

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Stefanie Vassos

- of a Determination issued by -

The Director of Employment Standards

PANEL: Lynn Muldoon
SUBMISSIONS: Stefanie Vasson, on her own behalf
FILE NUMBER: 2024/051
DATE OF DECISION: September 23, 2024

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act (ESA)* by Stefanie Vassos (“Ms. Vassos”), also known as Stefanie McAuley, doing business as Broad World Consulting (“BWC”) of a determination issued by a delegate (“Deciding Delegate”) of the Director of Employment Standards (“Director”), on April 5, 2024 (“Determination”).
2. Sarina Arefzadeh (“Complainant”) filed a complaint with the Director alleging that BWC had contravened the *ESA* in failing to pay her outstanding wages and GST owed. The Complainant also claimed constructive dismissal. Another delegate of the Director (“Investigative Delegate”) investigated the complaint and issued an investigation report (“Investigation Report”) to parties on July 13, 2023.
3. The Determination concluded that BWC had breached Part 3, sections 17 and 18 of the *ESA* in relation to the Complainant’s employment. Consequently, BWC was ordered to pay the Complainant a total of \$13,105.68 in wages, including vacation pay, compensation for length of service, plus \$1,478.85 in interest under section 88 of the *ESA*. Additionally, BWC was fined \$1,000.00 in administrative penalties. The total amount owed under the Determination is \$15,584.53.
4. BWC has appealed the Determination on the ground that evidence has become available that was not available at the time the Determination was being made.

BWC’s Request for an Extension

5. On May 15, 2024, the Tribunal received an Appeal Form from BWC. The form did not include arguments or supporting documents, but it did request an extension of the statutory appeal period for BWC to provide these materials. The statutory appeal period is set out in subsection 112(3) of the *ESA*. The Determination stated the statutory appeal deadline in this case was May 13, 2024. BWC does not dispute the service of the Determination.
6. BWC offered four reasons in support of its request for an extension: the ongoing review of extensive digital records, efforts to retain legal counsel, being out of town for family obligations and mistakenly noting the wrong appeal deadline, and challenges stemming from childcare responsibilities for a sick child.
7. The Tribunal granted an extension until May 31, 2024, for BWC to submit its arguments and supporting documents. The Tribunal clarified that this extension only applied to the submission of materials and did not extend the statutory appeal period itself.
8. On May 31, 2024, BWC emailed the Tribunal duplicate copies of forms already provided on May 15, 2024, and a link to a Google Drive folder. On the same day, the Tribunal requested BWC to submit materials in a specific file format by June 7, 2024. BWC submitted its arguments and supporting documents in compliance with the Tribunal’s request.

9. In a letter dated June 12, 2024, the Tribunal confirmed it had received BWC's appeal and its request to extend the statutory appeal period. The Tribunal also asked the Director to provide the *ESA* section 112(5) record ("Record") and invited the parties to comment on any issues related to the disclosure of personal information or circumstances. The Tribunal informed the other parties that, at this stage, it was not seeking their submissions on the request to extend the appeal period or on the merits of the appeal.
10. The Record was subsequently submitted to the Tribunal by the Director, with copies sent to BWC and to the Complainant. Both parties were given a chance to challenge the completeness of the Record, but no such objections have been made. The Tribunal accepts the Record is complete.
11. 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. Given my analysis below, I find it is unnecessary in this matter to seek submissions from the other parties or the Director, and I have not done so.
12. Section 109(1)(b) of the *ESA* allows me to extend the statutory appeal period for filing an appeal. In determining the appeal, I will first assess whether I should grant an extension under section 109(1)(b). Should I grant the extension, I will then assess if the appeal should be allowed, or be dismissed in whole or part in accordance with section 114(1) of the *ESA*.
13. This decision is based on the Record, the Determination, and BWC's appeal submissions.

ISSUES

14. As I noted above, the Determination states the statutory appeal deadline is May 13, 2024. The Tribunal received all of BWC's appeal submissions after this deadline.
15. Given this, the issues on appeal are whether I should grant an extension for BWC to file its appeal under section 109(1)(b) of the *ESA*, and, if I grant the extension, whether I should allow or dismiss the appeal on its merits in whole or in part.

DETERMINATION

16. Ms. Vassos operates BWC as a sole proprietor providing marketing and consulting services to clients in Vancouver. The Complainant worked for BWC as an account manager from March 15, 2021, to April 29, 2022.
17. The parties presented differing positions on their employment arrangement. BWC claimed that the Complainant was an independent contractor and thus the *ESA* does not apply. The Complainant asserted that she was an employee.
18. The Deciding Delegate addressed five issues in the Determination. The five issues were whether:
 - 1) the Complainant was an employee under the *ESA*;
 - 2) BWC substantially altered the Complainant's employment conditions to a degree that effectively terminated her employment;

- 3) the Complainant was entitled to compensation for length of service;
- 4) the Complainant was owed any other wages; and
- 5) the Complainant was entitled to the GST that she paid out of pocket.

19. In concluding that the Complainant is an employee under the *ESA*, the Deciding Delegate observed that the overall nature of the arrangement between BWC and the Complainant supported an employment relationship rather than that of an independent contractor.
20. The Deciding Delegate examined key elements, including the degree of control BWC exercised over the Complainant's work and how integral the Complainant's tasks were to BWC's operations.
21. Having found that the Complainant was an employee under the *ESA*, the Deciding Delegate determined that BWC's failure to consistently and fully pay wages amounted to a substantial alteration to the Complainant's employment conditions, leading to the termination of the Complainant's employment. Consequently, the Deciding Delegate awarded compensation for length of service to the Complainant for the days that BWC's notice fell short of the statutory requirement under the *ESA*.
22. The Deciding Delegate also concluded that the Complainant was entitled to vacation pay under the *ESA*.
23. In addition, the Deciding Delegate calculated the difference between the total wages the Complainant received during her employment and the amount she was entitled to, determining that BWC owed the Complainant the shortfall.
24. The Deciding Delegate determined that jurisdiction over the GST issue did not fall within his authority.

ARGUMENTS

25. In addition to the statutory extension request, BWC indicates in the Appeal Form that new evidence has become available that was not available at the time the Determination was being made. To support the claim, BWC submitted email communication records with the Complainant from 2022 regarding GST payment and resignation, and the business revenue and expense summary for a three month period, which BWC indicated as "2022 projections."
26. BWC also provided two written submissions: the first presenting BWC's account and arguments supporting its position that the Complainant was an independent contractor, not an employee; the second serving as a response to the Determination.
27. The first written submission states that the Complainant approached Ms. Vassos when she commenced operations of BWC, having previously worked with Ms. Vassos in another context. Ms. Vassos sought a reliable person with the necessary skillset, and the Complainant, seeking flexible hours and fulfilling work, was considered a suitable candidate.
28. BWC claims that the Complainant was engaged as an independent contractor, providing her own laptop, cell phone, and car, and selecting her own work hours and locations, except for weekly

check-in and client meetings. Although the term “employee” was used in relation to the Complainant’s request for extended medical coverage, because it is typically available to employees rather than independent contractors, BWC secured insurance that accommodated independent contractors.

29. BWC says that on April 8, 2022, the Complainant verbally notified BWC of her intent to terminate the employment, followed by a written notice on April 19, 2022, indicating that the contract would end on May 31, 2022. BWC, however, advised the Complainant to conclude the contract by April 30, 2022.
30. BWC acknowledged that the Complainant was not paid for her final paycheque, including the applicable GST, and expressed willingness to settle the outstanding balance.
31. In its second written submission, provided in response to the Determination, BWC reiterates its work arrangement with the Complainant. BWC asserts that the mentorship and guidance given to the Complainant do not alter her status as an independent contractor. BWC emphasizes that the Complainant’s work hours were not tracked, she did not work a standard 40-hour week, and she adjusted meeting schedules based on her own availability.

ANALYSIS

A) *Extension of time in which to file the appeal*

32. The deadline for filing an appeal of the Determination was May 13, 2024. BWC filed its appeal on May 15, 2024, and submitted its supporting documents on June 7, 2024.
33. The Tribunal has the authority to extend the time period for filing an appeal under section 109(1)(b). However, such extensions are not granted automatically; they require “compelling reasons”: *Re: Wright*, BC EST # D132/97. The onus is on an appellant to demonstrate that an extension of the time period is warranted: *Moen & Sagh Contracting Ltd.*, BC EST # D298/96.
34. In considering whether to grant an extension request, the Tribunal considers the following non-exhaustive list of factors:
- a) Is there a reasonable and credible explanation for the appellant’s failure to meet the appeal period deadline?
 - b) Has there been an ongoing, genuine intention, on the part of the appellant, to appeal the determination?
 - c) Were the respondent (in this case, the Complainant) and the Director made aware of the appellant’s intention to appeal?
 - d) Will the Complainant be unduly prejudiced if the Tribunal grants the extension request?
 - e) Does the appellant have a strong case that might succeed? (This factor is traditionally expressed as an inquiry into whether there is a “strong *prima facie* case” in favour of the appellant; however, I prefer to use the simpler language of “a strong case that might succeed”): *John Curry*, 2021 BCEST 92 at para. 74 (aff’d in *John Curry*, 2022 BCEST 2). See also *Niemisto*, BC EST # D099/96; *Patara Holdings Ltd. carrying on business as Best*

Western Canadian Lodge and/or Canadian Lodge, BC EST #RD053/08; C.G. Motorsports Inc., BC EST # RD110/12; Eli Rosenberg Inc., 2023 BCEST 4.

35. These criteria are not exhaustive. Additional factors may be relevant, and not all of the mentioned factors may apply when determining whether to grant an extension.
36. For the reasons outlined below, I decline to grant BWC's request for an extension.
37. BWC submitted its appeal of the Determination to the Tribunal on May 15, 2024, beyond the prescribed deadline, and requested an extension to supply supporting documents. The reasons provided for the delay included the ongoing review of a substantial volume of digital records, efforts to secure legal representation, being out of town for family obligations and mistakenly noting the wrong appeal deadline, and challenges related to childcare due to a sick child. While BWC listed these reasons, they were not supported by additional details or explanation.
38. In considering this request, I have taken into account both the reasons advanced and the fact that this is a request for a relatively short extension. While I find that the majority of the reasons are not particularly compelling on their own, especially given the lack of further elaboration, I am also mindful that life circumstances can impose unexpected burdens, and BWC's situation reflects some of these challenges. That said, I must weigh these factors alongside the procedural requirements of timely filing, and the importance of fairness to all parties involved in the process.
39. Moreover, BWC's submissions do not indicate a clear and ongoing intention to appeal the Determination prior to the late filing. There is also no indication that the other parties involved were made aware of such an intention. However, even if BWC had a genuine intent to appeal and the parties had been notified accordingly, the key question remains whether the case being put forward is strong enough to warrant further consideration. In this case, BWC's failure to present a compelling case is the decisive factor in my determination not to grant the extension.
40. When deciding whether an appellant has a potentially strong case, the Tribunal must assess the merit of the appeal based on the grounds provided by the appellant, as guided by established legal principles: see *Craftsman Collision (1981) Ltd.*, BC EST # D030/10 at para. 29; *Dr. Eli Rosenberg Inc.*, *supra*. Here, BWC's appeal hinges on the claim that new evidence has become to light that was unavailable at the time of the Determination. While BWC does not explicitly state an error of law, it appears to suggest one indirectly. I will consider each of these grounds in turn, starting with the claim of new evidence.

B) New Evidence, section 112(1)(c)

41. 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.

42. Appeals are decided based on the record that was before the Director. The only exception is the introduction of new evidence that was not available when the determination was made. To rely on new evidence on appeal, an appellant must establish all of the following requirements (see *Bruce Davies et al.*, BC EST # D171/03 at p. 3):
- (a) 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 the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) 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.
43. This ground of appeal is not intended for a dissatisfied party to introduce additional evidence on appeal that was available earlier. It is reserved for new evidence that was unavailable to the Director at the time determination was being made: see *Bruce Davies et al.*, *supra*.
44. For the fair and efficient resolution of complaints under the *ESA*, it is essential that parties engage in good faith by presenting all relevant evidence during the Director's investigation and adjudication process. It undermines the fairness and efficiency of resolving complaints when a party fails to fully participate during these stages and then attempts to introduce information on appeal that could have been presented earlier: see *Kaiser Stables Ltd.*, BC EST # D058/97; *Sunrise Trailer Sales Ltd.*, 2024 BCEST 16 at para. 49. The Tribunal has held in previous cases that it will not consider evidence on appeal that should have been tendered during the course of the Director's investigation: see *Bains Bros. Demolition & Excavating Ltd.*, BC EST # D140/98, and *Kaiser Stables Ltd.*, *supra*.
45. In the present case, the evidence submitted by BWC does not qualify as new evidence, as it existed at the time the Determination was being made, and BWC has not provided any reason to believe that it was inaccessible at the time. The evidence BWC submitted for this appeal consists of email communication with the Complainant from 2022 and a business revenue and expense summary. The dates on these documents indicate that they existed at the time the Determination was being made. This evidence should have been presented to the Director during the investigation.
46. In addition, BWC did not produce documents requested by the Investigative Delegate on June 2, 2023, under section 46(1) of the *Employment Standards Regulation*. The Investigative Delegate's letter dated June 2, 2023, requested that BWC provide several documents, including the Complainant's payroll records, vacation records, and employment contract. However, BWC did not comply with this request. Also, despite being given the opportunity to do so, BWC did not respond to the Investigation Report when it was issued. To reiterate, BWC was expected to fully participate in the Director's investigation process rather than waiting to submit information on appeal to the Tribunal after the Determination was issued.
47. Even if the evidence had been presented during the investigation and available at the time the Determination was being made, I am not persuaded that it holds sufficient probative value to alter the outcome. The materials submitted, such as the email communications regarding GST payments and resignation, largely align with the information already before the Deciding Delegate, and the

“2022 projections” appear irrelevant to the issues at hand. For these reasons, I do not find it satisfies the Tribunal’s test for new evidence on appeal.

C) *Error of Law, section 112(1)*

48. BWC applied for the appeal under only one ground of appeal – section 112(1)(c). BWC says that new evidence has become available. The Tribunal recognizes that most appellants lack formal training and represent themselves on appeal. Consequently, the Tribunal adopts a liberal view to the grounds of appeal, addressing the relevant arguments to ensure all parties are treated fairly: see *Triple S Transmission*, BC EST # D141/03. As a result, in addition to the new evidence ground of appeal, I will also consider whether BWC’s arguments raise a question as to whether the Director erred in law.
49. The Tribunal has held in numerous cases that the error of law ground of appeal relates to questions of legal analysis and reasoning. In deciding whether a delegate of the Director erred in law, the Tribunal considers whether the delegate misinterpreted or misapplied a section of the *ESA* or an applicable principle of law, acted without evidence or on an unreasonable view of the facts, or adopted an analysis or exercised a discretion in a way that was wrong in principle: *Dr. Eli Rosenberg Inc.*, *supra*; *Britco Structures Ltd.*, BC EST # D260/03; *Jane Welch operating as Windy Willow Farm*, BC EST # D161/05; *C. Keay Investments Ltd. c.o.b. as Ocean Trailer*, 2018 BCEST 5.
50. The onus is on an appellant to address these considerations and establish, on a balance of probabilities, that the delegate erred in law. In its appeal submissions, BWC has not done so.
51. BWC’s submissions challenge the Deciding Delegate’s finding of fact in the Determination that the Complainant was an employee rather than an independent contractor. In this appeal, BWC has provided further elaboration on the written submissions it initially provided to the Investigative Delegate during the investigation. BWC disagrees with the Deciding Delegate’s factual findings, asserting that they are “irrelevant” because the Complainant was, in BWC’s view, an independent contractor.
52. However, the evidence submitted by BWC – “2022 projections” and email communications with the Complainant regarding GST payments and resignation – does not support a finding that the Deciding Delegate misinterpreted or misapplied a section of the *ESA* or an applicable principle of law. Nor does it demonstrate that the Deciding Delegate acted without evidence or on an unreasonable view of the facts, or adopted an analysis or exercised a discretion in a way that was wrong in principle.
53. BWC’s appeal submissions effectively ask the Tribunal to reassess the Deciding Delegate’s factual findings. However, the Tribunal is not typically permitted to conduct such a reassessment: see *516400 B.C. Ltd.*, 2022 BCEST 73; *Dr. Eli Rosenberg Inc.*, *supra*. Factual findings are only reviewable under the error of law ground of appeal where the appellant can demonstrate that the delegate committed a “palpable or overriding error.” This is a stringent standard, requiring the appellant to show that the delegate’s findings or inferences are so inadequately supported by the evidence that they lack any rational basis, rendering them “perverse or inexplicable”: *CCON Recon Inc. and CCON Metals Inc.*, 2022 BCEST 26 at para. 38; see also *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13, and *Meher Trucking Ltd.*, 2019 BCEST 138. The factual issues raised in the appeal submission do not meet this stringent standard.

54. Further, the Tribunal’s appeal process is not intended to revisit the same arguments made before the Director – it is not an opportunity to reargue an appellant’s case or ‘try again’ with repackaged facts and arguments: *Jia Ning Gan (Re)*, 2024 BCEST 22 at para. 23.
55. For the above reasons, I find there is no merit to the appeal. Even I had granted an extension, I would not have found the appeal successful and would dismiss the appeal under section 114(1)(f) of the *ESA*.
56. I dismiss the appeal under section 114(1)(b) of the *ESA*, and in the alternative, under section 114(1)(f) of the *ESA*.

ORDER

57. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated April 5, 2024, be confirmed.

Lynn Muldoon
Member
Employment Standards Tribunal