Employment Standards TRIBUNAL

Citation: Anna Brill-Edwards (Re)
2019 BCEST 56

An appeal

- by -

Anna Brill-Edwards
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

**PANEL:** Carol L. Roberts

**FILE NO.:** 2018A/88

**DATE OF DECISION:** June 12, 2019

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Michael Kiperchuk | on behalf of Anna Brill-Edwards |
| Dan Armstrong | delegate of the Director of Employment Standards |

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Anna Brill-Edwards (the "Appellant") has filed an appeal of a Determination (the "Determination") issued by Dan Armstrong, a delegate ("Delegate Armstrong" or the "Delegate") of the Director of Employment Standards (the "Director"), on July 12, 2018.

2. On May 15, 2017, the Appellant filed a complaint with the Director alleging that the Oceanside RCMP Victim Services Society (the "Employer") had contravened the *ESA* in failing to pay her wages. The Appellant contended she was owed regular and overtime wages, vacation pay, and banked time as well as compensation for length of service in the total amount of $26,232.82. On May 16, 2017, a co-worker of the Appellant's also filed a complaint with the Director making the same allegations.

3. Following an investigation, Delegate Armstrong issued a Determination addressing both complaints. In the Determination, the Delegate determined that the Appellant was owed wages and accrued interest in the total amount of $1,657.51. The Director imposed two $500 administrative penalties on the Employer for contraventions of sections 17 and 58 of the *ESA* in the total amount of $1,000, for a total amount payable of $2,657.51.

4. The Appellant appeals the Determination on the basis that the Director erred in law and that the Director failed to comply with the principles of natural justice in making the Determination.

5. The Appellant filed her 77-page appeal on August 16, 2018, along with a surreptitious audio recording of a telephone conversation she had with one of the Director's delegates and sought an extension of time to provide additional documentation. The Appellant was given a deadline of October 22, 2018, to file additional documents, and on that day, submitted an additional 1,294 pages in support of the appeal.

6. The Director also sought an extension of time in which to provide the section 112(5) record. That request was granted and on September 13, 2018, Delegate Armstrong submitted the record of over 650 pages.

7. Upon receipt of the record, the Tribunal noted some discrepancies, which the Director was asked to address no later than October 22, 2018. The Director complied with this request.

8. The Tribunal invited the Appellant to make submissions on the completeness of the record. In response to the Appellant's submission, the Delegate disclosed seven additional pages of written notes, three pages of "workflow notes," and additional correspondence.

9. On March 6, 2019, I issued a decision on the completeness of the record, concluding that Delegate Armstrong had produced the entire record and made no order for further records to be produced (*Anna Brill-Edwards*, 2019 BCEST 21).

10. This is my decision on the merits of the appeal. It is based on the section 112(5) record and the submissions of the parties.

## FACTS AND ARGUMENT

11. The Employer is a British Columbia incorporated society which provided a police-based victim services program supporting victims of crime and trauma. Incorporated March 10, 2005, the Employer had four directors. All four of the directors (the "Board") had resigned by the time the appeal was filed and the Employer did not participate in the appeal.

12. The Appellant was employed from November 2009 until May 17, 2017. Initially employed as an Assistant Program Manager, she assumed the position of Program Manager in June 2016.

13. The Appellant entered into a written employment agreement with the Employer on May 26, 2016, which came into effect August 1, 2016. The terms of the agreement included a provision that the Appellant was to be paid "in equal, monthly instalments." While the contract was silent on the amount of that monthly payment, it did set out the Appellant's hourly wage.

14. Shortly after assuming the role of Program Manager, the Appellant noticed that her wages were being calculated based on an assumption that each month comprised exactly four weeks without accounting for the fact that the number of days in each month fluctuated. Consequently, the Appellant was paid for 48 weeks per year rather than 52. The Appellant's ability to detect this perceived error sooner was limited by the fact that prior to assuming the role of Program Manager she did not receive copies of her wage statements from the Employer.

15. In order to correct her wage payments, the Appellant submitted employee timesheets indicating that she was to be paid for 121.34 hours every month. She based that on a calculation of the number of weekly hours (28) multiplied by the number of weeks per year (52) divided by the number of months per year (12). Although the hours did not provide an accurate representation of the hours the Appellant actually worked, she believed this practise was necessary to satisfy the wording of the employment contract.

16. On December 7, 2016, the Appellant attended a Board meeting at which she informed the Board that she had identified a payroll accounting error that had resulted in her being underpaid a total of $18,000 since 2010.

17. On February 1, 2017, and May 3, 2017, the Appellant presented the Board with a payment schedule for what she asserted was her unpaid wages. At the May 3, 2017, meeting, she informed the Board

that she had secured pre-approval for a loan to cover the payment from a lending institution. The Board rejected both proposals, as they had not been provided with any supporting documentation for the wage claims. The Board also noted that the Appellant was responsible for monitoring the Employer's expenditures, and, as a non-profit organization, it could not take on debt for operations.

18. The Appellant then retained counsel, who issued a "demand letter" to the Board, alleging violation of the *ESA*, a breach of the employment contract and misallocation of provincial and regional funding received by the Employer. The letter notified the Board that the Appellant sought full payment of her wage claim in her next paycheque.

19. On May 4, 2017, the Board chair tendered his resignation. On May 8, 2017, two other Board members resigned. On May 11, 2017, the fourth Board member resigned, leaving the Employer without any directors. Under section 40 of the *Societies Act*, all societies are required to have at least three directors. As the Employer did not have the minimum number of directors as of May 8, 2017, the Employer ceased its operations.

20. On May 16, 2017, the provincial government informed the Appellant that it would not continue to fund her wages in the absence of a functioning Board and directed her to shut the program down. The Appellant's last day of work was May 17, 2017. She received no wages for the month of May.

**THE DETERMINATION**

21. Delegate Armstrong decided to proceed by way of investigation under section 76 of the *ESA* and sought written responses to specific questions from the Appellant and her co-worker. The Appellant and her co-worker submitted one response to some questions, for others, they submitted identical evidence and arguments.

22. The Determination indicates that the Delegate obtained evidence from one of the former Board members as well as from the Employer's accountant.

23. In the Determination, the Delegate found the Employer had failed to ensure the Appellant was paid at least semi-monthly in accordance with the *ESA*. As well, the Delegate found the Employer had not paid outstanding wages within 48 hours of the termination of the Appellant's employment.

24. In determining whether the Appellant was owed wages, the Delegate noted that pursuant to section 80(1) of the *ESA*, the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning six months before the earlier of the date of the complaint or the termination of the employment. As the last day the Appellant worked was not contested, the Delegate found the recovery period commenced on November 18, 2016. The Delegate found the analysis of the Appellant's earnings during the recovery period was complicated by her use of a time bank to which she assigned hours to be subsequently taken as paid leave. As a significant portion of the Appellant's earnings during the recovery period pertained to the use of time banked prior to the recovery period, the Delegate had to analyze the circumstances in which the Appellant was permitted to assign hours to a time bank.

25. The Delegate determined the Appellant assigned hours to a time bank in multiple circumstances, including for time worked outside of her regular schedule, for after-hours crisis callouts, and for statutory holidays. The Delegate determined the Appellant's contract permitted her to bank hours pertaining to crisis call outs but did not permit the banking of hours in other circumstances. The Delegate noted the Appellant argued that even if she was not explicitly entitled to a time bank, it had always been the practice to add unscheduled hours and statutory holidays to time banks and the Employer had in effect accepted this practice or that there had been verbal agreements permitting it. The Delegate found the Appellant was not entitled to the use of a time bank in circumstances unrelated to crisis call outs as a result of the action or inaction of the Employer.

26. The Delegate reviewed the Appellant's records to determine the hours the Appellant would have banked with respect to crisis call outs.

27. With respect to overtime, the Delegate noted the Appellant's records demonstrated she frequently claimed overtime rates for hours worked despite having worked fewer than eight hours in a day and 40 hours in a week. The Delegate found the Appellant's practice was to record any hours worked on a regularly scheduled day off as double time. The Appellant indicated she had misunderstood her entitlement to overtime and acknowledged she ought to have been compensated at a regular wage rate for working less than eight hours in a day or 40 hours in a week pursuant to section 34 of the *Employment Standards Regulation* (the "*Regulation*"). In any event, the Delegate found the Appellant was a manager and as such was excluded from entitlement to overtime under the *ESA*. The Delegate also determined that the employment contract did not entitle the Appellant to overtime (Determination, p. R21 – R24). In particular, the Delegate found he was unable to conclude the Employer ignored evidence the Appellant had been receiving overtime for additional hours worked as it was not apparent it had been presented with any evidence of overtime earnings to ignore. The Delegate noted there was no reference to overtime hours on the Appellant's wage statements as she had not reported them to the payroll accountant. The Delegate found the Appellant's records of work during lunch hours to be problematic as she had already recorded this time as part of her regular work day which resulted in her being compensated for the hours twice – once at the regular hourly rate and then again at the overtime rate. The Delegate found that in almost all instances where the Appellant worked through the lunch hour, the Appellant worked fewer than eight hours in that day and was therefore not entitled to overtime. [Determination, p. R23].

28. The Delegate found the Appellant's records to be the most reliable evidence of the Appellant's actual work hours and concluded that the Appellant received payment for her lunch on 227 occasions, even though her records did not show work being performed on those occasions.

29. The Delegate found that vacation pay was owing, but the Appellant had not worked on any statutory holidays.

30. With respect to the Complainant's assertion that she was entitled to compensation for length of service, the Delegate found the Appellant's employment ultimately ended as the result of the collapse of the Employer, an event which the Delegate found was precipitated by the presentation of the demand letter on May 3, 2017 (Determination, p. R26). The Delegate found the demand letter was irreconcilable with continued employment of the Appellant. As a result, the Delegate found the

Employer had just cause for termination and the Appellant was therefore not entitled to compensation for length of service.

31. The Delegate found the Appellant was entitled to 12% in lieu of benefits, as well as on call additional wages, and a retroactive bonus. The Delegate found the Appellant was not entitled to employment matters that predated the recovery period.

32. In total, the Delegate found the Appellant was owed $1,601.38, plus interest.

**THE APPEAL**

33. The Appellant raises six grounds for appeal, each of which will be set out in greater detail below:

- the Delegate erred in law when he allowed a former Board member to respond to the Appellant's complaint on behalf of the Employer.
- the Delegate erred in law in determining the Appellant was terminated for cause.
- the Delegate breached the principles of natural justice by failing to accept the evidence provided by the Appellant without providing adequate reasons.
- the Delegate ignored the Appellant's evidence and "acted on a view of facts which could not reasonably be entertained".
- the Delegate breached the principles of natural justice by failing to complete its investigation into the Appellant's complaints in a timely manner; and
- the Delegate breached the principles of natural justice by failing to complete a thorough investigation into the Appellant's complaints.

**ISSUE**

34. Has the Appellant demonstrated a basis for interfering with the Determination?

**ANALYSIS**

35. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

### *Error of law*

36. I turn first to the Appellant's allegations the Delegate erred in law.

37. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

38. The Appellant says that the Delegate erred in law in allowing a former Society Board member to respond to the complaint; in concluding that the Appellant's employment had been terminated for cause; and in acting on a view of the facts that cannot reasonably be entertained. I shall deal with each of those alleged errors in turn.

Allowing a former Society Board Member to respond to the Appellant's complaint

39. The Appellant argues that the complaint was filed against a Society, not any single, former director of that Society and that because the Society no longer had any members or any governing Board, it had no ability to dispute her complaint. The Appellant further contends that the Delegate erred in allowing a former director to respond to the complaint.

40. The Director of Employment Standards is charged with enforcing the standards prescribed under the *ESA*, including determining, by investigation or adjudication, wage complaints. Section 77 of the *ESA* provides that the Director must give a person being complained of a reasonable opportunity to respond to allegations.

41. As noted above, the Delegate chose to proceed by investigation in this matter. In so doing, the Delegate has the power to receive information he deems relevant in order to investigate and determine the complaint (section 76 of the *ESA*). Even though all the members of the Board had resigned, the Delegate nevertheless had an obligation to evaluate and determine the Appellant's complaint. I find it was not an error of law for the Delegate to contact a former Board member as well as the Employer's accountant, to investigate and obtain information about the issues in the complaint. While neither of these parties officially represented the Society, the Delegate found they had relevant information regarding the specifics of the complaint. I find no error in the Delegate's decision to gather information from either a former director of the Employer or the Employer's accountant.

Determining that the Appellant was terminated for cause

42. The Appellant claimed compensation for length of service.

43. The Delegate set out an employee's entitlement to length of service compensation pursuant to section 63 of the *ESA* and noted that the Appellant's employment ended as the result of the collapse of the Society, an event that he found was "precipitated by the presentation of [her] Demand letter on May 3, 2017." The Delegate found that the Appellant's employment was terminated by way of the mass resignation of Board Members which caused the Society to cease its operations.

44. The Delegate then noted that an employer had no obligation to pay length of service compensation if an employee was terminated for cause. The Delegate determined that the Demand letter which the Appellant served on the Board was "disrespectful in tone, inflammatory, intimidating, and irreconcilable with [the Appellant's] continued employment." He noted that the letter stated

> …that [the] Board Members had been "complicit" in the misallocation of provincial and regional funds, and implied that certain aspects of their actions were illegal and in breach of contractual agreements. The Demand Letter was sent not only to the Board but also to provincial government officials responsible for funding, Mayors, the RCMP Detachment Commander and a provincial Minister. The letter was obviously intended to do serious damage to the reputation of the Board and its members.
>
> The letter also directed the Board to arrange payment of the funds claimed forthwith or it would be confronted with the prospect of engaging in litigation to recover an even greater wage claim. Board Members were informed that they could expect to incur personal liability in the form of "crippling" legal fees. … I note that the impetus for [the] Complainants' Demand Letter – that they were owed a significant amount of wages – is not supported by the facts... I also find it necessary to point out that the many erroneous accounting practices may have been detected and reconciled if [the Appellant] had simply submitted timesheets which accurately reflected the basis for [her] compensation. The practice of characterizing all hours as regular hours – regardless of whether they pertained to statutory holiday pay, vacation, overtime, time banked and taken as leave, left plenty of room for error.
>
> Ultimately, the Board was given a short window with which to arrange payment of significant wage claim that I have determined to be baseless… The Demand Letter permanently undermined the employment relationship. In the totality of the circumstances, the Demand Letter constituted just cause for dismissal. I find that the Society had just cause to terminate the Complainants.

45. The Appellant argues that the Board never terminated her for cause and the Delegate had no rational basis for concluding that it did.

46. I conclude that it is not necessary to make a determination on this issue. I conclude that, even if there was not just cause for the termination of the Appellant's employment, the Appellant was not entitled to compensation for length of service.

47. Section 65(1)(d) of the *ESA* provides that an employer is not liable to pay compensation for length of service where an employee is employed under an employment contract that is impossible to perform

due to an unforeseeable event or circumstance. This section codifies the common law doctrine known as "frustration" whereby a contract is deemed at an end if an external event, beyond the control of either party, renders the continued performance of the agreement impossible.

48. In my view, the mass resignation of all four volunteer directors was not reasonably foreseeable. Upon that happening, the Province, the Employer's source of funds, directed that the program be shut down and all money be returned to the province. In my view, the continued performance of the employment agreement was impossible. After the Appellant issued the Demand Letter and the directors resigned, the Employer was left with no functioning Board and no funds with which to pay the Appellant's wages. In those circumstances, it was impossible for the Appellant to perform her work.

49. Accordingly, whether or not the Appellant's employment was brought to an end by just cause, I find that the Appellant is not entitled to compensation for length of service under section 65(1)(d) because the Appellant's employment was brought to an end through the frustration of the employment contract.

Acting on a View of the Facts that Cannot Reasonably be Entertained

50. The Appellant contends that the Delegate erred in law by acting on a view of the facts that could not reasonably be entertained. Specifically, the Appellant argues that the Delegate "completely" ignored evidence she presented in support of her claim, primarily regarding the use of a time bank.

51. The Appellant submits that the Delegate erred in relying on the information supplied by the former Board member regarding the existence of a time bank over the Appellant's assertions that another former Board member assisted her in constructing and implementing a time bank system.

52. In my view, the Delegate did not mischaracterize the facts.

53. The Appellant's initial position was that she had not been paid wages, including overtime. In response to the Delegate's view that the employment contract did not indicate an entitlement to overtime or the ability to bank hours, the Appellant contended that the Employer had nevertheless agreed to such an arrangement. The Appellant made a number of submissions on this point, including assertions that another former Board member, an RCMP Corporal, signed her paycheques and was aware of "the wording and intent" of her contract. Other assertions, including one made by Mr. Kiperchuk, was that "members of the RCMP were aware of the fact that…Victim Services staff were compensated in lieu time, rather than wages, for any overtime or call-out hours…"

54. Factual findings are within the purview of the Delegate and are not reviewable on appeal unless they constitute an error of law. What the Appellant asserts as "facts" were not determined to be so by the Delegate after a review of all of the information before him.

55. As set out in the Determination, the Delegate noted that in the 17 months prior to the end of the Appellant's employment, none of the Appellant's wage statements referenced overtime, and the Appellant had not provided any documentation supporting her allegation regarding overtime. The Delegate also noted that although the Appellant claimed that the Board had made a decision

preventing her from disclosing information regarding "extra hours worked, time bank balances, vacation balances or stat-holiday-in lieu balances" to the accountant, she had "provided no documentation in support of having received such a direction, nor did she describe when or how this direction was received and from whom. I do not find her suggestion that the Board prevented her from disclosing this information to [the accountant] to be compelling." (Determination, p. R22)

56. While it is clear that the Appellant takes a different view of the facts and wishes a different result, that disagreement does not support a finding that the Delegate erred in law.

***Failure to comply with Principles of Natural Justice***

57. The Appellant contends that the Delegate failed to comply with natural justice by not completing his investigation into her complaint in a timely manner, by failing to accept the Appellant's evidence without providing adequate reasons, and by failing to complete a thorough investigation into her complaints. I will address each of these grounds of appeal in turn.

Delay

58. Delay, in and of itself, is not a basis to cancel a Determination. The leading case on the issue of delay in the administrative context is that of *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307. In that case, the Human Rights Tribunal heard complaints against Mr. Blencoe approximately 32 months after they were originally filed. Mr. Blencoe contended that the Tribunal had lost jurisdiction due to an unreasonable delay in processing the complaints and that the delay had caused him serious prejudice. The Supreme Court of Canada held that in an administrative context, to constitute an abuse of process, any delay must be so "unacceptable to the point of being so oppressive as to taint the proceedings," (*Blencoe* para. 121) and there must be evidence of prejudice flowing from that delay.

59. The Appellant's complaint was filed in May 2017. The Employment Standards Branch ("ESB") acknowledged the complaint and requested materials from the Employer on June 2, 2017. Those materials were sent to the ESB on June 14, 2017. On June 29, 2017, the Delegate issued a preliminary assessment letter to the Appellant, seeking her response and comments to his initial conclusions on various aspects of her claim.

60. While the Appellant complains that the final determination was not issued for a further 379 days, the record indicates that between June 2017 and December 2017, the parties were in regular communication. The Appellant disagreed with the Delegate's preliminary assessment and submitted a significant amount of information in response. In a December 18, 2017, email, Delegate Armstrong indicated to the Appellant he would be away from his office until January 8, 2018.

61. The Appellant sent an email to the ESB Regional Manager, Delegate Webb, on February 12, 2018, seeking an update on the status of Delegate Armstrong's investigation. In response, Delegate Webb assured the Appellant that the Delegate was working on the decision. She also advised the Appellant that Delegate Armstrong had a large workload and could not state with any certainty when the decision would be released. On April 23, 2018, Delegate Armstrong informed the Appellant that he would be away from his office until May 30, 2018, and that he would be in touch upon his return.

62. After the Appellant contacted the Deputy Minister of Labour regarding the delay in the issuance of the Determination, a telephone call was arranged between her and Chantal Webb, another delegate ("Delegate Webb") of the Director. Unbeknownst to Delegate Webb, the Appellant surreptitiously recorded the conversation. The audio, as well as a transcript, of the conversation was submitted in support of the appeal.

63. While recording conversations without notifying or obtaining the consent of the other party is not illegal, it undermines the process.

64. I note that the preliminary determination was issued less than two months after the Appellant submitted her complaint. The Appellant was offered an opportunity to respond to that preliminary assessment, and over the next seven months, there was an ongoing exchange of information and requests. In my view, if there was any delay in the issuance of the Determination, such delay occurred between January and July 2018, a period of approximately six months. In these circumstances, I am unable to conclude that the delay was "unacceptable."

65. In *Tung*, BC EST # 511/01, the Tribunal said:

> "To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. There is no abuse of process by delay *per se*. [It] must [be] demonstrate[d] that the delay was unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121). While I am of the view that the delay in this case was inordinate (this was not a complicated matter and it ought to have been dealt with considerably more expeditiously), I cannot conclude that this delay "tainted" the proceedings.

66. Furthermore, although the Appellant contends that she has suffered serious health issues as a result of the stress surrounding the loss of her employment, she has not identified any prejudice as a result of the delay in the adjudication process. On this point, I note that the Tribunal has refused to cancel determinations where there was a delay of 20 months between the filing of the complaint and the issuance of the determination, (*Westhawk Enterprises Inc.* BC EST # D302/98) of 39 months, (*Ecco II Pane Bakery Inc.* BC EST # D396/00) and over 4 years (*Tung*) because of the absence of demonstrated serious prejudice.

67. I am not persuaded there has been unreasonable delay in this case. Accordingly, I find no breach of the principles of natural justice on this ground.

Inadequate Reasons

68. The Appellant argues that Delegate Armstrong failed to accept her evidence without providing adequate reasons for doing so.

69. Specifically, the Appellant contends that the Delegate misunderstood her argument that she received vacation pay, statutory holiday pay, and banked overtime with the full knowledge and consent of the Employer. The Appellant argues that the Delegate disregarded or misinterpreted her position, which was that the Employer and the Appellant verbally agreed to her compensation. She contends that the Delegate incorrectly set out her position to be that the Board gave effect to the method of compensation by acquiescing to it. The Appellant says that her argument was supported

by evidence submitted to the Delegate, including Board meeting minutes, Board approval of Excel spreadsheets staff used to track such things as overtime and banked hours, newspaper articles, emails, and pay cheques. The Appellant says that that the Delegate did not refer to any of this evidence in denying her claim.

70. I find the Delegate analyzed the circumstances in which the Appellant (along with her co-worker) was permitted to assign hours to a time bank. After reviewing the written employment contract, which did not include any references to an ability to bank hours outside of Crisis Call Outs, the Delegate wrote:

> … I must therefore consider whether the Board, either through acceptance or abdication of its responsibilities as the employer, allowed an alteration to their terms of employment pertaining to the use of a time bank.
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> I have determined that the Board did not allow an alteration to the terms of the Complainants' employment pertaining to the use of a time bank. In reaching this conclusion my primary consideration has been whether the Board had a reasonable opportunity to inform itself of the Complainants' practices regarding time banked. I find that it did not. I have reviewed each of the wage statements that were prepared by the payroll accountant during the course of the employment term. The only wage statement to reference a time bank was the final wage statement, prepared on May 17, 2017. This was based on a submission which [the Appellant] prepared and forwarded on her last day of work. … During the approximately 17 months that she provided payroll services for the Society, [the accountant] indicated she had not heard of the use of a time bank and had not received any prior indication from [the Appellant] that time was being banked or taken as paid leave.
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> …
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> The Complainants also argued that their entitlement to the use of a time bank also stemmed from certain verbal agreements with the Board which preceded [the accountant's] tenure as payroll accountant and their current contracts.
>
> I have determined that it is unnecessary to consider whether any verbal agreements were reached between the Society and the [Appellant] prior to entering into the contract. The contract contains a clause identified as "Entire Agreement", which states [that the agreement supersedes any prior agreements]. (pages R13 – R14)

71. The Delegate also relied on other evidence from the accountant who stated that she had no directions from the Board, either directly or through the Appellant, to process payments for additional wages other than those submitted.

72. In my view, the Delegate's reasons were both intelligible and transparent, and referred to the Appellant's arguments and the documentary evidence before him. He ultimately concluded that he did not have to consider whether an ongoing verbal contract existed, as the terms of the written contract were "straightforward" and "easily discernible" and that "any prior or extraneous agreements were nullified when they signed the contracts." The Appellant's disagreement with the Delegate's conclusion does not render his reasons inadequate. I do not find that the Delegate's reasons contravene the requirement to give reasons. I also find that the result falls within a range of possible outcomes.

Failing to Complete a Thorough Investigation

73. The Appellant contends that the Delegate failed to complete a thorough investigation into her complaints. She argues the Delegate ought to have sat down in person with the Appellant to obtain a complete record of her version of events. She also says that the Delegate "refused to meet or speak over the phone" with the Appellant to review her documentary evidence.

74. The Delegate says that he chose to proceed by way of written submissions because of his belief that the Appellant was surreptitiously recording his conversations with her. He also says that the Appellant's "accusations of impropriety and demands for apologies led me to believe that written correspondence was preferable."

75. The Appellant says that the Delegate failed to obtain important minutes of the Employer's meetings as well as evidence of former Society Board members who could have provided critical, probative, and reliable evidence. Further, she says the Delegate failed to draw appropriate negative inferences from former Board members' unwillingness or inability to furnish the relevant documents.

76. The Delegate says that he sent correspondence to a number of former Board members notifying them of the complaint and enclosing a demand for employer records.

77. I am unable to conclude that the Delegate's method of deciding the Appellant's claims was incomplete or that his method of assessing the Appellant's complaint was wrong.

78. Section 76 of the *ESA* gives the Director discretion on whether to conduct an investigation and does not specify how that investigation should be conducted. The Director, and the Director's delegates, assess complaints based on the information before them based on a balance of probabilities.

79. As the Tribunal stated in *Gaspar et. al.* (2018 BCEST 48)

> The Director has discretion over how a complaint will be addressed. There is no entitlement for any party to an oral hearing before the Director. Whether one, or both, parties would prefer to have an oral hearing is not particularly relevant. The question is whether the refusal to conduct an oral hearing, in the circumstances of the particular case, amounted to a breach of the principles of natural justice.
>
> …
>
> The Tribunal will only compel an oral hearing where the case involves a serious question of credibility on one or more key issues, or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly. The concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the evidence and issues. (paragraphs 50 – 52)

80. The Delegate was entitled to decide to determine the complaint by way of investigation. Having decided to conduct an investigation, the Director's delegate has an obligation to ensure that the parties have a fair opportunity to be heard. (see also *Cariboo Gur Sikh Temple Society (1979) v. British*

*Columbia (Employment Standards Tribunal* (2019 BCCA 131) The Delegate provided the Appellant with a preliminary Assessment of her complaint and gave her an opportunity to reply to it. In light of the number of emails and documents provided to the Delegate over a six-month period, it cannot be said that the Appellant was denied an opportunity to make submissions or to advance her position.

81. The record demonstrates that the Delegate sent a letter to all four volunteer Directors of the Employer, accompanied by a Demand for Employer Records. At the time the letter was sent, the Employer had no Directors or Board members. None of the former directors responded. It is difficult to understand the Appellant's argument that the Delegate had an obligation to ether compel evidence from volunteer members of a Board that had ceased to exist, or to demand documents from a Society that had ceased to operate. The record discloses that the Delegate did speak to one of the former Board members as well as to an uninterested third-party. The Delegate was under no obligation to draw "negative inferences" from the former Board members' inability to provide Employer documents.

82. The Delegate relied largely upon documents provided by the Appellant, which he found unreliable in many respects. The Delegate noted that the Appellant was a manager and as such, was not entitled to overtime, which she had claimed. The Delegate also relied upon information provided by one of the former Board members and the accountant, an unbiased professional, in arriving at his conclusion.

83. Had the Appellant been of the view that other former Board members had information supporting her allegations, she ought to have obtained that information and presented that to the Delegate. In the circumstances, I do not find that the Delegate's investigation was inadequate or incomplete and I do not find there has been a breach of natural justice.

84. In light of my conclusions regarding the error of law and natural justice grounds of appeal, I have not listened to, nor reviewed the transcript of, the surreptitiously recorded telephone conversation between the Appellant's representative and the Regional Manager in which, purportedly, the issue of delay, inadequate reasons, and the investigation was discussed.

85. For the reasons above, the appeal is dismissed.

**ORDER**

86. Pursuant to section 115 of the *ESA*, I order that the Delegate's findings on the Appellant's claim for compensation for length of service are varied as noted above and I order that the amount of the Determination, dated July 12, 2018, be confirmed together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

**Carol L. Roberts**
**Member**
**Employment Standards Tribunal**