Citation: Unitow Services (1978) Ltd. (Re)
2024 BCEST 96

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Unitow Services (1978) Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Carol L. Roberts
SUBMISSIONS:	Stella Tarantino, on behalf of Unitow Services (1978) Ltd.
FILE NUMBER:	2024/070
DATE OF DECISION:	October 18, 2024

DECISION

OVERVIEW

1. Unitow Services (1978) Ltd. ("Employer") appeals a determination issued by a delegate of the Director of Employment Standards ("Director") on May 10, 2024 ("Determination"), pursuant to section 112 of the *Employment Standards Act* (*ESA*).

2. Gurprit Malhi ("Employee") filed a complaint with the Director alleging that the Employer had contravened the *ESA* in failing to pay him minimum wage, overtime wages, and statutory holiday pay.

3. A delegate of the Director ("Investigating delegate") investigated the Employee's complaint and issued an Investigation Report ("Report"). The Report was provided to the parties for response on March 15, 2024. A second delegate ("Adjudicating delegate") reviewed the information produced during the investigation, the Report, and the responses of the parties to that Report, before issuing the Determination.

4. The Adjudicating delegate determined that the Employer had contravened sections 17/18, 58 and 63 of the *ESA* in failing to pay the Employee wages, annual vacation pay, and compensation for length of service. The Director determined that the Employee was entitled to wages and accrued interest in the total amount of $3,691.72.

5. The Director also imposed three $500 administrative penalties for the contraventions of the *ESA* for a total amount owing of $5,191.72.

6. The Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

7. Section 114(1) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions and the record, I found it unnecessary to seek submissions from the Employee or the Director.

8. This decision is based on the section 112(5) "record" that was before the Adjudicating delegate at the time the Determination was made, the appeal submission, and the Reasons for the Determination.

FACTS

9. The Employer is a British Columbia incorporated company which operates a tow truck business in Surrey, British Columbia.

10. The Employee was employed as a tow truck driver from February 6, 2020, until May 29, 2020, when he resigned. He was rehired to perform "bridge duty" shifts approximately one month later, although the parties did not agree on the date. He resigned from his second period of employment on August 27, 2021.

11. On May 27, 2021, while still employed, the Employee filed a complaint alleging that the Employer had contravened the *ESA* by, among other things, failing to pay wages for driving time and not providing uninterrupted meal breaks after 5 hours. A delegate of the Director investigated that complaint, but because the Employee did not file another complaint after his employment ended, a second investigation was not undertaken for the period May 28, 2021, until the end of his employment.

12. In a determination dated July 6, 2023 ("2023 Determination"), the Director determined that the Employee was entitled to wages arising out of his first complaint. The Employer appealed the 2023 Determination with respect to the Director's findings that the Employee was entitled to travel time from his residence to the bridge duty sites. The Tribunal dismissed the Employer's appeal (see *Unitow Services (1978) Ltd.*, 2024 BCEST 10).

13. On July 6, 2023, the Employee filed a second complaint to address outstanding wages for driving time and meal breaks and overtime wages from May 28, 2021, until the end of his employment. The Employee also sought an extension of time in which to file the complaint alleging that he had been "misinformed by my case worker at your office that I couldn't file for this time."

14. The Employer objected to the complaint on the basis that it had been filed well past the deadline for filing such a complaint and said that it had no additional information to submit that was different from the first complaint.

15. The Adjudicating delegate considered that although the Employee's complaint was filed past the six-month statutory period for filing complaints, the investigation into the Employee's first complaint, which was filed May 2021, was not started until July 2022. The Adjudicating delegate further considered that that the Employee was not told he would be required to file a second complaint for the balance of his employment until that date, as the Investigating delegate at that time was under the mistaken belief that the Employee could not file a late complaint. The Employee was later advised by a different delegate to file an out of time complaint to address his alleged outstanding wages from May 28, 2021, until August 27, 2021.

16. The Adjudicating delegate noted that the Director's "usual practice" was to advise an employer against whom a complaint was made by an existing employee that the Director would start a second investigation to ensure that the employer complied with the *ESA* and remedied any contraventions of it. The Adjudicating delegate considered that the Employee was not made aware of the requirement to file a second complaint until approximately 24 months after he delivered his first complaint because he had initially been given inaccurate information.

17. The Adjudicating delegate determined that the second complaint was filed almost two years after his employment ended and thus past the statutory time period within which to file a complaint. She also considered the Employer's submissions on the question of whether the Director should exercise her discretion under section 74(5) of the *ESA* to accept the second complaint. The Adjudicating delegate also considered the Employer's submission that it should not bear responsibility for the Director's error.

18. The Adjudicating delegate noted that, had the Director been able to investigate the Employee's complaint within a year, the Director could have initiated an investigation into the travel and

inspection time and compensation for length of service issues to the end of the Employee's employment under the previous provisions of the *ESA*. The Adjudicating delegate determined the length of time it took the Employment Standards Branch to begin investigating the Employee's complaint, coupled with the misinformation the Employee received about filing an out of time complaint, constituted "special circumstances" under section 74(5)(a) of the *ESA*.

19. The Adjudicating delegate further determined that although the Employee had not indicated that an injustice would result if the Director did not extend the time for delivering his complaint, it was reasonable to conclude that he would lose the ability to recover wages the Employer did not dispute were owed, as well as wages alleged to be owed and that were found to be owed in a previous determination.

20. The Adjudicating delegate determined that the Director should exercise her discretion to accept the second complaint although it had been filed after the section 74(3) statutory time limit.

Outstanding wages

21. The Adjudicating delegate determined that, based on the Employer's records and the Employer's agreement, the Employee had not been paid all wages he was entitled to for work and travel time on July 24 and 25, 2021.

22. The Adjudicating delegate further determined that the Employer permitted the Employee to drive a specific tow truck to his home and park it there after each shift. The Employee claimed one half hour travel time for driving the Employer's truck from his home to his assigned site at the start of every shift. The Employer disputed the Employee's entitlement to wages for travel time, arguing that this was the Employee's choice, and it was a "perk" for him to drive the Employer's vehicle rather than to pick the tow truck up from the Employer's yard and return it after a shift. The Employer argued that travel time would only be compensated if the Employee arrived at the Employer's yard and picked up the tow truck to drive it to the bridge site. However, the Employer acknowledged that the Employee had not been compensated for time spent picking up and dropping off a heavy-duty tow truck at the Employer's site on July 24 and 25, 2021.

23. The Adjudicating delegate re-iterated her conclusions from her determination on the first complaint, which was that there was a presumption that time taken by an employee to travel to and from their place of work is not "work" but a commute for which an employee is not entitled to wages. The Adjudicating delegate set out a non-exclusive list of factors that an employee would have to establish to overcome the presumption, including whether the employer provided the employee with a vehicle for a specific purpose that related to the travel claim, whether the use of the vehicle by other employees is mandatory, and whether there was a reasonable alternative means of getting to the worksite. (relying on the Tribunal's decision in *Grand Construction Ltd.*, BC EST # D18/13)

24. The Adjudicating delegate then considered that because the Employer required the tow truck to be delivered to the bridges for the Employee's bridge duty shifts, it was irrelevant whether the Employee drove the tow truck directly from his home to the bridge or from the Employer's yard to the bridge each shift. She found that driving the tow truck to the bridge was for a specific and mandatory purpose, was a requirement of the Employer, and constituted work for which the Employee was entitled to be compensated. The Adjudicating delegate then found that the Employer did not require

the Employee to return the tow truck to the Employer's yard after each bridge duty shift and that when the Employee chose to drive the truck directly home after each shift rather than return it to the Employer's yard, he was not under the control and direction of the Employer. The Adjudicating delegate concluded this driving time was a commute for which he was not entitled to be compensated.

25. The Adjudicating delegate noted these conclusions were upheld on appeal and because the Employer provided no new evidence or submissions, she arrived at the same conclusions for the new complaint.

Compensation for Length of service

26. The parties disagreed about the end of the employment. The Employer contended that the Employee quit while the Employee contended that the Employer substantially altered a condition of his employment, which constituted constructive dismissal.

27. The Employer did not dispute that the Employee's hours of work would have been cut unless he drove a specific heavy-duty truck as directed by his supervisor. The Adjudicating delegate found there was a change in the Employee's scheduled days and hours of work. She then considered whether those changes were substantial enough to constitute a termination. A review of the Employer's records demonstrated that the Employee worked approximately 45 hours per week between July 3, 2020, and August 27, 2021. The Employer's schedule for August 30 to September 5, 2021, showed that the Employer removed the Employee's Monday and Tuesday morning shifts, which resulted in him being scheduled for 37 hours of work for that week. The Employer did not dispute the Employee's evidence that he was told that if he did not take the heavy-duty tow truck shift, he would be scheduled for even fewer hours. The Adjudicating delegate found that if the Employee was scheduled to only one shift per day over a five-day work schedule, he would only work 55% of his usual or average hours of work, and that this change represented a substantial change to a condition of his employment.

28. The Adjudicating delegate then considered whether she should exercise her discretion to determine whether the Employee's employment had been terminated, based on the statutory purposes and object of the provisions relating to the termination of employment (referred to in *Thrifty Foods,* BC EST # D031/18).

29. The Adjudicating delegate considered the purposes of the *ESA*, specifically the provision to promote the fair treatment of employees and employers (section 2). She noted that the Employer unilaterally assigned some of the Employee's shifts to other drivers over his objections, as well as the fact that the Employee was given two weeks verbal notice and what appeared to be only a few days' written notice of the change to his hours of work and compensation. The Adjudicating delegate also considered that a 45% reduction in the Employee's normal or average hours with little or no notice was not only unfair but constituted a substantial alteration to the conditions of his employment. The Adjudicating delegate determined that the Employee's employment had been terminated.

30. The Adjudicating delegate rejected the Employer's argument that the Employee quit when the Employer refused his request to be scheduled for 2 days off in a row, similar to other employees, or that he stated that he did not want to work weekends. The Adjudicating delegate noted that there was no dispute that the Employee had repeatedly asked the Employer to accommodate this request.

31. The Adjudicating delegate found that the Employer's offer for the Employee to drive truck 994 on weekends did not constitute reasonable alternative employment, as truck 994 shifts required the Employee to work increased hours each shift for no additional pay and with a corresponding reduced hourly rate. Driving truck 994 would also require the Employee to complete his split shifts after more than 12 hours each day in contravention of section 33 of the *ESA* and potentially put him in breach of the Motor Vehicle Act Regulations.

32. The Adjudicating delegate determined that the Employee was entitled to compensation for length of service.

Argument

33. The Employer contends that the Adjudicating delegate erred in imposing administrative penalties (which the Employer characterized as "fines"). The Employer argues that the penalties are "redundant" and constitute "double jeopardy" because the issues raised in the second complaint had been addressed in the previous decision and the penalties had been paid.

34. The Employer further contends that the Adjudicating delegate erred in concluding that the Employee was entitled to compensation for length of service. The Employer contends that the Employee quit, and that this issue was addressed in the first complaint.

35. Finally, the Employer argues that the Adjudicating delegate erred in determining that the Employee was entitled to compensation for time spent travelling from home to the job site. The Employer says that "the travel time from home to the job site is only warranted for the large truck that could not be parked at the residence."

ANALYSIS

36. Section 114(1) of the *ESA* provides that 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.

37. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;

- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

Failure to observe the principles of natural justice

38. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.

39. The Employer was informed about the complaint and given the opportunity to respond. The record demonstrates that the Employer did respond to the Investigating delegate's inquiries and made submissions in response to the specific issues raised by the Employee. Furthermore, the Employer was provided with a copy of the Investigation Report and given the opportunity to make further submissions in response to that report.

40. The fact the Employer now disagrees with the Adjudicating delegate's analysis and conclusions does not constitute a denial of natural justice. I find no basis for this ground of appeal.

Error of Law

41. 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.

42. The Employer argues that the Adjudicating delegate erred in imposing administrative penalties on the basis that the Employee's complaint had already been adjudicated and the penalties paid.

43. I am unable to agree. The Employee's second complaint related to issues arising during an entirely different period of employment from the first complaint. While the first complaint was for the period February 6, 2020, to May 27, 2021, the second complaint was for the period May 28, 2021, to August 27, 2021. The Employee's allegations relating to the second period of employment were not investigated during the investigation of the first complaint. In addition, some of the issues addressed during the investigation of the second complaint, including allegations regarding compensation for length of service, were not at issue in the first complaint.

44. I find no error in the Adjudicating delegate's finding of contraventions of the *ESA*, and the consequential penalty assessments, which are mandatory once a contravention is found.

Compensation for length of service

45. In *Britco Structures Ltd*., BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law only if they were based on no evidence, or a view of the facts which could not reasonably be entertained.

46. Section 66 of the *ESA* gives the Director the discretion to determine that the employment of an employee has been terminated where a condition of employment has been substantially altered.

47. In *Bogie and Bacall Hair Design,* BC EST # D062/08, the Tribunal found that the essential elements of section 66 of the *ESA* were a finding that there was a change in the conditions of employment, that the change was substantial, and that the change constituted a termination.

48. Section 1 of the *ESA* defines "conditions of employment" to mean "all matters and circumstances that in any way affect the employment relationship of employers and employees." In *Helliker*, BC EST # D338/97, the Tribunal determined that to find a termination of employment under section 66, any alterations to the conditions of employment must be "sufficiently material that it could be described as being a fundamental change in the employment relationship." In *Robert Craig*, BC EST # D052/10, reaffirmed in *Willis*, BC EST # D076/14, The Tribunal stated

> ...the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:
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> a) the nature of the employment relationship;
>
> b) the conditions of employment;
>
> c) the alterations that have been made;
>
> d) the legitimate expectations of the parties; and
>
> e) whether there are any implied or express agreements or understandings.
>
> (my emphasis)

49. The Tribunal has also affirmed common law principles of constructive dismissal in determining whether an employer has substantially altered a condition of employment under section 66. (see, generally, *Kyah Development Corporation*, 2020 BCEST 112)

50. The Director's exercise of discretion will only be interfered with in exceptional and limited circumstances (see *Re: Jody L. Goudreau and Barbara E. Desmarais of Peace Arch Community Medical Clinic Ltd.* (BC EST # D066/98). An appellant must show that the Director made a mistake in construing the limits of her authority, there was a procedural irregularity, the exercise was an abuse of power, or the decision was unreasonable, in the sense that the Director considered irrelevant factors and did not consider relevant ones.

51. The undisputed evidence before the Adjudicating delegate was that the Employee's hours of work would have been cut unless he drove heavy-duty truck shifts and that the heavy-duty truck shift work represented 55% of his usual or average hours of work per week. She determined that this change to the Employee's hours of work represented a substantial change to a condition of his employment. I find no error in the Adjudicating delegate's conclusion based on the facts before her.

52. The Adjudicating delegate then went on to consider whether she should exercise her discretion to find that the Employee's employment had been terminated. She noted that, in exercising her discretion she was to be guided by the purposes and objects of the *ESA* and the statutory purposes of the provisions relating to the termination of employment.

53. I am unable to conclude that the Adjudicating delegate considered irrelevant factors or failed to consider relevant ones, that there was a procedural irregularity, or that the Director made a mistake in construing the limits of her authority.

54. I am not persuaded the Employer has demonstrated an error of law.

Compensation for travel time

55. The Adjudicating delegate considered the Employer's arguments regarding the Employee's claim for wages for travel time to drive the Employer's tow truck from his home to the bridge duty site and repeated submissions made in response to the Employee's first complaint. The Adjudicating delegate repeated the reasons she gave for finding that the Employee was entitled to wages for providing services to the Employer, reasons which were upheld on appeal. Given that the Employer provided no new evidence or submissions, the Adjudicating delegate found no basis to depart from her earlier conclusions and repeated those in her second Determination.

56. The Adjudicating delegate's reasons for determining that the Employee was entitled to wages for 30 minutes driving the tow truck from his home to the assigned bridge or from the Employer's yard to the assigned bridge, for driving the tow truck from one bridge to another when the first shift ended and the second started 30 minutes later, and driving the tow truck from the bridge to the Employer's yard at the end of a shift for the purpose of returning to switching tow trucks when required or directed by the Employer, were upheld by the Tribunal in a previous appeal. As the Employer has failed to demonstrate how the Adjudicating delegate erred in law in her conclusions, I find no basis for this ground of appeal.

57. In conclusion, I find, pursuant to section 114(1)(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

58. I dismiss the appeal.

ORDER

59. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115(1)(a) of the *ESA*, the Determination, dated May 10, 2024, is confirmed in the amount of $5,191.72, together with whatever interest may have accrued since the date of issuance.

/s/ Carol L. Roberts

Carol L. Roberts
Member
Employment Standards Tribunal