



EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Arctic Pearl Fishing Ltd.  
("Arctic")

- 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:** Shafik Bhalloo

**FILE No.:** 2020/112

**DATE OF DECISION:** November 23, 2020

## DECISION

### SUBMISSIONS

Cliff Liu

on behalf of Arctic Pearl Fishing Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Arctic Pearl Fishing Ltd. (“Arctic”) has filed an appeal of a determination issued by the Director of Employment Standards (the “Director”) on June 17, 2020 (the “Determination”).
2. The Determination found that Arctic contravened Part 3, sections 17 and 18 (wages); Part 4, section 40 (overtime wages); Part 5, sections 45 and 46 (statutory holiday pay); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *ESA* in respect of the employment of Daryl McMillan (“Mr. McMillan”) and Nathan C. Read (“Mr. Read”) (collectively “the Complainants”).
3. The Determination ordered Arctic to pay the Complainants wages totaling \$53,856.26, including accrued interest.
4. The Determination also levied three administrative penalties of \$500 each against Arctic, pursuant to section 29(1) the *Employment Standards Regulation* (the “ESR”), for breaching sections 17, 18, and 27 of the *ESA*.
5. The total amount of the Determination is \$55,356.26.
6. Arctic appeals the Determination on all three grounds of appeal under section 112(1) of the *ESA*, namely, the director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made.
7. Arctic also requests an extension of the appeal period pursuant to section 109(1)(b) of the *ESA*. More particularly, while Arctic filed its appeal form with some submissions by its representative, Mr. Cliff Liu (“Mr. C. Liu”), on July 27, 2020, the last day of the statutory appeal period, Arctic also wanted to make further submissions and did so on August 28, 2020. The extension application relates to the latter submissions and I will address Arctic’s extension application below, under the heading “Analysis”.
8. In correspondence dated July 30, 2020, the Tribunal notified the Complainants and the Director that it had received Arctic’s appeal and request for an extension of the appeal period, and it was enclosing the same for informational purposes only and no submissions on the merits of the appeal or the extension of the statutory appeal period were being sought from them at this time. The Tribunal also requested the Director to provide one complete copy of the section 112 record and a personalized copy of the record for each of the Complainants (the “record”).
9. After the Tribunal received the record, on September 25, 2020, the Tribunal forwarded a complete copy of the record to Arctic and personalized copies of the record to each Complainant. All parties were

provided an opportunity to object to the completeness of the record, but no one objected. Accordingly, the Tribunal accepts the record as complete.

10. On October 22, 2020, the Tribunal sent correspondence to the parties advising that a Panel was assigned to decide the appeal.
11. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other party. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Determination, the Reasons for the Determination (the “Reasons”), Arctic’s appeal submissions, and my review of the record when the Determination was being made. If I am satisfied that Arctic’s appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite the Complainants and the Director to file reply submissions on the merits of the appeal. Arctic will then be given an opportunity to make a final reply to the submissions, if any.

## ISSUE

12. The issue at this stage of the proceeding is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

## OVERVIEW

13. I will only set out facts that are relevant to the issues raised by Arctic in its appeal.
14. Based on an online BC Registry Services Search conducted on November 27, 2018, with a currency date of October 22, 2018, Arctic was incorporated in British Columbia on May 24, 2017. Xian Peng Liu (“Mr. Liu”) and Fei Wu Liu (“Mrs. Liu”) are listed as its directors and officers.
15. Arctic operates a commercial fishing business in Richmond, British Columbia.
16. Arctic employed Mr. Read and Mr. McMillan starting on January 12 and February 7, 2018, respectively. Both complainants’ employment ended on June 3, 2018.
17. In November 2018, the Complainants filed their complaints under section 74 of the *ESA*, alleging that Arctic contravened the *ESA* by failing to pay them wages and vacation pay (the “Complaints”). One of the Complainants, Mr. McMillan, also claimed that Arctic caused him to bear some business costs, but he settled this claim with Arctic before the Determination was issued.
18. Pursuant to section 76 of the *ESA*, the delegate of the Director investigated the Complaints and on June 17, 2020, issued the Determination pursuant to section 81 of the *ESA*.
19. In the Reasons, the delegate identifies the following issues for her determination:
  - a. Were the Complainants “fishers”?
  - b. Were the Complainants entitled to any wages?
  - c. Were the Complainants entitled to compensation for length of service?

20. The delegate also summarizes, in the Reasons, the evidence she obtained from the parties during her investigation. She sets out the applicable law and legal principles and assesses and weighs the parties' evidence before making her Determination.
21. I will delineate below, the delegate's summary of the parties' evidence and her findings of fact and reasons for her decisions. I will then delineate Arctic's appeal submissions. Thereafter, under the heading "Analysis", I will consider Arctic's extension application and grounds of appeal before setting out my decisions and supporting reasons.

### **REASONS FOR THE DETERMINATION**

22. With respect to the evidence of the Complainants, the delegate notes that both Complainants commenced working for Arctic, on board the latter's commercial fishing vessel called Viking Enterprise (the "Vessel"), in 2018. Mr. McMillan was a skipper on the Vessel and Mr. Read, the First Mate. They went on fishing trips and were paid by share of the fishing proceeds based on their roles on board the Vessel. Neither received any wage statements consistently with payment of wages.
23. In April 2018, the Vessel broke down and was towed to Port Alberni, British Columbia for repairs. The Vessel remained in Port Alberni throughout May 2018 and no fishing trips were made during this period, although one unsuccessful attempt was made to take the Vessel out to sea resulting in a tow back to the dock.
24. While the Vessel was docked for repairs in May 2018, the Complainants remained with the Vessel and performed Transport Canada mandated work, supplying and maintaining the Vessel and man overboard boat, and keeping the gas pumps running on board. They believed they had an agreement with Arctic to receive a salary while the Vessel was undergoing repairs. Mr. McMillan said he spoke to Mr. Liu about both his and Mr. Read's salary and also had a discussion with him about his intention to leave Arctic. Mr. Liu offered Mr. McMillan \$20,000.00 for the months of April and May each. It was Mr. McMillan's understanding that he would receive total wages of \$20,000.00 in April, after topping up the proceeds from the poor fishing in April (before the Vessel broke down), and a further payment of \$20,000 in May for all hours he would work aboard the Vessel.
25. In the case of Mr. Read, based on the communication he received from Mr. McMillan, Mr. Liu had agreed to top up of his wages to \$15,000 for April and he would receive another \$15,000 for work to be performed in May aboard the Vessel.
26. Both Complainants remained with Arctic and worked on board the Vessel in May 2018. Each submitted to Arctic their record of hours worked on the Vessel in May. The records showed that each worked 10.5 hours every day, seven days a week.
27. In early May 2018, the Complainants each received a payment from Arctic that they thought was the top-up payment for their April wages. In the case of Mr. McMillan, he received a payment on May 10 with no wage statement. Mr. Read received a payment on May 11 and with a wage statement on May 28.
28. Neither Mr. McMillan nor Mr. Read received any wages for May and therefore, they decided to leave their employment with Arctic on June 3, 2018.

29. With respect to the evidence of Arctic, the delegate notes that while both Mr. Liu and his wife, Mrs. Liu, were directors and officers of Arctic, Mrs. Liu was not involved with the Arctic's operations. It was Mr. Liu who looked after the Vessel, dealt with Arctic's major employees, and made decisions about wages.
30. Arctic only operates the Vessel and fishes hake from April to the end of October, and arrowtooth flounder from November to March.
31. Arctic is responsible for paying for any repairs to the Vessel and buying supplies for the Vessel. The Vessel can accommodate 21 crew. The crew receive their share of the net proceeds of the catch, after sharing the costs of fuel and food.
32. Mr. McMillan was initially hired as a replacement skipper for the Vessel but took over as skipper in March 2018 after the previous skipper left. Arctic acknowledges that while acting as a replacement skipper, Mr. McMillan received a mate's share of the fishing proceeds.
33. After Mr. McMillan came on as a skipper, there were three fishing trips on the Vessel in April which netted a low volume of fish and the crew received a very low share of the catch. In order to help out the crew financially, Mr. Liu decided that Arctic would bear the cost of the food for the crew in April.
34. In late April, the Vessel experienced hydraulic issues and had to dock in Port Alberni for repairs. As Mr. Liu was concerned about losing significant crew like the skipper, the first mate and the engineer, he consulted with a friend in the industry, Dave Dawson ("Mr. Dawson"), and decided to make a one-time payment to the Complainants to ensure that they stayed with Arctic during the time it was undergoing repairs.
35. Mr. Liu discussed with Mr. McMillan the payment arrangement for both Complainants.
36. In the fact-finding meeting held by the delegate during the investigation of the Complainants, the delegate states Mr. Liu was not clear on the nature of the payments to the Complainants. On the one hand Mr. Liu said the payments were to balance the shortfall in wages for April at another time he said they were a one-time payment unrelated to the wages for April because the crew had been paid their share of the April catch. At another time, Mr. Liu refused to clarify whether the payment was for wages in April, or for May. He also described the payments as generous gifts.
37. When asked by the delegate, at first, Mr. Liu did not recall if he asked the Complainants to stay with the Vessel in May while it was undergoing repairs. However, later, he said, that Mr. McMillan was required to stay with the Vessel until it was repaired, because he had accepted Arctic's payment.
38. As concerns Mr. Read, Mr. Liu disagreed that that Mr. Read performed any work on the Vessel in May 2018 but later said that he too was also required to stay with the Vessel while it was undergoing repairs.
39. Arctic also hired Joseph Boroevich ("Mr. Boroevich") to perform the hydraulic repairs on the vessel. Mr. Boroevich signed off on time sheets for both Complainants in May 2018.
40. In early June 2018, when the Vessel left the dock for its first trip after repairs, the engine overheated and the Vessel was towed back to the dock. The Vessel did not make any other fishing trip in June and the

Complainants left their employment with Arctic on June 3. They did not receive any payments thereafter from Arctic.

41. The delegate also spoke with Alice Chan (“Ms. Chan”), Arctic’s accountant as of May 1, 2018. While Ms. Chan did not have any authority to make decisions about wages, she was responsible for preparing payroll.
42. Ms. Chan was not familiar with Arctic’s previous payroll system but said that Arctic only paid shore pay to the engineer and assistant engineer, as they are the only crew members who perform work when the Vessel is docked.
43. In May 2018, according to Ms. Chan, Mr. Liu instructed her to make a payment to the Complainants. Later, she received inconsistent messages from Mrs. Liu. At first, she was told by Mrs. Liu not to make a payment to the Complainants and later told to deduct the Complainants’ gross share of fishing proceeds from the payments that were made to them on May 10 and May 11.
44. According to the delegate, Ms. Chan was unclear as to whether she recorded the payments to the Complainants on May 10 and 11 as wages, an advance on wages, or a gift by Mr. Liu. However, she did put through the payments to the Complainants and provided them wage statements by the end of May 2018. The delegate addresses these payments on the Complainant’s individual summary sheets attached to the Reasons.
45. Ms. Chan admitted that she received the Complainants’ timesheets signed by Mr. Boroevich, but he advised her that they were a lie. She did not investigate the matter further and did not pay wages according to the timesheets based on the direction she received from Mr. Liu and Mrs. Liu.
46. The delegate also spoke with Mr. Dawson who advised that Mr. Liu spoke with him about the industry practice when a vessel breaks down. He told Mr. Liu that while it was not a common practice to offer financial help to the crew, the industry is competitive when it comes to retaining skippers and ticketed engineers. He also said that sometimes companies pay shore wages when work is done outside the regular or normal job description.
47. The delegate also spoke with Mr. Boroevich, Arctic’s shoreside manager in May, during her investigation of the Complaints.
48. Mr. Boroevich stayed on the Vessel Monday through Friday throughout May 2018. He said he observed Mr. McMillan live and perform work on the Vessel in May 2018.
49. Mr. Boroevich also observed and worked with Mr. Read in May when he was performing repairs to the Vessel. He was not able to say whether Mr. Read worked on the weekends as he (Mr. Boroevich) returned to the Lower Mainland on weekends. He did, however, confirm that Mr. McMillan stayed on the Vessel fulltime and that he understood that Arctic had instructed both Complainants to remain with the Vessel in May, and they were to be paid a set salary for the month of May.
50. Mr. Boroevich was tasked with signing off on different crew time sheets. In the case of the Complainants, he reviewed his own documents and provided an estimate of the hours each Complainant worked.

51. Mr. Boroevich also denied that he ever told Ms. Chan that the Complainants' timesheets were a lie.
52. Having summarized the evidence of the parties, the delegate next considered the issues before her starting with the question of whether or not the Complainants are fishers. She notes that section 37 of the *ESR* excludes a "fisher" from the provisions of the *ESA* that entitle employees to compensation for length of service, overtime wages, statutory holiday pay, and vacation pay. She notes that to be a "fisher" one needs to satisfy both requirements in the definition of a "fisher" in section 1 of the *ESR*: (i) "a person employed on a Vessel engaged in commercial fishing" and (ii) "whose remuneration is a share or portion of the proceeds of a fishing venture". With respect to the latter requirement, the delegate notes that:
- A fisher's remuneration is uncertain. The outcome of a particular fishing venture is not guaranteed and may fall anywhere from significant to insufficient. The nature of the remuneration is one of two fundamental pieces of the definition of fisher, such that if the remuneration for a fisher is a set amount, and not based on the uncertain outcome of a venture, that employee does not fit within the definition.
53. In determining that both Complainants were not "fishers", the delegate reasoned as follows:
- As the Act is benefits-conferring legislation to be construed liberally, provisions in the Regulation which limit or restrict rights are to be read narrowly. Given a narrow reading, I find that any agreement for wages the parties entered into for May 2018 did not involve a share or portion of the proceeds of a fishing venture, and as a result the Complainants do not fall within the definition of 'fisher' in the Regulation for the purposes of determining any respective entitlements. Additionally, all parties confirmed that no commercial fishing occurred in May 2018.
54. With respect to the question of whether the Complainants were entitled to wages, and if so, in what amount, the delegate found Mr. Liu's evidence problematic. She said that he was inconsistent about the nature of his agreement with the Complainants while the Vessel was docked for repairs in May. She also notes that he characterized the payments to the Complainants variously as gifts, assistance, and advances. He was also inconsistent on the period of time the payments covered. However, she states Mr. Liu said that, as a result of the payments, the Complainants were required to stay with the Vessel while it was undergoing repairs and he also acknowledged that they remained with the Vessel in May 2018, and performed work. In the result, the delegate found that the Complainants were employed with Arctic in May 2018 and performed work.
55. With respect to the hours worked by the Complainants in May and June 2018, the delegate notes that while Arctic disagreed with the record of hours the Complainants submitted for this period, Arctic did not produce its own record of the Complainants' hours worked. In the circumstances, the delegate relied on the Complainants' records as the best evidence before her and went on to find that they were both entitled to wages in the amounts indicated in the records.
56. With respect to the payments Arctic made to the Complainants on May 10 and May 11, 2018, the delegate observed that Mr. Liu provided inconsistent evidence as to whether the amount of the payments made was intended to be wages for either April or May or for both months. She notes that Arctic produced wage statements showing deductions made from the payments, which characterized the payments as advances to the Complainants. However, the delegate concluded that the payments in question were

made by Arctic to the Complainants as an incentive to retain the Complainants as employees while the Vessel was undergoing repairs. The delegate then goes on to conclude:

As detailed on their individual wage calculations, the Complainants each received wages as a share of fishing proceeds in addition to the incentive payments made by Arctic Pearl. I find that the incentive payments were related to hours of work in April 2018 and as a result fall under the definition of wages in the Act. As a result, the Complainants are entitled to vacation pay on these wages, which are detailed in the attached summary sheets.

57. Finally, the delegate considered the question of whether the Complainants are entitled to compensation for length of service. The delegate, here, referred to section 66 of the *ESA* which provides the Director with the authority to determine that employment has been terminated due to a substantial alteration of a condition of employment. At common law, this concept is referred to as “constructive dismissal”. In concluding that Arctic did indeed terminate the Complainant’s employment and therefore owes the Complainants compensation for length of service pursuant to section 63 of the *ESA*, the delegate reasoned:

The exchange of work for wages is a fundamental aspect of the employment relationship. I find that by failing to pay wages, Arctic Pearl terminated the employment relationships it had with both the Complainants on June 3, 2018. Upon termination, the liability to pay compensation for length of service to each of the Complainants crystallized.

58. The delegate then set out the amount each Complainant was entitled to in the individual wage calculation sheets attached to the Reasons. I have reviewed the sheets and do not find it necessary to set out the calculations here. It suffices to say that the delegate awarded the Complainants wages totaling \$53,856.26, including accrued interest. The delegate also levied administrative penalties totaling \$1,500 against Arctic for failing to pay all wages earned by the Complainants within eight days of the end of a pay period; failing to pay all wages owed to Complainants within 48 hours of the employer’s termination of the employment relationship; and failing to provide a written wage statement to the Complainants on each payday contrary to sections 17, 18, and 27 of the *ESA* respectively.

## **SUBMISSIONS OF ARCTIC**

59. In his appeal submissions on behalf of Arctic on July 27, 2020, Mr. C. Liu sets out the “Procedural History” and “Summary of Facts” of the matter which I have read and do not find necessary to set out here as it largely consists of evidence that Mr. Liu gave to the delegate during the investigation of the Complaints. He then goes on to delineate Arctic’s arguments under each ground of appeal starting with the error of law ground of appeal.
60. Mr. C. Liu states that the Director erred in law in finding that the Complainants “fall within the definition of ‘employee’”. He says that the Complainants both come within the definition of “fisher” in the *ESR* as they were employed on the Vessel and engaged in commercial fishing and their remuneration, previously, was “their pound share” of the catch in the fishing venture. He also states that previously neither Complainant was paid for any shore hours when the Vessel was docked. Therefore, the *ESA* does not apply to them.



61. Mr. C. Liu also argues that Arctic or Mr. Liu did not “substantially change the conditions of employment” of the Complainants so as to change their status from fishers to employees. He says that all parties agreed that Mr. Liu offered a single lumpsum payment of \$20,000 to the Complainants for the latter’s agreement to “return to the Vessel for fishing in a timely manner once the Vessel was operational”. He contends:

If the lump-sum payment was intended to be paid on a monthly basis, then it goes in direct contraction [*sic*] of the time-sheets made and submitted by the Complainants. By applying Section 63 of the Act to find that the original arrangement between the parties changed, the Director effectively expanded the definition of “employer” to include all those occurrences which fall outside of the control of the employer and to which the employer did not consent.

62. In the alternative, Mr. C. Liu argues that if, before May 2018, the Complainants were employed as fishers for the three fishing trips that occurred in April 2018, they are not entitled to compensation for length of service, overtime wages, statutory holiday pay and vacation pay during this period, pursuant to section 37 of the *ESR*. Therefore, if the Complainants employment as fishers terminated in April and in May they resumed employment in a capacity other than fishers, their employment was less than 3 months and therefore they are not entitled to compensation for length of service under section 63 of the *ESA* and any related vacation pay.

63. He also submits that Mr. Liu did not substantially change the conditions of employment, such that the employment relationship of the Complainants was terminated. He states that it was “the natural course of events [that] resulted in a unilateral decision to change conditions of employment [of the Complainants] as opposed to the explicit act of the employer.” To conclude otherwise, he says, is inconsistent with the comments of all the parties “that all parties assumed that the boat would remain operational.”

64. Finally, under the error of law ground, he challenges the delegate’s reliance on the payment record prepared by Ms. Chan stating that she “was a new employee, acting on the instructions of [Mrs. Liu] ... who was not aware of the arrangement made between Mr. Liu and the [C]omplainants.”

65. Under the “natural justice” ground of appeal, Mr. C. Liu contends that the delegate breached the principles of natural justice by failing to provide Arctic with disclosure, before the Determination was made, that Mr. Boroevich denied that he ever told Ms. Chan that the timesheets of the Complainants he signed off on were a lie.

66. Mr. C. Liu also contends that the Director breached the principles of natural justice because the delegate failed to consider evidence that Mr. Liu did not instruct Ms. Chan to provide wage statements to the Complainants. He also states that the delegate should have been mindful of Ms. Chan’s “lack of knowledge in light of her start date with [Arctic].”

67. With respect to the “new evidence” ground of appeal, Mr. C. Liu submits:

- The reasons state that Mr. Boroevich was hired to perform hydraulic repairs on the Vessel but the Vessel’s hydraulic system is “complicated and complex” requiring a specialist and not someone like Mr. Boroevich to repair.
- Contrary to the delegate’s finding that Mr. McMillan was required by Transport Canada regulations to stay on board the Vessel for watch keeping while it was docked for repairs, there is no such requirement.

- Contrary to Mr. McMillan’s evidence that he had to stay on board to keep gas-run pumps running, there are no gas-run pumps on the Vessel and the shoreside generator is plugged in and always running on the Vessel with or without personnel on board. It is also the Chief Engineer’s job, not the skipper’s or mate’s job to keep the gas pumps running.
- Mr. McMillan was only obligated to remain with the Vessel so that after the machinery issues resolved, he would be available to immediately set sail and resume fishing operations at sea.
- As for Mr. Read’s evidence that he worked on board the Vessel doing safety and chart work corrections, these tasks are completed at the time of casting off the lines when starting the fishing trip and these tasks had been completed in April when the Vessel was ready to sail then. Mr. Read’s claim, therefore, is “false and dishonest” that “such work would require 400+ hours as claimed by Mr. Read.”
- Throughout his relationship with Arctic, Arctic paid Mr. McMillan through his company, Dragger Bum Incorporated. Therefore, Mr. McMillan is not an employee but an independent contractor and the *ESA* does not apply to him.
- It is coincidental that both Complainants’ hours matched the amount paid to them by Arctic “to keep them on call until the Vessel was operational.” The amount Arctic paid to the Complainants was “a one-time payment to appease Mr. Millan and Mr. Read for the low catch and haul” previously so that they would be available to fish when the vessel was ready after repairs.

68. With respect to Arctic’s application for an extension to the statutory appeal period, Mr. C. Liu submits that the individual who was working on the appeal requested a leave of absence “to take care of his family and be with them more during the pandemic.” While Arctic submitted the appeal within the appeal period, he feels “there is more hard evidence and files” he should have added if he had more time to work on the appeal. Therefore, he requests an extension of the statutory appeal period to Monday, August 3, 2020.

69. On August 28, 2020, by e-mail, Mr. C. Liu forwarded additional submissions in support of Arctic’s appeal. He attaches 5 pages of records that he claims show that unlike the rest of the Vessel’s crew, the Complainants, previously, did not receive hourly pay “while the [V]essel was moored to shore during offloads”. The Complainants would “only be paid per poundage of the fish caught”.

## ANALYSIS

70. In this section, I would like to, first, deal with Arctic’s application for an extension of the statutory appeal period before turning to the substantive merits of Arctic’s appeal submissions.

### *i. Application to extend the statutory appeal period*

71. The Tribunal may dismiss an appeal without a hearing, if the appeal is not filed within the statutory appeal period: see section 114(1)(b). In this case, Arctic filed its appeal of the Determination within the statutory appeal period, on the last day, on July 27, 2020. However, Arctic seeks an extension of the statutory appeal period to be able to file additional submissions, which Mr. C. Liu filed on August 28, 2020.

72. Section 121(3) of the *ESA* imposes an appeal deadline on appeals to ensure they are dealt with promptly. This is also consistent with the purpose of the *ESA* in section 2(d), namely, to “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act”.
73. In section 109(1)(b) of the *ESA*, the Tribunal, on application by the appellant, has authority to extend the time limit for filing an appeal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed when considering application to extend the appeal period:
- Section 109(1)(b) of the Act provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
74. In *Re Niemisto*, BC EST # D099/96, the Tribunal stated that the onus is on the appellants seeking time extensions for requesting an appeal to satisfy the Tribunal that:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
  - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - v) there is a strong *prima facie* case in favour of the appellant.
75. In this case, as previously indicated, Mr. C. Liu submits that the individual who was working on the appeal took a leave of absence to take care of and be with his family during the pandemic. He also said that he felt “there is more hard evidence and files” he should have added if he had more time to work on the appeal. I am not persuaded that the reason Mr. C. Liu has provided for asking for an extension of the statutory appeal period to submit additional evidence is credible. I would have thought that, to corroborate his submissions, he could have adduced some evidence from the unnamed person who was allegedly working on the appeal. However, Mr. C. Liu does not name the individual or the position the individual occupied with Arctic nor present any affidavit or signed statement from the individual in support of his assertion that the person was working on the appeal and had to take a leave of absence to take care of his family during the pandemic.
76. While I am mindful that Arctic filed its appeal form and some appeal submissions within the statutory time limit and both the Director and the Complainants were aware of the intention of Arctic to appeal and would likely not be unduly prejudiced if I were to grant an extension of the statutory appeal period to allow Arctic to make its additional submissions, I am not convinced there is a strong *prima facie* case in favour of Arctic in this appeal. Therefore, I dismiss Arctic’s application for an extension of the statutory appeal period to make further appeal submissions.
77. If I am wrong in this decision, I note that the additional submissions Arctic made on August 28, 2020, include 5 pages of records that Mr. C. Liu claims show that unlike the rest of the Vessel’s crew, the Complainants, previously (in March and April, 2018), did not receive hourly pay when the Vessel was

moored to shore and offloading. I note that this latter assertion - that the Complainants previously did not get hourly pay when the Vessel was moored for offloading - has already been made in Mr. C. Liu's earlier submissions filed with Arctic's appeal form on July 27, 2020, and it was also proffered in Arctic's evidence during the investigation of the Complaints. As for the 5 pages of records Mr. C. Liu has submitted, they show offload hours worked by the Vessel's crew in March and April 2018. These documents would not be allowed in the appeal as new evidence under the first criteria in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, because they were reasonably available and could have been presented during the complaint process or at any time before the Determination was made.

*(ii) Merits of the appeal*

78. Turning next to the merits of the appeal, the appropriate starting point is the grounds of appeal in the *ESA* and a consideration of the principles developed and applied to appeals generally as they relate to the appeal under consideration. Subsection 112(1) of the *ESA* says:

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

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

79. The Tribunal has repeatedly said that 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 the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

80. Further, the grounds of appeal delineated in section 112 do not provide for an appeal based on errors of fact. In *Britco Structures Ltd.*, (BC EST # D260/03), the Tribunal held that it has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law.

81. Mr. C. Liu alleges the Director erred in law, failed to observe principles of natural justice, and that "new evidence" has come available. I will discuss each ground of appeal under separately below.

***Error of law***

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

- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
- 2. a misapplication of an applicable principle of general law;
- 3. acting without any evidence;

4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

83. Section 1(1) of the *ESR*, exclusively defines fisher as follows:

"fisher" means a person

- (a) who is employed on a vessel engaged in commercial fishing, and
  - (b) whose remuneration is a share or portion of the proceeds of a fishing venture,
- but does not include a person employed in aquaculture;

84. Section 37 of the *ESR* excludes fishers from the minimum wage, hours of work and overtime (except for protection from excessive hours of work), statutory holidays, annual vacation and termination of employment provisions of the *ESA*:

37 The following provisions of the Act do not apply to fishers:

- (a) section 16 (minimum wages);
- (b) Part 4, other than section 39;
- (c) Parts 5, 7 and 8.

85. In this case, Arctic contends that the Director erred in law in finding that the Complainants were employees, in May 2018, and did not come within the definition of "fisher" in section 1 of the *ESR*. Arctic says that both the Complainants satisfy the requirements of the definition of "fisher" in section 1 of the *ESR* because they were employed on a vessel engaged in commercial fishing and their remuneration, previously, was "their pound share" of the catch in the fishing venture. Arctic also contends that Mr. Liu did not "substantially change the conditions of employment" of the Complainants so as to change their status from fishers to employees. However, the delegate notes that in May 2018, when the Vessel was undergoing repairs, all parties agreed that no commercial fishing occurred and the agreement the Complainants entered into with Arctic or Mr. Liu did not involve a share or portion of the proceeds of a fishing venture, and therefore the Complainants, then (in May 2018) did not fall within the definition of "fisher" in the *ESR* for the purposes of determining their entitlements.

86. The delegate also noted that while Mr. Liu was inconsistent in his evidence on the nature of the agreement he entered into with the Complainants while the Vessel was under repair, he did acknowledge that he offered to make payments to the Complainants and that they were obligated to stay with the Vessel as a result of those payments and remained with the Vessel in May and performed work.

87. I am unable to conclude that the delegate, in making her findings of fact and concluding that the Complainants did not come within the definition of "fisher" in the *ESR*, erred in law as defined in *Gemex, supra*. To the contrary, I find that, on the facts presented by the parties (as summarized in paragraphs 22 – 51 above), it was open for the delegate to conclude, as she did, that the Complainants were not a "fisher" under the *ESR*. The definition of "fisher" in section 1 of the *ESR* sets out two conjunctive requirements one must meet to be a "fisher" and consequently, be excluded from the provisions of the *ESA* entitling employees to compensation for length of service, overtime wages, statutory holiday pay and vacation pay. In this case, while the Complainants satisfy the first requirement, namely, they were employed on a vessel

engaged in commercial fishing; they do not satisfy the second requirement because their remuneration (in May 2018) was not based on sharing proceeds of a fishing venture. It is only where pay is a share of the proceeds of a fishing venture of the commercial fishing industry that the Complainants can properly be considered a “fisher”.

88. While Arctic and Mr. C. Liu contend that the delegate should consider how the Complainants were previously paid to determine their status, I do not find the past practice, in this case, probative in determining the Complainant’s status in May 2018. As with the delegate, I find the payment arrangement in the latter part of April and in May, between the Complainants and Arctic, changed.
89. I also find that it was open for the delegate, on the facts, to conclude that the payments Arctic made to Complainants on May 10 and 11 were paid to them as an incentive in order to retain them as employees while the Vessel was undergoing repairs. I also find that it was open for the delegate to conclude, on the facts, that these payments were related to hours of work in April 2018 and fall under the definition of wages in the *ESA*. I do not find any basis for me to interfere with the delegate’s conclusions of fact here.
90. I also find that, for the purpose of calculating compensation for length of service under section 63 of the *ESA*, the delegate properly took into consideration the Complainants’ start dates with Arctic - February 7, 2018 for Mr. McMillan and January 12, 2018 for Mr. Read.
91. As for Mr. C. Liu’s contention, under the error of law ground of appeal, that the delegate should not have relied on the payment record prepared by Ms. Chan because she was a new employee of Arctic and unaware of the arrangement between Mr. Liu and the Complainants, I find this argument without any merit.

### ***Natural Justice***

92. Arctic has raised the natural justice ground of appeal.
93. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
94. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal summarized the natural justice principles that typically operate in the complaint as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST #D050/96)
95. Courts and Tribunals have also confirmed that the content and scope of the right to natural justice or procedural fairness is highly contextual. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at p. 21, the Supreme Court of Canada stated:

The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, supra, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.

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

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

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

98. In the present case, Mr. C. Liu contends that the delegate breached the principles of natural justice by failing to disclose to Arctic, before the Determination was made, that Mr. Boroevich denied ever telling Ms. Chan that the timesheets of the Complainants he signed off on were a lie. Section 77 of the *ESA* and principles of natural justice do not require the delegate investigating a complaint to share her investigative evidence before issuing a determination. There is no requirement for the delegate to allow a form of “discovery” of the evidence she collects in her investigation or any entitlement to receive a transcript or other record of the evidence of the complainants or witnesses. However, what is required is that the delegate provide a meaningful disclosure of the details of the complaint in order to make the opportunity to respond reasonable and effective. In this case, it is evident from the record and the Determination that Arctic had an adequate opportunity to know the case against it and ample opportunity to respond to it. Therefore, I do not find the delegate to have breached the principles of natural justice because she may not have disclosed Mr. Boroevich’s evidence disputing Ms. Chan’s evidence.

99. I also find no merit in Mr. C. Liu’s assertion that the Director breached the principles of natural justice in failing to consider evidence that Mr. Liu did not instruct Ms. Chan to provide wage statements to the Complainants. Ms. Chan was Arctic’s accountant and whether or not she was new with Arctic, there is no evidence that the wage statements she issued were inconsistent with or contrary to any instructions she received from Mr. Liu. I find that the delegate did not err in any form or manner in considering the wage statements issued by Ms. Chan in making the Determination. In the circumstances, I dismiss the natural justice ground of appeal.

### ***New Evidence***

100. Arctic has also advanced the “new evidence” ground of appeal.

101. The Tribunal has held that admission of “new evidence” is discretionary and taken a relatively strict approach to the exercise of this discretion. In *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, the Tribunal delineated the following four-part-test for admitting new evidence:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

102. It is important to note that the requirements above are conjunctive and not alternative. That is, a party adducing new evidence on appeal must meet all four criteria set out in *Merilus Technologies, supra*, before the Tribunal will admit new evidence (See *Corinex Communications Corp.*, BC EST # D043/09; *Khela Excavating Ltd.*, BC EST # D141/15; *Grand Construction Ltd.*, BC EST # D018/13).

103. In this case, the proposed “new” evidence of Arctic is summarized in paragraph 67 above and I need not reiterate it here. I find the proposed evidence does not meet the necessary considerations for admission under section 112(1)(c) in the following respects: First, there is nothing in the proposed evidence that could not, without the exercise of due diligence have been discovered and presented to the delegate during the investigation of the Complaint and before the Determination was made.

104. Second, most of the proposed evidence is in the nature of a challenge to the delegate’s findings of fact and not of high potential probative value in the sense that it could have led the delegate to a different conclusion on a material issue. As noted previously, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd., supra*. The test for establishing an error of law on this basis is stringent and requires the appellant, in this case Arctic, to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. I do not find Arctic to have done this. Therefore, the Tribunal will defer to the findings of fact made by the delegate.

105. Third, Arctic, for the first time, argues, that Mr. McMillan was an independent contractor and not an employee and therefore the *ESA* does not apply to him. An appeal is not a venue for parties to make new arguments. Parties are expected to make their best case before the delegate, in this case, during the investigation of the Complaint and before the Determination was made.

106. In the result, I dismiss the new evidence ground of appeal

107. In summary, I find Arctic’s appeal has no presumptive merit and has no reasonable prospect of success and, must be dismissed under subsection 114(1)(f) of the *ESA*.



**ORDER**

- <sup>108.</sup> Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, I order the Determination made on June 17, 2020, confirmed together with any interest that has accrued under section 88 of the *ESA*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**