of the Report with a delegate. He asserts that he filed his own complaints with “the Labour Board” on three previous occasions, and each time, he was treated fairly. He said that on those occasions, the Branch made arrangements for “three-way conversations” in order to settle disputes and that the discussions were pleasant. The Appellant asserts that he was belittled during his communications with the Investigating delegate.
47. I find that the Appellant was given many opportunities to respond to the allegations and that he did so. Nevertheless, when he informed the Investigating delegate that he had text messages which may have assisted his case and asked for technological assistance in submitting screen shots of those text messages, the Investigating delegate might have been more helpful. Given that there was a Branch office in Prince George, she might have suggested that he go to that office (which he was

familiar with, having gone there with the Complainant to assist him in filing his complaint) rather than have him “google” online support in order to submit evidence.

48. In 2015, the *Truth and Reconciliation Commission of Canada* published a report: “*Calls to Action*” recommending initiatives in several areas. Recommendation #57 called for professional development and training for public servants:

57. We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills- based training in intercultural competency, conflict resolution, human rights, and anti-racism.

49. In response to the *Calls to Action*, the Province of British Columbia developed draft principles in which the Province committed itself to “working collaboratively with Indigenous organizations, communities, and stakeholder groups to ensure all parties undertake comprehensive and meaningful actions on all the TRC calls to action.”¹ Specifically, the Province recognized that “a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of Indigenous peoples in B.C. are acknowledged, affirmed and implemented”².

50. In my view, the principles outlined in the *Calls to Action*, which were acknowledged by the Province, were not reflected in the investigation and adjudication process. Considering the Appellant’s background and circumstances, in my view, much more could and ought to have been done to assist him in responding to the complaint.

Error of Law

51. The Tribunal has adopted the following definition 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)*, [1998] B.C.J. No. 2275 (B.C.C. A.):

- a) a misinterpretation or misapplication of a section of the Act;
- b) a misapplication of an applicable principle of general law;
- c) acting without any evidence;
- d) acting on a view of the facts which could not reasonably be entertained; and
- e) adopting a method of assessment which is wrong in principle.

52. I find that the Adjudicating delegate acted on a view of the facts which could not reasonably be entertained.

¹ <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/truth-and-reconciliation-commission-calls-to-action>

² https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf

53. Although I have found that the Appellant's ability to respond adequately to the complaint was encumbered by a number of factors, including his difficult interactions with the Investigating delegate as well as his technological abilities, in my view, the information before the Director could not have led to the conclusions ultimately made.
54. The Complainant alleged that he responded to a Facebook advertisement for a labourer, and that when he responded to it, the person who communicated with him was the Appellant. The Complainant stated that he understood the Appellant had a company called DEL Custom Ventures but did not provide any evidence of the Facebook marketplace advertisement that he said he responded to despite being asked to submit it. The Investigating delegate determined that DEL Custom Ventures was not an entity registered with BC Registries.
55. The Appellant says, and I have no reason to disbelieve, that he is a 70-year-old disabled individual who has not been permitted to drive for approximately 20 years due to health-related issues. He receives disability, old age, and CPP benefits. He says that while he did operate a company many years ago, he has not operated it since his first heart surgery 25 years ago. He also says that he lives in a remote area with no internet and minimal cell service. Given this information, it is difficult to understand how the Adjudicating delegate arrived at his conclusion that the Appellant operated a business.
56. The Investigating delegate spoke to Bercic who denied any employment relationship with the Complainant. It was Bercic's position that he hired the Appellant as a contractor and that the municipal permits which were required for the renovation work were taken out by DEL Custom Ventures. However, despite assurances that he would provide documentary evidence to support his assertions, Bercic did not submit any documentation. The Appellant stated that Bercic's information was false, and that Bercic also owed him money. It is not clear, given the Complainant's position that he was not sure who hired him and his outstanding complaint against Bercic, as well as the Appellant's position regarding Bercic's status, why the delegates determined that the Appellant was the sole employer. There is no evidence that the Investigating delegate assessed Bercic's credibility regarding his direction or control over the Complainant or why she preferred his version of the facts over that of the Appellant. During the investigation, the Investigating delegate informed the Complainant that the Appellant was his employer and sought the Complainant's "permission to withdraw" the second complaint against Bercic. The record discloses that before the investigation was completed, the Investigating delegate pre-judged the outcome of the complaint against the Appellant. I find that this conclusion constitutes a legal error. Not only was it not open to the Investigating delegate to make factual findings during the investigation, but her conclusion also lacked an adequate evidentiary foundation.
57. The Adjudicating delegate then set out indicators of an employment relationship, including control and direction over how, when and where work is performed, and considered the content of text messages between the Appellant and the Complainant. Based on those messages, the Adjudicating delegate concluded that the Appellant:
- ...regularly directed the actions of the Complainant including denying a day off request because the Complainant was sick as there were no other workers available (June 28, 2021) and directing the Complainant where and when to show up (multiple dates). Further, the Complainant asked [the Appellant] on multiple occasions if he could show up at specific times rather than the initial time agreed upon as well as referring to [the Appellant] as "boss"

throughout the entire correspondence period which lasted several months. As a whole, the text message correspondence generally shows that [the Appellant] exerted a significant level of control and direction over the actions of the Complainant with regards to work, which is indicative of an employer/employee relationship. (Determination, page R9)

58. The Adjudicating delegate continued:

A further hallmark of an individual being an independent contractor is their ability for profit and loss... As evidenced by the text message discussions, and the hourly rate of work found in the invoices [the Appellant] directed the Complainant to prepare, the Complainant received an hourly rate of pay for the work he performed...

...

As there is clear evidence in the text messages that [the Appellant] exerted control and direction over the actions of the Complainant, and further evidence that the Complainant had no ability to influence his own profit or loss beyond his own hours of work, rather he relied upon [the Appellant] to pay wages rather than billing clients directly, I find the Complainant meets the definition of employee and that [the Appellant] meets the definition of the Complainant's employer as per section 1 of the Act. (Determination, page R9)

59. The Appellant says that during the entire time he knew him, the Complainant had a full-time job at a restaurant and that he contracted labour jobs with friends. He says that the Complainant called him "Boss" in the text messages because it was easier for him to pronounce and remember, and because it was the Complainant's custom to do so, not because he was, in fact, his boss. He says that the Complainant picked him up to go to work for others, and after working on a job, either the Complainant or one of his friends would drive him home. He says that he did not direct the Complainant to write invoices, although he did offer to help. The Appellant's version of events is consistent with the text messages.

60. The Appellant further says that the Complainant wrote invoices to Bercic and communicated with him directly, either by phone or in person. He says that he tried to help the Complainant file a claim against the third party, and when he was at the Branch, asked for the clerk to arrange for an interpreter to help him understand and complete the forms. He says that he does not know if Bercic paid the Complainant or not.

61. A review of the invoices submitted by the Complainant does not, in my view, provide the foundation for concluding that an employee/employer relationship existed between the Appellant and the Complainant. Many of the invoices are addressed to someone other than the Appellant, with some addressed to "Tom" (Bercic) and contain little detail about when the work was performed or where. One, dated November 1, is addressed to "Lloyd and Bev." There is no evidence, other than the Complainant's assertion, that they were written at the Appellant's direction.

62. Similarly, the text messages do not, in my view, confirm that the Appellant directed and controlled the Employee's work. In some, the Appellant asks the Complainant to be at his house to pick him up at specific times. This is consistent with the Appellant's contention that he does not drive. In other messages, the Appellant asks the Complainant what time he finished work at the restaurant. This is also consistent with the Appellant's assertion that the Complainant had a full-time job in a

restaurant. Considering this information, it is unclear how the delegate concluded that the Complainant's invoices, which claimed he worked, for example, 50 hours per week, were reliable.

63. Furthermore, a text message from the Appellant to the Complainant on October 11, in which the Appellant asks the Complainant why he was "not going to stand up for me and the others" and whether he was "writing off the money owed," is consistent with the Appellant's allegation that none of the individuals working on Bercic's project got paid, and that the Appellant did not view the Complainant as his employee. The Appellant continues "each of us deserves to be paid" and "there are several things we can do to force Tom to pay." None of these messages supports a finding of an employer/employee relationship between the Appellant and the Complainant.
64. Overall, I find that the conclusions are unsupportable, and that the investigation was inadequate. Consequently, I allow the appeal and refer the complaint back to the Director for a new investigation.

ORDER

65. Pursuant to section 115(1) of the *ESA*, I allow the appeal, cancel the Determination, and refer the matter back to the director.

Carol L. Roberts
Member
Employment Standards Tribunal