Citation: Robin Camille Groulx (Re)
2021 BCEST 55

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Robin Camille Groulx
(the "Appellant")

- 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: Jonathan Chapnick

FILE NO.: 2021/012

DATE OF DECISION: June 9, 2021

DECISION

SUBMISSIONS

Robin Camille Groulx — on his own behalf

OVERVIEW

1. On August 22, 2018, Robin Camille Groulx (the "Appellant") filed a complaint (the "Complaint") under section 74 of the *Employment Standards Act* (the "*ESA*"). On January 6, 2021, a delegate of the Director of Employment Standards (the "Delegate") issued a determination regarding the Complaint (the "Determination").

2. In the Determination, the Delegate found that Raymond English (the "Employer") employed the Appellant in May and June 2018 and contravened sections 18 and 21 of the *ESA* in respect of the Appellant's employment. The Delegate ordered the Employer to pay the Appellant $756.09 in wages and interest and to pay a total administrative penalty amount of $1,000.00.

3. Under section 112(1) of the *ESA*, the Appellant was allowed to appeal the Determination 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.

4. On February 15, 2021, the Appellant appealed the Determination to the Employment Standards Tribunal (the "Tribunal"). The Tribunal received his appeal form and other initial materials on February 16, 2021. On his appeal form, the Appellant selected the following two grounds for his appeal:

   ☒ The Director of Employment Standards failed to observe the principles of natural justice in making the determination.

   ☒ Evidence has become available that was not available at the time the determination was being made.

5. To succeed in his appeal, the Appellant must show that at least one ground under section 112(1) of the *ESA* has been met. The Appellant has not done so. In light of my analysis below, I have not found it necessary to seek submissions from the Delegate or the Employer in this matter. For the reasons that follow, the appeal is dismissed.

ISSUES

6. In this part of my decision, I set out the issues I must decide in this appeal.

7. The Tribunal takes a large and liberal approach to appeals under the *ESA*. This means inquiring into the nature and substance of an appeal to determine whether the grounds of appeal have been met, rather than mechanically adjudicating the matter based solely on the particular boxes checked by the Appellant: *Triple S Transmission Inc.*, BC EST # D141/03.

8. Based on my review of the Appellant's submissions and supporting materials, taking a large and liberal approach, I find no indication that the Appellant's challenge to the Determination extends beyond the two grounds selected in his appeal form. As a result, at issue in this proceeding is whether those two grounds of appeal have been met. In other words, expressed as questions, the issues I must decide in this appeal are as follows:

   (a) Has the ground of appeal set out in section 112(1)(b) of the *ESA* been met? In other words, has the Appellant established that the Delegate failed to observe the principles of natural justice in making the Determination?

   (b) Has the ground of appeal set out in section 112(1)(c) of the *ESA* been met? In other words, has the Appellant established that evidence has become available that was not available at the time the Determination was being made?

9. The onus is on the Appellant to satisfy the Tribunal, on a balance of probabilities, that the answer to at least one of these questions is "yes": *683233 B.C. Ltd. (c.o.b. Pacific Kia, Cal National Leasing Ltd. and Lenux Motorcars & Leasing Ltd., Associated Employers*) BC EST # D041/06 [***Pacific Kia* case**] and *Impromptu Hair Design*, BC EST # D271/97.

THE DETERMINATION

10. In this part of my decision, I briefly set out the facts and circumstances surrounding the Determination made by the Delegate and the Appellant's subsequent appeal. Specifically, I outline relevant information regarding the Complaint process, the Delegate's written reasons for the Determination (the "Reasons for Determination"), and the appeal process.

11. In deciding the appeal, I have considered the Appellant's February 2021 appeal submission, which comprised the appeal form, the Appellant's written reasons and arguments supporting the appeal, the documents (including images and video files) provided by the Appellant in February in support of the appeal, a copy of the Determination, and a copy of the Reasons for Determination. I have also considered the record that was before the Delegate at the time of the Determination, which was provided to the Tribunal by the Delegate under section 112(5) of the *ESA* (the "Record"). In addition, I have reviewed the submissions and documents (including images and video files) provided by the Appellant to the Tribunal in March and April 2021.

12. In the discussion below, I do not refer to all of the information and submissions that I have considered. Rather, I only recount the portions that I have relied upon to reach my decision.

The Complaint Process

13. The Appellant submitted the Complaint on August 22, 2018. In his initial complaint form, the Appellant alleged that the Employer employed him "to help develop an REE [Rare Earth Element] research and

recovery Project" for the Employer's son's property in Likely, BC (the "REE Project"). The Appellant described tasks performed in relation to the Employer's ventures and other activities, such as driving the Employer to meetings, repairing and cataloguing equipment, and cleaning up a property in Yale, BC (the "Yale Project"). The Appellant indicated that he was owed an estimated total amount of $16,000.00 in regular and overtime wages.

14. The Employer denied having ever employed the Appellant.

15. In subsequent correspondence with the Employment Standards Branch (the "Branch"), the Appellant submitted additional information and documents. In response to a November 16, 2018 email request from the Branch for "any documents that will help to support [the Appellant's] position in this dispute," the Appellant submitted work calendar and expense information by email on November 19, noting that he had "literally … hundreds of files (maybe thousands) and documents, downloads and photos compiled, researched , and documenting" his endeavours with the Employer. He went on to state that he could provide a "significant" amount of additional documentation of work activities and requests.

16. In late-November 2018, the Branch advised the Appellant that the Complaint would proceed to an oral hearing. The Delegate conducted a teleconference hearing on January 16, 2019. The Appellant gave oral evidence at the hearing. He also provided documentary evidence, including printouts of his "Google calendar with hours worked and mileage travelled highlighted," computer "[s]creen clippings" of lists of electronic files related to the REE Project, and documentation of webpages he reviewed in the course of his activities with the Employer.

17. In addition to the Appellant, two witnesses gave oral evidence at the hearing. The Employer did not testify at the hearing, due to medical reasons. He was represented by legal counsel and provided evidence in the form of a two-and-a-half-page sworn affidavit, in which he stated that the Appellant had not performed work for him, but rather had helped him as a friend.

The Reasons for Determination

18. The Delegate issued the Determination and Reasons for Determination on January 6, 2021. In the Reasons for Determination, the Delegate assessed the credibility and reliability of the evidence to make findings of fact on a balance of probabilities. The Delegate explained that the Appellant's "evidence regarding the work he performed" for the Employer "was both vague and inconsistent," citing examples of such deficiencies, particularly in relation to the days and hours worked by the Appellant and his rate of pay. The Delegate also found the evidence of the two witnesses to be generally vague and unhelpful. In summary, the Delegate stated that he did "not find much" of the Appellant's "evidence to have been capable of belief" and preferred the "consistent evidence" of the Employer.

19. The Delegate concluded that, for the most part, the evidence did not show that the Appellant was an "employee" of the Employer:

> I find that Mr. Groulx has not demonstrated that he was Mr. English's employee while he was performing research, repairing equipment in Mr. English's yard, or driving Mr. English to meetings. I find it more likely that Mr. Groulx was interested in engaging in a form of joint venture with Mr. English to develop an REE station and other projects, with an eye to sharing the profits of these ventures.

20. In contrast, the Delegate found that the Appellant's involvement in the Yale Project between May 15 and June 9, 2018 was "of a different character." On the evidence, the Delegate found that the Appellant worked on the Yale Project under the Employer's direction, and concluded that the Appellant performed labour for the Employer at the Yale Project site, "which falls under the Act's jurisdiction." However, having found a lack of "any credible evidence" regarding the Appellant's hours worked or work performed on the Yale Project, the Delegate determined that the Appellant was owed only "the minimum daily pay of two hours for each day that he worked at the Yale site between May 15 and June 9, 2018." Relying on the Appellant's documentary evidence, the Delegate found that the Appellant "worked on 23 days in this period." Finally, based on the Appellant's evidence "that he never discussed a wage rate with Mr. English," the Delegate concluded that the Appellant was entitled to only the minimum wage for his hours of work.

21. In addition to ordering the Employer to pay the Appellant all wages owing under section 18 of the *ESA*, the Delegate ordered the Employer to pay the Appellant vacation pay under section 58 of the *ESA*. The Delegate also ordered the Employer to pay the Appellant for business costs incurred but not recovered by the Appellant contrary to section 21(2) of the *ESA*.

The Appeal Process

22. The Tribunal received the Appellant's appeal submission on February 16, 2021. Specifically, the Tribunal received three emails from the Appellant, consisting of the Appellant's written reasons and arguments supporting the appeal (five pages), documents in support of the appeal (two pages), a copy of the Determination, and a partial copy of the Reasons for Determination. Later that day, the Appellant submitted a completed and signed appeal form and the remaining portion of the Reasons for Determination. The Tribunal also received four video files from the Appellant via the Tribunal's secure file transfer service (the "Service"). The next day, on February 17, the Tribunal received three additional video files and 14 images from the Appellant via the Service.

23. On March 1, the Delegate provided the Record to the Tribunal. On March 17, the Tribunal wrote to the Appellant, the Employer, and the Delegate to disclose the Record. The Tribunal asked each of the Appellant and the Employer to review the Record to ensure that it was complete, and to let the Tribunal know, by March 31, if any documents were missing.

24. On March 31, the Appellant emailed the Tribunal to ask for more time to respond to the Tribunal's March 17 correspondence regarding the Record. In his email, the Appellant also submitted information and arguments related to his appeal. On April 1, the Tribunal granted the Appellant's request for more time, asking him to provide any submissions regarding the completeness of the Record no later than April 19.

25. On April 19, the Appellant emailed the Tribunal, submitting further information and arguments related to his appeal. In his email, the Appellant also stated that he wished to send additional video files in support of his appeal. On April 26, the Tribunal received three email messages and roughly 40 documents (including 24 images and 11 video files) from the Appellant via the Service. In some of the email messages and documents, the Appellant submitted further information and arguments related to his appeal.

26. On May 11, the Tribunal wrote to the Appellant, the Employer and the Delegate to advise that it had not received any objections to the completeness of the Record. The Tribunal also informed the parties that it had received further submissions and documents from the Appellant on April 19 and April 26.

ANALYSIS

27. In this part of my decision, I explain my findings regarding the issues in this appeal. In doing so, I outline relevant legal principles and discuss some of the submissions and documents provided to the Tribunal during the appeal process.

Issue #1: Has the Appellant established that the Delegate failed to observe the principles of natural justice in making the Determination?: ESA, section 112(1)(b).

28. Under section 112(1)(b) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "the director failed to observe the principles of natural justice in making the determination." This is the first ground of appeal identified by the Appellant.

29. This ground of appeal centres on the principles of natural justice, and goes to whether the Delegate's process in making the Determination was fair.

30. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker. In the context of the complaint, investigation and determination processes under Part 10 of the *ESA*, questions of procedural fairness may arise in a variety of circumstances. For example, in some instances, if a delegate of the Director of Employment Standards fails to consider relevant evidence in making their determination, this could amount to a denial of natural justice: *Economy Movers (2002) Ltd*., BC EST # D026/07. In other cases, a delegate's failure to provide adequate reasons for their determination may constitute a breach of natural justice: *Regent Christian Academy Society, c.o.b. Regent Christian Online Academy*, BC EST # D011/14. In addition, sometimes delay in the complaint, investigation and determination processes may rise to the level of procedural unfairness. Previous decisions of the Tribunal establish that a delegate's failure to issue their determination in a timely manner may run afoul of the principles of natural justice if the delay is inordinate and causes serious prejudice to a party or to the process itself: *Garrick Automotive Ltd. (Re)*, 2020 BCEST 85.

31. I appreciate that the Appellant has expended time and effort to provide voluminous materials to the Tribunal in support of his appeal. However, nowhere in those materials is there any discernible evidence or argument regarding the issue of procedural fairness. Rather, the Appellant's submissions and documents replicate and expand upon the types of evidence and argument the Appellant submitted to the Delegate during the Complaint process.

32. For example, in his February 2021 appeal submission materials, the Appellant details the tasks he performed in relation to the Employer's ventures and other activities, and provides documents, including images and video files, in support of the position he took in the Complaint. The images and video files show (and, in the case of some of the video files, describe) equipment and vehicles, lumber, work processes, properties and project sites, and individuals performing various tasks. In his written reasons and arguments supporting the appeal, the Appellant describes meetings he attended with the Employer, and asserts that he "was promised pay" and was never working as the Employer's business partner. He states that he worked more than two hours per day for the Employer – "often 16 hrs [o]f which 8-10 was of hard slogging labour, loading scrap & garbage for several weeks and repairing heavy equipment." He

discusses details of the Yale Project, including the physical demands of the project, the shortcomings of the vehicles and equipment, and the nature of the working conditions. The Appellant describes the Employer bringing equipment "into his yard," which was "next door" to the Appellant's. He states that the Employer "would call [the Appellant] up to check, inspect and or view" the equipment and that often the Appellant "would have to repair little things." He discusses his ample training and experience in mining and various other relevant fields, and describes the research he conducted and other tasks he performed in relation to the Employer's ventures and activities.

33. The submissions and documents provided by the Appellant to the Tribunal in March and April 2021 are similar in nature to the appeal submission materials provided in February 2021. For instance, in his March 31 email to the Tribunal, the Appellant describes how the Employer initially gained his interest and confidence, and details some of the tasks he performed in relation to the Employer's ventures and activities. He also discusses the documentary evidence related to his Complaint, and the conclusions that he believes should be drawn from such evidence:

> I provided my hours of work. I said I have verification of my mileage and my time by my hours on my Google Maps but I did not provide a day-to-day of my activity I have more videos but they are just highlights; they did not show the week it took me to get the truck running and backhoe tractor that has sat-discarded for 7 years … [D]espite what Ray says this is not me helping my neighbour, or driving him to a friend's place to catalogue his Lumber so he could sell it to a Mill … I videotaped [the lumber and the mill], cataloging it so that he could present it to buyers … This is not me being helpful to my friend although I thought he was my friend as well.

34. The Appellant's April 19 email to the Tribunal and April 26 email messages and documents similarly replicate and expand upon the types of evidence and argument canvassed by the Delegate in the Reasons for Determination. For example, the materials submitted by the Appellant in April contain information regarding meetings and tasks performed, days and hours worked, equipment and supplies, and the Appellant's professional knowledge and experience. He asserts that his work with the Appellant was "not neighbourly help." The images and videos provided to the Tribunal in April are of equipment and vehicles, lumber, work processes, properties and project sites, and individuals performing various tasks.

35. The submissions and materials provided by the Appellant in this appeal may well have been relevant to the Complaint (although I make no findings in this regard). However, they do not relate to the principles of natural justice, and do not go to whether the Delegate's process in making the Determination was fair. On the contrary, all of the submissions and materials before me suggest that the Appellant was given a full and fair opportunity to present his case to an impartial decision-maker, who, in turn, considered the Appellant's case and made certain findings in the Appellant's favour. All indications are that the Delegate carefully reviewed the evidence and submissions of the parties, made reasoned assessments regarding the credibility and reliability of evidence, made findings of fact on a balance of probabilities, and applied the *ESA* to draw conclusions and come to the Determination. While the Determination and Reasons for Determination were issued roughly two years following the January 16, 2019 oral hearing, the Appellant did not identify this as an issue in his appeal and did not provide any suggestion, let alone evidence, of any resulting prejudice. Therefore, in this case, there is no reasonable basis for me to conclude that the lengthy time period between the hearing and the Determination constituted a breach of natural justice.

36. An appeal to the Tribunal is not an opportunity for an appellant to reargue the case they made to a delegate of the Director of Employment Standards: *Masev Communications*, BC EST # D205/04. The appellant's task in an appeal is entirely different. They must marshal their information and arguments to show that it is more likely than not that the delegate erred in making their determination on the basis of one or more of the specific grounds set out in section 112(1) of the *ESA*. This much is clear on the face of the legislation and the Tribunal's appeal form. As the Tribunal discussed in the *Pacific Kia* case, an appellant must take care to explain in detail why they selected a particular ground of appeal and how that ground is met in their situation.

37. I recognize that the Appellant (like most other appellants who come before the Tribunal) is not a lawyer and was not represented by legal counsel in these proceedings. Accordingly, as discussed above, I have taken a large and liberal view of the Appellant's submissions. Despite doing so, I am unable to discern any explanation as to why the Appellant selected the ground of appeal set out in section 112(1)(b) of the *ESA* or how that ground is met in the Appellant's circumstances.

38. I therefore find that the ground of appeal set out in section 112(1)(b) of the *ESA* has not been met in this appeal. The Appellant has not shown me that it is more likely than not that the Delegate failed to observe the principles of natural justice in making the Determination.

Issue #2: Has the Appellant established that evidence has become available that was not available at the time the Determination was being made?: ESA, section 112(1)(c).

39. Under section 112(1)(c) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "evidence has become available that was not available at the time the determination was being made." This is the second ground of appeal identified by the Appellant.

40. This ground of appeal is not meant to simply allow an appellant to seek out additional evidence to supplement the materials that were before a delegate of the Director of Employment Standards during the complaint, investigation and determination processes, if that additional evidence could have been provided to the delegate before they made their determination: *Merilus Technologies Inc.*, BC EST # D171/03 [***Merilus Technologies* case**]. The threshold for meeting this ground of appeal is higher than that. Specifically, the evidence that the appellant puts forward to the Tribunal must satisfy each of the following four criteria:

(a) The evidence is new, in the sense that it could not, with the exercise of due diligence, have been discovered and presented to the delegate during the complaint, investigation and determination processes and before the delegate made their determination.

(b) The evidence is relevant. More specifically, the evidence must be relevant to a particular material issue in the complaint that was before the delegate.

(c) The evidence is credible, in the sense that it is reasonably capable of belief.

(d) The evidence has high potential probative value. This means that, if the evidence had been provided to, and believed by, the delegate, it could have led the delegate to reach a different conclusion on the particular material issue in the complaint: *Merilus Technologies* case.

41. For the following reasons, I find that the Appellant has not succeeded in satisfying these criteria in this appeal.

42. First, nowhere in the Appellant's voluminous appeal materials does he identify what, if any, novel evidence he is putting forward to the Tribunal. There is no discernible information or argument to point me to a specific document or item of testimony that was missing at the time the Determination was being made.

43. Second, in all of the submissions and documents provided by the Appellant to the Tribunal, I am unable to identify any evidence that is actually new. A portion of the materials received by the Tribunal appear to have been before the Delegate, and I have no reason to conclude that any of the Appellant's materials were unavailable during the Complaint process or could not, with the exercise of due diligence, have been presented to the Delegate before they made their Determination. Indeed, early on in the Complaint process, in his November 19, 2018 email to the Branch, the Appellant stated that he had "literally … hundreds of files (maybe thousands) and documents, downloads and photos compiled , researched , and documenting" his endeavours with the Employer, and could provide a "significant" amount of additional documentation of work activities and requests. I find that it is more likely than not that the evidence put forward by the Appellant in this appeal was from among those hundreds or thousands of files, documents, downloads and photos, which were readily available at the time the Determination was being made.

44. I therefore find that the ground of appeal set out in section 112(1)(c) of the *ESA* has not been met in this appeal, without the need to consider matters of relevance, credibility and probative value. The Appellant has not shown me, on a balance of probabilities, that evidence has become available that was not available at the time the Determination was being made.

ORDER

45. For all of the above reasons, the Appellant's appeal is dismissed and the Determination is confirmed: *ESA*, section 115(1).

Jonathan Chapnick
Member
Employment Standards Tribunal