

An appeal

- by -

Michael Hannas

- 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:** Carol L. Roberts

**FILE No.:** 2017A/108

**DATE OF DECISION:** October 18, 2017

## DECISION

### SUBMISSIONS

Michael Hannas on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Michael Hannas has filed an appeal of a Determination issued by Michael Thompson, a delegate (the “*Delegate*”) of the Director of Employment Standards (the “*Director*”) on July 20, 2017. In that Determination, the Delegate found that Mr. Hannas’ former employer, Shelter Modular (“*Shelter*”), had contravened section 21 of the *ESA* in requiring Mr. Hannas to pay its business costs. Mr. Hannas was awarded \$529.73 for business costs and interest. The Delegate also determined that Mr. Hannas had not established a claim for additional wages, statutory and vacation pay.
2. Mr. Hannas appeals the Determination contending that the Delegate erred in law and failed to observe principles of natural justice in making the Determination.
3. This decision is based on Mr. Hannas’ submissions, the section 112(5) “record” that was before the Delegate at the time the decision was made, and the Reasons for the Determination.

### FACTS AND ARGUMENT

#### *Evidence*

4. Shelter operates a modular building manufactory. The Determination indicates that Mr. Hannas was employed as Shelter’s Internal Operations Manager from May 9, 2016, until October 27, 2017. The record indicates that Mr. Hannas’ employment in fact ended on October 27, 2016.
5. On April 11, 2017, Mr. Hannas filed a complaint alleging that Shelter contravened the *ESA* by failing to pay him wages, statutory holiday pay and vacation pay, termination pay and failing to reimburse him for business expenses. Mr. Hannas withdrew his claim for termination pay at the hearing.
6. Before being hired as an employee, Mr. Hannas performed consulting work for Shelter as a contractor. After receiving a cheque for his consulting work, Mr. Hannas asked to convert the payment into Shelter stock/shares. After his employment ended, Mr. Hannas said that he had not received any shares, and therefore, not been paid for his consulting work.
7. Mr. Hannas claimed that Shelter had not paid him for expenses assumed on Shelter’s behalf, including the purchase of code books and mileage. Shelter agreed that although it had never received any documentation for Mr. Hannas’ expenses, any expenses he incurred were owed to him. Shelter also agreed that Mr. Hannas had not been paid for consulting work in 2015.
8. The Delegate determined, based on Shelter’s admission, that Mr. Hannas had not been reimbursed for expenses and was entitled to those expenses. Although the Delegate noted that while Shelter also admitted that Mr. Hannas had not been paid for his consulting fees, he concluded that he was unable to order repayment of those fees because Mr. Hannas was not an employee at the time the fees were earned and thus

not covered by the *ESA*. The Delegate also concluded that even if it was determined Mr. Hannas was an employee at the time the fees were earned, the time period for filing a claim for those amounts was outside the six month period provided in the *ESA*. Neither of these conclusions is disputed and will not be referred to further.

9. As the Internal Operations Manager, Mr. Hannas' responsibilities included coaching and training staff, directing and coordinating resources both within and between various departments, and, at the direction of Shelter's Chief Executive Officer Kelly Meinema, hiring, firing and disciplining staff.
10. Shelter utilized a punch clock to record staff hours. According to Shelter's records, Mr. Hannas worked an average of 23 hours per week. Mr. Hannas believed that Shelter's records were incomplete. For some days, Mr. Hannas was recorded as working in the morning but not the afternoon. Although Mr. Hannas believed that the absence of times recorded in the afternoon reflected time off for doctors' appointments, he contended that did not have as many appointments as the records indicated.
11. Shelter employees who worked overtime hours could have those hours banked or paid out. Although employee overtime hours would be recorded by the punch clock, Mr. Hannas believed that some of his overtime hours were not recorded by the punch clock records but by email records, and asserted that Shelter had not produced all the emails recording such hours.
12. In June 2016, Mr. Hannas took a week off. He emailed Ms. Meinema about using his banked hours for the time off but did not receive a response. He did not follow up on his request until after his employment ended and Shelter refused to pay him for his hours of work.
13. Although Mr. Hannas indicated that he would be calling four witnesses on his behalf, at the hearing one of the witness declined to testify and another was unavailable. A third witness was called to give evidence on Shelter's behalf. The fourth witness, Ron Tucker, gave evidence about Mr. Hannas' hours of work, testifying that he observed Mr. Hannas arrive at work at 6:30 a.m. and still be at work after Mr. Tucker left at 4:30 p.m. Mr. Tucker also testified that he understood Mr. Hannas worked on the weekend of July 9, 2016.
14. Shelter provided the Delegate with Mr. Hannas' employment agreement, punch records indicating Mr. Hannas' hours of work, payroll records, records of leave requests, as well as email correspondence regarding the end of Mr. Hannas' employment.
15. Ms. Meinema testified that although Mr. Hannas' hours were recorded by the punch clock, Shelter did not have any provision for managers to bank hours. Ms. Meinema testified that the punch clock hours were an accurate record of Mr. Hannas' hours of work and that Shelter had no email record of any hours Mr. Hannas worked outside of the hours recorded by the punch clock. Ms. Meinema testified that Mr. Hannas was usually at work when she arrived at 9:00 a.m., but that he rarely worked until 5:00 p.m.
16. Ms. Meinema testified that Mr. Hannas moved his own office in the summer of 2016, but was not aware that he had done so over a weekend. Shelter denied that Mr. Hannas was owed any statutory holiday pay. Ms. Meinema said that any pay periods recording reduced hours reflected time off for vacation, which was documented in Mr. Hannas' leave form request.
17. The Delegate heard evidence from three other witnesses for Shelter - Nigel Harrison, Shelter's Vice President of Sales and Business Development; Marianna Harley, Shelter's Process and Control Manager during the period of Mr. Hannas' employment; and Harold Clifford. None of the witnesses observed, or had any communication with Mr. Hannas regarding overtime work.

*Delegate's factual findings and conclusions*

18. The Delegate determined that Mr. Hannas was employed in an executive capacity, and thus considered a manager for the purposes of the *ESA*. As a manager, Mr. Hannas was excluded from the overtime and statutory holiday pay provisions of the *ESA*. Mr. Hannas does not appear to dispute these conclusions.
19. The Delegate noted that Mr. Hannas' employment contract was silent on the issue of his normal or expected hours of work. Consequently, he had to determine what those hours were based on the evidence. The Delegate considered Mr. Hannas' wage statements which indicated that, with the exception of his final two weeks of work, he worked 40 hours per week except for the weeks he was on vacation. In order to determine if Mr. Hannas was entitled to wages in addition to the time for which he had already been paid, the Delegate considered the evidence of the parties and the witnesses.
20. The Delegate noted that Mr. Hannas' evidence about his hours of work was supported in part by two witnesses and by the punch cards, which demonstrated that he initially worked from 7:00 a.m. until after 5:00 p.m., and that he worked shorter hours as time went on.
21. Although Mr. Hannas testified that he worked five days per week, three of the witnesses indicated that Mr. Hannas often took time off later in his employment for personal reasons. Noting that Shelter maintained a record of the hours of work of each employee by way of the punch clock and that all employees were directed to use the punch clock, the Delegate relied on Shelter's records as the best evidence. The Delegate found no evidence to support Mr. Hannas' assertion that Shelter's records were incomplete (page R7 of the Determination):

Section 28 of the Act requires employers to keep a record of the daily hours worked by their employees. [Shelter] has done so by maintaining the punch records. Mr. Hannas testified that he did his best to diligently use the time clock, and the other witnesses testified that [Shelter] made it clear that it was important to do so. As noted above, where hours are recorded the punch records largely agree with the hours Mr. Hannas claims to have worked. Mr. Hannas contends, without any supporting evidence or explanation, that the records are nonetheless incomplete. Given that Mr. Hannas understood the importance of using the time clock, that he own evidence was that he diligently used the time clock, and the lack of any evidence that the records have been altered or are otherwise incomplete, I find that the punch record is the best evidence available as to the hours worked by Mr. Hannas.

22. The Delegate noted that, although Mr. Hannas asserted that he worked weekends and evenings, he could provide no evidence that he did so, with the exception of one day, and on that one day, he could not say how many hours he worked. The Delegate found Mr. Hannas' evidence that he understood that banked hours would be tracked by a punch card to be incongruous, and noted that Mr. Hannas neither kept a record of his hours of work nor notified Shelter in any way of his hours of work. Although Mr. Hannas' evidence was that he sent Ms. Meinema an email regarding banked hours and received no response, the Delegate noted that he did not follow up on that email at any time during his employment.
23. The Delegate determined, based on the punch card records and the wage statements, Mr. Hannas was paid for more hours than he worked for every pay period except the final pay period in which he was paid for the hours he worked. The Delegate concluded that Mr. Hannas was not entitled to any additional wages.

*Argument*

24. Mr. Hannas contends that the Delegate's conclusion that he was not entitled to additional wages to be an error of law and a breach of natural justice. Specifically, Mr. Hannas takes issue with the Delegate's conclusion that Shelter's records were the best evidence of his hours worked. He contends that Shelter's records were incomplete and inadequate and ought not to have been relied upon. He argues that while Ms. Meinema testified that she reviewed emails which supported the punch clock records, those records were not submitted as evidence. Mr. Hannas notes that it was not his responsibility to maintain a record of his hours of work. Mr. Hannas also asserts that he worked on a laptop provided by Shelter, which would contain some evidence of his hours of work.
25. Mr. Hannas asserts that the Delegate did not give appropriate weight to the evidence of the witnesses regarding his hours of work, particularly given the discrepancies identified in the punch clock records. He argues that the Delegate disregarded, or did not consider, many comments made at the hearing that supported his position.
26. Finally, Mr. Hannas also argues that the Delegate failed to give appropriate consideration to the inconsistencies in Shelter's evidence regarding the recording of banked hours and the evidence of the witnesses in that regard.
27. Mr. Hannas contends that although other Shelter employees could give evidence regarding the operation of the time clock system, they would not do so because they feared it might jeopardize their relationship with the employer.
28. Mr. Hannas says that "... there is more information that could be provided by the employer that will support my position and would hope that you will endeavor to obtain such as I cannot."

**ANALYSIS**

29. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
30. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision.
31. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."
32. I find that Mr. Hannas has not met the burden of demonstrating that the Determination should be changed or cancelled.

*Failure to observe the principles of natural justice*

33. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.
34. Mr. Hannas appeared at a hearing and was able to ask questions of Shelter's representative. He was provided with the documentation submitted by Shelter in support of its position in advance of the hearing, and was able to ask questions of Ms. Meinema. Mr. Hannas also called witnesses to give evidence on his behalf. Although one of his witnesses did not appear for unexplained reasons and another declined to give evidence, neither of these considerations amounts to a failure on the Delegate's part to observe the principles of natural justice. Similarly, one of Mr. Hannas' witnesses was also called by Shelter, and Mr. Hannas was able to ask that witness any questions he felt relevant. I find that Mr. Hannas has not established the appeal on this ground.

*Error of Law*

35. 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.
36. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
37. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
38. Mr. Hannas' argument is, in essence, that the Delegate erred in finding that Shelter's punch card record constituted the best evidence of his hours of work in light of some inconsistencies in those records as well as the evidence of the witnesses. I find no error in the Delegate's decision to rely on Shelter's punch cards as the best evidence. The only other evidence before the Delegate that Mr. Hannas worked additional hours over and above those noted on the punch card record appeared to be the imprecise recollections of witnesses. While Mr. Hannas may fairly take issue with the accuracy of some of the records as well as the existence of a time bank, the Delegate must nevertheless arrive at a reasoned conclusion based on all of the evidence before him. Mr. Hannas provided no compelling evidence that Shelter's records could not be relied upon. While Mr. Hannas had no obligation to maintain his own record of hours of work, had he done so, the Delegate could have considered that evidence along with that of Shelter's. Furthermore, two of the witnesses Mr. Hannas believed would support his allegations did not appear at the hearing for unexplained reasons. The Delegate cannot be faulted for failing to consider evidence that was not presented.

39. The Delegate is obliged to make an objective and reasoned determination of Mr. Hannas' actual hours of work based on all of the evidence before him. I am unable to find that in arriving at his conclusion, the Delegate made a palpable or overriding error and I decline to interfere with his decision.
40. At the hearing, Mr. Hannas argued that his overtime hours would be corroborated by emails and noted that Shelter failed to produce any emails at the hearing. Shelter's evidence was that no emails confirming Mr. Hannas' overtime hours existed. Mr. Hannas' contention on appeal appears to be that Shelter either refused or neglected to present evidence at the hearing which would support his claim. In my view, Mr. Hannas' appeal is an attempt to re-argue the case he made before the Delegate, which is not the purpose of an appeal. The Delegate considered Mr. Hannas' argument that he mentioned banked hours to Ms. Meinema in an email that received no response, and did not mention those overtime hours again until after his employment ended. The Delegate determined there was insufficient evidence to demonstrate what, if any hours, Mr. Hannas worked in excess of those recorded on the time clock. I find no error in this conclusion.
41. The appeal is dismissed. I find that the appeal has no reasonable prospect of success. I also find that the object and purposes of the *ESA* are not met by requiring the other parties to respond.

## **ORDER**

42. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated July 20, 2017, be confirmed.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**