

Citation: Custom Driven Designs Inc.,
formerly known as Custom Drive Designs Inc.
2024 BCEST 117

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Custom Driven Designs Inc.,
formerly known as Custom Drive Designs Inc.
("Custom Driven")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

SUBMISSIONS: Nathaniel Mcghie, legal counsel for Custom Drive Designs Inc., formerly known as Custom Driven Auto Inc.

FILE NUMBER: 2024/093

DATE OF DECISION: December 20, 2024

DECISION

OVERVIEW

1. Custom Driven Designs Inc., formerly known as Custom Drive Designs Inc. (“**Custom Driven**”) appeals a determination issued on June 14, 2024 (the “**Determination**”), by a delegate (the “**Delegate**”) of the Director of Employment Standards (the “**Director**”).
2. The Determination held Custom Driven contravened the *Employment Standards Act (ESA)* and ordered Custom Driven to pay Karthigayan Ponnayya wages, overtime, statutory holiday pay, annual vacation pay, minimum daily pay adjustment, hours free from work adjustment, and interest totaling \$13,814.95. The Determination also levied administrative penalties totaling \$4,500.00 for a total amount payable of \$18,314.95.
3. Custom Driven appeals on the ground that the Director erred in law.

BACKGROUND

4. Custom Driven is a British Columbia corporation that operates a business specializing in car customization in Richmond, B.C., which falls within the jurisdiction of the *ESA*.
5. Mr. Ponnayya worked as a helper and car wrap installer with Custom Driven from October 1, 2021, to April 12, 2022. Mr. Ponnayya quit on April 13, 2022, citing low pay as the reason.
6. Mr. Ponnayya subsequently filed a complaint under section 74 of the *ESA* alleging Custom Driven had contravened the *ESA* by failing to pay Mr. Ponnayya wages owing.
7. A delegate of the Director (the “**Investigator**”) followed up with the parties and requested evidence and submissions about their respective positions. The Investigator received statements and evidence from the parties and their representatives. As part of the investigation, the Investigator also followed up with various witnesses for further information.
8. The Investigator prepared a report for Custom Driven and Mr. Ponnayya dated August 4, 2023, summarizing the information provided by Mr. Ponnayya and Custom Driven's representative and including a list of relevant records and documents (the “**Investigation Report**”).
9. Custom Driven and Mr. Ponnayya were requested to review the Investigation Report carefully and were given an opportunity to provide further information and clarification.
10. Custom Driven and Mr. Ponnayya provided further information and responses to the Investigator. The information and responses were disclosed by the Investigator to the parties and representatives for review and any further response.
11. The Investigation Report and the evidence from the parties were subsequently submitted to the Delegate for a determination.
12. The Delegate issued the Determination dated June 14, 2024.

13. As noted above, the Determination held Custom Driven owed Mr. Ponnayya wages, overtime, statutory holiday pay, annual vacation pay, minimum daily pay adjustment, hours free from work adjustment, and interest totaling \$13,814.95. The Determination also levied administrative penalties totaling \$4,500.00 for a total amount payable of \$18,314.95.

14. Custom Driven appealed the Determination.

ARGUMENTS

15. Custom Driven submits on the Appeal Form that the Director erred in law in the Determination.

16. Custom Driven sets out submissions and evidence in support of its appeal.

17. Custom Driven submits the Delegate “mistakenly assumed” Mr. Ponnayya was an employee under the *ESA* and that the Delegate should have found Mr. Ponnayya to be an “independent contractor” not entitled to the wages found owing.

18. In the alternative, Custom Driven submits the Determination improperly calculated the amount owing to Mr. Ponnayya. Custom Driven submits the assessment of the evidence was flawed and states: “The Delegate erred in failing to properly consider the terms of the agreement between [Custom Driven and Mr. Ponnayya] when calculating hours worked – much of the time [Mr. Ponnayya] spent at [Custom Driven's] premises was used to work on his own contracts independent of [Custom Driven].”

19. In sum, Custom Driven submits that the calculation of wages, overtime, statutory holiday pay, annual vacation pay, minimum daily pay adjustment, hours free from work adjustment, interest, and administrative penalties is incorrect and the Determination should be set aside or, in the alternative, reduced.

ANALYSIS

20. These reasons are based on the written submissions of Custom Driven, the Determination, and the section 112(5) record (the “**Record**”).

21. On receiving Custom Driven's appeal, the Tribunal, Custom Driven, and Mr. Ponnayya received the Record from the Director for purposes of the appeal. The Tribunal requested submissions on the completeness of the Record from the parties. I note there was an objection to the completeness of the Record, which was remedied. As the Tribunal did not receive any further objections, the Tribunal accepts the Record as complete.

Appeal of the Determination

22. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

23. An appeal is limited to the specified grounds set out in the *ESA*. An appellant has the onus to show that the appeal meets one or more of the specified grounds. An appeal is not another new hearing of the case nor is it meant to be an opportunity to resubmit an appellant's facts and arguments before a different forum and 'try again.'

Error in Law

24. To show an error in law, Custom Driven has the burden to show a material legal error in the decision. Examples of errors in law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466).

25. A disagreement with a finding of fact does not amount to an error in law. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate (see *Britco Structures Ltd.*, BC EST # D260/03; *M.S.I. Delivery Services Ltd.* BC EST # D051/06, upheld on reconsideration BC EST # RD082/06; *Noor Investments Ltd. (Re)* 2021 BCEST 50 - calculation of wages owing finding of fact).

26. I have reviewed Custom Driven's submissions, the Determination, and the evidence in the Record and do not find an error of law in the Determination.

27. The finding that Mr. Ponnayya was in an employment relationship and not an independent contractor was based on the applicable law and facts found by the Delegate. Although Custom Driven resubmits evidence and arguments about Mr. Ponnayya's work, the Delegate properly considered the submissions and evidence within the established law and came to a conclusion based on the law, evidence and findings of fact (see *Beach Place Ventures and Black Top Cabs* 2019 BCEST 23, aff'd 2019 BCEST 61, aff'd 2021 BCSC 1463, aff'd 2022 BCCA 147, leave to SCC dismissed 2023 CanLII 8264 (SCC); *Ajay Chahal (Zip Cartage)*, BC EST # D109/14, aff'd BC EST # RD005/15; *United Specialty Products Ltd.*, BC EST # RD126/12).

28. I find there was evidence to support the finding that Mr. Ponnayya was an employee under the *ESA* and Custom Driven has not met the required onus to show there was an error of law in the Determination. Custom Driven's own evidence during the investigation included statements and submissions clearly supporting the finding Mr. Ponnayya met the definition of employee set out in the *ESA*. The Record indicates the Investigator followed up on submissions from Custom Driven's representative and witnesses about Mr. Ponnayya working independently, and the evidence on investigation did not support Custom Driven. I have also reviewed the decisions cited by Custom Driven and find they do not assist. There was clearly evidence the Delegate could rely on to find Mr.

Ponnayya was performing work normally performed by an employee and was entitled to wages for work performed such that Mr. Ponnayya was in an employee relationship within the *ESA* (see *Specialist Real Estate*, BC EST # D027/05; *Perfect Partners Inc.*, BC EST # D012/01; *Cambie Malone's Corporation*, 2016 Canlii 153640 (BCEST); *Wildflower Productions Inc.*, 2000 Canlii 49689 (BCEST)).

29. I have also considered Custom Driven's alternative submission that, even if Mr. Ponnayya was an employee or dependent contractor under the *ESA*, the Director erred in the calculation of the amount owing for wages, overtime, statutory holiday pay, annual vacation pay, minimum daily pay adjustment, hours free from work adjustment, and interest totaling \$13,814.95. I find there is no error of law in the calculation and confirm the amounts. While Custom Driven may not agree with the Determination, I find there was evidence the Delegate could rely on to make the findings of fact and arrive at the calculations and conclusions in the Determination. As set out in the Determination, the Delegate considered the evidence and made a reasoned decision based on the evidence and the law. It is clearly established in Tribunal decisions that this Tribunal will not re-hear the case, nor will it re-evaluate and re-weigh the evidence and substitute its own view of the same evidence.

30. I have also considered the administrative penalties. I note the administrative penalties found owing by Custom Driven are mandatory in the circumstances (see *537370 B.C. Ltd. (Ponderosa Motor Inn)*, BC EST # D011/06). As stated in the Tribunal decision *STP Canada Enterprises Ltd.*, 2022 BCEST 40 (Canlii) at paragraph 33:

Multiple contraventions can result in multiple administrative penalties. The circumstances in this case clearly establish [the Employer] committed multiple contraventions of the *ESA* and the imposition of multiple administrative penalties was both correct and required by the *ESA*.

31. I find the conclusions in the Determination were supported by evidence and the law and it is not open to this Tribunal to retry the evidence and arguments. I find Custom Driven has not shown that there was an error in law in the Determination.

32. In summary, I find Custom Driven is, for the most part, rearguing its view of the facts and evidence that have already been properly considered and decided by the Delegate in the Determination. Absent an error of law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate. I find there is no error in law and would dismiss this ground of appeal.

Other grounds

33. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc, dba Superior Transmissions*, BC EST # D141/03).

34. Even though I have found Custom Driven has not demonstrated there was an error in law in the Determination, I will also consider Custom Driven's submissions on other grounds in the alternative.

35. While not set out as a ground of appeal by Custom Driven, I have considered whether the Director failed to observe the principles of natural justice in making the Determination.

36. Natural justice has been described as the right to a fair procedure and includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05). To be successful on this ground of appeal, there must be credible evidence about how the determination procedure did not meet the requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).
37. I have reviewed the Record and find there is no basis for concluding the Director failed to observe the principles of natural justice. The Record indicates Custom Driven was aware of the case to be made and had the right to present their case and respond to the evidence. The Investigator conducted an ample investigation and the parties, including Custom Driven, were very involved in the investigation process, had every opportunity to respond and, in fact, did provide evidence and submissions. The Investigator followed up with the parties and witnesses. As noted previously, the Record specifically shows the Investigator received and investigated evidence from Custom Driven concerning Mr. Ponnayya's work and status.
38. In sum, the evidence does not support that the Director failed to observe the principles of natural justice in making the Determination. I would find there is no merit in this ground of appeal, and it is dismissed.

SUMMARY DISMISSAL

39. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.
40. I find there is no reasonable prospect the appeal will succeed and dismiss the appeal.

ORDER

41. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.
42. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

/S/ John Chesko

John Chesko
Member
Employment Standards Tribunal