

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Horizon Motorcycles Ltd. carrying on business as Courtney Motorsports
("HML")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Shafik Bhalloo

FILE NO.: 2021/086

DATE OF DECISION: December 16, 2021

DECISION

SUBMISSIONS

Christine Copeland

on behalf of Horizon Motorcycles Ltd. carrying on
business as Courtney Motorsports

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Horizon Motorcycles Ltd. carrying on business as Courtney Motorsports (“HML”) has filed an appeal of a determination issued by Mitchell Dermer, a delegate (the “Adjudicative Delegate”) of the Director of Employment Standards (the “Director”), on September 20, 2021 (the “Determination”).
2. The Determination found that HML contravened Part 4, section 40 (overtime wages) and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Coleen Kennelly (“Ms. Kennelly”).
3. The Determination ordered HML to pay Ms. Kennelly wages in the total amount of \$3,658.78 including accrued interest.
4. The Determination also levied two administrative penalties against HML of \$500 each under the *Employment Standards Regulation* (the “*ESR*”) for breach of sections 40 and 58 of the *ESA*.
5. The total amount of the Determination is \$4,658.78.
6. HML appeals the Determination on the “natural justice” ground of appeal under section 112(1)(b) of the *ESA*.
7. The deadline to file the appeal of the Determination was 4:30 p.m. on October 28, 2021. On October 7, 2021, the Tribunal received HML’s appeal submission from Christine Copeland (“Ms. Copeland”), the General Manager of HML. The appeal also sought an extension of time to January 31, 2022. Ms. Copeland explained that the extension of time was required “[p]artially because of the absolute horrible bookkeeping mess” Ms. Kennelly left when she resigned from her employment with HML that she (Ms. Copeland) and her new bookkeepers were trying to cleanup while “continu[ing] with current work”. The other reason for the extension is that she has been “trying to take a month off to travel to Israel” to see her grandson who was born at the beginning of the Covid-19 pandemic. She said that if the Israeli government approves her to go, “everything else will be put on hold”.
8. On October 14, 2021, the Tribunal corresponded with the parties advising them that it had received HML’s appeal of the Determination and application to extend the statutory appeal period. The Tribunal also informed Ms. Kennelly and the Director that, at this time, no submissions were being sought from them on HML’s request to extend the appeal period and on the merits of the appeal.
9. In the same correspondence, the Tribunal requested the Director, pursuant to section 112(5) of the *ESA*, to provide the Record that was before the Director at the time the Determination was made.

10. On November 5, 2021, the Tribunal received the Record from the Director. A copy of the same was sent to HML and Ms. Kennelly and both parties were provided an opportunity to object to its completeness by November 24, 2021.
11. On November 12, 2021, Ms. Copeland, on behalf of HML, requested the Tribunal to extend the submission deadline from November 24, 2021 to February 2022, for reasons including that she will be travelling out of the country for personal reasons between November 18, 2021 and December 22, 2021. The Tribunal canvassed Ms. Kennelly for her position on the extension request and the latter objected to any further delay in the process. The Tribunal in declining to grant the extension request of Ms. Copeland informed her that, at this time, the Tribunal is only requesting her submissions on whether there are any documents she submitted to the Director that are missing from the Record. The Tribunal reiterated that the deadline for HML to provide a submission on the completeness of the Record remained 4:00 p.m. on November 24, 2021.
12. On November 29, 2021, after no objections to the completeness of the Record were received from HML or Ms. Kennelly by November 24, 2021, the Tribunal informed the parties that the appeal had been assigned to a panel, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. The parties were advised that if all or part of the appeal was not dismissed, the Tribunal would seek submissions from Ms. Kennelly and the Director on the merits of the appeal.
13. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based solely on HML's appeal submissions, the Record, and the Reasons for the Determination (the "Reasons"). Under section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any reasons listed in the subsection. If satisfied the appeal or part of it should not be dismissed, the Director and Ms. Kennelly will be invited to file submissions. On the other hand, if the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case I will consider whether the request to extend the statutory appeal period should be allowed or dismissed under section 114(1)(b). In this regard, I will assess the relative strength of the appeal and also whether there is any reasonable prospect that the appeal will succeed.

ISSUE

14. The issue to be considered at this stage of the proceeding is whether the request to extend the statutory appeal period should be granted, and the appeal allowed to proceed, or should the appeal be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

Background

15. A B.C. Online Corporate Registry search conducted on February 22, 2021, with a currency date of October 15, 2020, shows that HML was incorporated in British Columbia on July 10, 1991, and Stewart Graham is listed as its sole director and officer.

16. HML operates a motorsports business in Courtenay, BC, and employed Ms. Kennelly as its bookkeeper from April 4, 2019 to February 12, 2021. At the time of the termination of her employment, Ms. Kennelly's rate of pay was \$22.50 per hour.
17. Ms. Kennelly filed a complaint under section 74 of the *ESA* on February 19, 2021, alleging that HML contravened the *ESA* by failing to pay her overtime wages (the "Complaint").
18. Abraham An, a delegate (the "Investigative Delegate") of the Director of Employment Standards, investigated the Complaint and received submissions from both Ms. Kennelly and Ms. Copeland.
19. On July 27, 2021, the Investigative Delegate provided HML with his Investigation Report and advised HML that the report and any responses made by the parties would be considered in making a final determination regarding the complaint.
20. The Record does not show any further submissions being made to the Investigative Delegate or the Adjudicative Delegate prior to the issuance of the Determination.
21. On September 20, 2021, the Adjudicative Delegate issued the Determination and the Reasons.

The Reasons

22. The Adjudicative Delegate notes that he considered the following two issues:
 - a. Was Ms. Kennelly owed overtime wages?
 - b. Was Ms. Kennelly owed vacation pay?
23. The Adjudicative Delegate succinctly summarizes the evidence both parties submitted to the Investigative Delegate at pages R2 and R3 in the Reasons. In the case of Ms. Kennelly, based on the latter's timesheets for March 2020 to February 2021, the Adjudicative Delegate notes that Ms. Kennelly submitted that from February 2020 to her final day worked, February 12, 2021, she was paid a total of \$51,392, being \$48,498.75 in regular wages, \$1,800 in statutory holiday pay and \$1,093.25 in vacation pay. \$221.40 of the vacation pay was earned prior to February 12, 2020. Further, the Adjudicative Delegate also notes that the above totals did not include 32 hours Ms. Kennelly was paid while she was away from work due to illness.
24. With respect to HML's evidence, the Adjudicative Delegate notes that Ms. Copeland made detailed submissions regarding Ms. Kennelly's past work performance. She also stated that Ms. Kennelly had been paid by HML for 32 hours on February 19 to 24, 2020, while the latter was away off work due to sick leave and this amount should be offset against any wages found to be owing to her. Ms. Copeland also argued that Ms. Kennelly may have been paid additional vacation pay in August or September 2020 but did not provide any specifics to the Investigative Delegate during the investigation of the Complaint.
25. Having summarized the evidence of both parties, the Adjudicative Delegate preferred the evidence of Ms. Kennelly as to her hours worked over HML's stating that HML "has not provided any material evidence in dispute" of Ms. Kennelly's. In determining that overtime wages were owed to Ms. Kennelly by HML, the Adjudicative Delegate reasoned:

The parties agree that the Complainant's wage rate was \$22.50. She worked a total of 1958.5 regular hours, 132 daily overtime hours and 61.5 weekly overtime hours, totaling 2152 hours.

She was paid a total of \$48,498.75 in regular wages. 2152 hours x \$22.50 per hour totals \$48,420.00. Although these numbers do not sync perfectly, I find they are sufficiently proximate to support a finding that the Complainant was paid her regular wage for all hours worked, including the 193.5 hours for which she should have been paid 1.5 times her regular wage rate.

The Complainant is entitled to \$12.25 per hour for those 193.5 overtime hours, pursuant to section 40 of the Act, since I find she was already paid \$22.50 for each of those hours. The Complainant is therefore owed **\$2,370.38 in overtime wages**.

26. With respect to vacation pay, the Adjudicative Delegate noted that section 58 of the *ESA* provides that employees in Ms. Kennelly's circumstances must be paid 4% vacation pay on all wages earned. In awarding her an additional \$1,234.92 in vacation pay, the delegate explains:

The Complainant is entitled to 4% vacation pay payable on her regular wages (\$48,498.75), overtime wages (\$2,370.38) and statutory holiday pay (\$1,800.00). This totals \$52,669.13. 4% of this amount is \$2,106.77. The Complainant was paid \$1,093.25 in vacation pay from February 12, 2020 onwards, and of this amount, \$221.40 related to vacation pay entitlements from prior to the recovery period. She was therefore paid \$871.85 (\$1,093.25 – \$221.40) against the \$2,106.77 in vacation pay she is owed and is still owed **\$1,234.92 in vacation pay**.

27. The Adjudicative Delegate rejected Ms. Copeland's argument that the 32 hours Ms. Kennelly was paid for by HML in February 2020, when she was away from work due to illness should be offset against the amounts found owing to her. The Adjudicative Delegate said the payment in question was "gratuitous on behalf of the Employer".

28. The Adjudicative Delegate also found Ms. Copeland's submissions criticizing Ms. Kennelly's conduct in the performance of her job duties did not affect her entitlement to overtime wages and vacation she earned:

...the Employer's submissions with respect to the Complainant's conduct, even if I accept them, do not impact the Complainant's entitlement to overtime wages or vacation pay that she earned.

29. The Adjudicative Delegate also rejected MS. Copeland's contention that Ms. Kennelly was paid additional vacation pay in August or September 2020, because HML failed to provide any supporting payroll evidence although requested by the investigator.

30. Finally, the Adjudicative Delegate also levied two mandatory administrative penalties against HML of \$500 each, under section 29 of the *ESR*, for contraventions of section 40 and 58 of the *ESA* in respect of the employment of Ms. Kennelly.

SUBMISSIONS OF HML

31. In its Appeal Form, HML has checked-off the "natural justice" ground of appeal available in section 112(1)(b) of the *ESA*. However, HML has not provided any specific submissions in support of this ground of appeal. In her written submission on the merits of HML's appeal, Ms. Copeland's submissions are very brief, and I have set them out verbatim below:

Coleen Kennelly had requested to have a flexible schedule, to which we said as long as she got the work done. I questioned her time sheets more than once. She was told explicitly that there is no overtime. She continued to hand in extra hours regardless. Most of the time the timesheets were over inflated.

We paid her for the time off she needed for health issues (just to be nice) and then she ALSO over inflated the hours when she returned, which overstated her actual hours for that month.

She was abusing the Time Sheet honour system. She would leave by the exit I could not see, so I wouldn't know until I would go looking for information from her.

Coleen asked for a raise, and we said we would consider a raise once she could supply our Internal Financials by the 15th of the following month, every month, (how it was always done in the past prior to her arrival) The over inflated time sheets, I assume was to give herself a raise. Not once did she provide internal financials by the 15th. And once we were doing her work, we realized that she had not posted anything after October 31st 2020 other than invoices. No payments, no bank statement items etc. Nothing. She left February 12th, 2021 120 days of posting nothing.

...

I am also including the information I kept track of while she worked here. I could see I probably would have to let her go as her incompetence was showing up more and more. I had hoped it was just mistakes and she would improve. But it appears she actually had no idea what she was doing and just made it up on the go. She did me a favor of quitting. She couldn't even get her resignation right. Please see file "Kennelly" attached

32. The attachment consists of a 6-page document, dated April 7, 2020, containing a critical summary of Ms. Kennelly's work performance prepared by Ms. Copeland. This document was previously presented to the Investigative Delegate during the investigation and it also forms part of the Record (at pages 64 to 69).

33. Ms. Copeland also submitted a "To whom It May Concern" document dated June 5, 2019, on the letterhead of HML, signed by Mr. Graham and Ms. Kennelly which appears to give Ms. Kennelly notice that overtime is not allowed at HML. It states:

Please be advised that Overtime is not allowed. However, we want our staff to have the ability to have a flexible schedule, with management permission. If a flexible schedule creates overtime hours, they do not qualify.

34. With respect to the reasons in support of HML's application for extension of appeal date to January 31, 2022, Ms. Copeland submits:

Many reasons. Partially because of the absolute horrible bookkeeping mess she left (which we now see she had no idea what she was doing) She made reconciliation "Balance" falsely. She made up entries to help "Balance" etc. As myself and my new administrators/bookkeepers try to follow and fix the mess, we still have day to day work to complete. We can't just work on fixing the absolute mess left by Coleen, we have to continue with current work. So we can do our taxes (PST/GST) on time for example. She lied repeatedly and over paid vendors by THOUSAND OF DOLLARS, (which fortunately we caught while we signed the cheques) Another reason is we just switched software (mandatory switch) so we are all learning the new system. Problems, glitches and mistakes along the way. Another reason is, I have been trying to take a month off to travel to

Israel to see my Grandson who was born at the very beginning of the Pandemic and if I get the Israeli Government approval to go, everything else will be put on hold.

ANALYSIS

35. Section 2 of the *ESA* sets out the purposes of the *ESA*. In subsection (d), one of the purposes of *ESA* is to provide fair and efficient procedures for resolving disputes over the application and interpretations of the *ESA*. Consistent with that purpose, the legislature has set out a deadline for filing an appeal of a determination to ensure they are dealt with promptly: see subsections 112(2) and (3). However, in subsection 109(1)(b) of the *ESA*, the legislature also allows the Tribunal the discretion to extend the period for requesting an appeal.
36. 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.
37. In *Re Niemisto*, BC EST # D099/96, the Tribunal has developed a principled approach to the exercise of its discretion. The following criteria must be satisfied to grant an extension:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.
38. While the above criteria have been consistently considered and applied in numerous decisions of this Tribunal, they are neither conjunctive nor exhaustive: *Re Joseph James Hirak* 2021 BCEST 67 (CanLii). Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time: *Re Wright*, BC EST # D132/97. No additional criteria have been advanced by HML in this appeal.
39. In this case, while HML has filed its Appeal Form with limited submissions on the merits of the appeal together with its extension application before the expiry of the appeal period, the considerations that apply to HML's application are substantially the same: *Ctour Holiday (Canada) Ltd.* 2021 BCEST 73 (CanLii).
40. Having said this, I note that criteria ii), iii) and iv) in *Re Niemisto* above do not factor significantly into whether an extension ought to be granted in this case. I find criteria i) and v) more determinative in this case.

41. With respect to criteria i), while HML filed its Appeal Form and limited submissions on the merits of the appeal together with its extension application before the expiry of the appeal deadline, I am not persuaded with HML's reasons for seeking an extension of time are reasonable or meritorious. More particularly, I do not find Ms. Copeland's explanation that she and her new bookkeepers having to deal with the "bookkeeping mess" allegedly left by Ms. Kennelly when she resigned from her employment with HML in February 2021, almost 8 months before the appeal deadline, and her "current work" is preventing HML from filing a complete appeal of the Determination. Based on my review of the Record in this appeal Ms. Copeland was very involved and made substantial submissions on behalf of HML in the investigation of the Complaint. In her communications with the Investigative Delegate during the investigation, she appears to have prepared and submitted to the Investigative Delegate a 6-page document, dated April 7, 2020, that meticulously summarizes the deficiencies she observed in Ms. Kennelly's work throughout the latter's employment with HML. She also submitted all payroll documents HML had pertaining to Ms. Kennelly to the Investigative Delegate including, particularly, the time sheets for January and February 2020 pertaining to Ms. Kennelly and a wage statement for July 2020. It is unclear in Ms. Copeland's submissions in support of the extension application, what, if any other, information is forthcoming that would necessitate an extension to the appeal deadline. The onus is on the applicant to show a compelling reason why the appeal period should be extended and, here, Ms. Copeland or HML has not done so.
42. Ms. Copeland also submits that an extension is required because she has been "trying to take a month off to travel to Israel" to see her grandson who was born at the beginning of the Covid-19 pandemic. She states that if the Israeli government approves her to go, "everything else will be put on hold". As much as her desire to unite with her family is a commendable and very worthwhile endeavour, it is not, in my view, a reasonable justification to delay the appeal proceedings and make Ms. Kennelly revolve around Ms. Copeland's travel schedule for a discretionary visit out of the country.
43. I find that an extension of the appeal period for any of these reasons would only subvert the purposes and objectives of fairness, finality and efficiency set out in subsections 2(d) of the *ESA*.
44. With respect to criteria v), in *Re: C.G. Motorsports Inc.*, BC EST # RD110/12, the Tribunal accepted that it is necessary to undertake some examination of the merits of an appeal in order to determine whether there is a strong prima facie case in favour of an Appellant:
- ... to the extent necessary to determine whether there is a "strong prima facie case" the Tribunal will examine the merits of the appeal. ... An examination of the relative strength of an appeal considered against established principles necessarily requires some conclusions to be made about the merits.
45. In this case, as indicated previously, HML appeals the Determination based on the "natural justice" ground in subsection 112(1)(b) of the *ESA*. While HML has not checked-off or advanced the "new evidence" ground of appeal in subsection 112(1)(c) of the *ESA*, the appeal materials filed by Ms. Copeland include: (i) a 6-page document, dated April 7, 2020, containing a critical summary of Ms. Kennelly's work performance prepared by Ms. Copeland; and (ii) a "To whom It May Concern" document dated June 5, 2019, on the letterhead of HML, signed by Mr. Graham and Ms. Kennelly which appears to give Ms. Kennelly notice that overtime is not allowed at HML. While the first document is in the appeal Record, the second one is not. Consistent with the instructive guidance of the Tribunal in *Triple S Transmission Inc.* BC EST #D141/03, that a broad view should be taken of an appellant's choice of grounds of appeal,

particularly when that choice is made by persons untrained in the law, I will also examine whether HML's arguments establish the new evidence ground of appeal.

46. Before examining whether there is a strong *prima facie* case in favour of HML under either the natural justice or the new evidence grounds of appeal, it is important, first, to delineate some of the relevant principles applicable to appeals.
47. In no particular order, one of those important principles is that 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, and the burden is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1): *Re GC's Door Express 2007 Ltd.*, 2018 BCEST 88 (CanLii).
48. It is also important to note that section 112(1) does 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.
49. Where the appellant is alleging a failure to comply with principles of natural justice, they must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

Natural Justice

50. As indicated above, HML has invoked the natural justice ground of appeal.
51. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal explained the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST # D050/96)
52. I have reviewed both the Record and Ms. Copeland's submissions in the appeal and find neither provides any foundation or basis for an appeal on the natural justice ground. As indicated above, the onus is on the party alleging a failure to comply with principles of natural justice to provide some evidence in support of that allegation and, in this case, HML has clearly failed to do so. To the contrary, I find ample evidence in the Record showing that the Investigative Delegate, during the investigation of the Complaint and, subsequently, the Adjudicative Delegate, in making the Determination, met all of the requirements of natural justice referred to in *Re Imperial Limousine Services Ltd.* In the circumstances, I do not find any merit in HML's natural justice ground of appeal.

New Evidence

53. With respect to the “new evidence” ground of appeal, the Tribunal has consistently stated that the appellant relying upon this ground, at a minimum, must demonstrate that the evidence sought to be admitted as “new evidence” in the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal furthermore requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination. All of the foregoing requirements are conjunctive requirements that the appellant must satisfy before “new evidence” will be admitted into an appeal (*Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03).
54. In this case, neither of the documents adduced in the appeal would pass the *Davies* test for admitting new evidence on appeal. The first document, a 6-page criticism of Ms. Kennelly’s work prepared by Ms. Copeland and dated April 7, 2020, was presented by her to the Investigative Delegate during the investigation and it was neither probative then to determine whether Ms. Kennelly was owed any overtime wages nor is it probative now in this appeal.
55. As for the second document, wherein HML appears to provide Ms. Kennelly notice that overtime is not allowed at HML, it is dated June 5, 2019, and although somewhat relevant to the issue of overtime, it could have been produced to the investigator during the investigation of the Complaint or before the Determination was made. Therefore, it is inadmissible as “new evidence” as it fails the first of the four prongs in the *Davies* test for admitting evidence on appeal.
56. As indicated above, an appeal is an error correction process, with the burden of showing an error on one of the three statutory grounds in section 112(1) being on the appellant. Here, HML has not shown a strong *prima facie* case in its favour which is fatal to its request for an extension of the appeal period and therefore, HML’s extension application is denied.
57. Secondly, the appeal, on its merits, has no reasonable prospect of succeeding. It is abundantly clear that HML is simply attempting to reargue the position it took in the investigation of the Complaint without presenting any new compelling evidence or arguments. It is rearguing that Ms. Kennelly performed her work poorly or not competently and she did not work overtime because there is no overtime at HML, and she was told this. There is absolutely no cogent evidence from HML to dispute Ms. Kennelly’s evidence of hours she worked that she presented in the investigation of the Complaint and which the Adjudicative Delegate accepted. All there is from HML and Ms. Copeland is bare assertions that Ms. Kennelly “over inflated time sheets ... to give herself a raise”. This Tribunal has indicated time and again that an appeal is not an opportunity to take a second kick at the proverbial can in the hopes of getting a more favourable result before a different panel, which is what HML is doing here.
58. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

59. Pursuant to section 115 of the *ESA*, I order the Determination dated September 20, 2021, be confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal