

Citation: Pro Care Enterprises Ltd.  
2025 BCEST 24

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Pro Care Enterprises Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Mona Muker
SUBMISSIONS:	Jennifer Jorgensen, on behalf of Pro Care Enterprises Ltd.
FILE NUMBER:	2024/132
DATE OF DECISION:	February 5, 2025

## DECISION

### OVERVIEW OR INTRODUCTION

1. Pro Care Enterprises (“Pro Care”) operates a first aid services organization in Kamloops, British Columbia. It employed Gatlin Wilson (“Wilson”) as a Level 3 Occupational First Aid Attendant (**OFA**) from October 1, 2021, to May 23, 2023. On March 29, 2023, Wilson filed a complaint with the Employment Standards Branch when he was still employed, alleging that Pro Care had not paid him wages. Wilson filed a second complaint on June 12, 2023, seeking wages after the first complaint was made.
2. An investigating delegate of the Director of Employment Standards (the “**Investigator**”) interviewed Wilson and Pro Care, collected written evidence, and issued an Investigation Report. Both parties provided written submissions in response to the Investigation Report. An adjudicating delegate of the Director of Employment Standards (the “**Director**”) issued a determination finding that Pro Care breached sections of the *Employment Standards Act* (**ESA**) by failing to pay Wilson wages, reimbursement for expenses, and compensation for length of service. The Director ordered Pro Care to pay a total amount of \$24,860.66, which included \$21,860.66 in unpaid wages and a \$3,000.00 administrative penalty (the “**Determination**”).
3. Pro Care appeals the Determination on the grounds that the Director breached the principles of natural justice. Pro Care says that the Director used an unfair hourly calculation when the parties had agreed to a flat rate based on a 12-hour calculation. Pro Care also says that Wilson is not entitled to compensation for length of service because he was terminated for cause, namely, dangerous driving and keeping his work vehicle in poor condition. Pro Care also submitted a copy of an employment contract (the “**Contract**”), emails, text messages, pay stubs, time sheets, and photos.
4. While Pro Care appeals the Determination on the grounds that the Director breached the principles of natural justice, I have also considered whether the Director erred in law because Pro Care’s submissions imply that it was treated unfairly through the Director’s assessment of the evidence.
5. For the reasons that follow, I conclude that this appeal has no reasonable prospect of success. Pro Care has not shown that the Director breached the principles of natural justice or erred in law in assessing the evidence provided by the parties. The record shows that Pro Care had sufficient opportunity to know the case against it and respond. While Pro Care takes issue with the Director’s findings of evidence, the Tribunal’s role is not to reassess evidence on appeal.

### ISSUES

6. Has Pro Care shown a reasonable prospect of success in arguing, with respect to the Director’s treatment of evidence, that the Director:
  - 1) breached the principles of natural justice?
  - 2) erred in law?

## ANALYSIS

### 1) Has Pro Care shown that the Director breached the principles of natural justice in its treatment of the evidence submitted by the parties?

7. A person may appeal a determination on the ground that the Director failed to observe the principles of natural justice, under section 112(1)(b) of the *ESA*. The Tribunal has clarified that these principles require the Director to ensure parties have the right to know the case against them, have the opportunity to respond, the right to know about the hearing process, and the right to be heard by an unbiased decision maker: *607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05; *Imperial Limousine Service Ltd.*, BC EST # D014/05.
8. The burden of proof lies on the party alleging a breach of natural justice: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. In this case, Pro Care has not met this burden. While Pro Care argues that the Director used an unfair calculation for determining Wilson's hourly wage, the Tribunal has clarified that natural justice does not mean that the Director must arrive at a conclusion Pro Care considers just and fair (*Tejinder Dhaliwal* (Re), 2021 BCEST 34). Pro Care's arguments are instead an attempt to have the Tribunal reassess the parties' evidence on appeal and to re-argue its case before this Tribunal in the hope of a different outcome.
9. The record shows that the Director gave Pro Care ample opportunity to understand the case against it and present its evidence in response. The Investigator provided Pro Care with the particulars of Wilson's complaint and how it calculated his wages at the outset of the investigation. The Investigator also orally interviewed the parties about their evidence and collected records, photos, and documentary evidence from Pro Care.
10. After the Investigator issued the Investigation Report, the Director also allowed the parties to make additional submissions.
11. Based on the evidence before me, I find that the Director did not breach the principles of natural justice throughout the adjudication process.

### 2) Has Pro Care shown that the Director erred in law in its treatment of the evidence submitted by the parties?

12. A person may also appeal a determination on the ground that the Director of Employment Standards erred in law. 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.): a misinterpretation or misapplication of a section of the law; a misapplication of an applicable principle of general law; acting without any evidence; acting on a view of the facts which could not reasonably be entertained; and adopting a method of assessment which is wrong in principle.
13. The Tribunal's authority to interfere with a delegate's exercise of discretion was well summarized in *Li Zheng* (Re), 2020 BCEST 142 ("*Zheng*") at paras 27 to 31. The Tribunal has demonstrated "considerable reluctance to interfere with the exercise of discretion by the Director, only doing so in

exceptional and very limited circumstances”: *Victor Noakes (Re)*, 2021 BCEST 16 (“*Noakes*”) at para 28.

14. The Tribunal has also stated that it “will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable”: *Jody L. Goudreau and Barbara E. Desmarais*, BC EST # D066/98. Absent any of those considerations, the Director even has the right to be wrong: *Zheng* at para 29, citing *Ted N. Hunt*, BC EST # D089/11, at para 42.
15. In rare cases, findings of fact may amount to an error of law where the Director acted without any evidence on a view of the evidence that could not be reasonably entertained; or committed a palpable overriding error; or arrived at a clearly wrong conclusion of the facts, unsupported by the evidence. In cases where there is some evidence, the Tribunal will generally not reevaluate the evidence or substitute the delegate’s findings of facts with its own view, even if it is inclined to reach a different conclusion based on the evidence (*Hossein Lotfi (Re)*, 2021 BCEST 70; *United Specialty Products Ltd.*, BC EST # D075/12).

#### *Wages*

16. On appeal, Pro Care argues that the Director should have used an hourly rate based on the flat rate Wilson agreed to work. Pro Care argues that the flat rate is based on working 12 hours, even if the workday amounts to 8 hours. Pro Care says that this shows that Wilson was overpaid on most pay periods.

#### *Overtime wages*

17. The Contract stipulated that Wilson would be paid a daily rate of \$300.00 per day for up to 12 hours and after 12 hours he would be paid \$45.00. The Contract also stated that the wage rate for travel time was \$30.00 per hour and that overtime rates did not apply to travel time. Wilson’s daily rate increased to \$325.00 for the period June 16 to June 30, 2022, and to \$350.00 from July 1, 2022, to the end of his employment. The Director reviewed the parties’ records and found that they indicated that Wilson was paid his daily rate plus \$45.00 per hour after 10 hours worked per day, regardless of the wage rate that was in place.
18. The Director reviewed the Contract, the timecards submitted for all hours worked, and the parties’ wage-statements, and found that Wilson’s overtime compensation structure waived the minimum requirements of the *ESA*. I agree with this finding. Section 40 of the *ESA* states that employers must pay 1 ½ times an employee’s regular wage rate for hours worked in excess of 8 hours in a day and double an employee’s regular wage rate for hours worked in excess of 12 hours in a day.
19. The Director also determined Wilson’s regular wage rate by using the calculation set out in section 1 of the *ESA*. Section 1 states that when an employee is paid a flat fee, the regular wage rate is determined by dividing the employee’s wages by the employee’s total hours of work during the same pay period. The Director found that Wilson was not paid overtime wages in the amount of \$10,974.28 based on the wage statements provided for the periods March 16 to May 15, 2022, July 1 to November

30, 2022, and January 16 to May 23, 2022. I find that the Director's finding was reasonable given that it was based on the evidence before her, and the calculations stipulated in the *ESA*.

#### *Statutory holiday pay*

20. The evidence before me shows that after the Director reviewed the parties' records, the Director determined that Wilson was not paid statutory holiday pay under section 45 of the *ESA* for Good Friday, BC Day, and Remembrance Day in 2022; and Good Friday and Victoria Day in 2023. Pro Care paid Wilson \$1,200.00 for these statutory holidays. However, according to the evidence and calculations he was entitled to \$1,361.16. As a result, the Director found that Wilson was owed \$161.15 in statutory holiday pay.
21. In addition, Wilson was not paid additional statutory holiday pay under section 46 of the *ESA* (average day pay plus 1 ½ times regular wage rate) for Canada Day, Labour Day, and Thanksgiving Day in 2022; and Family Day in 2023. Pro Care paid Wilson \$2,535.00.00 for these statutory holidays. However, according to the evidence and calculations he was entitled to \$3,373.22. As a result, the Director found that Wilson was owed \$838.22 in statutory holiday pay.
22. In total, the Director found that Wilson was owed \$999.37 in statutory holiday pay. I find nothing unreasonable with the Director's calculations, given that they were based on the wage statements, time sheets, and records before her.

#### *Illness or Injury Leave*

23. Pro Care argues that Wilson is not entitled to an illness or injury leave because he did not claim to be sick until after Pro Care refused to pay him compensation and he did not provide a doctor's note until 7 days after he requested sick pay. Pro Care says that Wilson never called in sick for any of his shifts through the duration of his employment and nor did he inform anyone on site that he was feeling ill on May 23, 2023.
24. The Director considered the parties evidence regarding Wilson's illness and found that he requested personal illness leave from May 24 to May 28, 2023, and provided reasonably sufficient proof to support the leave entitlement on June 1, 2023. The Director acknowledged that there was a delay in providing the proof. However, the Director found that Wilson provided the doctor's note as soon as practicable, given his remote location.
25. As a result, the Director found that Wilson was entitled to five paid days from May 24 to May 28, 2023, and was thus owed \$1,400.00, based on \$280.00 being his average day's pay.
26. In this case, I find the Director's finding to be reasonable. The Director acknowledged Pro Care's concerns, considered the evidence, and did not act without any evidence in her finding. Nor did the Director act on a view of the facts which could not reasonably be entertained.

#### *Vacation pay*

27. The Director determined that Wilson was owed additional wages for a total amount of \$13,373.65 and as a result he was owed 4% vacation pay on these wages under section 58 of the *ESA*.

Accordingly, the Director found that Wilson was owed \$534.95 in vacation pay. I find the Director's finding to be reasonable as it is based on the evidence and Wilson's entitlement under the *ESA*.

#### *Summary of wages*

28. The Director reviewed all the evidence submitted by the parties carefully and diligently. The Director prudently calculated Wilson's wage rate, overtime wages, statutory holiday pay, vacation pay, and illness leave based on that evidence, in accordance with relevant sections of the *ESA*. The Director also identified and interpreted relevant sections of the *ESA*. In addition, the Director made findings about Wilson's entitlement to illness pay based on supporting evidence. As a result, I conclude that the Director's conclusions are reasonable because they are supported by the evidence and the *ESA*.

#### *Reimbursement for expenses*

29. The parties' Contract set out that Wilson was entitled to a mileage allowance of \$0.59/km, if he travelled to or from a job site using his personal vehicle. During the investigation, Pro Care said that using a personal vehicle was not a business cost.
30. The Director cited section 21(2) of the *ESA* which prohibits employers from requiring employees, directly or indirectly, to contribute towards the costs of the employer's business. Section 21(3) sets out that these costs are recoverable as wages under the *ESA* if the cost can be determined.
31. The Director determined that by including a provision to reimburse Wilson for the use of his personal vehicle while traveling to or from a job site, Pro Care deemed this cost as a business cost. The Director reviewed the evidence and found that Wilson drove approximately 45 kilometers each way from March 17 to June 15, 2022 and was thus owed \$3,132.90 in business costs.
32. On appeal, Pro Care did not make any submissions about the reimbursement of Wilson's expenses. I interpret Pro Care's silence as an indication that it does not dispute the Director's finding. However, I have still considered whether the Director erred in law in making this finding.
33. I find the Director's finding to be reasonable for it considers the provision in the Contract, the days Wilson worked during the relevant period, the kilometres he drove, and his mileage allowance. The Director did a comprehensive review of the evidence and identified and interpreted relevant sections of the *ESA*. Therefore, I find that the Director's findings and calculations are supported by the evidence.

#### *Complainant's termination*

34. The Director reviewed the evidence about Wilson's illness and the parties' disagreement and found that Wilson was terminated not because of his medical leave (which is protected under the *ESA*), but because the parties disagreed about overtime wages, and the state Wilson left Pro Care's provided vehicle and accommodation in. As a result, the Director did not order any remedy because she found that Pro Care did not contravene the *ESA*.
35. On appeal, Pro Care did not make any submissions about this issue, given that the Director's finding was in Pro Care's favour. However, I have still considered whether the Director erred in law in making this finding.

36. In this case, the Director identified and interpreted sections 54 and 126 of the *ESA* and considered the parties' evidence regarding Wilson's illness leave, reasons in the termination letter, and post-termination communications between the parties in making its finding. I find that the Director's findings are supported by the evidence and therefore I find no reason to interfere with the Director's decision.

*Compensation for length of service*

37. Pro Care argues that Wilson was not terminated because of a disagreement with his overtime wages. Pro Care's submissions suggest that Wilson was terminated because of his job-related performance. Pro Care says that it received multiple complaints about Wilson's dangerous driving and that he was verbally warned about these complaints.

38. Pro Care also argues that Wilson was verbally warned about keeping the company vehicle in clean and sterile condition, as stipulated in the safety manual and the Contract. Pro Care also submitted photos of the vehicle that were taken in the end of May 2023. Pro Care says that this was Wilson's third strike and that he intentionally left the vehicle unlocked with thousands of dollars' worth of equipment in it. Pro Care says that if it had known earlier that Wilson kept the vehicle in such poor condition, it would have taken action sooner.

39. The Director cited section 63 of the *ESA*, which establishes liability for an employer to provide an employee with compensation for length of service upon termination. The Director also cited section 63(3) of the *ESA*, which discharges an employer from liability if it can show that the employee was given proper written working notice of termination or equivalent wages, or a combination of both, or if the employee quit, retired, or was terminated for cause.

40. The Director noted that the burden of proving that an employee's conduct justified dismissal for just cause is on the employer. The Director then explained that just cause may arise from an employee's misconduct or from work related issues. The Director determined that Pro Care terminated Wilson on June 11, 2023, without paying him compensation in lieu of notice.

41. The Director considered provision 10 of the Contract, which addressed mistreatment of equipment and stated that it would be a cause for immediate dismissal. The Director also considered the mobile nature of the vehicle, the remote area Wilson worked in, the first aid treatment he provided in the vehicle, and the multiple complaints Pro Care received. The Director also noted that Wilson denied leaving the vehicle in the condition depicted in the photos.

42. The Director found that provision 10 of the Contract was broad, ambiguous, and did not define mistreatment. Furthermore, Pro Care did not submit the safety manuals it relied on into evidence, nor did it provide evidence that it communicated safety standards to Wilson. In addition, Pro Care did not submit any disciplinary records.

43. The Director cited *McKinley v. BC Tel* 2001 SCC 38, which sets out a two-part test for just cause. The first part states that misconduct must be established on a balance of probabilities, and the nature and degree of the misconduct must warrant dismissal. The second part of the test requires an examination of the nature and circumstances of the misconduct.

44. The Director determined that on a balance of probabilities she could not establish if misconduct occurred. She found that the photos depicted the vehicle in a singular point in time and was at most circumstantial evidence. The photos also did not have any date stamps, and it was unclear from the photos if Wilson worked in the vehicle while it was in the condition that was depicted in the photos.
45. The Director noted that even if she found Wilson left the vehicle in the condition depicted in the photos, this did not amount to major misconduct such that it would warrant dismissal. The Director stated that not meeting safety standards would not justify summary dismissal without progressive discipline.
46. Furthermore, the Director found that the employer-provided accommodation was not equipment as contemplated in the Contract. Nevertheless, Wilson's treatment of the accommodation also did not amount to just cause for termination because it did not rise to major misconduct, it did not interfere with Wilson's ability to work, and nor did Pro Care provide evidence of warning Wilson during his employment.
47. The Director cited section 63 of the *ESA* and concluded that Wilson was entitled to two weeks of average wages as compensation, since he was employed for greater than twelve months but less than three years. The Director noted that under section 63(4) of the *ESA*, the last eight weeks of an employee's normal or average hours worked are used to calculate such compensation.
48. The Director found that Wilson worked 40 hours on average during this last eight weeks, with a regular wage rate of \$35.00 per hour. Therefore, the Director found that Wilson was entitled to \$2,800.00 as compensation for his length of service.
49. The Director also noted that under section 58 of the *ESA*, 4% annual vacation pay is payable on compensation for length of service. Accordingly, the Director found that Wilson was entitled to \$112.00 in annual vacation pay on his compensation of length of service.
50. In this case, I find that the Director did not misapply or misinterpret the law, act without evidence, or act on a view of the facts that could not be entertained. I find that the Director identified and interpreted relevant sections of the *ESA*, set out the test for just cause, and considered *McKinley v. BC Tel*, 2001 SCC 38.
51. I find that the Director was alive to general principles of contract law when she interpreted the Contract the parties entered into. Absent any clear intent, the Director was reasonable in her interpretation of provision 10 and finding that it was ambiguous, broad, and lacked a definition for mistreatment.
52. I also find that the Director considered the parties' evidence. The Director provided a thoughtful analysis of the photos that depicted the vehicle, the condition of Pro Care's accommodation, and how on a balance of probabilities neither amounted to just cause for summary dismissal. I find the Director's acceptance of the parties' evidence on some issues while rejecting it on others to be supported by the evidence. Furthermore, the Director's calculations of compensation for length of service and annual vacation pay are supported by the evidence and the *ESA*.
53. Therefore, I find no reason to interfere with the Director's decision.



### *Penalties*

54. The Director imposed administrative penalties under sections 21, 40, 45, 46, 49.1, and 63 of the *ESA* on Pro Care for contravening sections of the *ESA*. The total amount payable is \$3,000.00.
55. Findings of violations of the *ESA* will amount to penalties being imposed under the *ESA*. I find that the Director's conclusions regarding Pro Care violating the *ESA* are supported by the evidence. Therefore, I find that the Director did not err in law by applying administrative penalties.

### *Summary*

56. I find that there is no evidence that the Director engaged in an abuse of power, made a mistake in construing the limits of her authority, or made a procedural irregularity. Nor did the Director misinterpret the *ESA* or general principles of the law.
57. The Director was obliged to and did consider, evaluate, and weigh the evidence. Although the Director did not assess the evidence in the manner advocated by Pro Care, the Director's assessment was based on the evidence produced. Therefore, I find nothing unreasonable with the Director's assessment of the evidence produced.
58. I am satisfied that the Director conducted a sufficient analysis of all legal tests and considered the facts in light of those tests. I am unable to find that the conclusions of the Director, which are challenged by Pro Care, are based on a view of the facts which cannot be reasonably entertained. As a result, I find that Pro Care has failed to show that the Director committed a palpable or overriding error in arriving to her conclusions, made a finding that was unsupported by the evidence, or came to a conclusion without any evidence.
59. As a result, I find that the Director did not err in law.

### **CONCLUSION**

60. Pro Care's appeal has no reasonable prospect of success and is dismissed on this basis.

### **ORDER**

61. I dismiss this appeal under section 114(1)(f) of the *ESA*.
62. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated August 21, 2024, be confirmed in the amount of \$24,860.66, together with any interest that has accrued under section 88 of the *ESA*.

/S/Mona Muker

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**Mona Muker**  
**Member**  
**Employment Standards Tribunal**