

Citation: Mahigan Research & Development Inc. (Re)  
2019 BCEST 49

An appeal

- by -

Mahigan Research & Development Inc.

- 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)

**PANEL:** Richard Grounds

**FILE NO.:** 2019/3

**DATE OF DECISION:** May 29, 2019

## DECISION

### SUBMISSIONS

Matthew Stainsby	counsel for Mahigan Research & Development Inc.
Andriene Pella	on her own behalf
Rodney J. Strandberg	delegate of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Mahigan Research & Development Inc. (“Mahigan”) has filed an appeal of a Determination issued on December 13, 2018, by Rodney J. Strandberg, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”).
2. Tamara Goddard is the sole director and president of Mahigan which conducts complex applied research projects for First Nations and governments. Andriene Pella (the “Complainant”) worked for Mahigan from June 1, 2015, to January 31, 2018, and ran its business office. The Complainant used her personal credit card to pay some of Mahigan’s business expenses.
3. The Complainant was laid off by Mahigan on January 31, 2018, due to economic conditions. On February 2, 2018, Mahigan issued a termination letter for cause after Ms. Goddard discovered the following: there was an outstanding balance owed to a bookkeeper, the Complainant had withdrawn cash from Mahigan’s bank account the morning of her lay off, a cheque was missing from Mahigan’s check book, the Complainant had given herself raises without approval, the Complainant was carrying a significant credit card debt, the Complainant did not keep Mahigan’s corporate records updated and Mahigan had lost money because the Complainant did not ensure that a contract was signed.
4. On April 4, 2018, the Complainant filed a complaint under section 74 of the *ESA* for regular wages and compensation for length of service. The complaint proceeded to an adjudication hearing on September 13, 2018, in front of the Delegate. The Delegate concluded in his Determination that Mahigan owed the Complainant wages, compensation for length of service, annual vacation pay, and accrued interest. The Delegate ordered Mahigan to pay administrative penalties for each contravention of the *ESA*.
5. Mahigan appealed the Determination on the basis that the Delegate erred in law. In addition, Mahigan appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice by not allowing Mahigan to make submissions on the merits of the Complainant’s various claims.
6. For the reasons that follow, the Determination is cancelled, and the matter is referred back to the Director.

### ISSUE

7. The issues are whether or not the Delegate erred in law or failed to observe the principles of natural justice when he determined that Mahigan contravened the *ESA*.

## ARGUMENT

8. Mahigan submitted on appeal that the Delegate failed to observe the principles of natural justice when the Delegate did not give Mahigan an opportunity to make submissions on the Complainant's various claims. Mahigan submitted that its legal counsel advised the Delegate at the hearing that it had submissions to make but the Delegate wanted to hear what the Complainant had to say first and advised that Mahigan would be given an opportunity to make submissions once all of the evidence was put in.
9. The Delegate requested additional information from the Complainant at the hearing which was received after the hearing. Mahigan submitted that "in complete contrast to his assurances that Mahigan would be given an opportunity to give submissions on [the Complainant's] various claims", the Delegate proceeded to complete the Determination without giving Mahigan an opportunity to make submissions. Mahigan seeks to set aside the Determination.
10. Mahigan included with its appeal a summary of background facts related to the complaint. Mahigan submitted that the Delegate erred in finding that the T4 prepared by the Complainant was evidence that Mahigan authorized the Complainant's pay raises. Mahigan submitted that the evidence in its totality constituted just cause to terminate the Complainant and referred to judicial and Tribunal decisions which support this position.
11. Mahigan did not dispute that it owes the Complainant wages (for her last pay period) but submitted that the Delegate incorrectly calculated the wages owed based on wage increases the Complainant had given herself but that had not been authorized by Mahigan. Mahigan submitted that the Complainant is not entitled to annual vacation pay because she received compensation during her vacation time or that it should be reduced. Mahigan submitted that the accrued interest should be reduced accordingly. Mahigan submitted that the administrative penalties for contraventions of sections 27 and 46 should be set aside because the Complainant prevented Mahigan from being able to provide the necessary payroll records.
12. Mahigan submitted that if the Tribunal is unable to determine the Complainant's wages or if she was terminated for cause, it should be given a new hearing because the Delegate failed to provide it with a fair hearing when the Delegate prevented Mahigan from giving submissions on the very contraventions later found to have occurred.
13. Submissions on the merits were requested from the parties. The Complainant provided with her submissions a spreadsheet of the debts owed to her by Mahigan. The Complainant submitted that she gave Mahigan all company computer files (that she had on her personal Google drive), that Mahigan had authorized her salary increases, that she did not expense a business license in Delta (and that this expense was for a parking ticket) and that she returned a MacBook Pro laptop to Mahigan in May 2018.
14. The Delegate submitted that Mahigan's background facts were contrary to the findings of fact in the Determination, that Mahigan was asking the Tribunal to substitute its findings of fact for the Delegate's and that there was no evidence in the record addressing what the Complainant's salary should have been or who was involved in preparing the Complainant's T4. The Delegate submitted that the review of the evidence leading to the finding about the Complainant's salary was "transparent, intelligible and evidence-based".

15. The Delegate submitted that the Director accepted Mahigan's summary of the law relating to summary dismissal of employees but noted that Mahigan was "asking the Tribunal to substitute its findings of fact for the Delegate's reasonable, evidence-based findings of fact" regarding the Complainant's termination. The Delegate made various submissions about the evidence relating to the factors raised by Mahigan in regards to cause for termination. The Delegate submitted that Mahigan had shown no reversible error committed in regards to awarding the Complainant compensation for length of service, vacation pay or in imposing administrative penalties.
16. The Delegate submitted that Mahigan was provided with an opportunity to learn the case against it, the right to present its evidence and the right to the complaint being heard and decided by an independent decision maker. The Delegate submitted that there is no evidence that the Delegate failed to give Mahigan the opportunity to give submissions on the Complainant's various claims. The Delegate submitted that he properly instructed himself on the applicable law and relevant evidence. The Delegate submitted that the Tribunal should confirm the Determination.
17. Mahigan submitted in reply to the Delegate's submissions on the merits that the Delegate failed to address its submissions regarding his failure to observe the principles of natural justice. Mahigan submitted that the Delegate's submissions constituted argument, both for his original decision and on behalf of the Complainant. Mahigan made further submissions about the evidence relating to the Complainant's withdrawal of money on the day she was terminated and related to the Complainant's wages.

## THE FACTS AND ANALYSIS

### *Background Facts*

18. The Complainant worked for Mahigan from June 1, 2015, to January 31, 2018. There was no written employment contract. The Complainant was initially paid \$2,500.00 twice per month according to the Complainant or \$65,000.00 per year according to Mahigan. In addition, the Complainant was paid a vehicle allowance and for her cell phone. The Complainant also used her personal credit card to pay for Mahigan's business expenses and would make payments from Mahigan's bank account.
19. The Complainant's salary was increased to \$3,150.00 twice monthly in January 2016 and to \$3,650.00 every two weeks in December 2016. According to the Complainant, the salary increases were authorized by Ms. Goddard but, according to Ms. Goddard, the increases were intended to be applied to the Complainant's credit card debt.
20. According to the Complainant, she was not a bookkeeper or accountant but her job duties evolved and included sending invoices to clients when requested by Ms. Goddard, making bank deposits and arranging events (including arranging travel, hotels, advertising, promotion and hospitality). According to Mahigan, the Complainant was hired as a bookkeeper and administrator and her responsibilities included coordinating events, looking after human resources and payroll, and bookkeeping, including accounts payable and receivable.
21. On January 31, 2018, the Complainant discovered that she no longer had online access to Mahigan's bank account and went to the bank in person to withdraw \$3,000.00 which she applied to her credit card debt.

That same day the Complainant met with Ms. Goddard who informed her that she was being laid off. The Complainant did not advise Ms. Goddard of the cash withdrawal she had made that morning. Ms. Goddard had intended to make a GST payment and rent payment with the money.

22. During their meeting on January 31, 2018, the Complainant informed Ms. Goddard that she had a significant credit card debt. According to the Complainant, her credit card debt was just over \$34,000.00. According to Ms. Goddard, the Complainant told her that her credit card debt was approximately \$40,000.00. Ms. Goddard was “stunned” by this because Mahigan had been giving the Complainant additional money to pay down her debt.
23. After her meeting with the Complainant, Ms. Goddard discovered the \$3,000.00 cash withdrawal by the Complainant. She also looked more carefully at the company’s books and learned that the Complainant had reported the additional income as payroll and not as money to pay down credit card debt. Ms. Goddard also discovered a missing cheque and that there was a significant outstanding balance (of \$7,895.00) owed to a bookkeeper engaged by Mahigan. According to Ms. Goddard, she also located financial information that she had been requesting from the Complainant since October 2017 but had not been provided.
24. On February 2, 2018, Mahigan terminated the Complainant with cause based on the following reasons: the Complainant did not forward important “financials and debts” to Ms. Goddard; there was an outstanding \$7,895.00 balance owed to a bookkeeper which Ms. Goddard was not aware of; the Complainant had withdrawn \$3,000.00 cash from Mahigan’s bank account the morning of her lay off without authorization; a cheque was missing from Mahigan’s check book with no explanation except “Void” written on the cheque stub; the Complainant had given herself raises without approval; the Complainant was carrying a significant credit card debt despite being instructed to keep her credit card paid; the Complainant did not keep Mahigan’s corporate records updated; and Mahigan had recently lost money because the Complainant did not ensure that a contract was signed.
25. The termination letter informed the Complainant that any outstanding credit card charges would “be paid with an aggressive payment plan”. The termination letter stated that it was the Complainant’s “job as Administrative Manager to keep Mahigan’s cash flow steady, manage the payments and receivables, file taxes, keep [the] corporate records to date, sign and track contracts, due dates and signatures of contracts”. The termination letter requested that the Complainant return any property of Mahigan.

#### *Adjudication Hearing*

26. On April 4, 2018, the Complainant filed a complaint under section 74 of the *ESA* for regular wages and compensation for length of service. The complaint proceeded to an adjudication hearing on September 13, 2018, in front of the Delegate. The Delegate asked the Complainant to provide a copy of her 2017 T4 and copies of her credit card statements for the period June 2017 to February 2018. These documents are included in the Record (at pages 75 to 103 of the Director’s Record) but there is no indication when they were received by the Delegate.
27. The Delegate sent the credit card statements to Mahigan after the hearing but the Record does not include the Delegate’s communication in regards to these records including what was requested from Mahigan. It is unclear from the Record if the Delegate sent the T4 to Mahigan as well. On September 27,

2018, legal counsel for Mahigan provided a letter response to the Delegate and made various comments on the expenses claimed by the Complainant (pages 161 – 162 of the Director’s Record). The last line of the letter reads as follows:

We look forward to an opportunity to provide submissions with respect to [the Complainant’s] claims, as directed by the Branch.

28. There is no further documentation in the Director’s Record in regards to the request by legal counsel for Mahigan for an opportunity to make submissions on the Complainant’s claims.

#### *The Determination*

29. The Delegate completed the Determination on December 13, 2018, and found that Mahigan owed the Complainant wages, compensation for length of service, annual vacation pay, and accrued interest. The Delegate ordered Mahigan to pay administrative penalties for each contravention of the *ESA*.

30. The Delegate summarized the evidence of the Complainant and Ms. Goddard. In regards to Mahigan’s business expenses that the Complainant paid with her personal credit card, the Delegate found that the Complainant charged \$17,170.61 to her personal credit card for Mahigan’s business expenses in the six month period preceding her termination. During this same period, the Delegate found that the Complainant transferred \$23,500.00 from Mahigan’s bank account to pay her credit cards. Given the payments exceeded the business expenses, the Delegate found that Mahigan did not contravene the *ESA* by requiring the Complainant to pay its business expenses.

31. A key fact to decide relating to the wages owed by Mahigan to the Complainant was the Complainant’s salary. As noted above, the parties disagreed on the Complainant’s salary where Mahigan asserted that additional money paid to the Complainant was for the Complainant to make payments on her credit card. The Delegate concluded that the Complainant’s evidence about her salary was reasonable for the following reasons (at pages R7 – R8 of the Determination):

1. The Employer sent the Complainant a T-4 for 2017 showing employment income of \$91,250.00,
2. Ms. Goddard's evidence was that in December 2016 the Employer began paying the Complainant \$3,650.00 bi-weekly, with a \$500.00 payment designed to help the Complainant pay off her credit card debt. This is internally inconsistent with her evidence that, throughout the Complainant’s employment, the Employer never agreed to any raises for her, although a \$500.00 increase to \$3,650.00 bi-weekly of necessity implies that she was earning \$3,150.00 bi-weekly prior to December, 2016, and not \$2,500.00 as she would have if the Employer had not increased her salary from the \$2,500.00 bi-weekly that it paid her when her employment began, and
3. Ms. Goddard knew, when the Complainant's employment with the Employer began, that she had approximately \$19,000.00 in credit card debt relating to Ms. Goddard's sole proprietorship expenses. In her final six months of employment, the Complainant charged, on average, \$2,861.77 of business expenses each month to her credit cards. The Employer, providing her with an additional \$500.00 per month, could not reasonably have concluded that this would pay off its business expenses that she was charging on her credit card each month.

32. The Delegate found that the Complainant was earning \$3,650.00 bi-weekly when Mahigan terminated her employment. Later in reasons related to compensation for length of service, the Delegate stated that “[t]he 2017 T-4 issued by the Employer shows that it paid the Complainant wages of \$91,250.00, which I find is explicit recognition by it that her salary increased, with its knowledge” (Page R9 of the Determination). The Delegate concluded that Mahigan owed the Respondent wages based on \$3,650.00 bi-weekly for her last pay period for which she had not been paid.
33. The Delegate addressed each of the factors Mahigan relied upon to terminate the Complainant’s employment. The Delegate concluded that while Mahigan may have been unaware of the outstanding bookkeeper balance of \$7,895.00, this was not something that constituted just cause and nor was the void cheque. The Delegate concluded that the Complainant’s withdrawal of \$3,000.00 on the date of termination was one of many during her employment and that she did not have any advance knowledge or warning that she was going to be terminated.
34. The Delegate concluded that Mahigan had knowledge of the Complainant’s pay raises and that the Complainant’s failure to keep her credit cards paid did not constitute just cause. The Delegate concluded that there was no evidence that the Complainant received any corporate records to update and, even if the Complainant did fail to update Mahigan’s corporate records, this was conduct that only merited a warning. The Delegate noted that no additional evidence was provided at the hearing in regards to the Complainant’s failure to have a client sign a contract and that this would only warrant progressive discipline.
35. The Delegate considered whether the totality of the Complainant’s conduct amounted to just cause but concluded that it did not and that Mahigan failed to communicate to her the scope of her work with no evidence that Mahigan reviewed the Complainant’s work performance or established an objective standard or performance for her. The Delegate concluded that Mahigan was required to pay the Complainant compensation for length of service based on the salary of \$3,650.00 bi-weekly.
36. The Delegate concluded that Mahigan was required to pay vacation pay for her final pay and for length of service. The Delegate concluded that the Complainant was entitled to interest and that Mahigan was subject to administrative penalties for the above contraventions and for failing to pay the wages within the prescribed time.

#### ANALYSIS

37. Section 112 of the *ESA* sets out the Tribunal’s jurisdiction to consider appeals of the Director’s determinations:
- 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.

38. The Appellant appealed the Determination on the basis that the Delegate erred in law and failed to observe the principles of natural justice. The allegation that the Delegate failed to observe the principles of natural justice will be considered first as it is a threshold issue.

*Failure to Observe the Principles of Natural Justice in making the Determination*

39. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. Although the scope of the right to procedural fairness can vary for a given situation and is, therefore, contextual, the right to procedural fairness can include the right to make submissions in administrative tribunal settings.<sup>1</sup>
40. A key issue in this appeal relates to the Complainant's salary and whether or not Mahigan approved the two salary increases. This finding of fact was critical to all of the Complainant's claims that were based on her salary and also for consideration of whether or not there was just cause to terminate the Complainant. The analysis of whether or not there was just cause to terminate the Complainant changes significantly if the Complainant did give herself salary increases that were not authorized by Ms. Goddard, as alleged by Mahigan.
41. A primary fact that the Delegate relied upon to conclude that the Complainant's salary increases were authorized by Ms. Goddard was the Complainant's 2017 T4 which showed employment income of \$91,250.00. This was the first factor relied upon by the Delegate in accepting that the Complainant's evidence regarding her salary was reasonable. The Delegate later concluded in the Determination that the T4 was "explicit recognition" that Mahigan had knowledge of the salary increases. It is apparent that the Delegate gave great weight to the Complainant's 2017 T4 in concluding that she did not give herself salary increases without Ms. Goddard's knowledge.
42. The Delegate also relied on an inconsistency in Ms. Goddard's evidence regarding the amount of the monthly increase intended to pay the Complainant's credit card debt and that Ms. Goddard should have known this amount was not sufficient to pay off Mahigan's business expenses each month. However, there is no indication that these were put to Ms. Goddard during or after the hearing or that Mahigan was provided an opportunity to make submissions on these issues.
43. Mahigan in its appeal submissions stated that Ms. Goddard gave evidence that the Complainant prepared the T4 or had the bookkeeper do it without Ms. Goddard's knowledge. The Delegate, in submissions on the merits, stated that there was "nothing in the Record supporting the assertion that the Complainant was involved in preparing or instructing" the bookkeeper to issue the T4. The Determination references the T4 but does not include any reference to oral evidence from either party about the Complainant's T4. This may be due to the fact that the T4 was provided after the hearing.
44. The Delegate in submissions on the merits submitted that there is no evidence that the Delegate failed to give Mahigan the opportunity to give submissions on the Complainant's various claims. In support of this, the Delegate cited the second paragraph of the Determination which states that the Complainant's 2017

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<sup>1</sup> For example, see *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122, *Rimex Supply Ltd. v. British Columbia (Human Rights Tribunal)*, 2011 BCSC 1410 and *Overwaitea Food Group LP v. Bates*, 2006 BCSC 1201.



T4 and copies of the Complainant's credit card statements for the period June 2017 to February 2018 were sent to Mahigan for its review and comment. As noted above, the Record does not include the correspondence from the Delegate to Mahigan so it is unclear what the Delegate communicated to Mahigan when it provided the additional records.

45. Regardless of the uncertainty about what was requested from Mahigan by the Delegate, it is clear that on September 27, 2018, legal counsel for Mahigan provided some comments on the various expenses claimed by the Complainant and then closed its letter with the following:

We look forward to an opportunity to provide submissions with respect to [the Complainant's] claims, as directed by the Branch.

46. This strongly supports Mahigan's claim that up to that point it had not been provided with an opportunity to make submissions on the merits of the Complainant's various claims. There is no evidence in the Director's Record that Mahigan was provided an opportunity to make submissions after its request on September 27, 2018. The next substantive action on the file was the Delegate's Determination issued on December 13, 2018. Given the evidence, I am satisfied on a balance of probabilities that Mahigan was not provided with an opportunity to make submissions on the merits of the Complainant's various claims before the Delegate issued the Determination.

47. The Delegate in submissions on the merits accepted Mahigan's summary of the law relating to summary dismissal of employees. The Delegate submitted that he carefully considered all of the evidence as a whole and properly instructed himself on the applicable law and relevant evidence. However, this does not address the fact that the Delegate failed to provide Mahigan with an opportunity to make submissions on the merits of the Complainant's various claims. It is not sufficient for the Delegate to assert after the fact that he properly instructed himself on the applicable law and relevant evidence. Rather, he must do so before reaching a decision and with the benefit of hearing submissions from the parties.

48. I am satisfied that the failure to allow Mahigan to make submissions on the merits of the Complainant's various claims compromised the fairness of the complaint process. Accordingly, the Delegate failed to observe the principles of natural justice when he made his determination without allowing Mahigan to make submissions on the Complainant's various claims. The appropriate remedy is to grant Mahigan a new hearing in front of a new delegate.

49. It is important to note that this conclusion does not make any finding on the merits of the Complainant's various claims, either in favour of the Complainant or Mahigan. In other words, the finding that the Delegate failed to observe the principles of natural justice does not directly address whether or not the Complainant's various claims have merit.

### *Error of Law*

50. Mahigan also appealed the Determination on the basis that the Delegate erred in law when he determined the Complainant's wages and that the Complainant was entitled to compensation for length of service. Given the finding that the Delegate failed to observe the principles of natural justice when he failed to provide Mahigan with an opportunity to make submissions on the merits of the Complainant's various claims, it is not necessary to address this ground of appeal.
51. In reaching this conclusion, I take into account that the evidence related to the Complainant's 2017 T4 is disputed, where Mahigan submits that Ms. Goddard testified about the T4 and the Delegate submits that there was no evidence from Ms. Goddard about the Complainant's T4, with no way to resolve the dispute. Although this may be due to the fact that the T4 was gathered after the hearing, this does not change that the evidence is insufficient to reach a conclusion on a critical fact necessary to decide the Complainant's salary and, indirectly, the issue relating to whether or not just cause existed to terminate the Complainant's employment.

### *Remedy*

52. The Delegate failed to observe the principles of natural justice when he failed to provide an opportunity to Mahigan to make submissions on the merits of the Complainant's various claims.
53. Section 115(1)(a) of the *ESA* provides that the Tribunal may confirm, vary or cancel the determination under appeal. Section 115(1)(b) provides that the Tribunal may refer the matter back to the director.
54. Given the Delegate's failure to observe the principles of natural justice and the disputed evidence on a critical fact which impacts the ability of the Tribunal to assess the evidence, the Determination should be set aside and the matter referred back to the Director for a new hearing.

### **ORDER**

55. I allow the appeal, cancel the determination under section 115(1)(a) of the *ESA*, and refer this matter back to the Director pursuant to section 115(1)(b) of the *ESA*.

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**Richard Grounds**  
**Member**  
**Employment Standards Tribunal**