

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Craig Morrison
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

FILE No.: 2023/018

DATE OF DECISION: May 30, 2023

DECISION

SUBMISSIONS

Craig Morrison on his own behalf

OVERVIEW

1. Craig Morrison (the "Appellant") appeals a determination issued on January 20, 2023 (the "Determination") by a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director").
2. In the Determination, the Adjudicative Delegate dismissed the Appellant's complaint under section 74 of the *Employment Standards Act* (the "ESA"). The Appellant's complaint alleged that their former employer, Caliber Projects Ltd. (the "Employer"), had failed to pay the Appellant for lunch breaks, a Q4 bonus and compensation for length of service contrary to the *ESA*.
3. The Appellant appeals the Determination on the ground the Director failed to observe the principles of natural justice in making the Determination.

BACKGROUND

4. The Determination sets out that the Appellant was employed as a Construction Safety Officer by the Employer from October 3, 2019, to December 24, 2020. The Employer operates a construction business in Langley that falls within the jurisdiction of the *ESA*.
5. The Appellant alleged the Employer contravened the *ESA* by failing to pay the Appellant for lunch breaks where the Appellant was required to be available for work, a Q4 bonus and compensation for length of service.
6. Following receipt of the Appellant's complaint, an investigative delegate (the "Investigative Delegate") made contact with the parties and conducted an investigation of the complaint. During the investigation, the Appellant and Employer were given the opportunity to present evidence and make submissions.
7. Subsequently, on November 21, 2022, the Investigative Delegate prepared a report summarizing the "information provided by the Complainant, the Respondent and any witnesses" and included "a list of relevant records and documents" (the "Investigation Report"). The relevant records and documents were attached to the Investigation Report. The Employer and the Appellant were invited to review the Investigation Report and provide a response within a deadline.
8. The Investigative Delegate did not make any findings in the Investigation Report. As noted above, the Investigation Report summarized the information provided by the parties.
9. The Investigation Report specifically requested the Appellant and the Employer to carefully review the Investigation Report and provide submissions on any errors, omissions or clarifications. The parties were

also advised that the Investigation Report and any responses would “be considered in making a final determination regarding the complaint.”

10. When no further submissions were provided by either the Appellant or the Employer, the Investigation Report along with the relevant records and documents were submitted to the Adjudicative Delegate for a determination.
11. The Determination dismissed the Appellant's complaint, finding there was no breach of the *ESA* by the Employer.
12. The Determination held the Appellant was not entitled to pay during the lunch break as the Appellant was not required to be available nor was he prevented from leaving the work site as there were other qualified employees to respond to safety concerns. The Determination also noted the Appellant's own evidence that he occasionally did leave the work site during lunch break.
13. On the issue of the Q4 bonus, the Determination found the Appellant did not meet the contractual requirements for the bonus where the Appellant was not actively employed at the pay-out date. The Determination noted that, so long as the bonus plan does not otherwise contravene the *ESA*, an employer is free to structure the bonus as they wish.
14. Similarly, the Determination held the Appellant did not qualify for compensation for length of service under the *ESA*. While noting there was disagreement about whether the Appellant was dismissed during the compensation notice period, the Determination held the Appellant was exempt from section 63 compensation pursuant to section 65(1)(e) (construction).

ARGUMENTS

15. On the Appeal Form, the Appellant submits the Director failed to observe the principles of natural justice in making the Determination.
16. The Appellant submits he should be paid for lunch breaks as he was the only sufficiently qualified employee for certain safety issues. The Appellant submits he was obligated to respond to any issues even though other safety officers were on site.
17. With respect to the Q4 bonus and compensation for length of service, the Appellant submits there was 'confusion' in the Determination. The Appellant notes he worked almost the full year required for the Q4 bonus and was forced to resign as it was 'untenable and impossible for me to remain in my position'.
18. In support of the appeal, the Appellant submitted evidence including email correspondence and statutory references (*Workers Compensation Act - Duties of Employees*).
19. The Appellant also submitted that the finding in the Determination that the Appellant acknowledged 10% of his lunch breaks were off-site was incorrect. The Appellant submitted clarification that he would go off site to buy food or ask someone to bring food.

ANALYSIS

20. On receiving the Appellant's appeal, the Employment Standards Tribunal (the "Tribunal") requested the section 112(5) record (the "Record") from the Director for purposes of the appeal. The Tribunal provided the Record to the parties and sought submissions on the completeness of the Record. As the Tribunal did not receive any objections to the completeness of the Record, the Tribunal accepts the Record as complete.

21. These reasons are based on the written submissions of the Appellant, the Determination, and the Record.

Appeal of Determination

22. 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.

23. An appeal is limited to the grounds set out in the *ESA*. It is not a new hearing of the case. Nor is it an opportunity to reargue an appellant's facts or 'try again' with the same facts and arguments.

Failure to Observe Principles of Natural Justice

24. The Appellant alleges the Director failed to observe the principles of natural justice in making the Determination.

25. Natural justice has been described as the right to a fair procedure. It includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05).

26. A party alleging failure to comply with natural justice principles must provide evidence in support of the allegation. It isn't enough to just allege a failure of natural justice. There needs to be specific evidence or argument about how the determination procedure did not meet requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

27. I have reviewed the Record and considered the Appellant's submissions. I find there is no basis for the Appellant's argument on this ground nor is there any basis on the Record for concluding the Director failed to observe the principles of natural justice. The Appellant does not point to any specific deficiencies in the procedure, but merely submits facts and arguments that were before the Adjudicative Delegate at the time the Determination was made.

28. The evidence is clear that the Appellant was aware of the case to be made and had the right to present his case and respond to the evidence. The Record indicates the Investigative Delegate conducted an investigation of the issues and the parties had ample opportunity to present evidence and respond. As

noted in the Determination, the parties were provided with the Investigation Report and directed to review and provide further submissions on any errors, omissions or clarifications.

29. In sum, the Appellant has not shown the Director failed to observe the principles of natural justice in making the Determination.

30. I find there is no merit in this ground of appeal and it is dismissed.

Tribunal may consider alternative grounds

31. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc, dba Superior Transmissions*, BC EST #D141/03).

32. Even though I have found the Appellant has not demonstrated a breach of natural justice in the Determination, I will also consider the Appellant's submissions on other grounds in the alternative.

33. While not specifically noted on the appeal form, the Appellant's submission appears to allege the Director erred in law in dismissing the claims for paid lunch break, Q4 bonus and compensation for length of service.

34. To show an error of law, the Appellant has the burden to show a material legal error in the Determination. A disagreement with a finding of fact does not amount to an error of law. Examples of errors of law may include: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion that is inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466).

35. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Adjudicative Delegate.

36. I have reviewed the Determination and the evidence in the Record and do not find an error of law in the Determination.

37. In the Determination the Adjudicative Delegate came to findings consistent with the law and supported on the evidence. Although the Appellant may not agree with the Determination, I find there was evidence the Adjudicative Delegate could rely on to make findings of fact and conclude the Appellant was not required by the Employer "to work or be available for work" during the lunch break and therefore did not meet the requirement for pay as time worked and as set out in section 32 of the *ESA* (see *Hirschfelder BC EST # D024/03, reconsideration refused BC EST # RD183/03*).

38. While the Appellant raised other legislation (such as the *Workers Compensation Act, Occupational Health and Safety Regulation*), the Determination and this Tribunal decision concerns the Appellant's complaint under the *ESA*. It is also noteworthy the Appellant has not submitted any evidence of complaints or rulings

from Worksafe under the *Workers Compensation Act* or *Occupational Health and Safety Regulation* (see *Wayte* BC EST # D207/98).

39. On the issue of the Q4 bonus and compensation for length of service, the Adjudicative Delegate considered the evidence and issues framed in the Investigation Report.
40. Concerning the Q4 bonus, the Adjudicative Delegate applied the facts and law and came to a conclusion supportable on the evidence that the contractual requirements for the bonus were not met. This conclusion is consistent with previous Tribunal decisions concerning bonuses (see *Shell Canada Products* BCEST # RD488/01; *Ali*, BC EST # D134/14, reconsideration refused BC EST # RD037/15).
41. On the issue of compensation for length of service, the Adjudicative Delegate likewise considered the parties' evidence and submissions in some detail. The Determination reviews the competing submissions and evidence on the application of section 63 and the resignation of the Appellant and concludes the exemption set out in section 65(1)(e) of the *ESA* would apply in any event. The Record shows evidence that the Employer's principal business was construction and the Appellant was employed at a construction site supporting the finding the Appellant did not meet the statutory requirement for length of service compensation (see *Lockerbie & Hole Industrial Inc.* BC EST # D071/05).
42. I find the conclusions in the Determination were supported by evidence and the law and it is not open to this Tribunal to retry the evidence and arguments.
43. Absent an error of law as required under section 112(1) of the *ESA*, the Tribunal cannot re-hear the evidence and 'second-guess' the Adjudicative Delegate. Accordingly, I find there is no error of law and would dismiss this ground of appeal also.

Summary dismissal

44. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.
45. In this case, I find there is no reasonable prospect the appeal would succeed.

ORDER

46. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.
47. Pursuant to section 115 of the *ESA*, I confirm the Determination.

John Chesko
Member
Employment Standards Tribunal