Employment Standards TRIBUNAL

An appeal

- by -

Grand Construction Ltd.
("Grand")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2012A/126

DATE OF DECISION: February 13, 2013

DECISION

SUBMISSIONS

Trish Warren	on behalf of Grand Construction Ltd.
Richard B. Johnson	counsel for Ian Graham
Reena Sharma	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") Grand Construction Ltd. ("Grand") has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on August 3, 2012 (Reasons issued August 15, 2012).

2. The Determination found that Grand had contravened Part 3, section 18 of the *Act* in respect of the employment of Ian Graham ("Graham") and ordered Grand to pay Graham an amount of $5,363.53, an amount that included wages and interest under section 88 of the *Act*.

3. The Director also imposed an administrative penalty under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $500.00.

4. The total amount of the Determination is $5,863.53.

5. In its appeal, Grand alleges the Director failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled. Grand has also grounded the appeal on new evidence coming available that was not available when the Determination was being made.

6. Grand seeks to have the Determination cancelled.

7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from Determination, the material on the section 112(5) "record", together with the written submissions of the parties and any additional evidence allowed by the Tribunal to be added to the "record".

ISSUE

8. The issues in this appeal are whether Grand has shown the Director failed to observe principles of natural justice in making the Determination and whether there is evidence which has become available that was not available at the time the Determination was made which ought to be admitted into this appeal.

THE FACTS

9. Graham was employed by Grand as site supervisor on a construction project in Prophet River from June 7, 2011, to October 12, 2011. In late December 2011 he filed a complaint alleging Grand had failed to pay expenses accrued by him during his employ, living out allowance, overtime wages, statutory holiday, vacation pay and wages for travel time. The claim for expenses, overtime wages, statutory holiday pay and annual vacation pay were resolved during the compliant process with the assistance of an Employment Standards Branch mediator. Graham withdrew his claim for living out allowance.

10. The claim for travel time and overtime were not voluntarily resolved and were adjudicated by the Director. The Determination identifies three issues related to those claims: whether Graham was performing "work" during travel time and was therefore entitled to wages for travel time; whether Graham was a "manager" as that term is defined in the *Regulation*; and whether there were any wages owed to Graham as a result of the findings on the first two issues.

11. The Director conducted a hearing on the complaint on May 31 and June 5, 2012.

12. The Director found Graham was a "manager" for the purposes of the *Act* and, under section 34 of the *Regulation*, was excluded from the overtime requirements of Part 4 of the *Act*. This aspect of the Determination has not been appealed and will not be addressed further in this decision.

13. The Director found Graham was entitled to wages for some of his travel time. It is this part of the Determination that has been appealed by Grand.

14. The Determination contains the following facts in respect of this matter.

15. Graham commenced work for Grand at the construction project on June 22, 2011. Initially, Graham stayed at a Ramada hotel in Fort Nelson and drove to the job site in Prophet River and back to Fort Nelson. The Director accepted Graham's estimate that this commute took approximately 70 minutes each way.

16. The Director found that Graham and two other employees of Grand, Dan Graham (Graham's son) and Shawn Derbyshire, all stayed at that hotel for a period of 44 working days, from June 22 to August 4, 2011. Graham moved to another hotel upon his return from holidays he took between August 4 and 14, 2011 and the two other employees moved to a trailer near Prophet River sometime between August 4 and August 15, 2011.

17. Graham claimed travel time for 146 trips to and from Prophet River and Fort Nelson which he said involved transporting Dan Graham and Mr. Derbyshire when they all resided at the Ramada and picking up materials and supplies. In respect of the former matter, Graham claimed this involved driving Dan Graham and Mr. Derbyshire to and from the job site each day for 44 days – a total of 88 trips. The Director noted that Grand had not provided any evidence to dispute "that Mr. D. Graham and Mr. Derbyshire had other means of being transported to Prophet River when they resided at the Ramada prior to residing in the trailer at the job site" and found it "more probable that Mr. Graham transported these two employees to the job since Mr. Graham himself was residing at the Ramada at this time and because he had access to [Grand's] truck to transport the crew members." The Determination records his evidence on this part of his claim as follows:

> Mr. Graham stated that he transported his son Mr. Dan Graham and Mr. Shawn Derbyshire to and from Prophet River when they resided at the Ramada in Fort Nelson prior to residing in the first trailer located near Prophet River. Mr. Graham alleges he picked up Mr. D. Graham and Mr. Derbyshire from the "Ramada" every morning and transported them to the job site until the trailer became available. (page R8)

18. The Director considered whether Graham was performing "work" when he was transporting the two employees, concluded this activity was "performing a service for the direct benefit of the employer" and was therefore "work" as that term is defined in the *Act*. The Director accepted this "work" involved 88 trips between Fort Nelson and Prophet River.

19. In respect of the claim for picking up materials, the Determination records Graham's evidence on that as follows:

> Mr. Graham stated that he would not consider the time spent travelling between Prophet River and Fort Nelson as a commute as half the time he was performing work by picking up materials for the employer on his way back to the hotel. . . .
>
> Mr. Graham stated he made approximately 20 trips back and forth to Acklands, an industrial supplier, to pick up supplies needed at the job site. Mr. Graham explained that he would make arrangements whereby he would pick up the material on his way back to Fort Nelson at the drop box located outside the building. He also stated that he transported "embd plates" in the truck provided to him by GCL [Grand]. The "embd plates" were dropped off at Dushay Welding where they needed to be repaired. Mr. Graham says he made approximately 10 trips to and from Dushay Welding. He also explained that he made approximately 6 trips to Canadian Freightways after his normal working hours. When asked if he recalled any other trips he made Mr. Graham was not able to recall any further trips. (page R9)

20. The Determination summarizes Graham's travel claim at page R10:

> . . . the complainant's position is that he is entitled to travel time from June 2011 to September 2011. During this time Mr. Graham worked 73 days which means he made 146 trips to and from Prophet River to Fort Nelson.

21. The Director did not accept that Graham performed 146 trips in which he picked up supplies and materials, but found, on the "best evidence" and applying a balance of probabilities, that Graham actually made 35 trips to suppliers and that all but 8 of these trips were made during the time he was found to be transporting Dan Graham and Mr. Derbyshire to or from the job site. The Director found that he was performing "work" on those 8 trips.

22. In sum, the Director found Graham performed "work" on a total of 96 trips between Fort Nelson and the construction site and was entitled to wages for each of those trips, based on 70 minutes a trip at a rate of $45.00 an hour, as well as vacation pay and interest on those wages.

23. The section 112(5) "record" contains, among other material, Graham's time sheets, his pay stubs, copies of receipts submitted and, it appears, paid and copies of receipts for which he was not, at least initially, paid.

24. The Determination identifies Grand's main argument on Graham's travel time claim as being that:

> . . . Mr. Graham is not entitled to travel time because he was not performing "work" or providing service(s) outside of his normal working hours . . .

25. A brief examination of Graham's time sheets would suggest his "normal working hours" were 10 to 10.5 hours a day, worked between 7:00 or 7:30 am and 5:30 or 6:00 pm.

ARGUMENT

26. Grand says the Director failed to observe principles of natural justice in making the Determination. Grand has also grounded its appeal on new evidence coming available that was not available when the Determination was being made. A substantial amount of information and material has been submitted with the appeal that requires some analysis. The position of Grand, however, is that this information and material shows Graham was not entitled to the travel time he was awarded in the Determination.

27. Grand has structured the appeal on a day by day analysis of Graham's hours of work using expense receipts for which Graham was reimbursed and contends these receipts ought to have raised several concerns about Graham's claim for travel time. Grand says this material demonstrates two things: firstly, that Graham was frequently in Fort Nelson at a time when, based on his assertions and representations (and the findings of the Director in the Determination), he should have been travelling between Fort Nelson and Prophet River; and secondly, the "trips" he made to suppliers were, in most cases, shown by the receipts to have been undertaken during hours which Graham recorded on his daily time sheets he was working and for which he has already been paid.

28. Graham and the Director have both responded to the appeal.

29. The Director submits the majority of the evidence provided with the appeal was available at the time the Determination was being made and "could have been presented at the adjudication"; material that was not provided during the time the Determination was being made is identified and objected to. The Director acknowledges some of the material presented with the appeal, specifically the gas receipts and Graham's time sheets, is part of the section 112(5) "record" and takes no objection to that material being included in the appeal.

30. The Director says there was no failure to observe principles of natural justice; that Grand knew the case against them, was given the opportunity to respond, had the matter decided by an unbiased decision maker and provided with reasons for the decisions made.

31. On the matter of the travel time, the Director notes that Grand never provided a "day to day analysis" during the complaint process, even though they were provided with much of the information and material that has been used by them in that analysis in this appeal. The Director also notes, and raises a concern, that some of the facts and evidence in the analysis is not found or is not apparent in the section 112(5) "record". The Director says some of the admissions made by Grand in the appeal confirm Graham at times transported materials to the job site in the morning, but that Grand never argued an examination of the time sheets would show Graham had already been paid for travel time.

32. The Director says the decision on travel time was based on the "best evidence available" and, even if Grand now feels they were "overcharged" by Graham, section 21 would not allow the wage liabilities as found to be offset by the perceived overpayment.

33. Counsel for Graham takes a position that is similar to that taken by the Director, addressing each of the groups of documents submitted by Grand with the appeal and, effectively, submitting none of them should be admitted with the appeal. More particularly, counsel says Grand should not be allowed to use material that existed and was presented to the Director during the complaint process but not brought up to the Director during the complaint hearing.

34. Counsel for Graham submits there was no failure by the Director to observe principles of natural justice; that the Director took "great pains" to ensure Grand was aware of the process, had full opportunity to present its case and ample time to make closing argument. He says significant parts of Grand's appeal are not properly characterized as "evidence" at all, but are only re-argument.

35. In final reply, Grand takes issue with the "facts" set out in the submission made on behalf of Graham. Grand says the exhibit identified as "Eric's Journal Notes" are only a summary of what was submitted at the complaint hearing. Ms. Warren, who is acting on behalf of Grand, says the hand written notations on the documents were made by her in order to point out relevant information and dates on those documents. The remainder of the reply does little more than reiterate assertions made in the original appeal submission.

ANALYSIS

36. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *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 made.*

37. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.

38. 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, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

39. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Ltd. dba Honda North*, BC EST # D043/99.

40. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. The Tribunal has 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] B.C.J. No. 2275 (B.C.C.A.):

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.

41. The definition of "error of law" adopted by the Tribunal includes cases where the Director is found to have acted without any evidence or to have acted on a view of the facts which could not reasonably be entertained. Also, as a general proposition, a failure by the Director to consider relevant evidence is a breach of natural justice as well as an error in law and can result in a setting aside of the Determination: see *D. Kendall & Son Contracting Ltd.*, BC EST # D107/09.

42. Subsection 112(1) (c) of the *Act* provides that a person may appeal a Determination on the ground that evidence has become available that was not available at the time the Determination was being made. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. It should be noted that the conditions set out in the *Davies* decision are conjunctive and the party requesting the Tribunal to admit new evidence must satisfy all of them before the Tribunal will admit the new evidence.

43. The Tribunal has adopted a position that relaxes the approach taken to evidence adduced for the first time on appeal, distinguishing those circumstances where the evidence is adduced for the purpose of having the truth of the evidence accepted "on the merits" from circumstance where the new evidence is adduced to show jurisdictional error. The rationale for this approach is that barring the latter type of evidence would be inconsistent with the purpose of the *Act* to provide fair and efficient procedures for dispute resolution: section 2(d) of the *Act*. In *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03, the Tribunal, at page 15, elaborated on the distinction in the following excerpt:

> This distinction, which reinforces the fairness requirement in the Act, is consistent with elementary administrative law principles. Even on judicial review, courts allow "new evidence" to be tendered to show jurisdictional error such as a breach of procedural fairness: *Evans Forest Products Ltd. v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 729 (S.C.). Brown and Evans, in *Judicial Review of Administrative Action in Canada* (2003) at pp. 6-56, 57, accurately summarize the law as follows:
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> > …any evidence that relates to an excess of jurisdiction is admissible, as is evidence in support of the allegation that there was "no evidence" in support of a material finding of fact made by an administrative tribunal, evidence establishing an insufficient basis for the administrative action taken, or evidence of a breach of a duty of fairness….
> >
> > Breaches of procedural fairness are often not apparent on the record. Courts have long recognized that the traditionally restrictive "fresh evidence" principles cannot apply to evidence adduced to demonstrate a breach of procedural fairness. Justice and necessity require that evidence concerning such alleged breaches can be received so that procedural fairness allegations can be meaningfully raised and addressed. That is, of course, even more true where, as in this case, the Tribunal does not have the Delegate's record of what transpired during the hearing.

44. In that context, I shall address the admissibility of the evidence submitted with the appeal.

45. That evidence, looked at in its entirety, is not "new" at all, but is a combination of evidence included in the section 112(5) "record" and evidence that could have been provided to the Director during the complaint process but was not.

46. Evidence that falls into the former category is clearly acceptable on this appeal. This evidence includes most of the receipts that have been attached, compiled and analyzed in the appeal submission. I do not accept the position of counsel for Graham that receipts taken from the "record" and marked with handwritten notations should be not admitted with the appeal. The handwritten notations do nothing more than convert the time included and shown on the receipt from a twenty-four hour clock time to a 12 hour am-pm clock time, re-state the date, typically expressed on the receipts as some combination of dd/mm/yy, by month and day and in some cases notes Graham's sign in or sign out time for the day – a function that requires nothing more than transcribing that information from the time sheets Graham provided to the Director during the complaint process. None of the notations alter the information already on the receipts or in the record or contain anything controversial. While counsel for Graham submits he should be allowed to cross-examine the author of the notations and, since that opportunity is unavailable, the documents should not be considered, this submission contains no basis for such a suggestion or for concluding there would be any unfairness by accepting the documents with the notations. I exercise my discretion to allow this evidence as submitted.

47. Evidence submitted with the appeal that falls within the latter category will not, for the most part, be accepted or relied on in this appeal. Among the evidence that will not be accepted is that document, along with the supporting information and material, identified as "Exhibit 1" in the appeal. Ms. Warren says the journal notes are just a summary of what has already been provided in the complaint hearing. While that assertion may be accurate in respect of some of the information set out in the journal notes (in which case the Determination speaks), it is not borne out in respect of all the information in that exhibit and on that basis its acceptance in this appeal is not justified. To clarify, I will not allow or consider evidence that simply speaks "to the merits" of the Determination.

48. Evidence submitted with the appeal that speaks to "no evidence" or natural justice concerns – in the sense that the Director ignored relevant evidence or made findings of fact "not rationally supported by the evidence" – will be considered. Such evidence will be identified and discussed where a consideration of it arises in these reasons.

49. In making this decision concerning the evidence, I also accept and adopt the remarks of the Tribunal in *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05, that described the limitations of intervening in a Determination on the basis the Director "failed to consider relevant evidence". Those limitations are reflected in the following excerpt from the analysis of the *Jane Welch* decision at paras. 40-43:

> . . . there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700,
>
> > . . . any attempt to determine whether an administrative decision-maker has considered "all of the evidence" as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.
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> Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence. Although the Director and his delegates have a duty, both under the *Act* and at common law, to provide reasons for their determinations, "[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision": *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also *Manuel D. Gutierrez*, BC EST #D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate's reasons.

> Third, even if an appellant establishes that a delegate failed to consider relevant evidence, it does not automatically follow that the delegate failed to observe the principles of natural justice in making the determination. In *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at 491-92, Lamer C.J. held that the rejection of relevant evidence is not automatically a breach of natural justice; rather, whether it constitutes a breach of natural justice depends on the impact of the rejection of the evidence on the fairness of the proceeding:
>
> > For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.
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> Relevant factors include the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue. Although *Université du Québec à Trois-Rivières* involved a refusal to permit a party to adduce relevant evidence, this reasoning applies with equal force to the question of whether a failure to consider relevant evidence denied a party a fair hearing. Thus, whether a failure to consider relevant evidence amounts to a breach of the principles of natural justice will depend on the particular circumstances of each case.
>
> A determination that a delegate has failed to consider relevant evidence involves an assessment of both the reasons given by the delegate for making a determination, and an analysis of the issue to which the evidence is relevant.

50. Applying the above comments, I now address the substance of this appeal.

51. As I stated in my section 114 decision on this appeal (BC EST # D121/12), while the appeal is framed in natural justice and new evidence, it is apparent that the issue for Grand is how the Director, as a matter of law, could find Graham entitled to travel time. That is not to say the appeal does not raise natural justice; the natural justice element is that described in *D. Kendall & Son Contracting Ltd.*, *supra*: failing to consider relevant evidence. The Director and counsel for Graham are misguided in seeking to cast the natural justice ground of appeal in the typical procedural fairness concerns: the right to know the case and be heard.

52. The appeal is headed: "Travel Time Dispute". In the appeal submission, Grand states:

> Ian was not asked to drive employees from Fort Nelson to prophet River job site – employees had their own trucks. . . .

53. In addition, Grand contends the facts, properly analyzed, show Graham was paid for all or substantially all of the travelling he did on any day for materials and supplies. Counsel for Graham submits I should not allow Grand to rely on documents that were produced to the Director and were part of the "record", but were not referred to by Grand during the complaint hearing. I reject that submission; it ignores at least two points that I consider critical in the circumstances of this appeal. First, it ignores the reality expressed in cases such as *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, *supra*, and *British Columbia Securities Commission*, BC EST # RD121/07, that the parties to the complaint process are typically lay persons that are often ill equipped to appreciate or deal with the nuances of the *Act*. Such persons do not argue cases "in the alternative" and have no reason to believe the Director might ignore evidence that had been produced in making a decision on a key issue in the complaint. Second, it ignores that the purpose of submitting the documents in this appeal is to show the Director either based findings on no evidence or made findings that are not supportable on the evidence. As stated above, the presentation of the documents and their analysis raise natural justice concerns

that fairness demands be accepted and reviewed. Accordingly, the documents and the analysis will be considered in this appeal.

54. I shall address the travel time dispute in the same order taken in the Determination: considering first the question of transporting crew members; and second the matter of transporting materials/supplies.

Transporting Crew Members

55. The Determination correctly notes that employees are not entitled to wages for commuting to and from work unless the commute can be considered as work. It appears the conclusion by the Director that Graham was performing work was based solely on a finding that Dan Graham and Mr. Derbyshire rode with Graham from Fort Nelson to the construction project and back for 44 days in a truck provided to Graham by Grand. That action was considered by the Director to have been a "service" performed by Graham for Grand.

56. The Tribunal has considered the question of "travel time" on many occasions and in many different circumstances. In those cases, the Tribunal has been generally guided by the following statement from *Carol Lacroix and Kevin Lacroix, operating as Lone Wolf Contracting*, BC EST # D267/96 (affirmed on Reconsideration, BC EST # D230/97):

> Where travel time is claimed as 'work' employees will be required to demonstrate some very compelling reason why that time should be treated as such for the purposes of the Act.

57. The circumstances of the travel time claim in the *Lone Wolf Contracting* case were described as follows in that decision:

> The employer provided a vehicle which he used to pick up employees and transport them to the job site. There was no evidence or indication the employees were without any other alternative method of getting to the job site. A substantial portion of the route between the marshalling point and the job site involved travel on a primary provincial highway. Some employees had taken vehicles to the job site, suggesting the availability of that option.

58. The travel time claim was accepted by the Director on the above facts. The Determination was varied and the travel time claim was dismissed in the appeal. The Director sought reconsideration of that finding, arguing the statement established a new test on travel time claims and reversed the usual onus of proof on wage claims. In dismissing the reconsideration application, the Reconsideration Panel said the following:

> In the ordinary course, employees who travel to work do so on their own time. They are not performing services for their employer when they do so. They are travelling to a place at which they will perform services. In the absence of evidence to take the situation out of the norm, there is no reason to assume that the employer is responsible for the time an employee takes to travel to work. Depending on the specific facts, in some cases an evidentiary onus will be cast on the employee and in others it will be cast on the employer. Depending on the required departure from custom or common understanding, a party's burden of adducing evidence can be a substantial one. In this case, the adjudicator made it clear that, on the facts, the employees had an evidentiary onus to establish that they were at "work" in the course of travelling. On the facts, the adjudicator determined that the evidence must be compelling.

59. In the same vein, in *Craig Norton and Alain Berube*, BC EST # D406/98, the Tribunal dismissed a claim for travel time by employees of Insulpro Industries Ltd. and Insulpro (Hub City) Ltd. who claimed that the time spent travelling from their home to insulation jobs they were assigned, often up to 70 kilometres, was "work". In dismissing this claim, the Tribunal said:

> The basic character of wages under the *Act* is payment for work performed by an employee for an employer. Many employees travel significant distances to get to and from work. The *Act* presumes that time taken by an employee to travel to and from their place of work is not "work" and an employee is not entitled to payment for it. An employee can overcome this presumption by showing the travelling ought to be considered as labour or service *for the employer*. That is a factual issue and the burden is on the employee. Several factors that might be relevant to the issue were identified by the Tribunal in *Miller*, BC EST #D208/97, but none have been shown by the individuals to be present in this case.

60. The Tribunal also noted in *Precision Service & Pumps Inc.*, BC EST # D439/01, that "the question of whether "travel" is "work" is primarily a question of fact". As such, it is important that all of the relevant facts and factors be identified and examined against the legal principles established for considering travel time claims. The "several factors" identified in decisions of the Tribunal include: whether the time spent travelling is under the "control and direction" of the employer and the employee is required to travel in such a manner: *Spearhead Forestry Services Inc.*, BC EST # D488/97, *Cambridge Exteriors Ltd.*, BC EST # D672/01, *Brock Services Ltd.*, BC EST # D176/04; whether the employer provided the employee with a vehicle for a specific and mandatory purpose that relates to the travel claim: *Lawrence Taylor operating as L & L Trucking*, BC EST # D305/01; whether the use of the vehicle by other employees is mandatory: *Lone Wolf Contracting*, *supra*, *Maid West Housecleaning Services Ltd.*, BC EST # D090/97, *Sean Smyrichinsky*, BC EST # D505/98; whether there is a reasonable alternative means of getting to the work site: *Lone Wolf Contracting*, *supra*, *Maid West Housecleaning Services Ltd.*, *supra*, *Aleza West Contracting Ltd.*, BC EST # D089/99; whether a marshalling point has been designated: *Maid West Housecleaning Services Ltd.*, *supra*, *Irvine J. Millar*, BC EST # D208/97; whether the employee has been assigned to perform duties en route: *Irvine J. Millar*, *supra*.

61. The importance of the existence of a marshalling point and reasonable alternative means of getting to work has been expressed quite bluntly in *Maid West Housecleaning Services Ltd.*, *supra*:

> When employees are not required to meet at a marshalling point, and they have a practical alternative means of getting to the work site, they are not paid wages for travel time.
>
> This reflects a reasonable, pragmatic approach to the interpretation and administration of the *Act* so as to "best insure the attainment of its objects."

62. The above points do not express all of the factors that have been identified in the Tribunal's decisions, but they express the key facts and factors against which a claim for travel time must be examined, with the basic considerations being the presumption against finding travel time is work and the onus imposed on the employee to overcome this presumption. With the above principles and comments in mind, I will address Graham's travel time claim.

63. The first point is that while Graham was provided with a vehicle by Grand, who also assumed all of the costs related to the operation of that vehicle, 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. I reiterate: in respect of the identified factors that might support a travel time claim and which are referred to at the outset of my analysis on this question, the only reason given by the Director for finding this was "work" was Dan Graham and Mr. Derbyshire rode with Graham in a vehicle that Grand provided to him and assumed the costs of operating.

64. From the perspective of Dan Graham and Mr. Derbyshire, there is no evidence that they were required to travel to the job site in a company owned vehicle. They had reasonable alternative transportation. It is not "how" Dan Graham and Mr. Derbyshire arrived on site, but whether they had the option of using alternative transportation. Grand contends Dan Graham and Mr. Derbyshire had their own truck. The Director says this assertion was never provided during the complaint process. Ms. Warren disagrees. I do not, however,

need to resolve that disagreement as it is apparent from the material in the section 115(2) "record" that Graham, Dan Graham and Mr. Derbyshire brought two vehicles to the job, with Graham driving the truck Grand provided and Dan Graham or Mr. Derbyshire driving the other.

65. The material in the "record" supports this conclusion.

66. The records of the trip made by the three men from Penticton to Prophet River, then on to Fort Nelson between June 19 and June 22, 2011, show receipts for fuelling two vehicles in Penticton, Kamloops, Hinton, Beaverlodge and Fort Nelson on Graham's Master Card account. There are also gas receipts for the Fort Nelson Husky on July 21 and 23 and receipts for the Fort Nelson Husky and Fort Nelson Petro Canada on July 22 clearly showing Graham is fuelling two vehicles on each of those days; the vehicle provided by Grand to Graham – a 2008 Dodge Ram ½ ton pickup, according to material in the "record" – could not hold the amount of fuel purchased on each of those occasions.

67. The evidence in the "record" also shows Dan Graham and Mr. Derbyshire must have had alternative transportation to the job site and back as a review of the record of purchases made by Graham, as shown in the receipts he provided to the Director, between June 22 and August 4 makes it highly improbable that Graham drove his son and Mr. Derbyshire to work and back "every day" for 44 straight days as the Determination records he testified to. The most obvious days which support this conclusion are July 11, 15, 26, 28 and 29, where Graham is shown making a series of purchases after his recorded start time or before his recorded finish time. While I do not have the start times on those days for Dan Graham and Mr. Derbyshire, I have evidence that the crew was working at least 10 hours a day, which is consistent, and accords with, the hours Graham was recording for himself on his time sheets. I conclude from all of this evidence that Dan Graham and Mr. Derbyshire were on the job site, as they should have been, at times Graham was in Fort Nelson and he could not possibly have transported them to the site. While it is not entirely out of the realm of possibility that Graham might have had Dan Graham and Mr. Derbyshire with him on these occasions, I find it unreasonable and entirely inconsistent with the representation by counsel for Graham of him being a "diligent and good employee" that he might waste otherwise productive time – up to 3 hours – of members of the crew with his errands.

68. On August 25, 2011, Dan Graham and Mr. Derbyshire drove from Fort Nelson to Grand Prairie and parked a vehicle at the Grand Prairie Airport parking lot from August 26 to September 5, 2011. Graham continues to use the company vehicle during this period. There is no record showing a rental vehicle was acquired and used during this period. It is not possible for those two men to have generated this evidentiary record without having their own vehicle.

69. I do not suggest that Dan Graham and Mr. Derbyshire never travelled to the jobsite with Graham in the company vehicle, but that does not, on its own, establish the time spent was travel time for Graham. The arrangement was no different to "car pooling" and, similar to the conclusion reached in the *Cambridge Exteriors Ltd.* decision, I find the "benefit" of the arrangement did not flow to Grand but to Dan Graham and Mr. Derbyshire, who, but for the opportunity to travel to the job site with Graham, would have been required to use the alternative transportation available. In the circumstances, it was not Grand's responsibility to get those two men to the job site, but theirs.

70. There is no evidence of a marshalling point. The job site was not a remote site as suggested by Graham at one point; Prophet River, where the job site was located, is on a paved stretch of the Alaska Highway. While it is a significant distance to and from Fort Nelson and the job site, the choice to travel that distance was one Graham made and the other two followed. There is no evidence that Grand ever agreed to consider compensation to Graham for travel time. In fact, the testimony of Mr. Eric Guran, recorded on page R11 of

the Determination, was that there "was no agreement to pay Mr. Graham travel time to and from Prophet River and Fort Nelson."

71. Graham contended that "transporting crew members" was one of his "duties" as site supervisor. The Determination does not indicate that contention was accepted but even if it was, I find such a contention by Graham without foundation, and any finding based on it would be perverse and unsupportable in the circumstances. Graham was hired as site supervisor, not a crummy or bus driver, and he was paid accordingly. On the evidence, the only persons he says he ever transported to the site were his son and Mr. Derbyshire and only, apparently, while they all resided in the same hotel and not on every work day. Any acceptance of the suggestion that his "duties" included transporting crew members also ignores the clear evidence that it was initially contemplated Graham, his son and Mr. Derbyshire would stay in a trailer near the project site. Mr. Eric Guran testified that prior to commencing his employment Graham agreed to stay in the trailer and later changed his mind. Graham confirmed this evidence in his testimony. The need to drive to and from Fort Nelson and the job site was created late in the day by Graham's refusal to stay in the trailer when he got to the job site. There is not one scintilla of evidence that Graham "transporting crew members" was either contemplated by Grand, assigned by them to Graham as part of his site supervisor's duties or that the truck provided to him was for the purpose of transporting employees.

72. As stated above, a finding that travel time is "work" requires that all of the relevant facts and factors be identified and examined against the legal principles established for considering travel time claims. There was relevant evidence relating to such a finding that the Director failed to consider and I find the failure to consider this evidence was a breach of principles of natural justice and an error of law.

73. Having found the Director failed to observe the principles of natural justice by reason of the failure to consider relevant evidence in finding Graham was performing "work" when he was transporting Dan Graham and Mr. Derbyshire to and from the job site, I must decide the appropriate remedy. I could either decide this issue myself based on the "record" before me and apply the result to the Determination made, or cancel the Determination and remit this matter back to the Director for a new hearing. In my view, the appropriate remedy in this case is to decide the issue myself. I am satisfied the factual record is sufficient for a proper assessment of this issue and, applying the relevant elements of the record, I find Graham has not shown whatever time he spent transporting Dan Graham and Mr. Derbyshire to and from the jobsite was "work" as that term is defined in the *Act*.

74. Even if I had found Graham was entitled to travel time relating to transporting his son and Mr. Derbyshire to and from the job site, there is simply no way a finding that Graham transported these men every day for 44 days could have been made on the available evidence. In addition to those dates in July, which I have referred to above and which show Graham to be in Fort Nelson for periods after his recorded start and before his recorded finish times, there are days where the gas receipts show Graham fuelling a vehicle in Fort Nelson at times when Graham's time sheets indicate he was still "on the clock"; June 23 and 24 and July 4 are such dates. Other receipts, not all gas receipts, show Graham fuelling a vehicle or making purchases during the time he claims he was travelling between Fort Nelson and the job site: June 22, July 2, 12, 13, 19, 21, 25, 29 and 30 are such dates. This last group of dates records occasions when a receipt was generated within 45 minutes of Graham's recorded start or finish time. They do not include several other dates where a receipt was generated within 50 to 60 minutes of his recorded finish time. Not recording these dates takes into account the possibility that a trip, from time to time, may have taken less that the 70 minutes accepted by the Director for such trip.

75. In sum, this evidence, which was admittedly not considered by the Director shows that even if Graham was entitled to travel time for transporting crew members (which, to reiterate, I find he was not) he has been paid for much of it and adjustments would have to be made to determine what balance might be owed.

76. An appropriate remedy in this scenario, that is if the "transporting employees" travel time claim were not dismissed in its entirety, would be to cancel the Determination on this claim and refer it back to the Director with the comment that under the *Act* travel time is presumptively not "work" and the employee claiming travel time bears the burden of showing the travelling ought to be considered as labour or service *for the employer* and of proving the amount of travel claimed.

77. The Determination on this travel time claim will be cancelled.

Picking Up Materials/Supplies

78. The focus of this aspect of the appeal is not trips for materials and supplies during hours for which Graham has already been paid but for such trips which Graham claims were made outside of the hours recorded on his time sheets. In respect of the hours for which Graham has already been paid, even if Grand feels Graham was paid for hours he did not work, the Director is correct in saying that section 21 of the *Act* would not allow wages already paid to an employee to be used as a "set-off" or to be "clawed back" in a proceeding under the *Act* because it was later discovered the employee was, arguably, not entitled to those wages.

79. I accept that travel time related to this head does, in the circumstances, overcome the presumption against travel time being "work" under the *Act*. I agree with the Director on this claim, that it was "probable" the truck provided to Graham was accompanied by the requirement, from time to time, to transport material/supplies. This finding by the Director is also consistent with the facts: particularly the fact that there was no evidence of any surprise or consternation on the part of Grand that Graham was, according to Mr. Eric Guran, leaving the job site in the 3:00 – 3:30 in the afternoon to pick up material in Fort Nelson.

80. The Determination does, however, note the evidence in respect of this claim was conflicting in some respects. Mr. Eric Guran testified that when Graham picked up materials, he would leave the job site at 3:00 or 3:30 pm in order to get to Fort Nelson before 5:00 or 5:30 pm. His evidence is to some extent, but not entirely, borne out by material/supply receipts generated on July 4, 11, August 19, 25, September 8, 20, 23, October 3, 5, 6, and 7. The Director found the evidence supported a conclusion that in such circumstances Graham would not have returned to the job site the same day, but would have gone home, returning the following morning with whatever he had picked up. The Director considered the morning trip on the following day to be "work" for which Graham was entitled to wages.

81. The findings of the Director did not consider the documentary evidence in the "record" relating to the purchase and transporting of materials/supplies. This evidence shows that on at least 8 of the days I have noted above, the period between the time of the material/supply receipt and Graham's recorded finish time exceeds – sometimes significantly exceeds – the 70 minutes for the trip between Fort Nelson and the job site. The consequence of the Director's conclusion is that, not only is Grand required to compensate Graham for the 1¾ to 3 hours the Director accepts it was okay for Graham to be at home, but they also must pay him an additional 70 minutes for the trip in the morning.

82. That appears to me to be a grossly unfair result. If Graham chose to stay at home in these cases and be paid for not working instead of returning to the job site, there is no fair or rational reason he should expect to be paid for the trip in the morning, assuming it was made outside of his recorded hours. If he did return to the job site the same day, then he was paid for that trip and has no claim to be paid again for the morning trip.

83. Graham, on the other hand, bases his claim on what he testified were approximately 36 trips outside of his working hours to drop off or pick up supplies and materials: 20 to and from Acklands, 10 to and from Dushay Welding, and 6 to and from Canadian Freightways. There is no evidence of any such trips in the "record": no receipts, account statements or way bills.

84. While the Director accepts Graham's evidence – because it is "more probable that such arrangements would have to be made" and Grand gave no evidence "this was not the case" – I have difficulty with it for two reasons. First, as just noted, there is not a single piece of objective evidence in the section 112(5) "record" that supports his claim that he made approximately 36 trips to suppliers *outside of his recorded working hours* – one in the evening and another the following morning. Graham's evidence would represent 36 different working days (of the 92 days shown by the time sheets that Graham worked for Grand), which would necessarily exclude 21 days on which Graham was in Fort Nelson during working hours picking up material and supplies and another 13 days where the evidence shows he was in Fort Nelson when he says he was travelling, which ought to show he dropped off or picked up outside of his recorded hours. There are approximately 40 material and supply receipts in the "record"; no receipt for materials or supplies purchased in Fort Nelson shows it was generated outside of Graham's recorded working hours. As well, Graham controlled his own time sheet and it appears he was not averse to inflating his hours, including time that he clearly was not working. Yet there is not a single day on his time sheets where Graham has claimed or recorded extra time for "travel" or "transporting material/supplies". Second, based on my analysis of his testimony on the "transporting crew members" claim tested against the objective evidence, I would also consider his testimony on this claim, when examined against the available objective evidence, to be less than compelling and to require something more than simply his recollections and approximations.

85. In my view, the findings made by the Director on this part of Graham's claim are perverse and inexplicable, in the sense that they have been made without any evidence, are inconsistent with and contradictory to the evidence and are without any rational foundation. The Director did not consider the receipts in finding Graham was entitled to travel time for transporting material/supplies. This material was in the "record" and is material and relevant to Graham's claim.

86. In the circumstances, I also find this failure to consider relevant evidence to be a breach of natural justice and an error of law. In the circumstances, however, I find the appropriate remedy would be to cancel the Determination and remit this aspect of Graham's travel time claim back to the Director with the same comments as I made above: the employee claiming travel time bears the burden of showing the travelling ought to be considered as labour or service *for the employer* and of proving the amount of travel claimed.

87. As well, and in any event, my decision on the claim for transporting crew members will require a re-assessment of the claim for transporting materials as the Director found it "probable" that the two claims "may" have overlapped. In light of my remarks above, I would not agree or accept that Graham's claim for transporting material can at this stage simply be allowed on his estimation of the approximate number of trips he made, but must be re-examined against all the evidence that has been or might be provided on this claim.

ORDER

88. Pursuant to section 115 of the *Act*, I order the Determination dated August 3, 2012, be cancelled. As a result of this decision, Graham's complaint is still before the Director and needs to be addressed under Part 10 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal