Citation: Paladin Security Group Ltd. (Re)
2020 BCEST 135

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Paladin Security Group Ltd.
(the "Employer")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

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

and

An application for suspension

- by –

Paladin Security Group Ltd.
(the "Employer")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

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

PANEL: Kenneth Wm. Thornicroft

FILE Nos.: 2020/098

DATE OF DECISION: November 20, 2020

DECISION

SUBMISSIONS

Danny Bernstein	legal counsel for Paladin Security Group Ltd.
Alexandre Bigras	on his own behalf
Shannon Corregan	delegate of the Director of Employment Standards

INTRODUCTION

1. Paladin Security Group Ltd. (the "Employer") appeals a Determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the "delegate"), on May 25, 2020. This appeal is filed pursuant to section 112(1)(a) and (b) of the *Employment Standards Act* (the "*ESA*"). The Employer says that the delegate erred in law or otherwise failed to observe the principles of natural justice in making the Determination.

2. By way of the Determination, the Employer was ordered to pay a former employee (the "complainant") $1,927.45 on account of unpaid wages and section 88 interest. The delegate also levied three separate $500 monetary penalties (see section 98) based on the Employer's contraventions of sections 17 (payment of wages earned in a pay period), 18 (payment of wages after termination), and 25 (reimbursement for special clothing cleaning costs). Accordingly, the total amount payable by the Employer under the Determination is $3,427.45.

3. This appeal principally concerns when a person is "being trained by an employer for the employer's business" (see section 1(1) definition of "employee", subsection (c) of the *ESA*), and the scope of an employer's obligation to reimburse employees for their "special clothing" cleaning costs (see section 25).

4. There is one unusual aspect to this appeal. The Employer paid the entire amount due under the Determination (including penalties) to the Director of Employment Standards, and these funds have been deposited into the Director's trust account. The Employer, through its legal counsel, says "…although [the Employer] disputes the wages ordered to be paid to [the complainant] by the Delegate, should [the Employer] succeed in its appeal it will not be seeking repayment of any amounts paid to [the complainant]."

5. As previously noted, the monies ordered to be paid to the complainant are currently being held in the Director's trust account. In my view, the Tribunal does not have any statutory authority to make orders regarding funds that are held in trust by the Director. The Director's authority to pay out funds held in trust is governed by section 99 of the *ESA*. In my view, the Employer's submission regarding the monies currently being held in trust constitutes an unequivocal direction to the Director to pay out those monies to the complainant, but in my view, that is not something I have any jurisdiction to order if the Employer were to succeed in its appeal.

6. In its appeal submission, the Employer requested an order suspending the Determination under section 113. By letter dated July 6, 2020, the Tribunal's Registrar advised the Employer that in light of the delegate's advice that the funds held in trust would continue to be held in trust pending the outcome of this appeal, "the Tribunal does not find it necessary to make an Order on the suspension issue at this time."

7. The Employer also sought an order extending the appeal period under section 109(1)(b) of the *ESA*. I now turn that application.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

8. The delegate issued the Determination and her accompanying "Reasons for the Determination" (the "delegate's reasons") on May 25, 2020, following a complaint hearing held on April 23, 2020. The statutory deadline for appealing the Determination, as set out in that document and presumably calculated in accordance with section 113(3)(a) of the *ESA*, was July 2, 2020. This deadline, along with other relevant information regarding the appeal process, is set out in a text box found at the bottom of the third page of the Determination.

9. The Employer filed its appeal form (using a form the Tribunal has posted on its website) on June 29, 2020. The Employer appended a written submission to its appeal form and, in this submission, requested that the Tribunal "exercise its discretion pursuant to section 109 of the *ESA*, to extend the appeal period by three weeks from July 2, 2020 to July 23, 2020…in order for [the Employer] to file complete submissions on its reasons and argument supporting each ground of appeal."

10. On July 3, 2020, the Tribunal's Registrar wrote to the Employer requesting that it file its further submissions by no later than July 23, 2020. The Registrar explained in her letter that this dispensation to file further submissions "is not an extension to the statutory appeal period but is a deadline to provide the requested documents to the Tribunal" and that "the Panel assigned to decide [the] appeal will decide the Appellant's request for an extension of the appeal period." The Employer filed further submissions on July 21, 2020, in which it expanded on, but did not materially deviate from, its submission dated June 26, 2020, and filed on June 29, 2020 (appended to its appeal form).

11. By letter dated September 1, 2020, the Tribunal requested submissions from both the delegate and the complainant regarding the Employer's application to extend the appeal period and with respect to the merits of the appeal. The complainant opposes the Employer's application to extend the appeal period and also maintains that the appeal is without merit. The delegate filed a submission that addresses the merits of the appeal but not the section 109(1)(b) application.

12. Although the Employer sought an extension of the appeal period in order to file more comprehensive arguments in support of its appeal, I also note that its appeal submission (at pages 6 – 9) includes relatively detailed arguments supporting both of its grounds of appeal. Section 112(2)(a) of the *ESA* describes what must be filed with the Tribunal in order to properly file an appeal of a determination: i) a written request specifying the grounds on which the appeal is based under subsection (1), (i.1) a copy of the director's written reasons for the determination, and (ii) payment of the appeal fee, if any, prescribed by regulation [an appeal fee has not yet been prescribed]. In my view, the Employer fully complied with section 112(2)(a) and, that being the case, there is no need to extend the appeal period, since this appeal was

perfected within the section 112(3)(a) appeal period. The further submissions that the Employer filed on July 21, 2020, simply broadened and more fully particularized the submissions previously filed together with its appeal form.

13. In the event that I have erred in finding that the Employer's appeal, as filed, fully complied with section 112(2)(a) of the *ESA*, I would in any event grant the Employer's application to extend the appeal period. In my view, most, if not all, of the relevant *Niemisto* criteria (see BC EST # D099/96) have been satisfied in this case. In particular, the evidence before me clearly demonstrates that the Employer has had an ongoing *bona fide* intention to appeal dating from shortly after it first received a copy of the Determination; the monies payable under the Determination have been deposited into the Director's trust account and the Employer has unequivocally stated that it will not oppose payment out to the complainant even if the Employer prevails in this appeal (thus, any potential prejudice to the complainant has been substantially ameliorated); the Employer's appeal is not obviously without merit; and, finally, the Employer has moved with all reasonable dispatch regarding this appeal.

14. I now turn to the merits of this appeal.

FACTUAL BACKGROUND

15. The Determination was issued following a complaint hearing held on April 23, 2020. Only two witnesses testified at this hearing – the complainant on his own behalf, and the Employer's so-called "Employee Care Manager" (a person who conceded "he had no oversight of [the complainant's] daily activities" (delegate's reasons, page R7). As detailed in the delegate's reasons, the complainant applied online for a position as a security guard with the Employer and was shortly thereafter interviewed in person at the Employer's Burnaby office. After the interview, and on the same day (February 20, 2019), the Employer sent the complainant an e-mail, headed "Welcome to Paladin Security!", offering him a position and attaching several documents. The Employer's February 20th e-mail contained the following statements:

- "We're thrilled that you chose to apply with us and are excited to invite you to join our team!
- "Included with this email is your Paladin New Hire Package containing all of your necessary employment documents. For security purposes, we use DocuSign to verify and secure all of your on-boarding transactions. Please click the secure link below to get started then simply follow the instructions included in the documents."

16. These documents included an "offer of employment", requisite federal and provincial income tax forms, a direct deposit authorization form (see section 20(c) of the *ESA*), an authorization regarding the issuance of a T-4, a probationary employment acknowledgement form, a form authorizing a criminal record check, as well other relevant employment documents. As recorded in the delegate's reasons (page R3), the complainant "reviewed these documents on his phone and filled them out while he was still in the office."

17. One of the key documents forwarded to the complainant was the "Offer of Employment" dated February 20, 2019. This agreement, which fixed a $14 hourly wage, included the following provisions:

- "It is our pleasure to offer you a position of security officer with Paladin Security Group Ltd. ("Paladin"), on the terms and conditions set out in this letter (the "Agreement"). We are excited to have you join the Paladin team!"

- "This offer of employment is conditional upon: a) your successful completion of all pre-employment screening and/or background checks, including drug and/or alcohol testing, as determined and assessed by Paladin in its sole discretion; b) your successful completion of any training courses required by Paladin; and c) you obtaining a provincial security license (if you do not already have one)."
- "Your employment with Paladin will commence following your successful completion of any required training courses on a date to be determined by your first shift schedule. Your employment will continue indefinitely until terminated in accordance with the following terms…"
- "Paladin provides all essential training required to perform the duties of your role at no cost to you."
- "Paladin will issue you a uniform to be worn for work purposes only. It is your responsibility to ensure that your uniform is cleaned, pressed and in good repair. You agree to abide by Paladin's uniform policies on where and when you can wear your uniform and how you must maintain that uniform."
- "You agree that this Agreement contains all the terms of your employment and that there are no other agreements, understandings or representations between the parties…Please sign and return this letter to us indicating your acceptance of the terms and conditions set out in the Agreement. You will be provided access to the online Paladin Security Employee Manual once all documents have been signed."

18. The complainant signed this document and above his electronic signature there appears the following statement: "I have read and understood this letter and accept employment on the terms and conditions set out in this contract."

19. On February 20, 2019, and shortly after the complainant signed and returned the "Offer of Employment", the Employer sent a second e-mail to the complainant, the relevant portions of which I have reproduced, below:

> Welcome to Paladin Security! *All employees of Paladin are granted access to our extensive list of online training courses*, as we invest in your career :) The below courses are mandatory for the week's training class, but please work through as many others as you like in your spare time as they are very useful in our industry.
>
> *I've attached instructions for logging into our Employee Portal. Your Username or Employee Number* is # **[number omitted].** Please note that once you access your ERC account for the first time, it may take up to 24 hours before you can access all the courses…
>
> Required Online Training Courses (please follow the instructions in pdf attached):
>
> - Basic Security Online Training ("BSOT") Modules 1-8 **(10-15 hours)**
> - Basic Security Online Training ("BSOT") Practice Exam **(1.5 hours)**
>
> Please complete these courses and let me know when you are finished.
>
> *Note: the dress code for our in-class training is business attire. Please dress to impress!*

[**boldface**, underlining and *italics* in original text; *underlined italicized text* is my emphasis]

20. On February 28, 2019, the complainant sent a short e-mail to the Employer stating: "I have finished the 8 modules and the practice exam." The complainant's evidence before the delegate was that he took about 11 – 12 hours to complete these online assignments (delegate's reasons, page R3). On March 1, 2019, the Employer sent the following e-mail to the complainant: "Congratulations on finishing the BSOT! I have attached a proposed training schedule for you. Read it over carefully and I will book it. Keep in mind that if you have to cancel any BST exam within 3 business days, it will count as a fail with a $60 fee for rewrite." Later that same day, the complainant replied stating that he had reviewed the schedule and asking the Employer to "book it".

21. The training schedule, entitled "Paladin Security Shield Training Information", indicated that the training sessions would be held at the Employer's offices on Wednesday to Friday, March 6 to 8, 2019, and Monday/Tuesday, March 11 and 12, 2019 from 9:00 AM to 5:00 PM each day. The training information schedule also included the following directions:

> **Students must be on time, attend all hours of the course, and participate fully to be successful through this pre-employment training.** Students who are late may be removed from the class or instructed to rejoin in the following week's class. The instructor has the authorization to remove any student causing disruption or disturbance to other students. If a training day is missed and we are not contacted, you are no longer eligible for employment with Paladin Security, and the cost of any training courses attended must be paid in full.
>
> **The dress code for the training is business casual.** To be consistent with the Paladin Security Personal Appearance Policy, please ensure that you are dressed professionally and that your deportment is suitable to a corporate environment. This includes maintaining good personal hygiene, having hair clean, and beards/ mustaches kept neatly groomed. Hair must be no longer than collar length and if longer, must be tied up off the collar during training and while at work. All piercings and/or earrings should be limited to studs or removed. **Wednesday and Thursday – wear business casual attire (dress pants, dress shoes, button up shirt). Friday and Monday – wear your Paladin uniform. Tuesday – wear comfortable casual attire (running shoes, jogging pants, t-shirt with no logo).**
>
> [**boldface** in original text]

The information sheet also stated, in boldface text, that the complainant was to arrive by no later than 8:45 AM each day and that "students who are late may be removed from the class".

22. As recounted in the delegate's reasons (page R4), the complainant wrote, and passed, the BST (Basic Security Training) examination on March 6, 2019. The certificate he received from the Justice Institute of British Columbia attesting to his completion of the BST was "portable", in the sense that it could be used to secure employment with other security firms. The complainant testified that "his attendance at the in-person review prior to the BST exam was not the Justice Institute's requirement, but [the Employer's] requirement" and "the rest of his training was internal training required by [the Employer] and was specific to the [Employer's] needs". The delegate's reasons continue (page R4):

> March 7, 2019 was orientation and management of aggressive behaviour (MOAB) training. March 8, 2019 was note taking, report writing, radio use, patrol procedures, and personal safety techniques. [The complainant] did not attend training on March 11, 2019, as he already had his

> first aid training. March 12, 2019 was MOAB physical components and scenario training. Each day of training took eight hours and 15 minutes. He never received a certificate for his MOAB training.

Although the delegate stated that the complainant did not receive a certificate attesting to this completion of the MOAB training, in fact, a certificate, dated March 12, 2019, was issued to him (see section 112(5) record at page 155).

23. The Employer's uncontested evidence at the complaint hearing was that anyone working as a security guard in British Columbia must have a BST certificate, and that it has an agreement with the Justice Institute authorizing it to offer the BST course through online modules. The course modules, an in-person review, and the qualifying examination must "be delivered together as a package" (delegate's reasons, page R7). The BST examination is invigilated by a Justice Institute representative, and the Justice Institute sends the results directly to the candidates. Similarly, the MOAB certification is offered by an external body, MOAB Training International Inc., and "this training is administered by [the Employer's] MOAB-certified trainers" (page R7).

24. The complainant commenced his duties as a security guard at the Coquitlam Centre mall, his first shift being March 17, 2019. He was paid by way of a direct deposit to his bank account. There were some issues with respect to the proper processing of the complainant's earned wages.

25. On September 18, 2019, the complainant returned his uniform clothing, and e-mailed the Employer giving immediate notice of resignation. I should note that although under the contract of employment, the complainant was obliged to provide "two weeks' advance written notice of your intent to resign", the *ESA* does not contain any provision regarding notice of resignation by an employee (section 63 sets out an employer's pay/notice obligation). In his September 18th e-mail, the complainant asked that his final pay be directly deposited into his "Credit Union [account] as is normally done or mail it to my home address above."

26. For some unknown reason – and despite the complainant having sent his e-mail to two separate supervisors and having returned his uniform – the Employer appears not to have processed the complainant's resignation. On October 10, 2019, the Employer's "Employee Care Administrator" sent an e-mail to the complainant enquiring why he had not worked any shifts since September 7th. The complainant responded to this individual by e-mail on October 13th, explaining that he resigned and returned his uniform on September 18th. The complainant received the following reply on October 17th: "Yes it looks like I was left out of the loop. I apologize for this. I will process this accordingly."

27. Notwithstanding the complainant's clear direction in his September 18th resignation letter, the Employer failed to either deposit the complainant's final pay into his credit union account, or to mail his final paycheque to him. Rather, by e-mail sent on October 24th, the Employer advised the complainant that "we still have your final pay cheque ready for pick-up" (at its Burnaby office), and that if he had any uniform clothing, he could return them "for disposal or re-issue". About 1 ½ hours later, the complainant replied, referred to his earlier e-mail, and in light of the fact a "manual cheque" had been issued, requested that the cheque be mailed to him at a specific address (the same address he had identified in his September 18th resignation letter). For whatever reason, the Employer failed to mail out the final paycheque and, as noted by the delegate in her reasons (page R7): "[The complainant] never received his final paycheque."

THE DETERMINATION

Unpaid wage claims

28. The complainant claimed wages for the training sessions he attended on March 6 to 8 and 12, 2019. The Employer maintained that the complainant did not commence his employment until March 17, 2019 and, that being the case, was not entitled to be paid for any training sessions (either online or in person), or other related activities he undertook prior to that date.

29. Section 1(1) of the *ESA* defines "employee", "employer", and "work" as follows:

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business…
>
> "employer" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

30. The delegate held that the Employer "began treating [the complainant] like an employee as soon as it gave him the Offer of Employment" (page R9). The delegate noted that the complainant was issued an employee number and granted access to the Employer's online portal as soon as he accepted the "Offer of Employment". Further, upon accepting the offer, he was required to complete tax forms and a direct deposit authorization and that "one would not expect a prospective employee to be given these types of records, information or access" (page R9).

31. The delegate held that since the Employer exercise a considerable degree of control over the complainant's training activities, these activities constituted "work" within the context of an employment relationship (delegate's reasons, pages R9 – R10):

> Of much greater significance, however, is [the Employer's] behaviour after February 20, 2019. If [the Employer] required prospective employees to have certain qualifications, it was open to [the Employer] to convey those requirements, but [the Employer] went further than this. [The Employer] did not merely tell [the complainant] what qualifications he needed: it unilaterally set his in-person training schedule, told him what time to show up, what preparation he was required to complete before the in-person training, required him to "participate fully" in the classes, and told him there would be consequences if he did not follow these instructions. [The Employer] also required that he dress in accordance with [the Employer's] Security Personal Appearance Policy. This behaviour goes beyond merely requiring certain qualifications: it shows a level of control that is indicative of an employment relationship…

> I do not find it necessary to consider which training was transferrable and which was not. [The Employer] made the choice to exercise control and direction over [the complainant] in the manner of an employer prior to his first day of work at the Coquitlam Centre. In light of this finding, it does not matter whether certain elements of the training were portable: [the Employer] gave [the complainant] directions, and [the complainant] was expected to obey them. This was therefore work.
>
> Moreover, with the exception of the member of the Justice Institute who invigilated the BST exam at the end of the day on March 6, 2019, there is no evidence that [the complainant] was trained by anyone other than [the Employer]. This places him squarely within the meaning of "a person being trained by an employer for the employer's business".
>
> …On the facts before me, however, it seems that [the Employer's] business model depends on providing potential employees with BST qualifications rather than simply relying on a sufficient number of qualified candidates to apply for a position. The fact that [the Employer] has an agreement with the Justice Institute to provide this training is evidence that this arrangement benefits [the Employer]. Under this model, instead of having to wait for qualified candidates to apply, [the Employer] is able to ensure that it has a pool of qualified employees. In such circumstances, I find that [the complainant] performed a service for [the Employer] by attending the training. The service he provided was becoming qualified for security work on a timeline that suited [the Employer's] hiring needs. The fact that [the complainant] experienced a benefit by obtaining BST certification does not change the fact that he performed a service for [the Employer] by attending the training.
>
> [The Employer] had a variety of options in determining how to hire qualified employees. The fact that [the Employer] chose to exercise a high degree of control over [the Complainant] during the training period prior to his first day of work, and the fact that [the Employer] experienced a benefit from requiring [the complainant] to attend the training such that it can be said that [the complainant] provided a service by attending, lead me to conclude that [the complainant] performed work for [the Employer] by attending the training. He is entitled to wages for this work.

32. The delegate determined that the complainant spent 19.92 hours completing online training modules and attended four 8.15-hour in-person training sessions on March 6, 7, 8, and 12, 2019, for a total of 52.52 hours compensable at $14 per hour plus 4% vacation pay.

33. In addition, the delegate awarded the complainant some additional wages for shifts where he had been erroneously paid less than his contractually agreed $14 per hour wage rate, and a further amount reflecting the complainant's final paycheque that was never deposited to his account or mailed to him.

34. In light of the Employer's concession that the complainant was not paid all of his earned wages in several pay periods due to what was characterized as a "clerical error" (see delegate's reasons, pages R7 – R8), it follows that a $500 monetary penalty was properly issued based on the Employer's contravention of section 17 of the *ESA*.

Special clothing (section 25)

35. The complainant also sought reimbursement for expenses incurred to launder his uniform. The Employer provided him with various uniform items including two branded shirts. The complainant's evidence was

that he believed two shirts was insufficient. He often needed to change from one shirt to the other on a single shift because his duties included many tasks that would cause his shirt to become soiled. For example, he would have to change his shirt because it was stained by blood or vomit following an interaction with someone in the mall where he worked.

36. The complainant testified that although he requested additional shirts, this request was denied because his supervisor stated that the complainant only required two shirts (page R6). The Employer's representative testified at the complaint hearing that he did not know why the complainant's request for additional shirts was not accommodated (page R8). The complainant testified that he cleaned his shirts "pretty much [after] every shift" (page R6). On July 6, 2019, the complainant submitted an $80 claim for reimbursement of laundry costs, but the Employer, by e-mail on July 8, 2019, rejected the claim stating, "without receipts you can't claim cleaning fees". The Employer's evidence at the hearing was that although it had a dry-cleaning policy, it did not have "laundry" policy, and since the complainant never submitted dry cleaning receipts, his claim to recover laundry costs was refused.

37. Under his employment contract the complainant was obliged "to ensure that your uniform is cleaned, pressed and in good repair". The evidence before the delegate was that the Employer's "dry cleaning" policy allowed employees to claim up to $20 per month provided the claim was supported by a bona fide particularized receipt.

38. Section 25 of the *ESA* provides that if an employee is required to wear a designated uniform (i.e., "special clothing" as defined in section 1(1)), the employer must provide the uniform as well as clean and repair it, both at no cost to the employee. However, section 25(2) provides as follows:

> 25 (2) If an employer and the majority of the affected employees at a workplace agree that the employees will clean their own special clothing and maintain it in a good state of repair,
>
> (a) the agreement binds all employees at that workplace who are required to wear special clothing,
>
> (b) the employer must reimburse, in accordance with the agreement, each employee bound by the agreement for the cost of cleaning and maintaining the special clothing, and
>
> (c) the employer must retain for 4 years records of the agreement and the amounts reimbursed.

39. The Employer did not have a section 25(2) agreement in place. The delegate made the following findings of fact and, on the basis of those findings, made the following section 25(3)(b) unpaid wage award (at page R12):

> [The complainant] stated – and [the Employer's representative at the hearing] did not dispute – that he sometimes came into contact with blood and vomit, and more regularly with toilets, dumpsters and garbage. I accept that [the complainant's] uniform often needed to be washed. I also find his belief that he needed to have a spare shirt on hand to be reasonable, as it was not unexpected that he might come into contact with potentially biohazardous materials during his shifts [and] I find it was reasonable for [the complainant] to wash his uniform or parts of his uniform after almost every shift.

> [The complainant] estimated that he incurred costs of between $10.00 and $15.00 per week for water, gas, wear and tear on the machine, spot cleaner and detergent. He did not provide any details to support this estimate. This is not surprising, given that laundry expenses are typically incorporated into general home expenses. [The Employer] did not provide any evidence regarding the costs of laundering, nor did it submit that [the complainant's] estimate of laundry costs was unreasonable. [The complainant] worked anywhere between two and six days per week, but typically worked at least five days per week. Considering that [the complainant] typically worked towards the higher end of the range of days worked per week, I find it is appropriate to grant him laundry costs at the higher end of the range he provided. I find that [the complainant] incurred laundry costs of $3.00 per shift. As he worked 127 shifts, he is owed **$381.00.**
>
> **[boldface** in original text; my underlining]

Monetary penalties (section 98)

40. Finally, and based on her conclusions with respect to the evidence before her, the delegate levied three separate $500 monetary penalties. These penalties flowed from the Employer's failure to pay the complainant all of his earned wages in various pay periods (a section 17 contravention), its failure to pay him all of his earned wages within 6 days after he resigned (a section 18 contravention), and section 25 (the special clothing cleaning provision).

FINDINGS AND ANALYSIS

41. As noted above, the Employer says that the delegate erred in law and also failed to observe the principles of natural justice in making the Determination. These alleged errors concern the delegate's findings that the complainant was entitled to be paid for attending training sessions prior to taking up his formal duties as a security guard at the Coquitlam Centre mall, and that the complainant was entitled to a $381 reimbursement for uniform laundry costs. I will address each matter in turn.

The training sessions

42. To recap, the delegate determined that the complainant was entitled to be paid for his time spent completing the online training modules (at home) during the period from February 20 to 28, 2019, and for the four days of in-person training sessions held at the Employer's offices on March 6 to 8 and 12, 2019 (52.52 hours at $14 per hour plus 4% vacation pay). The Employer says that the delegate erred in finding that the parties were in an employment relationship while these training sessions were being undertaken by the complainant. The Employer submits that "the Training was an activity performed to meet a pre-hiring condition of employment" or, alternatively, says that "only the BST training should not be considered to create an employer/employee relationship".

43. In my view, the parties entered into an employment contract when the complainant accepted the Employer's "Offer of Employment" on February 20, 2019. This is clear from the specific language of the acceptance: "I have read and understood this letter and accept employment on the terms and conditions set out in this contract." Upon receipt of the complainant's acceptance, the Employer sent an e-mail in which it "welcomed" the complainant to the firm, and this e-mail also stated that "all employees of Paladin are granted access to our extensive list of online training courses". The complainant was issued an employee number that would enable him to access the online material through "our Employee Portal".

44. Nevertheless, the parties' employment contract was subject to various conditions precedent. As a matter of law, a subsisting contract is discharged if a condition precedent is not satisfied (subject to a valid waiver of the performance of the condition precedent – see the *Law and Equity Act*, section 54). In this instance, the conditions precedent included "successful completion of all pre-employment screening and/or background checks", "successful completion of any training courses required by Paladin", and obtaining a provincial security licence (if you do not already have one)" (see "Offer of Employment", Article 1).

45. After the complainant signed and returned the "Offer of Employment" – and thereby "accepted employment" with the Employer – he was then required, as directed by the Employer, to complete the online BSOT training modules and the BSOT practice exam. The Employer clearly stated that completing these training modules and the practice exam were "mandatory" requirements. The complainant was directed "to complete these courses and let me [i.e., the Employer's "talent acquisition coordinator"] know when you are finished." Under the *ESA*, an "employer" is a person who directs and controls an employee. The complainant, as I have already indicated, was an "employee" as and from the moment that he accepted the offer of employment. Of course, it is not enough to simply be an employee; wages are only payable for the "work" an employee undertakes within the context of an employment relationship. In my view, the complainant's hours spent completing this mandatory online training was "work", because it constituted "labour or services an employee performs for an employer whether in the employee's residence or elsewhere".

46. The Employer says that since it did not itself offer the training, and because the complainant could not work in the industry without a BST certificate, the online training activities could not be characterized as "work". The Employer asserts that the completion of the training was "a precondition to being employed with Paladin". However, in my view, at the point in time when the complainant was completing these online training requirements, he had already been hired. Of course, had he failed to complete this training and/or failed to obtain a BST certificate, the Employer could treat the parties' employment contract as being discharged, but that is a separate question from whether this training was undertaken by the complainant as directed by the Employer in accordance with the parties' employment contract.

47. In my view, it is not particularly relevant to suggest, as the Employer does, that an employment relationship could not crystallize unless and until the complainant had a BST certificate in hand. While I accept that the complainant could not "work" (not lawfully, at least) *as a security guard* for the Employer without a BST certificate, it does not follow from that circumstance that he could not "work" for the Employer in some other capacity (for example, as a trainee).

48. The Employer says that because the online training and the BST certificate were "portable" and "transferable to other employers", this training cannot be properly characterized as compensable "work" undertaken for the Employer's benefit. The Employer says that the delegate erred in finding that the online and other training in-person training the complainant received was "work" because that finding "ignores the fact that the BST certificate is portable to other employers and is of a personal benefit to the individual". The Employer also asserts that the delegate's finding that the complainant's hours spent being trained was compensable "work" is an outcome that will "strongly discourage a prospective employer from assisting prospective employees in obtaining skills and qualifications necessary to obtain the job being offered." The Employer relies on *Canadian Corps of Commissionaires (Victoria and Vancouver Island),* BC EST # D168/00, to support its position that training undertaken to obtain "portable" credentials cannot be properly characterized as "work" under the *ESA*.

49. In the *Commissionaires* decision, *supra*, the employee claimed he was entitled to be paid for time spent taking "security training" and in relation to first aid re-qualification courses and the associated exam. The Director dismissed the former claim as it was outside the statutory wage recovery period, but suggested, as *obiter dictum*, that the time spent in training could be considered to be compensable; the latter "first aid" claim was allowed. On appeal, the Tribunal declined to address the question of whether, aside from timeliness, the security training was compensable work. The Tribunal simply upheld the dismissal of the "training" claim since it was outside the statutory wage recovery period. As for the "first aid" claim, the Tribunal held that this was a business cost that could not be offloaded to the employee. In my view, the *Commissionaires* decision does not assist the Employer; indeed, to the extent it is relevant at all, it is a decision that undermines the Employer's position.

50. More generally, I find the Employer's arguments regarding "portability" and "personal benefit" to be unpersuasive. To a degree, the decision to hire an employee, like many business decisions, is a "make or buy" decision. In other words, does the business enter the market and acquire what is needed, or does the business meet its needs "in house"? In the employment context, an employer can hire an individual who already possesses the requisite skills, experience and abilities, or it can hire an individual who may be developed into a productive employee. Indeed, the delegate (but without expressly adopting the "make or buy" framework) noted that the Employer appeared to follow a "make", rather than a "buy", approach (at page R10):

> ...[the Employer's] business model depends on providing potential employees with BST qualifications rather than simply relying on a sufficient number of qualified candidates to apply for a position…Under this model, instead of having to wait for qualified candidates to apply, [the Employer] is able to ensure that it has a pool of qualified employees…The fact that [the complainant] experienced a benefit by obtaining BST certification does not change the fact that he performed a service for [the Employer] by attending the training.

51. A good deal of the training provided by employers to their employees is designed to enhance the employee's "human capital". The employee's newly acquired knowledge, skill, or certification may well be transferrable from one employer to another employer. An employer might direct an employee to attend a course to obtain a first aid certificate; another employer might direct an employee to attend a workshop regarding the handling of hazardous materials. In each case, this training may be mandated by legislation or regulation. In my view, the fact that an employee cannot handle hazardous materials without having first attended a particular training program, or that an employer is legally required to have a first aid attendant on site, does not determine whether the training undertaken is "work". In each case, the key question is whether the individual was directed by their employer to take the training within the context of an employment relationship.

52. In this case, the Employer – as the delegate rightly noted – could have simply restricted its applicant pool to those individuals who already had security guard training and a BST certificate. But it decided, for its own business reasons, to hire "unqualified" individuals, and it then required them to obtain the requisite qualifications under its direction and control. Insofar as the in-person training is concerned, the Employer's control over the training regimen was direct, clear and unequivocal. Although, the level of direction and control was somewhat attenuated with respect to the online training, there nonetheless was, in my view, a sufficient level of value to the employer, coupled with Employer direction and control, so as to bring that latter training within the definition of "work". It should also be noted that the delegate

made a critical finding of fact – unchallenged on appeal – that touches on this question, namely, the Employer's evidence that this online training was delivered by the Employer under "an agreement with the Justice Institute which permits [the Employer] to provide a condensed version of the BST course through online modules" (delegate's reasons, page R7). In other words, while undertaking this online training, the complainant was "being trained by [the Employer] for the [Employer's] business" (see section 1(1) definition of "employee", subsection (c)) – see also, *City of Surrey*, BC EST # D433/98.

53. Article 2 of the "Offer of Employment" states: "Your employment with Paladin will commence following your successful completion of any required training courses on a date to be determined by your first shift schedule." I have already held that the parties' employment relationship crystallized as soon as the complainant "accepted" the employment offer (on February 20, 2019), but that the employment contract was subject to several conditions' precedent. The parties' employment contract was a contract of adhesion, and Article 2 is inconsistent with the "acceptance" provision. In my view, the proper interpretation of Article 2 is that the complainant would not be eligible to take up his duties *as a security guard* unless and until he satisfied all of the training and other requirements (such as, for example, drug testing). I do not interpret Article 2 as supporting the Employer's position that no employment relationship arose, and that no compensable "work" was undertaken, prior to the complainant first taking up his security guard duties on March 17, 2019.

Laundry costs

54. The delegate awarded the complainant $381.00 based on 127 cleaning cycles at $3 per cycle. The Employer says that the delegate erred in determining that the Employer did not have a section 25(2) agreement. The Employer says that this finding "was not supported by the evidence" inasmuch as it "had an agreement with its employees to reimburse them up to $20.00 per month for laundering expenses upon submission of receipts."

55. The delegate held that the Employer did not have a section 25(2) agreement: "[The Employer] did not have an agreement with its employees to reimburse them for the costs of cleaning and maintaining their uniforms" (delegate's reasons, page R12). Article 9 of the parties' employment contract provided as follows: "Paladin will issue you a uniform to be worn for work purposes only. It is your responsibility to ensure that your uniform is cleaned, pressed and in good repair." In addition, the section 112(5) record includes what I understand to be an excerpt from the Employer's policy manual regarding dry-cleaning expenses ("2.39 Dry-Cleaning & Alterations"):

> Paladin Security provides a dry-cleaning allowance to all staff members of up to $20.00 each month for issued uniform items only. When submitting dry-cleaning receipts, please adhere to the following rules:
>
> 1. Paladin is only able to reimburse for dry-cleaning or alterations when accompanied by a valid receipt or proof of payment.
> 2. All receipts must include your full name, date of cleaning, the item(s) cleaned and name of the dry-cleaning establishment. In other words, the receipt should not simply say "shirt." It should say "uniform shirt" etc… before it can be approved for reimbursement.
>
> Approved alterations made to the Paladin Uniform (hemming, waist adjustment etc…) are also covered by the dry-cleaning allowance.

> You may submit your dry-cleaning and alterations through the Employee Resource Centre or by submitting [*sic*] them directly to your manager or the Human Resources department.

56. The Employer's evidence at the complaint hearing was that it "does not have a laundry policy but [that] it does have a dry-cleaning policy" (delegate's reasons, page R8). The Employer's policy, on its face, limits reimbursement to $20 per month, and only for "dry-cleaning" expenses and approved alterations. There is nothing in the record indicating that this policy was anything other than one unilaterally imposed by the Employer. A bona fide section 25(2) agreement must be approved by a "majority of the affected employees at a workplace" and must also reimburse employees for the "cost of cleaning and maintaining the special clothing". In my view, a policy that is not approved by a majority of the affected employees, that limits reimbursement of actual uniform cleaning and alteration costs, and that limits "cleaning costs" to reimbursement for dry-cleaning undertaken by commercial establishments, cannot constitute a valid section 25(2) agreement.

57. In the absence of a valid section 25(2) agreement, the Employer was obliged to not only provide the complainant with a uniform (which it did), but also to clean and maintain the complainant's uniform in a good state of repair without charge to the complainant (which it did not do) – see section 25(1(a) and)(b) of the *ESA*. By passing on uniform cleaning costs to the complainant, the Employer, in effect, offloaded its business costs to the complainant contrary to section 21(2) of the *ESA* (see *Commissionaires*, *supra*). Pursuant to section 21(3), these "offloaded" costs are recoverable as if they were unpaid wages.

58. In *Glen Lake Inn*, BC EST # D419/97, the Tribunal allowed at-home laundry costs of $1.55 per shift based, in part, on evidence that commercial laundries charged from between $1.55 to $2.10 per shirt. The Tribunal observed that the Tribunal should not set a fixed rate and that the delegate had "made a reasonable attempt to determine a fair rate for laundering the required clothing and arrived at $1.55 per shift." This latter amount, adjusted for inflation to date, is about $2.21. *Glen Lake* was cited in *Westguard Security Services (1986) Inc.*, BC EST # D071/01, where the Tribunal confirmed a $1.72 per laundry cycle award. The following comments in *Westguard* are apposite here (at pages 5 – 6):

> The delegate went to some considerable length to establish a reasonable amount to replicate the cost of washing, drying and ironing the uniform worn by [the employee] …
>
> … [The employee] is entitled to compensation for maintaining his uniform at home. If other personal items are added to that load it does not change the obligation. There has been a violation of Section 25 (1) of the *Act* and a Determination has been issued. The appellant has an obligation to prove the Determination wrong. For me to take a discretionary position different than the delegate requires some evidence proving the delegate erred in law or in fact. No such evidence was presented.
>
> If the uniforms worn by [the employee] had been returned to the company for cleaning each week I am sure the cost incurred in having them cleaned would exceed the amount established by the delegate.

59. The delegate's $381 award for cleaning costs was based on the complainant's estimate which, in turn, was derived from his estimated weekly cleaning costs. He did not provide granular details regarding his weekly laundry costs (including utilities, detergent and washer/dryer depreciation). Similarly, "[the Employer] did not provide any evidence regarding the costs of laundering, nor did it submit that [the complainant's] estimate of laundry costs was unreasonable" (delegate's reasons, page R12). On appeal,

the Employer says that the laundry cost award should be set aside because the complainant "did not present any documentary evidence to support the costs of laundering his uniform at home, such as utility bills, detergent costs, or any repairs to his laundry machine."

60. In my view, the delegate made a good faith effort to estimate laundry costs based on the rather flimsy evidentiary record before her. The Employer provided no evidence on this point; the complainant's evidence regarding his actual laundry costs was admittedly far from pristine. But the complainant also submitted evidence that commercial laundries charged about $5-6 per shirt, and that commercial dry cleaners charged well more than double that amount. Considering the evidence as a whole, I am not persuaded that the delegate acted without any evidence in making the laundry cost reimbursement award, nor am I persuaded that the delegate's laundry costs award is tainted by a palpable and overriding error.

61. It follows from the above finding that the $500 monetary penalty levied with respect to the Employer's contravention of section 25 of the *ESA* must be confirmed.

The section 18 monetary penalty

62. The delegate levied three separate $500 monetary penalties. The Employer's appeal also concerns the penalty levied with respect to the Employer's contravention of section 18(2) of the *ESA*, namely, its failure to pay "all wages owing to an employee within 6 days after the employee terminates the employment." The delegate's rationale for levying this penalty is as follows (page R13):

> [The complainant] terminated his employment on September 18, 2019. Wages were therefore payable by September 24, 2019. While [the Employer] issued [the complainant's] final wage statement and paycheque, it failed to deposit the paycheque into [the complainant's] account, failed to mail him the paycheque cheque, and failed to tell him he was required to pick the paycheque up in person. [The Employer] therefore cannot be said to have paid [the complainant] all wages owing [within 6 days after the employee terminates the employment].

63. The Employer says that the delegate failed to give adequate, or any, weight to the Employer's evidence that it notified the complainant, by e-mail on October 24, 2019, that his final paycheque was available to be picked up. The Employer's submits that the section 18 penalty should be cancelled because:

> [The Employer] prepared [the complainant's] final pay and advised him to pick up his cheque. This is supported by an email from [name omitted] to [the complainant] dated October 24, 2019 that was before the Delegate (Tab #5). It is not clear in the Determination whether the Delegate simply failed to consider this evidence or chose not to accept it. This error is critical because if the Delegate concluded that [the Employer] made [the complainant's] final pay available to him within the time limit required by the *ESA*, then the Delegate could not have ordered a penalty against [the Employer] for a breach of section 18 of the *ESA*. Therefore, the Tribunal should vary the Delegate's determination that [the Employer] breached section 18 of the *ESA*.

64. I have already summarized the relevant facts relating to this issue. Briefly, the complainant resigned his employment, by e-mail, on September 18, 2019. The complainant returned his uniform to his supervisor that same day, informing the supervisor that he was resigning. The complainant directed that his final pay either be deposited into his credit union account, or that a cheque be mailed to his residence. There

is no suggestion whatsoever in the evidence that the Employer did not receive this resignation. The evidence suggests that the Employer either received it but then failed to process it, or that the e-mail somehow got lost in the Employer's information systems database. Either way, the Employer failed to either deposit the complainant's final pay or mail him a final paycheque. The Employer's evidence at the complaint hearing was that it did not know why the complainant's cheque was not mailed to him (delegate's reasons, page R8).

65. The evidence before the delegate overwhelming supports her finding that the complainant terminated his employment on September 18, 2019. That being the case, section 18(2) of the *ESA* obliged the Employer to pay the complainant all of his earned and payable wages "within 6 days after the employee terminates the employment" and it clearly did not do so. The record (page 115) shows that as of October 17, 2019 (*one month* after the complainant resigned), the Employer had still not processed the complainant's final pay, although the Employer committed to do so as of that date ("I will process this [the resignation] accordingly").

66. Further, even if the complainant's final paycheque had been delivered to him within the section 18(2) 6-day time frame (and I wish to reiterate that I see no evidence in the record to support the Employer's position in this regard), the fact remains that there were other unpaid wages owing to the complainant as of the date of his resignation that were never paid to him (see delegate's reasons, page R11).

67. In light of the foregoing, I see no basis for cancelling the $500 monetary penalty levied as a result of the Employer's section 18(2) contravention.

Summary

68. I consider the Employer's appeal to have been timely, and that this appeal is properly before the Tribunal. In my view, the Employer did not need to file an application to extend the appeal period. However, I also am of the view that this appeal must be dismissed. I am not satisfied that the delegate erred in law in finding that the complainant's training (both online and in-person) was compensable work undertaken within the ambit of a subsisting employment relationship. Further, I do not find that the delegate erred in law, or failed to observe the principles of natural justice, with respect to her findings regarding the interpretation of section 25 and complainant's entitlement to be reimbursed for in-home laundry costs, or with respect to the section 18(2) monetary penalty.

ORDER

69. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the total amount of $3,427.45, together with any additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal