

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Chengfang Liao  
("Ms. Liao")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson  
SUBMISSIONS: Chengfang Liao, on her own behalf  
FILE NUMBER: 2024/074  
DATE OF DECISION: September 24, 2024

## DECISION

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act (ESA)* by Chengfang Liao (“Ms. Liao”) of a determination issued by Kenneth Proulx, a delegate (“deciding Delegate”) of the Director of Employment Standards (“Director”), on June 19, 2024 (“Determination”).
2. The Determination found Ms. Liao’s former employer, Angela Chiu (“Ms. Chiu”), had contravened Part 3, sections 17 and 18, and Part 5, section 45, of the *ESA* in respect of her employment and ordered Ms. Chiu to pay Ms. Liao wages, including vacation pay, in the total amount of \$702.00, interest under section 88 of the *ESA* in the amount of \$96.38, and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$2,298.38.
3. Ms. Liao has appealed the Determination on the ground that new evidence has come available that was not available when the Determination was being made.
4. On June 24, 2024, the Tribunal received an Appeal Form from Ms. Liao. The Appeal Form attached written reasons for the appeal and supporting documents, which she seeks to introduce as new evidence.
5. In correspondence dated July 4, 2024, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (“record”) from the Director, invited the parties to file any submissions on personal information or circumstances disclosure, and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to Ms. Chiu and to Ms. Liao. These parties have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from either party.
7. The Tribunal accepts the record is complete.
8. I have decided this appeal is appropriate for consideration under section 114(1) 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, any new evidence added to the record, and my review of the material that was before the deciding Delegate 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.

9. 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. Chiu 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

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

## BACKGROUND FACTS

11. Ms. Chiu employed Ms. Liao as a caregiver from March 1, 2019, to November 30, 2021.

12. Ms. Liao filed a complaint alleging Ms. Chiu had contravened the *ESA* by failing to pay her overtime wages.

13. In response to the complaint, Ms. Chiu said Ms. Liao was paid for all the hours she worked.

14. The complaint was investigated by a delegate of the Director (“investigating Delegate”) who issued an Investigation Report (IR) which was delivered to each party, who were provided the opportunity to respond to it. Neither party provided a response to the IR.

15. The deciding Delegate identified four issues in the reasons for Determination:

1. Was Ms. Liao excluded from the *ESA* as a “home care worker” or a “sitter”?
2. Was Ms. Liao excluded from the hours of work and/or overtime provisions of the *ESA*?
3. What hours did Ms. Liao work?
4. Is Ms. Liao owed wages and, if so, how much?

16. The deciding Delegate made findings on those issues. The answer on each of the first two issues was “no,” and that decision is not challenged in this appeal.

17. On the third issue, the deciding delegate found Ms. Liao worked 2,107.50 hours during the wage recovery period – November 2020 to November 2021. In making this finding, and critically for this appeal, the deciding Delegate rejected the record of hours worked provided by Ms. Liao, finding that record was not accurate or reliable and could not be used as a source to identify Ms. Liao’s hours of work. The reasons for that finding are set out at pages R13-R14 of the Determination.
18. On the fourth issue, the deciding Delegate found Ms. Liao was not owed regular or overtime wages but was owed the amounts set out in the Determination for statutory holiday and annual vacation pay.
19. The deciding Delegate found Ms. Chiu had contravened several sections of the *ESA* and imposed administrative penalties for those contraventions.

## ARGUMENTS

20. Ms. Liao objects to the deciding Delegate finding that her record of hours was unreliable and consequently rejecting her claim for regular and overtime wages.
21. In support of her appeal, she has filed a set of documents she identifies as her “original schedules about working overtime” and some screenshots.
22. As well, Ms. Liao has provided commentary and explanations on two matters addressed in the reasons for Determination supporting the deciding Delegate’s finding on the reliability of the schedules provided by her: the absence of an explanation for why “household tasks,” which, on their face, included tasks which were similar to those she would have performed during her regular work day or for herself; and 2.5 hours of overtime claimed every Saturday.

## ANALYSIS

23. 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.
24. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
25. The ground of appeal raised by Ms. Liao is the “new evidence” ground of appeal – section 112(1)(c).

26. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations: whether such evidence was reasonably available and could have been provided during the complaint process; whether the evidence is relevant to a material issue arising from the complaint; whether it is credible, in the sense that it be reasonably capable of belief; and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
27. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.
28. Applying the test for admitting “new evidence” on appeal, I find this ground of appeal has not been made out.
29. The “evidence” which Ms. Liao seeks to introduce, both by way of additional documents and by way of explanations challenging some of the conclusions made by the deciding Delegate, are not “new.”
30. In respect of what Ms. Liao refers to as the “original schedule” and “screenshots,” this material existed while the investigation was being conducted and the Determination was being made. It is not referred to by Ms. Liao in any submission or discussion with the investigating Delegate nor is there any reference to it in the IR or the reasons for Determination. In fact, what the IR says about her record of the hours she worked is found at page IR.4, and states:
- [Ms. Liao] recorded her extra hours caring for Mrs. Law and the hours spent doing chores for Ms. Chiu’s family on her monthly calendar. She reported her hours on the calendar to Ms. Chiu and Ms. Chiu would take the information and enter it into the computer.
- [Ms. Liao] provided a copy of her monthly calendar for the hours she worked between March 2019 and November 2021.
31. The “original schedule” Ms. Liao has presented to support her challenge does not conform to that description. It is disconcerting that Ms. Liao seems to have presented the calendar to the investigating Delegate as the one on which she recorded her hours, and it colours every other aspect of her submission that the Tribunal should “take some time” to look at the materials she has provided.
32. The above comment should also make it clear that I do not find the “new evidence” sought to be introduced in this appeal to be either credible or probative. Even a cursory examination indicates this material does not answer the concerns expressed by the deciding Delegate with the schedule of hours worked that was provided during the investigation. I am not persuaded this “new” evidence would have the effect of changing the decision of the deciding Delegate on the accuracy and reliability of the records Ms. Liao provided.

33. The explanation and commentary on the two matters addressed in the reasons for Determination add nothing to the validity of Ms. Liao's appeal; at their root, they simply challenge findings made by the deciding Delegate on the material before him at the time.

### **CONCLUSION**

34. For all of the above reasons, I find there is no merit to any of the arguments made and no reasonable prospect this appeal will succeed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to; it is, accordingly, dismissed.

### **ORDER**

35. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated June 19, 2024, be confirmed in the amount of \$2,298.38, together with any interest that has accrued under section 88 of the *ESA*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**