

Citation: Commercial Trailer Services Ltd. (Re)  
2023 Bcest 113

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Commercial Trailer Services Ltd.

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Richard Grounds

**FILE NO.:** 2023/112

**DATE OF DECISION:** December 13, 2023

## DECISION

### SUBMISSIONS

Peter Yew

on behalf of Commercial Trailer Services Ltd.

### OVERVIEW

1. This is an appeal by Commercial Trailer Services Ltd. (“Appellant”) of a determination issued by Tara MacCarron, a delegate (“Delegate”) of the Director of Employment Standards (“Director”), dated June 23, 2023 (“Determination”). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
2. In the Determination, the Delegate concluded that Arjun Beedh (“Complainant”) is owed wages in the total amount of \$15,465.35 and interest in the amount of \$1,461.57 by the Appellant and that the Complainant’s last day of employment was November 5, 2020. The Delegate also imposed two administrative penalties totalling \$1,000.00 for contravention of sections 17 and 18 of the *ESA*.
3. The Appellant appealed the Determination on the basis that the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was being made.
4. Submissions were not requested from the parties.
5. I have considered the Determination, the reasons for the Determination, the appeal submissions, and the *ESA* section 115 record (“Director’s Record”). For the following reasons, the Appellant’s appeal is dismissed, and the Determination is confirmed.

### ISSUES

6. The issues to be decided in this appeal are whether the Director erred in law and/or failed to observe the principles of natural justice in making the Determination and whether evidence has become available that was not available at the time the Determination was being made.

### FACTUAL BACKGROUND

7. The Appellant operates a truck and trailer repair business in Surrey, BC. The Complainant worked as a welder for the Appellant from October 1, 2019, until sometime around October or November 2020. The Complainant also contracted with the Appellant through a company. On March 20, 2021, the Complainant made a complaint to the Employment Standards Branch for regular wages and overtime for the time period August 1, 2019, to November 6, 2020.
8. The Complainant’s complaint proceeded to an investigation which was conducted by David Ramsay, a delegate of the Director (“Investigating Delegate”). The Investigating Delegate spoke with the Complainant, a witness who was employed by the Appellant as the Complainant’s direct supervisor, and

he also communicated with the Appellant's accountant who provided information and submissions on behalf of the Appellant.

9. On February 3, 2023, the Investigating Delegate sent an email to the Appellant's accountant asking if the Appellant wished to voluntarily resolve the complaint by paying \$13,070.91, which the Investigating Delegate stated was likely the minimum the decision-maker would order. The Investigating Delegate suggested that "this option might make sense as [the Appellant] could potentially avoid the penalties and interest."
10. On February 8, 2023, the Appellant's accountant responded to the offer with a "message from owner" that "everything was paid to the complainant." Although the February 3, 2023 "offer" email was only sent to the Appellant's accountant, the Appellant as the employer was copied on the response email rejecting the offer. The Investigating Delegate responded to this email rejecting the offer and asked the Appellant's accountant if the Investigation Report should be sent to him and the employer (Appellant) or just to the employer (Appellant). The Appellant's accountant confirmed that it should be sent to both of them.
11. On March 10, 2023, the Investigating Delegate sent the Investigation Report to the Appellant, to the Appellant's accountant, and to the Complainant. The Investigation Report identified the questions to be answered as "What was the Complainant's last day of work and last day of employment?" and "Is the Complainant owed wages? If so, how much is owed?" The Investigation Report noted that both parties agreed that the Complainant had been paid at least \$30,397.50 including by cheque and e-transfer. The Investigation Report noted that the Complainant had also worked for the Appellant as an independently contracted cleaner and that the investigation only related to his work as a welder.
12. The Investigation Report contained a summary of the information obtained for the investigation including the information from the Complainant, from the Appellant through the Complainant's direct supervisor and based on submissions from the Appellant's accountant. The Investigation Report noted the differences in the evidence from the parties, including relating to the last day the Complainant worked, the hours worked by the Complainant, how much the Complainant was paid and whether the Complainant was paid in cash. The Investigation Report included a list of documents obtained for the investigation.
13. Neither the Appellant nor the Complainant provided a response to the Investigation Report.

## **THE DETERMINATION**

14. The Delegate, Tara MacCarron, completed the Determination based on "a review of all information on the file, which includes the investigation report (the IR) issued on March 10, 2023, summarizing the information collected from the investigation".
15. The Delegate identified the two issues as: "What was the Complainant's last day of work and last day of employment"; and "Is the Complainant owed wages and, if so, in what amount?" The Delegate discussed the differences in the evidence regarding why the Complainant stopped working for the Appellant, the Complainant's last day of work, the number of hours the Complainant worked, how much the Complainant was paid and how the Complainant was paid, including whether he was paid in cash.

16. The Delegate did not fully accept the evidence of either the Appellant or the Complainant. Upon weighing the evidence, the Delegate found the Appellant's records to be the most probable of the hours of work performed by the Complainant and the Complainant's evidence to be the most probable of the wages he had been paid. The Delegate calculated the difference between these two amounts as being \$11,439.00 in regular wages, \$462.38 in overtime wages, \$1,800.00 in statutory holiday pay and \$1,763.96 in vacation pay.
17. The Delegate concluded that the Complainant was owed total wages of \$15,465.34 plus \$1,461.57 in interest. Finally, the Delegate concluded that the Appellant contravened the *ESA* by failing to pay all wages earned by the Complainant within the required time after his employment ended. The Delegate also imposed two administrative penalties totalling \$1,000.00.

## ARGUMENTS

18. The Appellant's representative has made the following submissions in support of the Appellant's appeal:
- The Director of Employment Standards erred by dealing with the Appellant's external accountant instead of with the Appellant and the external accountant was not an authorized representative. Its external accountant did not explain the February 3, 2023, offer of settlement so the Appellant was not "alerted" to the "severity and urgency of the investigation" and was "pre-empted from providing crucial evidence in a timely manner, to support [its] argument that the Complainant was, in fact, grossly overpaid."
  - After the Determination, the Appellant initiated a review of the Complainant's hours of work and discovered that had absences from work due to 2 bouts of COVID and a trip to the United States. These absences from work had not been deducted from the time sheets compiled by the Appellant's external accountant.
  - The Appellant did not take issue with disregarding a payment of \$6,826.05 paid to the Complainant for work done prior to the Complainant's employment with the Appellant, but the Director of Employment Standards failed to consider payments to the Complainant's company for cleaning services in the total amount of \$9,581.25 for invoices from October 2019 to February 2020, and these wages were in fact for work performed as an employee.
  - The Complainant insisted that he be paid wages in cash on several occasions and the Appellant has provided on appeal third party witness statements in support of this.
  - The Complainant was untruthful when he stated that he quit because the Appellant did not help him with his son's dental bill and has provided on appeal payment of the dental bill by the Appellant.
  - After deducting the amounts that the Complainant was overpaid during the three periods of absences from work, the Complainant was still overpaid by the Appellant.
  - The context and credibility of the Complainant support that the Complainant was overpaid by the Appellant.
19. I have not requested submissions from the Complainant or the Director.

## ANALYSIS

20. The Appellant appeals the Determination on the basis that in making the Determination the Director committed an error of law and/or failed to observe the principles of natural justice. In addition, the Appellant submits that evidence has become available that was not available at the time the Determination was being made. The role of the Tribunal is to decide whether the appeal should be allowed or dismissed based on one of these grounds of appeal. It is not to re-weigh the evidence and decide the merits of the original complaint afresh.
21. The Appellant has raised a number of issues on appeal including: the Delegate dealt with the Appellant's external accountant instead of with the Appellant's director; a review of the Complainant's work hours completed after the Determination discovered absences from work by the Complainant that were not deducted from the Complainant's time sheets by the Appellant's accountant; the Delegate failed to consider payments to the Complainant's company for cleaning services as employee wages; the Appellant submitted third party statements in support of its position that the Complainant was paid cash; the Complainant was untruthful relating to a dental bill paid by the Appellant; the Complainant was overpaid after taking into account the Complainant's absences from work; and it disagreed with the Delegate's assessment of credibility.

### *Error of Law*

22. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), [1998] B.C.J. No. 2275 (BC CA):
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.
23. The Delegate applied the applicable sections of the *ESA* and general legal principles related to the assessment of disputed evidence. Although the Appellant has raised new evidence on appeal, which will be considered below, the Delegate reviewed and considered the available evidence in reaching conclusions about the Complainant's last day worked, hours worked, and wages owed. Although the Appellant disagrees with the Delegate's assessment of the facts and credibility, the facts relied on by the Delegate can reasonably be entertained and the Delegate did not adopt a method of assessment of credibility that is wrong in principle.
24. The Appellant submitted invoices and pay stubs on appeal for payments totalling \$9,581.25 paid to the Complainant's company that the Appellant submits was for work the Complainant performed as an employee. Although the Appellant submitted this information as new evidence, this information was

already submitted to the Investigating Delegate, so it is not new evidence.<sup>1</sup> The Appellant as employer raised this issue during the investigation but only in relation to a different \$6,826.05 payment paid to the Complainant's company. The Determination did not include this payment as wages paid to the Complainant because it was for work performed by the Complainant before his period of employment.

25. The Appellant did not dispute this finding on appeal but instead attempts to raise a similar argument with the other \$9,581.25 in payments made to the Complainant's company that did occur during his period of employment, i.e., that they were for work performed as an employee. The Appellant should have raised this argument during the investigation, either when its director provided the information to the Investigating Delegate<sup>2</sup> or in response to the Investigation Report<sup>3</sup>, but it did not do so.
26. In the absence of an argument from the Appellant as employer and based on the evidence known to them, there was no obvious reason for the Investigating Delegate or the Delegate to question whether the payments made to the Complainant's company were for wages as an employee. The Delegate concluded that the Complainant's wages did not include these other payments to the Complainant's company and this conclusion is reasonably supported by the evidence.
27. The evidence does not support that the Director erred in law in making the Determination.

#### *Failure to Observe the Principles of Natural Justice*

28. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them, and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
29. The obvious fairness issue raised by the Appellant is that the Delegate dealt with the Appellant's external accountant who was not the Appellant's authorized representative, and this resulted in the Appellant not being able to respond to the complaint. This is not supported by the evidence. The Investigating Delegate sent a demand for payroll records to the Appellant's email address on October 28, 2022. The Appellant's external accountant responded to the email, copying the Appellant's email address, and requested an extension of time to provide the requested documents. The request was granted, and the Appellant's director provided the information with a signed letter dated November 14, 2022.<sup>4</sup>
30. Given the direct and ongoing involvement of the Appellant's external accountant in the investigation, it was reasonable for the Investigating Delegate and the Delegate to consider that the Appellant's external accountant was an authorized representative of the Appellant. The Appellant's email address was included in the email discussions related to the offer of settlement and the Investigation Report was sent

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<sup>1</sup> The invoices and cheque stubs are located at pages 273-279 of the Director's Record.

<sup>2</sup> The Appellant's director noted in his letter responding to the demand for payroll records that the Complainant "use to provide clean up services at our workshop as a sole proprietorship, so I have attached those invoices and cheques copies as well." See page 272 of the Director's Record.

<sup>3</sup> The Investigation Report specifically stated that the Complainant had worked for the Appellant as an independently contracted cleaner and that the investigation only related to his work as a welder. See page 6 of the Director's Record. The Investigation Report did not include these payments as wages.

<sup>4</sup> Page 272 of the Director's Record.

to the Appellant's email address. The Appellant was provided with notice of the complaint, advised of the issues, and given an opportunity to respond to the Investigation Report. There is no evidence that either the Investigating Delegate or the Delegate were biased against the Appellant employer. The circumstances do not support that there was a reasonable apprehension of bias against the Appellant.

31. The evidence does not support that the Director failed to observe the principles of natural justice in making the Determination.

#### *New Evidence*

32. The Appellant has submitted that there is new evidence that was not available at the time the Determination was made. In particular, the Appellant has submitted on appeal the following evidence: information about the Complainant's absences from work due to COVID and a trip to the United States not deducted from timesheets and supported by third party witness statements; invoices and cheque stubs for payments to the Complainant's company for cleaning services that was in fact for work as an employee (but as noted above this is not new evidence); a bank statement from the Appellant's director and third party witness statements supporting that the Complainant was paid in cash; and a December 19, 2020 payment receipt for a dental bill paid by the Appellant on the Complainant's behalf.

33. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Davies et al. (Merilus Technologies Inc.)*, BC EST # D171/03, where it stated (at page 3):

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

34. The first stage of the test for admitting new evidence on appeal requires that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation

or adjudication of the complaint and prior to the Determination being made. The Appellant has not provided any reasons why these documents could not have been discovered and presented prior to the Determination being made. In each case, it is reasonable to infer that the information could have with due diligence been discovered and presented to the Director during the investigation.

35. The new evidence raised by the Appellant has not met the first part of the test to be admitted on appeal. Accordingly, it will not be considered further.

### **ORDER**

36. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1)(a) of the *ESA*.

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**Richard Grounds**  
**Member**  
**Employment Standards Tribunal**