Citation: Christopher King (Re)
2023 BCEST 103

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Christopher King
("Employee")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/126

DATE OF DECISION: November 22, 2023

DECISION

SUBMISSIONS

Christopher King — on his own behalf

OVERVIEW

1. This is an appeal by Christopher King ("Employee") of a decision of the Director of Employment Standards ("Director") issued on July 28, 2023 ("Determination").

2. On February 28, 2021, the Employee filed a complaint under section 74 of the *Employment Standards Act* ("*ESA*") with the Director alleging that Automind Collision Squamish contravened the *ESA* by making unauthorized deduction from his wages ("Complaint").

3. The Director followed a two-step process in investigating the Complaint and making the Determination. One delegate of the Director ("investigative delegate") telephoned and corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report ("Investigation Report") summarizing the results of the investigation and sent it to the parties for review and comment.

4. Neither party responded to the Investigation Report, and it was forwarded to a second delegate ("adjudicative delegate") who assumed responsibility for reviewing it and issuing the Determination pursuant to section 81 of the *ESA*.

5. In the Determination, the adjudicative delegate found that Auto Mind Collision Repair (E. 7th Avenue) Ltd. carrying on business as Automind Collision Repair (Squamish), Automind Collision and Automind Collision Repair (collectively, "Employer") contravened the *ESA* in respect of the employment of the Employee and ordered the Employer to pay the Employee $1,368.54 in overtime wages, $631.27 in statutory holiday pay, $79.99 in annual vacation pay and $164.33 in accrued interest on the said amounts. The total wages plus interest payable to the Employee was $2,244.13.

6. The adjudicative delegate also levied two mandatory administrative penalties in the amount of $500 each against the Employer for contravening sections 17 and 18 of the *ESA*.

7. The total amount of the Determination is $3,244.13.

8. The Employee appeals the Determination on the sole statutory ground that the Director erred in law in making the Determination.

9. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I find it is unnecessary to seek submissions on the merits from the Employer or the Director.

10. My decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions of the Employee, the Determination, and the Reasons for the Determination ("Reasons").

ISSUE

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

THE DETERMINATION AND THE REASONS

12. The Reasons show that the adjudicative delegate considered three issues, namely:

    a. Whether the Employer fulfilled its wage obligations to the Employee by paying him more than $27 per hour for all hours worked?

    b. Whether the Employer made a "30% deduction" from the Employee's wages or was the said deduction a part of the formula used by the Employer to determine what portion of the pool the Employee was entitled to?

    c. Whether the Employee has been paid all wages owed, including overtime wages, statutory holiday pay and annual vacation pay?

13. In deciding these questions, the adjudicative delegate considered the Investigation Report prepared by the investigative delegate and the relevant documents submitted by each party in the investigation of the Complaint. The adjudicative delegate noted that each party was afforded an opportunity to review the evidence and documents presented by the opposing party during the investigation of the Complaint and to provide any clarification or identify any errors. However, neither party responded to the Investigation Report. As a result, the adjudicative delegate accepted the Investigation Report to be an accurate reflection of the parties' evidence and issues in the matter.

14. The adjudicative delegate noted in the Reasons that it was unnecessary for her to recount, in detail, all of the evidence collected in the investigation of the Complaint, and she would only reference that evidence which was necessary to reach the required findings and to apply the relevant legislation. However, I think some background information is in order here.

15. The Employer is in the business of automotive repair and refinishing in British Columbia.

16. The Employee commenced working for the Employer as an Automotive Painter on October 13, 2020.

17. Both parties signed a hiring agreement *after* the Employee's start date, on December 1, 2020.

18. The agreement listed the Employee's rates of pay as $28.00 per hour for the "Automind Pool Rate," $27.00 per hour for the "Straight Time Rate" and $27.00 per hour for the "Pool Division Hourly Rate."

19. The Employee worked full-time hours including some overtime.

20. Throughout his employment, the Employee's biweekly pay varied due to the nature of the Employer's pay structure.

21. The Employee quit his employment on September 30, 2021.

22. In the Reasons, the adjudicative delegate notes that both the Employee and the Employer agree on the Employee's job title, job duties, period of employment, and hours worked. They also agree that the wage statements accurately reflect wages paid to the Employee by the Employer.

23. The parties also agree that the Excel spreadsheet calculations for the Automind Pool entitlement for pay periods of 26-2020 to 03-2021, which include the notation "refinish labour (less 30%)," are an accurate record of how the Employer calculated the Employee's Automind Pool wages.

24. The adjudicative delegate notes that, early in his employment, the Employee developed concerns about the wages he was being paid by the Employer and repeatedly tried to address his concern about the matter with the Employer. These concerns are more clearly delineated in the Investigation Report which states that the Employee received his wage statements each pay period and realized that he had no method of calculating or predicting his pay. He repeatedly asked the Employer why his pay was lower than expected. He was frustrated with the Employer's pay system because it was unpredictable and there were multiple issues with it. The Employer attempted to address the Employee's concerns including by drawing up an employment agreement dated December 1, 2020, to clarify the pay structure, which agreement was executed by both parties.

25. In the Complaint and in the investigation of the Complaint, the Employee said that the agreed upon wage between the parties was $27 per hour for all hours he worked plus a portion of the Automind Pool for every production hour completed. While he does not dispute that he was properly paid for "Straight Time hours," he submitted that the Employer paid him 30% less than the agreed upon amount for Automind Pool earnings.

26. The Employer's position was that the 30% deduction the Employee referred to was not actually a deduction from his wages but instead a part of the formula used to calculate Automind Pool entitlement. The Employer also contended that since the Employee received more than the $27 per hour rate for all hours worked, he was fully paid. The adjudicative delegate observed that the Employer's latter position was based on the premise that the Employee's regular wage rate was $27 per hour, but the evidence provided by the Employer shows it was not.

27. The Adjudicative delegate then considered the definitions of "wages" and "regular wage" in the *ESA*, particularly emphasizing that "regular wage" includes "other incentive bonus." The adjudicative delegate noted that in his employment agreement, the Employee was entitled to two different types of wages, namely, "Straight-Time Rate" and those calculated as owing from the Automind Pool. Both these categories of wages were reflected in the Employee's wage statement under the headings "Paint labour" and "Painter Contract." She further noted that in the employment agreement, the Employer defined "Straight-Time Rate" as actual time worked and wages from Automind Pool were associated with "Production Hours" which were based on the number of closed repair orders in a specific period. She also noted that the Employer pays a "Automind Pool Rate" for every production hour generated, calculates a base rate for the team based on their "Efficiency", and then calculates each employee's percentage of the Automind Pool based on the Automind "Pool Division Hourly." She further noted that under the heading "Remuneration" in the employment agreement, the Employer explained: "…given that the team base flat rate remuneration pays base on the performance," the actual amount of pay may be higher or lower than the actual attendance. She then reasoned that by tying performance to income through Automind Pool,

the Employer provided its employees with an incentive to work efficiently. Therefore, the income from the Automind Pool is included in the definition of wages and the Employee's regular wages must be calculated based on both the Employee's Straight-Time and Automind Pool earnings before a proper determination can be made if the Employee has been paid all wages owed. According to the adjudicative delegate, by simply showing that the Employee earned $27 per hour for all hours worked, the Employer has not established that it fulfilled its wage obligations to the Employee.

28. The adjudicative delegate next considered whether the Employer made a "30% deduction" from the Employee's wages or was the said deduction a part of the formula used by the Employer to determine what portion of the pool the Employee was entitled to.

29. Here, the adjudicative delegate noted that the Employee contended that the Employer deducted 30% from the total production hours during the pay period, 26–2020 to 03-2021, in contravention of the employment agreement which states that every production hour generated will be paid for by the employer at the "Automind Pool rate" of $28 per hour. The Employer, conversely, argued that the 30% deduction was a part of the entitlement calculation and not a deduction from the Employee's wages. More particularly, the Employer explained that this deduction was included in its calculations because of a change in 2010 made by ICBC in how ICBC paid its closed repair orders, decreasing the hourly labour rate by approximately 30%, but increasing the hours allotted for the repair job so the end payment was essentially the same. The Employer said that it kept the old wage rate and applied 30% deduction because a lower rate on the wage statement could "possibly affect [employees] financially when dealing with a banking institution."

30. While the adjudicative delegate found that the Employee took the job believing he would be paid for all of the hours allotted by ICBC in their closed work order, she found noteworthy and determinative on this issue that the Employer defined "production hours" in the employment agreement as the "total number of hours produced **based on** the closed work orders in the specified period" and further specified that "calculations are done by the management system." [**emphasis** in original] In finding in favour of the Employer that "30% deduction" was part of the calculations to determine wages and not a deduction from the Employee's wages itself, the adjudicative delegate reasoned as follows:

> By stating that the closed work orders are the basis for the calculation of the number of production hours, [the Employer] made clear that there is a distinct difference between the hours allotted in the closed work order, and those considered "production hours". Thus, it follows they also made it clear that paying 100% of the production hours did not mean paying 100% of the hours provided in the closed work order.
>
> When [the Employee] signed the employment agreement, he agreed that [the Employer] could apply their own calculations to determine the number of Production Hours generated by a closed worked order.

31. The adjudicative delegate next considered whether the Employee had been paid all wages owing to him including overtime wages, statutory holiday pay and annual vacation pay. She went on to determine the Employee's hourly rate based on the Employee's total wages in the pay period divided by his total hours of work which she then applied to calculate his entitlements. Based on the Employee's wage statements in the record, the adjudicative delegate, by way of an example, explained that in the pay period 24/20, the Employee worked a total of 79.34 hours of "clocked-in time" including a total of 7.34 hours of overtime. His straight time rate was $27 per hour, and he received $511.34 for "Painter Contract" (i.e.,

amount calculated from the Automind pool). Based on this information she calculated his hourly rate, for the pay period, was $33.44, as follows:

- $27.00 x 79.34 hours = $2,142.18
- $2,142.18 + $511.34 = $2,653.52
- $2,653.52/79.34 hours = $33.44 per hour

32. As previously indicated, the Employee did not contest that he was properly paid "Straight-Time hours." With respect to overtime hours, however, the adjudicative delegate found that in each of the pay periods, between 2/20 to 17/21 inclusive, the Employee worked some overtime hours. With the exception of one pay period, 26/20, when the Employee was overpaid very slightly and is not owed any overtime wages, for all other periods, the Employee's wage statements show that his overtime entitlements were calculated using only Straight-Time Rate and not his regular wage which includes the Automind Pool. As a result, the adjudicative delegate went on to find that the Employer violated section 40 of the *ESA* for failing to pay the Employee his full entitlement to overtime wages. The adjudicative delegate calculated the overtime owed to the Employee is $1,368.54.

33. The adjudicative delegate also found that the Employer calculated the Employee's statutory holiday pay using only actual hours worked at the Straight-Time Rate and did not include the Automind Pool. She also observed that the employment agreement provides that Straight-Time Rate will be used to calculate statutory holiday pay. This is *inconsistent* with section 4 of the *ESA* which prohibits employers and employees from contracting out of the minimum requirements of the *ESA* and, therefore, unenforceable. Having said this, the adjudicative delegate notes that with the exception of BC Day 2022 and Labour Day 2022, when the Employer overpaid wages to the Employee (which cannot be offset against wages owing in another period according to section 21), the Employer underpaid on 6 other holidays starting Christmas Day 2021 to Canada Day 2022 because the calculation of holiday pay did not include hours from the Automind Pool. The references to holidays overpaid and underpaid between Christmas Day 2021 and Labour Day 2022 appear to be a mistake on the part of the adjudicative delegate as the Employee only worked between October 13, 2020 and September 30, 2021. The operative period for holidays overpaid and underpaid is more accurately between Christmas Day 2020 to Canada Day 2021. The adjudicative delegate calculated the amount owing to the Employee for statutory holiday pay is $631.27.

34. While the adjudicative delegate found that the Employee was paid 4% of his total wages in vacation pay in each pay period including wages derived from the Automind Pool, she found that he was also entitled to 4% annual vacation pay on the additional amounts found to be owing for overtime and holiday in the amount of $79.99.

35. Further, pursuant to section 88 of the *ESA*, the adjudicative delegate ordered the Employer to pay the Employee $164.33 in interest on all the amounts owing.

36. Finally, she also levied two administrative penalties of $500 each against the Employer pursuant to sections 17 and 18 respectively for failing to use the Employee's regular wage to calculate his entitlements for overtime and statutory holiday and for failing to pay the Employee all wages within 6 calendar days of him quitting his employment.

SUBMISSIONS OF THE EMPLOYEE

37. The Employee submits that the Director erred in law in making the Determination. He states that the adjudicative delegate failed to consider that the *ESA* "previously stated" on the Director's website:

> **Part 3 - Wage statements**
>
> 27 (1) On every payday, an employer must give each employee a written wage statement for the pay period stating all of the following:
>
> […]
>
> (h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for.

38. He states that in and throughout his employment with the Employer, he received several pay rates, namely, "Straight-Time," "Pool Rate" and "Pool Division Hourly Rate." He contends that the calculations the Employer provided of these pay rates on his wage statements did not meet the obligations as set out in section 27(1) of the *ESA* above. He says the current legislation "today differs from that above which was in force" when he filed his Complaint.

39. The Employee also contends that the adjudicative delegate missed or failed to consider that the Employer neglected to contractually define the difference between a "closed work order" and "production hours." He states that while in the Reasons the adjudicative delegate "refers to the definition of production hours in the employment contract," she fails to "bring into discussion the importance of what a closed work order meant, as it related to the wage calculations."

40. He also adds:

> My understanding of line 'F' of the employment contract with AutoMind was that a closed repair order contained both the physical labour aspect along with the paperwork. At times I would do the physical labour piece for a work order and not be paid for that specific order for a month, maybe two, while the vehicle would sit waiting for the parts. To me, this is a failure of AutoMind's processes, payment structure, and clearly defined orders. Why should I be penalized income due to a delay of closed work order because there is a delay in parts or on the administrative side? Having a clear understanding of the difference between the calculations in the pay structures (and proper definitions) was critical to my income, and consequently the lack thereof. Of importance, AutoMind did not provide an employment agreement despite my request on several occasions, until roughly two months after I started work.

41. The Employee also submits that when the Employer started applying the 30% deduction in response to a change to ICBC's closed work orders in 2010, they had "ample opportunity to (a) update their standard employment agreement and (b) make the necessary changes to the associated payroll and wage statements to **clearly** show the calculations while providing [him] an opportunity to be satisfied that they were correct." [**emphasis** in original]

42. He also says the adjudicative delegate assumed that the calculations done by the "management system" are synonymous with the definition of a "closed work order." He contends that '[t]his lack of clarity created even more confusion when the [Employer] unilaterally started to apply the 30% deduction to [his] wage statements as a directive from procedural or policy changes at ICBC." He

adds, whether or not the Employer followed the directive from ICBC, they failed to provide him this information for his review and consideration. He states, from the onset of his employment with the Employer, the latter represented to him that he would earn 100% of his production hours, and not a range depending on ICBC payment structure and closed work orders.

43. He concludes his submissions stating that he is:

> disputing the [e]mployer's obligations to provide an *accurate and clear* calculation on the wage statement which would ultimately have changed those amounts given that (a) no breakdown of the three types of pay rates was provided; and/or (b) the deductions of 30% were not made clear by AutoMind; and/or (c) no clear calculation for incentives was provided.

ANALYSIS

44. Having reviewed the Determination, the section 112(5) record and the submissions of the Employee, I find there is no reasonable prospect that the appeal will succeed. My reasons for so concluding follow.

45. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

46. Section 114 (1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112 (2) have not been met.

47. The burden is on an appellant, in this case, the Employee, to demonstrate, on a balance of probabilities, that the Director made a reviewable error. As previously indicated, the Employee has checked off a single ground of appeal in the Appeal Form, namely, the Director erred in law and breached the principles of natural justice in making the Determination.

48. Tribunal jurisprudence regarding error of law is well established. The leading case *Britco Structures Ltd.*, BC EST # D260/03, in which the Tribunal 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. 2775 [B.C.C.A.]:

1. a misinterpretation or misapplication of a section of the *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

49. I note that the Employee contends that the calculations the Employer provided of his various pay rates on his wage statements did not meet the obligations as set out in section 27(1) of the *ESA* above. He says the current legislation "today differs from that above which was in force" when he filed his Complaint. I have reviewed the provision in question, section 27(1)(h) of the *ESA*, and find that it has remained unchanged since the Employee filed his Complaint. It may be that the Employee was looking at the annotated explanation of the legislation on the Director's site, but the language of section 27(1)(h) is the same today as when he filed the Complaint February 28, 2021. It provides:

> **27** (1) On every payday, an employer must give each employee a written wage statement for the pay period stating all of the following:
>
> …
>
> (h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for;

50. Therefore, if an employee is paid other than by the hour or by salary, for example by commission, pursuant to section 27(1)(h), an employer must provide the employee with enough information as to how the wages were calculated that the employee can check the employer's calculations and be satisfied that the payment amount is correct.

51. During the investigation and in the appeal, the Employee consistently argues that the Employer failed to comply with the letter of section 27(1)(h) of the *ESA*. That is, he was not provided sufficient information as to be able to determine how his wages, particularly, wages other than "Straight-Time," those from the "Automind Pool," were calculated. He states that the adjudicative delegate failed to take into account section 27(1)(h) of the *ESA*, in making the Determination.

52. I have reviewed the wage statements and I note that while the adjudicative delegate observes in the Reasons that both the "Straight-Time" and "Automind Pool" are reflected on the wage statement under the headings "Paint Labour" and "Painter Contract" respectively, the latter has a varying rate from one pay period to another. Further, there is not enough or any information on the wage statement as to how the rate for "Painter Contract" was calculated for the Employee to check the Employer's calculations. In the circumstances, it was open to the adjudicative delegate to find the Employer contravened section 27(1)(h) of the *ESA,* and she did not. However, I am not convinced, on a balance of probabilities, that as result of this failure, the adjudicative delegate erred in law within the meaning of error of law described in *Gemex* above in concluding that the "30% deduction" was a part of the formula used to determine what portion of the pool he was entitled to and *not* a deduction from the Employee's wages.

53. I find, based on the evidence adduced by the parties in the investigation of the Complaint, that it was open to the adjudicative delegate to prefer the evidence of the Employer over the Employee's. I find the reasoning of the adjudicative delegate pages R5 and R6 persuasive:

> [The Employer's] position is that the 30% deduction is a part of the entitlement calculation and not a deduction from [the Employee's] wages. They explain that this deduction is included in their calculations because of a change in 2010 to how ICBC paid its closed repair orders, decreasing the hourly labour rate by approximately 30% but increasing the hours allotted for the repair job so the end payment was essentially the same. They state they kept the old wage rate and applied a 30% deduction because of a lower rate on the wage statement could "possibly affect [employees] financially when dealing with a banking institution."
>
> [The Employee's] early and on-going questioning of the pay structure supports his assertion that he took the job believing he would be paid for 100% of the hours allotted by ICBC in their closed work order.
>
> However, [the Employer] defines "production hours", in the employment agreement, as the "total number of hours produced **based on** the closed work orders in the specified period" and adds **"calculations are done by the management system"** (**emphasis** mine).
>
> By stating that the closed work orders are the basis for the calculation of number of production hours, [the Employer] made clear that there is a distinct difference between the hours allotted in the closed work order and those considered "production hours". Thus, it follows they also made clear that paying 100% of the production hours did not mean paying 100% of the hours provided in the closed work order.
>
> When [the Employee] signed the employment agreement, he agreed that [the Employer] could apply their own calculations to determine the number of Production Hours generated by a closed worked order.
>
> **I find** that the "30% deduction" was a part of the calculations to determine wages and not a deduction from [the Employee's] wages itself. [**emphasis** in original]

54. I reiterate that while I agree that the Employer failed to provide the Employee with sufficient information as to how his wages, particularly, from the Automind Pool were calculated, and I do not disagree with him that the Employer could have "updated their standard employment agreement" and "made necessary changes to the associated payroll and wage statements" when the Employer started applying the 30% deduction in response to a change to ICBC's closed work orders in 2010, I do not find the Employee has discharged the burden placed upon him in the appeal to show, on a balance of probabilities, that the conclusion reached by the adjudicative delegate on the matter of the "30% deduction" was wrong. I find that in this regard (i.e., the "30% reduction"), the Employee is essentially rearguing the position he advanced in the investigation of the Complaint and challenges the adjudicative delegate's conclusions of fact with a view to having this Tribunal come to a different conclusion, which is not the purpose of the appeal mechanism in the *ESA*.

55. Lastly, I note that the Employee does not challenge the awards made by the adjudicative delegate for overtime wage, statutory holiday pay and annual vacation pay. I find persuasive the adjudicative delegate's reasons for these awards, and I find no reason to interfere with the same.

56. Accordingly, I find there is no basis for me to interfere with the Determination under the error of law ground of appeal.

ORDER

57. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is summarily dismissed. Pursuant to subsection 115(1)(a) of the ESA, the Determination dated July 28, 2023, is confirmed as issued in the amount of $3,244.13 together with whatever further interest that has accrued, under section 88 of the *ESA*, since the date of issuance.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal