

Citation: Kathleen J. Parsons (Re)
2019 BCEST 85

An appeal

- by -

Kathleen J. Parsons
("Ms. Parsons")

- 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: Marnee Pearce

FILE NO.: 2019/25

DATE OF DECISION: August 21, 2019

DECISION

SUBMISSIONS

Julianne Yeager	counsel for Kathleen J. Parsons
Philip J. Dougan	counsel for A&B Tool Rentals Ltd.
John Dafoe	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Kathleen J. Parsons (“Ms. Parsons”) has filed an appeal of a determination (the “*Determination*”) issued by John Dafoe, a delegate (the “*delegate*”) of the Director of Employment Standards (the “*Director*”) dated February 8, 2019.
2. The *Determination* related to Ms. Parsons’ complaint to the Director alleging that A & B Tool Rentals Ltd. (“A&B”) contravened the *ESA* by failing to pay overtime wages and compensation for length of service and had discriminated against her contrary to section 83 of the *ESA*.
3. The *Determination* was issued following an oral hearing where both parties were represented by counsel. In the *Determination*, the delegate concluded that Ms. Parsons was a manager and therefore was not entitled to overtime wages. The delegate found no additional wages were outstanding. The delegate also found Ms. Parsons’ employment had been terminated with just cause, so A&B did not owe her compensation for length of service. Finally, the delegate found A&B had not contravened section 83 of the *ESA*.
4. On appeal, Ms. Parsons alleges the delegate made several palpable and overriding errors of fact, which she says amount to errors of law. She also says the delegate failed to observe principles of natural justice in making the *Determination*. Ms. Parsons seeks to have the *Determination* varied to find that she was an employee and therefore entitled to overtime wages and that she was not terminated for cause and therefore was entitled to compensation for length of service. Alternatively, she seeks to have her complaint referred back to the Director for a new hearing.
5. In my consideration of the appeal, I sought submissions from the parties on credibility, entitlement and payment of overtime hours worked, and unpaid profit sharing.
6. This decision is based on the written submissions of the parties, the section 112(5) record, and the Reasons for the *Determination*.

ISSUE

7. Has Ms. Parsons established any basis to interfere with the Director’s *Determination*.

FACTS AND ARGUMENT

8. Ms. Parsons was employed as an office manager with A&B from May 11, 2011, to October 16, 2017. A&B is a tool rental business operating in Surrey, BC.
9. Ms. Parsons' office manager functions included accounting, human resources, payables and receivables, benefits administration, payroll, and bank and credit card reconciliation. The accounts payable clerk reported to Ms. Parsons, and Ms. Parsons was responsible for hiring, training, overseeing and correcting the clerk's work if necessary. Ms. Parsons was responsible for approving the clerk's vacation time. She did not carry out performance reviews for the clerk. She says she would spend about 10 minutes daily answering questions from the clerk.
10. Ms. Parsons worked with and reported to Aldo Chies ("Mr. Chies"), the owner of A&B. Mr. Chies would approve Ms. Parsons' payroll documents prior to the processing of payments.
11. Ms. Parsons' hours were 8:30am to 5:00pm; however, Ms. Parsons says that starting around early 2017, she worked overtime most days, arriving at work before 8:00 am, usually not eating lunch, and continuing to work until after 5:00pm, due to the high volume of work.
12. While Ms. Parsons had signed off on A&B's overtime policy in its policy manual stating that overtime is only paid to hourly employees, Ms. Parsons nonetheless began to record the overtime on her payroll slips as "retro pay" and presented these to Mr. Chies for review and approval each payroll period. She testified that she also banked and recorded on the payroll extra hours for two other managers at their request.
13. Ms. Parsons did not ask for permission to record and pay herself extra hours and did not tell Mr. Chies she had done so, but she asserted that Mr. Chies knew that she was working overtime because they worked so closely together. She asserted Mr. Chies had allowed her to work the extra hours and she believed he saw and approved the payment of her overtime hours because he reviewed the payroll documents.
14. Mr. Chies testified that he did not review the payroll documents relating to the managers in detail, as they were on salary, but would review branch-wide overtime numbers.
15. On October 12, 2017, while reviewing Ms. Parsons' payroll documentation, Mr. Chies noticed that her direct deposit slips included an entry for 'retro pay', but there was no indication of 'retro pay' amounts on the employee detail sheet. When confronted by Mr. Chies, Ms. Parsons explained that this was for extra work she was performing.
16. On October 16, 2017, Mr. Chies terminated Ms. Parsons' employment with cause.
17. In December 2017, A&B filed a complaint against Ms. Parsons with the RCMP.
18. On April 16, 2018, Ms. Parsons filed her complaint with the Director.
19. The delegate conducted an oral hearing. Both parties were represented by counsel and gave oral evidence.

20. In the Determination, the delegate found that Ms. Parsons was a manager for A&B as she exercised independent authority with regards to the hiring, supervision, and direction of an accounts payable clerk, and she had autonomous decision-making authority involving credit accounts. As he found she was a manager, she was therefore exempted from entitlement to overtime wages.
21. The delegate went on to consider whether she was owed additional wages for work performed over and above the hours for which she was compensated by her salary. After reviewing the payroll for the last six months of employment for Ms. Parsons, the delegate found “the amount she has added to her cheques in the form of “retro pay” exceeds any additional pay that would be due to her for hours she worked beyond an average of forty in a week”, even if he accepted Ms. Parsons’ records of hours worked without question (Determination, p. R10). Accordingly, the delegate found that Ms. Parsons was not entitled to additional wages for extra hours worked.
22. In considering the question of whether A&B owed Ms. Parsons compensation for length of service, the delegate found that Ms. Parsons:
- ... chose to unilaterally pay herself additional wages without authorization and without informing her employer. As Mr. Chies worked in close proximity to Ms. Parsons it would have been a very simple matter to directly raise the matter with him. She did not do so. Ms. Parsons held a position of trust with A&B where, as illustrated by these events, she was in a position to independently alter conditions of employment. I find that in doing so she irredeemably broke A&B’s trust and, accordingly, A&B had just cause to terminate her employment. ... (Determination, p. R11)
23. Accordingly, the delegate found that Ms. Parsons was not entitled to compensation for length of service.
24. With respect to the question of whether A&B owed Ms. Parsons compensation for a contravention of section 83 of the *ESA*, the delegate found that Mr. Chies’ decision to report what he considered to be a fraudulent activity by Ms. Parsons to the RCMP four months prior to a complaint being filed under the *ESA* did not constitute a contravention under section 83 of the *ESA*.

ARGUMENT

25. Ms. Parsons argues the Delegate erred in finding that Ms. Parsons was a manager and therefore not entitled to overtime pay under the *ESA*, erred in finding there was no retaliation, and erred in finding A&B had just cause to dismiss Ms. Parsons.
26. Ms. Parsons also argues there was a failure of natural justice in rendering the Determination. She says the delegate erred in finding her evidence was vague or evasive and she argues there was undue delay in reaching a decision. She also alleges the delegate failed to make a finding about Ms. Parsons’ right to profit-sharing for work performed from June 1 to August 31, 2017.
27. A&B argues the appeal should be dismissed. A&B argues the delegate made reasonable findings of fact and correctly applied the *ESA*. A&B notes the test for palpable and overriding error is a stringent one and the errors alleged by Ms. Parsons do not amount to palpable and overriding errors. A&B notes the trier of fact is entitled to considerable deference on his findings of fact. On matters of credibility, A&B says the delegate preferred A&B’s evidence, as he was entitled to do.

Status as a manager

28. Ms. Parsons submits the onus was on A&B to show that Ms. Parsons was a manager. Ms. Parsons says A&B did not adduce evidence showing that Ms. Parsons' duties primarily involved supervising a part-time accounts payable clerk or approving credit, or that she had autonomous authority to approve credit, or that she was employed in an executive capacity. Accordingly, Ms. Parsons says the Delegate erred in law in finding that Ms. Parsons was a manager.
29. As well, Ms. Parsons submits the Delegate relied on a number of flawed findings of fact that had no basis in the evidence to find that Ms. Parsons was a manager.
30. With respect to the hiring, supervision, and direction of the accounts payable clerk, Ms. Parsons says that her uncontested evidence was that she hired an accounts payable clerk in 2017 to replace one that had retired. She sought permission from Mr. Chies to hire the clerk, and he gave permission for her to hire a clerk at the usual starting rate for administrators. The clerk was paid the same rate, had the same duties, and worked the same hours as the previous clerk. Ms. Parsons' uncontested evidence was that she spent about ten minutes per day answering questions from the account payable clerk. She says she did not "supervise" the clerk as the clerk and her predecessor required little direction from Ms. Parsons.
31. Ms. Parsons says it was "incorrect" for the delegate to find that Ms. Parsons exercised independent authority with regard to the hiring, supervision, and direction of the accounts payable clerk. Rather, Ms. Parsons only did what A&B had done before and there was no evidence to suggest Ms. Parsons spent more than ten minutes a day directing the clerk by answering her questions.
32. Although the delegate stated "all finance clerks reported to Ms. Parsons", Ms. Parsons said there was only one clerk who worked part-time and required minimal supervision. To the extent that the delegate relied upon this to determine Ms. Parsons was a manager, Ms. Parsons says this is a palpable and overriding error.
33. Ms. Parsons notes the delegate referred to "credit clerks" in the Determination and says neither party gave evidence about credit clerks working for A&B. To the extent that the delegate relied upon this to determine Ms. Parsons was a manager, Ms. Parsons says this is a palpable and overriding error.
34. Ms. Parsons says the evidence does not support the finding that Ms. Parsons was either primarily employed to supervise or direct human or other resources or employed in an executive capacity. The evidence was that the only person Ms. Parsons hired was the accounts payable clerk and she spent minimal time supervising or directing her. Ms. Parsons submits the delegate had an insufficient factual basis upon which to find that Ms. Parsons was the manager of the accounts payable clerk and took into account inaccurate evidence in coming to this finding and therefore committed a palpable and overriding error of fact. Ms. Parsons further submits the delegate committed an error of law by determining on the facts that Ms. Parsons was a manager.
35. With respect to Ms. Parsons' authority to approve credit, Ms. Parsons said the delegate found that Ms. Parsons did not challenge Mr. Chies' evidence that she had autonomous decision-making authority over credit accounts. In her testimony, however, Ms. Parsons says she said she vetted and proposed approvals

for credit and then submitted her recommendations to Mr. Chies for approval. Accordingly, Ms. Parsons says she had no independent authority to approve work on credit.

36. Ms. Parsons says the onus was on A&B to disprove Ms. Parsons' claim, not on Ms. Parsons to challenge A&B's defence. Ms. Parsons says the delegate erred in law in putting the onus on Ms. Parsons to specifically challenge every aspect of A&B's defence in order to prove her claim.
37. Ms. Parsons argues there was no evidence approving credit was her primary responsibility and the delegate had no basis to determine that Ms. Parsons had final authority to issue credit to customers, either from Mr. Chies evidence or Ms. Parsons' evidence.
38. Ms. Parsons also argues the evidence did not establish that Ms. Parsons was employed in an executive capacity.
39. Ms. Parsons submits that if she was not a manager, and was therefore entitled to overtime pay, "then initiating payment of overtime pay in compliance with the [ESA] would not be a breach of A&B's trust amounting to cause to dismiss. Rather, it would be an innocent remediation of A&B's persistent breach of the [ESA]."
40. A&B says Ms. Parsons is attempting to minimize her role with A&B. A&B says Ms. Parsons had specific and significant responsibilities. A&B says she hired and supervised an office (accounts payable) clerk and prior to the current clerk, Ms. Parsons supervised a different clerk and has therefore supervised at least two clerks during her term of employment.
41. A&B says a manager need not exclusively manage staff to be a manager. A&B says Ms. Parsons managed human and other resources. As well, A&B says the approval of credit for clients was part of Ms. Parsons' job.
42. With respect to the argument that Mr. Chies, as the boss, had the final say on any given decision or the ability to override a decision of an employee, A&B argues it is a reality of employment and not an indication of whether Ms. Parsons was a manager.
43. The delegate acknowledges the reference to "credit clerks" in the Determination was in error. However, he said the analysis of whether Ms. Parsons was a manager did not refer to her supervision of clerks, but only her role in hiring and supervising the current accounts payable clerk.
44. In reply, Ms. Parsons argues A&B mischaracterizes Ms. Parsons' appeal. Ms. Parsons says she was not a manager because she did not meet the criteria in the *Employment Standards Regulation* (the "Regulation"). Ms. Parsons says her uncontroverted evidence is that she spent about ten minutes per day reviewing a clerk's work product and prepared credit accounts for Mr. Chies' approval.
45. Ms. Parsons also notes that A&B has corroborated her evidence that when advertising for the accounts payable clerk position, Ms. Parsons replicated the terms of employment of the previous clerk and did not unilaterally determine those terms herself or exercise any authority other than to replace the previous clerk.

46. Ms. Parsons also alleges the delegate's submissions give no basis for his finding that Ms. Parsons' primary employment responsibilities consisted of supervising or directing human or other resources or that she was employed in an executive capacity. Ms. Parsons submits that Mr. Chies' evidence was consistent with Ms. Parsons' evidence that she only spent ten minutes per day supervising the part-time accounts payable clerk. Ms. Parsons submits the delegate made a finding in law that Ms. Parsons exercised a "primary" supervisory role, without having any factual basis for such a finding. Ms. Parsons further submits that the delegate's acknowledged errors in recording the facts concerning Ms. Parsons' authority over "finance clerks" and "all the credit clerks", coupled with the eight-month delay in producing the Determination led to a palpable and overriding error.

Retaliation

47. Ms. Parsons submits the delegate erred in fact and in law by failing to consider the express wording of section 83. Ms. Parsons notes that section 83(1)(d) provides that an employer must not intimidate or impose a penalty on a person because a complaint or investigation "may be made" under the *ESA*. Ms. Parsons submits the delegate placed weight on the fact that Ms. Parsons did not file her complaint with the Director until April 2018 and found that because the police report was filed in December 2017, there was no retaliation. However, Ms. Parsons says the delegate failed to consider that Ms. Parsons sent Mr. Chies a demand letter seeking damages for wrongful dismissal and threatening to make a claim under the *ESA* in late November 2017 and he contacted the police within a week. Ms. Parsons alleges the demand letter triggered the police complaint.
48. A&B says it did not retaliate against Ms. Parsons, rather it followed the advice of its counsel who was appointed after A&B's insurer reviewed coverage for the claims advanced by Ms. Parsons.
49. In reply, Ms. Parsons says it is improper for A&B to raise the issue of its police complaint and resulting criminal trial to taint the Tribunal's assessment of Ms. Parsons' credibility.

Entitlement to compensation for length of service

50. With respect to the finding that Ms. Parsons was not entitled to compensation for length of service because she had been dismissed for just cause, Ms. Parsons argues the delegate failed to account for her reasonably and honestly held reasons for not raising the matter of overtime pay with Mr. Chies.
51. In particular, Ms. Parsons says she had been instructed by two store managers to record and pay out banked time in excess of their contracted hours. She says when those managers instructed her to pay out the banked hours she did so – either for various paid days off or for vacation time. Ms. Parsons says the delegate did not consider the time sheets submitted by the store managers to Ms. Parsons in his reasons. Ms. Parsons says that when she saw that the store managers were having their additional hours approved by Mr. Chies, she decided to start recording her own overtime to use when she took time off. However, when it became apparent she would not be able to take enough time off to use the overtime, she began to prepare a pay statement for herself that included a "retro pay" line. She says that she gave her pay statements to Mr. Chies each pay period and she saw he reviewed the pay statements and concluded he approved of her overtime payments.

52. Ms. Parsons says that the delegate committed a palpable and overriding error of fact by failing to determine whether Ms. Parsons was instructed to record and pay out additional time to the store managers. She says this error relates directly to whether Ms. Parsons gave cause to dismiss by initiating payment of overtime to herself.
53. Ms. Parsons also alleges the delegate made a palpable and overriding error of fact by ignoring or not considering affidavits from the store managers. Ms. Parsons alleges the affidavits were improperly made because they were not in the affiants' own words. While the affidavits were not mentioned in the Determination, Ms. Parsons says the credibility of Mr. Chies ought to have been assessed "[i]n part based on the fact that his employees submitted improperly sworn affidavits in support of his case." Ms. Parsons also alleges A&B "engaged in a campaign of fabricating...records for the purpose of defeating Parsons' complaint".
54. Ms. Parsons submits that because the store managers were not dismissed for cause for instructing Ms. Parsons to bank and pay out their additional hours, Ms. Parsons cannot be treated as having given cause to dismiss for engaging in the same behaviour. Ms. Parsons submits the delegate committed a palpable and overriding error of fact by failing to account for the fact that the store managers remain employed.
55. A&B says Ms. Parsons' employment contract excluded overtime but provided for a performance bonus based on the overall profitability of the company. She was trusted with A&B's money and that trust was destroyed. Her employment was terminated for taking funds without authorization.

Breach of natural justice

56. Ms. Parsons says the delegate found that she was "vague and evasive" in her testimony and preferred the evidence of Mr. Chies, which was described as "detailed and specific". However, Ms. Parsons alleges the delegate accepted evidence from Mr. Chies that was vague, speculative, contradictory, or untrue.
57. In particular, Ms. Parsons says the delegate accepted evidence from Mr. Chies about Ms. Parsons' start times that were speculative, instead of the specific times Ms. Parsons noted in her payroll journal. The delegate accepted evidence from Mr. Chies that all finance clerks reported to Ms. Parsons, when there was only one finance clerk.
58. Ms. Parsons says the fact the store managers denied involvement or knowledge of the banked time payout, and Mr. Chies accepted their statements notwithstanding that they were recording and submitting their additional hours, indicates an "animus" towards Ms. Parsons.
59. Regarding the issue of credibility, Ms. Parsons says her evidence was not vague; rather, the delegate ignored or forgot about it in the eight months between the hearing and the Determination.
60. Ms. Parsons submits the delegate did not refer to a settlement offer Mr. Chies made to Ms. Parsons in the Determination or to Ms. Parsons' argument that Mr. Chies' willingness to pay out statutory notice indicated that he did not believe he had cause to dismiss Ms. Parsons.
61. Ms. Parsons says her evidence was not vague – she kept a detailed record of her total time worked each day in a payroll journal that was submitted as part of A&B's evidence. She was able to account for her

daily activities in detail. She alleges the delegate either ignored or forgot her evidence in the eight months between the hearing and the Determination.

62. Ms. Parsons says the delegate committed a palpable and overriding error by determining that her evidence was vague or evasive. She says this error goes to the root of the Determination.
63. Ms. Parsons also argues there was undue delay in issuing the Determination. The Determination was not issued until February 8, nearly eight months after the oral hearing. Ms. Parsons submits the “extensive delay is partly responsible for the Delegate’s faulty recollection and recitation of the evidence and operates as a fundamental failure of natural justice for [Ms.] Parsons.”
64. A&B says the delegate, on matters of credibility, preferred the evidence of A&B as “is open to any adjudicator”.
65. The delegate says two main issues turned on questions of credibility. The first issue which turned on credibility was the question of the hours worked by Ms. Parsons. The delegate notes that having found that Ms. Parsons was a manager within the meaning of the *ESA* and having found that her salary compensated her for only 40 hours per week, it was only necessary to determine whether she was due additional wages at the straight time rate for hours worked in excess of 40 in a week. In conducting this analysis, the delegate states he only used Ms. Parsons’ record of hours worked and found that no wages were owed. While Ms. Parsons alleges significant weight was placed on Mr. Chies’ evidence, the delegate says no weight was placed on Mr. Chies’ testimony because the only comprehensive record of hours worked was recorded by Ms. Parsons in the payroll journal.
66. The delegate notes that it was with respect to the question of her hours of work and her approach to dealing with the compensation for those hours that Ms. Parsons’ evidence was problematic. This is because she referred frequently to “assuming” that Mr. Chies was aware of her hours and “assuming” that he was aware she was paying herself additional wages without ever acknowledging the proximity in which they worked provided her the regular opportunity to raise these matters with Mr. Chies.
67. The delegate states that the most important question that turned on credibility was the degree of independent authority exercised by Ms. Parsons. The delegate says Ms. Parsons provided scant direct evidence with respect to the hiring and supervision of the accounts payable clerk. She acknowledged that she hired the clerk and indicated she would only spend about ten minutes per day answering questions from the clerk and she was not responsible for carrying out her performance review. Under cross-examination, Ms. Parsons acknowledged the clerk reported to her, she was responsible for monitoring the clerk’s work and correcting it, and for approving any vacation. Ms. Parsons stated the clerk required minimal direction and that Mr. Chies would also deal with her. Mr. Chies testified that Ms. Parsons was the sole point of control and direction for the clerk, she posted the recruitment ad, hired and set the wage rate and duties and hours of work for the new hire. This evidence was not rebutted when the opportunity arose.
68. The delegate wrote that although the appeal submissions indicate that Ms. Parsons gave evidence that the new hire payment clerk was “paid at the same rate, had the same duties and worked the same hours as the previous clerk” Ms. Parsons did not actually provide this evidence at the hearing. She did, under

cross-examination, state that the ad placed was a ‘standard ad’ and that the clerk was paid an annual salary.

69. In reply, Ms. Parsons asserts that documents submitted to the Tribunal by A&B in its response submissions ought properly to have been disclosed prior to the adjudication before the delegate. Ms. Parsons says that the adjudication without the benefit of these documents was prejudicial to Ms. Parsons and resulted in a failure of natural justice.
70. In particular, Ms. Parsons believes that the documents should be taken as a strong indication that she believed her actions were lawful, that her actions were based on instructions from managers at A&B, and supported her belief that she herself was entitled to the banked pay she submitted to Mr. Chies for approval.
71. Ms. Parsons also asserts A&B may have evidence concerning Ms. Parsons’ manner of treatment for the purpose of assessing profit sharing that will disclose that Ms. Parsons was not treated by A&B as a manager for the purposes of assessing profit sharing, and that withholding these documents is prejudicial to Ms. Parsons and has resulted in the failure of natural justice.
72. In reply to the delegate’s submissions, Ms. Parsons says the delegate’s acknowledgement of errors in the Determination are “indicative of the issues raised in this appeal and further indicate a failure of natural justice caused by the Delegate’s inaccurate recording of the parties’ evidence and his lengthy delay in producing the Decision.” Ms. Parsons says it was not clear from the Determination what areas of Mr. Chies’ evidence were relied upon in finding that Ms. Parsons was a manager, except that in general, Mr. Chies’ evidence was preferred. Ms. Parsons asserts that placing “any weight on Mr. Chies’ evidence would have been an error of fact, as Mr. Chies’ evidence was without merit at all in this respect, whereas Ms. Parsons’ was fulsome and not seriously contradicted.”
73. With respect to the delegate’s statement that Ms. Parsons’ assumption that Mr. Chies reviewed her weekly pay records was problematic from a credibility standpoint, Ms. Parsons submits that her actions and evidence should be viewed in light of her comprehensive record-keeping and use of bold red script in the records A&B submitted on appeal. Ms. Parsons states it was not unreasonable for Ms. Parsons to conclude that Mr. Chies was aware and approved of her overtime work and payments and the delegate erred in narrowing his view of the parties’ evidence to consider only Ms. Parsons’ physical proximity to Mr. Chies.

Unpaid profit sharing

74. Ms. Parsons says the delegate failed to make any finding about the profit sharing claimed for work she performed from June 1 to August 31, 2017.
75. In response, the delegate states the question of unpaid profit sharing was only touched on in passing in the hearing and that there was no claim made for unpaid profit sharing in the original complaint. The delegate says in the opening statement made by counsel for Ms. Parsons, it was not identified as something they intended to show was owed to her. Ms. Parsons mentioned it only at the end of her direct evidence when she indicated what a calculation in her evidence represented and indicated it had not been paid to her. Mr. Chies’ evidence was that it was not paid because of specific rules around profit sharing

including that an employee had to be employed when the cheques were issued to be entitled. This was not challenged in cross-examination and there was no indication that this was disputed. Accordingly, the delegate states there was no claim for profit-sharing advanced in the complaint or at the hearing.

ANALYSIS

76. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- a. the director erred in law;
 - b. the director failed to observe the principles of natural justice in making the determination;
 - c. evidence has become available that was not available at the time the determination was being made.
77. 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 that made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
78. 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;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of facts which could not reasonably be entertained; and
 5. Adopting a method of assessment which is wrong in principle.
79. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on an appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
80. The principles of nature 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.

Did the delegate err in finding that Ms. Parsons was a manager?

81. Section 1 of the *Regulation* defines a "manager" as: (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human and other resources; or (b) a person employed in an executive capacity.
82. If the employee's duties do not primarily consist of supervising and directing other employees or the employee is not employed in an executive capacity (actively participating in the control, supervision and

management of the business), then the individual is not a manager (see *Howe Holdings Ltd.*, BC EST # D131/04).

83. A question about whether an employee is a manager under the *ESA* is one of mixed fact and law, requiring an application of findings of facts about what the employee actually does to the definition of manager in the *Regulation*. As indicated above, the Tribunal has authority over questions of mixed law and fact where “a question of law can be extricated that has resulted in the error”: *Britco Structures*, supra.

84. As has been stated by the Tribunal in many previous decisions, it is irrelevant to the conclusion that the person is described by the employer as a “manager”, as that would be putting form over substance.

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgements about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person. (*Director of Employment Standards (re: Amelia Street Bistro)* BC EST # D479/97.

85. I find the delegate did not err in finding that Ms. Parsons was a manager within the definition of the *Regulation*.

86. The evidence before the delegate showed that Ms. Parsons’ responsibilities included hiring a clerk. This involved advertising, interviewing, and choosing a candidate. The evidence does not support Ms. Parsons’ assertion that she did not have independent authority in hiring, even if the rate of pay and hours of work were the same as the previous clerk. Ms. Parsons confirmed that the employee she hired was trained by her, reported to her, monitored by her, and she corrected the employee’s work. Ms. Parsons approved her vacation and time off. She was responsible for answering the clerk’s questions. Even if answering questions only took ten minutes per day, that did not mean that supervising and directing the clerk was not one of her primary responsibilities.

87. Further, Ms. Parsons’ remaining employment responsibilities included participating in the control, supervision, and management of the financial and other aspects of the business. Her duties included payroll, accounting, human resources, payables and receivables, the negotiation of contracts with suppliers, and signing off on various bank transactions.

88. The delegate considered the above, and also considered the evidence from Mr. Chies that Ms. Parsons exercised independent authority with respect to decisions involving extending credit accounts to clients. Ms. Parsons argues that the delegate overlooked or misapprehended her testimony that the ultimate authority for approving customer credit fell to Mr. Chies. However, while the ultimate approval may have been given by Mr. Chies, the primary decision to recommend the approval of credit was made by Ms. Parsons.

89. Ms. Parsons argues that the delegate erred in finding that there were multiple credit clerks. The delegate acknowledged this was an error but said his primary basis for finding that Ms. Parsons was a manager was that she exercised independent authority regarding the hiring, supervision, and direction of the accounts payable clerk, as well as with respect to decisions involving extending credit. I am not persuaded the delegate's reference to credit clerks in his summary of the testimony amounts to a palpable and overriding error. In reviewing the Determination, it is clear the delegate relied on Ms. Parsons' supervision of the accounts payable clerk and decisions involving credit to find she was a manager, and not on the supervision of other credit clerks.

90. Where there is no evidence that the Director acted without any evidence or a view of evidence that could not be reasonably entertained, or committed a 'palpable, overriding error' or arrived at a 'clearly wrong conclusion of fact', the Tribunal is reluctant to substitute the delegates findings of fact even if it is inclined to reach a different conclusion on the evidence. (*Re: United Specialty Products Ltd.*, BC EST # D075/12).

91. I find there was evidence available to the delegate to find that Ms. Parsons was a manager. I am not persuaded the delegate has made any palpable or overriding errors that would impact this conclusion.

Did the delegate err in finding that Ms. Parsons was not entitled to compensation under section 83?

92. Section 83(1)(d) provides that an employer must not intimidate or coerce or impose a monetary or other penalty on a person, because a complaint or investigation may be or has been made under the *ESA* or because an appeal or other action may be or has been taken or information may be or has been supplied under the *ESA*.

93. Ms. Parsons submits the delegate found there was no retaliation because Ms. Parsons did not file her complaint with the Director until April 2018 – four months after the police report was filed. However, Ms. Parsons says the delegate failed to consider the evidence that Ms. Parsons sent Mr. Chies a demand letter seeking damages for wrongful dismissal and threatening to make a claim under the *ESA* in late November 2017, and he contacted the police within a week of receiving that letter. Ms. Parsons alleges the demand letter threatening to make a claim under the *ESA* triggered the filing of the police report. Ms. Parsons submits the delegate erred in fact and in law by failing to consider the express wording of section 83, and, in particular, the words that a complaint "may be made".

94. The delegate accepted Mr. Chies' evidence that his decision to report the matter to the RCMP was made after his lawyer asked why he had not filed a police report and not in retaliation for Ms. Parsons' demand letter indicating that she would be complaining under the *ESA*. While the timing is very close between the demand letter and the police report, I am not persuaded the delegate has erred in law in finding A&B did not contravene section 83 of the *ESA*. The delegate accepted Mr. Chies' explanation, as he was entitled to do, and I find no basis for interfering with this finding.

Did the delegate err in finding Ms. Parsons was not entitled to compensation for length of service?

95. Ms. Parsons argues the delegate failed to account for her reasonably and honestly held reasons for not raising the matter of overtime pay with Mr. Chies. Ms. Parsons says that the delegate committed a palpable and overriding error of fact by failing to determine whether Ms. Parsons was instructed by the

store managers to record and pay out additional time to them. She says this error relates directly to whether Ms. Parsons gave cause to dismiss by initiating payment of overtime to herself.

96. Ms. Parsons submits that because the store managers were not dismissed for cause for instructing Ms. Parsons to bank and pay out their additional hours, Ms. Parsons cannot be treated as having given cause to dismiss for engaging in the same behaviour. Ms. Parsons submits the delegate committed a palpable and overriding error of fact by failing to account for the fact that the store managers remain employed.
97. Ms. Parsons also alleges the delegate made a palpable and overriding error of fact by ignoring or not considering affidavits from the store managers. Ms. Parsons alleges the affidavits were improperly made because they were not in the affiants' own words. Ms. Parsons says the credibility of Mr. Chies ought to have been assessed "in part based on the fact that his employees submitted improperly sworn affidavits in support of his case."
98. The delegate considered the evidence relating to whether A&B had just cause to dismiss Ms. Parsons. This includes Ms. Parsons' explanation of events leading to her payment of additional monies she believed she was owed. However, the delegate was not persuaded by Ms. Parsons' explanation about why she did not speak directly to Mr. Chies about the fact that she was adding additional monies to her pay statement for overtime she had worked. They worked in the same office, three feet apart. She had the opportunity to raise the issue directly with Mr. Chies, but she chose not to and instead "assumed" he knew that she was adding the extra money to her pay statement. Ultimately, Ms. Parsons did not satisfy the delegate that she had her employer's permission to pay herself extra money. Whether the store managers were entitled to have their overtime banked, whether they instructed her to do it, and whether they remained employed is not the matter at issue. The question before the delegate was whether Ms. Parsons had given her employer just cause to terminate her employment. Ms. Parsons had the responsibility for the payroll. By paying herself extra money without express permission from her employer, the delegate found the employer had just cause to dismiss her.
99. I am not persuaded that there is an error of law regarding the findings made by the delegate - there was evidence available and considered on which the delegate could reasonably arrive at the decision made. I do not find that a palpable and overriding error of fact was made.

Was there a breach of natural justice by the delegate?

100. The principles of nature 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.
101. Ms. Parsons submits that the delegate unfairly accepted evidence provided by Mr. Chies that was vague, speculative, contradictory, and plainly untrue. In particular, Ms. Parsons says the delegate accepted evidence from Mr. Chies about Ms. Parsons' start times that were speculative instead of the times Ms. Parsons noted in her payroll journal. The delegate accepted evidence from Mr. Chies that all finance clerks reported to Ms. Parsons, when there was only one finance clerk. Ms. Parsons submits that her evidence was not vague but was either ignored by the delegate or forgotten in the 8 months between the hearing and the decision. She kept a detailed record of her total time worked each day; she was able to recount

instructions given to her by the store managers and show that she followed their instructions with reference to the payroll records.

102. However, as the Determination indicates, the delegate did not rely on Mr. Chies' evidence about Ms. Parsons' start time, rather he only recounted that Mr. Chies gave that evidence. As is clear in the Determination, the delegate found "the amount she has added to her cheques in the form of "retro pay" exceeds any additional pay that would be due to her for hours worked beyond an average of forty in a week", even if he accepted Ms. Parsons' records of hours worked without question (Determination, p. R10). Thus, Ms. Parsons' records of her time were accepted, rather than Mr. Chies' evidence about her hours of work. With respect to the accounts payable clerk, it is clear the delegate only relied on the information regarding the current accounts payable clerk.

103. Ms. Parsons and Mr. Chies provided different evidence as it related to the participation of the store managers in the recording and payment of banked hours. However, it is clear it was not necessary to rely on what instructions, if any, had been given by the store managers or whether the store managers were entitled to overtime. The question before the delegate was whether Ms. Parsons was entitled to pay herself extra money for overtime. There was no evidence the other store managers had told her that her overtime payments had been approved.

104. The delegate found Ms. Parsons' explanation for why she did not seek express authorization for payment of the additional hours worked was not credible. She testified that she assumed Mr. Chies was reviewing and was aware of the payments of banked monies to herself and the store managers. She asserted that Mr. Chies knew she was working, allowed her to put in the hours, and authorized each payroll. However, Ms. Parsons did not acknowledge the proximity in which she and Mr. Chies worked provided her the regular opportunity to raise these matters with Mr. Chies. I find that the delegate's finding about credibility in this regard is not an error of law or a breach of natural justice, but rather a finding of credibility the delegate made after hearing the evidence. I find no basis to interfere with this finding.

105. Ms. Parsons also argues that the eight months delay in rendering the Determination was undue delay. Ms. Parsons submits the "extensive delay is partly responsible for the Delegate's faulty recollection and recitation of the evidence, and operates as a fundamental failure of natural justice for [Ms.] Parsons." I am not persuaded that the eight months between the date of the oral hearing and the Determination amounts to unreasonable delay in this case. Accordingly, I find no breach of the principles of natural justice on this ground.

106. Ms. Parsons argues the delegate did not refer to a settlement offer Mr. Chies made to Ms. Parsons or to Ms. Parsons' argument that Mr. Chies' willingness to pay out statutory notice indicated that he did not believe he had cause to dismiss Ms. Parsons. I find the fact that Mr. Chies may have made a settlement offer is not necessarily an admission that he did not have cause, but a desire to enter into settlement discussions.

107. In reply, Ms. Parsons asserts that documents submitted to the Tribunal by A&B in its response submissions ought properly to have been disclosed prior to the adjudication before the delegate and that the adjudication made without the benefit of these documents was prejudicial to Ms. Parsons and resulted in a failure of natural justice. She says the documents support her assertion that she believed her actions were lawful, that her actions were based on instructions from managers at A&B, and that it supported her

belief that she herself was entitled to the banked pay she submitted to Mr. Chies for approval. I find these documents do not support the assertion that her actions were lawful or that she was entitled to the banked pay. In any event, the fact that Ms. Parsons used bold red script on the payroll documents was information Ms. Parsons' had prior to the adjudication (as she was the one who had used the bold red script in the documents). Even without the documents, she could have testified that she used bold red script in the documents and argued therefore it was not unreasonable to assume that Mr. Chies was aware of her overtime work. As such, I find there has not been a breach of natural justice in failing to disclose these documents.

108. In reply, Ms. Parsons also asserts A&B may have evidence concerning Ms. Parsons' manner of treatment for the purpose of assessing profit sharing that will disclose that Ms. Parsons was not treated by A&B as a manager for the purposes of assessing profit sharing and that withholding these documents is prejudicial to Ms. Parsons and has resulted in the failure of natural justice. Ms. Parsons does not identify these documents and I find this amounts to speculation. I find no breach of natural justice on this ground.

Did the delegate err by failing to make a finding about profit-sharing?

109. On appeal, Ms. Parsons alleges the delegate failed to make any finding about the profit sharing claimed for work she performed from June 1 to August 31, 2017.

110. The delegate states the question of unpaid profit sharing was touched on only in passing in the hearing and that there was no claim made for unpaid profit sharing in the original complaint. The delegate says in the opening statement made by counsel for Ms. Parsons, it was not identified as something they intended to show was owed to her. Ms. Parsons mentioned it only at the end of her direct evidence when she indicated what a calculation in her evidence represented and indicated it had not been paid to her. Mr. Chies' evidence was that it was not paid because of specific rules around profit sharing, including that an employee had to be employed when the cheques were issued to be entitled. This was not challenged in cross-examination and there was no indication that this was disputed. Accordingly, the delegate states there was no claim for profit-sharing advanced in the complaint or at the hearing.

111. The delegate's submissions were not challenged in reply by Ms. Parsons. Accordingly, I find no error in the delegate's failure to address the profit sharing claimed by Ms. Parsons.

ORDER

112. Pursuant to section 115 of the *ESA*, I order the Determination, dated February 8, 2019, be confirmed.

Marnee Pearce
Member
Employment Standards Tribunal