Citation: Capt'n Crunch Holdings Ltd.
2025 BCEST 1

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Capt'n Crunch Holdings Ltd.
("CC Holdings")

- of a Determination issued by -

The Director of Employment Standards

PANEL:	David B. Stevenson
SUBMISSIONS:	Richard Pemble, on behalf of Capt'n Crunch Holdings Ltd. Cody Reedman, counsel for Capt'n Crunch Holdings Ltd.
FILE NUMBER:	2024/067
DATE OF DECISION:	January 03, 2025

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *ESA*) by Capt'n Crunch Holdings Ltd. ("CC Holdings") of the Determination issued by Stephanie Zegarac, a delegate of the Director of Employment Standards (the "deciding Delegate"), on May 30, 2024.

2. The Determination addressed a complaint filed by Jonathan Dirnaichner, who alleged he was owed compensation for length of service.

3. The deciding Delegate associated CC Holdings under section 95 of the *ESA* with Capt'n Crunch Recycling Ltd. ("CC Recycling"), found the associated entity had contravened Part 8, section 63 of the *ESA* in respect of the employment of Mr. Dirnaichner, and ordered CC Holdings to pay Mr. Dirnaichner wages in the total amount of $$8,904.00, interest under section 88 of the *ESA* in the amount of $800.32, and to pay an administrative penalty in the amount of $500.00.

4. CC Holdings has appealed the Determination on all of the grounds available under section 112(1) of the *ESA*, submitting the deciding Delegate erred in law by associating CC Holdings with CC Recycling under section 95, that the deciding Delegate failed to observe principles of natural justice because CC Holdings is a separate company from CC Recycling, Mr. Dirnaichner never worked for CC Holdings, there is no money/assets in CC Holdings, and CC Holdings is in the process of being assigned into bankruptcy, and that new evidence has come available that was not available when the Determination was being made.

5. Another delegate of the Director investigated the complaint (the "investigating Delegate") and issued an investigation report (the "IR"). A copy of the IR was delivered to CC Holdings and its registered directors. An opportunity to respond to the IR was provided. CC Holdings, through one of its directors, Richard Pemble, and its accountant, responded, disagreeing that CC Recycling and CC Holdings should be associated under the *ESA*.

6. The section 112(5) record (the "Record") has been provided to all the parties and no objection has been raised to its completeness.

7. Under section 114(1) of the *ESA*, the Tribunal may, without a hearing of any kind, dismiss all or part of an appeal if, among other things, the Tribunal finds no reasonable prospect the appeal will succeed: section 114(1)(f) of the *ESA*.

8. For the reasons that follow, I dismiss this appeal under the above provision.

ISSUES

9. The appeal raises three issues, which I will address in the following order:

- has CC Holdings met the conditions on which the Tribunal will accept additional evidence;

- have any of the delegates of the Director of Employment Standards failed to observe principles of natural justice in making the Determination; and
- has the deciding Delegate erred in law by associating CC Holdings with CC Recycling?

Issue 1: Has CC Holdings met the conditions on which the Tribunal will accept additional evidence?

10. This ground of appeal is commonly described as the "new evidence" ground of appeal. 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 et al. (Merilus Technologies Inc.)*, BC EST # D171/03.

11. 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, could have and should have been provided during the complaint process and 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*.

12. The "evidence" CC Holdings seeks to introduce, is not "new." The correspondence from CC Holdings' accountant echoes information and opinion provided during the investigation of the complaint and in response to the IR. The Learning Disability Assessment Report appears to have been prepared in 2022. It was never alluded to during the complaint process.

13. Nor is the Learning Disability Assessment Report relevant or probative on the question of common control or direction. That document does not derogate from the facts and circumstances upon which the deciding Delegate found common control or direction between CC Recycling and CC Holdings. Most particularly, there is nothing in that document that establishes Mr. Pemble was incapable of exercising control or direction of CC Recycling and CC Holdings. Such suggestion runs against evidence provided during the investigation that was accepted by the deciding Delegate.

14. The additional evidence provided with this appeal does not meet the conditions for admission and it is not accepted.

Issue 2: Have any of the delegates of the Director of Employment Standards failed to observe principles of natural justice?

15. A party alleging a failure to comply with principles of natural justice, as CC Holdings has done, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. I find nothing in the appeal that would support a finding the deciding Delegate failed to comply with principles of natural justice.

16. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96.)

17. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found.

18. There is nothing in the Reasons for the Determination (the "Reasons"), the Record, the appeal forms, or the submissions showing that the deciding Delegate, or the Investigating Delegate, failed to comply with the principles of natural justice in making the Determination. The Record shows the delegates involved adhered to principles of natural justice throughout the process; CC Holdings was notified of the section 95 issue and was given full opportunity to understand it and to present its evidence and position on it.

19. I find CC Holdings has not shown there was a failure by either delegate to observe principles of natural justice.

Issue 3: has the deciding Delegate erred in law by associating CC Holdings with CC Recycling?

20. 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.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

21. CC Holdings recognizes, and accepts, there are four conditions to an application of section 95:

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.

22. CC Holdings argues the deciding Delegate erred in law in finding the second and third conditions were satisfied.

23. In making the argument relating to the second condition, CC Holdings says, "the question of financial support…is not relevant to the second element of the test" and the deciding Delegate failed to consider the individual business operations of CC Holdings – which, CC Holdings asserts, is a holding company whose sole purpose is to hold and rent the property on which CC Recycling has operated its business since 2016 – while the business of CC Recycling is auto wrecking and disposal.

24. CC Holdings cites the Tribunal's decision in *Louis Russo Sawmills (1998) Limited and others*, BC EST # D158/05, as a decision similar on its facts and contends the same result should apply in this case. With respect, that decision is not similar on its facts to this case. The appellant in that case provided evidence in the appeal, which was accepted by the Director of Employment Standards and by the Member deciding the appeal, that a key finding in the determination – that it owned equipment used in the business – was an error of law on the facts that justified a variance to remove the appellant as a party and as an associated entity.

25. In this case, the deciding Delegate summarized the findings on the second condition as follows at page R4 of the Reasons:

> …I find that CC Recycling and CC Holdings did operate a joint business, trade or undertaking. … CC Holdings stepped into the shoes of CC Recycling, the original employer, by financially supporting the continuation of the business. This combined with the lack of evidence to the contrary supports the finding that CC Recycling and CC Holdings were financially and operationally integrated….

26. The circumstances of this case are more consistent with those in *Remko'B Investments Ltd. v. Director of Employment Standards*, 1994 CanLII 168 (BCCA), where the British Columbia Court of Appeal considered section 20 of the *Employment Standards Act*, S.B.C. 1980 (what is now section 95). In that instance, the Director of Employment Standards sought to associate companies that were very clearly under common control and direction. The issue on appeal was whether or not the business conducted by the primary company was carried on by or though the appellant. In dismissing the appeal, a majority of the Court found that the appellant had no business activity other than financially supporting the primary company, and that the primary company could not operate absent that support. The following statement of principle is found at para. 9 of the Court's decision:

> Where company A carries on its business with the financial support of company B, and cannot continue to do so without that support; and where company B has no business activity other than the provision of financial support to company A, then it can reasonably be said that the business of company A is carried on by or through company B.

27. That statement of principle has been adopted and applied by the Tribunal: see *0708964 B.C. Ltd.*, BC EST # D015/11, at paras. 30-33.

28. Clearly the question of financial support *is* relevant to a consideration of the second condition in a consideration of section 95.

29. It is also apparent from a reading of the Reasons that the deciding Delegate did not fail to consider the nature of the respective business operations of CC Recycling and CC Holdings.

30. This argument does not show an error of law by the deciding Delegate in addressing the second condition for an application of section 95.

31. CC Holdings argues the deciding Delegate erred in finding common control or direction. In *San Bao Investment Inc.*, BC EST # D017/17, at para. 35, the Member in that case identified the following statements of the Tribunal about common control or direction:

a) "Common control or direction is clearly established where the same person is in reality the guiding force or managing authority for both businesses…" (*Broadway Entertainment Corporation*, BC EST # D184/96, at page 11).

b) Common control or direction "…is not limited in its application to direct financial or corporate control." (*Invicta Security Systems Corp.*, BC EST # D349/96, at page 6).

c) Common control or direction "…may be determined based on financial contributions from one entity to another (although this factor, standing alone, in not determinative); the fact that one entity is economically dependent on another entity; interlocking shareholdings and directorships; common management principles (e.g., corporate officers and other key employees); sharing of resources (including human resources) among the various entities; asset transfers at non-market transfer prices; operational control by one entity over the affairs of another entity; joint ownership of key assets and operational integration" (*0708964 B.C. Ltd.*, *supra*, at para. 32).

d) "The totality of the business and the inter-relationships of the entities must be examined." (*Invicta Security Systems Corp.*, *supra*, at page 6).

32. The question of whether there is common control or direction is predominantly a factual exercise. In its argument, CC Holdings challenges findings of fact made by the deciding Delegate on this question. In doing so, CC Holdings makes assertions of fact that are not supported by anything in the IR, the Record, or the Reasons. CC Holdings has sought to introduce new evidence into this appeal and that effort has been rejected.

33. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director of Employment Standards (the "Director") unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03.

34. A finding of fact is only reviewable by the Tribunal as an error of law on the facts in limited circumstances. The test for establishing findings of fact constitute an error of law is stringent. Findings of fact made by the deciding Delegate require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact. Based on my assessment of the facts in the Record and as found in the Reasons, CC Holdings has not met the test.

35. The factual basis for the finding of the deciding Delegate on this matter is set out at pages R4-R5 of the Reasons.

36. In my view, the conclusions of the deciding Delegate were adequately supported on the material before her. Based on what the Tribunal has identified as reflecting common control or direction, the deciding Delegate was right to conclude that these facts were collectively capable of showing a sufficient level of connection necessary to show common control or direction for the purposes of section 95.

37. CC Holdings has not shown an error of law on the matter of common control and direction.

CONCLUSION

38. As I find there is 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. The appeal is dismissed.

ORDER

39. Pursuant to section 115(1) of the *ESA*, I order the Determination dated May 30, 2024, be confirmed in the amount of $10,204.32, together with any interest that has accrued under section 88 of the *ESA*.

/S/ David B. Stevenson

David B. Stevenson
Member
Employment Standards Tribunal