

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Tamara Kirk
(the “Employee”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo

FILE No.: 2023/060

DATE OF DECISION: July 27, 2023

DECISION

SUBMISSIONS

Tamara Kirk on her own behalf

OVERVIEW

1. This is an appeal by Tamara Kirk (“Employee”) of a decision of a delegate of the Director of Employment Standards (“Director”) issued on March 29, 2023 (“Determination”).
2. On July 19, 2021, the Employee filed a complaint under section 74 of the *Employment Standards Act* (“ESA”) with the Director alleging that 1204334 B.C. Ltd. carrying on business as Cranbrook Hyundai (“Employer”) had contravened the ESA by failing to pay her overtime wages, annual vacation pay, compensation for length of service and commission wages (“Complaint”).
3. The Director followed a two-step process in investigating the Complaint and making the Determination. One delegate of the Director (the “investigative delegate”) corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report (“Investigative Report”) summarizing the results of the investigation which was sent to the parties for review and comment. Upon receiving the responses to the Investigative Report and the replies to those responses, the matter was sent to a second delegate (“adjudicative delegate”) who assumed responsibility for reviewing the responses and replies and issuing the Determination pursuant to section 81 of the ESA.
4. During the investigation, the investigative delegate advised the parties that it appeared that additional wages were owed for compensation for length of service and annual vacation pay. The investigative delegate provided an assessment of the amount of wages outstanding and, consequently, the Employer paid an additional \$6,869.49 in gross wages to the Employee, consisting of \$1,371.43 in compensation for length of service and \$5,498.06 in annual vacation pay.
5. In the March 29, 2023, Determination, the adjudicative delegate determined that the ESA had not been contravened by the Employer and no wages were outstanding. Accordingly, pursuant to section 76(3) of the ESA, no further action would be taken.
6. The Employee appeals the Determination, identifying two statutory grounds of appeal; namely, that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
7. 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.
8. 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, and the Determination.

ISSUE

9. 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

10. The adjudicative delegate delineated the following four issues in the Reasons for the Determination:
- i. Did the Employer owe the Employee overtime wages?
 - ii. Did the Employer owe the Employee compensation for length of service?
 - iii. Did the Employer owe the Employee annual vacation pay?
 - iv. Did the Employer owe the Employee additional commission wages?
11. The adjudicative delegate considered the evidence received from both the Employee and the Employer as summarized by the investigative delegate in the Investigative Report together with the responses of the parties to the Investigative Report.
12. The Employer operates an automobile dealership which falls within the jurisdiction of the *ESA*. The Employee was employed as a Finance Manager from January 1, 2020, to June 5, 2021, and was paid on a commission basis.
13. As previously indicated, the Complaint was filed on July 19, 2021, within the time period allowed under the *ESA*.
14. During the investigation, the investigative delegate advised the parties that it appeared that additional wages were owed to the Employee for compensation for length of service and annual vacation pay. The investigative delegate provided an assessment of the amount of wages outstanding and, consequently, the Employer paid an additional \$6,869.49 in gross wages to the Employee, consisting of \$1,371.43 in compensation for length of service and \$5,498.06 in annual vacation pay.
15. During the investigation of the Complaint and after delivering to the parties his Investigative Report and the relevant documents adduced by each party, the investigative delegate provided the parties another opportunity to provide further information. However, neither party provided any further information. Accordingly, the adjudicative delegate accepted the Investigative Report to be an accurate reflection of the parties' evidence and positions regarding the issues delineated above and went on to adjudicate the same.
16. With respect to the matter of whether or not the Employer owed the Employee any overtime wages, the adjudicative delegate observed that section 37.14 of the *Employment Standards Regulation* ("*Regulation*") excludes salespersons paid entirely or partly by commission from entitlement to overtime wages or statutory holiday pay as long as the wages earned in a pay period exceed the wages that would have been paid under the overtime or statutory holiday sections if calculated at the greater of the employee's base rate or minimum wage.
17. The adjudicative delegate further noted that as the Finance Manager for the Employer, the Employee's job primarily involved the sale of financial products such as extended warranties, life insurance or lifetime

oil change packages as well as arranging for the financing of vehicle deals. She was paid a commission on a percentage of profit for these deals. The actual commission rate would vary depending on whether certain benchmarks were achieved. In the result, the adjudicative delegate found the Employee was a salesperson paid by commission and that section 37.14 of the *Regulation* applied to her employment. Accordingly, he found the Employee's employment was excluded from entitlement to overtime wages and statutory holiday pay as long as, in each pay period, the wages paid to her exceeded the wages that would have been paid under the overtime and statutory holiday sections of the *ESA* at minimum wage.

18. The adjudicative delegate, next, observed that as part of the investigation of the Complaint, the investigative delegate reviewed the payroll evidence and conducted a calculation for each pay period to determine whether the exclusion in section 37.14 applied to the Employee. In every pay period in the wage recovery period, the amount paid to the Employee exceeded the amount that would have been payable pursuant to the relevant sections of the *ESA* at minimum wage. The adjudicative delegate reviewed the investigative delegate's calculations and found them to be correct. Accordingly, the adjudicative delegate concluded the Employee was excluded from entitlement to overtime wages and statutory holiday pay pursuant to section 37.14 of the *Regulation* and the Employer did not owe her any overtime wages.
19. The adjudicative delegate next considered whether the Employer owed the Employee compensation for length of service. He noted that section 63 of the *ESA* requires an employer to pay an employee with more than one year but less than three years of service, two week's wages as compensation for length of service. Where an employee gives notice of termination and an employer terminates the employee within that notice period, the employer owes the employee compensation equal to the lesser of their entitlement under section 63 or the remainder of their notice period. In the case at hand, the adjudicative delegate observed that the Employer terminated the Employee with one week remaining in her notice period and paid her \$684.45 in compensation. He notes the investigative delegate examined the payroll records and provided an assessment that, based on the previous eight weeks, one week's compensation for the employee would be \$2,005.88. Based on this assessment, the Employer voluntarily paid an additional \$1,371.43. The adjudicative delegate reviewed the assessment of the investigative delegate and found it to be correct. Accordingly, the adjudicative delegate concluded that the Employer did not owe the Employee any additional compensation for length of service.
20. With respect to the next question, that is, whether the Employer owed the Employee annual vacation pay, the adjudicative delegate noted that section 58 of the *ESA* requires an employer to pay an employee 4% of their total earnings in annual vacation pay. After examining the payroll records for 2020 and 2021, the investigative delegate provided an assessment to the parties that annual vacation pay appeared to be outstanding in the amount of \$5,498.06. Based on this assessment, the Employer voluntarily paid this amount to the Employee. The adjudicative delegate reviewed the assessment of the investigative delegate and found it to be correct. Accordingly, the adjudicating delegate concluded that the Employer did not owe the Employee annual vacation pay.
21. With respect to the question of whether the Employer owed the Employee additional commission wages, the adjudicative delegate noted the Employee's specific complaint with respect to her commissions involved a cost of \$100.00 that was taken from the finance and insurance gross profit. This represented a charge for the fuel that was in the tank of a vehicle when the customer took possession of it. When the Employee submitted a deal, she would include the cost as a negative balance as part of the accessories gross. She became aware at some point that, after she had submitted her deals for payment, the \$100

fuel cost was being reassigned against the document fee portion of the Finance and Insurance Gross. She argued that deals should not be altered after she had submitted them. She also acknowledged that, on March 3, 2021, an email from the Employer confirmed that the proper way to account for the fuel cost was as a cost against the document fee.

22. In response to the Employee's said complaint, the adjudicative delegate notes that Ivan Reina ("Mr. Reina"), the Chief Financial Officer with the Employer, indicated that the fuel cost had been applied to deals since September 2019, long before the Employee's time with the Employer. He agreed that the only change that had been made was to move the cost to the document fee as opposed to the accessories area as this was easier for the Employer's accounting department to deal with and did not increase the fuel charge. Mr. Reina also indicated that it was common, if errors were noted in deal sheets, for the document to be corrected. The fuel charge practice was also discussed in daily finance staff meetings which would have been attended by the Employee. Furthermore, Mr. Reina said that the General Manager would sit down with staff monthly and review their commission breakdown sheets which would then be signed off. This would include the Employee.
23. On the basis of the foregoing, the adjudicative delegate concluded that the Employee did not or failed to show that the manner in which the fuel cost was recorded is contrary to her employment agreement or to the *ESA*. Further, he also observed that the Employee did not show how the change in how it was recorded negatively affected the commissions to which she was entitled. In the result, the adjudicative delegate concluded that the Employer did not owe the Employee any additional commission wages.

SUBMISSIONS OF THE EMPLOYEE

24. In her appeal submissions, the Employee lists four reasons why she is appealing the Determination.
25. First, she states the Employer "was taking money off my cheque without my knowledge, and Employment Standards took the stance that Bob Bullock [the Employer's General Manager] had told me in a meeting they would be taking \$100 off every deal to cover the gas in every sold unit". She states that this is not true as she "would have walked out" if this were the case. She states she tried to get Mr. Bullock to pay her fuel money because she was previously paid "in past jobs" and it is "normal in this line of work."
26. Second, she states that Mr. Bullock was visibly upset with her about raising the matter of the fuel money and told her she could no longer work for the Employer, and he would provide her with the "necessary paperwork to leave" but failed to do so. She states he then began to attack her performance and berate her and send her emails about her performance although he never previously had any problems with her performance. She states she "stood [her] ground for the paperwork" but never received the paperwork. She then gave the Employer her notice of termination on June 1, 2021, but was "forced out on Jun 5, 2021." She states, the "Employment Standards did not see this as wrongful dismissal."
27. Third, she submits that she claimed overtime in her complaint but the "Employment Standards states selling cars in the auto industry does not pay overtime." She says she did not sell cars but "only did the financing, insurance, and service products" and she worked "6 days for the most part, up until a sales manager was hired."
28. Lastly, she contends that she was owed vacation pay but was told "by Employment Standards that if I did not take the vacation pay now and resolve then they couldn't guarantee I would get that vacation pay."

However, she admits that the Employer “did in fact voluntarily send that money when this went to the formal outcome.”

29. She concludes her submissions stating that she has “recordings, emails, and documentation supporting these allegations, and so does Employment Standards Branch.” The recordings are of her conversations with Mr. Bullock, which she produced during the investigation of the Complaint and referred to in the investigative adjudicator’s Investigation Report. Also, the emails and documentation she refers to are those that were adduced by her in the investigation of the Complaint to the investigative delegate and listed in the section 112(5) record produced by the Director in the appeal. I do not find it necessary to summarize the contents of the audio recordings, emails, or documents here as they have been considered in the investigation of the Complaints and incorporated in the Investigative Report which the adjudicative delegate considered in making the Determination.

ANALYSIS

30. Section 114 of the *ESA* provides:

After an appeal is requested

- 114 (1) 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.

31. Section 112(1) sets out the grounds of appeal under the *ESA* as follows:

Appeal of director's determination

- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.

32. The Tribunal has consistently held that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).
33. Section 112(1) does 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.
34. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.
35. Having delineated some of the relevant principles applicable to appeals, as previously noted, the Employee has checked off the "error of law" and "natural justice" grounds of appeal under section 112(1)(a) in the Appeal Form.
36. I will discuss each ground of appeal under separate headings below starting with the error of law ground of appeal.

a. Error of law

37. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco, supra*, 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] BCJ No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *ESA*;
 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.
38. Having said this, the Employee disagrees with the adjudicative delegate's conclusion that she is a salesperson paid by commission and that section 37.14 of the *Regulation* applies to her employment to exclude her from entitlement to overtime wages. The adjudicative delegate relied upon the investigative delegate's Investigation Report to find that as a Finance Manager for the Employer, the Employee's primary job involved the sale of financial products such as extended warranties, life insurance or lifetime oil change packages as well as arranging financing of vehicle deals. For this work, the Employee was paid on a commission basis – "a percentage of profit for these deals". This brought her within the purview of section 37.14 of the *Regulation*. While the Employee appears to disagree with this conclusion because she did not "sell cars" but "only did the financing, insurance, and service products", I find this argument lacking cogency. Section 37.14 is not so limited in its language or application as to only cover a salesperson that "sell cars". It is broader in its language and in my view, it covers selling of services related to car sales on

a commission basis which the Employee was engaged in. Therefore, I find that the adjudicative delegate did not misinterpret or misapply section 37.14 of the *Regulation*.

39. I also do not find anything in the rest of the submissions of the Employee to engage the error of law ground of appeal within the meaning of *Gemex Developments Corp., supra*. In the result, I dismiss the Employee's error of law ground of appeal.

b. Natural Justice

40. The often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BCEST # D055/05, explains that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

41. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on 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 respond to the evidence and arguments presented by an adverse party (see *B.W.I. Business World Incorporated* BC EST # D050/96).

42. The onus is on the party alleging a failure to comply with principles of natural justice to provide some evidence in support of that allegation and, in this case, the Employee has not discharged that burden. I have also reviewed the section 112(5) record and I find nothing in the record that remotely suggests an infringement of the Employee's natural justice rights in the investigation or adjudication of the Complaint. To the contrary, there is ample evidence in the record that the Employee actively participated in the investigation of the Complaint including make submissions to the investigative delegate. She was also afforded an opportunity to respond to the submissions of the Employer.

43. Accordingly, I find there is no basis to interfere with the Determination under the natural justice ground of appeal.

44. Having said this, I find this is a quintessential case of an appellant dissatisfied with the decision of the Director rearguing their case before a different panel in the hopes that the new panel will give them a more favourable hearing. The Tribunal has said, time and again, an appeal is an error correction process and not a process to allow a dissatisfied party to take the proverbial "second kick at the can" which is what the Employee is doing here by disputing the adjudicative delegate's findings of fact.

45. It also bears mentioning here that although the Tribunal lacks jurisdiction over questions of fact, it has jurisdiction when the matter involves errors on findings of facts which may amount to an error of law. However, the onus is on the Employee here to show that the Director made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish error of law (see *Re: Funk*, BC EST # D195/04). In this case, I am persuaded that the adjudicative delegate, in making his findings of fact on

each of the four issues in dispute, did *not* make any palpable or overriding error, or reached a clearly wrong conclusion of fact, or acted without any evidence, or on a view of evidence that could not reasonably be entertained. To the contrary, I find the adjudicative delegate's conclusions of fact on all material issues were supported in evidence and do not find any reason to disturb those conclusions. Moreover, to allow the Employee, in the circumstances, to re-argue her case on appeal is contrary to the stated objective of the *ESA* in section 2(d), namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*.

46. I am satisfied the Employee's appeal has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it. In the result, I dismiss the appeal under section 114(1)(f) of the *ESA*.

ORDER

47. Pursuant to section 115(1) of *ESA*, I confirm the Determination dated March 29, 2023.

Shafik Bhalloo
Member
Employment Standards Tribunal