Citation: Unitow Services (1978) Ltd. (Re)
2024 BCEST 10

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Unitow Services (1978) Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2023/114

DATE OF DECISION: January 26, 2024

DECISION

SUBMISSIONS

Christopher Munroe	counsel for Unitow Services (1978) Ltd.
Carrie H. Manarin	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Unitow Services (1978) Ltd. ("Appellant") of a determination issued by Carrie Manarin, a delegate ("Delegate") of the Director of Employment Standards ("Director"), dated July 6, 2023 ("Determination"). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. The Determination found that Gurprit Malhi ("Complainant") is entitled to overtime and annual vacation pay in the amount of $5,198.88, plus interest, and imposed mandatory administrative penalties in the amount of $1,500.00 for contraventions of three sections of the *ESA*.

3. The Appellant appeals the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination ("Appeal"). The Appellant says the Delegate erred in law in concluding that the Complainant was entitled to be paid for travel time between his home and each of two worksites. The Appellant also submits that the Delegate failed to adhere to the principles of natural justice in assessing a travel time of 30 minutes for travel between the Appellant's place of business and each of the worksites the Complainant was assigned to.

4. For the reasons that follow, I deny the Appeal and confirm the Determination.

ISSUES

5. Did the Director err in law or fail to observe the principles of natural justice in determining that the Complainant was owed wages for the times spent driving the Appellant's tow truck from his home to the worksite to start his shifts, and in concluding that it took 30 minutes to drive each way between the Appellant's yard and the worksite.

THE DETERMINATION

6. The issues before the Delegate in the Determination were as follows:

    1. When did the Complainant's second term of employment start?
    2. Did the Employer provide the Complainant with meal breaks for shifts that exceeded 5 hours and if not, what is his remedy?
    3. Is the Complainant owed wages for driving time?

4. Is the Complainant owed overtime wages for split shifts that were not completed within 12 hours?

7. The Delegate identified that another delegate ("Investigating Delegate") conducted an investigation and issued an investigation report ("Investigation Report") that both parties had an opportunity to, and did, respond to. Accordingly, the Delegate accepted the Investigation Report and the responses to it as an accurate reflection of the facts before her.

8. There was ultimately no disagreement with respect to the first two issues, and the Appellant resolved the answer to the second question with a voluntary payment.

9. With respect to the fourth question, the Delegate concluded that the Appellant had contravened section 33 of the *ESA*, but that no wages were owing. The Delegate did, however, impose a mandatory $500 administrative penalty for this non-compliance.

10. This Appeal, however, concerns the third-listed issue of whether and to what extent the Complainant is owed wages for driving time.

11. With respect to the third question, the Delegate broke the answer down into four scenarios. The Complainant's role working for the Appellant involved attending on-site at certain bridges with a tow-truck owned by the Appellant. The Employer did not dispute that the Complainant's work hours for which he was compensated were calculated exclusively as the time spent by the Complainant on-site at a bridge and did not include any travel time, whether between the bridge and the Appellant's yard, between the bridge and the Complainant's home, or between the Complainant's home and the Appellant's yard.

12. The Complainant asserted that he should be entitled to be paid for travel time in the following scenarios: whether such travel time occurred at the start of a shift, during a shift, in between a split-shift, or at the end of a shift.

13. The Employer had taken the position that when there was a half-hour between the end of a shift at one bridge and the start of a shift at another bridge, this was considered an unpaid break. The Delegate rejected this position. The Appellant ultimately acknowledged that not paying the Complainant for the half-hour between the end of one shift and the start of another at a different site was not compliant with the *ESA* and agreed, during the course of the investigation, to pay the Complainant at overtime rates for the 23 occasions this occurred.

14. The Delegate identified the presumption that the time taken by an employee to travel to and from their place of work is not work, and reviewed a list of factors to be considered if that presumption is to be rebutted.

15. The Delegate concluded that part of the Complainant's responsibilities in his role was to deliver a tow truck to a given bridge for the purpose of his bridge duty shifts. As a result, the Delegate determined that driving the tow truck to the bridge, whether from the yard or from his home, was work under the *ESA*. In addition, the Delegate concluded that the Complainant did not have the option of leaving the tow truck at the bridge, and so on occasions where the Appellant required the Complainant to return the tow truck to its own yard, the drive from the bridge to the yard was also work under the *ESA*.

16. Conversely, the Delegate concluded that when the Complainant chose to drive the tow truck to his home after his shift, he could have instead returned it to the yard. Accordingly, the Delegate determined that the Complainant's drive home represented a commute, rather than work.

17. Although the Delegate confirmed that driving from a bridge to the Appellant's yard was work, she found the only evidence of this occurring related to five specific shifts after which the Complainant was specifically directed to bring the truck back to be swapped for a different one. In the absence of supporting evidence, the Delegate rejected the Complainant's assertion that every time he was assigned a specific truck, he drove that truck back to the yard because it would not fit in the driveway where he was living.

18. The Delegate concluded that the Complainant's travel time, either from his home to his bridge duty shifts, or between either bridge and the Appellant's yard, was 30 minutes, and used this figure, along with the Complainant's schedule, to determine the amounts owing.

19. The Delegate awarded the Complainant $4,987.25 in unpaid overtime, $211.63 in annual vacation pay, and $401.24 in accrued interest. In addition, the Delegate imposed mandatory administrative penalties in the amount of $1,500.00 for contraventions of sections 17, 18, and 33 of the *ESA*.

ARGUMENTS

20. The Appellant submits that the Delegate erred in law in finding that the Complainant's drive from his home to the bridges at which his work was performed fell within the definition of "work" under section 1 of the *ESA*.

21. The Appellant agrees that there is presumption that a commute to a work location is not considered work, and acknowledges that there are several factors to be considered in determining whether that presumption can be rebutted. The Appellant, however, says that the Delegate erred in relying on only one of those factors in reaching her conclusion.

22. The Appellant relies on *Grand Construction Ltd. (Re),* BC EST # D018/13, and says that decision concluded that driving a company vehicle to work does not, on its own, convert a commute to "work" under the *ESA*.

23. The Appellant also submits that the Delegate's conclusions are inconsistent with the finding that choosing to drive the tow truck home was not compensable, but driving the tow truck back to work was.

24. The Appellant asserts that there were other factors that should have been considered that would support a conclusion that the Complainant's drive to the worksite was not "work," including that:

a. There was no marshalling point;

b. There were no duties to be performed en route to the bridge;

c. The employer provided the tow truck and paid all costs of operating the tow truck;

d. The Delegate found that use of the tow truck was mandatory and required for [the Complainant's] work, but that taking it home after work was not;

e. The amount of travel was minor;

f. The commute was not under the control or direction of the Employer; [the Complainant] could have completed other chores or personal errands; and

g. [The Complainant] chose to drive the tow truck home at the conclusion of his shift.

25. Having found that it was the Complainant's choice to drive the tow truck home at the end of his shift, the Appellant says it was this choice that led to the requirement that the Complainant drive the truck back to the bridge for any subsequent shift.

26. The Appellant submits that a review of all of the above factors leads to the conclusion that the Complainant's drive to a bridge to start a shift is a commute, rather than work as defined by the *ESA*.

27. The Appellant further says the Delegate failed to observe the principles of natural justice in assigning a time of 30 minutes for the drive between the Employer's yard and either bridge without setting out the basis for making such a finding.

28. The Appellant says, instead, that the driving time is approximately 15-20 minutes, and not 30 minutes as indicated in the Determination.

29. The Delegate rejects the Appellant's assertion that the only factor reviewed was the fact that the Complainant was required to deliver the tow truck to the bridge at the start of each shift and says both the jurisprudence and the other relevant factors were considered including the location of the worksites in relation to the Complainant's home and the Appellant's yard. The Delegate also says the Appellant has not identified which factors were not considered that should have been.

30. The Delegate also rejects the Appellant's assertion that there was no basis for her finding of a 30-minute travel time and notes that it was based on the undisputed evidence before her of the Complainant and one of his witnesses. The Delegate says this information was provided to the Appellant in the Investigation Report and was not refuted. The Delegate submits that the Appellant's evidence that the Complainant's travel time was 15-20 minutes, rather than 30 minutes, is new evidence that could have been provided at the time of the investigation, or in response to the Investigation Report, and should be rejected.

31. In reply, the Appellant asserts that at no time did the Delegate specifically request information with respect to travel time to or from the Appellant's yard.

ANALYSIS

32. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:

> 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.

33. The Tribunal has adopted the following definition of "error of law" set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 Coquitlam),* 1998 CanLII 6466 (BC CA) (*Gemex*):

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.

34. I will deal first with the Appellants' assertions with respect to alleged errors in law, followed by a consideration of the Delegate's conclusions assessing travel time at 30 minutes.

35. The Appellant says the Delegate misinterpreted the Tribunal's jurisprudence surrounding assessments of whether travel time constitutes work by failing to consider more than the sole factor of whether the Employer provided the Employee with a vehicle for a specific and mandatory purpose. While the Appellant relies on *Grand, supra*, in which a determination was overturned on the basis of a finding that transporting co-workers to a jobsite in a company-provided vehicle was work, I note that decision is distinguishable from this Appeal. In *Grand*, *supra*, Member Stevenson observed at para. 63 that "there is no evidence, and no finding, that Graham was required to use that vehicle to transport his son and Mr. Derbyshire – or, indeed, to transport any employees – to and from the job site."

36. The second decision relied on by the Appellant, *Millar (Re),* BC EST # D208/97, similarly involved travel to a worksite picking up co-workers en route. Akin to the decision in *Grand*, *supra*, the Member's conclusions rested, in part, on a finding that the transportation of those employees to the worksite was not required of Mr. Millar. In fact, Member Kempf further concluded that the Employer in that case also did not require the company vehicle to be present at the worksite.

37. In contrast, in the present matter, the Delegate determined that the Complainant was, in fact, required to bring the tow truck with him to each of the bridges for his shifts. While there was a dispute between the parties as to whether the Complainant, in the course of his duties, was required to tow disabled vehicles from the bridge, a conclusion which the Delegate accepted, the Appellant did not go so far as to say that the Complainant could have left the tow truck at home and traveled to the worksite in some other fashion or in some other vehicle.

38. Further, although the Appellant points out that it was the Complainant's choice to drive the tow truck home after each of his shifts, and it was on this basis that the Delegate rejected the claim for travel time at the end of these shifts, the Appellant does not take the position that the Complainant had the option of leaving the tow truck at the bridge. The only alternative to driving the tow truck home after a shift was to drive the tow truck back to the Appellant's yard, and the Appellant does not, in the matter before me, take the position that such travel back to the yard would not be considered work.

39. The Appellant says the commute was not under the control or direction of the Appellant and the Complainant "could have completed other chores or personal errands." I note that there is no evidence before me that the Complainant did perform other chores or personal errands during any given commute, nor is there evidence that the time determined by the Delegate to be work included any such extraneous travels.

40. The Delegate agrees she did not review every possible factor, noting not all were applicable to the matter before her. The Delegate nevertheless asserts, and I accept on a plain reading of the Investigation Report and Determination, that the ownership and maintenance of the vehicle was considered, as was the fact that the Complainant was required to deliver the tow truck to each of the bridges to start each shift, whether from his home or from the yard, and the choices available to the Complainant in relation to each of the distinct travel time periods claimed. The Delegate also asserts that she considered the relative locations of the Complainant's home, the worksites, and the Appellant's yard.

41. Based on all of the foregoing, I am not persuaded that the Delegate erred in law in concluding that the Complainant's travel time to either bridge, from his home, was "work" as defined under the *ESA*.

42. With respect to the Appellant's submissions regarding procedural fairness under subsection 112(1)(b), I note a party alleging a failure by the Director 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.

43. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> 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)

44. While the Appellant disagrees that it takes 30 minutes to drive from their yard to either of the bridges, and that this would have been readily ascertainable through Google Maps or a similar program, it was nevertheless not unreasonable for the Delegate to rely on the information provided during the investigation into the Complaint in determining the length of travel.

45. The Delegate points to the Investigation Report provided to the Parties in which the evidence of the Complainant was that "it was well over 30 minutes from Unitow's yard with truck 434 to each bridge" and the evidence of the Complainant's witness estimating the travel time from the Appellant's yard to one bridge at 30 minutes, and to the other between 30 and 45 minutes.

46. The Appellant, in reply, asserts that they were not specifically asked for their estimate of the travel time required from their yard to either of the bridges; however, the Complainant's estimates were clearly

indicated in the Investigation Report, and it would have been incumbent upon the Appellant to provide contrary information had they determined that information was not accurate.

47. I agree with the Delegate that the Appellant's assertion in this Appeal that travel time between each bridge and the Appellant's yard is 15-20 minutes is new evidence and that the Appellant has not provided any basis for persuading me that this information could not have been presented earlier, either during the investigation, or in response to the Investigation Report that outlined the Complainant's assertions in this regard.

48. Further, In the absence of a dispute raised by the Appellant during the investigation, or in response to the Investigation Report, I do not agree that the Delegate had any obligation to independently verify the travel times asserted by the Complainant.

49. For these reasons, I am not persuaded that the Delegate failed to act in accordance with the principles of natural justice.

ORDER

50. The Appeal is denied.

51. I order that the Determination be confirmed pursuant to section 115(1) of the *ESA* together with any interest that has accrued under section 88 of the *ESA*.

Ryan Goldvine
Member
Employment Standards Tribunal