Citation: 1697692 Alberta Ltd.
2025 BCEST 7

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

1697692 Alberta Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	M. Diane Irvine
SUBMISSIONS:	Brent Parker, on behalf of 1697692 Alberta Ltd.
FILE NUMBER:	2024/092
DATE OF DECISION:	January 9, 2025

DECISION

OVERVIEW

1. 1697692 Alberta Ltd, which operates using the name Crew Haulers, operates a service which is contracted to provide short- and long-haul transportation to CN Rail employees. It has branches in several communities in British Columbia and Alberta.

2. One of Crew Haulers' employees filed a complaint under the *Employment Standards Act* (*ESA*) after he was terminated in February of 2023, alleging various violations of the *ESA*. Some of the issues between Crew Haulers and its employee were resolved through a settlement agreement, including the employee's claim to holiday pay and statutory holiday pay for a specific period, as well as three days of bereavement leave. Other issues were not resolved, including a claim for unpaid wages and overtime. However, Crew Haulers objected to the jurisdiction of the Director of Employment Standards to determine these issues on the grounds that the *ESA* did not apply to the employment relationship between Crew Haulers and its former employee.

3. On June 13, 2024, a Delegate of the Director determined that the ESA did apply. Furthermore, the Delegate determined that Crew Haulers owed its former employee $10,079.84 plus interest, representing unpaid wages (including unpaid minimum daily pay and overtime), vacation pay on the unpaid wages, and compensation for length of service. The Delegate also imposed administrative penalties of $2,000.00 for these contraventions.

4. Crew Haulers appeals the Delegate's determination on the grounds that the Director erred in law and breached the principles of natural justice. For the reasons that follow, I conclude this appeal has no reasonable prospect of success.

5. I therefore dismiss the appeal without seeking submissions from the other parties (section 114(1)(f) of the *ESA*).

ISSUES

6. The issue I must decide is whether Crew Haulers' appeal shows reasonable prospect of success in arguing that the Director erred in law or breached the principles of natural justice. To do that, I must consider the following questions:

    1. Does the *ESA* apply to Crew Haulers?
    2. Was Crew Haulers denied an opportunity to respond on the issue of jurisdiction?
    3. Was the employee a "taxi driver" within the meaning of the *ESA*?
    4. Did the settlement between the parties prevent the Delegate from making a determination about vacation pay?
    5. Did Crew Haulers have just cause to terminate the employee?

ANALYSIS

1. Does the *ESA* apply to Crew Haulers?

7. The Delegate determined that the *ESA* does apply and that the Director did have jurisdiction to determine the employee's complaint, applying the "functional test" for determining whether an employment activity falls under provincial or federal legislative jurisdiction. This test was summarized by the BC Court of Appeal in *NIL/TU,O Child and Family Services Society v. British Columbia Government and Service Employees' Union*, 2008 BCCA 333.

8. Crew Haulers does not assert that the Delegate applied the wrong legal test, but instead asserts that the Delegate made a palpable and overriding error with respect to her findings of fact, and that this amounted to an error of law. Crew Haulers argues the federal *Canada Labour Code* applies instead of the *ESA*, because their operations involve providing vital services to a railway that are integral to CN Rail's operations. In the alternative, Crew Haulers asserts federal jurisdiction on the basis that they are in the business of interprovincial trucking.

9. An appeal may be granted where there has been an error of law: see section 112(1)(a) of the *ESA*. However, the Tribunal has held that errors of law involving the Director's findings of fact on the evidence are limited, and can only occur where the Director makes these findings "without any evidence," or by "acting on a view of the facts which could not reasonably be entertained": *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam),* 1998 CanLII 6466 (BC CA), [1998] B.C.J. No. 2275 (B.C.C.A.).

10. I agree with the Delegate that the complaint is within the jurisdiction of the *ESA*, albeit for different reasons. The general rule is that labour and employment relations fall under provincial, not federal, jurisdiction: *Construction Montcalm Inc. v. Minimum Wage Commission* [1979] 1 S.C.R. 754, 1978 CanLII 18 (SCC). The burden was on Crew Haulers to provide the factual basis for a conclusion that the *ESA* does not have jurisdiction over the complaint: *Re More Marine Ltd. BC EST# RD118/08*. Nothing in the record that was before Delegate at the time of their determination establishes sufficient justification to rebut the general rule.

11. Crew Haulers position that it is federally regulated is based on its contract to provide necessary services to a federally regulated undertaking. Were that sufficient to satisfy the functional test, then any company that was contracted to a provide necessary services to a bank or a railroad or other federally regulated undertaking would also be federally regulated, but that is not so.

12. Similarly, there is nothing on the record to establish that Crew Haulers is engaged in interprovincial trucking.

13. Further, I note that Crew Haulers itself appears to believe that it is not federally regulated, being registered in Alberta as an Alberta Numbered Corporation. There is nothing on the record to indicate that Crew Haulers is federally registered under the *Canada Business Corporations Act,* RSC 1985, c C-44.

14. The presumption in favour of provincial jurisdiction over employment relations continues to apply in this case.

2. Was Crew Haulers denied an opportunity to respond on the issue of jurisdiction?

15. Crew Haulers raised the issue of jurisdiction during the investigation process and provided evidence and submissions to support its position. It then requested that if the Director came to a different conclusion that the Director or Delegate provide reasons so that Crew Haulers could further respond.

16. In this appeal, Crew Haulers argues that the Delegate did not observe the principles of natural justice because it did not have an opportunity to respond to the Delegate's conclusion that the *ESA* applied before the determination was finalized. It says this violated section 77 of the *ESA*, which provides that "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

17. A person may appeal a determination on the ground the Director failed to observe the principles of natural justice: see section 112(1)(b) of the *ESA*. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.

18. The burden of proof lies on the person alleging a breach of natural justice: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. In this case, the record shows that Crew Haulers has not met this burden.

19. The record shows that Crew Haulers were given ample opportunity to provide evidence and submissions about jurisdiction. They then received an investigation report setting out all the evidence that had been collected about the complaint, including with respect to jurisdiction, and were given the opportunity to respond. Natural justice does not require that a party be given the opportunity to know what the decision will be, and to then choose to provide more evidence if the decision will be unfavourable.

20. As a result, I am satisfied that the principles of natural justice were observed throughout the investigation and determination process.

3. Is the employee a taxi driver?

21. The Delegate concluded that the employee was not a "taxi driver." A "taxi driver" is defined under section 1 of the *Employment Standards Regulation* as a person employed to drive a taxi. However, the term "taxi" is not defined. This issue was important to Crew Haulers because certain provisions of the *ESA* do not apply to taxi drivers, including some provisions relied upon by the Delegate in her determination. If the former employee was a taxi driver, for example, then he would not be entitled to overtime wages and so that part of her determination would be an error.

22. The Delegate reached her conclusion after considering the circumstances of the employee's work and his responsibilities. She noted that he did not have a taxi meter, did not charge passengers fares or collect tips, and was unable to drive any passengers besides CN Rail employees. She was not

persuaded by Crew Haulers' evidence that the employee was a taxi driver, which included that Crew Haulers' contract to provide transportation services referred to the service as a "rail taxi service" and that CN Rail referred to the drivers as taxi drivers. Similarly, she was not persuaded by Crew Haulers' license from the BC Commercial Passenger vehicle program. The Delegate explicitly gave no weight to a taxi business license from the town of Adson, Alberta.

23. Crew Haulers argues that the Delegate made an error of law in concluding that the employee was not a "taxi driver," by failing to properly consider the evidence presented, and by not giving any weight to the taxi business license issued by Edson, Alberta.

24. A disagreement with a finding of fact does not amount to an error in law unless the finding was not grounded in the evidence. 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.

25. 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 are considered a question of fact properly within the purview of the delegate.

26. Here, I am not persuaded that the Delegate made an error of law in deciding that the employee was not a taxi driver. I find the record contained sufficient evidence to support that conclusion. Much of this was set out in the Delegate's reasons, but there was also additional information on the record. For example, an email from the Passenger Transportation Board confirmed that Crew Haulers' Commercial Passenger Vehicle Program license was not for taxi services, but instead for "limo/shuttle" services. Further, the Delegate was entitled to give no weight to a municipal business license from a town in a province with a different statutory regime, and where the employee did not work.

27. I note at this juncture that Crew Haulers sought, and was granted, a request for an extension of time to obtain further information from the Passenger Transportation Board regarding its status and then to provide further submissions. However, no further information or submissions were received.

28. I am satisfied that the employee was not a taxi driver. Consequently, the provisions in the *Employment Standards Regulation* with respect to taxi drivers do not apply.

4. Did the settlement between the parties prevent the Delegate from making a determination about vacation pay?

29. As noted at the outset, the Delegate determined that the Crew Haulers owed its former employee $10,079,84, plus interest. This included $387.69 for Annual Vacation Pay under section 58 of the *ESA,* representing 4% of the unpaid wages. It also included overtime, and compensation for length of service that she determined Crew Haulers owed to its former employee.

30. Crew Haulers argues that this determination constituted an error of law because it contradicts the terms of a settlement agreement reached between Crew Haulers and its former employee, before the Delegate made her determination. This Agreement stated in part:

> 2. The parties have agreed to resolve some of the issues identified in the Complaint by way of a settlement agreement pursuant to section 78 of the Act, specifically $3,474.18 for vacation pay between December 29, 2020-February 28, 2023, ...
>
> 6. This settlement agreement represents a full and final resolution of all matters referenced in paragraph 2.
>
> 7. Once the Terms of Resolution (below) have been met, the Director of Employment Standards (the Director) will take no further action regarding the matters referenced in paragraph 2.

31. While I am sympathetic that Crew Haulers was surprised by the Delegate's determination in the face of the settlement agreement, Crew Haulers' argument ignores section 4 of the *ESA*, which states:

> **Requirements of this Act cannot be waived**
>
> **4** The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2), has no effect.

32. Once the Delegate found that Crew Haulers owed its former employee wages, she was obliged to also consider the statutory requirement for Crew Haulers to pay 4% of those wages as vacation pay. This requirement cannot be waived, including by the employee and employer.

5. Did Crew Haulers have just cause to terminate the employee?

33. During the investigation, Crew Haulers asserted that it had just cause to terminate the employee on two grounds, and that he had previously received verbal warnings about the following issues:

a. On his last day of employment, he was asleep at the side of the road with his radio turned off; and

b. He did not have a Class 4 driver's license, which was a fundamental requirement of his employment.

34. After setting out the test for demonstrating just cause for minor misconduct, the Delegate determined that Crew Haulers did not have just cause to terminate the employee. She noted that the burden was on Crew Haulers to show they provided warnings, but Crew Haulers was unable to provide any evidence it gave the employee verbal warnings regarding sleeping with his radio turned off, or that he would be terminated if he did not obtain his Class 4 driver's license. She rejected Crew Haulers' argument that the employee was not taking steps to obtain a Class 4 license, preferring the employee's evidence that he been doing so and keeping Crew Haulers informed of his progress. Having found that Crew Haulers terminated the employee without just cause, the Delegate then found that Crew Haulers owed the employee compensation for length of service under section 63 of the *ESA*.

35. Crew Haulers argues that this constituted an error of law for the following reasons:

a. The Delegate mischaracterized the employee's failure to obtain a Class 4 driver's license as minor misconduct;

b. The Delegate adopted a fundamentally wrong assessment method by not giving adequate weight to its legal and contractual requirements to ensure its drivers held a Class 4 driver's license; and

c. The Delegate misapplied the law by failing to recognize the absence of a required Class 4 constitutes just cause for termination.

36. In support of its position, Crew Haulers cites two cases: *Kamsteeg*, BC EST # D372/00, and *Lucas*, BC EST # D171/00. *Kamsteeg* involved a mechanic who was terminated a week after he informed his employer that his driver's license had been suspended for three months for impaired driving. In that case, the Tribunal determined that the employer had just cause to terminate Kamsteeg because his job required him to have a valid driver's license to test-drive customer's vehicles, and having a suspended license rendered him unable to perform a necessary duty of his employment. *Lucas* involved a hair stylist. Her employer had policies about employees providing free services and prohibiting them from carrying out procedures that they were not licensed to undertake. The Tribunal was satisfied that Lucas breached both policies and her employer had just cause to terminate her employment.

37. However, these cases can be distinguished from the matter before me based on one significant difference: in both cases, the employer promptly terminated the employee when they became aware that the employee had breached a fundamental policy, or were unable to perform the essential duties of their employment. Here, though, the record shows that Crew Haulers knew of the employee's failure to hold a Class 4 license for a significant period before terminating him, demonstrating that it did not view this as a fundamental requirement of the employment relationship. Further, if an employer learns of an act of misconduct on the part of an employee but does not terminate the employee within a reasonable period of time of learning of the misconduct, then the employer will be held to have condoned the employee's conduct and will be precluded from dismissing the employee for that misconduct in the future: *Le Soleil Hospitality Inc*, BC EST # D050/14.

38. When the employee was hired on December 29, 2020, he signed an agreement that states:

> Subcontractors will have Class 1,2 or 4 license to operate vehicle, with a driver abstract to be supplied.
>
> If contractor does not have such class of license, Crew Haulers can train you to acquire it.

39. However, the employee did not have a Class 4 license at that time; he held only a Cass 5. There is no evidence on the record that Crew Haulers trained him to acquire one. There is also no evidence on the record that Crew Haulers made any attempt to verify the employee's license status for at least a year, although the employee did operate vehicles during this time.

40. It is common ground that at some point in early 2022, Crew Haulers did an audit of employee driver licenses, determined the employee did not hold a Class 4 license, and directed him to obtain one. It is not clear if Crew Haulers gave the employee a deadline to obtain his Class 4, or warned him that failure to do so would result in termination. As the Delegate noted, the burden is on Crew Haulers to show they provided warnings.

41. Once the employee was directed to obtain his Class 4 license, he did make efforts to do so and to keep Crew Haulers informed as to his progress through a series of text messages. The employee passed his Class 4 written test on May 6, 2022. The employee scheduled several driving tests during the period of May to December 2022, but did not pass. The employee kept working as a driver for Crew Haulers during this period, until his termination on February 28, 2023. It is clear from the record that Crew Haulers knew he did not have a class 4 license, but Crew Haulers did not prohibit him from operating vehicles and indeed kept scheduling him to do so. There is no evidence before me that Crew Haulers imposed a deadline for the employee to obtain a Class 4 license.

42. I therefore cannot find that the Delegate made an error of law. Crew Haulers treated the employee's lack of a Class 4 license as a minor issue, despite their legal and contractual requirements, and condoned this for almost two years. They cannot then use this lack as justification for termination for just cause without any warning.

GENERAL SUMMARY AND CONCLUSION

43. The appeal does not have any reasonable prospect of success.

ORDER

44. Pursuant to section 114(1)(f) of the *ESA*, I dismiss this appeal. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination.

/S/ M. Diane Irvine

M. Diane Irvine
Member
Employment Standards Tribunal