

An appeal

- by -

Saab Electric Ltd.  
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

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

**PANEL:** Richard Grounds

**FILE NO.:** 2019/153

**DATE OF DECISION:** March 9, 2020

## DECISION

### SUBMISSIONS

Amrinder S. Randhawa	counsel for Saab Electric Ltd.
Paul Grace	delegate of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Saab Electric Ltd. (the “Appellant”) has filed an appeal of a determination (the “Determination”) issued on July 11, 2019, by Paul Grace, a delegate of the Director of Employment Standards (the “Delegate”).
2. The Appellant operates an electrical services business in Surrey, British Columbia. Jagdeep Singh (the “Complainant”) was employed by the Appellant as an electrician from August 8, 2015, to June 10, 2018. On October 2, 2018, the Complainant filed a complaint under section 74 of the *ESA* for failing to pay regular wages, overtime, vacation pay, and compensation for length of service.
3. The complaint proceeded to a hearing in front of the Delegate on January 25, 2019. The Delegate concluded that the Appellant owed the Complainant unpaid wages, overtime, annual vacation pay, compensation for length of service, and accrued interest. The Delegate imposed administrative penalties for contraventions of the *ESA*.
4. The Appellant appealed the Determination on the basis that the Delegate erred in law, failed to observe the principles of natural justice in making the Determination, and / or evidence has become available that was not available at the time the Determination was being made. Although the Appeal Form only had the first two grounds of appeal checked off, the Appellant’s appeal submissions included all three grounds of appeal.
5. For the reasons that follow, the appeal is allowed and the Determination is cancelled. The matter is referred back to the Director of Employment Standards for a new hearing.

### ISSUE

6. The issues are whether or not the Delegate erred in law, failed to observe the principles of natural justice in making the Determination, and / or evidence has become available that was not available at the time the Determination was being made.

### ARGUMENT

7. The Appellant submitted on appeal that the Delegate erred in law by failing to frame the issues with respect to the authenticity of the documents and credibility of the witnesses. The Appellant submitted that the Delegate erred in law by giving more weight to the Complainant’s evidence even when the Complainant’s evidence was inconsistent. The Appellant submitted that the Delegate erred in law by

misinterpreting the evidence from the witnesses. The Appellant submitted that the Complainant never raised an objection about not getting paid overtime before abandoning his job. The Appellant submitted that the Complainant and his witnesses have started a similar business as the Appellant so their evidence should not be considered as they were interested witnesses.

8. The Appellant submitted that the Delegate failed to observe the principles of natural justice in making the Determination because there is no evidence that the Complainant was terminated instead of resigning from his employment (to open a business with other former employees of the Appellant), the Delegate did not consider the Appellant's submission that the Complainant was dishonest in recording his work hours, and the Delegate did not consider the Appellant's submissions that the Complainant engaged in time theft. The Appellant submitted that the Delegate incorrectly found that the Complainant's time sheets were reliable and accepted them as an accurate record of the hours worked by the Complainant. The Appellant submitted that the Delegate based his decision on "assumption and presumption" rather than on the totality of the evidence including for the month of February 2018 for which there were no records.
9. The Appellant submitted that the Complainant only worked for the Appellant up to May 31, 2018, and never worked for the Appellant in June 2018. The Appellant submitted that the Appellant was never served with a notice to provide the original time sheets. The Appellant provided an Affidavit from Narinder Singh Grewal with attached time sheets and wage statements that he states were submitted to the Delegate.<sup>1</sup>
10. The Appellant submitted that the Delegate allowed the Complainant to be his own interpreter for his witnesses. The Appellant requested a hearing record or transcript for the adjudication hearing. The Appellant submitted that the Determination should be set aside.
11. Submissions on the merits of the appeal were requested from the Complainant and from the Delegate. Submissions were received from the Delegate but no submissions were received from the Complainant. The Delegate confirmed that there was no hearing record or transcript. The Delegate submitted that he did assess the authenticity of the documents and witnesses. The Delegate submitted that he gave greater weight to the Complainant's photographs of the time sheets because they appeared to be taken of the original time sheets still in place at the work place.
12. The Delegate submitted that at no time during the hearing was any evidence given in any language other than English and that all of the parties communicated adequately in the English language. The Delegate submitted that he based his decision on the Complainant's termination based on the facts leading up to the termination and the impact on the Complainant. The Delegate submitted that he found no evidence that the time sheets were dishonestly recorded and, in addition, that the Appellant did not advance an argument of time theft.

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<sup>1</sup> The documents include two different wage statements for December 16, 2017, to January 15, 2018, based on 70 hours and 78 hours respectively, that are not included in the Record from the Director of Employment Standards.

13. The Delegate submitted that the Appellant did not present an argument that the Complainant abandoned his job and there was no evidence before him to indicate that he had. The Delegate submitted that he made findings about the Complainant's hours worked and overtime based on the available evidence.
14. The Appellant was given an opportunity to provide final reply submissions, but the Tribunal did not receive any further submissions from the Appellant.

## **THE FACTS AND ANALYSIS**

15. The Appellant operates an electrical services business in Surrey, British Columbia. Narinder Grewal ("Mr. Grewal") is the sole director and officer of the Appellant. The Complainant was employed by the Appellant as an electrician from August 8, 2015, to June 10, 2018. On October 2, 2018, the Complainant filed a complaint under section 74 of the *ESA* for failing to pay regular wages, overtime, annual vacation pay, and compensation for length of service.
16. The complaint proceeded to a hearing in front of the Delegate on January 25, 2019. The Complainant testified on his own behalf and two additional witnesses testified on his behalf. Four additional witnesses were not available at the time of the hearing. Mr. Grewal testified on behalf of the Appellant. A witness for the Appellant was not available at the time of the hearing.

### *The Determination*

17. On July 11, 2019, the Delegate completed the Determination and identified the issues as follows:
  1. Is the Complainant entitled to regular wages?
  2. Is the Complainant entitled to overtime?
  3. Is the Complainant entitled to vacation pay?
18. The Delegate noted that section 80 of the *ESA* had been amended to increase the wage recovery period from six to twelve months. The Delegate advised the parties of this change, but the Complainant declined to pursue wage recovery for longer than a six-month period because he did not keep records for hours worked before January 1, 2018.
19. The Delegate reviewed the evidence from the parties and two witnesses. The Complainant stated that he was only paid 70 hours each pay period regardless of the hours and overtime worked. He received no wages for May 14, 2018, to June 10, 2018. He recorded his hours on timesheets at the shop but would record the finish time the following morning because the shop would be closed at the end of the day. He took photographs of the timesheets, contained in a ring binder, at the end of each month. Sometimes he called in his time and someone else recorded them. The Complainant stated that the record of hours provided by the Appellant was false because all of the handwriting was not his and the hours were false and not recorded by him. He quit his job because he was not being paid.
20. One witness who worked with the Complainant stated that they usually worked nine to ten hours each day, five days a week. Sometimes he would write the finish times for the Complainant on the timesheet. Another witness who worked with the Complainant stated that he worked with the Complainant up to ten days each month and they usually worked ten hours a day. Whoever would arrive at the shop first

would record the finish times for the previous day. He has seen the Complainant write in his finish times and take photographs of timesheets, as most electricians do.

21. Mr. Grewal provided to the Delegate a letter dated September 21, 2018, he had written to the Complainant confirming that he had already been paid all wages for the period January 10, 2018, to June 10, 2018, but that vacation pay for the period February to May 2018 remained outstanding. Mr. Grewal stated to the Delegate that wages were not paid to the Complainant for May 14, 2018, to June 10, 2018, because the Complainant had quit his employment. Mr. Grewal provided wage statements for the hours worked by the Complainant from January 1, 2018, to May 31, 2018.
22. The Delegate reviewed the evidence relating to the timesheets including that there was a significant discrepancy between the photocopied timesheets provided by Mr. Grewal and the photographs of the timesheets provided by the Complainant. The Delegate noted that the photographs of the timesheets indicated that the Complainant worked for ten hours on a significant number of days between January 1, 2018, and May 31, 2018, but the photocopied timesheets showed that he did not work more than eight to nine hours.
23. The Delegate stated that the *ESA* requires employers to keep payroll records worked by the employee and “[a]lthough the original time sheets belong to [the Appellant] and presumably remain in [the Appellant’s] control, given that they were able to photocopy them, [the Appellant] has not provided the originals”. The Delegate noted that without the originals, it was impossible for him to determine whether alterations were made to the photocopies in order to verify or dispute the Complainant’s photographs. The Delegate found the Complainant’s photographs to be a more reliable representation of the original timesheets and accepted them as an accurate record of hours the Complainant worked.
24. The Delegate relied on the Complainant’s evidence that he quit because he was not being paid and the Appellant’s evidence that the Complainant was not paid from May 14, 2018, to when he quit on June 10, 2018, and found that this amounted to a substantial alteration of the conditions of employment.
25. The Delegate concluded that the Appellant owed the Complainant unpaid wages, overtime, annual vacation pay, compensation for length of service, and accrued interest. The Delegate imposed administrative penalties for contraventions of the *ESA*.
26. The Appellant appealed the Determination on the basis that the Delegate erred in law, failed to observe the principles of natural justice in making the Determination, and / or evidence has become available that was not available at the time the determination was being made.

## ANALYSIS

### *Error of Law*

27. The Appellant’s appeal submissions relating to how the Delegate erred in law primarily relate to the Delegate’s assessment of credibility of the evidence relating to the hours worked by the Complainant. This evidence was in dispute with the Complainant’s version supported by the photographs of time sheets and witness evidence that the Complainant usually worked ten hours per day. In contrast, the Appellant’s version was supported by photocopies of time sheets and wage statements.

28. The Delegate found that the Complainant’s photographs of his time sheets were more reliable and accepted them as an accurate representation of the hours worked. In reaching this conclusion, the Delegate noted that the Appellant failed to provide the original times sheets when it could have. The Delegate extrapolated the Complainant’s evidence to determine the hours worked by the Complainant in February 2018, for which there were no time sheets. Although the Appellant provided a time sheet for the month of February to the Delegate, the time sheet was from 2017, not from 2018.

29. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.

30. It was within the Delegate’s discretion to assess the credibility of the evidence related to the hours worked by the Complainant. In doing, so, however, the Delegate must not commit an error of law. The Delegate hinged his decision in part based on contradictory evidence of Mr. Grewal in regards to whether or not the Complainant was paid for wages between May 14, 2018, and June 10, 2018. In addition, he relied heavily on his inability to compare the original time sheets from the Appellant with the photographs of the time sheets provided by the Complainant.

31. The Delegate noted that the two versions of time sheets differed significantly in regards to whether or not the Complainant worked overtime. There are other obvious differences between the two time sheets that the Delegate did not address in the Determination. A review of the photographed and photocopied time sheets for January 2018<sup>2</sup> and March 2018<sup>3</sup> reveals the following:

<u>Date</u>	<u>Complainant’s Photograph</u>	<u>Appellant’s Photocopy</u>
January 18, 2018	Contains entries for work	Contains no entries for work
January 19, 2018	Contains entries for work	Contains no entries for work
March 2, 2018	Appears to contain writing in Job Address	Contains line through Job Address
March 9, 2018	Contains entries for work	Contains no entries for work

32. The Delegate stated in the Determination that neither party provided evidence for the hours worked in February 2018 or May 2018, but the Director’s Record contains documents provided by the Appellant including wage statements for these months and a photocopied time sheet for May 2018.<sup>4</sup> It was not correct for the Delegate to state that there was no evidence for the hours worked by the Complainant in

<sup>2</sup> Found at pages 35 and 60 of the Director’s Record.

<sup>3</sup> Found at pages 37 and 65 of the Director’s Record.

<sup>4</sup> At page R6 of the Determination and pages 62 – 64 and 71 – 72 of the Director’s Record.

February and May 2018. Although the Delegate noted that that the Appellant provided wage statements for January 1, 2018, to May 31, 2018, he failed to directly address this evidence in his analysis.

33. Despite the lack of a photographed time sheet provided by the Complainant for May 2018, the Delegate stated at page R5 in the Determination:

My review of the photographs of [the Complainant's] time sheets indicates that he worked for 10 hours on a significant number of days between January 1, 2018 and May 31, 2018.

34. Given the Complainant did not provide a photograph of the time sheet for May 2018, this statement by the Delegate is not aligned with the evidence that was before him for the Determination.

35. The Delegate misinterpreted the evidence before him relating to the hours worked by the Complainant in February 2018 and May 2018. In doing so, the Delegate acted on a view of the facts that cannot be reasonably entertained. Accordingly, the Delegate committed an error of law in making the Determination.

#### *Failure to Observe the Principles of Natural Justice*

36. The Appellant submitted that the Delegate failed to observe the principles of natural justice in making the Determination because there is no evidence that the Complainant was terminated instead of resigning from his employment (to open a business with other former employees of the Appellant), the Delegate did not consider the Appellant's submission that the Complainant was dishonest in recording his work hours, and the Delegate did not consider the Appellant's submissions that the Complainant engaged in time theft. The Appellant also submitted that the Appellant was never served with a notice to provide the original time sheets and the Delegate allowed the Complainant to be his own interpreter for his witnesses.

37. The Delegate submitted that the Appellant did not advance an argument of time theft or that the Complainant abandoned his employment. In addition, the Delegate submitted that the evidence at the hearing was presented in the English language.

38. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them, and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

39. The Delegate submitted on appeal that the Appellant did not make submissions about time theft and abandonment by the Complainant of his employment. Unfortunately, the Delegate did not indicate in his Determination what submissions were made by the parties. Given this failure, it would not be appropriate to allow submissions on appeal by the Delegate about what submissions were made. Put another way, the submissions on appeal by the Delegate should be based on the content of the Determination and they are not.

40. Given the failure of the Delegate to address in the Determination the submissions made by the parties, it is not possible to determine on appeal whether or not the parties were given a meaningful opportunity to respond to the case against them. In regards to termination of the Complainant's employment, it is

worth noting that the Delegate did not identify this issue as one of the issues for the Determination at page R2 where he outlined the issues. This fact combined with the fact that the Delegate did not outline any submissions made by the parties also makes it difficult to determine on appeal whether or not the parties were given a meaningful opportunity to make submissions on the Complainant's termination.

41. The Appellant clearly articulated a ground of appeal based on the Complainant being allowed to be the interpreter for his witnesses. The Delegate denied that any evidence was given in a language other than English. It is difficult to address this ground of appeal on the basis of disputed submissions alone. Given the other successful grounds of appeal, it is not necessary to reach a conclusion about this ground of appeal.
42. As discussed above, the Delegate reached his conclusions about credibility in large part because the Appellant did not provide the original time sheets that would have been in his control. This would be a significant and relevant factor if the Appellant had been ordered to produce such records. The photographed and photocopied time sheets contained significant disparities which obviously warranted examination of the original time sheets.
43. The Appellant was required to produce payroll records for the Complainant for the period December 11, 2017, to June 10, 2018, by Demand for Employer Records letter dated December 14, 2018.<sup>5</sup> The Demand for Employer Records did not require the Appellant to produce original payroll records. Once the Delegate identified that there was an obvious issue respecting the two versions of the time sheets provided to him, he should have ordered the Appellant to produce the original time sheets, including for February 2018, for his review. Rather than do this, the Delegate relied on the failure of the Appellant to produce original time sheets in finding that the Appellant's evidence was not reliable.
44. The Delegate did not provide the Appellant an opportunity to provide evidence on a significant evidentiary issue relating to his assessment of the time sheets. This amounts to a breach of procedural fairness. Accordingly, the Delegate failed to observe the principles of natural justice in making the Determination.

### *New Evidence*

45. The Appellant did not make any submissions on appeal about evidence that has become available that was not available at the time the determination was being made. There is no obvious basis to consider this ground of appeal.<sup>6</sup> Accordingly, this ground of appeal is dismissed.

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<sup>5</sup> See page 7 of the Director's Record.

<sup>6</sup> Although the Appellant included two additional (but contradictory) wage statements for the period December 16, 2017, to January 15, 2018, that were not before the Delegate, these would have been available at the time of the hearing and prior to the Determination being made so would not meet the test for new evidence in *Bruce Davies et al.* BC EST # D171/03.



*Remedy*

46. The Delegate erred in law and failed to observe the principles of natural justice when he made the Determination. Section 115(1)(a) of the *ESA* provides that the Tribunal may confirm, vary or cancel the determination under appeal. Section 115(1)(b) provides that the Tribunal may refer the matter back to the Director.
47. Given the issues concerning the disputed time sheets cannot be decided by the Tribunal on appeal, the Determination should be set aside and the matter referred back to the Director for a new hearing.

**ORDER**

48. I allow the appeal, cancel the determination under section 115(1)(a) of the *ESA*, and refer this matter back to the Director pursuant to section 115(1)(b) of the *ESA*.

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**Richard Grounds**  
**Member**  
**Employment Standards Tribunal**