

Citation: Western K9 Security Services Inc. (Re)
2018 Bcest 115

An appeal

- by -

Western K9 Security Services Inc.
("Western K9")

- 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)

PANEL: Maia Tsurumi

FILE No.: 2018A/85

DATE OF DECISION: December 24, 2018

DECISION

SUBMISSIONS

| | |
|----------------------------|--|
| Janet Hader | on behalf of Western K9 Security Services Ltd. |
| The Complainant/Respondent | on her own behalf |
| Paul Grace | delegate of the Director of Employment Standards |

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Western K9 Security Services Ltd. (“Western K9” or the “Appellant”) has filed an appeal of a determination (the “Determination”) issued by Paul Grace, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on July 12, 2018. In the Determination, the Delegate found that Western K9 contravened sections 17, 40, and 58 of the *ESA*.
2. Western K9 appeals the Determination on the grounds that the Delegate failed to observe the principles of natural justice in making the Determination. Western K9 seeks to have the Determination varied.
3. Western K9 also requests an extension of time to the statutory appeal period pursuant to section 109(1)(b) of the *ESA*.
4. I have decided this appeal pursuant to sections 114 and 115 of the *ESA*. I dismiss the appeal and confirm the Delegate’s Determination.
5. This decision is based on the submissions made by Western K9 in its Appeal Form, supplemental submissions from the Appellant, the Respondent, and the Delegate that I requested during the appeal process (“Supplemental Submissions”), the sub-section 112(5) record (the “Record”), the Determination, and the Reasons for the Determination.

ISSUE

6. The issues before the Employment Standards Tribunal are whether:
 - a. the time period for filing the appeal should be extended pursuant to section 109(1)(b) of the *ESA*; and
 - b. all or part of this appeal should be allowed or dismissed.

ARGUMENT

7. Western K9 submits that:
 - a. The amount the Delegate ordered as payment for daily work caring for Western K9's security dog should be varied from an hour a day at the Complainant's hourly wage to an industry standard daily allowance for dog care;
 - b. The amount the Delegate ordered as payment for hours the Complainant spent training to become a dog handler for Western K9 should be varied from the ordered amount;
 - c. The amount the Delegate ordered as reimbursement of wages arising from an unauthorised deduction for the cost of the dog handler course should be varied from the ordered amount; and
 - d. The amount the Delegate ordered as payment for the week of May 28 to June 3, 2017, should be varied from wages for 44 hours to wages for 39 hours.
8. Western K9 asks me to extend the time period for its submissions on this appeal because it does not have access to the Complainant's employment file and because Western K9's principals were out of the country until August 13, 2018.
9. I note that Western K9 is not appealing the administrative penalties (\$1,500) imposed.

THE FACTS

Background

10. Western K9 is an incorporated British Columbia company. Werner and Janet Hader were its directors at the time of the hearing. Western K9 operates a security services company.
11. The Complainant is a licensed security officer. When she was offered employment with Western K9, her security officer licence was not endorsed to work as a dog handler for Western K9. It was a condition of her employment that she successfully complete a dog handler training course and receive validation by the Justice Institute of B.C.
12. The Complainant was employed by Western K9 as a security officer and dog handler until September 11, 2017, at a rate of pay of \$12 per hour for onsite and maintenance training, \$15 per hour for static duties, and \$17 per hour for dog patrols.
13. Western K9 provided the Complainant with a security dog (Franca) for her training and employment.
14. The Delegate heard the complaint on January 3, 2018. Western K9 was represented by Ms. Brandee Yuen and the Complainant represented herself.

Issues Before the Delegate

15. The issues before the Delegate were whether:
- (1) Western K9 misrepresented the position of dog handler;
 - (2) the Complainant was entitled to regular wages and/or overtime; including whether the Complainant was entitled to payment for work relating to the incident that occurred on July 18, 2017; and
 - (3) whether the Complainant was entitled to reimbursement for expenses, unauthorised deductions and/or damage caused to her cell phone.

Evidence and Submissions at the Hearing

16. The Complainant said that she was employed by Western K9 as a full-time dog handler. She signed an employment agreement, a training fees agreement, and a canine agreement, and received a copy of Western K9's policies.
17. According to the Complainant, Western K9 misrepresented the dog handler position because it did not provide her with full-time hours and it did not pay her \$17 per hour, both of which were advertised conditions of employment. She worked 35 hours per week on average and was paid either a training wage (\$12 per hour) or static security officer wage (\$15 per hour) for many of her shifts. She testified that she was entitled to a dog allowance of \$100, paid twice a year, but that it was paid to her as wages and not an allowance.
18. The Complainant also said that she was not paid:
- a. wages or overtime for her travel between her residence and the work site with the security dog;
 - b. wages for the time she put in at home caring for the security dog, which was about one hour per day;
 - c. training wages at \$12 per hour for 60 hours of dog handler training in May 2017, which Western K9 told her was necessary to endorse her security officer licence;
 - d. the \$180 cost for updating her security officer licence;
 - e. \$700 for a pet damage security deposit required by her landlord; and
 - f. \$224.29 as replacement value for her cell phone damaged by Western K9's dog.
19. The Complainant further said that when her employment terminated, Western K9 deducted her wages to reimburse itself for her dog handler training course fees without her authorisation.
20. Western K9 testified that the Complainant's first day of dog handler training was on April 27, 2017, prior to her employment commencing. It said that the Complainant's first paid shift was a training shift on May 18, 2017.

21. Western K9 submitted that the Complainant accepted the position of security officer knowing the conditions of employment as explained to her during the interview process and set out in the employment agreement that she signed.
22. One condition of the dog handler position was to successfully complete a dog training course. Western K9 explained this condition to the Complainant before she accepted the position and she agreed to this condition. The Complainant knew that she would not be paid at the dog handler rate until she had completed the required dog handler training course.
23. Another condition of employment that the Complainant accepted was that Western K9 would not pay overtime for hours worked over 40 hours in a week.
24. A condition of the dog handler position was to house and care for the security dog when off-duty and the Complainant knew that she was required to house, care for, and exercise the dog when she was not on duty. These responsibilities were contained in Western K9's employee policies and canine agreement.
25. Western K9 said that the Complainant was never guaranteed full-time hours. Further, she told Western K9 that from August 20, 2017, she could not work Monday to Friday for three weeks because she was training to work for a new employer.
26. Western K9 also said that it did not pay wages for the time required for employees to commute between home and their designated work sites unless those work sites are outside of the Lower Mainland, which was not the case for the Complainant. This was the case even when an employee has to bring a security dog to the work site.
27. According to Western K9, the Complainant was not provided with full-time hours as a dog handler or paid the hourly rate for a dog handler when she was not yet qualified to be a dog handler. Instead, she was employed as a security officer until her dog handling endorsement was completed. However, where possible, she was given training shifts and static security shifts to provide her with full-time hours of employment before and after she qualified as a dog handler.
28. Once qualified as a dog handler, the Complainant was entitled to a dog allowance of \$100, paid twice a year as an allowance, not as part of her wages.
29. In the training agreement, Western K9 agreed to pay the cost of the dog handler training course and validation fees. Western K9 says it told the Complainant at her interview that Western K9 does not pay any of its employees to take the dog handling course and that it would not pay her wages to take this course. Furthermore, the training agreement says that if the Complainant terminated her employment less than a year after completing her dog handling training course, she had to pay a pro-rated amount for the course fees.
30. The fact that the Complainant moved residences during her employment with Western K9 did not make Western K9 responsible to pay the pet damage deposit, which the Complainant can recover from her new landlord.

31. Regarding the amount claimed by the Complainant for damage to her cell phone, Western K9 said that it was not responsible for any damage to the phone if it occurred when she was off-duty.
32. The Complainant's employment agreement, training agreement, canine agreement, and her scheduled shifts were in evidence, along with Western K9's Employees Policies.
33. Finally, both parties provided evidence about an incident that occurred with the security dog on July 18, 2017, when the Complainant was off-duty and she and the security dog were attacked by another dog.
34. The Complainant said that Western K9 asked her to take the dog to its training facility for an assessment. The training facility was about a 60-minute drive from her residence. She took the dog there and waited for the dog to be assessed and then took the dog home again. All told, she said that she worked for 27 hours caring for the security dog, taking the security dog for assessment, providing ongoing care, and monitoring to the security dog, taking herself for medical attention, providing police and by-law reports, and providing Western K9 with a written incident.
35. Western K9 agreed that it asked the Complainant to bring the security dog to its training facility for assessment, after first advising the Complainant to take care of herself. On July 19, 2017, the Complainant brought the dog in and Ms. Hader of Western K9 inspected it and treated it for a minor puncture wound on its neck. The Complainant was there for about 30 minutes. The Complainant reported the incident to the Workers' Compensation Branch and there was no time lost from work.

Delegate's Findings and Analysis

Alleged misrepresentation

36. The Delegate first considered whether Western K9 misrepresented the dog handler position to the Complainant. Based on the evidence before him, he found that Western K9 did not misrepresent the position of dog handler.
37. The website advertisement relied on by the Complainant in arguing that Western K9 misrepresented the dog handler position stated that the position would start as part-time and on-call. Also, the position description from the job search website provided by the Complainant to the Delegate did not describe the position as full-time and neither did the employment agreement.
38. Further, the Delegate's review of the Complainant's shift schedules and corresponding wage statements showed that she averaged about 42 hours per week during June and July 2017. For August 2017, she averaged just over 29 hours per week and in September 2017, she averaged about 18 hours per week, but from August 20, 2017, the Complainant told Western K9 that she was not available to work Monday to Friday for three weeks.

Regular wages and/or overtime

39. The Delegate addressed the Complainant's allegations that she was not paid:
- a. at the \$17 per hour dog handler rate;
 - b. overtime for hours worked over 40 hours per week;
 - c. training wages at \$12 per hour for 60 hours of dog handler training in May 2017, which Western K9 told her was necessary to endorse her security officer licence;
 - d. for her travel between her residence and the work site with the security dog;
 - e. for the time she put in at home caring for the security dog, which was about one hour per day.
40. He also addressed the Complainant's allegation that she was paid her \$100 dog allowance as wages and not as an allowance.
41. The Delegate found that the Complainant was:
- (1) paid the correct wage for every scheduled security shift worked;
 - (2) owed some amounts for regular wages and overtime;
 - (3) owed training wages at \$12 per hour for the 60 hours of dog handler training in May 2017;
 - (4) not entitled to wages for her commute between her home and work site;
 - (5) entitled to wages for housing, caring for, and walking Western K9's security dog during off-duty hours; and
 - (6) paid her \$100 dog allowance as an allowance.
42. The Delegate reviewed the employment agreement between the Complainant and Western K9. It contained clearly established wage rates. It also stated that the Western K9 did not pay overtime for hours worked over 40 hours in a work week. During her testimony, the Complainant acknowledged that she understood the terms and conditions of the employment agreement. The Delegate's review of the Complainant's wage statements showed that she was paid in accordance with the wages schedule in her employment agreement.
43. The Complainant received validation for her security licence endorsement on May 31, 2017, and her shift schedule for June 2017 showed that she was scheduled for 21 of 23 shifts as a dog handler. Similarly, in July 2017, she was scheduled for 20 shifts as a dog handler out of 23 shifts scheduled, and in August 2017, she was scheduled for 11 shifts as a dog handler out of 15 shifts scheduled. As requested by the Complainant, Western K9 scheduled her shifts for three weeks from August 20, 2017, for Saturdays and Sundays only. She was paid as a dog handler at the \$17 per hour rate for every scheduled shift she worked as a dog handler.
44. Regarding overtime, the Delegate correctly noted that the *ESA* requires employers to pay employees one-and-a-half times their regular rate of pay for time worked over eight hours in a day and over 40 hours in a week: *ESA*, section 40. These overtime requirements cannot be waived by agreement.

45. Based on his review of the Complainant's scheduled shifts and corresponding wage statements, the Delegate determined that she was owed the following regular wages and overtime under sections 17 and 40 of the *ESA* as follows:
- a. the week of May 28 to June 3, 2017: 1 hour of regular wages and 4 hours of overtime (based on the \$17 per hour regular rate) for a total of \$119;
 - b. week of June 4 to 10, 2017: 3 hours of overtime (based on the \$17 per hour regular rate) for a total of \$76.50; and
 - c. vacation pay on these amounts of \$8.50.
46. Prior to deciding this appeal, I requested Supplemental Submissions from the Delegate regarding his conclusion about the hours the Complainant worked during the week of May 28 to June 3, 2017. In response, on October 31, 2018, I received submissions from the Delegate that show he calculated the hours worked based on Western K9's work scheduling calendar as follows:
- a. May 28, 2017: nil hours worked;
 - b. May 29, 2017: 0900-1600 training (7 regular hours);
 - c. May 30, 2017: 0900-1600 training (7 regular hours);
 - d. May 31, 2017: 0800-1600 validation (8 regular hours);
 - e. June 1, 2017: 1900-0200 training (7 regular hours);
 - f. June 2, 2017: 1330-2130 training (8 regular hours);
 - g. June 3, 2017: 1900-0200 K9 patrol (3 regular hours + 4 overtime hours)
47. In the result, there were 29 training hours at \$12/hour, 8 validation hours at \$12/hour, and 7 K9 patrol hours at \$17/hour, for a total of 44 hours.
48. Turning to the claimed amount for training wages, the Delegate noted that under section 13 of the *Security Services Regulations*, B.C. Reg. 207/2008, a security worker or a business licensee was prohibited from using a dog for security work unless the licensee had an authorisation from the Registrar. Further, the dog handling endorsement on the back of the Complainant's security licence was specifically for the security dog (Franca) provided to her by Western K9.
49. Thus, Western K9 was required to have the Complainant get her endorsement and the endorsement was specific to Western K9's security dog so she could not use it to work for any other employer. The endorsed licence had no portability and was inextricably linked to Western K9 as the security dog's owner.
50. As the dog handler endorsement was a cost of Western K9 doing business, the Delegate found that the Complainant was entitled under section 21 of the *ESA* to wages for attending the dog handling training course in the amount of 60 training hours at \$12 per hour training wage, plus 4% vacation pay: \$748.80.

51. The Delegate rejected the Complainant's claim for wages for her commute between her home and work site. Time spent going between home and work is usually commute time for which employers bear no responsibility for costs, even if transporting a "tool" (here the security dog) required for work.
52. The Delegate accepted the Complainant's claim for wages for housing, caring for, and walking Western K9's security dog during off-duty hours. This was work done for Western K9. If the Complainant did not do this work, Western K9 would have had to make alternative arrangements and would have incurred the costs directly. These were wages owing under section 17 of the *ESA*.
53. The Delegate could not determine the actual time required to carry out this work each day, but he considered the Complainant's estimate of one hour per day to be reasonable. He also found that the work would not be paid for at the \$17 per hour dog handler security work and in absence of any agreement to pay off-duty wages, he applied the statutory minimum wage of \$11.35 per hour.
54. Based on the evidence of the Complainant's scheduled security shifts and her written submissions, she was employed as a dog handler from June 3, 2017, to September 11, 2017, which was 100 days. For 87 of the 100 days, the Complainant did not work more than seven hours in a day and the amount for the extra hours worked for these days was 87 x \$11.35 for a total of \$987.45. Thirteen of the shifts in the 100-day period were eight-hour shifts and thus the extra hour worked on those days were overtime hours and the calculation of amount owing was 13 x (\$11.35 x 1.5) for a total of \$221.32. Vacation pay of 4% on the \$987.45 and \$221.32 was \$48.35.
55. The Complainant's wage statements indicated that she was paid her \$100 dog allowance correctly as an allowance and not as wages and it was not subject to any deductions.

Payment for the July 18 – 19, 2017, period

56. Next, the Delegate considered whether the Complainant was entitled to payment for her off-duty work resulting from the July 18, 2017, attack on the security dog by another dog. Consistent with his determination that the Complainant was entitled to wages for time spent caring for Western K9's security dog, the Delegate determined that under section 17 of the *ESA*, Western K9 had to pay an amount for the time spent by the Complainant as a result of the July 18, 2017, dog attack.
57. The Complainant was not scheduled to work on July 18 or 19, 2017, and was not paid wages for the time she put in because of the dog attack. The evidence from both the Complainant and Western K9 was that the Complainant attended the training facility because of the security dog's injuries, but there was no evidence showing how many hours the Complainant actually worked in relation to the July 18, 2017, incident.
58. The Delegate was not persuaded that the Complainant spent 27 hours between July 18 and 19, 2017, in relation to the incident, as claimed by the Complainant. Given that both parties agreed that the Complainant did have to take the dog to the training facility for treatment, he allowed her 40 minutes of travel time each way between her home and the training facility (based on the Complainant's estimate of her travel time), one hour at the training centre, two hours for providing a police report (based on the report in evidence), two hours for providing a by-law report, two hours to provide a written report to

Western K9, two hours for post-treatment monitoring of the security dog and two hours for her to see a doctor for a total of 12.33 hours worked.

59. The Delegate calculated the amount that the Complainant was entitled to under section 17 of the *ESA* for those 12.33 hours as follows:
- a. the Complainant worked 38 regular hours the week of July 16 to 22, 2017;
 - b. she was entitled to 2 hours of pay at her regular rate of \$17 per hour as a dog handler; and
 - c. she was entitled to 10.33 hours of pay at her overtime rate of \$17 x 1.5 per hour as a dog handler.

60. The Complainant was entitled to \$34 for the first two hours of work, \$263.41 for the remaining 10.33 hours of work for a total of \$297.41, plus 4% vacation pay totalling \$11.89.

Reimbursement of expenses, unauthorised deductions and/or for damage to cell phone

61. Finally, the Delegate considered the Complainant's claims for reimbursement for expenses including her pet damage security deposit and/or for her damaged cell phone. He correctly noted that the *ESA* prohibits an employer from requiring an employee to pay any of the employer's business costs.

62. The Delegate determined that the Complainant was not entitled to \$700 from Western K9 for the pet damage security deposit she paid for the security dog when she entered into a rental agreement on May 20, 2017. Although the security deposit was specific to Western K9's security dog, the Complainant stated that she moved out of the residence on October 20, 2017, and she did not say whether she was refunded the deposit or not. As the dog was no longer at the residence, the deposit either was, or should have been, refunded by the landlord.

63. The Complainant alleged that Western K9 withheld \$1,168.72 from her final pay as an unauthorised deduction from her wages. The Delegate's review of all of the Complainant's wage statements for her time as an employee showed no deductions for any amounts other than statutory deductions. However, there was a letter in evidence from Western K9 to the Complainant that stated that Western K9 had withheld wages and vacation pay in the amount of \$1,168.72 for shifts she worked from August 27 to September 10, 2017, because Western K9 said it was owed for this amount for the dog handling course.

64. Although the Complainant entered into a training fees agreement with Western K9 that required her to repay the training course fees in a pro-rated amount because she left her employment before the 12-month period, the *ESA* prohibited Western K9 from passing on its costs of doing business to its employees. As the Delegate had already found that the dog handler endorsement training course was a cost of Western K9 doing business, the Complainant was entitled to payment of wages in the amount of \$1,168.72, under sections 17 and 21 of the *ESA*.

65. The Delegate determined that the Complainant was entitled under section 21 of the *ESA* to reimbursement for her damaged cell phone. This was a cost to Western K9 of doing business because the Complainant was required to have the security dog at her home when off-duty. The amount of \$224.59 was verified by a Staples store advertisement for the cell phone provided by the Complainant.

Penalties and interest

66. The Delegate imposed administrative penalties pursuant to section 29 of the *Employment Standards Regulation (the "Regulation")*.
67. Section 17 of the *ESA* requires all employers to pay wages owing to an employee within eight days after the end of each pay period. As the Delegate found that wages were not paid as required, Western K9 breached section 17 of the *ESA* and incurred an administrative penalty of \$500.
68. Section 21 of the *ESA* prohibits an employer from requiring an employee to pay any of the employer's business costs except as permitted by the regulations. Any money required to be paid contrary to the *ESA* is deemed wages. As the Complainant paid Western K9's business costs of the dog handling training course and the cost of replacing her cell phone, Western K9 breached section 21 of the *ESA* and incurred an administrative penalty of \$500.
69. Section 40 of the *ESA* requires an employer to pay overtime for all hours worked over 8 hours in a day or 40 hours in a week. The Delegate found that Western K9 did not pay overtime rates as required and thus it violated section 40 of the *ESA* and incurred an administrative penalty of \$500.
70. The Complainant was entitled to interest under section 88 of the *ESA*.

ANALYSIS

Issue 1: Extension of Time for Filing the Appeal

71. As held by the Tribunal in *Liisa Tia Anneli Niemisto*, BC EST # D099/96, extensions of time should not be granted as a matter of course. While the Legislature has established tight time frames for filing an appeal from a Determination, the time periods established in the *ESA* are not that unusual: *Liisa Tia Anneli Niemisto, supra*, at p. 3.
72. The Tribunal has established criteria to provide guidance in determining whether or not to extend the time periods for appeals from decisions of the Director. These criteria are set out in the *Niemisto* decision. Appellants seeking time extensions for requesting an appeal from a Determination should satisfy the Tribunal that:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 - iii) the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.

Niemisto at p. 3; see also *Gorenshtein v. British Columbia*, 2013 BCSC 1499 at paras. 28 and 57

73. These criteria are not an exhaustive list. There may be other factors that ought to be considered. Further, in my view, not all of the above factors may be applicable in determining whether an extension should be granted or not, depending on the circumstances of each case.
74. Based on the above, I grant Western K9's request to extend the time limits for filing its appeal under paragraph 109(1)(b). My reasons are as follows.
75. Western K9's explanation for why it wanted an extension of time to make its written submissions on the appeal was because it did not have access to the Complainant's employment file and because its principals were out of the country on vacation until August 13, 2018. While I find that both of these reasons are credible, they are not reasonable. Access to the Complainant's employment file is not required as this appeal is decided on the Record that was before the Delegate at the hearing. Any information in the Complainant's employment file that was not before the Delegate is inadmissible on this appeal as it would not meet the test for admitting fresh evidence: *Bruce Davies et al.*, BC EST # D171/03, at p. 3. A planned vacation occurring within the appeal period is also not a reasonable explanation for an extension of time.
76. However, other *Niemisto* criteria favour the granting of an extension.
77. Western K9 filed the Appeal Form, written reasons for requesting an extension to the statutory appeal period, a complete copy of the Determination, and written Reasons for the Determination within the statutory time limits. The remaining item required to perfect the appeal was Western K9's submissions on the appeal ("Submissions"). I take from this that Western K9 had a genuine and ongoing *bona fide* intention to appeal the Determination and the Respondent and the Director were made aware of this intention.
78. I also find that the Respondent will not be unduly prejudiced by the granting of a time extension. Western K9 requested a one-month extension of time to file its Submissions from August 20, 2018, until September 20, 2018. Ultimately, Western K9 filed its Submissions on August 27, September 4, and September 17, 2018. Western K9's submissions were made before the complete Record required for the appeal was available. While the Delegate filed a version of the Record on August 21, 2018, on August 31, 2018, the Complainant filed objections with the Tribunal regarding the completeness of this version of the Record. It was only after the Delegate responded to these submissions on October 9, 2018, that the Record was complete.
79. I note that the final *Niemisto* factor is whether there is a strong *prima facie* case in favour of the appellant. Given the circumstances described above in which the extension of time was requested and my reasons below on the determination of the appeal, I do not find this criterion applicable to the request for an extension of time.

Issue 2: Should the appeal be allowed or dismissed

80. As noted above, in this appeal, Western K9 asks that:
- a. The amount the Delegate ordered as payment for daily work caring for Western K9's security dog should be varied from an hour a day at the Complainant's hourly wage to an industry standard daily allowance for dog care;
 - b. The amount the Delegate ordered as payment for hours the Complainant spent training to become a dog handler for Western K9 should be varied from the ordered amount;
 - c. The amount the Delegate ordered as reimbursement of wages arising from an unauthorised deduction for the cost of the dog handler course should be varied from the ordered amount; and
 - d. The amount the Delegate ordered as payment for the week of May 28 to June 3, 2017 should be varied from wages for 44 hours to wages for 39 hours.
81. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- a. the director erred in law;
 - b. the director failed to observe the principles of natural justice in making the determination;
 - c. evidence has become available that was not available at the time the determination was being made.
82. An appeal is not another opportunity to argue the merits of the claim to another decision-maker. The Legislature has expressly limited the grounds of appeal to those set out in sub-section 112(1). The burden is on the appellant to persuade the Tribunal that there was an error in the Determination under one of the statutory grounds.
83. I have considered whether there is any basis, pursuant to sub-section 112(1)(a) through (c), for the Tribunal to interfere with the Determination. For the reasons that follow, I conclude that there is no basis and thus I dismiss this appeal under section 114(1)(f) of the *ESA*.
84. Western K9 submits that the Delegate failed to observe the principles of natural justice in making the Determination. There is nothing in the Determination, the Reasons for Determination, or the Record that indicates the Delegate failed to observe principles of natural justice in making his Determination. Western K9 was given notice of the proceedings, including the allegations made by the Complainant. It had the opportunity to provide evidence and submissions in relation to those allegations. I am satisfied on my review of the Reasons for Determination and the Record that the Delegate based his Determination on the submissions and evidence before him.

85. On appeal, Western K9 also relies on evidence that was not before the Delegate. This evidence consists of:
- a. an allegedly corrected timesheet for May 22-June 3, 2017;
 - b. a September 4, 2018, letter from Securiguard’s VP of Strategic Planning with an excerpt from the “Securiguard K9 Policy”; and
 - c. an e-mail from ARC Protection Corp. with information on its canine allowances and standards

(“Additional Evidence”).

86. Western K9 submits that based on the Additional Evidence, the Delegate’s findings regarding the amounts owing as wages and/or overtime for the Complainant’s daily care of the security dog should be varied to reflect industry standards. I do not accept this submission for two reasons. First, I find that the Additional Evidence is inadmissible and does not provide a ground of appeal. Second, I find that the Delegate did not err in law in his conclusion that Western K9 was required under the *ESA* to pay a wage for the Complainant’s daily work caring for Western K9’s security dog.

87. An appeal is decided on the record before the Delegate unless there is evidence that has become available after the Determination that was not available at the time the Determination was being made: *ESA*, section 112(1)(c). The Tribunal in *Bruce Davies et al.* provided guidance on how the Tribunal applies section 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence...[The evidence] must meet four conditions:

- (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;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably culpable of belief; and
- (d) the evidence must have high potential 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.

(*Bruce Davies et al.*, BC EST # D171/03, at p. 3)

88. The Additional Evidence could have been discovered and presented to the Delegate for the hearing and prior to the Determination.
89. Regarding a possible error of law, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal’s determination. In this context, an error of law occurs in the following situations:
- a. A misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
 - b. A misapplication by the decision-maker of an applicable principle of general law;
 - c. Where a decision-maker acts without any evidence;
 - d. Where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
 - e. Where the decision-maker is wrong in principle.
90. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.
91. Thus, the Tribunal has no authority to consider appeals that seek to have the Tribunal reach a different factual conclusion than was made by the Director (or Delegate) unless these findings raise an error of law as defined in *Gemex Developments Corp.*: see *Britco Structures Ltd.*, BC EST # D260/03.
92. I am satisfied that the Delegate did not make an error of law in relation to the amounts the Delegate ordered in his Determination.
93. There was no misinterpretation or misapplication by the Delegate of the *ESA* or misapplication of an applicable principle of general law. Neither do I find the Delegate was wrong in principle.
94. Furthermore, the Delegate did not act without any evidence or on a view of the facts that could not reasonably be entertained. As noted above in relation to the principles of natural justice, my review of the Record and Reasons for Determination indicate that the Delegate’s findings were based on the evidence and submissions before him. I further find that these findings were reasonable.
95. The Delegate found that the work the Complainant did for Western K9 caring for its security dog was work done for Western K9. If the Complainant had not done this work, then Western K9 would have had to make alternative arrangements and would have incurred costs for dog care directly. Under the *ESA*, “work” is defined as “the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.” The Delegate was reasonable in holding that the time the Complainant spent each day caring for Western K9’s security dog was work as defined by the *ESA* and that Western K9 had to pay the Complainant wages for this work.

96. Regarding the question of payment for the hours the Complainant attended the dog handling course, validation exam, and reimbursement of the Complainant for amounts deducted from her wages to pay for the cost of the course itself, the Delegate found that the dog handler course (including the validation exam) was specifically linked to Western K9's business. While it is true, as Western K9 submitted on this appeal, that the skills the Complainant learned in taking the course may help her to further her career in the canine security services industry, the fact remains that the endorsement itself was specific to Western K9. The endorsement required training the Complainant and Western K9's security dog so that together, they could pass the required validation process. Without this endorsement Western K9 could not have its security dog and the Complainant perform work on its behalf. I find that the Delegate was reasonable in holding that this was a cost of Western K9 doing business and thus pursuant to sections 17 and 21 of the *ESA*, Western K9 is required to pay the amounts for the hours spent training and reimbursement for the cost of the course.
97. Regarding Western K9's submission that the Delegate's specific calculation of the wages owing Western K9 for the May 28 to June 3, 2017, time period is an error of law because there is no evidence that the Complainant worked 44 hours rather than 39 hours for the May 28 to June 3, 2017, time period, the Complainant's work schedule for the week in question, which was in evidence before the Delegate and which is in the Record, purportedly sets out the hours she worked during the week of May 28 to June 3, 2017. The notation for day that the Complainant attended the dog handling course validation exam says "0800".
98. During the appeal process, I asked for Supplemental Submissions from the Appellant, the Complainant, and the Delegate about the Delegate's calculation of 44 hours for the May 28 to June 3, 2017 period. The Complainant did not directly address the calculation in her submissions. In his Supplemental Submissions, the Delegate explained that he calculated the hours worked for the week of May 28 to June 3, 2017, time period as follows:
- | | | | |
|---------------|------------------|------------|---|
| May 28, 2017: | Nil hours worked | | |
| May 29, 2017: | 0900 to 1600 | Training | 7 regular hours |
| May 30, 2017: | 0900 to 1600 | Training | 7 regular hours |
| May 31, 2017: | 0800 to 1600 | validation | 8 regular hours |
| June 1, 2017: | 1900 to 0200 | Training | 7 regular hours |
| June 2, 2017: | 1330 to 2130 | Training | 8 regular hours |
| June 3, 2017: | 1900 to 0200 | K9 Patrol | 3 regular hours + 4 hours x 1.5 overtime. |
99. In its Supplemental Submissions, the Appellant stated that the validation exam was not eight hours of work, but rather was two hours of work and that the "0800" notation on the Appellant's calendar of scheduled work documenting the Complainant's shifts indicates the starting time of the validation exam and not the hours worked. In response, the Delegate's Supplemental Submissions state that the Appellant's record of work showed "0800 hours" on May 31, 2017, and there was no further entry on the record. Furthermore, he considered other similar records provided by the employer with respect to Western K9's training to conclude that the hours worked were eight hours. The Complainant, in her Supplemental Submissions, said that at the hearing the Appellant agreed that the Appellant's calendar of scheduled work provided the hours worked by the Complainant.

100. In the result, I find that the Delegate's finding in relation to the May 31, 2017, validation exam is not an error of law. While it would have been preferable if the Delegate had explained in the Determination how exactly he found an eight-hour work day for May 31, 2017, the Delegate did not act without any evidence or act on a view of the facts that could not reasonably be entertained. Furthermore, Western K9's Supplemental Submissions are, in fact, additional evidence that could have been discovered and presented to the Delegate at the hearing prior to the Determination. For the reasons given above in relation to the Additional Evidence, evidence about the length of the validation exam is not admissible in the hearing before me.

101. Based on the above, I dismiss the appeal pursuant to section 114(1)(f) of the *ESA*.

ORDER

102. Pursuant to section 115 of the *ESA*, I order the Determination, dated July 12, 2018, confirmed in the amount of \$5,531.80, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal