Employment Standards TRIBUNAL

Citation: Alternative Cartage Inc. (Re)
2024 BCEST 34

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Alternative Cartage Inc.
("ACI" or "Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2024/005

DATE OF DECISION: April 17, 2024

DECISION

SUBMISSIONS

Brian Vickers — counsel for Alternate Cartage Inc.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*"ESA"*) by Alternative Cartage Inc. ("ACI" or "Appellant") of a determination issued by Shannon Corregan, a delegate ("deciding Delegate") of the Director of Employment Standards ("Director"), on December 19, 2023 ("Determination").

2. The Determination found ACI had contravened Part 3, section 18 of the *ESA* in respect of the employment of Robert Emmett Flavin ("Mr. Flavin") and ordered ACI to pay Mr. Flavin the amount of $51,654.59, an amount that included interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $52,154.59.

3. ACI has appealed the Determination alleging the deciding Delegate erred in law and there was a failure to observe principles of natural justice during the complaint process.

4. In correspondence dated February 5, 2024, the Tribunal, among other things, acknowledged having received an appeal, 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 at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to the parties. They have been provided with the opportunity to object to the completeness of the record.

6. None of the parties has raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.

7. I have decided this appeal is 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 submissions filed on 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 any 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 should not be dismissed under section 114(1), the Director and Mr. Flavin 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 will succeed.

ISSUE

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

THE DETERMINATION AND REASONS

10. By way of background, the reasons for Determination recite the corporate information relating to ACI and describes ACI as operating a transportation company in Surrey, BC.

11. Mr. Flavin worked for ACI from June 19, 2019, until November 2021 as a truck driver. He filed a complaint under the *ESA* on November 12, 2021, alleging ACI contravened the *ESA* by failing to pay all regular and/or overtime wages, statutory holiday pay, and annual vacation pay; and by failing to reimburse him for business expenses.

12. The complaint was investigated by a delegate of the Director ("investigating Delegate"), who produced an Investigation Report ("IR") that was provided to ACI and to Mr. Flavin. Both were provided with the opportunity to respond to the IR. Mr. Flavin filed a response, ACI did not.

13. The deciding Delegate identified several issues in the reasons for Determination:

1. Was Mr. Flavin an "employee" of ACI within the meaning of the *ESA* during the claim period;
2. If Mr. Flavin was an employee, is he owed regular wages or overtime wages;
3. If Mr. Flavin was an employee, is he owed statutory holiday pay;
4. If Mr. Flavin was an employee, is he owed vacation pay; and
5. If Mr. Flavin was an employee, is he owed reimbursement for business expenses?

14. On the first issue, the deciding Delegate found Mr. Flavin was an employee of ACI under the *ESA*. In reaching this finding, the deciding Delegate considered the purposes of the legislation, identified the applicable statutory provisions, made findings of fact, and within the context of the statutory purposes and provisions, and facts as found, analyzed and assessed the factors arising in the circumstances.

15. The analysis of the deciding Delegate on this issue is found at pages R4-R6 of the Determination and need not be repeated here.

16. On the second issue, the deciding Delegate found that Mr. Flavin was not owed additional regular or overtime wages.

17. On the third and fourth issues, the deciding Delegate found Mr. Flavin was owed statutory holiday and annual vacation pay, in the amounts set out in the Determination.

18. On the fifth issue, the deciding Delegate found that Mr. Flavin had incurred business expenses – primarily for fuel, insurance, and maintenance – that should properly have been borne by ACI and that ACI had made unauthorized deductions from his wages.

19. Based on the conclusions reached, the deciding Delegate found ACI had contravened section 18 of the *ESA*, awarded Mr. Flavin wages in the amount set out in the Determination, and imposed an administrative penalty for those contraventions.

ARGUMENTS

Error of Law

20. The Appellant disagrees with the central finding of the deciding Delegate: that Mr. Flavin was an employee of ACI for the purposes of the *ESA*. Their appeal submission on this matter substantially incorporates all of the elements of the submission made on their behalf during the complaint process (see pages 1149-1158 of the record) and incorporates the following assertions:

- The deciding Delegate failed to properly apply the legal test for determining whether an individual is an employee for the purposes of the *ESA*;
- The deciding Delegate did not give sufficient effect to the "Independent Contractor Agreement" Mr. Flavin signed with ACI in June 2019 and incorrectly found Mr. Flavin "was not in business for himself";
- The deciding Delegate erred in disregarding the Canada Revenue Agency decision which found Mr. Flavin to be a self-insured person for the purposes of employment insurance and pension benefits under federal legislation; and
- The deciding Delegate incorrectly weighed the circumstances of the relationship between Mr. Flavin and ACI, which ought to have favoured a finding that Mr. Flavin was an independent contractor in business for himself.

21. The appeal also contends there was a failure to comply with principles of natural justice in the complaint process when ACI was not provided with a copy of Mr. Flavin's response to the IR or given an opportunity to reply to his response.

22. ACI submits that, even if the deciding Delegate was correct in finding Mr. Flavin was an employee for the purposes of the *ESA*, she erred in finding he was entitled to any reimbursement of business expenses. In making this submission, ACI relies on a provision in the "Independent Contractor Agreement" where Mr.

Flavin agreed, as an independent contractor, that he would bear the costs of operating the vehicle, "which included all costs for fuel, licensing, insurance and maintenance."

23. ACI submits that even if Mr. Flavin was entitled to reimbursement of business expenses, the deciding Delegate erred in calculating the amount of those expenses.

24. Lastly, ACI submits that even accepting Mr. Flavin was entitled to reimbursement of business expenses in the amount calculated by the deciding Delegate (which is expressly disputed by ACI), that amount should more appropriately have been addressed as a component of the wages paid to him, rather than awarded as additional to those wages.

ANALYSIS

25. 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.*

26. 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.

27. ACI argues error of law and failure to observe principles of natural justice.

Error of Law

28. 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.

29. 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 unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

30. An error of law may arise from a misinterpretation or misapplication of the *ESA* or the general law, through an error on the facts – acting without evidence or on a view of the facts that cannot reasonably be entertained – or by adopting a method of assessment that is wrong in principle.

31. There is no suggestion in the submission filed by ACI that the deciding Delegate misinterpreted or misapplied the *ESA* or the general law, but rather "failed to properly apply the legal test."

32. The proper approach to deciding whether a person is, or is not, an employee for the purposes of the *ESA* is to determine whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *ESA*.

33. This is done, in large part, by determining the reality of the relationship through objective facts.

34. The principal conclusion being challenged in this appeal – whether Mr. Flavin was an employee of ACI for the purposes of the *ESA* – is a question of mixed law and fact. In *Britco Structures*, *supra*, the Tribunal considered the application of the *Gemex* test to questions of mixed fact and law, and concluded that "error of law" should not be applied so broadly as to include errors of mixed law and fact which do not contain extricable errors of law.

35. 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. Based on my assessment of the facts in the record and as found in the Determination, ACI has not met the test. The conclusions of the deciding Delegate were adequately supported on the material before her; there is no basis for alleging, or finding, that the deciding Delegate made an error on the facts. 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 the review of findings of fact.

36. While ACI disagrees with the conclusion reached by the deciding Delegate on whether Mr. Flavin was an employee for the purposes of the *ESA*, the argument made by them does little more than re-state the arguments that were insufficient to persuade the deciding Delegate on that question. Effectively the appeal does no more than quarrel with the conclusion reached by the deciding Delegate on this issue from the facts as found, seeking either to have those conclusions ignored or to have those facts weighted toward a different conclusion. It is well established that assessing the weight of the evidence is within the purview of the deciding Delegate and this Tribunal should not intervene lightly; this assessment must be minimally defensible, in terms of both substance and reasons.

37. The appeal does not present a significant challenge to the findings of fact made by the deciding Delegate or to how those facts were assessed in the context of the provisions and purposes of the *ESA*. To reiterate, disagreement with how findings of fact and inferences drawn therefrom are weighted does not provide a ground for appeal under section 112 of the *ESA* unless an error of law is shown and ACI has not done that in this appeal.

38. In its interpretation of the terms "employer" and "employee" in the *ESA*, the Tribunal has not rejected the intention of the parties as one potentially relevant factor in deciding whether an employment relationship exists between them. However, the Tribunal has made it clear that an expression of the intention of the parties is only one factor that may be considered, and that it does not trump the reality of the nature of the relationship as revealed by other relevant factors: see for example, *LoveAgain Network Inc.*, BC EST # RD120/12, at para. 25.

39. While some of the evidence submitted by ACI supported a finding that Mr. Flavin was an independent contractor, the deciding Delegate was bound to consider the totality of the evidence in light of the statutory considerations and, in that regard, I find the deciding Delegate's ultimate conclusion that Mr. Flavin was an employee of ACI was reasonable and sound.

40. In her analysis, the deciding Delegate correctly indicated that who is an employee for the purposes of the *ESA* is determined by a consideration of the definitions and objectives of the legislation, bearing in mind the *ESA* is intended to be remedial legislation and, as such, should be given such large and liberal interpretation that will best ensure its objects and purposes are met. I agree entirely with the observation of the deciding Delegate that whether a person is an employee and thus entitled to the benefits and standards provided in the *ESA* cannot be waived or compromised by private agreements: correctly concluding the agreement between Mr. Flavin and ACI expressed in the "Independent Contractor Agreement" is not determinative of Mr. Flavin's status under the *ESA*.

41. I find the Determination is consistent with the legal approach the Tribunal has mandated under the *ESA* for determining employee status. My assessment of the reasons provided by the deciding Delegate in the Determination confirm that the correct law and principles relating to whether an individual is an employee within the meaning of the *ESA* were applied.

42. In the reasons for Determination, the deciding Delegate provided a sufficiently complete legal and factual analysis of the actual relationship between Mr. Flavin and ACI, and made a decision on his status on the facts and in accordance with the provisions of, and for the purposes of, the *ESA*.

43. The law and the facts support the conclusion reached.

44. ACI submits the deciding Delegate erred by not giving effect to a Canada Revenue Agency ("CRA") decision which concluded (for the purposes of access to employment insurance and Canada pension) Mr. Flavin is considered to be self-employed. I do not agree. It is firmly established that, as stated by the deciding Delegate, decisions made in a different statutory context do not determine how the *ESA* is applied. As the Supreme Court of Canada noted in *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39 ("*McCormick*"), an individual may be an "employee" in one statutory context but not in another: see also the comments at paras. 57-58 of *Beach Place Ventures Ltd and Black Top Cabs Ltd.*, 2019 BCEST 61 (Judicial Review dismissed 2021 BCSC 1463).

45. For the above reasons, I am not persuaded the deciding Delegate made any error of law in finding Mr. Flavin was an employee of ACI for the purposes of the *ESA*.

46. The arguments relating to entitlement to expenses and the valuation of the expenses fail on an application of the principle that 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 unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

47. I do not accept a consideration of Mr. Flavin's entitlement to reimbursement of the expenses he incurred while driving for ACI should be decided on an application of the "Independent Contractor Agreement." ACI has not been successful in affecting the finding in the Determination that Mr. Flavin is an employee for the purposes of the *ESA*; it is the provisions of the *ESA* that will govern any entitlement he claims. Accordingly, as the deciding Delegate correctly identified, Mr. Flavin's entitlement to reimbursement is properly decided on a consideration of the provisions of section 21 of the *ESA*, which, at its root, prohibits an employer from requiring an employee to pay its business expenses.

48. I concur completely with the conclusions of the deciding Delegate on her assessment of which expenses incurred by Mr. Flavin should have been borne by ACI. The reasons for Determination on this assessment were comprehensive and fully supported by evidence provided by Mr. Flavin during the complaint investigation.

49. The findings of the deciding Delegate on the amount of reimbursement to which Mr. Flavin was entitled are findings of fact based on the material provided, and included in the record.

50. The Tribunal has held that findings of fact are reviewable as errors of law under prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal has noted that the test for establishing an error of law on this basis is stringent, citing the reformulation of the third and fourth *Gemex* factors in *Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11- Richmond/Delta)*, [2000] B.C.J. No. 331 (S.C.) at para. 18:

> ... that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could."

51. I do not agree that the deciding Delegate failed to undertake an intelligible and reasoned analysis of the evidence. The argument by ACI that some of the findings made by the deciding Delegate seemed 'arbitrary' is not demonstrative of a failure to provide a reasoned analysis, or raise any other reviewable error of law.

52. ACI makes reference in their submission to there being a burden on Mr. Flavin to establish which expenses he incurred should be considered 'business expenses.' I do not disagree with that assertion, but I do disagree with the contention by ACI that he failed to meet that burden. The deciding Delegate accepted the material he provided and made what I consider to be reasonable and logical findings based on it.

53. The burden on Mr. Flavin ended there. In this appeal, the burden is on ACI to demonstrate there was an error in the findings of the deciding Delegate on one of the grounds found in section 112 of the *ESA*. I am not persuaded that burden has been met in respect of the arguments relating to Mr. Flavin's entitlement to expenses incurred and the value of those expenses.

54. In sum, I find the Director analysed and made decisions on the several issues identified in the reasons for Determination on the facts and in accordance with, and for the purposes of, the *ESA*. I find ACI has not shown an error of law in the deciding Delegate's analysis. Effectively, the appeals do no more than quarrel with the conclusions reached by the deciding Delegate in the Determination from the facts as found, seeking either to have those conclusions ignored or to apply the facts toward a different conclusion. The appeal does not present a significant challenge to the findings of fact made by the deciding Delegate upon which the Determination was based. To reiterate, disagreement with findings of fact and inferences drawn therefrom does not provide a ground for appeal under section 112 of the *ESA*.

55. There is no merit to this ground of appeal.

Failure to Observe Principles of Natural Justice

56. A party alleging a failure to comply with principles of natural justice 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 there was a failure to comply with principles of natural justice within the complaint process.

57. The Tribunal has 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).

58. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination.

59. ACI's argument on this ground is that it was not provided with the response made by Mr. Flavin to the IR and had no opportunity to reply to its contents.

60. ACI has not, however, shown how not receiving Mr. Flavin's response to the IR and being allowed an opportunity to reply to it has effectively denied them the procedural rights described above. It is apparent they were aware of the case against them and provided full opportunity to present their evidence in response to Mr. Flavin's claims. My view of the response of Mr. Flavin to the IR is that it adds nothing to the evidentiary body relating to his complaint. At page 1213 of the record, the investigating Delegate notes the response of Mr. Flavin provided no additional documents or new evidence. ACI does not suggest otherwise or identify any 'evidence' contained in the response that as a matter of fairness required ACI be given an opportunity to respond.

61. To reiterate, an allegation of a failure to observe principles of natural justice carries the burden to provide some evidence in support of that allegation. ACI has not met that burden.

62. I find no merit in the natural justice ground of appeal.

63. The final argument made by ACI is that the amounts calculated as business expense amounts should more appropriately have been addressed as a component of the wages paid to him, rather than awarded as additional to those wages.

64. This submission does not identify any reviewable error in the Determination.

65. As a general response, I adopt a comment made by the deciding Delegate at page R7 of the reasons for Determination, that the "wages that are found owing . . . are not a windfall for [Mr. Flavin]: they are costs that ACI should have borne and must now bear." The consequences of ACI's contraventions are those dictated by the statute. There is nothing in the *ESA* that allows its provisions to be tailored to avoid statutory entitlements because ACI, having been found to have run afoul of the *ESA*, now seeks to minimize the monetary effect of its contravention.

66. 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; it is, accordingly, dismissed.

ORDER

67. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated December 19, 2023, be confirmed in the amount of $52,154.59, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal