

An appeal

- by -

Laloni Everitt

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE NO.: 2017A/128

DATE OF DECISION: January 17, 2018

DECISION

SUBMISSIONS

David Huxtable, Advocate

on behalf of Laloni Everitt

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Laloni Everitt has filed an appeal of a Determination issued by Jordan Hogeweide, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on September 25, 2017. In that Determination, the Director found that although Ms. Everitt’s former employer, Createabundance International Institute Inc. carrying on business as Mineral Springs Resort (“Mineral Springs”) had contravened section 28 of the *ESA*, Ms. Everitt was not owed wages.
2. Ms. Everitt appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice. Ms. Everitt also says that evidence has become available that was not available at the time the Determination was made.
3. This decision is based on submissions made on Ms. Everitt’s behalf, the section 112 (5) record, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Createabundance International Institute Inc. is a BC incorporated company that operates, among other things, Mineral Springs Resort on Salt Spring Island. Ms. Everitt worked for Mineral Springs from July 25, 2016, until January 23, 2017. On March 3, 2017, Ms. Everitt filed a complaint alleging that Mineral Springs contravened the *ESA* by failing to pay her regular wages, overtime wages, vacation pay, statutory holiday pay and compensation for length of service.
5. The delegate conducted a hearing on June 28 and July 7, 2017. Mineral Springs was represented by counsel. Ms. Everitt appeared on her own behalf.
6. On July 16, 2016, Ms. Everitt applied for the position of manager at Mineral Springs. When asked what she expected to be paid, Ms. Everitt responded that she wanted \$4,480 per month but that she would work for a lesser amount if she was to be hired as the onsite manager. She indicated she would expect to re-visit the salary once she was able to generate income for the resort. Createabundance’s CEO, Morgan Li, offered Ms. Everitt a salary of \$3,000 per month for the first three months, which she accepted. Ms. Everitt’s salary increased to \$4,000 per month on September 1, 2016, an amount she was paid until the end of her employment. There was no written employment agreement.
7. At the time Ms. Everitt was hired, Mineral Springs, which consisted of 12 chalets, a lodge and some additional buildings including one that served as the front office, was not in good condition, and at least several buildings were not fit for accommodating the public. Ms. Everitt performed a number of managerial and non-managerial tasks, including directing staff, cleaning, doing laundry and working the front desk.

8. Bookings at Mineral Springs were sporadic, particularly during the winter months.
9. Ms. Everitt began living at Mineral Springs in September or October 2016. In late 2016, Mineral Springs expressed concern about staff living at the resort. On January 23, 2017, Mineral Springs emailed Ms. Everitt a letter, dated January 12, 2017, informing her that her employment was terminated immediately because of her “unauthorized and unpaid use” of the suite she was living in, which Mineral Springs contended was “equivalent to theft or embezzlement.” Although the letter indicated that Ms. Everitt was terminated for cause, the letter was accompanied by a text message from a Mineral Springs employee stating that because she had made a positive contribution to the resort for the past six months, Ms. Everitt would be paid until January 23rd. The text message indicated that Ms. Everitt would also be paid for one additional week, after which her service would no longer be required. The text continued: “all these shows our appreciation to you and hope you be good to yourself have a good life.” [reproduced as written]
10. At issue before the delegate was whether or not Ms. Everitt was a manager, and whether she was entitled to compensation for length of service, wages and vacation pay.
11. Ms. Everitt contended that, although she was hired as a manager, was called a manager and performed some managerial tasks, because her principal duties were non-managerial, she should not be considered a manager as defined in the *ESA*.
12. Ms. Everitt’s evidence was that, when she was hired, the resort was in a serious state of disrepair, the units were filthy, the grounds were unkempt and the records were in disarray. She also alleged that the resort was understaffed and the staff who were there were incompetent. Ms. Everitt said that she requested Mineral Springs to hire more staff and to pay them more, but those requests were ignored. As a result, Ms. Everitt performed much of the work, including laundry, housekeeping, front desk duties as well as repairs, herself. Ms. Everitt estimated that approximately two-thirds of her time was spent on non-managerial tasks.
13. Ms. Everitt provided the delegate with a record of the hours she worked and the tasks she performed, a record she said she transcribed from a diary she maintained daily. Ms. Everitt was unable to produce the diary because, she alleged, Mineral Springs had “misappropriated” it after her employment was terminated and she was evicted from her accommodation. According to the record, Ms. Everitt worked very long hours (12 to 16 hour days) almost seven days per week. However, the record also suggested Ms. Everitt had worked on September 31, 2016, a day that did not exist. When asked about that discrepancy, Ms. Everitt indicated that she had perhaps erred because she was so busy, but insisted the record was accurate.
14. Ms. Everitt submitted a large amount of other material she contended supported her complaint, including reports and presentations she made with respect to staffing, repairs, marketing, business ideas including a yoga studio and addictions treatment facility, and health and safety concerns. One such report consisted of a 90 page Power Point presentation documenting the state of the resort and the improvements that had been completed under her direction.
15. Ms. Everitt contended that although she posted job advertisements, conducted interview and created job descriptions, she had no capacity to hire or fire. She asserted that all staffing decisions were made by Mineral

Springs executives based in Vancouver. She said that although she had some authority to make purchases on Mineral Springs' account, she had limited influence on the resort's finances.

16. Ms. Everitt acknowledged that she directed staff members to perform certain tasks, including directing them to create reports, and hired and oversaw contractors.
17. Ms. Everitt argued that, even if she was determined to be a “manager” and not entitled to overtime wages, she was still owed wages based on the terms of her employment agreement which provided that she was to work a 40 hour work week. Although Ms. Everitt believed that she was entitled to a bonus or lump sum payment once the financial situation at the resort had improved, she acknowledged that she never discussed or requested payment of such a bonus.
18. Ms. Everitt acknowledged receiving an additional two weeks' pay along with her final paycheque but disagreed that this amount satisfied the employer's obligation to pay compensation for length of service, suggesting that the payment “could be for anything.” Although Ms. Everitt also received vacation pay in her final paycheque, she argued that the amount was inadequate.
19. Ms. Everitt's witness, Geri Laurence, is a yoga instructor who worked with Ms. Everitt to develop business plans to teach yoga at the resort. Nothing came of the business proposals. Ms. Laurence testified that Ms. Everitt was very busy with various tasks at the resort, including housekeeping, which interfered with their business discussions.
20. Mr. Li testified that he hired Ms. Everitt to manage the resort. He said that although he did not discuss specific hours of work with Ms. Everitt, her job was to do “whatever it took” to “take care of everything.”
21. Mineral Springs provided Ms. Everitt with a cash float to purchase items for the resort, and Ms. Everitt had access to a Mineral Springs credit card and hardware store accounts with which she could purchase whatever she felt necessary to operate the facility.
22. Although Mr. Li argued that Ms. Everitt's hours were not justified by the amount of business at the resort, Mineral Springs did not maintain any records of Mr. Everitt's hours of work to refute those presented by Ms. Everitt. While Mr. Li conceded that the resort was somewhat run down when Ms. Everitt began working there, he contended it was still functional. Mr. Li said that he presented Ms. Everitt's business proposals to the owners, who ultimately did not approve them.
23. Mineral Springs submitted a number of documents supporting its position that Ms. Everitt was a manager, including emails regarding Ms. Everitt's hiring and dismissal of employees; setting pay rates; discussing the budget, inventory, resort website, marketing and staffing with Mineral Springs principals; and preparing job descriptions.
24. The current manager of the resort, Justin Scott, testified that Ms. Everitt originally hired him to perform maintenance work, but shortly thereafter he was also doing electrical, plumbing and landscaping work in addition to coordinating tradesmen and receiving bids and quotes for repairs. Rather than paying him an hourly rate, Ms. Everitt suggested he be put on salary. Mr. Scott said he was paid based on a five day work

week regardless of how much time he actually worked, and when he discussed his pay with Ms. Everitt, she said that was “just the way salary worked.”

25. Mr. Scott said that he reported to, and took direction from, Ms. Everitt. Although he observed her occasionally doing laundry or housekeeping, he never saw her at the front desk. He also said that, in general, the resort was never very busy, with perhaps five or six bookings per month, excluding seminars. In Mr. Scott’s view, Ms. Everitt was the manager of the resort and the person who provided daily direction and supervision of the staff. He also said it was common knowledge that Ms. Everitt lived in the executive suite, which provided a good view of the resort.
26. Shaylyn Boleak testified that she had worked as a front desk clerk since October 7, 2016, the date she was hired by Ms. Everitt. She said that she responded to an online advertisement and was interviewed by Ms. Everitt in Ms. Everitt’s executive suite. Ms. Boleak testified that Ms. Everitt gave her training about front-desk duties. She also testified that she reported to Ms. Everitt at the start and end of each shift, and that, throughout the day, she received direction from Ms. Everitt, typically by text message. Ms. Boleak confirmed that the resort was very slow and that there were often no bookings at all.
27. The delegate also heard evidence from Christina Fang, an accountant who provided accounting services to Mineral Springs. Ms. Fang calculated Ms. Everitt’s entitlement for her final pay and sent that information to Mineral Springs’ accountant. Ms. Fang explained that she used an arbitrary figure of 5 working days per week used to calculate Ms. Everitt’s final wages, since Ms. Everitt had not worked a full pay period at the time of her termination.

Delegate’s Findings and Analysis

28. After considering sections 34(f) and 36 of the *Employment Standards Regulation*, the delegate concluded that Ms. Everitt was a manager. He noted that although Ms. Everitt argued that she had no capacity to hire or fire, the evidence was that she did exercise control and discretion over the hiring of staff. Specifically, the delegate noted a September 2016 report in which Ms. Everitt indicated that she had fired three people and hired three new employees. The delegate noted that Ms. Everitt’s own documents demonstrated that she took it upon herself to create hiring packages, job descriptions and policy documents, and posted jobs online. The delegate also noted a three page report Ms. Everitt wrote about a “difficult” employee, which led to his termination, and her log book entry of September 14, 2016, indicating that she had fired that employee.
29. The delegate noted that Ms. Everitt did not challenge evidence presented by Mineral Springs which showed that she was involved in the hiring and firing of staff. The delegate found the evidence of Mr. Scott and Ms. Boleak to be forthright and credible, remarking that Ms. Everitt did not challenge the truthfulness of their evidence. The delegate concluded that Mineral Springs’ evidence that Ms. Everitt hired Mr. Scott and Ms. Boleak was consistent with the documentary evidence, including an email from Ms. Everitt stating that she had hired Mr. Scott to replace the previous maintenance manager.
30. The delegate found that, in addition to supervising “human” resources, Ms. Everitt also supervised and directed other resources, including financial (the cash float, hardware store accounts and company credit card) and the physical resource of the resort itself (directing and overseeing repairs and improvements). The

delegate considered Ms. Everitt's Power Point presentations reporting on her progress, and observed that although Ms. Everitt occasionally sought approval for expenditures, she made decisions on her own on several occasions, directing staff, purchasing materials and hiring contractors to carry out some projects.

31. The delegate also noted that while Ms. Everitt's managerial authority was poorly defined, it was not unlimited. He determined that Ms. Everitt reported to an individual at Mineral Springs who provided her with directions. The delegate also found that Ms. Everitt's ability to generate income for the resort was restricted by Mineral Springs. While Ms. Everitt sought out and consulted with a number of businesses which might have been able to partner with the resort to increase revenue, none of those ideas were realized. Ms. Everitt required Mineral Springs' approval, which she did not receive.
32. The delegate considered Ms. Everitt's record of her hours of work, noting that although Mineral Springs disputed Ms. Everitt's record, it had failed to comply with section 28 the *ESA* by maintaining its own records. The delegate considered the irregularities, including the fact that Ms. Everitt had claimed to work on September 31, 2016, a date that did not exist, but not for November 30, 2016, a date that did exist, as well as the evidence of Mr. Scott and Ms. Boleak, who testified they rarely saw Ms. Everitt performing housekeeping, laundry or front desk work. The delegate also noted that the resort was often empty, particularly during the winter months, and found it hard to believe Ms. Everitt's evidence regarding the amount of time she spent doing laundry or housekeeping during those months. The delegate was also satisfied that, more often than not, Ms. Everitt had two to four staff members assisting her in operating the resort, and concluded that Ms. Everitt had exaggerated her hours of work.
33. The delegate determined, after reviewing all of the evidence, that Ms. Everitt was hired to take over the management of a small, disorganized, run down and unfrequented resort that had been previously operated by two or three employees, and that, in doing so, she exercised the power and discretion typical of a manager, although that power was not unlimited. The delegate concluded that Ms. Everitt supervised and directed the human and other resources of the resort and determined that Mineral Springs had met its burden of demonstrating that Ms. Everitt was a manager and thus not entitled to overtime wages.
34. The delegate next considered whether Ms. Everitt was entitled to wages for work performed according to her employment agreement. As there was no written agreement, the delegate considered the evidence of the parties, including Ms. Everitt's statement that she was to be paid based on a 40 hour week and that she was to be paid extra for any hours in excess of those hours, and Mr. Li's evidence that Ms. Everitt was to be paid a monthly salary regardless of the number of hours of work she performed. Noting inconsistencies in Ms. Everitt's testimony, the delegate concluded that the employment agreement did not contemplate Ms. Everitt would be paid more than her regular salary if she worked more than 40 hours per week. After a review of Ms. Everitt's hours of work, the delegate determined that, even taking the records at face value, Ms. Everitt was paid at least minimum wage for all hours worked.
35. The delegate determined that Ms. Everitt had been paid vacation pay in accordance with section 58(1)(a) of the *ESA*.
36. Finally, the delegate concluded that it was not necessary to determine if Ms. Everitt was terminated for cause. The delegate found that, even if Mineral Springs did not have just cause to terminate Ms. Everitt's

employment, since it had paid Ms. Everitt two weeks wages rather than the one she was entitled to under section 63 of the *ESA*, Ms. Everitt had been paid more than what was prescribed by statute.

Argument

Denial of natural justice

37. Ms. Everitt argues that her ability to meaningfully participate in the adversarial process used by the Employment Standards Branch was significantly impaired by the unwillingness or inability of Branch staff to address her safety concerns. Ms. Everitt says that she suffers from post-traumatic stress disorder (PTSD) and has, in the past, been designated as a “person with a disability” by the Ministry of Social Development. She further contends that she lives in fear of her Employer and at least one former co-worker because of a break-in at her residence at the resort.
38. While Ms. Everitt acknowledges that her concerns were addressed during the initial stages of the Branch process (the mediation) at which she attended in person and Mineral Springs attended by telephone, she argues that the Branch did not give sufficient weight to her safety concerns in determining the process by which the Branch would thereafter evaluate her complaint. Ms. Everitt says that although the Branch initially set the matter to be decided by teleconference, the delegate later determined the matter would be resolved by an in-person hearing. Even though Ms. Everitt initially agreed to an in-person hearing, she says that she understood “in-person” would be similar to the mediation session, where she appeared in-person with the mediator and the Employer participated by telephone. Ms. Everitt says that she would not have agreed to an in-person hearing “if she had known that she would be across the table from those she feared.”
39. After the hearing date and format was confirmed, Ms. Everitt informed Branch staff that she did not want Mr. Li to know where she lived and asked that the hearing be conducted by telephone.
40. The delegate who conducted the hearing asked Ms. Everitt to provide evidence supporting her claim that her safety was at issue. Ms. Everitt contends that she then agreed to an in-person hearing because she was “overwhelmed and emotionally exhausted.”
41. Ms. Everitt contends that she had an anxiety attack at the hearing and was unable to properly conduct herself.
42. Mr. Huxtable contends that there is nothing requiring the Director to conduct an oral hearing, and that, in making the decision whether a complaint is to be decided by way of a hearing or through an investigation, the Director must consider factors such as those raised by Ms. Everitt. Mr. Huxtable submits that the delegate could have suspended the hearing when Ms. Everitt’s concerns were made to him and decided the complaint by way of an investigation. Mr. Huxtable argues that by not proceeding by way of investigation, the Director negatively impacted Ms. Everitt’s ability to have a fair hearing.
43. Mr. Huxtable also argues that it was unreasonable for the Director to require Ms. Everitt to provide evidence that her safety was in jeopardy:

When presented with a complainant who expressed fear for their safety, the reasonable course of action is to proceed with a process that would allow the complainant to feel safe, but not impinge on the

respondent's right to respond. In other words, there was no conflict between the rights of each party to a fair process, and it was not reasonable for the delegate to proceed with a process that one party felt was unsafe.

44. Mr. Huxtable further argues that Ms. Everitt has new evidence that she was not able to present at the hearing due to her housing situation. He submits that Ms. Everitt was experiencing an acute housing crisis, which meant that she was unable to access certain documents, and was unable to print off a number of text messages because she did not have regular access to a computer and printer.
45. That new evidence consists of two WeChat exchanges between Ms. Everitt and a principal of Mineral Springs which Mr. Huxtable says is evidence of direction of Ms. Everitt on staffing issues. He argues that these exchanges should be included in the assessment of the issue of whether or not Ms. Everitt was a manager. Additional WeChats relate to the number of guests at the resort over a certain period, which Mr. Huxtable contends were relevant to Ms. Everitt's hours of work.
46. Ms. Everitt argues that the Tribunal ought to send the matter back to the Branch to be re-heard by another delegate.
47. Finally, Mr. Huxtable argues that the delegate erred in law in not imposing an administrative penalty for Mineral Springs' failure to pay Ms. Everitt's final pay until February 2, 2017.

ANALYSIS

48. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
49. I have considered whether there is any basis for the Tribunal to interfere with the decision.

Failure to observe the principles of natural justice

50. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. In essence, Ms. Everitt's argument is that her ability to present her case was adversely affected as a result of her disabilities and that the Director ought to have accommodated those disabilities through offering her a different form of hearing.
51. The delegate has discretion about how to decide a complaint. Section 76(1) of the *ESA* provides that the Director must accept and review a complaint and section 76(2) provides that the Director may conduct an investigation to ensure compliance with the *ESA* whether or not the Director has received a complaint. In *Metasoft* (BC EST # D022/12) the Tribunal observed that:

...the *Act* appears to provide the Director with a level of discretion about whether to conduct an investigation and does not direct how an investigation is to be conducted. The decision of the Director

about the complaint process is not *per se* open to challenge on natural justice grounds. There may well be a failure to observe principles of natural justice within the complaint process selected by the Director, but that would be substantially different than there being a breach arising directly from the process chosen, and would have to be established on objective evidence: see *Jennifer Oster*, BC EST # D120/08, and *Emmanuel's House of Dosas Inc.*, BC EST # D006/11.

52. The improper exercise of discretion may amount to an error of law. The Tribunal has held that it will interfere with the delegate's exercise of discretion in limited circumstances (see *Takarabe et al.*, (BC EST # D160/98, and *Jody Goudreau et al.*, BC EST # D066/98).

53. The Tribunal will not interfere with the Director's 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. Unreasonable, in this context has been described as being:

...a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229.

54. The Tribunal has also referred to the Supreme Court of Canada's decision in *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 S.C.R.:

It is, as well, a clearly established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might exercise the discretion in a different manner had it been charged with that responsibility. When the statutory discretion has been exercised in good faith, and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

55. I am not persuaded the delegate's decision to conduct an oral hearing was an improper exercise of discretion, an error of law or a denial of natural justice.

56. On May 2, 2017, the Director informed both Ms. Everitt and Mineral Springs that the complaint would be resolved by way of a teleconference hearing on June 6, 2017. On May 23, 2017, following the Employer's request for an adjournment, the hearing date was changed to June 28, 2017, also by telephone. In making the decision to re-schedule, the delegate considered the reasons for the request and noted Ms. Everitt's objections to the request. The delegate noted the adjournment request was both timely and reasonable, and determined that, while Ms. Everitt would be inconvenienced, she would suffer no prejudice.

57. On June 6, 2017, the Employer requested that the hearing to be held in person. On June 8, 2017, Ms. Everitt was asked if she had a preference for the complaint hearing to be held either by telephone or in-person, and if she preferred that it not be in-person, to provide reasons. Ms. Everitt responded to the email less than one hour later, stating that she had "no preference" whether she attended in person or by telephone. The record indicates that the only concern expressed by Ms. Everitt was that the employer was not made aware of her place of residence.

58. The delegate decided that, due to the large volume of information submitted by the parties, an in-person hearing would be held in Nanaimo. Ms. Everitt was informed of the delegate's decision on June 14, 2017.
59. On June 20, 2017, Ms. Everitt emailed the Branch indicating that she was under the impression that Mr. Li would not be present at the hearing in Nanaimo. She wrote "I agreed to be in person at the office here. I do not want them to know where I live. Can you further clarify. If this is the case I want to do it over the phone. Please clarify." She later informed Branch staff that she did not want to attend in person if Mr. Li was also attending, as she was concerned that her Employer would find out where she lived. She indicated this was due to "huge safety issues as I have been in contact with the RCMP and keep in contact with victim services who I check in on a regular basis due to the huge safety concerns and the sensitive evidence that I have submitted."
60. In a June 20, 2017, email, the Branch asked Ms. Everitt to provide further information about her concerns while providing some assurances about her physical safety:
- What particular safety concerns do you have and why? Are there any court orders or peace bonds in place? The hearing would be held at the office of the Employment Standards Branch in Nanaimo. Your current residence would not be disclosed. Mr. Li would be in attendance with his lawyer. You would not be left alone in a room with Mr. Li at any time. If during the hearing the adjudicator thinks it appropriate he may separate the parties or, if need be, adjourn the hearing.
61. Ms. Everitt indicated she had not applied for a peace bond, but stated there was an ongoing RCMP investigation. She stated that "... until charges are laid I do not fall under the safety of protection program." She also expressed concerns about Mr. Scott as she alleged that he was the individual who broke into her suite.
62. In a further email of the following day, Ms. Everitt wrote that she had "given it considerable thought overnight and I think we should just proceed with it as the adjudicator requests to how to go forward...". She also expressed the view that neither Mr. Li nor Mr. Scott would "pull anything" at the hearing.
63. In exercising his discretion to hold an in-person hearing, the delegate sought some basis to evaluate Ms. Everitt's request for a teleconference hearing after previously agreeing to an in-person hearing. Although Ms. Everitt indicated a general concern about her safety, she later agreed to proceed with the form of hearing.
64. In light of Ms. Everitt's agreement, I find the delegate's decision to proceed with an in-person hearing to be a reasonable one. The delegate considered Ms. Everitt's concerns, the considerable amount of evidence and the Employer's request, all of which were relevant considerations. There is no evidence he considered any irrelevant factors.
65. There was nothing before the delegate to indicate there were any specific issues regarding Ms. Everitt's safety and the Branch had provided Ms. Everitt with certain assurances to address her concerns, including not disclosing her address and conducting the hearing in a public space with counsel present.
66. I also find that the delegate acted reasonably and fairly in asking Ms. Everitt to provide some evidence in support of her safety concerns. The Director is not under any duty to accept one party's asserted concerns

without some *prima facie* evidence that those concerns are well founded and cannot be accommodated through the normal supports offered at in-person hearings.

67. Furthermore, there is no evidence that Ms. Everitt was denied the opportunity to fully present her case. Although she asserts that she suffered an anxiety attack, there is nothing in the Determination that suggests she was medically unable to participate, sought an adjournment, or expressed any other concerns during the hearing.

68. I find no basis for this ground of appeal.

New Evidence

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

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (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 capable 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.

70. Ms. Everitt's "new evidence" does not meet the test for new evidence. The material was clearly available at the time of the hearing, and could with due diligence, have been presented to the delegate. While I appreciate Ms. Everitt was facing some housing issues, there is no evidence that she informed the delegate that she had additional documentation that she was unable to access for any reason, or sought an extension of time to submit that documentation. I note that there was a mediation session on April 18, 2017, followed by a hearing which took place over two days, with approximately one week between the hearing days. In my view, Ms. Everitt had sufficient time in which to obtain and present the material had she considered it important to her complaint.

71. Furthermore, although the material was relevant to the issues before the delegate, I am not persuaded that the new evidence would have caused him to arrive at a different conclusion on either the issue of whether Ms. Everitt was a manager or her hours of work. It is evident that the delegate considered a large volume of evidence and that his conclusion was based on all of that evidence.

72. Having reviewed the record, I find that the evidence supported the delegate's factual conclusions. In other words, there was evidence upon which the delegate could rely in concluding that Ms. Everitt's principal employment responsibilities consisted of supervising or directing human or other resources. In my view, two WeChat messages would not have altered his conclusion.

73. I dismiss the appeal on this ground.

Error of law

74. Ms. Everitt also argues that the delegate erred in law in not imposing an administrative penalty on Mineral Springs for not sending out her final pay until February 2, 2017. There is no evidence that this issue was raised by Ms. Everitt during the hearing. Consequently, I am unable to conclude that the delegate erred in law in making a finding on an issue that was not before him.

75. The appeal is dismissed.

ORDER

76. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated September 25, 2017, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal