An Application for Reconsideration

- by -

ProTruck Collision & Frame Repair Inc.
("ProTruck")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2016A/19

DATE OF DECISION: March 7, 2016

DECISION

SUBMISSIONS

Diana Wright — on behalf of ProTruck Collision & Frame Repair Inc.

OVERVIEW

1. ProTruck Collision & Frame Repair Inc. ("ProTruck") applies for a reconsideration of Tribunal Decision Number BC EST # D137/15, dated December 29, 2015 (the "Appeal Decision"). The application is brought pursuant to section 116 of the *Employment Standards Act* (the "*Act*").

2. The Appeal Decision resulted from an appeal filed by ProTruck pursuant to section 112 of the *Act*. ProTruck's appeal challenged a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") issued on March 3, 2015.

3. The Determination ordered ProTruck to pay $3,766.20, representing compensation for length of service, annual vacation pay, and interest arising from a complaint brought by one Steven Martin Thomas (the "Complainant"). The Determination also ordered ProTruck to pay two administrative penalties of $500.00. The total payable was, therefore, $4,766.20.

4. In the appeal, the Director delivered to the Tribunal what she asserted was the record that was before the Delegate at the time the Determination was made, as required under section 112(5) of the *Act*. ProTruck objected that the record was incomplete. After considering the merits of ProTruck's objection, the Tribunal ordered the Director to disclose any documents, whether written, in electronic format, or both, that recorded evidence provided by individuals giving evidence regarding the complaint (see BC EST # D075/15).

5. The Director sought reconsideration of the Tribunal's disclosure order. In a decision dated October 5, 2015 (BC EST # RD100/15), a reconsideration panel of the Tribunal refused to reconsider the order.

6. On October 7, 2015, the Director delivered further documents to the Tribunal in response to the disclosure order. ProTruck objected, arguing that the record was still incomplete. In the Appeal Decision, the Tribunal decided that the record was complete. It also declined to accede to ProTruck's submission that parts of the record had been falsified.

7. On the merits of the appeal, ProTruck alleged that there was new evidence the Tribunal should consider, that the Delegate had failed to observe the principles of natural justice, and that the Delegate had erred in law. The Tribunal accepted a submission of ProTruck that the Delegate had acted on a view of the evidence that could not be reasonably entertained when the Delegate concluded that the Complainant had been dismissed from his position of employment with ProTruck. That error on the part of the Delegate was held to constitute an error of law.

8. Accordingly, the Tribunal ordered that the Determination be cancelled, and that the complaint be referred back to the Director for re-investigation.

9. I have before me the Determination, the Reasons for the Determination, ProTruck's Appeal Form, the submissions of the parties to the appeal, the interim decision of the Tribunal as well as the decision of the

reconsideration panel regarding the matter of the Director's disclosure of the record, the record that was before the Tribunal on appeal, the Appeal Decision, and ProTruck's application for reconsideration.

10. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

11. ProTruck, incorporated in January 2014, operates a collision and heavy-duty truck repair shop in Kamloops. In a purchase that closed on April 3, 2014, ProTruck acquired the assets of Overdrive Collision Centre Ltd. ("Overdrive"), a firm that previously operated the repair business. Overdrive ceased to carry on active business thereafter.

12. Martha Goheen ("Goheen") is the sole director of ProTruck. Previously, she acted as the bookkeeper for Overdrive. Keith Pryce ("Pryce"), who was the owner and operator of Overdrive, became the shop manager for ProTruck after the asset purchase.

13. On December 20, 2010, the Complainant commenced to work for Overdrive as a collision repair technician. He suffered a work-related injury on March 4, 2014, and filed a claim with WorkSafeBC shortly thereafter.

14. On March 23, 2014, Overdrive issued the Complainant a Record of Employment. The reason given was "illness or injury", and the expected dated of recall was marked "unknown".

15. On September 4, 2014, the Complainant attended at the location where ProTruck was conducting business. He spoke to Pryce. The Complainant informed the Delegate that he made a request to return to light duties, but Pryce refused. Pryce's recollection, as recorded by the Delegate in her Reasons, was that the Complainant stated he would be having surgery sometime later in 2014, and that he asked whether he could return to work after he recuperated. Pryce stated that he told the Complainant he would need assurances the Complainant would be capable of performing his duties, as there were no other positions available. Previously, Pryce said, the Complainant had indicated that he doubted he would ever be physically capable of performing his former duties and that he would have to be re-trained for other work. Pryce also informed the Delegate that the Complainant had mentioned that WorkSafeBC was pressuring him to return to work on light duties, which he did not want to do, and that he had asked Overdrive to advise WorkSafeBC that there were no light duties for him to perform.

16. Shortly thereafter, Goheen issued a second Record of Employment on behalf of Overdrive in respect of the Complainant. Pryce's evidence was that the Complainant requested the ROE on September 4, 2014, and demanded that it state "business closed" as the reason for its issuance. He also stated that the Complainant insisted the ROE not state that he had been "terminated". According to Pryce, Goheen prepared the ROE as the Complainant had requested. It was dated September 8, 2014, and the Complainant received it on September 16, 2014, the same day that the Complainant delivered at the ProTruck premises, addressed to Overdrive, an Employment Standards Branch self-help kit outlining his claim for monies owed pursuant to the *Act*.

17. The Complainant's evidence was that he attended at the ProTruck premises again on September 8, 2014, when he was presented with a second ROE from Overdrive. The Complainant also said that Pryce told him,

for the first time, that Overdrive had closed. The Complainant then decided to seek compensation for length of service, as he believed he had been terminated.

18. An issue of importance considered by the Delegate was whether ProTruck was an employer that fell within the ambit of section 97 of the *Act*, which reads:

> 97 If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

19. In her Reasons, the Delegate noted that Overdrive did not terminate the Complainant's employment due to his medical condition, or when it sold its assets to ProTruck. Indeed, Pryce informed her that if it had not been for the Complainant's injury, he would have commenced to work for ProTruck, as another technician had done. Given these facts, the Delegate decided that by operation of section 97, the Complainant's employment was continuous when Overdrive sold its assets to ProTruck. I do not discern that ProTruck takes any issue with the Delegate's conclusions on this point. Indeed, its position throughout has been that the Complainant was never terminated by either Overdrive or ProTruck, and so his claims under the *Act* are unfounded.

20. The Delegate, however, determined that the Complainant had been terminated by ProTruck on September 8, 2014, and so it was required to pay him compensation for length of service, vacation pay, and interest. I believe the Delegate's rationale for these conclusions is captured in the following excerpts from her Reasons, at R7:

> 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 indicates 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 WorkSafeBC 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 Pro-Truck 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.
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> 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.
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> When the sale of Overdrive's assets to ProTruck completed, ProTruck became Mr. Thomas' employer by operation of section 97 of the Act. ProTruck terminated Mr. Thomas' employment on September 8, 2014....

21. On appeal, ProTruck alleged that new evidence should be considered by the Tribunal, that there were multiple failures to observe the principles of natural justice during the course of the Delegate's investigation and her preparation of the Determination, and that the Delegate had committed several errors of law.

22. The Appeal Decision rejected ProTruck's submissions relating to new evidence and the alleged failures to observe natural justice.

23. Regarding new evidence, the Tribunal observed that ProTruck's submissions did not clearly address this ground. The Tribunal also stated that if, in the very thorough submissions made by ProTruck, new evidence appeared, it had not been demonstrated that the evidence could not have been discovered and presented to the Delegate during her investigation, and before the Determination was issued.

24. As for the alleged failures to observe the principles of natural justice, the Tribunal decided that the Delegate had complied with her obligations under the *Act*. It also held that both Overdrive and ProTruck were provided with notice of the allegations being made against them, and a reasonable opportunity to respond. Moreover, the Tribunal concluded that ProTruck had failed to establish either that the Determination was tainted by bias, or that the Delegate had falsified the record.

25. On the issue whether the Delegate erred in law, the Tribunal noted that ProTruck had referred to several instances where it asserted the Delegate had made incorrect findings of fact, particularly on matters which turned on the Delegate's assessment of the credibility of the parties and their witnesses. The Tribunal rejected ProTruck's submissions in the Appeal Decision at para. 54, saying this:

> 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.

26. The Tribunal did, however, conclude that the Delegate had erred in law when she determined that the issuance of the second ROE constituted a termination of the Complainant's employment. The Tribunal Member put it this way in the Appeal Decision, at paras. 55-57:

> 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.
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> 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 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.
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> 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.

27. In the result, the Tribunal ordered that the Determination be cancelled, but also that the complaint be referred back to the Director for re-investigation.

ISSUES

28. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

29. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *Act*, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

30. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

31. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.

32. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

33. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

34. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).

35. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

36. In my opinion, ProTruck has failed to establish that the Appeal Decision should be reconsidered. My reasons for reaching this decision are as follows.

37. ProTruck submits that the Appeal Decision should be varied to eliminate the order referring the complaint back to the Director for re-investigation.

38. ProTruck also argues that the Tribunal made errors and omissions when interpreting the evidence, and since the Appeal Decision is published on the Tribunal's website, it should be corrected so as to reflect, accurately, all of the relevant facts.

The order referring the complaint back to the Director

39. ProTruck submits that the Tribunal's order referring the complaint back to the Director for re-investigation is flawed, for several reasons.

40. First, ProTruck contends that a re-investigation is unwarranted because all the evidence necessary to resolve the complaint was before the Delegate at the time the Determination was issued. There is, therefore, nothing else for the Director to investigate.

41. I disagree.

42. The key to the Determination was a finding by the Delegate that the Complainant did not quit, and that his employment was terminated by ProTruck. On appeal, the error the Tribunal noted was that the Delegate relied on the second ROE for the purpose of establishing that the Complainant had been terminated.

43. The Tribunal decided, rightly in my view, that the second ROE, stating as it did that the reason for issuance was "K", meaning "other", rather than "M", meaning "dismissal", was insufficient to warrant such a finding. Accordingly, the Tribunal concluded that the Delegate had acted on a view of the facts – in this case the wording of the second ROE – which could not be reasonably entertained. That in turn meant that the Delegate had committed an error of fact of a type that the Tribunal could find also amounted to an error of law, with the result that the Determination was cancelled.

44. The Delegate's investigation had focused on the second ROE as the pertinent evidence warranting a finding that the Complainant had been terminated. No other evidence of substance appears to have been developed by the Delegate in support of that conclusion. It was for that reason, I believe, that the Tribunal made the observation that the Delegate's investigation had produced no evidence on the basis of which she could have determined that the Complainant had been terminated.

45. That, however, is a different thing from saying that an investigation that placed the ROE in its proper legal context would not in any event have revealed a factual narrative supporting a conclusion that ProTruck had, indeed, terminated the Complainant's employment.

46. This, in my opinion, is the proper inference to be drawn from the Tribunal's comments in the Appeal Decision. It is also in accord with the essential fact-finding jurisdiction entrusted to the Director under the *Act*.

47. ProTruck also asserts that the Tribunal acted arbitrarily in failing to provide reasons for its decision to refer the complaint back to the Director for re-investigation.

48. Again, I disagree.

49. In my view, it was not incumbent upon the Tribunal to give specific reasons for referring the matter back. The rationale for the referral back is to be inferred from the reasons given for the Tribunal's decision to cancel the Determination. As stated above, the Tribunal decided that the Delegate's reliance on the second ROE to establish a termination was unreasonable. To the extent, then, that the Delegate's investigation focused on the second ROE, it was found to have been tainted.

50. It is not the role of the Tribunal to conduct investigations under the *Act*. That task is exclusively within the purview of the Director. All the Tribunal's referral back order does is state a conclusion that flows logically from the grounds that established a need to cancel the Determination. It was unreasonable for the Delegate to focus her investigative attention so heavily on the issuance of the second ROE when deciding that ProTruck had terminated the Complainant. In the end, it led her to make a finding that was perverse, having regard to that evidence. The Complainant and ProTruck were entitled to the benefit of an investigation that was more nuanced, and less narrowly focused than the Delegate provided. The Tribunal's referral back order does nothing more than provide the Director an opportunity to fulfill her duty pursuant to the legislative scheme.

51. A third argument made by ProTruck contains two elements. ProTruck states, rightly, that the Tribunal could have referred the matter back to the Director for further investigation *before* considering the appeal, pursuant to section 114(2)(a) of the *Act*. Clearly, the Tribunal did not do that in this instance, but I do not discern in the *Act* any proscription against the Tribunal's referring back *after* considering an appeal, merely because it chose not to do so beforehand.

52. Indeed, section 115(1) of the *Act*, which sets out the Tribunal's jurisdiction to make orders in appeals, states, in subsection (1)(b), that the Tribunal may refer the matter back to the Director *after* considering whether the grounds for the appeal have been met.

53. Section 115(1) of the *Act*, in its entirety, reads as follows:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

54. ProTruck submits that a correct reading of section 115(1) means that the Tribunal issuing the Appeal Decision had the authority to cancel the Determination *or* refer the matter back, but not both. I cannot accede to this argument. The proper interpretation to be ascribed to the language of section 115(1) is that it permits the Tribunal to employ one or more of the remedies listed within it, and that the selection of a remedy in one of subsections (a) or (b) does not preclude the addition of a remedy in the other subsection. The following excerpt from the decision of a reconsideration panel of the Tribunal in *Old Dutch Foods*, BC EST # RD115/09, sets out the correct approach at paras. 66-69:

> In our view, section 115 permits the Tribunal to employ its remedial powers cumulatively as well as exclusively, so as to enable it to fashion a remedy which best suits the circumstances presented in the particular case. The legislation nowhere expressly prohibits such an approach and such an interpretation is more apt to permit a result that is fair and efficient.
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> It follows that it was not improper for the Member to cancel the Determination under section 115(1)(a) and refer the matter back under section 115(1)(b).

> Both the Director and Old Dutch acknowledge that when a determination, or a part of it, is cancelled by the Tribunal pursuant to its jurisdiction under section 115(1)(a), the determination, or the part of it that is cancelled, is a nullity.
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> If the Tribunal orders that a determination be cancelled and that the matter be referred back, the Director must consider the complaint afresh in light of the errors identified by the Tribunal. If the Director makes a new determination, that determination attracts the same rights of appeal under the *Act* as the original determination.

The consideration of the evidence in the Appeal Decision

55. ProTruck submits that the Appeal Decision is flawed because the Tribunal misinterpreted evidence and deferred to statements made by the Delegate which ProTruck contends were false.

56. A key argument ProTruck makes is that the Delegate falsified the hand-written notes the Tribunal had ordered her to produce in BC EST # D075/15. The Tribunal in the Appeal Decision declined to accept this argument. It stated that allegations of fraud require clear proof, and there was no evidence the Delegate's notes were an inaccurate summary of events.

57. ProTruck takes issue with these comments. It repeats submissions made on appeal in support of its assertions of fraud. It states that the conclusions in the Appeal Decision can only mean that the Tribunal either did not consider its submissions at all, or applied, in error, a reasonable doubt burden of proof when weighing the evidence of fraud it had offered.

58. I reject these submissions of ProTruck. I do not discern that the Tribunal ignored its arguments made in the appeal. The Tribunal addressed them in the Appeal Decision. The fact that it did not accept them is a different matter entirely.

59. Nor am I persuaded that the Tribunal had in mind an incorrect evidentiary standard when it considered ProTruck's allegations of fraud. Requiring clear proof of fraud is entirely consistent with an appreciation that the relevant standard in civil cases is always a balance of probabilities, rather than a standard based on proof beyond a reasonable doubt. That said, a decision-maker in a civil case is entitled to scrutinize evidence with greater care if there is a serious allegation to be established. In *Bater v. Bater* [1950] 2 All ER 458, at 459, Lord Denning made the following oft-cited comment:

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher standard of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

60. When considering this passage in *Continental Ins. Co. v. Dalton Cartage Co.* [1982] 1 SCR 164, at 169, Laskin C.J.C. said that it did not imply a shifting burden of proof within the civil burden based on a balance of probabilities. Instead, His Lordship said:

> The question in all cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

61. In my view, when the Tribunal in the Appeal Decision stated that there was no evidence the Delegate's notes were inaccurate, the Tribunal was merely saying that the arguments tendered by ProTruck on this point were insufficient to establish that the veracity of the record had been misrepresented due to fraud.

62. ProTruck also asserts that the Tribunal should have drawn an adverse inference against the Delegate on the issue of falsifying her investigative notes, because the Delegate did not respond to ProTruck's allegations or provide submissions to explain why they were incorrect. However, I believe this assertion to be unfounded. In a letter to the Tribunal dated November 16, 2015, responding to ProTruck's allegations, the Delegate confirmed that the notes were a contemporaneous record of the telephone conversations in question, and that all records of evidence obtained during the investigation had now been submitted. The only reasonable conclusion to be drawn from this letter was that the Delegate was denying ProTruck's allegations of fraud.

63. ProTruck argues that this was not a substantive response to its allegations, and that it was incumbent on the Delegate to tender further evidence showing why the allegations were incorrect. I disagree. The onus was on ProTruck throughout to establish that the Delegate's notes were falsified. There was never an onus on the Delegate to show that they were not. The Tribunal in the Appeal Decision decided that ProTruck had failed to meet that burden. I cannot see that the Tribunal erred in reaching that conclusion. Merely raising questions regarding the integrity of the Delegate's notes, which ProTruck did, does not mean that the Tribunal was obliged to accept ProTruck's conclusions, even in circumstances where ProTruck's concerns were not addressed in detail by the Delegate.

64. ProTruck alleges further that the Tribunal in the Appeal Decision erred in stating that Diana Wright ("Wright") was identified as ProTruck's agent during the investigation that led to the issuance of the Determination. ProTruck says that this statement is incorrect, that it demonstrates the Tribunal did not review the submissions of ProTruck carefully, and so it reveals a failure to observe the principles of natural justice and administrative fairness.

65. Even if it can be said that the Tribunal's statement about the scope of Wright's agency was in error, I do not see that it leads inexorably to a conclusion that the Tribunal failed to give due consideration to ProTruck's submissions on the appeal. A fair reading of the Appeal Decision reveals that the Tribunal was alive to the substance of the arguments presented by ProTruck. The thrust of ProTruck's challenges on this application are related, principally, to the fact that the Tribunal declined to accept them.

66. Moreover, I am not persuaded that if the Tribunal did err, the error vitiates the efficacy of the Tribunal's Appeal Decision. ProTruck asserts that it was not aware it was under investigation until the Determination was issued. It acknowledges, however, that Goheen received two letters addressed to ProTruck from the Delegate dated October 10, 2014, and October 21, 2014, including, *inter alia*, a demand for employer records concerning its employees, and responses to certain evidence obtained regarding the complaint. ProTruck states that Goheen thought these letters were copies of other letters sent to Overdrive, and so she did not notice that they were addressed to ProTruck. I have no reason to doubt that this is true. However, if an error of this sort was made by Goheen, it cannot mean that the Delegate failed to notify ProTruck that it was under investigation regarding the complaint, and that it should provide submissions. There is no evidence the Delegate became aware that Goheen had misinterpreted the import of her October correspondence to ProTruck.

67. ProTruck also argues that the Delegate knew that Wright was the "employer's representative" from the outset of the complaint, and so the Delegate should have sent any correspondence relating to ProTruck to her. It seems, however, that the Delegate did not interpret this direction to mean that Wright was the agent for

ProTruck for the purposes of the investigation. Overdrive and ProTruck were entirely distinct legal entities, and the "employer" identified in the complaint was Overdrive, not ProTruck.

68. That being said, I note that in a letter dated October 10, 2014, directed to Overdrive, and copied to Wright via email, the Delegate stated the following, among other things:

> 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 on October 24, 2014**. After that date, I will proceed to write my decision based on the information I have available to me.
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> Section 97 of the Act states that, "If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition."
>
> Based on the evidence currently available, it appears that ProTruck Collision & Frame Repair Inc. acquired a substantial portion of Overdrive Collision Centre Ltd.'s assets. As such, it appears that Steven Thomas continued his employment into the new company of ProTruck Collision & Frame Repair Inc. If this is so, then ProTruck Collision & Frame Repair would be liable for any wages found owing to Steven Thomas. Please also note that, per section 96 of the Act, directors or officers of corporations are personally liable to pay up to two months' unpaid wages for each employee, if they were directors or officers when the wages were earned or payable. Compensation for length of service is considered to be wages per the definition of wages in section 1 of the Act.
>
> If you disagree with the points listed above or would like to add further information to the comments made by Steven Thomas then you must provide your response no later than **4:00 pm on October 24, 2014**. [**boldface** in original text]

69. Exactly the same wording was included in the Delegate's October 10, 2014, letter to ProTruck. It cannot be said, therefore, that either Overdrive, or ProTruck, could plausibly claim to have been unaware that the Delegate was investigating the potential exposure of ProTruck to pay wages to the Complainant as a result of his complaint against Overdrive.

70. ProTruck also claims that the Tribunal should have concluded that the Delegate failed to observe the principles of natural justice when she did not "cross-disclose" all the evidence to the parties, so as to give each side a full and complete opportunity to consider it, and address it if necessary.

71. Again, I disagree. As stated by the Tribunal in the Appeal Decision, an investigation is a dynamic process. Furthermore, section 77 of the *Act* does not mandate the all-encompassing cross-disclosure that ProTruck insists upon. What section 77 requires is that the Director make "reasonable efforts" to give a person under investigation an opportunity to respond. My review of the record does not reveal a failure on the part of the Delegate to disclose to either Overdrive, or to ProTruck, the substance of the complaint, or the principal elements of the evidence that the Delegate proposed to consider before issuing the Determination. The fact that the Delegate may not have disclosed every shred of evidence on which ProTruck might have wished to develop an argument does not alter this conclusion.

72. ProTruck further submits that it demonstrated the Complainant was untruthful, yet the Tribunal failed to consider its proof of this fact when it stated, in the Appeal Decision, that it was not open to the Tribunal to interfere with the Delegate's assessment of credibility without a strong basis to do so.

73. I concur with the Appeal Decision on this point. The appellate jurisdiction of the Tribunal under section 112 of the *Act* does not permit it to correct errors of fact, particularly those based on a delegate's assessment of

the credibility of witnesses. Instead, the Tribunal may only correct errors of law. A mistaken assessment as to a witness' credibility does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially, could have made the impugned finding (see *Gemex Developments Corp. v. B.C. (Assessor of Area # 12 - Coquitlam)* (1998) 62 BCLR (3d) 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). Another way of saying this is that the finding will stand unless it is shown to be irrational, perverse, or inexplicable.

74. What the Tribunal affirmed in the Appeal Decision was that the Delegate's findings based on credibility were unreviewable because ProTruck had not demonstrated that they were flawed in this sense. ProTruck disagrees with this conclusion and refers to the arguments it made in the appeal. In essence, it seeks a second opinion regarding the Delegate's assessment of the Complainant's credibility. I am not disposed to do that. Merely showing that the Delegate might have reached a different conclusion as to the Complainant's credibility is a different thing from establishing that the Delegate's findings were irrational, perverse, or inexplicable.

75. ProTruck refers to other instances in the Appeal Decision where it says the Tribunal erred in its characterization of certain facts. I refer to its statements that the Tribunal was incorrect to say that the Complainant had filed a complaint against ProTruck, when in fact his complaint named Overdrive as his employer, and that the Complainant's interruption in earnings, which necessitated the issuance of his first ROE, stated that the reason for the interruption was "illness or injury" and not, as the Tribunal stated, that the Complainant had been "laid off". ProTruck also states that the Tribunal erred when it stated that a witness, Drew Bucknell, had been employed by Overdrive, rather than ProTruck.

76. I perceive these alleged mis-statements to be of limited, if any, consequence since they do appear to have influenced the result of the appeal and, in any event, the Tribunal cancelled the Determination and directed that the complaint be referred back to the Director for re-investigation. ProTruck will have an opportunity to address these matters, if it wishes, when the Director considers the complaint afresh.

ORDER

77. Pursuant to section 116 of the *Act*, I order that the Appeal Decision, BC EST # D137/15, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal