

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Bear Creek Liquor Store Ltd.
("Bear Creek")

- 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.: 2020/132

DATE OF DECISION: December 8, 2020

DECISION

SUBMISSIONS

Amardeep Pamma

on behalf of Bear Creek Liquor Store Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Bear Creek Liquor Store Ltd. (“Bear Creek”) has filed an appeal of a determination issued by the Director of Employment Standards (the “Director”) on August 7, 2020 (the “Determination”).
2. The Determination found that Bear Creek contravened Part 8, section 63 (liability resulting from length of service), of the *ESA* in respect of the employment of Gurpreet Jassar (“Ms. Jassar”).
3. The Determination ordered Bear Creek to pay Ms. Jassar wages in the total amount of \$340.27, including accrued interest.
4. Pursuant to section 98(1) of the *ESA* and section 29(1) of the *Employment Standards Regulation* (the “*ESR*”), the Determination also levied an administrative penalty of \$500 against Bear Creek for breaching section 63 of the *ESA*.
5. The total amount of the Determination is \$840.27.
6. Bear Creek appeals the Determination on the “error of law” and “natural justice” grounds of appeal under section 112(1)(a) and (b) of the *ESA*.
7. In correspondence dated September 21, 2020, the Tribunal notified the Director that it had received Bear Creek’s appeal and it was enclosing the same for informational purposes only and no submissions on the merits of the appeal were being sought at this time. The Tribunal also noted that Ms. Jassar had advised that she did not wish to participate in the appeal process and therefore the letter and related enclosures would not be disclosed to her. The Tribunal also requested the Director to provide a copy of the section 112(5) record (“the record”).
8. On October 15, 2020, the Tribunal received the record from the Director and forwarded a copy of it to Bear Creek and provided the latter an opportunity to object to the completeness of the record, but Bear Creek did not object. Accordingly, the Tribunal accepts the record as complete.
9. On November 13, 2020, the Tribunal sent correspondence to Bear Creek advising that a panel was assigned to decide the appeal.
10. 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).

ISSUE

11. 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*.

BACKGROUND

12. Based on an online BC Registry Services Search conducted on February 27, 2020, with a currency date of February 6, 2020, Bear Creek was incorporated in British Columbia on August 31, 2011. Amardeep Singh Pamma (“Mr. Pamma”) is listed as its sole director.
13. Bear Creek operates a liquor store in Surrey, British Columbia.
14. Bear Creek employed Ms. Jassar as a liquor store clerk from June 25, 2019, to November 14, 2019, at a rate of pay of \$13.85 per hour.
15. Ms. Jassar’s employment was on a part-time basis and she worked shifts of eight hours per day, three days per week. Some of these shifts were during the daytime and others in the evening.
16. On November 14, 2019, Bear Creek terminated Ms. Jassar’s employment for cause.
17. On February 5, 2020, Ms. Jassar filed a complaint under section 74 of the *ESA*, alleging that Bear Creek terminated her employment “unfairly and without just cause” and contravened the *ESA* by failing to pay her compensation for length of service (the “Complaint”).
18. The delegate of the Director investigated the Complaint and obtained evidence from both parties before issuing the Determination.
19. In support of her Complaint, Ms. Jassar submitted that, in the afternoon of November 14, 2019, she received a message from her manager, John (the “Manager”), over the WhatsApp messaging application, to call him in the evening. When she indicated that she was unavailable to talk to him in the evening, he replied that her employment “has been terminated for reasons”. She requested the reasons for the termination and the Manager said he did not want to text her the reasons and preferred to speak with her over the phone. She replied that she would not consider her employment terminated until she received a “a proper letter and reasoning”. The Manager responded that Ms. Jassar was “terminated period” and that Bear Creek was not “obligated by law to give you anything more than a verbal termination”. When Ms. Jassar responded that she would come to talk to him “at 8 Monday morning” and expected “a letter ready by that time with an appropriate reason”, the Manager texted her the following reasons for the termination of her employment:

Due to numerous customer complaints regarding your customer service
We are terminating you [*sic*] job effective immediately.

Customers are complaining about you arguing and yelling at them in a very disrespectful manor
[*sic*] including swear words.

You have also said your name was Jasdeep when customers ask for your name.

And instead of de[-]escalating issues with customers you escalate them.

You also need to win every conversation.

Your [sic] never willing to work any dayshifts even on a holiday Monday and you have told other staff that you only like the night shifts because you make more tips.

Your [sic] Never willing to pick up any extra shifts.

Customers complaining your [sic] not smiling and being friendly.

You have made your coworkers very uncomfortable when arguing with customers in such a way.

20. Ms. Jassar said to the delegate that no one, including the Manager or Mr. Pamma, previously raised any of the issues identified in the Manager's text with her nor was she disciplined for any of them before.
21. When the delegate asked Ms. Jassar whether she recalled an incident at work with a customer on November 13, 2019, and any other instances where she yelled or swore at customers as alleged by Mr. Pamma in his evidence to the delegate, Ms. Jassar responded that there were a lot of intoxicated people who attended Bear Creek's store. She said that while other staff would serve these people, she would refuse to serve them and asked them to leave. She also asked for ID from anyone who looked under 30 years of age. Sometimes, these interactions escalated, and customers would swear at staff. She has also had beer thrown at her and has had to threaten to call police to get customers to leave the store. She said she simply went about her work as she was taught to do by another more senior employee. She said, however, Bear Creek never brought up any issue with her regarding her conduct in these interactions. She also did not recall any incident on the night of November 13, 2019.
22. On behalf of Bear Creek, Mr. Pamma submitted to the delegate that Ms. Jassar was terminated for cause because of repeated incidents of harassment and verbal abuse toward customers. However, he admitted that at no time was Ms. Jassar disciplined or given any form of written or verbal warning relating to her performance or conduct as management was unaware of the incidents. He said when a staff member at Bear Creek informed management of an incident on November 13, 2019, where Ms. Jassar had been rude and verbally abusive toward customers, her employment was immediately terminated.
23. Mr. Pamma also said that Ms. Jassar, on at least two occasions, was provided verbal warnings that she would be fired if her behaviour did not change. However, the first time was on September 24, 2019, and this warning was directed at all staff (not just Ms. Jassar) and it related to shift flexibility, as staff members apparently were refusing to take shifts seen as undesirable. The second verbal warning was on October 19, 2019, which, too, was concerning inflexibility regarding shift scheduling.
24. Mr. Pamma confirmed to the delegate that the decision to terminate Ms. Jassar's employment on November 14, 2019, was made after he spoke with the Manager and other staff at Bear Creek and not based on any complaints made directly by customers against Ms. Jassar. He gave the delegate the name and contact details of 'Jasdeep Saini', a colleague of Ms. Jassar at Bear Creek, who would have first-hand information about Ms. Jassar's conduct. It turns out, based on the appeal submissions of Mr. Pamma, that the correct spelling of this witness's last name is Shahi ("Ms. Shahi") although the delegate refers to her as 'Ms. Saini' in her Reasons for the Determination (the "Reasons").

25. The delegate spoke with Ms. Shahi in her investigation of the Complaint. Ms. Shahi said that she spoke with Mr. Pamma at some time before the termination of Ms. Jassar's employment about the latter using her name 'Jasdeep' in customer interactions she had that resulted in complaints to Mr. Pamma. She said when she asked Ms. Jassar why she was using her name, the latter said it was 'just for fun'. Ms. Shahi said that she asked Ms. Jassar to stop using her name as she didn't want to lose her job.
26. Ms. Shahi also stated to the delegate, in general terms, that Ms. Jassar's "behaviour was kind of rude" at work and customers had complained about Ms. Jassar to her, other staff, the Manager, and Mr. Pamma. Ms. Saini recalled a couple of instances of rude conduct Ms. Jassar engaged in with customers but was unable to provide accurate dates of when they occurred. She said they took place close to the time of Ms. Jassar's termination.

THE DETERMINATION

27. In the Reasons for the Determination (the "Reason"), the delegate reviewed the evidence of the parties in context of the applicable law to determine whether or not Ms. Jassar was dismissed with or without cause. She specifically noted that the onus is on the employer to discharge the burden of proving that the termination of employment is for cause or providing the employee with working notice or payment in lieu of working notice under section 63 of the *ESA*.
28. In concluding that Bear Creek failed to prove cause in terminating Ms. Jassar's employment, the delegate reasoned as follows:

The Complainant stated that her termination was without any previous warning or disciplinary history, while the Employer made several somewhat contradictory statements regarding his previous attempts to deal with Ms. Jassar's conduct and performance. Mr. Pamma initially stated that the Complainant had been terminated for numerous customer complaints, further stating that Ms. Jassar had been told 'on at least two previous occasions' that she would be terminated if her behaviour did not change. Later, via email, Mr. Pamma states that at no point was Ms. Jassar previously disciplined, whether via written or verbal means, and was instead 'terminated immediately' once Mr. Pamma learned on November 13, 2019 of her rude behaviour.

Mr. Pamma states that he investigated the Complainant's behaviour from November 13, 2019 - November 14, 2019. He states he was satisfied that Ms. Jassar's conduct necessitated immediate dismissal, and she was terminated via text message by a manager on November 14, 2019 with immediate effect. Mr. Pamma did not provide detail as to what his investigation consisted of beyond discussions with staff; however, what is certain is that the investigation did not include an opportunity for Ms. Jassar to respond.

For a just cause dismissal based on major misconduct to be valid, the employee must have been terminated immediately due to a specific incident that is serious, deliberate and intentional. The degree of employee misconduct that gives an employer just cause for termination depends on the unique circumstances of each case and should consider 'whether the employee behaved in a manner that was not consistent with the continuation of employment'. Mr. Pamma relied on statements of other employees, at least one of whom - Ms. Saini - believed that her job was at risk, to make a finding that Ms. Jassar's behaviour warranted immediate dismissal. He did not directly observe her conduct in the workplace, instead relying on staff observations.

Ms. Saini was unable to recall specific details of any incident having occurred on November 13, 2019; instead, she described in general terms Ms. Jassar's conduct and the frustrations she experienced as a result of Ms. Jassar using her name with customers. Her statements were general and did not substantiate the assertion by Mr. Pamma that an incident warranting immediate dismissal took place on November 13, 2019. Even if the Complainant had been rude to customers, this does not necessarily indicate that it was inconsistent with the continuation of her employment at Bear Creek, therefore I find a dismissal for just cause based on major misconduct cannot be found.

29. Having determined that no 'major misconduct' could be found in the evidence to justify Bear Creek's termination of Ms. Jassar's employment for cause, the delegate next considered whether Bear Creek had made out a case for dismissing Ms. Jassar based on 'minor misconduct'. In concluding that Bear Creek had not, the delegate reasoned as follows:

If [Mr. Pamma] wished to rely on a just cause dismissal for minor misconduct based on repeated incidents of rude behaviour, he would need to demonstrate that the four-step test for a minor misconduct dismissal had been made out. In order to do that, he would need to show that the following steps were taken:

1. The employer established a reasonable standard of performance and communicated that standard to the employee;
2. The employer provided the employee with sufficient time and a reasonable opportunity to meet the standard (may include training or tools);
3. The employer warned the employee that failure to meet the standard was serious and would result in termination; and
4. The employer can show that the employee still did not meet the standard.

...

An employee who fails to respond to an employer's disciplinary efforts through the above steps may be terminated for just cause. This termination must relate specifically to matters that gave rise to those disciplinary efforts.

For the Employer to absolve his liability to pay Ms. Jassar compensation for length of service, the Employer must prove he had cause to terminate Ms. Jassar's employment. The Employer did not provide proof that Ms. Jassar received a warning during her employment - whether oral or written - to satisfy the test for a minor misconduct dismissal. He relied instead on the witness statement of Ms. Saini to support the finding of Ms. Jassar's rude behaviour toward customers. No part of Ms. Saini's evidence supported a finding that Ms. Jassar had at any time been put on notice for her bad behaviour, or informed that a continuation of such behaviour would lead to termination or cause for summary dismissal.

... Mr. Pamma provided no evidence to indicate that any of those conduct issues had previously been addressed with Ms. Jassar, that she was provided with a warning or training on how to perform better in her role, or that she had previously been disciplined for the specific issues that resulted in her termination. Issues such as inappropriate behaviour in the workplace would typically require an employer to meet the four elements of the test as above. In the absence of any evidence from the Employer about how these concerns regarding Ms. Jassar's behaviour were addressed, I find that the Employer has not met the elements of the above test.

For the reasons stated above, I find that the Complainant was not terminated for just cause, therefore she is entitled to compensation for length of service under section 63 of the Act.

30. As Ms. Jassar was employed with Bear Creek for more than three consecutive months, but less than one year, the delegate concluded that she was entitled to one week's wages as compensation for length of service. Based on section 63(4) of the *ESA*, the delegate determined that Ms. Jassar's was entitled to \$322.19 plus 4% vacation pay and accrued interest for a total of \$340.27.
31. The delegate also levied an administrative penalty of \$500 against Bear Creek for violation of section 63 of the *ESA*.

SUBMISSIONS OF BEAR CREEK

32. In his written appeal submissions filed on behalf of Bear Creek, Mr. Pamma advances the "error of law" and the "natural justice" grounds of appeal.
33. Under the "natural justice" ground of appeal, Mr. Pamma contends that:
- a. The delegate failed to "investigate thoroughly" how Ms. Jassar reacted to instances of escalations with customers.
 - b. The delegate failed to provide him an opportunity to respond to Ms. Jassar's "accusations", particularly as it relates to intoxicated customers.
 - d. The delegate failed to "ask for clarification or more specific details regarding the investigation that took place between November 13-14, 2020 [*sic*]" and should have asked for more information if she needed it to complete her investigation and make the determination.
 - e. The delegate, when speaking with Ms. Shahi, failed to focus on whether "Ms. Jassar harassed and/or verbally abused customers".
 - f. The delegate "continually interrupted Ms. Shahi and asked for specific dates and times when Ms. Shahi had already mentioned that 'it's been over 7 months and it's hard to remember specific dates and times from so long ago'".
 - h. The delegate rushed the investigation and did not conduct it thoroughly because she did not confirm with Ms. Shahi the "correct spelling and pronunciation of her name".
 - i. The delegate failed to consider the evidence of Ms. Shahi "that Ms. Jassar was indeed harassing and verbally abusing customers".
 - j. The delegate did not "provide any clear explanation as to why harassing and verbally abusing customers isn't a just cause for dismissal for 'major misconduct'".
 - k. He never mentioned to the delegate that Ms. Jassar was given any warning, written or verbal, regarding harassing or verbally abusing customers but the delegate mentions twice in her Reasons that he "told Ms. Jassar on several occasions that she would be fired if her behaviour did not change".

- l. The delegate did not provide any explanation as to “why an employer is required to directly observe the employee’s conduct and how that is feasible, especially in a small store such as ours”.
- m. He asked several questions of the delegate by email but failed to get “detailed explanation” and only received “a generic reply stating ‘the greatest weight is attached to first hand evidence’”.
- n. The delegate made him feel like “she had already made her decision and was doing the minimum work required by the Branch”.

34. Mr. Pamma also attaches to his appeal submissions, under the natural justice ground of appeal, a statement dated September 7, 2020, purportedly from Ms. Shahi. The statement largely elaborates on the evidence Ms. Shahi provided to the delegate during the investigation of the Complaint. While I have read the statement carefully, I do not find it necessary to reiterate the contents here although I will address it under the heading “Analysis” below.

35. With respect to Bear Creek’s “error of law” of law ground of appeal, the crux of Mr. Pamma’s argument is that Ms. Jassar’s conduct “of harassing and verbally abusing customers” and “swearing and screaming” at them constitutes major or serious misconduct giving rise to just cause for Bear Creek to terminate her employment. He disagrees that her conduct was minor misconduct requiring Bear Creek “to give her fair warning or training on how to perform better” first.

36. He also contends that the *ESA* and the *ESA* guidelines do not require the employer “to directly observe an employee[’s] conduct in order to terminate employment for just cause based on major misconduct”.

37. He also adds that the delegate got it wrong when calculating severance pay:

Our pay period is semi-monthly. Ms. Jassar’s wages for her final four pay periods were \$452.38, \$765.52, \$626.51 and \$719.97(Exhibit C). With an average of 4.5 weeks in a month, the total should be divided by 9 weeks resulting in \$284.93. Adding 4% vacation equals \$296.33. This amount if [*sic*] different than the amount calculated by the Delegate.

38. Lastly, Mr. Pamma states that in the business Bear Creek is in, the turnover rate is high and it is difficult to get former employees like the Manager to cooperate. He also states that Bear Creek has been in business since 2012 and has not had any other complaints filed against it with the Employment Standards Branch because it takes compliance with the *ESA* “very seriously”.

ANALYSIS

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

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

40. As previously indicated, Bear Creek has invoked the error of law and natural justice grounds of appeal.
41. The Tribunal has consistently maintained that an appeal is an error correction process and the burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
42. 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.

Error of law

43. 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.
44. The Tribunal has consistently held that the question of whether an employee has been dismissed for just cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of just cause developed under the *ESA*: See *Re Michael L. Hook*, 2019 BCEST 120, *Re Dr. Paula Winsor-Lee*, 2019 BCEST 63, and *Re C. Keay Investments Ltd.*, 2018 BCEST 5.
45. A decision by the Director on a question of mixed law and fact requires deference. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court explained that: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error: see *Re Microb Resources Inc.*, 2020 BCEST 93.
46. In *Re Michael L. Hook, supra*, the Tribunal delineated the following well established principles of just cause, developed under the *ESA*, that are consistently applied (at para. 32):
1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 - i. A reasonable standard of performance was established and communicated to the employee;

- ii. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
 - iii. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 - iv. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

47. In the Determination, the delegate set out some, but not all of the above principles. On the whole, I find the delegate applied correct legal principles to the question of just cause. The delegate considered whether Bear Creek had established that Ms. Jassar behaved in a manner that was not consistent with the continuation of her employment. More particularly, the delegate considered whether an incident warranting immediate dismissal took place on November 13, 2019, as contended by Mr. Pamma. The delegate noted that Mr. Pamma relied on the statements of other employees and he himself did not directly observe Ms. Jassar at work. After speaking with Ms. Shahi, the worker whose contact details Mr. Pamma provided to the delegate, the delegate concluded that she was unable to recall specific details of any incident having occurred on November 13, 2019, and only described Ms. Jassar's conduct in general terms over the course of the period she worked with Ms. Jassar at Bear Creek. The delegate concluded that Ms. Shahi's evidence did not substantiate Mr. Pamma's contention that an incident warranting an immediate dismissal of Ms. Jassar took place on November 13, 2019. I find, on the evidence, it was open to the delegate to so conclude and do not find any fault in the delegate's conclusion.

48. The delegate also considered whether Bear Creek established just cause for dismissing Ms. Jassar based on "minor misconduct", but concluded that it had not. The delegate noted that Bear Creek failed to demonstrate that the four-step test for minor misconduct (set out in paragraph 29 above) was employed in this case. The delegate concluded that Ms. Jassar was never, at any time, warned, whether in writing or verbally, for her alleged rude behavior towards customers of Bear Creek. In the result, the delegate found that Ms. Jassar was not terminated for just cause, and therefore, entitled to termination pay under section 63 of the *ESA*. I do not find any error in this conclusion of the delegate. I find the delegate correctly applied the principles of just cause to the facts in this case and arrived at a decision that is reasonably supported in evidence and persuasive. In summary, I do not find there is any merit in the error of law ground of appeal.

49. While I do not object to Mr. Pamma's assertion that *ESA* or the *ESA* guidelines do not require the employer to directly observe an employee to terminate her employment for just cause, the onus still remains on the Employer to show that the employee's conduct justifies dismissal for cause. In this case, neither Mr. Pamma nor Ms. Shahi were able to provide specific or sufficient details of the incident on November 13,

2019, that Bear Creek relied upon to terminate Ms. Jassar's employment for cause. In other words, Bear Creek failed to discharge the onus to prove that Ms. Jassar's conduct justified dismissal for cause.

50. With respect to Mr. Pamma's contention that the delegate miscalculated the termination pay of Ms. Jassar and that the total of the final 4 pay periods should have been "divided by 9 weeks", I do not agree with him. I find the delegate strictly complied with section 63(4) of the *ESA* which is instructive on how the amount the employer is liable to pay for liability resulting from length of service is to be calculated:

- 63 (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
- a. totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
 - b. dividing the total by 8, and
 - c. multiplying the result by the number of weeks' wages the employer is liable to pay.

51. In the result, I would not interfere with the delegate's calculation of the wage award.

52. While not properly fitting under the error of law ground of appeal, Mr. Pamma also comments that he was unable to get the former Manager of Bear Creek to cooperate in the investigation of the Complaint. Whether or not the Manager would have been able to add anything specific beyond what was adduced by Mr. Pamma and Ms. Shahi in the investigation of the Complaint is neither here nor there in this appeal. Not infrequently will former employees cooperate and give evidence on behalf of their former employers. This may or may not affect employers' ability to discharge evidentiary burden in cases before the Director.

53. Lastly, whether or not Bear Creek has not had any past complaints lodged by former employees against it under the *ESA* is an irrelevant consideration in the appeal or for that matter in the investigation of the Complaint.

Natural Justice

54. With respect to the natural justice ground of appeal, it should be noted that 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.

55. 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)

56. 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.
57. 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).
58. The Tribunal has also repeatedly stated that natural justice does not require the decision maker to accept everything each party states nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other provided reasons are provided for the choice made and those reasons are based on relevant considerations: See *Re Jada Holdings Limited*, BC EST # D106/14.
59. On the face of the materials in the record, I find that Bear Creek was provided with procedural rights contemplated in both section 77 of the *ESA* and the statement in the Tribunal's decision in *Imperial Limousine Service Ltd.*, *supra*.
60. I also find that the delegate, in accepting the position of Ms. Jassar and rejecting Bear Creek's position that there was cause for dismissing Ms. Jassar, provided her reasons (reproduced in paragraphs 28 and 29 above) and those reasons are, in my view, based on relevant considerations.
61. I am also not persuaded that there is any basis in the submissions of Mr. Pamma under the natural justice ground of appeal (summarized in paragraph 33 above) for me to interfere with the Determination. More particularly, having reviewed the materials in the appeal including particularly the record, I find there is no objective evidentiary basis to found Mr. Pamma's assertions that the delegate failed to "investigate thoroughly" how Ms. Jassar reacted to instances of escalations with customers or failed to focus on whether "Ms. Jassar harassed and/or verbally abused customers" when she (the delegate) spoke with Ms. Shahi during the investigation of the Complaint.
62. I also find Mr. Pamma's contention that the delegate failed to provide him an opportunity to respond to Ms. Jassar's "accusations" relating to intoxicated customers at Bear Creek without any merit. As indicated above, under section 77 of the *ESA*, 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 meaningful, which I find occurred in this case.
63. I also find somewhat disingenuous of Mr. Pamma to say that the delegate failed to "ask for clarification or more specific details regarding the investigation that took place between November 13-14, 2020 [*sic*]" and should have asked for more information if she needed it to complete her investigation and make the Determination. The record shows email exchanges between the delegate and Mr. Pamma wherein, time and again, the delegate afforded Mr. Pamma an opportunity to provide more information including about the investigation relating to the alleged incident of November 13, 2019, that Bear Creek relied upon to immediately terminate Ms. Jassar's employment for cause. For example, on June 4, 2020, the delegate asked Mr. Pamma "[w]ho was a direct witness to what took place, and who would be able to speak to the

events of November 13, 2019? Would your previous manager, John, be able to speak to me about this?”. Mr. Pamma informed the delegate that the Manager did not want to be involved in the investigation. On June 8, 2020, the delegate shared her preliminary findings in the investigation with Mr. Pamma and invited him to contact her if he would like to “discuss anything further or have questions”. In his reply to the delegate on June 9, 2020, Mr. Pamma disagreed with the delegate’s preliminary assessment. The delegate in her email response of same date said to him “I can give you an additional two weeks to provide further information, including witness contact details or any other materials that you believe would be relevant. Please provide all such evidence by Monday June 22, 2020”. In his email of June 15, 2020, to the delegate, Mr. Pamma provided Ms. Shahi’s contact information and said she was a witness to “verbal abuse of customers on multiple occasions”. The delegate spoke with Ms. Shahi and found that the latter was “unable to recall specific details of any incident having occurred on November 13, 2019” and instead described Ms. Jassar’s conduct in general terms. In her email of June 16, 2020, to Mr. Pamma, the delegate states that she had spoken with Ms. Shahi and her evidence did not change her preliminary findings. She also ended the letter asking Mr. Pamma “[i]f you have any other evidence that you wish to submit please do so by the deadline given in my previous email, June 22, 2020”. Mr. Pamma, in his reply email of June 16, 2020, did not provide any further particulars about the alleged incident of November 13, 2019. I find the delegate gave Mr. Pamma ample opportunity to provide any specifics of the alleged incident of November 13, but he failed to do so, probably because he did not have any particulars.

64. I also find any allegations of Mr. Pamma that the delegate rushed the investigation or interrupted Ms. Shahi when speaking with her or failed to consider the latter’s evidence are not borne out by objective evidence and baseless.
65. I also do not find that the delegate failed to properly respond to any relevant enquiries and questions from Mr. Pamma. In some of the emails, Mr. Pamma appears to be asking questions that require the delegate to disclose results of the investigation prior to the Determination being made or the outcome of the evidence. In all such instances, I find the delegate responded appropriately although not to Mr. Pamma’s liking. I do not find anything turns on that in this appeal.
66. I also find that Mr. Pamma is inaccurate in suggesting, in his appeal submissions, that the delegate was requiring Bear Creek to “directly observe [Ms. Jassar’s] conduct” to be able to prove cause for termination. In her email to Mr. Pamma on June 9, 2020, the delegate simply opined that in their “process at the Branch, the greatest weight is attached to firsthand evidence.” However, she also noted that “[a] thorough investigation will take place, evaluating all evidence presented by both parties”. I do not find anything turns on this in the appeal.
67. Mr. Pamma also contends under the natural justice ground that he felt, in this case, the delegate “had already made her decision and was doing the minimum work required by the Branch”. This is a serious allegation on Mr. Pamma’s part. He is suggesting bias or lack of neutrality on the part of the delegate. In essence, he is questioning the delegate’s integrity. In *Dusty Investments Ltd. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the Tribunal stated that the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one, and the evidence presented should allow for objective findings of fact:

. . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: *see A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

68. The Tribunal has repeatedly stated that an allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the party alleging its existence. Furthermore, a “real likelihood” or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.
69. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:
- Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the **personal** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)
70. It follows from all of the above that the burden of proving actual or a reasonable apprehension of bias is high and demands “clear and convincing” objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias. In this case, Mr. Pamma’s allegation of bias or apprehension of bias on the part of the delegate is entirely gratuitous and based on his subjective feelings. He provides absolutely no objective evidence and there is nothing in the materials, in the slightest, substantiating his allegation. I find Bear Creek has failed to meet its burden of proof as there is simply no clear objective evidence from which it can reasonably be found the Director or the delegate was disposed to hold an adverse view of Bear Creek at any stage of the investigation process leading to the Determination.
71. Lastly, I will address the signed statement of Ms. Shahi attached to the appeal submissions of Mr. Pamma. As indicated previously the statement mainly elaborates on the evidence Ms. Shahi previously provided to the delegate during the investigation of the Complaint. Curiously, the statement is dated the same date as the appeal submissions of Mr. Pamma – September 7, 2020 – and the font, syntax and language in the statement is similar to that of Mr. Pamma’s written submissions and some of its content is uncannily similar to Mr. Pamma’s written submission. Whether or not the words in the written statement are Ms. Shahi’s, I do not find the statement satisfies the requirements in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, that must be met before new evidence will be considered in the appeal. More particularly, the statement does not contain any evidence that could not have been presented to the delegate during the investigation of the Complaint and before the Determination was made. It is also not probative such as to have led the delegate to a different conclusion on the penultimate issue in this case – whether Bear Creek had just cause to terminate Ms. Jassar’s employment. Therefore, I will not consider it in this appeal.
72. On the whole, I find that Bear Creek’s is attempting to dispute the findings or conclusions of fact of the delegate. The Tribunal will not substitute the delegate’s finding of facts, even if it is inclined to reach a different conclusion on the evidence, provided the findings of facts are not without a rational basis or

perverse or inexplicable. Here, the delegate's findings of facts are both rational and grounded in the parties' evidence and there is no basis for this Tribunal to interfere with them.

73. In summary, I find Bear Creek'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

74. 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 August 7, 2020, confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal