Citation: Ricky Burns (Re)
2024 BCEST 77

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Ricky Burns
("Mr. Burns")

- of a Determination issued by -

The Director of Employment Standards

PANEL:	David B. Stevenson
SUBMISSIONS:	Ricky Burns, on his own behalf
	John Dafoe, delegate of the Director of Employment Standards
FILE NUMBER:	2024/036
DATE OF DECISION:	August 26, 2024

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*ESA*) by Ricky Burns ("Mr. Burns") of a determination issued by Sarah Vander Veen, a delegate ("deciding Delegate") of the Director of Employment Standards ("Director"), on January 24, 2024 ("Determination").

2. The Determination found Mr. Burns' former employer, TMT Auto Finance Ltd. ("TMT"), had contravened Part 3, sections 17, 18 and 27, and Part 7, section 58, of the *ESA* in respect of his employment and 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. Mr. Burns 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 March 20, 2024, the Tribunal received an Appeal Form from Mr. Burns. The Appeal Form attached written reasons for the appeal and a supporting document.

5. The statutory appeal period expired on March 4, 2024. On March 20, 2024, the Tribunal communicated to Mr. Burns that he was required to provide a written request to extend the statutory appeal period. On March 21, 2024, Mr. Burns delivered a request for an extension to the statutory appeal period.

6. 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 were not being sought from them at that time.

7. 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.

8. The Tribunal accepts the record is complete.

9. My review of the submission received with the appeal, the record, and the Determination indicated there was sufficient presumptive merit to the appeal to warrant seeking further submissions from the parties on that matter.

10. In correspondence dated July 10, 2024, the Tribunal invited the Director, TMT, and Mr. Burns to make submissions on the merits of the appeal.

11. The Tribunal received a submission from the Director. No submission was received from TMT. A communication was received from legal counsel who represented TMT on its appeal advising his firm no longer represented TMT and that all future correspondence should be forwarded to them.

12. In correspondence dated July 25, 2024, the submission from the Director was provided to Mr. Burns, who was invited to respond to that submission. The Tribunal has received a response from Mr. Burns.

ISSUE

13. The issue in this appeal is whether Mr. Burns' request to extend the statutory appeal period should be granted and, if so, whether he has shown an error in the Determination.

BACKGROUND FACTS

14. TMT operates an automotive sales business in Langley, BC. It is affiliated with Pioneer Garage Limited carrying on business as Pioneer Auto Group ("Pioneer").

15. Mr. Burns worked as a sales representative from April 28 to November 30, 2021. He was paid solely by commission.

16. Mr. Burns filed a complaint alleging TMT had contravened the *ESA* by failing to pay commissions owed, failing to pay annual vacation pay, and had made unauthorized deductions from his wages.

17. 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.

18. 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.

19. The investigating Delegate issued a Demand for Records, which required TMT to "disclose, produce and deliver" all payroll records for Mr. Burns, including "Records of all sales and commission entitlements." TMT did not fully comply with the Demand. The Determination notes they did not provide records for several of Mr. Burns' deals, including a deal involving a vehicle purchase which I shall refer to as the "Cohen deal," which Mr. Burns has made the primary subject of this appeal.

20. The IR indicates the investigating Delegate issued a Production of Records to Pioneer (although it does not appear to have been included in the record), and was provided with "Deal Summary and JRN VS sheets for all the deals in question."

21. 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*?

22. On the first issue, the deciding Delegate found Mr. Burns was an employee of TMT for the purposes of the *ESA*.

23. 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."

24. That part of the Determination was appealed by TMT and has been dismissed: see *TMT Auto Finance Ltd.*, 2024 BCEST 62.

25. 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 concerning [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 on a deal.

26. 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.

27. On the fourth issue, the deciding Delegate found Mr. Burns was owed the amounts set out in the Determination.

28. The deciding Delegate found TMT had contravened several sections of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

29. Mr. Burns submits, on the merits of the appeal, that there was an error calculating his commission wages on the "Cohen deal" and he is owed an additional $12,586.39 on that deal.

30. In support of his appeal, he has filed a document he identifies as the "washout" on the "Cohen deal," which he says shows the information provided by TMT on that deal in the investigation was incorrect, and possibly deliberately false. Mr. Burns says he pulled a "proper washout" on January 25, 2024, which shows a different gross amount on the sale than what TMT provided to the investigating Delegate and has submitted that document as the basis for his appeal.

31. In support of his request for an extension of the appeal period, Mr. Burns says the reason for the delay in filing an appeal was because the appeal filed by TMT caused him to look again at some of the information provided by TMT to the investigating Delegate and he has found the "gross" on that deal was significantly more than what TMT presented.

32. The Director has submitted a response to the request for an extension and to the merits of the appeal.

33. In respect of the former, the Director says the request does not address, and does not satisfy, those factors which the Tribunal has considered when deciding whether to extend the statutory appeal period.

34. In response to the latter, the Director says the appeal ignores the finding of the deciding Delegate, that the "best evidence" of the "gross profit" for the purpose of calculating the commission owed to Mr. Burns on all of his deals, including the "Cohen deal," was that the "Total Gross" amount found on the JRN VS sheets was the amount upon which commissions were calculated as opposed to the amount shown on the Deal Summary. The JRN VS sheet for the "Cohen deal" is found in the IR at page 105.

35. The Director also says Mr. Burns has not challenged the manner in which the commission wages were calculated for any other deal.

36. In his reply to the Director's response, Mr. Burns has met the submissions of the Director by re-visiting the calculations for all of his deals and submitting a claim for commission wages well in excess of the amount he was found to be owed in the Determination.

ANALYSIS

37. I shall first address the failure of Mr. Burns to file his appeal within the statutory appeal period, as this failure gives me the discretion to dismiss this appeal without further analysis.

38. The approach adopted by the Tribunal to cases of this sort is well established. The *ESA* imposes a deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

> Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

39. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be addressed in deciding whether to grant an extension:

1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The responding party and the Director have been made aware of the intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension; and
5. There is a strong *prima facie* case in favour of the appellant.

40. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered.

41. What became Mr. Burns' appeal was initially filed with the Tribunal on March 16, 2024, in response to TMT's appeal which challenged the finding that Mr. Burns was an employee of TMT for the purposes of the *ESA*, the calculations of wages owed by the deciding Delegate, and sought to introduce new evidence (a ground of appeal that was later abandoned).

42. I find Mr. Burns' explanation for seeking an extension – that he believed TMT's appeal allowed him to seek to correct what he feels is an error in calculating his commission on one of his deals – is reasonable and credible.

43. It is fair to say that Mr. Burns did not demonstrate any intention to appeal the Determination before TMT filed their appeal to have the Determination cancelled or, alternatively, varied to reduce the amounts found owing, but I do not view his response as being unreasonable.

44. Most significantly, however, as I will explain in this decision, I am of the view that Mr. Burns has a strong *prima facie* case which I find, in the circumstances, warrants examination.

45. In the circumstances, I am granting the request for an extension of the statutory appeal period.

46. 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.

47. 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.

48. While the ground of appeal raised by Mr. Burns is the "new evidence" ground of appeal – section 112(1)(c) – applying the test for admitting "new evidence" on appeal, I find this ground of appeal has not been made out: see *Bruce Davies and others*, BC EST # D171/03.

49. However, the Tribunal has opted to not "mechanically" adjudicate appeals based solely on the particular box checked off by the appellant. Rather, the Tribunal takes a "large and liberal" view of the grounds of appeal, addressing the explanations of an appellant for challenging the determination as necessary to ensure that all parties receive "fair treatment": see *Triple S Transmissions Inc. o/a Superior Transmissions*, BC EST # D141/03.

50. In other words, while Mr. Burns has not described his appeal as an error of law or as a breach of natural justice, the Tribunal has opted not to dispense with considering other possible grounds of appeal simply because an unsophisticated appellant may not have correctly characterized the grounds of appeal: *Re Philp,* BC EST # D058/04, *Re J.C. Creations Ltd.*, BC EST # RD317/03).

51. I find this case is more appropriately considered under the "error of law" and "natural justice" grounds of appeal.

52. 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.

53. An error of fact can give rise to an error of law in some circumstances, such as where there is no evidence to support a finding of fact, where the deciding Delegate has failed to consider relevant and cogent evidence, or where a determination is reached on a view of the facts which could not reasonably be entertained.

54. The question raised invokes a consideration of how the deciding Delegate assessed the evidence that was compiled during the complaint investigation, specifically whether the investigating Delegate failed to conduct an adequate investigation and whether, as a result, the deciding Delegate was not provided with, and thus failed to consider, relevant and cogent evidence. In addressing this question, I am mindful of the admonition found in *Jane Welch operating as Windy Willows Farms*, BC EST # D161/05, that the Tribunal should not lightly find a delegate of the Director has failed to consider relevant evidence.

55. I also accept the comments made in that case, at para. 41, recognizing that while the Director and her delegates have a duty, both under the *ESA* and at common law, to provide reasons for their determinations, not every finding and conclusion needs to be explained and there is no need to expound on each piece of evidence or controverted fact. The caveat is that the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate's reasons.

56. A conclusion on whether the deciding Delegate failed to consider relevant evidence involves an assessment of both the deciding Delegate's reasons and an analysis of the issues to which the evidence is relevant. Where the reasons provided demonstrate a failure by the deciding Delegate to consider relevant and cogent evidence that leads to findings of fact that are not supported on the evidence considered by the Director or which do not reasonably support the conclusions reached, there is an error of law (and depending on the circumstances, a breach of natural justice) that justifies intervention.

57. The deciding Delegate acknowledged that, "[t]he evidence regarding which amounts were deductible from the gross profit to form the Complainant's commission base was scant."

58. The Determination notes that "[o]ther than the DS and JVS sheets, neither party provided any documents or witness evidence in support of their testimony or calculations." The information provided to the investigating Delegate relating to TMT's gross profit in a deal was from a discussion with the Controller of Pioneer, who described the relationship between Pioneer and TMT – "TMT sells Pioneer's vehicles in exchange for a flat-rate pack fee of $750 remitted to Pioneer for every vehicle sold" – and how the particulars of the sale are conveyed between Pioneer and TMT:

> When a deal is made, TMT creates and sends a Deal Summary sheet to Pioneer along with accompanying paperwork. Once the deal is approved and entered by Pioneer, Pioneer sends a Pioneer Used Vehicle Sales (JRN VS) document back to TMT as a final representation of the deal. On occasion, JRN VS sheets can be amended or corrected in the event of an error, but they generally represent the final profit retained by TMT.

59. That information is captured in the Determination at page R6:

> A commission base is calculated by taking a "gross" profit and deducting expenses and other agreed-upon amounts. In this case the parties did not agree on which number on which document represented TMT's gross profit. Pioneer's Controller, who has no monetary stake in this dispute, said that the Respondent's gross profit from each sale was the "Total Gross" amount set out in the lower left of the JRN VS sheets minus a$750.00 pack fee that Pioneer retained, and I so find.

60. In response to the Demand served on them, Pioneer did not provide any "accompanying paperwork." In fact, on the Cohen deal there was *no* evidence regarding the amounts which were deductible from the "gross" profit set out in the Deal Summary prepared by TMT, merely a figure placed on a JRN SV sheet for that deal.

61. The record provided to me by the Director does not include any notes of conversations with the parties and other witnesses. It is difficult to assess what, precisely, the information given to the

investigating Delegate by Pioneer's Controller actually was. The record presumptively should have included the notes of that discussion, given that the investigating Delegate gives it prominence in the IR and the deciding Delegate relies in her reasons on that information. There is no indication in any part of the record that the Controller for Pioneer was ever asked whether that figure might or might not be "expenses and other agreed-upon amounts" fully and fairly represented deductions from the "gross" profit related to the Cohen deal.

62. The deciding Delegate uncritically adopted the information recorded in the IR from Pioneer's Controller, in part, on the basis that Pioneer's controller had "no monetary stake in this dispute," which on closer analysis isn't entirely correct as the less the amount of profit paid to TMT, the more of the sale proceeds will be retained by Pioneer.

63. In any event, that is not my principal concern, which is that the information provided doesn't answer the most significant question on the matter of Mr. Burns wage entitlement relating to the Cohen deal: how does that deal transition from the "gross" profit amount set out in the Deal Summary prepared by TMT, of $37,009.00, which would have entitled Mr. Burns to a commission of approximately $13,000.00, to one showing a *loss* to TMT on that sale of $7,460.05, providing Mr. Burns with a commission of $500.00 when the deal was transposed to the JRN VS sheet. There is nothing on any document, or in any other material in the record, which answers that concern.

64. The absence of such evidence is entirely down to TMT essentially snubbing the Demand for Records, providing no evidence relating the Cohen deal, and the failure of the Investigating Delegate to follow up and compel disclosure.

65. In my view, it was necessary for the investigation Delegate to identify who determines what amounts are deducted from the "gross" profit set out in the Deal Summary prepared by TMT, what those amounts actually represent, how they are calculated, to what extent they affect Mr. Burns' commission entitlement, and whether such deductions are consistent with provisions of the *ESA*. Neither the IR nor the Determination make any reference to this matter. Such information is both relevant and cogent because the amounts apparently deducted from the "gross" profit set out in the Deal Summary prepared by TMT substantially determine the commission base.

66. In the context of Mr. Burns' appeal, such evidence is not only relevant and cogent to an analysis of the commissions to which he was entitled, it is critical to understanding how the transition from the Cohen Deal Summary submitted by TMT to the JRN VS prepared by Pioneer can result in reducing his wage claim on that deal from $12,603.15 to a finding of $500.00.

67. I reiterate that TMT avoided providing any records relating to this deal and, from all appearances, the investigating Delegate allowed that to happen. In fact, looking at the record, TMT failed to provide a significant number of documents that would be captured by the Demand for Records and this was allowed to slide.

68. It may also have been relevant that the JRN VS for the Cohen deal is dated as posted January 1, 2022, even though the contract date on the Deal Summary provided during the investigation by both Mr. Burns and by Pioneer is November 4, 2021. That anomaly is never raised or addressed in the IR or the investigation.

69. The deciding Delegate recognized the "paucity of evidence" regarding which amounts were deductible from the gross profit to form the Complainant's commission base, but made findings of fact without a proper consideration of all relevant evidence.

70. The findings on the issue of the commission base were not supported on an examination or an assessment of the relevant evidence and, therefore, could not reasonably be viewed as supporting the conclusions reached in the Determination.

71. By failing to identify and consider relevant and cogent evidence I am of the view that the deciding Delegate's finding regarding the amount upon which Mr. Burns commission on the Cohen deal was based on a view of the facts that could not be reasonably entertained.

72. It is trite that a failure by the deciding Delegate to consider relevant evidence is an error of law. As well, the Tribunal has also found the possibility that such a failure by the deciding Delegate could constitute a breach of natural justice, which would be reviewable by the Tribunal under s. 112(1)(b) of the *ESA*. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice. A failure to consider relevant evidence is generally treated as a breach of natural justice: see *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05 at para. 39.

73. Principles of natural justice are, in essence, procedural rights that ensure fairness in the process; they are context driven. As noted by the Tribunal in *Inshalla Contracting Ltd.*, BCEST # RD054/06 at para. 22, citing *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602:

> Indeed, the attributes of natural justice may vary according to the character of the decision and the context in which it applies.

74. In the context of this case my concern about whether the deciding and investigating Delegates failed to observe principles of natural justice arises from the failure of the investigating Delegate to identify and consider relevant evidence and from the deciding Delegate adopting that failure in the reasons for Determination.

75. I do not purport to say an investigation into this area and an examination of the evidence revealed through such investigation would have changed the result, but that does not change my conclusion that the investigation was inadequate and that the deciding Delegate relied on an incomplete investigation. I find these failings compromised the fairness of the process, and that the Delegates involved thereby failed to observe the principles of natural justice.

76. Since I am satisfied that the deciding and investigating Delegates erred in law and failed to observe the principles of natural justice by reason of their failure to conduct an adequate investigation and to consider certain evidence in calculating Mr. Burns' commission on the Cohen deal, I must decide what is the appropriate remedy. The factual record is not sufficient for a proper assessment of the issue raised in this appeal, so I am not in a position to address the matter myself. Further, given the limited grounds of appeal under the *ESA*, it is more in keeping with the Tribunal's role to remit this case back to the Director for further investigation.

ORDER

77. Pursuant to section 115(1) of the *ESA*, I order the Determination dated January 24, 2024, be varied in accordance with the above and the matter be referred back to the Director for further investigation and decision.

David B. Stevenson
Member
Employment Standards Tribunal