Employment Standards TRIBUNAL

An appeal

- by -

ProTruck Collision & Frame Repair Inc.

("ProTruck")

- 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.: 2015A/45

DATE OF DECISION: December 29, 2015

DECISION

SUBMISSIONS

Diana Wright	agent for ProTruck Collison & Frame Repair Inc.
Melony Forster	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), ProTruck Collision & Frame Repair Inc. ("ProTruck") has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on March 3, 2015. In that Determination, the Director found that ProTruck had contravened sections 58 and 63 of the *Act* in failing to pay its former employee, Steven Martin Thomas, $3,766.20, representing compensation for length of service, annual vacation pay and interest. The Director also imposed two administrative penalties in the total amount of $1,000 for the contraventions, for a total amount owing of $4,766.20.

2. ProTruck appealed the Determination contending that the delegate erred in law and failed to observe principles of natural justice in making the Determination. ProTruck also contended that evidence has become available that was not available at the time the Determination was made.

3. After the appeal was filed with the Tribunal, the delegate disclosed what she asserted was the record that was before her at the time the Determination was made. After considering ProTruck's objection to the completeness of that record, I ordered that the Director disclose "any documents in written and/or electronic format that record evidence provided by individuals giving evidence in relation to the complaint" and that such disclosure was to be completed no later than August 7, 2015 (BC EST # D075/15).

4. The Director sought reconsideration of that Order. On October 5, 2015, the Reconsideration Panel refused to reconsider my Order and the matter was referred back to me to be heard and adjudicated (BC EST # RD100/15).

5. On October 7, 2015, the Director provided the Tribunal with previously undisclosed officer notes. ProTruck argued that the record was still incomplete and I have addressed those arguments in my decision below.

6. This decision is based on the submissions of the parties, the section 112(5) "record", and the Reasons for the Determination.

FACTS

7. ProTruck operates a collision and heavy-duty truck repair shop in Kamloops, British Columbia. ProTruck, which was incorporated on January 29, 2014, purchased the assets of Overdrive, which had previously operated the business. The closing date of the sale was April 3, 2014. Keith Pryce, the sole officer and the owner-operator of Overdrive, filed for personal bankruptcy on June 4, 2014. He became ProTruck's shop manager on March 20, 2014. Martha Goheen is the sole director of ProTruck, and was previously Overdrive's bookkeeper.

8. Mr. Thomas worked for Overdrive as a collision repair technician from December 20, 2010, until March 21, 2014. On September 17, 2014, Mr. Thomas filed a complaint with the Employment Standards Branch alleging that ProTruck had contravened the *Act* by failing to pay him compensation for length of service.

9. ProTruck does not dispute the delegate's conclusion that Overdrive had never terminated Mr. Thomas' employment. It also does not appear to dispute that, by operation of Section 97 of the *Act*, Mr. Thomas' employment would have continued with ProTruck on April 3, 2014, had he not been injured.

10. At issue before the delegate was whether Mr. Thomas was entitled to compensation for length of service, and if so, what the amount of that compensation was. The delegate's conclusion in this respect is the subject of the appeal.

11. The undisputed facts are that Mr. Thomas experienced a work-related injury on March 4, 2014. On March 26, 2014, Mr. Thomas filed a WorkSafe BC claim. A doctor confirmed that Mr. Thomas had a medical condition that would prevent him from working until further investigation and follow-up with a specialist.

12. On March 23, 2014, Overdrive issued Mr. Thomas a Record of Employment (ROE) indicating that he had been laid off for "illness or injury" and that the expected date of recall was unknown. Mr. Pryce told Mr. Thomas that he could return to work when he was fit to do so.

13. Mr. Thomas went to the ProTruck location on September 4, 2014. According to Mr. Thomas, when he asked Mr. Pryce if he could return to light duties, Mr. Pryce told him he could not. According to Mr. Pryce, Mr. Thomas asked if there would be a problem with him returning in a year after he recuperated following the surgery he was scheduled to have between October 2014 and December 2014. Mr. Pryce told him they would discuss his return to work at that time if Mr. Thomas was capable of performing autobody technician duties. Mr. Pryce stated that Mr. Thomas doubted if he would ever be able to physically perform autobody technician work and would have to be trained for a new job or trade. Mr. Pryce also informed the delegate that Mr. Thomas mentioned that WorkSafe BC was pressuring him to return to work on light duties but that he did not want to, and that Mr. Thomas asked Overdrive to inform WorkSafe BC that there were no light duties available for him. Mr. Pryce informed the delegate that he did not know if Mr. Thomas would ever return to work.

14. Mr. Pryce further informed the delegate that Mr. Thomas asked Overdrive for another ROE stating that the business had closed and that it should not state that he was "terminated." Mr. Pryce confirmed that at no time did he tell Mr. Thomas that the business had changed ownership.

15. On September 8, 2014, Ms. Goheen, on Overdrive's behalf, issued Mr. Thomas a second ROE. The stated reason for issuing the ROE was "business closed."

16. On September 16, 2014, Mr. Thomas delivered the Employment Standard Branch's "self-help" kit, dated September 15, 2014, to ProTruck, and at the same time, picked up the September 8, 2014, ROE.

17. During her investigation of the complaint, the delegate had a discussion with Drew Bucknell, another of ProTruck's employees. Mr. Bucknell informed the delegate that he had been hired by Overdrive in mid-April 2014 and assisted in moving shop items from Overdrive's location to the ProTruck location. Mr. Bucknell also informed the delegate that Mr. Pryce told him "Steven Thomas thinks he will work here again. I don't have to take him back as an employee of ProTruck Collision Centre. He won't work here again."

18. Mr. Pryce confirmed that Overdrive hired Drew Bucknell as a shop trainee on April 14, 2014, and that Mr. Bucknell assisted in moving equipment and shop items to the ProTruck location. Mr. Pryce denied discussing Mr. Thomas' employment status with Mr. Bucknell or stating that Mr. Thomas would never work there again.

19. Diana Wright, Overdrive and Mr. Pryce's advocate, informed the delegate that Mr. Thomas was not, and would not be, medically fit to return to work. She said that Mr. Thomas' last day of work was in March, when Overdrive was still in business, and that, at Mr. Thomas' request, an additional ROE was produced when Overdrive ceased operations.

20. The delegate determined that Mr. Thomas had not quit his employment. She accepted that he kept in touch with Mr. Pryce and discussed returning to work after he recuperated from his surgery. She found these actions consistent with an employee who was intending to return to work after his rehabilitation.

21. The delegate noted that ProTruck provided no other evidence to establish how the employment relationship ended and concluded that ProTruck had terminated Mr. Thomas' employment on September 8, 2014.

ANALYSIS

22. Section 112(1) of the *Act* 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.

23. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, BC EST # D141/03, while

> most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
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> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

24. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not ProTruck has demonstrated any basis for the Tribunal to interfere with the Determination.

25. As a preliminary matter, ProTruck argued that the delegate failed to disclose electronic case management system documentation and that the "record" remained incomplete.

26. The delegate submits that the Branch does not keep an electronic record of communications or evidence in a case management system and that all the handwritten notes are now before the Tribunal.

27. While I accept that the Branch manages cases electronically, I also accept that this system does not contain communications or evidence relevant to any particular investigation. I am satisfied that the entire record is before me, including contemporaneous handwritten notes of the delegates involved in the investigation and that my Order that the Director disclose "any documents in written and/or electronic format that record evidence provided by individuals giving evidence in relation to the complaint" has been complied with.

28. ProTruck also argues that the fact that the Director objected to my disclosure order suggests that the handwritten notes subsequently disclosed were falsified and that I ought to draw an adverse inference both from the delegate's actions and from the delegate's failure to respond to Ms. Wright's allegations that her notes were falsified.

29. Allegations of fraud are serious and are not to be made lightly. The allegations require clear proof, which ProTruck has not provided. Simply because Ms. Wright disagrees with statements made to the delegate, or the delegate decided not to respond to allegations made without a clear foundation, does not establish fraud. There is no evidence that the delegate's notes are not an accurate summary of her conversations.

New evidence

30. In *Re Merilus Technologies (*BC EST # D171/03), the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

31. Although ProTruck argued that it had new evidence as a ground of appeal, there was nothing in the appeal submission that clearly addressed this ground.

32. Even if I am incorrect in concluding that there is no new evidence, I am not persuaded that this evidence could not have been discovered and presented to the Director during the investigation of this matter and find no basis for this ground of appeal.

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. Pro Truck alleges that the delegate failed to observe the principles of natural justice based on a number of arguments which I will address separately.

35. ProTruck argues that the delegate did not follow "due process" in the management of the complaint and failed to comply with the purposes of the *Act* in a number of ways, including failing to permit Mr. Pryce the opportunity to respond to the complaint within the 15-day period that the *Act* provides, and then failed to provide the parties with an opportunity to resolve the complaint by mediation. ProTruck also questions why the delegate would not adjudicate a complaint rather than investigate it, particularly when there were real issues of credibility and reliability to assess.

36. Although Ms. Wright alleges that the delegate did not conduct a proper investigation, she acknowledges that the delegate sent Mr. Pryce a letter outlining the evidence of Mr. Thomas and Mr. Bucknell, and offered him the opportunity to respond. She argues that this "one-shot" opportunity was insufficient and that the delegate did not cross-disclose the evidence of the parties to give them a further opportunity to respond or present further evidence. Ms. Wright says the delegate did not make any further inquiries, ask for further clarification, explanation or documentation to support the employer's position. Ms. Wright also says the delegate did not advise the employer of her preliminary findings and give it any further opportunity to respond, all of which she contends is a contravention of the principles of natural justice. Ms. Wright also suggests that the delegate failed to adhere to principles of natural justice by sending letters to Overdrive as well as ProTruck.

37. Part 10 of the *Act* establishes the framework for the Director's resolution of complaints. Section 76 provides that once a complaint is filed, the Director must accept and review the complaint, and section 78 provides that the Director may assist the parties in resolving a complaint. [my underlining]

38. The self-help kit and mediation are processes designed to assist the parties to attempt to resolve the matter between themselves. While I accept that these processes, which are not statutorily mandated, may have been engaged or discussed in this instance, I am not persuaded that the Director's decision to commence an investigation before these processes were completed constitute a denial of natural justice. It is not clear to me how the purposes of the *Act* would be better served had the delegate waited for ProTruck to respond to the self-help kit or allowed the parties an opportunity to resolve the dispute through mediation.

39. The Director has the discretion whether to proceed with the resolution of complaints by way of investigation or adjudication (*Metasoft Systems Inc.,* BC EST # D022/12). While it is not clear why the delegate chose to investigate rather than adjudicate the complaint, once the choice to investigate has been made, the director must make reasonable efforts to give the person under investigation an opportunity to respond. (section 77) The scope of that duty has been interpreted by the Tribunal on several occasions.

40. As noted by the Reconsideration Panel in *Milan Holdings Inc.* (BC EST # D313/98),

> investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial".

41. In *Inshalla Contracting Ltd.* (BC EST # RD054/06), a Reconsideration Panel found that an investigation under s. 76 did "not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. … section 77 does not mandate a face-to-face hearing or meeting between the Delegate and person

under investigation … it does require that reasonable efforts be made so that the person under investigation is made aware of the allegations and be given a reasonable opportunity to respond."

42. In my view, the delegate gave ProTruck many opportunities to respond to information obtained by the delegate during the investigative process. The delegate sent letters to Overdrive and ProTruck as she was exploring possible connection between the two possible employers to determine if they could be associated under section 97 of the *Act*.

43. The delegate also sent letters to the directors of both companies and spoke with Mr. Pryce and Ms. Wright, who was identified as ProTruck's agent. The record indicates that the delegate spoke with Ms. Wright several times between September 18 and October 30, 2014, relating information she had learned during the investigation and seeking a response. Moreover, the delegate spoke to a number of other individuals as set out above gathering evidence and information.

44. Ms. Wright also noted the delegate's letter to her of October 10, 2014, in which the delegate stated "I have attempted to ask questions of Diana Wright but her direction has been to correspond in writing. As such I am writing you to ask the following questions, and require your response by 4:00 pm October 24, 2014. After that date, I will proceed to write my decision based on the information I have available to me. "

45. Ms. Wright also argues that the delegate was biased. She makes this argument on several grounds, including a conversation she alleges she had with the first delegate on September 22, 2014, during which he informed her that under the *Act*, Overdrive owed Mr. Thomas "severance" because the business had closed and Mr. Thomas was not given written notice. According to Ms. Wright, the delegate informed her that even if the employees had no interruption of earnings they were owed "severance" if they were not given written notice. Ms. Wright further states that the delegate advised her that he would call her back in two days to discuss the complaint further, but did not do so. The record suggests that the delegate discussed both the allegations with her as well as the requirements of the *Act*. I do not accept Ms. Wright's contention that the delegate had already decided the case at that time; rather, the delegate informed her of the allegations as well as the relevant statutory provisions.

46. Ms. Wright further contends that the delegate was biased in her investigation, treating the employer as "guilty from the start" by demanding Employer records rather than "politely asking for what she needed." Section 85 (1)(f) of the *Act* gives the Director the power to require a person to produce records for inspection. That power is issued in the form of a Demand for Records and is routinely used by the Director. There is no evidence the Director "treated the employer as guilty" by issuing such a demand.

47. ProTruck has not met its burden of demonstrating that it was not given a reasonable opportunity to be heard, or that the delegate was biased.

Error of law

48. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] BCJ No. 2275 (BCCA):

> 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.

49. ProTruck says the delegate made a number of factual errors and that she applied an incorrect legal test for determining whether or not Mr. Thomas's employment had been terminated.

50. Ms. Wright contends that the delegate erred in finding that the ROE issued by Overdrive on September 8, 2014, was evidence that Mr. Thomas's employment was terminated by ProTruck. Ms. Wright argues that the ROE is not, in and of itself, evidence of termination. She says that Ms. Goheen completed the ROE at Mr. Thomas' request, and that the ROE indicated "K" (or "other") as the reason for issuance because Mr. Thomas had not quit, nor had he been terminated.

51. Ms. Wright also argues that the delegate erred in accepting the "lies" of Mr. Thomas and Mr. Bucknell as fact without considering Mr. Pryce's contrary evidence. ProTruck also contends that the delegate provided no records or documentation to indicate how she assessed and weighed the evidence.

52. ProTruck argues that the delegate failed to consider Mr. Thomas' evidence that he injured himself on March 21 and that he assisted in moving equipment in April, when he was in fact in Hawaii. In fact, the delegate made no such error. The delegate noted that Mr. Thomas was injured in March, and that it was Mr. Bucknell who assisted in moving shop items from Overdrive's location to ProTruck's location. Even if Mr. Bucknell's evidence was false, the delegate did not rely on this statement to arrive at her conclusion that Mr. Thomas' employment had been terminated.

53. After noting that section 63 established a liability on the employer to provide an employee with compensation for length of service upon termination unless the employer could show that the employee was given proper written notice of termination or equivalent wages, or had quit, retired or was terminated for cause, the delegate found that ProTruck had not discharged that burden. The relevant portion of the Determination is as follows:

> There is no disagreement that Mr. Thomas received the second ROE dated September 8, 2014 stating that he had been terminated. There is, however, the question of whether Mr. Thomas was in fact terminated or whether he quit as Mr. Pryce stated that Mr. Thomas had demanded the second ROE. The test for establishing whether an employee can be determined to have quit employment includes both a subjective and objective element. Subjectively the employee must form an intention to quit and objectively the employee must carry out an act inconsistent with continued employment. The onus is on the employer to establish that the employee has quit their employment.
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> Mr. Thomas has an ongoing WorkSafe BC claim and has received surgery to return to the workforce. He kept in contact with Mr. Pryce and Ms. Goheen to advise them of his progress. As per Mr. Pryce, Mr. Thomas visited [ProTruck] to discuss the status of returning to work in a year's time after he recuperated from his operation. I find these actions to be consistent with an employee who was intending to return to work after his rehabilitation.
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> Mr. Pryce's recollection of the events is that Mr. Thomas demanded the ROE on September 4, and that Mr. Thomas picked up the ROE on September 16, the day he also dropped off his self-help kit requesting payment of compensation for length of service. Mr. Thomas stated that he attended [ProTruck's] location on September 8, was presented his ROE at that time, and subsequently requested compensation for length of service as he had been terminated. I find Mr. Thomas' version of events to be more likely on the balance of probabilities; it is inconsistent to believe that Mr. Thomas would demand, on the one hand, that he be terminated while demanding on the other that he be paid compensation for length of service.

> No further evidence was submitted by [ProTruck] to establish how the employment relationship ended. Therefore I find that [ProTruck] has failed to establish that Mr. Thomas quit his employment, and I further find that Mr. Thomas was terminated on September 8, 2014.

54. In my view, the delegate did consider the evidence of the parties and set out the basis for her conclusion, although briefly. The delegate noted the evidence of the parties conflicted and explained her reasons for preferring the evidence of Mr. Thomas. It is not open to me to interfere with the delegate's assessment of credibility without a strong basis on which to do so.

55. The delegate considered two ROE's issued by Overdrive, the first of which was issued due to Mr. Thomas' injury, about which there is no dispute. There was also no dispute that Mr. Thomas visited the ProTruck location on at least a couple occasions asking if there would be any difficulty returning to work at a later time once he was medically fit to do so.

56. On September 8, Ms. Goheen issued Mr. Thomas a second ROE, apparently at his request. That ROE set out code "K", or "other" as the basis for issuance. The Reason was explained as "business closed". While there is indeed no dispute that Mr. Thomas received a second ROE, there clearly was a dispute about the reason for the issuance of the ROE. There was no evidence before the delegate on which she could conclude that the issuance of the second ROE constituted a dismissal or a termination of his employment. Had ProTruck terminated Mr. Thomas' employment, the corresponding code on the ROE would have been "M", or dismissal.

57. In my view, the delegate erred in law by acting on a view of the facts which could not be reasonably entertained. There was simply no evidence on which the delegate could have concluded that ProTruck terminated Mr. Thomas' employment.

58. I allow the appeal.

ORDER

59. Pursuant to section 115 of the *Act*, I allow the appeal. I Order that the Determination, dated March 3, 2015, be cancelled. The complaint is referred back to the Director for re-investigation.

Carol L. Roberts
Member
Employment Standards Tribunal