

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

TMT Auto Finance Ltd.  
("TMT")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** David B. Stevenson

**FILE No.:** 2024/029

**DATE OF DECISION:** July 16, 2024

## DECISION

### SUBMISSIONS

Ryan Monty

legal counsel for TMT Auto Finance Ltd.

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“*ESA*”) by TMT Auto Finance Ltd. (“*TMT*”) of a determination issued by Sarah Vander Veen, a delegate of the Director of Employment Standards (“*deciding Delegate*”), on January 24, 2024 (“*Determination*”).
2. The *Determination* found TMT had contravened Part 3, sections 17, 18 and 27, and Part 7, section 58, of the *ESA* in respect of the employment of Ricky Burns (“*Mr. Burns*”). The *Determination* ordered TMT to pay Mr. Burns wages, including vacation pay, in the total amount of \$14,225.08, interest under section 88 of the *ESA* in the amount of \$1,071.85, and to pay administrative penalties in the amount of \$2,000.00. The total amount of the *Determination* is \$17,296.93.
3. TMT has appealed the *Determination* on the ground that the *deciding Delegate* erred in law in making the *Determination*.
4. On March 4, 2024, the Tribunal received an Appeal Form submitted on behalf of TMT. The Appeal Form attached no written reasons, argument or supporting documents relating to the appeal, but included a request for a two-week extension of the statutory appeal period to, among other things, provide reasons and argument for the appeal, and to submit additional documents. The Tribunal granted the requested extension of time – to March 18, 2024 – to submit TMT’s written reasons and argument, and any supporting documents. The Tribunal noted the extension of time to file was not an extension of the statutory appeal period. Written reasons and argument for the appeal were delivered to the Tribunal on March 18, 2024. As part of their appeal, TMT has requested an extension to the statutory appeal period.
5. In correspondence dated April 3, 2024, the Tribunal, among other things, acknowledged having received the appeal and the request for an extension of the statutory appeal period, 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 and on the request to extend the appeal period 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 TMT, in care of their legal counsel of record, and to Mr. Burns. 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 any party.
7. The Tribunal accepts the record is complete.
8. 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 submission filed with 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 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 Mr. Burns 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 the requested extension of the statutory appeal period should be granted and, in any event, 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*.

#### **THE DETERMINATION**

11. TMT operates an automotive sales business in Langley, BC.
12. Mr. Burns worked as a sales representative from April 28 to November 30, 2021. He was paid solely by commission.
13. Mr. Burns filed a complaint alleging TMT had contravened the *ESA* by failing to pay commissions owed, failed to pay annual vacation pay, and had made unauthorized deductions from his wages.
14. In response to the complaint, TMT took the position Mr. Burns was an independent contractor, not an employee of TMT and, in any event, there were no amounts owing to Mr. Burns.
15. 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.

16. The deciding Delegate identified four issues in the Determination:
1. Was Mr. Burns an employee of TMT for the purposes of the *ESA*?
  2. How much did Mr. Burns earn as wages under the *ESA*?
  3. Did TMT take unauthorized deductions from Mr. Burns' wages?
  4. How much, if anything, is Mr. Burns owed under the *ESA*?
17. On the first issue, the deciding Delegate found Mr. Burns was an employee of TMT for the purposes of the *ESA*.
18. In deciding the first issue, the deciding Delegate considered elements of the relationship between TMT and Mr. Burns and found, "the bulk of the evidence supports a finding that [Mr. Burns] was [TMT's] employee."
19. On the second issue, the deciding Delegate found Mr. Burns earned \$27,018.77 in commission wages during his period of employment with TMT. The Determination states the parties provided "divergent evidence regarding [Mr. Burns'] commission structure and competing spreadsheet calculations of the commissions . . . allegedly earned," and notes that, except for documents referred to as "DS and JVS sheets," "neither party provided any documents or witness evidence in support of their testimony or calculations." Ultimately, the deciding Delegate applied a combination of areas of apparent agreement between the parties, the best available evidence (from the paucity of evidence provided), statements against interest, the failure of TMT to provide evidence it was required to maintain under section 27 of the *ESA* and provide to Mr. Burns, the failure of Mr. Burns to provide consistent evidence relating how expenses associated with each sale were to be treated, and inconsistent evidence from TMT relating to what appears to be the minimum commission earned.
20. On the third issue, the deciding delegate found TMT had deducted \$14,344.12 from Mr. Burns wages, which, applying sections 21 and 22 of the *ESA*, were found to be unlawful.
21. On the fourth issue, the deciding Delegate found Mr. Burns was owed the amounts set out in the Determination.
22. The deciding Delegate found TMT had contravened several sections of the *ESA* and imposed administrative penalties for those contraventions.

## ARGUMENTS

23. TMT argues the deciding Delegate erred in law in making the Determination by:
- i. finding Mr. Burns was an employee of TMT under the *ESA*; and
  - ii. calculating the amount owed to Mr. Burns.
24. In respect of the first of the alleged errors of law, TMT submits the deciding Delegate erred in law by "misinterpreting the facts, or not accounting for all the facts contained in the IR." The argument adds that in making the stated errors, the deciding Delegate "adopted a method of assessment which is wrong in

principle and, in turn, results in their view of the facts that cannot be reasonably entertained on the submissions before them.”

25. The argument addresses three elements of the reasons for Determination (“reasons”).
26. The first relates to the reference in the reasons to two sales on which Mr. Burns initially claimed he was owed commission. The appeal submission alleges the deciding Delegate, “failed to apprehend the full implications of these other sales,” suggesting Mr. Burns was working for another company on them.
27. The second relates to the reference in the IR to Mr. Burns purchasing “leads,” which are inquiries made on the websites of suppliers like CanadaDrives.ca and GetGoing.ca from a person who is considered a potential customer of TMT. Purchasing a “lead” gives the purchaser of the lead the right to contact that person. The argument contends that the ability of Mr. Burns to purchase these leads is indicative of his status as an independent contractor.
28. Third, TMT argues the deciding Delegate did not give enough weight to certain facts which TMT says goes to Mr. Burns’ independence:
  - that he was responsible for finding and retaining his own clients;
  - there was no evidence of punishment or “sales targets” Mr. Burns was required to meet;
  - that Mr. Burns did not have to attend monthly sales meetings; and
  - he assumed the cost of transportation fees for selling to clients outside the lower mainland.
29. TMT also argues that although they did not dispute Mr. Burns worked solely for TMT during his tenure, the deciding Delegate erred by not considering he had the ability to work for other companies similar to TMT.
30. TMT submits a proper accounting and weighing of all the facts, including those listed above, should have led to a finding that Mr. Burns was not an employee, but an independent contractor.
31. In respect of the second error of law alleged, TMT argues the deciding Delegate erred when determining the wages owed to Mr. Burns. This argument relates to amounts which were deducted from his wages by TMT and which the deciding Delegate found to be unlawful, being prohibited by section 21 of the *ESA* and not authorized *in writing* as required in section 22(4).
32. The deciding Delegate found TMT to have unlawfully deducted amounts from Mr. Burns wages for the personal use of one of TMT’s vehicles, for 35% of the cost of the leads obtained by him from suppliers, and for the amount of an advance to Mr. Burns’ girlfriend (who was also employed by TMT). While acknowledging there was no written agreement to deduct those amounts, TMT says the deciding Delegate made an error of law, arguing that Mr. Burns verifying the amounts deducted, which is recorded in the IR, should satisfy the requirement for written authorization by him and to do otherwise, when Mr. Burns has acknowledged this amount, would unjustly enrich him, “as he was never entitled to those deductions.”

33. The request to extend the statutory appeal period is based on the failure of TMT to engage legal counsel to prepare an appeal on their behalf until the last minute, requiring said legal counsel to ask for an extension of time to file a submission outlining the reasons and arguments for appeal, and to now make this request.

### ANALYSIS

34. 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.

35. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

36. 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.

37. TMT has chosen the “error of law” ground of appeal.

38. 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.

39. 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.

40. The question of whether Mr. Burns was an employee of TMT for the purposes of the *ESA* is a question of mixed law and fact. In *Britco Structures*, 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.

41. 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.
42. There is no suggestion in the appeal submission that the deciding Delegate misinterpreted or misapplied the *ESA* or the general law; the appeal argues the deciding Delegate erred in law under points 4 and 5 of the definition of error of law adopted by the Tribunal and set out above.
43. Nor does the appeal 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*. Rather, the appeal submission contends the deciding Delegate misinterpreted the facts, or failed to account for all the facts contained in the IR, which led her to take view of the facts that cannot be reasonably entertained.
44. To reiterate, TMT alleges the deciding Delegate made errors of law on two aspects of the Determination: finding Mr. Burns was an employee of TMT for the purposes of the *ESA*; and calculating the wages owed to him by TMT.
45. On the issue of the status of Mr. Burns, TMT makes arguments relating to three elements of the findings made by the deciding Delegate. I am not persuaded that any of these arguments raise an error of law.
46. The first argument relates to two sales Mr. Burns worked on but did not finalize. The argument challenges how the deciding Delegate addressed the circumstances of those sales, by simply accepting the information in the IR that “commissions are not owing on these two sales.”
47. This argument is grounded in the bald assertion that Mr. Burns’ work on those sales shows he had “business relationships with other contractors, like TMT,” a fact which TMT says the deciding Delegate failed to account for in her analysis. That allegation, however, is not supported by anything in the record or in the reasons and I reject it for the following reasons.
48. First, the assertion is not a “fact,” there is simply no evidence Mr. Burns had business relations with other contractors like TMT. Second, the assertion is inconsistent with the statement in the reasons, at page R5, that TMT did not dispute that Mr. Burns worked solely for TMT during his tenure. Third, it does not accord with information contained in two places in the record. At pages 7-8, the IR states:
- Two additional deals . . . are listed in [Mr. Burns’] records but not this Report because they were “scooped” by another dealership and Burns is not owed commissions on those deals.
49. And at page 21, the IR records information Mr. Burns provided about both those deals – that they were “Stole from DMS while I was working on him.”
50. The second argument relates to Mr. Burns purchasing “leads,” which TMT contends is indicative of his status as an independent contractor. I am simply unable to accept Mr. Burns searching out potential clients is demonstrative of the status of independent contractor, particularly when the lead and the client

were integrated into the business of TMT. This finding is reinforced by two other points: that, as noted in the reasons, TMT did not dispute that any sales made by Mr. Burns had to be approved by TMT, and TMT paid Mr. Burns for the leads he brought to their business.

51. Third, TMT argues the deciding Delegate failed to include in her analysis facts which, it is argued, are indicia of independence. I find nothing in this argument that convinces me that these “facts” listed, to the extent they were not addressed in the deciding Delegate’s analysis, are relevant criteria in deciding the question of Mr. Burns’ status.
52. The argument relating to Mr. Burns finding and retaining clients ignores that these “clients” were, on the evidence, TMT’s clients. On any reasonable assessment, that aspect of the relationship does not support its consideration an indicium of independence.
53. The deciding Delegate did address the “fact” that there were no consequences for not attending monthly sales meetings.
54. The matter of “sales targets” was never raised in any submission made by TMT during the investigation. The deciding Delegate can hardly be faulted for not addressing points never raised.
55. The “fact” that Mr. Burns would personally bear the cost of delivery for out-of-town sales cannot be equated with the concept of “risk of loss.” TMT bears the burden of showing this circumstance is demonstrative of his status as an independent contractor. It would take considerably more analysis of this circumstance than TMT has provided in their appeal submission to persuade me that this “fact” was relevant to the question of Mr. Burns’ status under the *ESA*.
56. Finally, TMT says the deciding Delegate erred by not considering that Mr. Burns, even though he worked solely for TMT during his tenure, had the ability to work for other companies similar to TMT. The simple answer to that argument is that the reality of the relationship is determined through objective facts which show what the relationship *is*, not what it might be. The deciding Delegate made no error of law by confining herself to the facts of the relationship and avoiding any speculation about what it could be.
57. In the context of the argument being made here, TMT is required to *objectively* demonstrate there was relevant evidence the deciding Delegate failed to consider and that failure led to an error of law on the facts. In other words, the Tribunal will not presume the deciding Delegate ignored or failed to consider evidence unless it is objectively demonstrated that an express consideration of such evidence in the Determination is legally essential to the ultimate conclusion: see *Jane Welch carrying on business as Windy Willows Farm*, BCEST D161/05, at para 40. TMT has not done this.
58. I find the deciding Delegate did not misinterpret or misapprehend the evidence presented and TMT has not demonstrated there was relevant evidence the deciding Delegate failed to consider. As a result, I find nothing in the appeal on the question of the status of Mr. Burns has altered the facts and factors that were assessed by the deciding Delegate. To the extent this appeal might also challenge the weighing of the facts found, and factors identified, in the reasons, it is well established that assessing the weight of the evidence is within the purview of the deciding Delegate and this Tribunal does not intervene lightly. There is no reason to consider doing so in this appeal.



59. I find the law and the facts support the conclusion reached; I am not persuaded the deciding Delegate made any error of law in finding Mr. Burns was an employee of TMT for the purposes of the *ESA*.
60. In response to that part of the appeal challenging the inclusion of amounts deducted in calculating the wages Mr. Burns was owed, the provisions of the *ESA* on which this part of the Determination was based are clear and unavoidable. Section 21 of the *ESA* prohibits an employer from withholding wages from an employee for any purpose. The *ESA* provides for some limited exceptions to that blanket prohibition that are set out in section 22 of the *ESA*.
61. In the circumstances present here, in order for the withholding of Mr. Burns' wages by the TMT to be lawful, there must be a written assignment of wages. Decisions of the Tribunal have held that assignments permitted by section 22(4) must be clear and unequivocal (see *National Cheese Company (Western) Limited* BC EST # D419/98, and *Honey Pot Enterprises Ltd.* BC EST # D103/06). There must be no doubt that it is a written assignment of wages to meet a credit obligation which is intended. Mere verification by Mr. Burns, in the IR, of the amounts deducted, which TMT suggests should be accepted as a written assignment, does not pass muster and cannot be accepted as meeting the statutory requirements.
62. The deciding Delegate made no error of law in calculating the amounts unlawfully deducted from Mr. Burns' wages. This argument is rejected.
63. For the above reasons, I find there is no merit to the appeal and no reasonable likelihood it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.
64. Based on the result of this decision, it is not necessary to consider the requested extension of the statutory appeal period, although if it were necessary to consider that request, I would be inclined to deny it for two principal reasons: that the explanation for failing to request an appeal within the statutory time limit is not reasonable; and TMT's appeal does not have merit.

#### **ORDER**

65. Pursuant to section 115 of the *ESA*, I order the Determination dated January 24, 2024, be confirmed in the amount of \$17,296.93, together with any interest that has accrued under section 88 of the *ESA*.

---

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