

Citation: Triumph Traffic Management Inc. and
Triumph Project Manager Company Corp. (Re)
2023 BCEST 102

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Triumph Traffic Management Inc. and
Triumph Project Manager Company Corp.
("Appellants")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE No.: 2023/080 and 2023/081

DATE OF DECISION: November 17, 2023

DECISION

SUBMISSIONS

Desiree Legare on behalf of Triumph Traffic Management Inc. and Triumph Project Manager Company Corp.

Nikala de Balinhard delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses appeals filed under section 112 of the *Employment Standards Act* (“ESA”) by Triumph Traffic Management Inc. (“TTMI”) and Triumph Project Manager Company Corp. (“TPMCC”), collectively “Triumph” or the “Appellants”, of a determination issued by Nikala de Balinhard, a delegate (“deciding Delegate”) of the Director of Employment Standards (“Director”), on May 19, 2023 (“Determination”).
2. The Determination found Triumph had contravened Part 3, section 18, and Part 5, section 45, of the *ESA* in respect of the employment of Shannon Wong (“Ms. Wong”) and ordered Triumph to pay Ms. Wong the amount of \$780.36, an amount that included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$1,780.36.
3. On May 30, 2023, the Tribunal received appeals from Triumph raising all three grounds of appeal set out in section 112(1) of the *ESA*: error of law; failure to observe principles of natural justice; and additional evidence coming available that was not available at the time the Determination was being made. I note that the reasons and arguments for each appeal is the same.
4. The Appellants requested an extension of time to August 31, 2023 to provide additional reasons, arguments, and supporting documents.
5. In correspondence dated June 23, 2023, the Tribunal, among other things, acknowledged having received each the appeals, granted the requested time to provide additional reasons, arguments, and supporting documents, requested the section 112(5) record (“record”) from the Director and notified the other parties that submissions on the merits of the appeals were not being sought at that time.
6. On September 5, 2023, Triumph notified the Tribunal it had additional evidence, but had no time to prepare and submit it. On September 18, 2023, the Tribunal advised Triumph that any further submissions and additional documents should be received by the Tribunal no later than September 25, 2023 and that no further extensions would be granted.
7. The record has been provided to the Tribunal by the Director and a copy has been delivered to each of the parties, who have been provided with the opportunity to object to the completeness of the record.
8. No objection to the completeness of the record has been received and, for the purposes of the appeals, I accept it as being complete.

9. My review of the submission received with the appeals, the record, and the Determination indicated there was sufficient presumptive merit to one aspect of the appeals to warrant seeking further submissions from the parties on that matter.
10. In correspondence dated September 28, 2023, the Tribunal invited the Director, Triumph, and Ms. Wong to make submissions on that aspect of the appeals, which was identified as being whether the deciding Delegate found Ms. Wong did not receive any pay for the statutory holidays to which she was entitled.
11. The Tribunal received a submission from the Director; no submissions on that question were received from any other party.
12. In correspondence dated October 18, 2023, the submission from the Director was provided to Triumph, who was invited to respond to that submission. Triumph was given November 1, 2023 as a deadline for response. No response was received from Triumph by that date.
13. On November 3, 2023, the Tribunal received a submission from Triumph attaching two “witness statements which declare what [sic] her position was a Manager.” The Tribunal has provided this submission to the other parties, indicating no response is required. I will address this submission more completely later in this decision, but note at this point it is unresponsive to the matter on which this Panel invited submissions in the September 28 correspondence.

ISSUES

14. The issue in each appeal is whether errors have been shown in the Determination on any of the grounds of appeal listed in section 112 of the *ESA*.

THE DETERMINATION

15. By way of background, the Determination recites the corporate information relating to the Appellants which showed both TTMI and TPMCC are incorporated in British Columbia and neither company appears in Government of Canada Bankruptcy and Insolvency Records search results.
16. Ms. Wong filed a complaint on April 20, 2021 alleging TPMCC had contravened the *ESA* by failing to pay overtime wages and statutory holiday during her period of employment, which was October 26, 2020 to March 17, 2021.
17. During the period of time relevant to the complaint, Triumph operated a traffic control business.
18. Ms. Wong was employed as a Dispatch Team Leader.
19. The complaint was investigated by a delegate of the Director (“investigating Delegate”), who produced an Investigation Report, dated November 8, 2022, that was provided to Triumph, to Ms. Legare and to Ms. Wong.
20. Triumph and Ms. Wong were invited to respond in writing to the Report. Neither provided a response of any substance.

21. The deciding Delegate identified three issues:
1. Are Triumph Traffic Management Inc. and Triumph Project Manager Company Corp. associated employers pursuant to section 95 of the *ESA*;
 2. Is Ms. Wong owed overtime wages, and, if so, how much; and
 3. Is Ms. Wong owed statutory holiday pay and, if so, how much?
22. On the first issue, the deciding Delegate found TTMI and TPMCC were associated employers under section 95 of the *ESA*.
23. On the second issue, the deciding Delegate found that Triumph had paid Ms. Wong's overtime earnings in full and that no additional overtime wages were owed to her.
24. On the third issue, the deciding Delegate found Ms. Wong had qualified for three statutory holidays during her employment, had not been paid for any of them, and was owed \$694.86 for the unpaid statutory holidays.
25. Based on the conclusions reached, the deciding Delegate found Triumph had contravened sections 18 and 45 of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

26. As indicated above, Triumph has appealed on each of the grounds of appeal set out in section 112(1) of the *ESA*.
27. The written submission which accompanied the appeals filed on May 30, 2023 do not specifically address how each of the grounds of appeal arises from the Determination, but the following matters are apparent:
- i. Triumph has been unable to provide all of their evidence because the Covid pandemic has resulted in a reduction of administrative staff available to handle the information needed to respond to the complaint, and Ms. Legare was on maternity leave during the complaint process;
 - ii. Ms. Wong was off Christmas Eve, Christmas Day, Boxing Day and New Years Day (as well as other days in the Christmas holiday period), and was paid her regular wage for each of those days; and
 - iii. Ms. Wong was paid significantly more as compensation for any outstanding wages owed than the deciding Delegate calculated was owed to her when she left her employment.
28. At this Panel's invitation, the Director has provided a submission on the question posed in the Tribunal's September 28 correspondence. In that submission, the Director says that on a consideration of Triumph's assertion that Ms. Wong had been paid for all statutory holidays during her period of employment and upon further review of the evidence, the Director acknowledges Ms. Wong "may have received pay" from Triumph for two of the three statutory holidays – Christmas Day and New Years Day – which were found to be owed, but maintains no pay was received by Ms. Wong for the Family Day statutory holiday. The

Director says that, based on the review, it is open to this Panel to vary the Determination to reduce wages payable by the amount found owed for the Christmas Day and New Years Day statutory holidays.

ANALYSIS

29. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

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.*

30. 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, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

31. I shall address each of the grounds of appeal raised by Triumph.

Natural Justice

32. A party alleging a failure to comply with principles of natural justice, as Triumph has done in the appeals, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. I find nothing in the appeals that would support a finding the deciding Delegate, or the investigating Delegate, failed to comply with principles of natural justice.

33. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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.

34. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record, Triumph was provided with the opportunity required by principles of natural justice to present their position to both the investigating and the deciding Delegates. Triumph has provided no objectively acceptable evidence showing otherwise.

35. There is nothing in the reasons, record, appeal forms, or submissions showing that the investigating Delegate, or the deciding Delegate, failed to comply with the principles of natural justice in making the Determination. The record shows Triumph was aware of the details of Ms. Wong's complaint and was given a full opportunity to respond to it before the Determination was made.
36. I find Triumph has not shown the deciding and/or investigating Delegate failed to observe principles of natural justice. This ground of appeal has no likelihood of succeeding and it is dismissed.

New Evidence

37. The ground of appeal set out in section 112(1)(c) is commonly referred to as the 'new evidence' ground of appeal.
38. In the appeals, the only material that might be considered new evidence is the two attachments to the November 3 email. The only point sought to be made in the attachments is that Ms. Wong was a manager for the purposes of the *ESA*.
39. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach; testing the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03.
40. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.
41. The submission on the appeals does not address any of the considerations applied by the Tribunal when considering whether to accept and consider material that is purported to be new evidence. The appeals do not indicate the 'new evidence' advanced was not reasonably available during the complaint process; how it is relevant to any issue arising from the complaint; that it is credible; or that it is probative.
42. In my assessment, the 'new evidence' delivered to the Tribunal does not meet any of the criteria under which the Tribunal might accept it. While the documents appear to have been prepared after the Determination was made, the information contained in these documents is not 'new.' Had Triumph sought to advance the argument that Ms. Wong was a manager for the purposes of the *ESA*, the same information provided in the attachments could have been provided during the complaint process.
43. The attachments do not address any issue that was relevant to the complaint. There is nothing in the material indicating Triumph took the position Ms. Wong was a manager for the purposes of the *ESA* in response to her complaint. Rather, the material reveals that in communications with the investigating

Delegate Triumph referred to Ms. Wong as an “administrative assistant” and “administrative staff member” in the material that was provided to the investigating Delegate: see record, pages 48 and 77.

44. I do not find the attachments to be either credible or probative.

45. This ground of appeal is dismissed.

Error of Law

46. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.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.

47. A finding of fact is reviewable by the Tribunal as an error of law on the facts in limited circumstances. The test for establishing that findings of fact constitute an error of law is stringent. Findings of fact are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

48. To expand the above point, an appeal on this basis must show the findings of fact that are being challenged were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the findings, or the conclusions and inferences drawn from them, and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13, at paras. 26-29.

49. The evidence in the record, and I don’t agree with the Director that such evidence wasn’t clear, shows Ms. Wong was paid for the Christmas Day and New Years Day statutory holidays. I find the deciding Delegate made an error of law by acting without evidence or, alternatively, by acting on a view of the facts that could not reasonably be entertained in awarding Ms. Wong wages for those days.

50. In respect of the third statutory holiday, I agree with the Director that the evidence does not show Ms. Wong was paid for that statutory holiday and Triumph has not shown any error was made by the deciding Delegate in finding it was owed.

51. As a result, I find the Determination must be varied by reducing the wages the deciding Delegate found were owed for two of the statutory holidays by the amount calculated to be payable for those two statutory holidays and by adjusting the interest on that amount.

52. The Director has provided a calculation for what the wages payable (and the interest adjustment) would have been for the two statutory holidays and I accept that calculation.
53. Nothing which has been set out above has the effect of cancelling or reducing the administrative penalties imposed for the contraventions of sections 18 and 45 of the *ESA*.
54. Except for the variance, and for all of the above reasons, the appeals are otherwise dismissed.

ORDER

55. Pursuant to section 115(1) of the *ESA*, I order the Determination dated May 19, 2023, be varied by reducing the amount of wages found owing to Ms. Wong by \$454.86 and the amount of vacation pay found owing by \$18.19. In all other respects, the Determination is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal

Notice: Paragraph 55 of this version of the reasons for decision has been amended in accordance with the corrigendum issued by the Tribunal on November 23, 2023. Paragraph 55 has been corrected as follows: "Pursuant to section 115(1) of the *ESA*, I order the Determination dated May 19, 2023, be varied by reducing the amount of wages found owing to Ms. Wong by \$454.86 and the amount of vacation pay found owing by \$18.19. In all other respects, the Determination is confirmed."