Citation: Beach Place Ventures Ltd. and Black Top Cabs Ltd. (Re)
2019 BCEST 23

An appeal

- by -

Beach Place Ventures Ltd. and Black Top Cabs Ltd.
("the Appellants")

– 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)

and

An application for suspension

- by –

the Appellants

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

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

PANEL: David B. Stevenson

FILE Nos.: 2018A/41 and 2018A/42

DATE OF DECISION: March 15, 2019

DECISION

SUBMISSIONS

Robert W. Grant, Q.C.	counsel for Beach Place Ventures Ltd. and Black Top Cabs Ltd.
Mary Walsh	delegate of the Director of Employment Standards
Laurel Courtenay	counsel for the Director of Employment Standards

OVERVIEW

1. The Appellants have filed an appeal under section 112 of the *Employment Standards Act* (the "*ESA*") of a Determination issued on March 29, 2018, by a delegate (the "Delegate") of the Director of Employment Standards (the "Director"). The Determination found the Appellants liable under various provisions of the ESA to pay wages and accrued interest to three complainants, Ali Abadi-Asbfroushani ("Mr. Abadi"), Fenton Ramesh Paul ("Mr. Paul"), and Arash Karimian Azimi Saraf ("Mr. Saraf") (collectively, "the Complainants").

2. The initial calculation of wages and accrued interest owed under the *ESA* in the Determination was corrected on April 17, 2018, such that the total amount found to be owed to the three Complainants was $117,755.76. The Determination also required the Appellants to pay $4,500.00 in administrative penalties for breaches of the *ESA*. The total amount of the payment order is therefore $122,255.76. In addition, the Determination required the Appellants to reinstate Mr. Paul.

3. In their initial appeal submission dated April 6, 2018, the Appellants requested additional time to finalize their appeal submission. The request was granted, and the Appellants filed a submission dated June 29, 2018, which they stated "expands on and supersedes" their initial submission. The Appellants also requested a suspension of the Determination under section 113 of the *ESA*. Both the appeal and the suspension request will be addressed in this decision.

4. In accordance with its usual process on receiving an appeal, the Tribunal requested the section 112(5) record (the "Record") from the Director, and then asked the parties whether they had any issue with respect to the completeness of the Record provided by the Director. The Appellants identified several areas where the Record may have been incomplete. The Director acknowledged the inadvertent omission of some documents from the Record, which were then provided to the Tribunal.

5. The Appellants and the Director each provided a final submission regarding the completeness of the Record, which I have reviewed. Having done so, I am satisfied the Record is complete for purposes of this appeal.

ISSUES

6. The main issue before me is whether to grant the Appellants' section 112 appeal of the Determination. I must also consider whether to grant their section 113 request for suspension of the Determination.

THE DETERMINATION

7. The Determination begins by noting that the Complainants alleged the Appellants, carrying on business as Black Top and Checker Cabs, contravened the *ESA* by failing to pay them regular wages, overtime, statutory holiday pay, vacation pay, and compensation for length of service (p. R2). It further notes that Black Top Cabs Ltd. ("Black Top") holds taxi licenses and insures a fleet of taxis, and Beach Place Ventures Ltd. ("Beach Place") provides logistical and operational support for the fleet of taxis (*ibid.*). The Complainants drove Black Top taxis. As the Determination notes:

> This is a case where the major dispute is over the legal status of the parties in relation to one another: for the purposes of the Act, are they in an employer-employee relationship or not? (p. R2)

8. The Determination sets out the position of the Appellants in considerable detail (pp. R20-R37). It begins by summarizing the Appellants' position as follows:

> The Respondents' positions at law are the same: when a driver drives a taxi under the Black Top and Checker Cabs banner, he or she is not an employee of anyone; in the alternative, if he or she is an employee, he or she is an employee of the owner (the "Owner") of the taxi he or she is driving (which is neither Beach Place nor Black Top). (p. R20)

9. The Determination then quotes the following submission of the Appellants as further outlining their position:

> A group of owners of taxis and taxi licenses… have created [Black Top] and its subsidiary Beach Place to provide shared services to the taxi [O]wners. These include the Black Top brand, dispatch services, credit card payments between drivers and customers, and posting of taxis available for rental, and assisting owners and drivers to negotiate the use of spare taxis and shifts.
>
> [Black Top] and Beach Place do not operate with a view to profit; they are legal entities set up to provide shared services to independent taxi [O]wners. They do not pay any drivers; they do not receive a share of revenues derived from the use of taxis. (p. R20)

10. The Determination notes the Appellants' position that, when the three Complainants drove Black Top taxis, they did not "sell their labour" to Black Top or Beach Place; rather, they "rent equipment and services for a fixed fee from a taxi owner and then seek to earn profits for themselves by selling taxi services to paying customers" (p. R20). The Appellants argued the "profit" they earned was "entirely dependent upon the drivers' abilities to maximize revenue from paying customers while reducing costs by negotiating lower rental fees with taxi owners" (*ibid.*). Therefore, the Appellants submitted, this arrangement "means that the drivers are operating as independent small businesses, not as employees of Black Top or Beach Place" (*ibid.*).

11. The Determination further sets out the Appellants' submission that Black Top "holds all taxi licences on behalf of Owners", as well as holding title to all the vehicles, "which is necessary to obtain discounted fleet insurance from ICBC" (p. R23). The vehicles are purchased by the Owners but registered to Black Top, which the Appellants submitted meant "Black Top's role in this regard is akin to a trustee" (*ibid.*). Beach Place is "a subsidiary corporation of Black Top", and "provides the dispatch and administrative services to Black Top's shareholders", who are the taxi Owners (*ibid.*). The Owners provide the funding to cover the expenses of Black Top and Beach Place, which do not "earn or seek to earn a profit, because they are set up for the mutual benefit of each individual Owner" (*ibid.*).

12. The Determination sets out the Appellants' explanation that services provided by Beach Place include accounting functions, which keep track of the non-cash customer payments that the taxi drivers receive while working day or night shifts. The payments are deposited into driver accounts held by Beach Place. At the end of each month, Beach Place "reconciles the accounts between the Owners and Beach Place" by deducting any assessment amounts and special payments and paying out the balance to the Owner (p. R23).

13. Some drivers are not Owners but merely lease the right to drive a taxi shift ("Lease Drivers"). Non-cash customer payments that Lease Drivers receive are also deposited into Beach Place accounts and paid out by Beach Place to the Lease Drivers in the same way as the Owners, except that Lease Drivers do not have to pay Owner assessments. Finally, there are Spare Drivers. They do not have an account with Beach Place, but Beach Place determines who is qualified to be driver, including a Spare Driver. Spare Drivers may be retained by Owners or Lease Drivers to drive shifts for them (pp. R23 – R24).

14. The Determination sets out the Appellants' submission that Mr. Abadi was a Spare Driver and that the "only interaction between Beach Place and Mr. Abadi was through the accounting and dispatching services provided by Beach Place to all drivers and Owners" (p. R26). The Appellants submitted that Mr. Abadi was "in business for himself and operated independent of their direction and control"; he "chose when he worked and negotiated his rental rate with Owners"; he "was free to use the services provided by Beach Place or not"; he could hire other drivers; and he "was not subject to discipline of Beach Place" (*ibid.*).

15. With respect to Mr. Paul, the Appellants' submission was that, from 2009 to November 2016, Mr. Paul leased the night shift of a taxi from an Owner and Black Top shareholder, Mr. Duhra (p. R36). Mr. Paul resided in a suite in Mr. Duhra's home, and Mr. Duhra usually drove the day shift. Mr. Paul paid Mr. Duhra a lease fee for use of the taxi to drive the night shift, which in 2016 was $1675 per month. In November 2016, Mr. Paul was hospitalized and could not drive his shift. Beginning in December 2016, Mr. Duhra leased the night shift to another person on a monthly basis, "in an arrangement similar to that which he had with Mr. Paul" (p. R37).

16. The Determination does not summarize any position the Appellants may have taken with respect to Mr. Saraf, other than a submission that he was not credible because he said he worked Saturday to Wednesday, but the dispatch reports showed he did not always work those days (p. R34). In their appeal, the Appellants take the position that all three Complainants "are or were taxi operators who leased taxis from independent taxi owner-operators under the Black Top brand" (p. 14).

17. The Determination contains a great deal more summary of the evidence and submissions of the Appellants, as well as summarizing the evidence and submissions of the Complainants. However, I find the above summary sufficient for purposes of this appeal and will now summarize the Delegate's findings and conclusions.

18. With respect to the main question in dispute – namely, whether the Complainants were employees of either or both of the Appellants within the meaning of the *ESA* – the Delegate noted that the Tribunal had made clear that, while common law tests for employment status were "helpful", they were not determinative (p. R38). The Delegate noted that a number of factors can be considered to determine whether an employment relationship within the meaning of the *ESA* exists, adding:

> In making this determination, the level of control the putative employer has over the worker's activities will always be a factor. However, other factors may include whether the worker provides equipment, whether the worker hires helpers, the degree of financial risk taken by the worker, the worker's degree of responsibility for investment and management, and the worker's opportunity for profit in the performance of tasks. This list is non-exhaustive and there is no formula for the application of factors. Each factor's relative weight will depend on the facts of each case. (p. R39)

19. The Delegate then set out the definitions of "employee", "employer", and "work" in section 1 of the *ESA*, noting that they "are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of those who enacted it", citing Supreme Court of Canada authority (p. R39). The Delegate then stated:

> In accordance with the stated statutory interpretation principles, I am satisfied that all three Complainants were employees and performed work for two employers, namely Black Top and Beach Place, which together carry on business as "Black Top and Checker Cabs" (ibid.).

20. The Delegate next discussed the factors he had earlier identified as relevant to the question of whether there was an employment relationship, in light of the facts before him, including: control and direction (pp. R40 – R42); equipment, tools and supplies (pp. R42 – R43); financial investment and risk (p. R43); "GST and WorkSafeBC" (p. R43); "Personal Tax Filings" (p. R44); opportunity for profit (pp. R44 – R45); permanency of the relationship (p. 45); and status of shareholders as employer (p. R45). Among other things, the Delegate stated:

> I accept the Complainants' evidence that the Respondents' control and direction extended to controlling their days and hours of work, the taxis they drove (with the exception of Mr. Paul, who leased a particular taxi on a regular basis), their operational regions, the fares they picked up (including mandatory account fares), portions of their training (including training to operate credit and debit machines, training to use the dispatch system and training to serve Handy Dart customers), how they took payment from customers (including being limited to using credit and debit machines provided by Beach Place), and their general conduct on and off the road (including how they drove, what clothing they wore while driving, and how and where they parked).

> While I accept that the Complainants had *some* freedom and discretion in the day-to-day performance of their duties by virtue of operating alone in their vehicles during their shifts and having the ability to pick up street fares, this level of freedom falls far below what I would deem sufficient to warrant carving the Complainants out of the protective mantle of the Act given the Act's remedial purpose, its benefits-conferring nature, and the ordinary meaning of the words "employee", "employer" and "work". (p. R40)

21. The Delegate found Beach Place's dispatch system gave the Appellants control and direction over the Complainants, because it "acted as a tether that kept the Complainants well within the supervisory, instructive and disciplinary reach of Beach Place at all material times" (p. R40). He stated that the evidence led him to reject the proposition that the Complainants had a choice about using the dispatch system, finding that the dispatch system "was an integral part of Beach Place's daily operations from a logical perspective (to instruct taxi drivers including the Complainants to pick up mandatory fares, to update drivers including the Complainants about Black Top's and Beach Place's policies, and to discipline drivers like the Complainants in real-time for breaching those policies" (p. R40).

22. The Delegate accepted the Complainants' evidence that Beach Place used denial of access to the dispatch system "as a punitive measure, and that being denied access could ruin the economic prospects for any given shift (by causing the daily taxi rental or lease fee to exceed fares collected, resulting in a net loss for the shift)" (p. R40). He rejected the notion that the dispatch system and the Appellants' rules for drivers "were merely a mechanism to protect fairness and efficiency between drivers and to ensure compliance with regulatory requirements", finding the rules and their enforcement through the dispatch system went beyond that function (p. R41).

23. The Delegated added:

> It has been argued that the Complainants cannot be said to be employees partly because (a) they set their own work schedules and (b) freely negotiated their profit and loss margins when they agreed to taxi rental or lease rates with the taxi owners. However, I find that the freedom the Complainants had in setting their own schedules was not unlike the freedom an employee enjoys when he or she informs an employer that he or she wishes to work particular days or hours, and the employer accedes to the request if the possibility to do so is there. (p. R41)

24. The Delegate went on to make other findings of fact with respect to the factors he considered (pp. R40 – R45). He found this analysis led to the conclusion that the Complainants and the Appellants were in an employment relationship for purposes of the *ESA* (p. R46). He addressed the Appellants' arguments against this conclusion (pp. R46 – R48). Among other things, the Delegate stated that while the Appellants argued that they "merely provide support services to taxi owners and drivers running their own businesses", he found that in reality the Appellants and their shareholders "are really a syndicate operating a single taxi business (i.e. Black Top and Checker Cabs" (p. R47).

25. The Delegate further found each of the Appellants to be an "employer" for purposes of the *ESA* "on the strength of only those factors that are pertinent to it" (p. R48). However, he added, if it were necessary to apply section 95 of the *ESA*, he would find the four preconditions for the application of that provision to be satisfied on the facts before him, and therefore that "Beach Place and Black Top may be treated as 'associated employers' under section 95 of the *Act*, if necessary" (p. R46).

26. Having concluded the Complainants were employees of the Appellants within the meaning of the *ESA*, the Delegate went on in the Determination to set out and explain his conclusions as to what wages were owing to each Complainant and what other remedies were either appropriate or required under the legislation (pp. R50 – R63).

POSITION OF THE APPELLANTS

27. The Appellants state that their June 29, 2018, submission "supersedes" their initial appeal submission; accordingly, the following summary is drawn from the June submission. That submission is 78 single-spaced pages in length. I have read and considered the entire submission but will only summarize what I find to be necessary for purposes of deciding this appeal.

28. The Appellants say that each of the three Complainants "drove taxis under the Black Top brand, which they leased for a fixed price from individual taxi owners" (p. 1). They assert that Black Top is "a holding company for taxi licences", and Beach Place is in the business of "providing services to the independent taxi owner-operators, who operate under the Black Top brand" (*ibid.*). They say that most of the independent taxi owner-operators are shareholders of Black Top, and that Beach Place's services include "dispatch services and accounting services provided to all drivers" (*ibid.*).

29. In terms of the three grounds of appeal available under subsection 112(1) of the *ESA*, the Appellants rely on the first two grounds: (a) error of law; and (b) failure to observe the principles of natural justice in making the determination. With respect to the first ground, the Appellants submit the Delegate erred in concluding the Complainants were their employees within the meaning of the *ESA*. With respect to the second ground, the Appellants submit the Delegate "failed to render an impartial and unbiased decision" (p. 1) and they complain about the process before the Delegate.

Alleged errors of law

30. In alleging the Delegate erred in law, the Appellants' submissions on appeal are generally congruent with the arguments they made to the Delegate, as summarized at length in the Determination and more succinctly above. In essence, the Appellants characterize the Complainants as each being in business for himself as a taxi driver, leasing the vehicle from an owner/shareholder of the Appellants and retaining any profit earned above the lease cost. The Appellants submit that Black Top and Beach Place do no more than provide services to Black Top taxi drivers and that therefore they were not in an employment relationship with the Complainants when they worked as Black Top taxi drivers.

31. The Appellants further submit the Complainants cannot be their employees within the meaning of the *ESA* because the Complainants did not perform work for them. The Appellants assert they received no economic benefit from the taxi driving done by the Complainants; only the Complainants themselves received the benefit of their taxi driving work. With respect to the fact that, in order to do the work, the Complainants leased taxis from Black Top shareholders, the Appellants submit the lease amounts were paid to their individual shareholders, not directly to the Appellants. They further submit the lease amounts were "distinct and independent transactions involving fixed amounts that have nothing to do with the labour or services or productivity of anyone" (p. 46).

32. The Appellants additionally submit that, to the extent it could be said they benefited indirectly from the Complainants' payments to their shareholders, because their shareholders paid monthly amounts to the Appellants, those amounts "were not connected to or contingent on any payments that the shareholders received from the Complainants" (p. 46).

33. The Appellants submit the only way it could be said that they benefited from the Complainants' work would be to extend the "economic benefit" obtained from the driving work to include "everyone". The Appellants submit this is "neither a plausible nor a desirable" interpretation of the *ESA* and they say it would render the words of the *ESA* "meaningless". They say this is because: "If everyone is part of a single business, there are no employees. Conversely, if everyone is an employee, then there are no businesses to employ them" (p. 46).

34. The Appellants assert that, at common law, weight is given to whether there was a subjective intention to create an employment relationship. Here, they submit, there was no subjective intention to create an employment relationship, and the Delegate erred in not considering or giving any weight to this fact.

35. The Appellants cite a number of tax and federal court cases in which taxi lease operators were found not to be employees for tax or employment insurance purposes. They submit these federal and tax court decisions "must be taken as strongly persuasive authority with respect to the application of the common law employment tests to taxi operators" (p. 54). They rely in particular on *Yellow Cab Co. v. M.N.R.*, 2002 FCA 294 ("*Yellow Cab 2002*"), which they submit considered a business structure "virtually identical" to the Appellants, and which held the drivers were not in an employment relationship with the company for employment insurance purposes. The Appellants submit the Delegate "erred by ignoring this case and many other indistinguishable cases".

36. With respect to previous Tribunal decisions which considered whether taxi drivers were employees for purposes of the *ESA*, the Appellants submit these decisions are "of much less assistance" because the Tribunal rarely conducts evidentiary hearings and generally does not interfere with delegates' findings of fact (p. 51). The Appellants further submit with respect to Tribunal jurisprudence that, as a result, "similar facts have resulted in inconsistent decisions" (*ibid.*). They cite *Bahia*, BCEST D111/12 ("*Bahia*") and *C and C Tax Inc. (cob Mayfair Taxi)*, BCEST D074/15 ("*C and C*").

37. The Appellants provide extensive submissions taking issue with the findings of the Delegate on each of the factors he took into account in deciding the Complainants were in an employment relationship with them for purposes of the *ESA*. They also submit the Delegate made findings of fact that could not reasonably be supported on the evidence, giving as an example the finding that the Appellants and the shareholders operated a "single taxi business". They submit the documentary evidence they submitted, including their accounting records, "confirmed that the expenses and revenues are allocated between many different taxi businesses which earn very different revenues" (p. 55). They submit the Delegate was fundamentally in error when he characterized the relationship between the Complainants and them as an employment relationship for purposes of the *ESA*.

Alleged breaches of natural justice

38. With respect to their second ground of appeal, the Appellants complain about a number of aspects of the process before the Delegate, including that they "never received a transcript or other record of the actual evidence of the Complainants, they were not present when the Complainants were questioned by the Delegate, they had no opportunity to meet with the Delegate, they had no opportunity to meaningfully challenge the Complainants' evidence, including through cross-examination" (p. 18).

39. They also complain that the Delegate "imposed no consequences whatsoever on the Complainants' refusal to comply with the Director's disclosure orders, and failed to even make an order for disclosure to Abadi" (*ibid.*). They say they were not given enough time to respond to the investigation "particularly given the time granted to the Complainants to present their cases" (*ibid.*).

40. The Appellants complain they were not given notice by the Delegate that he might conclude that they, together with Black Top's shareholders, were a single taxi business, or that the lease amounts paid by the Complainants to Owners (shareholders) might be considered "business costs" under section 21 of the *ESA*. They say there was also no notice that Paul might be ordered reinstated. In addition, they complain certain evidence was not disclosed to them by the Delegate, primarily documents obtained by the Delegate from the Complainants.

41. The Appellants assert that the Delegate "treated the Complainants very differently than the Appellants, meeting with them frequently, assisting them in presenting their evidence, and coaching them in making their complaints and seeking remedies" (p. 18). They submit the Delegate's investigation "was not conducted in an unbiased, impartial, and open-minded way" (p. 22). The Appellants allege a reasonable apprehension of bias, not only with respect to the Delegate, but also in relation to the "Employment Standards Branch" (p. 23). They submit this case is "illustrative of the systemic bias at the Branch in favour of finding employment relationships" (*ibid.*).

42. The Appellants make lengthy submissions with respect to their bias allegations and their complaints of procedural unfairness in the proceedings before the Delegate. They also complain about the sufficiency of the reasons he provided in the Determination. While I have reviewed and considered all of the Appellants' submissions, I find it unnecessary to further summarize them for purposes of this decision.

Section 21 and section 95 submissions

43. In addition to the submissions which I have outlined above, the Appellants made submissions with respect to two particular aspects of the Determination: the section 21 "business costs" determination and the section 95 "common employer" issue.

44. More specifically, the Appellants took issue with the Delegate's finding that the lease amounts paid by the Complainants to Owners are the Appellants' "business costs" and must be repaid pursuant to section 21 of the *ESA*. The Appellants submit that this leads to an absurd result, as the drivers would pay nothing to use the Owners' taxis to make fare revenue which they would keep in its entirety, while the Owners would get nothing and pay for all the expenses of the taxi business. The Appellants further say that, even if they were employers of the Complainants under the *ESA*, the *Employment Standards Regulation* (the "*Regulation*") clearly provides for the leasing of taxis to drivers at section 37.1.

45. With respect to section 95 of the *ESA*, the Appellants note that in an earlier decision, *Beach Place Ventures Ltd.*, BC EST # D124/17 ("*Beach Place #1*"), the Tribunal set out that section 95 "can be used to establish the existence of an employment relationship" (p. 47). The Appellants submit that, while they disagree with that interpretation, in any event, the Delegate "misapplied" that provision. Among other things, they submit that despite finding a "single taxi business" that includes not only the two Appellants but also their shareholders, "the shareholders were kept out of the s. 95 analysis, and no liability was imposed on them" (p. 48).

46. In terms of remedy, the Appellants seek an order cancelling the Determination. They ask that the three complaints not be remitted to the Director for re-determination but rather decided by the Tribunal, submitting that then "it can either be confirmed that the Complainants were in business for themselves, or the matter can proceed to higher levels of appeal" (p. 77).

ANALYSIS AND DECISION

Overview

47. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which states:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.

48. As noted earlier, in the present case the Appellants have appealed under subsections 112(a) and (b), submitting the Determination should be cancelled because the Delegate (a) erred in law in finding them to be in an employment relationship with the Complainants for purposes of the *ESA*; and (b) the Delegate failed to observe the principles of natural justice in making the Determination.

49. I will begin by addressing the Appellants' natural justice arguments, and then consider whether the Delegate erred in law as alleged. I will also address whether the Delegate erred in law with respect to his findings under sections 21 and 95 of the *ESA*.

Subsection 112(1)(b): Natural justice issues

50. Without doubt, the Delegate was under a general duty of fairness in making the Determination. However, both courts and the Tribunal have confirmed on many occasions that the content and scope of the right to natural justice/procedural fairness is highly contextual. As the Supreme Court of Canada stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at p. 21:

> The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its

> content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

51. Similarly, in *Insulpro Industries Inc. and Insulpro (Hub City) Ltd*., BC EST # D405/98, the Tribunal adopted the following passage from *Downing v. Graydon*, (1978) 21 O.R. (2d) 292 (C.A.), at p. 310, which reflects the policy considerations implicit in a flexible approach to the general duty of procedural fairness:

> There are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place the decision-making officials and tribunals in a procedural strait-jacket, and, in particular, not to require them to hold judicial type hearings in every case. The purpose of beneficent legislation must not be stultified by unnecessary judicialization of procedure. The presentation of this case suffered from the initial misconception that the right to know and to reply required a full scale hearing. This is not so. The appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied.

52. In addition to recognizing that the requirements of natural justice are flexible and contextual, and that judicial requirements should not be automatically imposed onto administrative decision-making, courts have also recognized that fairness requirements can be legislatively modified. As Blair J.A. stated in D*owning v. Graydon*, *supra*, at p. 308:

> Although under the common law *audi alterum partem* applies to the exercise of all judicial powers, it is, as Rand, J., pointed out in the *Alliance des Professeurs* case, *supra*, possible for the principle to be excluded or qualified by statute.

53. In the *ESA*, section 77 addresses the scope of procedural protection to be applied in the context of an investigation under the *ESA*. It states:

> 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

54. Under section 77, it is not required that the person under investigation be provided with the evidence of the claim; it is sufficient that they be provided with enough particulars of the claim to make the opportunity to respond meaningfully: see *Cyberbc.Com AD & Host Services Inc.*, BC EST # RD344/02 (Reconsideration of BC EST # D693/01).

55. The Appellants submit (p. 16), and I agree, that they were entitled to an adequate opportunity to be heard (*audi alteram partem*) and an impartial and unbiased decision-maker (*nemo judex in sua causa*). They quote a passage from *Vanform Canada Inc.*, BC EST # D048/08, which confirms that the first of these principles means that "the parties to a dispute are entitled to know the case against them and to be heard by, and make submissions to, the decision-maker" (para. 22), but that it does not necessarily include a right to an oral hearing or to cross-examine witnesses (para. 23). As stated in the excerpt from *Baker*, *supra*, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".

56. In the present case, the Appellants contend they were entitled to "a very high degree of procedural fairness". More specifically, they claim that the investigation conducted by the Delegate of the three complaints "ought to have led to a full hearing, or further investigation, and not to a Determination." They further assert they "were not permitted to participate in the investigation" between December 15, 2017, and March 5, 2018. They complain that they "never received a transcript or other record of the actual evidence of the Complainants", were not present when the Complainants were questioned by the Delegate, had "no opportunity to meet with the Delegate", no opportunity to cross-examine the Complainants, and insufficient time to respond to the investigation "given the time granted to the Complainants to present their cases" (p. 18).

57. I find these submissions appear to misconceive the nature of the investigative process carried out by delegates of the Director under the *ESA*. Section 2(d) of the *ESA* states that a purpose of the legislation is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". Thus, while the process must be fair, it should also be efficient. Section 76(1) states that the Director "must accept and review" complaints, and section 76(2) states that the director "may conduct an investigation". Section 76(3) provides that the Director has a discretion to "mediate, investigate or adjudicate a complaint". Thus, determinations may be (and frequently are) issued on the basis of an investigation alone; there is no statutory requirement to hold an adjudicative hearing.

58. There is also no entitlement to receive a transcript or other record of the evidence of complainants; to be present when complainants are questioned by a delegate; to meet with the delegate; to cross-examine complainants; or to be granted the same amount of time to respond to a complaint as complainants were given to present their cases. I find the Appellants have not established that the absence of these elements in the process before the Delegate denied them a fair hearing. I find it is evident from the Record and the Determination that the Appellants had an adequate opportunity to know the case against them and to respond to it.

59. With respect to the assertion that the Appellants were "not permitted" to participate in the investigation between December 15, 2017, and March 5, 2018, it would be more accurate to say that the Delegate did not seek submissions from them during that time period. The reason for this is evident on review of the Record, which shows the Appellants had filed lengthy responses to the three complaints before December 15, 2017. The Appellants' responses indicate their clear understanding of the complaints and state their position on them.

60. The Record also indicates that notice of each of the complaints was provided to the Appellants. The complaint of Mr. Abadi proceeded through a complaint hearing, a determination, and an appeal by the Appellants. The appeal decision (*Beach Place #1*) does not indicate any claim by the Appellants that they did not have a sufficient opportunity to know the case or to respond to Mr. Abadi's complaint.

61. The Record shows the Appellants received a copy of Mr. Paul's complaint, filed in May 2017, and Mr. Saraf's complaint, filed in July 2017. The Appellants filed their response to those complaints in October 2017. There was then an attempt at mediation, a Demand for Documents issued to the Appellants, the delivery by the Appellants of nearly 150 pages of documents, an amendment to the document list, and the delivery by Mr. Paul of his position and the documents on which he intended to rely at the complaint hearing.

62. The evidence and position of all the Complainants was summarized by the Delegate and provided to the Appellants on March 5, 2018. The Appellant's response submission to the Director in March 2018 related to all three complaints. Having considered how the three complaints were processed, including the notice and opportunities for response provided by the Delegate, I am satisfied the Appellants were given an adequate opportunity to respond to the complaints.

63. The Appellants complain in particular that they were not given notice that they and their shareholders might be considered "a syndicate operating a single taxi business", that any amounts might be found owing under section 21 of the *ESA*, and that Mr. Paul might be reinstated.

64. I do not accept the Appellants had no notice that they (and their shareholders) might be considered to be operating a single taxi business. Among other things, in *Beach Place #1* it is expressly stated that "the key question is not whether the complainant was employed by one or both (or neither) of Beach Place Ventures and Black Top Cabs but, rather, whether Beach Place Ventures, Black Top Cabs and possibly other individuals operated an integrated taxi business under the "Black Top & Checker Cabs" moniker which, in turn, employed the complainant." (para. 52). Thus, from at least the date of that decision (December 13, 2017), the Appellants had notice that they might be considered to operate a single taxi business.

65. With respect to the Delegate's finding that amounts were owed under section 21, that finding is addressed later in this decision. As I set aside that aspect of the Determination on its merits, it is unnecessary to consider whether it was made in a procedurally fair manner.

66. With respect to the reinstatement of Mr. Paul, the Appellants had notice that a contravention of section 83 of the *ESA* was being alleged. That provision contemplates reinstatement as a potential remedy. In these circumstances, I am not persuaded the Delegate's decision to grant this particular remedy for the breach of the *ESA* alleged was procedurally unfair.

67. Viewed as a whole, I find the process before the Delegate was procedurally fair. The Determination and the Record reveal that the Appellants were provided with the opportunity required by section 77 of the *ESA*, and the applicable principles of natural justice, to know the case they had to meet, present their position, including providing evidence to support that position, and to respond to the positions presented by the Complainants and the evidence provided by them to support that position.

68. In that regard, I note it is apparent that the central, material facts are largely not in dispute; rather, it is the correct legal characterization of those facts which is disputed. The facts underlying the Determination are, to a significant degree, those presented by the Appellants regarding the nature of their operations. It is not the facts to do with the operation of Black Top and Beach Place and the way the Complainants interacted with them which are disputed; rather, it is their legal characterization. Do they constitute an employment relationship for purposes of the *ESA*? I find the process before the Delegate gave the Appellants a fair opportunity to know and address that central issue.

69. I further note the Determination summarizes the Appellants' position and arguments at length and addresses them in some detail. I am satisfied the Appellants not only had a fair opportunity to know the case against them and respond to it, but that Determination evidences that the Delegate heard and

considered those positions and arguments. While the Delegate did not accede to the Appellants' arguments on their merits, that does not establish a breach of procedural fairness or natural justice.

70. I turn now to the Appellants' allegations of bias against the Delegate and "systemic bias" against the "Branch". The Appellants allege the Delegate's investigation was not conducted in "an unbiased, impartial, and open-minded way" and that the Branch is systemically biased "in favour of finding employment relationships".

71. As the Appellants acknowledge in their June 29, 2018, submission (p. 22), an allegation of bias is a serious matter which should not be made lightly or speculatively. The Appellants bear the onus of demonstrating bias on sufficient evidence that a reasonable and informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that the decision did not decide the matter fairly (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] S.C.R. 369). As further stated in *R v. R.D.S.*, [1997] 3 S.C.R. 484, the threshold for finding bias is high; a real likelihood or probability of bias must be demonstrated.

72. I find the Appellants have not demonstrated bias on the part of either the Delegate or the Branch in the present case. The only evidence cited by the Appellants for their allegation against the Branch of "systemic bias in favour of finding employment relationships" is the Determination. This is obviously insufficient, and I dismiss the allegation. I further note that, as the Delegate, not the Branch, made the Determination, the issue must be whether the Appellants have established a reasonable apprehension of bias against the Delegate.

73. In that regard, the Appellants cite a long litany of complaints and disagreements with the Determination and the process by which it was reached. I have already reviewed their procedural complaints and concluded the process before the Delegate was fair. Nothing the Appellants submit under the heading of "bias" persuades me otherwise. With respect to their substantive disagreements with the Determination, I will address their arguments under section 112(1)(a) – whether they establish an error of law. However, having reviewed their arguments in the context of their allegations of bias, I find they do not substantiate this allegation.

74. I find it would be excessive and unnecessary in the circumstances of this matter to address individually all of the many assertions made by the Appellants in alleging bias against the Delegate. Many of the Appellants' bias allegations flow from the Delegate's decision to proceed by way of investigation rather than adjudication. As I have set out above, the Delegate had the authority to choose to investigate, and I have found the choice to investigate in this case did not impede the Appellants' ability to know the case to be met and to answer it. The decision to investigate was not a breach of procedural fairness. Nor does it provide a basis for a reasonable apprehension of bias.

75. The nature of the investigative process is described in *Director of Employment Standards (Re Milan Holdings*, BC EST # D313/98):

> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator

> may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to a give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial". On completing an investigation, the director may make a determination: s. 79(1).

76. I find the Appellants' complaints about the investigation process fail to recognize the "informal, flexible and dynamic" nature of that process, and the modification of the common law by section 77. Their allegations do not establish bias on the part of the Delegate.

77. With respect to the Appellant's complaint that the Delegate had a "self-imposed deadline" for making a decision on the complaints, I find the Appellants have not shown the alleged "deadline" denied them procedural fairness or demonstrated bias.

78. I am also not persuaded by the argument that the Delegate showed animosity towards the Appellants and partiality for the Complainants. I have considered the examples and documents cited by the Appellants and find they do not provide a basis for a reasonable apprehension of bias.

79. I find the Appellants have not satisfied the burden on them to establish their allegations of bias. This argument is dismissed.

80. The Appellants' final procedural fairness argument is that the Delegate breached the principles of natural justice by failing to provide sufficient reasons for critical findings in the Determination. In assessing this argument, I note that the reasons in the Determination must be read as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they were delivered: *R. v. R.E.M.*, 2008 SCC 51 at paragraph 15. Every finding and conclusion need not be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned. Applying this approach, I find the Appellants have not established that the Delegate breached the principles of natural justice by failing to provide sufficient reasons for critical findings in the Determination. The Determination is lengthy and detailed and addresses the arguments and evidence submitted by the parties. I find no breach of procedural fairness in this regard.

81. In summary, I find the Appellants have not established the Delegate breached the principles of natural justice under section 112(1)(b) of the *ESA*. Whether the Appellants have established that the Determination should be cancelled for error of law is the question I will consider next.

Section 112(1)(a): Error of law

82. For purposes of subsection 112(1)(a) of the *ESA*, the Tribunal has adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.) ("*Gemex*"):

1. a misinterpretation or misapplication of a section of the Act;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

83. The grounds of appeal listed above do not provide for an appeal based on errors of fact, and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings of fact raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03 ("*Britco Structures"*). In *Britco Structures*, the Tribunal considered the application of the *Gemex* test to questions of mixed fact and law, and concluded that "error of law" should not to be applied so broadly as to include errors of mixed law and fact which do not contain extricable errors of law.

84. However, the Tribunal held that findings of fact were still reviewable as errors of law under prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal noted that the test for establishing an error of law on this basis is stringent, citing the reformulation of the third and fourth *Gemex* factors in *Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11- Richmond/Delta*), [2000] B.C.J. No. 331 (S.C.) at para. 18:

> ... that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could"….

85. As the Delegate stated in the Determination, this was a case where "the major dispute is over the legal status of the parties in relation to one another: for the purposes of the [*ESA*], are they in an employer-employee relationship or not?" (p. R2). The Delegate determined that matter on the basis of his findings of fact set out in the Determination and the applicable legal test for making such determinations under the *ESA*. In that regard, the Delegate was correct when he stated in the Determination:

> As the Tribunal very recently reaffirmed in *Golden Feet Reflexology Ltd.* 2018 BCEST 22, there is no single conclusive common law test that determines whether a person is an employee for the purposes of the Act. Common law tests are helpful and useful tools when addressing employment status, but they are subordinate to the provisions of the Act. The proper approach is to determine whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the Act. This is done by determining the reality of the relationship through objective facts. (p. R38)

86. I find the Delegate engaged in an appropriate analysis of relevant legal factors, and the Appellants arguments to the contrary are not persuasive. While the Appellants' arguments are based on the common law test for employment, the Tribunal has made clear the test under the *ESA* is not the same as the common law test. As stated in *Project Headstart Marketing Ltd.*, BC EST # D164/98, at page 3:

> … I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".

87. In *Ajay Chahal carrying on business as Zip Cartage*, BC EST # D109/14, the Tribunal similarly stated:

> In a very real sense it is counter-productive to spend a significant amount of time analyzing the relationship from the perspective of common law tests. It unnecessarily complicates the issue and invites appeals such as this one. The Tribunal has repeatedly said the question of the status of a person under the *Act* is determined in the context of the definitions of "employee", "employer" and "work". The only appropriate "test" is whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *Act*. (para. 55)

88. I find the approach taken by the Delegate is consistent with that endorsed by the Tribunal in considering the question of employment status, some of which are referred to in the following extract from *Kimberly Dawn Kopchuk*, BC EST # D049/05, at page 6:

> The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them . . . provide a useful framework for analyzing the issue.

89. The Tribunal stated in *Trendtham Group Enterprises Inc. carrying on business as Star Taxi*, BC EST # D032/08, at paras. 39 – 41:

> The Tribunal has said that it will consider any factor that is relevant (see *Larry Leuven*, (1996) BCEST No. D136/96). The Director looked at several factors, correctly noting the importance of control factors in assessing the nature of the relationship:
>
> > One of the most important factors in distinguishing between an employment relationship and an independent contractual one is the issue of control. In evaluating the degree of control exercised by one party over another, it is imperative to review not only whether one party controls what work is to be done, but also how it is to be done. The issue of control also examines who has the ability to select, discipline and terminate the relationship, as well as the method of remuneration for the work performed.
>
> The relative importance of control is not only reflected in the common law approach to the question of employee status, but in Section 1 of the *Act*, which defines an employer to include a person "*who has or had control or direction of an employee*".

> It also bears repeating that the *Act* is remedial and benefits-conferring legislation and is, in general, to be given a broad and liberal interpretation, as are definitions contained within the *Act*.

90. In *Windy Willows Farm*, BC EST # D161/05, the Tribunal stated that while common law tests may remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions which in turn are interpreted in light of the policy objectives of the *ESA*.

91. Lastly, the Tribunal noted in *C.A. Boom Engineering (1985) Ltd.*, BC EST # D129/04, at page 5:

> The common law tests originated chiefly for the purpose of determining whether an employer could be held vicariously liable for wrongs done by its employee, and not for the purpose of determining whether an employee is entitled to the minimum protections of the *Act*. The inadequacies of the common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada*, 2002 F.C.A. 96. The Supreme Court held there is no one conclusive test that can be universally applied at common law to determine whether a person is an employee or an independent contractor. Rather,
>
> > … the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
> >
> > It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. (paras. 47 and 48)

92. Accordingly, while the Appellants present an analysis of common law principles concerning employment status, and the purported effect of applying such principles to the facts of this case, this analysis does not establish an error by the Delegate. In the Determination, the Delegate analysed and made determination on the issue in accordance with, and for the purposes of, the *ESA*. I find the Appellants have not shown an error of law in the Delegate's analysis. Apart from asserting legal error, which I find is not established, the Appellants' arguments effectively do no more than quarrel with the factual findings and conclusions reached by the Delegate in the Determination. Disagreement with findings of fact and inference drawn therefrom does not provide a ground for appeal under section 112 of the *ESA*.

93. In arguing that the Delegate erred in law in finding an employment relationship on the facts of this case, the Appellants rely on court and tribunal decisions they provided which have considered that status of taxi lease operators in contexts other than the *ESA* and which have concluded that the drivers in those cases are "owners" of their own distinct businesses and/or not an "employee" for purposes of other legislation. The Appellants argue these decisions bolster their argument that the Delegate erred in finding an employment relationship in this case under the *ESA.* They also argue the Delegate breached natural justice in failing to expressly address these authorities in the Determination.

94. The mere fact that, in the Determination, the Delegate did not expressly reference or address the case authorities provided by the Appellants does not establish he did not consider them. Accordingly, I find no breach of procedural fairness is shown in this regard. I further note the Appellants' case authorities arise either under the common law or under statutory regimes other than the *ESA*, such as federal legislation governing taxation, employment insurance, and pension benefits. As such, they are distinguishable on this basis and not directly relevant to the issue of employee status under the *ESA*.

95. The Appellants submit decisions of the Tribunal that have addressed employee status of taxi drivers under the *ESA* are not helpful because the Tribunal "rarely conducts hearings and generally does not interfere with the Delegate's findings". However, I find this is not a basis for dismissing consideration of previous Tribunal decisions which have considered whether tax drivers who lease vehicles are in an employment relationship for purpose of the *ESA*. Nor do I accept the Appellants' contention that the Tribunal's jurisprudence is unhelpful because it is "inconsistent". The Appellants are correct that in *Bahia*, the Tribunal Member concluded on the facts of that case that there was not an employment relationship, whereas on the facts of the other case, *C and C Taxi Inc.*, the Tribunal Member concluded that an employment relationship did exist. However, the Tribunal's jurisprudence is consistent in that the same legal approach is taken to the issue, with the facts determining the differing outcomes.

96. I find the Determination is consistent with the legal approach the Tribunal has mandated under the *ESA* for determining employee status. I further note that, while the outcome of Tribunal decisions vary depending on the facts, the Determination is far from the first decision the Tribunal has upheld on appeal to conclude that persons who lease the taxis they operate are employees under the *ESA*: see, for example, *Victoria Taxi (1987) Ltd.*, BC EST # D601/97; *Sunshine Cabs Ltd.*, BC EST # D012/04; and *Trendtham Group Enterprises Inc. carrying on business as Star Taxi*, BC EST # D032/08. The conclusion reached in the Determination with respect to the three Complainants is therefore not novel or particularly surprising in the context of determinations made under the *ESA*.

97. As the Delegate stated in the Determination, the "common theme in the authorities is that the decision-maker is typically charged with determining whether a worker was in business for him or herself by weighing a series of common law factors and driving to the heart of the question: whose business is it?" (p. R26). In common with several previous decisions by the Tribunal under the *ESA*, the Delegate concluded in this case that the Complainants as lease taxi operators were not in business for themselves but rather were employed in the taxi business operated by the Appellants. I find the case law cited by the Appellants does not reveal an error of law in this conclusion.

98. After submissions in this matter closed, the Appellants sent an unsolicited submission enclosing a copy of a decision by the Tax Court of Canada, *Beach Place Ventures Ltd.*, 2019 TCC 24 (the "*2019 Tax Court Decision*"). In that decision, a judge of the Tax Court concluded that Mr. Abadi was not an employee of Beach Place for purposes of federal taxation and benefit entitlement statutes. In reaching this conclusion, the judge noted that "the Federal Court of Appeal examined almost identical facts in *Yellow Cab*" (para. 19) and found that there were "no distinguishing facts before the Court which justify a departure from the sound and logical analysis of Justice Sexton" (para. 29).

99. *Yellow Cab*, like the *2019 Tax Court Decision*, was a case where the issue of employee status was considered for purposes of federal taxation and benefits statutes. I appreciate these cases, and other tax and federal court cases, have come to a different conclusion with respect to employee status than did the

Delegate in this case. However, they did so in a different legislative context. The context of employment standards legislation is distinguishable from other legislative contexts with respect to the issue of employee status. As explained by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, employment standards legislation is remedial in nature, and the "harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers" (para. 31).

100. Accordingly, the Court stated in *Machtinger*, "an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not" (para. 32). This interpretative approach to employment standards legislation distinguishes it from other legislative contexts in which the issue of employee status arises. For this reason, an individual may be found to be an "employee" for purposes of labour relations or employment standards legislation, for example, but not for taxation purposes. This does not mean either finding is wrong in its statutory context; the variety of legislative circumstances in which the issue of employee status can arise is one of the reasons the test is so flexible, contextual, and fact-driven.

101. The Appellants argue that the Complainants cannot be their employees because, they say, the Complainant's taxi driving work does not provide the Appellants with any direct economic benefit. However, they acknowledge that they do benefit indirectly because the Complainants pay lease amounts to taxi Owners, and the Owners, who are shareholders, in turn pay monthly amounts to the Appellants. With respect to that fact, they submit it would be "neither a plausible nor desirable" interpretation of the *ESA* to take it into account when interpreting and applying the *ESA*. They say this is because "if everyone is part of a single business, there are no employees", and conversely, if everyone is an employee, "then there are no businesses to employ them".

102. I find this argument unpersuasive. First, as the Delegate observed, it is not necessary for the purpose of establishing an employment relationship to show that the Appellants received a direct economic benefit from the Complainants' taxi driving work. Second, as the Appellants concede, they did receive an indirect economic benefit. The Complainants' paid lease amounts to the Appellants' shareholders, who in turned paid monthly amounts to the Appellants. In addition, it is apparent that the driving work performed by Lease and Spare Drivers such as the Complainants is an essential element of the taxi enterprise (or enterprises, in the Appellants' submission) for which they say they provide services.

103. Accordingly, it cannot be said, and the Appellants do not claim, that they receive no benefit whatsoever from the Complainants' driving work. Rather, they argue that the benefit they receive should not be considered, or should count for nought, in deciding whether an employment relationship exists between them and the Complainants for the purpose of the *ESA*. They say to do otherwise would result in the untenable conclusion that either "everyone" involved (that is, presumably, all Black Top taxi drivers) is part of a single business with no employees, or conversely that they are all employees.

104. However, the Determination does not decide that all Black Top drivers are employees of the Appellants; it merely decides that the Complainants are. The Complainants are distinguishable from other Black Top taxi drivers in that they are not taxi vehicle Owners and therefore shareholders of the Appellants. Rather, they are Spare or Lease Drivers. As such, their circumstances are clearly different from any other Black Top drivers who are Owners/shareholders. A finding that the Complainants are employees of the

Appellants therefore does not necessarily equate to a finding that all Black Top taxi drivers are employees of the Appellants. The Delegate did not need to decide the employment status of other Black Top drivers, such as those who are shareholders of the Appellants. He only needed to decide the employment status of the Complainants, who were not shareholders. I find there is nothing untenable in the Delegate's conclusion that they were employees of the Appellants within the meaning of the *ESA*.

105. The Appellants argue the Delegate erred in law in not considering the "subjective intention" of the parties, which they submit was not to create an employment relationship. I do not agree. The subjective intention of the parties to create an employment relationship, as a factor in determining whether an employment relationship exists, may have greater relevance in other legislative contexts, but it generally has little relevance in the employment standards context. Among other reasons for this is the unequal bargaining power between employees and employers noted by the Supreme Court of Canada in *Machtinger*, and the fact that parties cannot contract out of the minimum protections provided by the *ESA*. I find the Delegate did not err in giving this factor little or no weight in the Determination.

106. For similar reasons, the Delegate did not err in the weight he gave to the documentary evidence submitted by the Appellants, including their accounting records which purported to allocate expenses and revenues between many different taxi businesses. I find no error of law has been shown in the Delegate's conclusion on the facts before him that "the form of the Respondents' intended relationship with the Complainants does not align with its substance" (p. R47). The objective reality found by the Delegate was that, for employment standards purposes, there were not many different taxi businesses, but rather a single taxi business operated by the Appellants, which employed the Complainants as Spare or Lease drivers. This conclusion was reached on the basis of the evidence before the Delegate, which he was entitled to weigh and assess, and I find the Appellants have not shown the Delegate made an error of law in doing so or in reaching his conclusion that the Complainants were employees of the Appellants for purposes of the *ESA*.

Section 21 and section 95 issues

107. After receiving and reviewing the Appellants' June 29, 2018, appeal submission, I sent correspondence to the parties requesting submissions on the section 21 and section 95 aspects of the Determination. Specifically, I sought submissions on whether the Delegate erred in finding that the Complainants' taxi rental/lease costs were employer business costs recoverable under section 21 of the *ESA*, and whether the Delegate erred in not treating the Appellants as one associated employer of the Complainants under section 95 of the *ESA*.

108. In response, the Director conceded the Delegate erred in finding that the Complainants' taxi rental/lease costs were employer business costs recoverable under section 21 of the *ESA*. The Director submitted section 37.1(1) of the *Regulation* creates an exception to the application of section 21(2) for taxi drivers leasing taxis from their employers. The Director submits the Determination should be varied to reflect this, and the matter referred back to the Delegate for the purpose of recalculation.

109. With respect to the section 95 issue, the Director submits the Delegate did not err in determining that the Appellants were both employers under the *ESA* and therefore it was not necessary to apply section 95. However, the Director further submits that, if the Delegate did err in failing to treat the Appellants as one associated employer, the Delegate nonetheless, as an alternative finding, determined that the

preconditions for the application of section 95 were present and an associated employer declaration as between the Appellants could be made if necessary. In these circumstances, the Director submits it is open to the Tribunal to confirm the Delegate's alternative finding associating the Appellants as one employer under section 95 of the *ESA*.

110. In reply, the Appellants submit the Director correctly accepts that the Complainants' taxi rental/lease costs are not recoverable. They submit the matter "should not be referred back to the Delegate, because the Determination should be cancelled".

111. Regarding the Delegate's consideration of section 95 of the *ESA* in the Determination, the Appellants submit the Delegate "did treat the Appellants as one associated employer of the Complainants under section 95 of the *ESA*, and that it was an error to do so". They say the Delegate's treatment of the Appellants as one associated employer was based on his finding that they and their shareholders operate a "single taxi business", a finding the Appellants dispute. They further submit the section 95 issue is "inconsequential and irrelevant", because even if there is a single taxi business, this "would lead to the same result: the Complainants are self-employed".

112. No submissions were received from the Complainants.

113. Having considered the submissions of the Director and the Appellants, I conclude the Delegate erred in finding that Appellants were liable for the Complainants' taxi rental/lease costs under section 21 of the *ESA*, for the reasons given by the Director. My order in relation to this issue is given at the end of this decision.

114. With respect to the section 95 issue, I agree with the Appellants' submission to the extent they say the Delegate did in fact treat them as associated employers in finding that they operated a single taxi business which employed the Complainants. I further find the Delegate's alternative finding that, if necessary, the Appellants meet the test for association under section 95, is reflective of, and supported by, the findings of fact in the Determination. I note the Appellants disagree, but on the basis that they should not be found to be employers of any kind of the Complainants. They do not specifically allege the Delegate erred in his application of the four-part test for making a section 95 association, and I find this aspect of the Determination is clearly correct and should be confirmed. To the extent the Appellants are employers of the Complainants, the circumstances of this case and the findings of the Delegate in the Determination are such that the Appellants should have been declared to be associated employers under section 95. My order in relation to this issue is also given at the end of this decision.

THE SUSPENSION REQUEST

115. As I am now issuing this decision on the appeal, I find it is unnecessary to address the Appellants' request for a suspension of the Determination pending appeal. To the extent the Appellants seek a suspension of the Determination beyond this appeal decision – for example, pending a decision on an application for reconsideration of this decision under section 116 of the *ESA* – that is a matter which must be sought by a fresh application to the Tribunal.

116. Unless a further suspension is sought and granted, the order made in the Determination must be followed, including the order to reinstate Mr. Paul. I am not persuaded there is any basis for overturning that order.

ORDER

117. The Determination is varied to cancel the finding that the Complainants' vehicle lease or rent payments were business costs recoverable under section 21 of the *ESA*. The matter is remitted to the Delegate for recalculation of the wages and interest owing in light of this variance of the Determination, and the Delegate is directed to issue a fresh payment order reflecting that recalculation.

118. The Determination is further varied to confirm the alternative finding that the Appellants meet the established test to be declared one associated employer under section 95 of the *ESA*. The Determination should therefore be read as finding the Appellants are an associated employer of the Complainants under section 95 for purposes of the *ESA.*

119. The Determination is otherwise affirmed, and the appeal otherwise dismissed, for the reasons given.

David Stevenson
Member
Employment Standards Tribunal