Employment Standards
TRIBUNAL

Citation: Expo Auto Repairs Ltd. (Re)
2021 BCEST 17

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

\- by -

Expo Auto Repairs Ltd.
(“Expo”)

\- 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.: 2020/159

DATE OF DECISION: February 10, 2021

DECISION

SUBMISSIONS

Sumandeep Singh counsel for Expo Auto Repairs Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Expo Auto Repairs Ltd. ("Expo") filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on October 15, 2020 (the "Determination").

2. The Determination found that Expo contravened Part 3, sections 17 (paydays), 18 (payment of wages if employment terminated), 27 (wage statements) and 28 (payroll records); Part 5, section 45 (statutory holiday pay); and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Tri Tran ("the Complainant").

3. The Determination ordered Expo to pay the Complainant wages totalling $30,400.44 including accrued interest.

4. The Determination also levied six administrative penalties of $500.00 each against Expo, pursuant to section 29(1) of the *Employment Standards Regulation* (the "*ESR*"), for breaching sections 17, 18, 27, 28, 45 and 58 of the *ESA*.

5. The total amount of the Determination is $33,400.44.

6. Expo appeals the Determination on the "error of law" and "natural justice" grounds of appeal under section 112(1)(a) and (b) of the *ESA*.

7. In correspondence dated November 23, 2020, the Tribunal notified the Complainant and the Director that it had received Expo's appeal and it was enclosing the same for informational purposes only and no submissions on the merits of the appeal were being sought from them at this time. The Tribunal also requested the Director to provide a copy of the section 112(5) record ("the record").

8. On December 2, 2020, the Tribunal received the record from the Director, a copy of which was forwarded to the Complainant and Expo on December 22, 2020. Both parties were provided an opportunity to object to the completeness of the record, but neither objected. Accordingly, the Tribunal accepts the record as complete.

9. On January 18, 2021, the Tribunal sent correspondence to the parties advising them that a panel was assigned to decide the appeal.

10. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other party. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Determination, the Reasons for the Determination (the "Reasons"), Expo's appeal submissions, and my review of the record when the

Determination was being made. If I am satisfied that Expo's appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite the Complainant and the Director to file reply submissions on the merits of the appeal. Expo will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

11. The issue at this stage of the proceeding is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

12. Based on an online BC Registry Services Search conducted on October 23, 2019, Expo was incorporated in British Columbia on July 20, 2016, under the name Best Deal Auto Repairs Ltd. and underwent a name change to Expo on January 25, 2017. The same search showed that Expo was in the process of being dissolved. However, a subsequent BC Registry Services Search conducted on June 9, 2020, with a currency date of February 28, 2020, showed that Expo was in good standing. Both searches show that Expo's sole director is Ghulam Reza Ahmed Ali ("the director of Expo").

13. Expo operates an auto repair business in Surrey, British Columbia and hired the Complainant as a mechanic at an hourly wage rate of $25.00.

14. The Complainant's first day of work at Expo was August 3, 2018, and his last day was July 31, 2019, when he quit his employment.

15. On October 3, 2019, the Complainant filed a complaint under section 74 of the *ESA* claiming that Expo failed to pay him regular wages, overtime, vacation pay and holiday pay (the "Complaint").

16. The Complainant submitted with the Complaint a list of cash payments Expo intermittently made to him, totaling $8,560.00.

17. The Complainant also provided screenshots of conversations he had with the director of Expo spanning the period February to October 2019, wherein they discussed work required on vehicles of Expo's customers and payment of his wages.

18. The Complainant also provided a copy of a calendar showing the hours he worked each day from August 2018 to July 31, 2019.

19. The delegate decided to proceed with the Complaint by investigation.

20. In the investigation, the delegate identified two issues, namely, whether or not the Complainant was an employee of Expo and if so, was the Complainant owed any wages.

21. The delegate contacted both parties during the investigation of the Complaint and obtained evidence from them before making the Determination.

22. On October 23, 2019, the delegate served Expo with a Demand for Employer Records asking it to supply payroll records for the Complainant. While Expo failed to produce payroll records, it supplied the delegate with copies of three wage statements totaling $5,387.50 in wages, and a T4 document for 2018 that Expo issued to the Complainant. Expo submitted that it normally does not provide subcontractors with wage statements, but it made an exception in the case of the Complainant as the latter needed the documents to show income to allow him to obtain credit at his bank.

23. Expo did not issue a record of employment to the Complainant after his employment ended with Expo.

24. Expo contended that the Complainant was not an employee but worked as a subcontractor on an "as-needed" basis. Expo said that the Complainant supplied his own tools, worked in another shop besides Expo's, and agreed to work as a subcontractor. If Expo had hired the Complainant as an employee, it asserted that it would have provided him with an employment contract.

25. Expo also contended that the Complainant's record of hours worked is inaccurate but did not provide its own record of the Complainant's hours worked.

26. Expo also complained that the Complainant removed a scanner valued at $4,500.00 from its shop and Expo gave him a 2004 Mini Cooper vehicle worth $6,000.00 that he has not paid Expo for. In the circumstances, Expo denied that it owed the Complainant any wages.

27. In determining that the Complainant was an employee of Expo and not a subcontractor, the delegate referred to the definitions of "employee", "employer" and "work" in the *ESA* and explained the applicable principles for determining whether an individual is an employee or a subcontractor as follows at pages R4 to R5 of the Reasons:

> The Act's definitions of "employee" and "employer" are expansive and do not refer to the parties' intentions. Whether a party falls within these definitions is based on an objective view about how their relationship ran. I give no weight to the subjective views of either party about the Complainant's status as either an employee or a contractor. This follows section 4 of the Act, which prohibits parties from agreeing to, or entering, working relationships providing for standards which are less than those in the Act or its Regulation. Such agreements contravene the Act and are unenforceable.
>
> I have considered the following factors about this issue. The presence or absence of any factor is not determinative of whether a relationship is one of employer-employee or sub-contractor. This is because there is no checklist of characteristics that will invariably be found in all relationships of either type.
>
> 1. The level of control over the Complainant's work exercised by Expo,
> 2. Ownership of equipment and tools,
> 3. The Complainant's opportunity for profit, ability to increase that, and the risk of loss from his work,
> 4. The degree of integration of the Complainant into Expo's business, and
> 5. The documentary evidence.

28. The delegate then went on to apply the above legal framework to the facts in the case at pages R5 to R7 of the Reasons:

> **Level of Control**
>
> While the text messages could support Expo's characterization that they show it calling the Complainant in for work when necessary, viewed in context they do not. They do not cover the entire period of his work, they discuss his medical issues supporting his decision, from time to time, that he could not work, and do not account for all the work he did. There is nothing suggesting that the Complainant set his own work schedule. I find that these text messages show that Expo directed and controlled the Complainant in his work.
>
> Expo's level of control over the Complainant's activities leads me to find that Expo exercised control over the Complainant's work as an employer would.
>
> **Ownership of Equipment and Tools**
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> The Complainant owned his own tools, which I do not consider surprising for a mechanic. He worked for Expo at its business and used the equipment available there to perform his work. I do not find that this factor has much weight in supporting any characterization of either Expo's or the Complainant's status.
>
> **Opportunity to Increase Profit and Risk of Loss**
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> The Complainant did not take on financial risk in his work. Expo dictated his earnings from his work. It provided him his work and dealt with its customers about the vehicles on which he worked. There was no scope for him, by managing his work or his business, to increase his earnings, profit, or income. Expo paid him $25.00 for each hour he worked. I find that the absence of any financial risk by the Complainant, and the absence of any opportunity for him, through his own initiative, management of his work or business acumen, to increase his earnings, is inconsistent with him being an independent contractor, in business for himself. This factor is consistent with the conclusion that the Complainant was an employee of Expo.
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> **Degree of Integration into Expo's Business**
>
> The Complainant's work as a mechanic for Expo was a crucial and central element of its business. He performed his work at its business location as part of the services that Expo provided to its customers. I find that from the perspective of an objective outsider, there would be no distinction between the Complainant and Expo's employees. He was not supplying discrete services that were, in some way, different from the services that Expo supplied its customers.
>
> **The Documentary Evidence**
>
> Expo supplied copies of three wage statements for the Complainant in 2018. It also supplied a copy of his 2018 T-4 showing his employment income that year. While the Director considers the substance of any relationship, and not its form, this evidence supports the Complainant's position that he was an employee of Expo. Despite repeated requests, Expo did not supply a copy of the Complainant's Record of Employment.
>
> Expo initially said that the Complainant never worked for it after 2018. It then said he worked for it as a subcontractor in 2019. It does not deny that it paid him cash [totaling $8,560.00]
>
> …

> If Expo is correct, and these amounts were paid to the Complainant in his capacity as a contractor, I would expect it to have records of the hours worked by him, the jobs it had for its customers on which he worked, invoices or time records from him showing the time he spent working, and an explanation about how the amounts it paid him were calculated. Despite repeated requests, Expo has not supplied any evidence about the basis on which it made these cash payments. I find it difficult to accept that it would pay the Complainant, as its contractor, without supporting documents.
>
> I note that there is no evidence that the Complainant had a business licence, G.S.T. number, Canada Revenue Agency business number, or WorkSafe BC registration. There is no evidence that he was working for himself in business as a contractor as compared with working for Expo as its employee.
>
> The absence of any documents provided by Expo to support its proposition that the Complainant was a contractor diminishes the strength of its assertion that he was. It supplied no explanation for its failure to supply information and documents within its control relating to either its characterization of the Complainant as a contractor or to explain the cash payments it made to him. This causes me to conclude that the missing evidence would not support its position.
>
> An objective view of all the evidence leads me to find that the Complainant was an employee of, and not a contractor of, Expo.
>
> Applying the Act's definitions of “employee" and “employer,” I find that the Complainant was an employee of Expo from August 3, 2018 to July 31, 2019 earning an hourly wage of $25.00. Expo directed him to perform work for it that its employees would normally perform. I find that the Complainant was not in business for himself. Accordingly. the Complainant is entitled to the Act's benefits and protections, including payment of wages by Expo as required by the Act.

29. Having determined that the Complainant was an employee of Expo, the delegate then turned to the question of wages owing to the Complainant. The Determination sets out, in some detail, the delegate’s calculations of the amount Expo is owing to the Complaint. While I do not find it necessary to set out in great detail the delegate’s calculations here, it is sufficient to note that Expo did not provide its own record of the Complainant’s hours worked. In the result, the delegate relied on the unchallenged records of the Complainant to determine the wages owed to the Complainant. More particularly, after calculating all the wages earned by the Complainant during the recovery period (12 months prior to the end of the Complainant’s employment on July 31, 2019), the delegate sought to deduct from the amount Expo’s cash payment to the Complainant of $8,560.00 in 2019 and the payments reflected in the three wage statements Expo issued to the Complainant in 2018 totaling $5,387.50, leaving the balance owing to the Complainant of $30,400.44 inclusive of interest.

30. The delegate also decided not to offset, from the amount owing, the cost of the scanner the Complainant allegedly took from Expo’s shop and the Mini Cooper vehicle worth $6,000.00 that Expo claims it gave him but which the Complainant has not paid for.

ARGUMENT

31. In the appeal submissions, Expo’s counsel provides a summary of the evidence presented to the delegate in the investigation of the Complaint. I have carefully reviewed the summary but do not find it useful nor

necessary to reiterate it here as it is largely repetitive of Expo's submissions to the delegate during the investigation of the Complaint and which the delegate considered in making the Determination.

32. As concerns the "legal basis" for Expo's appeal, counsel simply sets out the definition of "employee" and contends, without any real analysis, that the Complainant "does not come under the category of an Employee" and therefore, the delegate erred in awarding the Complainant wages under the *ESA* in the Determination. Counsel then goes on to contend that only during the period between August 2018 and October 2018, with respect to which Expo issued a T4 slip, the Complainant was an employee but at all other times he was a subcontractor. In support of this contention, counsel submits that Expo did not issue the Complainant any pay statements or T4 document during any other time.

ANALYSIS

33. The grounds of appeal under the *ESA* are set out in section 112(1):

> **Appeal of director's determination**
>
> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.

34. The Tribunal has consistently held 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).

35. 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.

36. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.

37. In this case, Expo appeals the Determination on the basis of the "natural justice" and the "error of law" grounds of appeal. I am not persuaded with the merits of Expo's appeal on either ground, and I dismiss the appeal for the reasons set out below.

Natural Justice

38. With respect to the natural justice ground of appeal, the often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explains that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

39. In *Imperial Limousine Service Ltd.,* BC EST # D014/05, the Tribunal expounded on 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 to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST #D050/96.

40. There is nothing in the record nor in counsel's submissions that gives the slightest hint of an infringement of Expo's natural justice rights at any stage in the proceedings leading to the Determination. 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. In this case, Expo has failed to do so. Conversely, there is ample evidence in the record that the delegate afforded Expo an opportunity to respond to the Complaint and received submissions from the director of Expo during the investigation of the Complaint. More particularly, on June 11, 2020, after communicating with both parties during the investigation, the delegate prepared and sent his preliminary findings in the matter to Expo and requested Expo to provide any further evidence or submissions by 4:00 p.m. on June 25, 2020. Subsequently, on June 22, 2020, the delegate followed up with another email containing a "gentle reminder" to Expo to provide any new evidence or further submissions in response to the preliminary findings by the June 25 deadline. On June 23 and July 6, 2020, the director of Expo responded to the delegate with submissions. The delegate considered Expo's submissions and incorporated the same in his amended preliminary findings which he then sent to both parties on August 18, 2020, and allowed the parties a further opportunity to provide additional evidence and submissions by 4:00 p.m. on August 27, 2020. Expo made its further submissions to the delegate on August 27, 2020, which the delegate considered before going on to make the Determination. In the circumstances, I find there is no sound basis for Expo to contend that the Director breached the principles of natural justice in making the Determination.

Error of Law

41. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.), the British Columbia Court of Appeal set out the following definition of "error of law":

> 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. According to *Britco Structures Ltd*., *supra*, the Tribunal does not have jurisdiction over a question of fact alone but does have jurisdiction over questions of mixed fact and law.

43. The question of whether a person is an employee under the *ESA* is a question of mixed fact and law, requiring application of facts as found to the relevant legal principles relating to those provisions.

44. A decision by the Director on a question of mixed law and fact requires deference. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court explained that: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error: see *Re Microb Resources Inc.*, 2020 BCEST 93.

45. Having said this, it should be noted that an individual's status under the *ESA* is determined by an application of the provisions of the *ESA.* Common law tests for employment developed by the courts are subordinate to the definitions contained in the *ESA.* In *Kimberley Dawn Kopchuk,* BC EST # D049/05 (Reconsideration denied BC EST # RD114/05), the panel considered the issue of whether a person is an employee under the *ESA* and stated:

> The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:
>
> > The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her own tasks.

> It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

46. I find that the delegate has correctly identified the legal framework within which the questions of whether a person is an employee under the *ESA* is assessed: See pages R4 to R5 of the Reasons with relevant parts reproduced in paragraph 27 above. At pages R5 to R7 of the Reasons (reproduced in paragraph 28 above), the delegate applied the legal framework to the facts in the case. Most of the facts and factors considered by the director in this case point in favour of the delegate's finding that the Complainant was an employee of Expo. This Tribunal is not in a position to interfere with that finding. As indicated by the Tribunal in *Re Richard Place*, 2020 BCEST 10 (CanLII):

> Provided the established principles have been applied, a conclusion on whether a person is an employee under the *ESA* is a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is… a question over which the Tribunal has no jurisdiction. The application of the law, correctly found, to the facts as found by the Director does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal [in *Gemex Developments Corp*, *supra*].
>
> This question of whether the Director committed an error of law on the facts, framed in the words used in the definition of error of law, is whether the Director acted without evidence or acted on a view of the facts which could not reasonably be entertained.

47. In this case the delegate did not act without evidence nor did he act on a view of facts which could not be reasonably entertained. At pages R5 to R7 of the Reasons, the delegate meticulously delineates all of the facts before him in the investigation and the reasons for reaching the conclusions on those facts. I find the delegate's findings on the facts were neither perverse nor inconsistent with the evidence but rationally grounded, compelling and persuasive. In the result, I am satisfied that the delegate did not commit an error of law when deciding that the Complainant was an employee of Expo. Therefore, I dismiss the error of law ground of appeal.

48. On a closer view of Expo's appeal, I find this is a case of the employer being dissatisfied with the delegate's finding of an employment relationship and desiring to reargue its case before the appeal Tribunal, using essentially the same evidence presented in the investigation of the Complaint, with a view to obtaining a favorable result this time. An appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced in the investigation stage and properly rejected in the determination. As indicated by the Tribunal in *Chilcotin Holidays Ltd.*, BC EST # D139/00:

> The purpose of an appeal is not simply to allow an aggrieved party a second chance to argue the same case that was argued unsuccessfully to the Director during the investigation. A party appealing a Determination must show it is wrong, in fact or in law. In the context of an appeal based on an alleged error on the facts or the conclusion to be drawn from the facts, a party saying, in effect: "I don't disagree that these are the facts and that the Director had all these facts, but I disagree with the result", will not be successful. The Tribunal is not a forum for second guessing the work of the Director.

49. Lastly, while Expo's counsel has made no legal arguments in the appeal to seek an offset of the cost of the scanner the Complainant allegedly took from Expo's shop and the Mini Cooper car he allegedly purchased from Expo against the outstanding wages awarded to the Complainant, I find that the delegate correctly rejected the notion of an offset in the Determination. That is, the delegate was correct in stating that if Expo wanted compensation for the value of these items, it cannot do so by withholding from the Complainant's wages as section 21 of the *ESA* prohibits this.

50. In summary, 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, therefore, dismissed under section 114(1)(f) of the *ESA*.

ORDER

51. Pursuant to section 115 of the *ESA*, I order the Determination dated October 15, 2020, be confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal