Citation: Corporate Couriers Logistics Ltd.
and CCL Transportation Ltd. (Re)
2023 BCEST 28

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Corporate Couriers Logistics Ltd. and CCL Transportation Ltd.
(the "Appellants")

- 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: Brandon Mewhort

FILE NO.: 2022/208

DATE OF DECISION: May 8, 2023

DECISION

SUBMISSIONS

Paul D. McLean	counsel for Corporate Couriers Logistics Ltd. and CCL Transportation Ltd.
Brian Kyle	on his own behalf
Donald McKay	counsel for Brian Kyle
Kara L. Crawford	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Corporate Couriers Logistics Ltd. ("Corporate Couriers") and CCL Transportation Ltd. ("CCL" and, together with Corporate Couriers, the "Appellants"), of a determination issued by Kara L. Crawford, a delegate of the Director of Employment Standards (the "Adjudicating Delegate"), dated November 14, 2022 (the "Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. In the Determination, the Adjudicating Delegate found that Brian Kyle (the "Employee"), a former employee of CCL, was not a "short haul truck driver", as defined in section 1 of the *Employment Standards Regulation* ("*Regulation*"), and that he was entitled to outstanding regular wages, statutory holiday pay, overtime wages, and vacation pay.

3. In their appeal, the Appellants submit that the Adjudicating Delegate erred in law in determining that the Employee was not a short haul truck driver, and that they were denied natural justice. For the reasons given below, I dismiss the appeal and order that the Determination be confirmed pursuant to section 115 of the *ESA*.

ISSUES

4. The issues to be considered are whether, in making the Determination, the Adjudicating Delegate: (1) erred in law in determining that the Employee was not a "short haul truck driver" for the purposes of the *Regulation*; and (2) failed to observe the principles of natural justice.

THE DETERMINATION

5. The Employee was employed since August 2019 to deliver Amazon packages using a Ford Transit Van supplied by CCL. The Employee was responsible for loading, driving, and delivering up to 250 packages a day along a designated route within a radius of less than 75 kilometers. CCL paid the Employee as a "short haul truck driver" with an overtime rate applied after nine hours of work in a day or 45 hours of work in a week.

6. The Employee filed a complaint under section 74 of the *ESA* on June 7, 2021, alleging that CCL failed to pay him overtime wages, statutory holiday pay and vacation pay. Another delegate of the Director of Employment Standards (the "Investigative Delegate") investigated the complaint and issued an Investigation Report on August 9, 2022.

7. On August 16, 2022, the Director received a notice of group termination on CCL letterhead dated August 10, 2022, advising that, on August 3, 2022, 81 employees were provided eight weeks working notice of termination effective September 28, 2022. The return address for the letter was directed to Corporate Couriers.

8. In the Determination, the Adjudicating Delegate found, as a preliminary issue, that CCL and Corporate Couriers are associated as one employer pursuant to section 95 of the *ESA*. The Appellants have not appealed that aspect of the Determination.

9. The Adjudicating Delegate went on to find that the Employee was not a "short haul truck driver" for the purposes of section 1 of the *Regulation*. In making that finding, the Adjudicating Delegate noted that regulatory exclusions from minimum entitlements are narrowly construed and that the burden of establishing the factual and legal basis for the exclusion lies with the person asserting it. The Adjudicating Delegate also noted that an interpretation of the *ESA* and the *Regulation* that extends its protections to as many persons as possible and encourages employers to comply with the minimum requirements of the *ESA* and *Regulation* is preferred over one that does not.

10. The Adjudicating Delegate discussed the approach to determining whether the Employee was a short haul truck driver as follows:

> …Any conclusion about whether an employee meets the definition in a regulatory exclusion depends on a total characterization of that person's duties. Whether a person performs duties to a degree that brings them within the exclusionary definition is predominantly a question of fact. Whether an employee fits the definition of a short haul truck driver is determined by the nature of their work and the distance they drive.

11. The Adjudicating Delegate applied that approach to this case, as follows, in determining that the Employee was not a short haul truck driver:

> To be found to be a short-haul truck driver the main responsibility must be that of driving. I rely on the job posting's description of "a delivery driver" as being responsible for "loading/unloading vehicles as required, lifting up to 50 lbs., and delivering up to 120 packages to customers' homes, businesses, and apartment buildings" to find that for each shift worked the Complainant spent a substantial portion of time outside the vehicle. I find that the loading and delivery of packages went far beyond being incidental or ancillary duty to that of driving. The parties agree that the radius of the Complainant's delivery route was no more than 75 km from the Work Location. I observe that a round trip to the outer limit of this radius and back at a residential speed of 50 km per hour would only require 3 hours of driving, however the Complainant's shifts were typically between 9 to 12 hours in length. Although it is not assumed that the routes were straight lines or direct, I find that this radius is indicative of the fact that driving was not the main function of the job as sufficient time for loading and delivery had to be allotted to each shift. I am satisfied that the nature of the work performed was that of a courier and not a short haul truck driver.

> My finding that the Complainant was not a short-haul truck driver is also support [sic] by the fact that the qualification required for the job was possession of a class 5 diver's licenses which allows a person to drive a 2-axle single motor vehicle and is the most commonly held license for personal vehicle use. This is not the class of license typically held by a person employed to drive as a short haul truck driver. Short haul truck drivers typically hold a Class 1 licence which allows them to drive semi-trailer trucks or a Class 3 commercial licence which permits them to drive large trucks with more than 2 axles, like straight-body trucks, heavy equipment trucks like mixers or dump trucks, tow trucks of any weight etc.

12. The Adjudicating Delegate then found that the Employee was entitled to outstanding regular wages, statutory holiday pay, overtime wages, and vacation pay. The Adjudicating Delegate also imposed mandatory administrative penalties for contraventions of sections 17, 40 and 46 of the *ESA*.

13. Given the Adjudicating Delegate's finding that the Employee was not a short haul truck driver because his main job duty was not driving, she found it unnecessary to determine whether the vehicle the Employee drove at work – a Ford Transit Van – was a "truck".

ARGUMENTS

The Appellants' argument

14. When asked to select their grounds of appeal in their appeal form, the Appellants only said the Director erred in law. In their submissions, the Appellants argue that the Adjudicating Delegate misinterpreted the definition of "short haul truck driver" in the *Regulation* and acted without evidence in reaching the conclusion that the Employee was not a short haul truck driver.

15. Regarding the alleged misinterpretation, the Appellants argue that, on the plain wording of the *ESA* and *Regulation*, if an employee is employed to drive a truck as part of their duties, they are appropriately classified as a "short haul truck driver". The Appellants' say that the Adjudicating Delegate's reliance (and assumptions) about how many specific deliveries an employee may make deprives the exemption of any meaning and creates substantial uncertainty around which employees could be considered short haul truck drivers. The Appellants refer to materials published by the Employment Standards Branch (the "Branch") that contemplate short haul truck drivers making multiple stops during a shift.

16. The Appellants also argue the Adjudicating Delegate improperly relied on the class of driver's license required for the position, because even the Branch's own interpretation guidelines contain no requirement for short haul truck drivers to have any specific class of driver's license.

17. Regarding their argument that the Adjudicating Delegate acted without evidence, the Appellants say the Adjudicating Delegate made assumptions about the number of deliveries made by the Employee and the amount of time he would be inside the vehicle during his shift based only on a job description. For example, the Appellants say there was no evidence before the Adjudicating Delegate about the specific routes driven by the Employee, the actual number of deliveries made per shift, how much time the Employee spent in the truck, the average speed of the vehicle, or the number of kilometres driven by the Employee per shift.

18. The Appellants also say that there was no evidence before the Adjudicating Delegate regarding what class of driver's licence is required to drive a "truck" and there are many different types of "truck" that do not require a class 1 licence. The Appellants again note that even the Branch's own interpretation guidelines contain no requirement for short haul truck drivers to have any specific class of driver's license.

19. The Appellants also argue in their submissions that they were denied natural justice, because the Adjudicating Delegate made the Determination based solely on the Investigation Report without an oral hearing or providing them an opportunity to make submissions, particularly regarding assumptions that, they say, were unsupported by evidence. The Appellants argue that the Adjudicating Delegate's reliance on those assumptions, without seeking any submissions from the parties, constituted a denial of natural justice.

The Adjudicating Delegate's argument

20. Regarding the alleged error of law, the Adjudicating Delegate argues that the Appellants' appeal concerns a finding of fact. More specifically, the Adjudicating Delegate argues that whether an employee performs duties that brings them within the exclusionary definition of "short haul truck driver" is predominantly a question of fact.

21. The Adjudicating Delegate argues that her findings were supported by the evidence, including the job posting for the Employee's position, the parties' agreement that the delivery route was no more than 75 km from the work location and the Employee's daily work hours. The Adjudicating Delegate also says she did not make a finding about the number of stops the Employee made during a shift. Further, the Adjudicating Delegate says the Appellants did not submit evidence during the investigation to support a finding that the Employee's core duty was to "drive", despite numerous opportunities to do so.

22. Regarding the interpretation of "short haul truck driver", the Adjudicating Delegate argues the term should be read with an emphasis on the verb "drive" rather than the noun "truck", because the type of work is what the *ESA* is concerned about, not the mode of transportation. The Adjudicating Delegate disagrees with the Appellants' submission that the Legislature grounded its exclusion on the type of vehicle used to perform the work, because whether an employee's work falls within an exemption should not be based on the tool used to do the work, but rather the nature of the work that is performed.

23. Notably, the Adjudicating Delegate says she is "prepared to waive consideration of the Delegate's comments related to classes of driver's licenses." However, she argues that the Determination is sufficient to be confirmed without any reliance on those comments.

24. Regarding the allegation that the Appellants were denied natural justice, the Adjudicating Delegate argues that the Appellants were given an adequate opportunity to know the case against them and to respond to it. Specifically, the Adjudicating Delegate notes that the Appellants received a copy of the Investigation Report and were given an opportunity to respond to it, which they did.

The Employee's argument

25. Two submissions were provided by the Employee: a submission he provided on his own behalf, and one provided by an assistant director at the Clinical Law Program at the University of Victoria's Faculty of Law.

26. The Employee's own submission only addressed whether the vehicle he drove at work – a Ford Transit Van – was a "truck". As discussed above, that is not an issue on appeal, because the Adjudicating Delegate found it unnecessary to make such a determination. Accordingly, while I appreciate the Employee taking the time to provide his own submission, it is not relevant to the issues on appeal.

27. In the other submission, the Employee argues that the Adjudicating Delegate did not err in law, because she properly relied on the available evidence (including evidence provided by the Appellants) and applied a functional analysis of the Employee's job duties. The Employee relies on this Tribunal's decision in *Three S Environmental Ltd. (Re)*, 2021 BCEST 88 ("*Three S*") for its submissions in that regard, which I discuss below in my analysis.

28. The Employee also says the Appellants mischaracterised the functional analysis followed by the Adjudicating Delegate, specifically where they note the absurdity of a distinction between couriers and short haul truck drivers based on an uncertain number of deliveries made per shift. The Employee argues the Adjudicating Delegate did not, in fact, rely on the number of deliveries per shift, and instead assessed whether the Employee's "main job responsibility" was driving.

29. The Employee also submits that, in the alternative, even if the Adjudicating Delegate erred in undertaking a functional analysis and the only necessary condition to qualify as a short haul truck driver is the type of vehicle driven, then the threshold for a "truck" must be higher than argued by the Appellants. For example, the Employee argues that section 37.3 of the *Regulation* assumes the same employee – and therefore the same type of "truck" – is capable of driving both long haul and short haul routes, with the only difference being the distance usually driven. The Employee also notes that the Branch's policy materials demonstrate that a "truck" is large and typically tows cargo rather than taking packages inside the vehicle.

30. Regarding the Appellants' allegation that the Adjudicating Delegate acted without evidence, the Employee argues that the job description relied on by the Adjudicating Delegate provides a rational basis for determining the nature of the Employee's work. The Employee also argues that the Adjudicating Delegate was entitled to make assumptions or inferences based on the evidence provided.

31. Regarding the Appellants' arguments that there was no evidence before the Adjudicating Delegate regarding what class of driver's licence is required to drive a "truck", the Employee submits that, while the argument may be well founded, it is not dispositive. That is because the Adjudicating Delegate was already "satisfied" that the Employee was not a "short haul truck driver" based on her analysis of the job description and typical duties.

32. Regarding the allegation that the Appellants were denied natural justice, the Employee argues that the Appellants are, in essence, complaining about the Adjudicating Delegate's exercise of the Director's fact-finding authority – specifically, reaching conclusions based on the evidence made available by the parties. The Employee argues that the Appellants have failed to explain how the assumptions and inferences made by the Adjudicating Delegate have denied their procedural rights to know the case against them and to respond to it. Accordingly, the Employee says, the Appellants have not met their burden of demonstrating a breach on natural justice.

The Appellants' reply argument

33. The Appellants reiterate that the Adjudicating Delegate erred in law by making a number of material factual findings without any evidence. The Appellants also stress that the word "truck" in the term "short haul truck driver" must be given meaning and, based on the Branch's own guidelines, the type of vehicle is critical in determining whether an employee is a short haul truck driver.

ANALYSIS

Alleged error of law

34. The Appellant bears the burden of demonstrating that the Adjudicating Delegate made an error of law: see e.g., *Multintel Education Ltd. (Re)*, 2019 BCEST 109 at para 18. The Tribunal has adopted the following definition of an error of law, which was set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA):

a. a misinterpretation or misapplication of a section of the Act;

b. a misapplication of an applicable principle of general law;

c. acting without any evidence;

d. acting on a view of the facts which could not reasonably be entertained; and

e. adopting a method of assessment which is wrong in principle.

35. In this case, as discussed above, the Appellants argue that the Adjudicating Delegate misinterpreted the definition of "short haul truck driver" in the *Regulation* and acted without evidence.

36. In *Anthony (Re)*, BC EST # RD123/17, a three-member reconsideration panel of this Tribunal discussed the principles that have been consistently applied regarding the interpretation and application of regulatory exclusions, such as the exclusion for short haul truck drivers. In summary (see paras 35 to 41):

a. Regulatory definitions that exclude persons from entitlements in the *ESA* must be narrowly construed and any doubt arising from difficulties of language should be resolved in favour of the employee.

b. If a person is to be denied statutory benefits, it should be clear and obvious that the individual meets the regulatory definition. The scope of an exclusion from the *ESA* is presumed to be limited, and so there must be clear evidence justifying the application of the exclusion.

c. The burden of establishing the factual and legal basis for the exclusion lies with the person asserting it.

d. Any conclusion about whether an employee meets the definition in a regulatory exclusion depends upon a total characterization of that person's duties.

37. The Tribunal also held that whether a person has responsibilities to a degree that brings that person within the definition of an exclusion is predominantly a question of fact, and that questions of fact are not reviewable absent evidence of palpable and overriding error resulting in findings that are irrational, perverse, or inexplicable: *Anthony (Re)* at paras 41 and 42.

38. In *Anthony (Re)*, the Tribunal applied those principles in considering the regulatory exclusion for farm workers and held (at paras 42 to 43, emphasis added):

> Questions of fact determined by the Director are not reviewable by the Tribunal on appeal, absent evidence of palpable and overriding error resulting in findings that are irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned findings of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 1998 CanLII 6466 (BC CA), 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* 2000 BCSC 289 (CanLII), [2000] BCJ No.331). This is so even in circumstances where the evidence before the Director might have led the Tribunal to make different findings of fact than those appearing in a determination (see *Britco Structures Ltd.*, BC EST # D260/03; *Carestation Health Centres (Seymour) Ltd.*, BC EST # RD106/10).
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> In our view, the Director's conclusions regarding Anthony's principal employment responsibilities were findings of fact that should not have been disturbed in the Final Appeal Decision. This is so because the Director's findings on this issue do not appear to have been irrational, perverse, or inexplicable. There was at least some evidence, offered primarily by Anthony, on the basis of which the Director, acting reasonably, could have concluded that Anthony's principal employment responsibilities did not include the agricultural tasks referred to in the definition of "farm worker"…

39. In *Three S*, which was relied on by the Employee, the Tribunal dismissed an appeal because it was not filed within the applicable time limit. However, in making its decision, the Tribunal also considered the merits of the appeal, including the issue of whether the employees fell within the definition of "short haul truck driver". In that regard, the Tribunal held (at para. 54): "Any conclusion about whether an employee meets the definition in a regulatory exclusion depends on a total characterization of that person's duties. Whether a person performs duties to a degree that brings them within the exclusionary definition is predominantly a question of fact."

40. The Tribunal in *Three S* went on to hold as follows (at paras 60 to 66, emphasis added):

> The Director correctly identified and gave effect to the following interpretive principles: that regulatory exclusions from minimum entitlements are narrowly construed; and the burden of establishing the factual and legal basis for the exclusion lies with the person asserting it. The Tribunal has adopted and consistently affirmed those principles on the interpretive question that was addressed in this case: see *Zack Anthony*, BC EST # RD123/17, at paras. 38 – 42.
>
> …
>
> The findings being challenged in this appeal are findings of fact about the work performed by the complainants.
>
> It is well established that the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

> The Tribunal has held that findings of fact are reviewable as errors of law under prongs (3) and (4) of the Gemex test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal has noted that the test for establishing an error of law on this basis is stringent, citing the reformulation of the third and fourth Gemex factors found in *Delsom Estates Ltd. v. British Columbia (Assessor of Area No. 11-Richmond/Delta)*, 2000 BCSC 289 (CanLII), [2000] B.C.J. No. 331 (S.C.) at para. 18:
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> > . . . that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" . . .
>
> The submissions made by Three S do not present a significant case for challenging the findings of fact made by the Director as errors of law. To reiterate, disagreement with findings of fact and inferences drawn therefrom does not provide a ground for appeal under section 112 of the *ESA* unless an error of law on the facts can be shown.
>
> I find the facts provided supported the conclusion reached. There is no apparent merit to any argument that the Director committed a reviewable error on the facts. There was evidence from the complainants on which it was both logical and reasonable for the Director to find they were not short haul truck drivers. On the evidence before the Director, it cannot be argued that such findings were perverse or inexplicable.

41. In *Nature's Choice Foods Limited (Re)*, 2020 BCEST 130, this Tribunal also discussed the test for establishing when findings of fact constitute an error of law as follows, including when inferences were made by the Director (at paras 31 and 32, emphasis added):

> The test for establishing findings of fact constitute an error of law is very stringent. In this case, in order to establish the delegate committed an error of law on the facts, NCFL is required to show the findings of fact and the conclusions and inferences reached by the delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions 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.
>
> I have carefully read the evidence of the parties in the Record and as summarized by the delegate in the Reasons and I am not at all persuaded that the findings of fact and conclusions and inferences the delegate reached in this case are without a rational basis or perverse or inexplicable. I also note that the Tribunal is generally reluctant to substitute the delegate's finding of facts even if it is inclined to reach a different conclusion on the evidence.

42. In this case, the Appellants take issue with the Adjudicating Delegate's determination that the Employee was not a "short haul truck driver" for the purposes of the *Regulation*. As discussed in the cases cited above, whether a person has responsibilities to a degree that brings that person within the definition of an exclusion is predominantly a question of fact. Accordingly, whether the Employee was a "short haul truck driver" is predominantly a question of fact, which is not reviewable absent evidence of palpable and overriding error resulting in findings that are irrational, perverse, or inexplicable.

43. In my view, it cannot be said in this case that the Adjudicating Delegate's finding was irrational, perverse, or inexplicable. Rather, the Adjudicating Delegate properly considered the total characterization of Employee's duties based on the evidence before her. Specifically, the Adjudicating Delegate considered the job posting for the Employee's position and determined that the loading and delivery of packages went far beyond being incidental or ancillary to the duty of driving. Notably, and contrary to the Appellants' submission, the Adjudicating Delegate did not make any findings as to the number of deliveries per shift necessary to not be considered a short haul truck driver.

44. I also do not find the inferences made by the Adjudicating Delegate to be irrational, perverse, or inexplicable. To the contrary, they were reasonable inferences based on the limited evidence available, including the job posting, the parties' agreement that the Employee's delivery route was no more than 75 km from the work location and the Employee's daily work hours. As noted by the Adjudicating Delegate in her submission, the Appellants only provided limited evidence despite having the burden to establish both factually and legally that the Employee was a short haul truck driver.

45. Regarding the Adjudicating Delegate's comments about the class of driver's licence typically required for short haul truck drivers, I agree with the Employee's submission that, while the Appellants' argument is well founded in that the comments were made without evidence, the Appellants' argument is not dispositive. In my reading of the Determination, the Adjudicating Delegate had already concluded that the Employee was not a short haul truck driver prior to her comments regarding the class of driver's licence typically required for short haul truck drivers. In other words, even if the Adjudicating Delegate did err in considering the class of driver's licence typically required for short haul truck drivers, I find that error did not impact her determination.

46. For the reasons discussed above, I dismiss this ground of appeal.

Alleged denial of natural justice

47. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal discussed the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST #D050/96.

48. In my view, the record in this case (parts of which are summarized in the Adjudicating Delegate's submission) demonstrates that the Investigative Delegate and Adjudicating Delegate afforded the Appellants an opportunity to know the case against them and to present their evidence, and they were heard by an independent decision-maker.

49. I agree with the Employee that this ground of appeal was primarily relied on by the Appellants to dispute the Adjudicating Delegate's findings of fact. As argued by the Employee, the Appellants have failed to

explain how the inferences made by the Adjudicating Delegate have denied their procedural rights to know the case against them and to respond to it. As discussed above, in my view, the inferences made by the Adjudicating Delegate were reasonable based on the evidence available.

50. Accordingly, I find that the Appellants have not met their burden of demonstrating a breach on natural justice and I dismiss this ground of appeal.

ORDER

51. I order that the Determination be confirmed pursuant to section 115 of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal