Citation: Coast Medical Air Inc. (Re)
2020 BCEST 148

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Coast Medical Air Inc.
("Coast")

- 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.:** 2020/119

**DATE OF DECISION:** December 17, 2020

**DECISION**

## SUBMISSIONS

Evgueni Iakovlev — on behalf of Coast Medical Air Inc.

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA"*), Coast Medical Air Inc. ("Coast") has filed an appeal of a determination issued by the Director of Employment Standards (the "Director") on July 9, 2020 (the "Determination").

2. The Determination found that Coast contravened Part 3, sections 17 (paydays) and 18 (if employment is terminated), and Part 7, section 58 (vacation pay), of the *ESA* in respect of the employment of Manrajpal Dhillon ("Mr. Dhillon").

3. The Determination ordered Coast to pay Mr. Dhillon wages in the total amount of $665.78, 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 two administrative penalties of $500 each against Coast for breaching sections 17 and 18 of the *ESA*.

5. The total amount of the Determination is $1,665.78.

6. Coast appeals the Determination on the "natural justice" and "new evidence" grounds of appeal under section 112(1)(b) and (c) of the *ESA.*

7. In correspondence dated August 21, 2020, the Tribunal notified the Director and Mr. Dhillon that it had received Coast's appeal and it was sending the same for informational purposes only and no submissions on the merits of the appeal were being sought at this time. The Tribunal also requested the Director to provide a copy of the section 112 record ("the record").

8. On September 16, 2020, the Tribunal received the record from the Director and forwarded a copy of it to Coast and Mr. Dhillon. Both were provided with an opportunity to object to the completeness of the record. While Mr. Dhillon did not raise any objections to the completeness of the record, Evgueni Iakovlev ("Mr. Iakovlev"), the director and President of Coast, submitted his objections by email on October 13, 2020. In his email to the Tribunal, Mr. Iakovlev states that Coast never received an email from the delegate on March 24, 2020, but there was an email on March 25 from the delegate, and it did not contain a request by the delegate that all communication from him be in writing. In response to Mr. Iakovlev's submissions, while the delegate does not deny the email she sent to Mr. Iakovlev was dated March 25 and not March 24, 2020, or that the email did not contain a request that all communication from Mr. Iakovlev be in writing, she states that Mr. Iakovlev's contention is not relevant to the completeness of the record and all information provided in the record is complete.

9. Mr. Iakovlev also contends that the record does not include mention of a telephone call he had with the delegate after April 22, 2020, wherein he asked the delegate whether Mr. Dhillon had a written contract of employment and other related questions. The delegate reiterates that the record is complete, but Mr. Iakovlev contends otherwise. I have reviewed the record carefully and it is very detailed and appears to meticulously record all exchanges the delegate had with the parties when investigating the Complaint. I do not have any reason to doubt the veracity of the delegate's response that the record is complete and, in any event, nothing in this appeal turns on whether or not the delegate's email was dated March 24 or 25, 2020, and whether or not the delegate asked Mr. Iakovlev to communicate in writing. Also, I have no reason to doubt that if the delegate made any notes of any call she received from Mr. Iakovlev during the investigation of the Complaint, it would be in the record. I find that the record, as produced by the Director in this appeal, is complete and Tribunal accepts it as complete.

10. On November 25, 2020, the Tribunal sent correspondence to the parties advising that a panel is 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).

## 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*.

## BACKGROUND

13. Based on an online BC Registry Services Search conducted on May 2, 2019, Coast was incorporated in British Columbia on May 10, 2016. Mr. Iakovlev is listed as its sole director.

14. Coast is in the business of selling air purifiers and operates in Vancouver and Delta, British Columbia.

15. On September 26, 2019, Mr. Dhillon filed a complaint under section 74 of the *ESA* claiming that Coast failed to pay him $600 in wages for working as a salesperson with Coast between September 11 to 18, 2019 (the "Complaint").

16. The delegate of the Director investigated the Complaint and obtained evidence from both parties before issuing the Determination.

17. In her summary of Mr. Dhillon's evidence in the Reasons for the Determination ("the Reasons"), the delegate notes that she interviewed Mr. Dhillon on March 16, 2020. He indicated to her that he applied for a sales job on an online sales website and later interviewed with a person by the name of Roman whose last name he could not remember. However, the delegate, through her investigation, discovered the last name was Ansari.

18. Mr. Dhillon said that Mr. Ansari told him that he could earn a guaranteed monthly pay of $3,500 plus sales commissions in the job. He agreed to the terms and received a response through the online website on September 10, 2019. The response was from Coast with a heading "Traveling Sales Reps…" and said:

> Congrats on making the decision to come on board.
> See you tomorrow, Wednesday, Sept 11 – 10am sharp. Kindly arrive 15 min. earlier.

19. Mr. Dhillon said he attended at Coast's office, in Delta, on September 11 and together with four other new hires, he received training from Mr. Ansari for the first three days. After his training, he worked with Coast until September 18, 2019, attending at the homes of prospective customers to demonstrate Coast's air purifier product. The appointments were scheduled for him by Coast and the product demonstration took him approximately 2 hours each time. He said he completed four appointments per day. He filled out his paperwork for each appointment and delivered it to Coast's office at the end of the workday.

20. During his period of employment, he said he worked approximately 7.5 hours per day without any meal breaks and conducted a total of 12 demonstrations of the company's product. While he did not make any sales, he said that he had agreed to a rate of $50.00 per demonstration and therefore, he was owed $600 for the 12 demonstrations he performed. He also said he did not receive any vacation pay.

21. He said he decided to resign from his employment after he realized it was not for him. He informed Mr. Ansari of his decision and the latter told him that he would only be paid after he returned to the company the two air purifiers that were in his possession. However, after he retuned the air purifiers to Mr. Ansari, Coast failed to pay him his wages despite his numerous attempts to obtain payment.

22. On March 25, 2020, the delegate sent Mr. Iakovlev an email containing a summary of Mr. Dhillon's position and attached the Complaint Form filed by Mr. Dhillon. The delegate provided Coast two options: to provide payroll evidence, if Coast was disputing the Complaint, or alternatively, to forward a cheque for the outstanding wages payable to Mr. Dhillon, if Coast concluded that Mr. Dhillon's allegations were correct.

23. On March 26, 2020, Mr. Iakovlev responded by email to the delegate and advised that Mr. Dhillon never worked for Coast. He said that Coast does not hire by email and therefore there is no email congratulating Mr. Dhillon on being hired. He further states that Coast does not make verbal contracts with their employees. All employees of Coast have written contracts which set out "exact pay, job expectations and everything that could possibly arise". He also asserted that even if Mr. Dhillon had an employment contract, there would not be anything in it guaranteeing him $50.00 per client demonstration or $3,500.00 per month.

24. Mr. Iakovlev went on to describe a two-step interview process Coast employs for hiring employment candidates. He explained that after the first interview, only those candidates selected for a second interview are invited to return for another interview in a group setting. He surmised that the email the delegate is referring to that Mr. Dhillon received from Coast was probably an invitation for the second interview. However, he states, this does not mean that the candidate is hired. He states that candidates are allowed to then decide "if they are capable of doing the job" and "if they will enjoy selling the product" and "if the pay structure works for them". It is after this that Coast's management decides which candidates they will proceed with for the training. He concluded his email by again denying that Mr.

Dhillon worked for Coast or worked 7.5 hours per day or was told he would receive $25 to $50 per product demonstration because that is inconsistent with how Coast operates or pays its salespeople. He requested the delegate to ask Mr. Dhillon for a copy of his employment contract.

25. On April 22, 2020, the delegate responded to Mr. Iakovlev by email. In the email, the delegate summarized, in much greater detail, the evidence of Mr. Dhillon that she obtained from interviewing the latter during the investigation of the Complaint. She also attached a screenshot of the message from Coast to Mr. Dhillon congratulating him "on making the decision to come on board" and asking him to attend at Coast's office on "Wednesday, Sept 11" at "10 am sharp". She informed Mr. Iakovlev that while Mr. Dhillon claimed he earned $50 per product demonstration, and that he was owed $600 in outstanding wages for demonstrations he performed between September 11 to 18, 2019, he did not provide any "supporting evidence of this agreement". She also explained that "where there is a dispute and there is no supporting evidence, the minimum wage for all hours worked" applies, which in this case would be $13.85 an hour for all hours Mr. Dhillon worked. She then "strongly encourage[d]" Mr. Iakovlev to "either (a) submit additional evidence relevant to the issues that have arisen in this matter, or (b) voluntarily comply with the *Act,* and pay out the balance of $647.93 to [Mr. Dhillon]" by 10:00 a.m. on May 5, 2020, failing which she would issue a determination.

26. According to the delegate, when Mr. Iakovlev failed to provide voluntary payment to Mr. Dhillon and did not adduce any further evidence, she issued the Determination.

27. In the Reasons, at page R5, after setting out the requirements of sections 17 and 18 of the *ESA*, the delegate explained why she preferred the evidence of Mr. Dhillon over Mr. Iakovlev's in concluding that the former was employed with Coast:

> The Complainant provided evidence, in the form of an email exchange he had with CMA, to support his position that he was hired by and worked for CMA in September of 2019. On March 26, 2020, Mr. Iakovlev asserted that the email the Complainant received must have been for his second orientation interview and denied that CMA has ever hired employees by email. However, on April 22, 2020, I sent Mr. Iakovlev a copy of the Complainant' evidence and provided him an opportunity to respond to it. Mr. Iakovlev did not respond. In the absence of further information from the Employer on this aspect of the complaint, I find that it is more probable that the email message the Complainant received was to confirm the Complainant's start of employment. The email stated, "Congrats on making the decision to come on board." It did not indicate "coming on board" was intended to mean that the Complainant was being invited back for a second interview, rather the wording in the message suggests that the Complainant was being congratulated for making the decision to work for CMA.
>
> Further, the Complainant provided concise and consistent information. The information he provided in his interview on March 16, 2019 was consistent with his picture evidence sent on March 26, 2019. Namely, that he was congratulated to start work and that work began on September 11, 2019. The Complaint stated the purifier demonstration took approximately 2 hours, which is consistent with his assertion that he worked 7.5 hours a day and attended four scheduled appointments. This verbal and documentary evidence also aligns with the Complainant's claim that he trained for three days, then worked in the field for three days and conducted four demonstration per day, and 12 demonstration appointments in total.

> The Complainant's ability to recall and provide details about his complaint is convincing. He recalled Mr. Ansari's first name, "Roman," as the person who hired and trained him. He described additional details about his training with four other employees and the work he did during each day primarily in Langley, BC. Given the nature of the traveling sales position, the Complainant's account of the day appears reasonable and not exaggerated. Accordingly, I am satisfied that the Complainant worked for CMA and entitled to wages for the work he performed between September 11, 2019 and September 18, 2019.

28. The delegate also explained, at page R5 and R6 of the Reasons, why she preferred the evidence of Mr. Dhillon to calculate outstanding wages owed to him by Coast:

> … Mr. Iakovlev's statements with respect to the [Mr. Dhillon's] rate of pay are largely unfounded. Although the Complainant has no evidence of the agreement to be paid $50.00 per client demonstration, Mr. Iakovlev's vague response that [Coast] neither pays its employees like that nor hires employees to work 7 or 7.5 hours per day, is not helpful. I am not persuaded by Mr. Iakovlev's statements because they lack the detail and supporting documentation associated with those provided to me by the Complainant. Accordingly, and in the absence of further Employer participation, I find the Complainant provided the best evidence available to calculate outstanding wages.

29. Based on Mr. Dhillon's evidence, the delegate concluded that he worked 7.5 hours per day with Coast for a total of six days, between September 11 to 18, 2019, which spanned over two pay periods. In each pay period he worked 22.5 hours for a total of 45 hours. Since there was a dispute regarding his rate of pay because Mr. Dhillon failed to provide any supporting evidence of his agreement with Coast, the delegate relied upon section 15 of the *ESR* and applied the minimum wage rate of $13.85 per hour to calculate that Mr. Dhillon was owed $623.25 in regular wages for the hours he worked. The delegate also awarded him vacation pay of $24.93 pursuant to section 58 of the *ESA* and accrued interest of $17.60 pursuant to section 88 of the *ESA*. The total amount Mr. Dhillon was awarded is $665.78.

30. The delegate also levied two penalties of $500 each against Coast for breach of sections 17 and 18 of the *ESA*.

31. On July 14, 2020, after the Determination was received by Coast and Mr. Iakovlev, the latter emailed the delegate with his submissions and documents questioning the evidence of Mr. Dhillon and the delegate's findings of facts in the Reasons. He also alleged that the delegate prematurely "closed the case before responding to [his] previous inquiry" and asked the delegate to reopen the case. The arguments and documents in the July 14, 2020, email feature significantly in the appeal submissions of Mr. Iakovlev, which I will summarize below.

## SUBMISSIONS OF COAST

32. In the Appeal Form, Coast has checked of the "natural justice" ground of appeal. However, in his written submissions filed on behalf of Coast, Mr. Iakovlev has added the "new evidence" ground of appeal.

33. Under the "natural justice" ground of appeal, Mr. Iakovlev states that this is his second time he is dealing with the delegate. He states that he finds her to be biased and partial because "there was constant siding with the employee" in both cases "followed by what sounded like threats to just pay so [he]wouldn't get

charged a penalty". In support of his contention, Mr. Iakovlev provides particulars of the previous complaint, including some of his email exchanges with the delegate. I have reviewed Mr. Iakovlev's materials and submissions and do not find it necessary to summarize them here, although I will discuss them under "Analysis" below.

34. Mr. Iakovlev also contends that there was "a massive lack of communication" by the delegate in the investigation of the Complaint because she failed to respond to his "emailed questions" including particularly his request "for a copy of the contract" between Mr. Dhillon and Coast. When he tired waiting for the delegate to respond, he states he telephoned her to ask the same questions and to "figure out how [he] need[ed] to respond to the false allegations". He says he spoke to her and told her he could ask his landlord to provide a CCV camera footage to show no one came back to Coast's office and also obtain written statements of employees that "no one ever signs anything other than actual bills of sale". However, "before [he] could have any type of response from [the delegate], [he] was sent a determination which was not in [his] favour."

35. In the balance of his submissions, Mr. Iakovlev attempts to dispute specific findings of fact of the delegate in the Reasons using, in some cases, documents he previously did not produce to the delegate in the investigation of the Complaint. I will summarize some of his allegations below.

36. Mr. Iakovlev attaches Coast's "Job Ad" entitled "TRAVELLING SALES REPS needed" (the "Advertisement") and says that Mr. Dhillon is "making false claims" in his Complaint because the Advertisement says the hours of work are 1:00 p.m. to 9:30 p.m. between Monday to Friday and shorter on weekends and this is inconsistent with "7 hours per day" Mr. Dhillon claims he worked.

37. He also states that in the Advertisement, Coast guarantees wages of $3,300 per month. There is no mention of a payment of $50 per demonstration or $3,500 per month guaranteed pay. Therefore, he states, Mr. Dhillon "did not even check the job advertisement before making a false claim".

38. He questions why the Complaint says that Mr. Dhillon worked 7 hours a day but the evidence the delegate sent to him says he worked 7.5 hours. However, a review of the record and particularly the Workflow Sheet shows that Mr. Dhillon, when interviewed by the delegate on March 16, 2019, claimed he worked 7.5 hours.

39. Mr. Iakovlev also contends that Mr. Dhillon could not have worked Monday to Friday and also trained three days but this seems to be a misreading by Mr. Iakovlev of the delegate's email of April 22, 2020, wherein she states Mr. Dhillon claimed he worked Monday to Friday 7.5 hours per day, but she goes on explain that it was a total of 6 days he worked, namely September 11, 12, 13, 16, 17 and 18, 2019. The delegate does not say that the 3 days of training were in addition to the 6 days of work.

40. Mr. Iakovlev also attaches the online exchanges of "the full conversation" between Mr. Dhillon and Mr. Ansari since September 6 to September 10, 2019, and states that it was Mr. Dhillon who made the decision "to move forward with [Coast] before coming for an initial interview." He also provides a copy of the complete communication from Mr. Ansari to Mr. Dhillon on September 10, 2019, which I have reproduced below (the incomplete version is reproduced in paragraph 18 above):

> 4:17 PM
>
> Congrats on making the decision to come on board.
>
> See you tomorrow, Wednesday, Sept 11 – 10am sharp. Kindly arrive 15 min earlier.
>
> Feel free to park anywhere. Business professional is attire.
>
> To recap Orientation will be under 3 hours after which training will continue till 4pm after a brief break.
>
> Training will continue Thursday and Friday from 10am till 4pm.
>
> Friday evening you will be set up with all the paperwork and contract.
>
> Monday, Sept 16th when you arrive at 1pm for Sales meeting, if we collective [sic] decide you are ready to rock and roll we will send you out to make money. [Sentence highlighted in original]
>
> Welcome aboard and see you tomorrow.
>
> Coast Medical Air Inc.

41. Mr. Iakovlev states that based on the portion he has highlighted in the communication, only "if all goes well" Mr. Dhillon can "start making money on the following Monday". That is, Mr. Dhillon was not hired by Coast yet because of the two-step interview process Coast employs. He reiterates Coast's interview process which he previously communicated to the delegate in his email of March 26, 2020 (as summarized in paragraph 24 above). He also points to the same communication from Mr. Ansari to Mr. Dhillon to argue that the latter's claim that the training Coast offered was 'paid training' is false. He states that Coast provides "a free 2-day training course for those who are a good fit for us and we're a good fit for them".

42. He further contends that had Mr. Dhillon undergone training and worked, he would have known that "his claims of 'getting customers to sign notes and bringing them back to the office every night' is also completely false".

43. He also attaches to his appeal submissions the Lead Sheets of Coast dated September 11, 12, 13, 14, 16, 17, and 18, 2019, which contain employee appointments for each day. He states Coast does "not book more than 3 appointment slots per day". Therefore, he contends, Mr. Dhillon could not have completed 4 appointments per day. He also states that the Lead Sheets do not show Mr. Dhillon was ever scheduled to a customer's home.

44. In the balance of his submissions, Mr. Iakovlev attaches a copy of the Reasons and highlights 9 different passages in the Reasons which either summarize the evidence of Mr. Dhillon or the delegate's findings of fact and he challenges both by advancing arguments he made in his email of March 26, 2020, to the delegate or in his email of July 14, 2020, after the Determination was made. I do not find it necessary to summarize these arguments here, but I will address them in my analysis below.

## ANALYSIS

45. 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.

46. As previously indicated, Coast has invoked the "natural justice" and "new evidence" grounds of appeal.

47. 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.

48. 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.

***Natural Justice***

49. 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.

50. 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).

51. 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.

52. 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.

53. 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.

54. In this case, I find that Coast was afforded the procedural rights contemplated in both section 77 of the *ESA* and the statement in the Tribunal's decision in *Imperial Limousine Service Ltd., supra*. More particularly, on March 25, 2020, the delegate emailed Mr. Iakovlev and advised him of the Complaint. She not only attached the Complaint document to her email but also summarized particulars of the Complaint. She also afforded Mr. Iakovlev and Coast an opportunity to respond by April 3, 2020, if Coast was intending to dispute the Complaint, or voluntarily pay Mr. Dhillon by sending her a cheque by March 30, 2020, which she would forward to Mr. Dhillon. Mr. Iakovlev opted to dispute the Complaint and set out Coasts' response in his email of March 26, 2020, to the delegate (which is summarized in paragraphs 23 and 24 above). While Mr. Iakovlev asks several rhetorical questions in the email, he also makes a request of the delegate to ask Mr. Dhillon for a copy of his employment contract with Coast. However, Mr. Dhillon did not produce any written agreement to the delegate. Subsequently, on April 22, 2020, the delegate sent Mr. Iakovlev a further email setting out, in greater detail, the evidence of Mr. Dhillon she obtained from interviewing him. She states in the email:

> The information above provides more information regarding Mr. Dhillon's complaint. It is intended to make you aware of the complaint and provide you with an opportunity to respond to Mr. Dhillon's allegations and evidence.

55. In the same email the delegate noted that while Mr. Dhillon claimed he earned $50.00 per product demonstration and worked between September 11 to 18, 2019, and was owed $600 in outstanding wages, he "*provided no supporting evidence of this agreement*" (italics mine). She further noted:

> … where there is a dispute and there is no supporting evidence, the minimum standards allows for minimum wage for all hours worked, which is $13.85, for the time Mr. Dhillon alleges he is owed for hours worked.

56. The delegate ended her email by "strongly encourag[ing]" Mr. Iakovlev, at this point, to either "submit additional evidence relevant to the issues that have arisen in this matter" or to "voluntarily comply with the *Act*, and pay out the balance of $647.93 to the complainant". She imposed a deadline of 10:00 a.m. on May 5, 2020, for Mr. Iakovlev to opt to do either and informed him that if he opts not to voluntarily comply with the *ESA* then a determination will be issued. According to the delegate, Mr. Iakovlev did not make a voluntary payment, nor did he respond with any further information. As a result, she issued the Determination on July 9, 2020. Subsequently, on July 14, 2020, after receiving the Determination, Mr. Iakovlev emailed the delegate stating that he was awaiting her response to his previous email to her (March 26, 2020) and he also left her a "phone message" but did not receive any response from her. In his appeal submissions, however, he states he called the delegate to "personally speak to her" and that he "mentioned to [the delegate] over the phone", if necessary, he can ask his landlord for the CCV camera footage to prove that no one returned to the office at the end of the day and he also offered to obtain written statements of other employees but the delegate "was insistent (sic) of payroll documents".

57. I find Mr. Iakovlev's email of July 14, 2020, and his appeal submissions somewhat inconsistent. In the former he seems to say that he left a voicemail for the delegate and in the latter he suggests that he actually spoke with her. In the record, the Branch Workflow Sheet, where the delegate meticulously sets out all her dealings with the parties during the investigation, shows no record of any call or voicemail from

Mr. Iakovlev. I am not at all persuaded that Mr. Iakovlev made any call to the delegate after the delegate's email of April 22, 2020, and before the Determination was made. I find that the July 14, 2020 email was the first contact Mr. Iakovlev made since his March 26, 2020 email. I also find it disingenuous of Mr. Iakovlev to say that he was waiting for his email (March 26, 2020) to be answered by the delegate when most of the questions in the email were rhetorical in nature. As for his question about whether Mr. Dhillon had a copy of a contract with Coast, the delegate, in her email of April 22, 2020, to Mr. Iakovlev, indicated that Mr. Dhillon "provided no supporting evidence of this agreement" and in the absence of supporting evidence "minimum standard allows for minimum wage for all hours worked". Therefore, Mr. Iakovlev knew there was no employment agreement forthcoming from Mr. Dhillon. In the circumstances, I find that Mr. Iakovlev and Coast were afforded ample opportunity to adduce all their evidence in the investigation and they were aware of the deadline of May 5, 2020, set by the delegate for receiving any "relevant evidence", but failed or neglected to act in a timely fashion.

58. I next turn to Mr. Iakovlev's allegation that the delegate was biased and impartial in this case as she was in a previous case involving Coast because she sided with the complainants in both cases.

59. 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: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99

60. In *R. V. S. (R.D.)*, [1997] 3 S.C.R., the Supreme Court added:

> Regardless of the precise words used to describe the test (of bias or 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.

61. On the basis of the legal principles delineated above, the onus or 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. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances would conclude the object of the allegation was biased against him. In this case, I have reviewed both the materials Mr. Iakovlev has adduced from the previous case against Coast (in which the complaint against Coast was dismissed) and the materials in this case to allege bias. I find that there is nothing in the slightest, in any of the materials, that would satisfy the requisite threshold or test for a finding of bias or perceived bias. It is evident from Mr. Iakovlev's appeal submissions that he is discontent with the delegate preferring the evidence of Mr. Dhillon over his. However, it is within the scope of the delegate to weigh or assess the evidence of the parties and accept the evidence of one party over the other provided reasons are provided for the choice made and those reasons are based on relevant considerations which they were in this case.

62. In the result, I dismiss the natural justice ground of appeal.

***New evidence***

63. Mr. Iakovlev also invokes the new evidence ground of appeal.

64. In *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:

> (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 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.

65. All of the above requirements are conjunctive requirements that the appellant must satisfy before "new evidence" will be admitted in the appeal.

66. In this case there are several documents that Mr. Iakovlev adduces in the appeal to dispute the evidence of Mr. Dhillon. These documents include Mr. Dhillon's resume, the Advertisement, Coast's Lead Sheets, and "full conversation" between Mr. Ansari and Mr. Dhillon including a complete copy of the September 10, 2019 communication from Mr. Ansari to Mr. Dhillon (set out above in paragraph 40). None of these documents would satisfy the first requirement in *Re Merilus Technologies, supra,* for admitting evidence in the appeal because they were all available and could have been presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. As indicated previously, Mr. Iakovlev simply missed or neglected to provide this evidence by the deadline of May 5, 2020, set by the delegate. I am not at all convinced that Mr. Iakovlev was waiting for a response to his email of March 26, 2020, from the delegate. I find this is a case of the employer waiting in the weeds and presenting evidence they believe is relevant only on appeal: See *Re Berjak Construction Ltd.*, 2019 BCEST 46. In the circumstances, none of the said documents are admissible as new evidence in this appeal.

67. I am also not persuaded that any of the documents presented by Mr. Iakovlev as "new evidence" in this appeal are probative such that they would have led delegate to a different conclusion on the issue of whether or not Mr. Dhillon was employed with Coast. Had Mr. Iakovlev presented the documents to the delegate during the investigation, she would have had the opportunity to assess the reliability of that evidence.

68. Having said this, I find of particular note, the September 10, 2019, communication from Mr. Ansari to Mr. Dhillon (see paragraph 40 above). Mr. Iakovlev contends that the highlighted portion in this exchange is evidence that Mr. Dhillon was not yet hired. However, in his email of March 30, 2020, to the delegate, he states that *after the second interview*:

> …we allow the candidates to first decide if they are capable of doing the job, if they will enjoy selling the product, … if the pay structure works for them. Then we decide as management which candidates we would like to proceed with for the training.

69. The exchange of September 10, 2019, therefore, means that Mr. Dhillon must have completed his second interview as he was not only invited for training on Wednesday, September 11, (which was to continue for two more days on Thursday and Friday, September 12 and 13), but on Friday he was to be "set up with all the paperwork and contract" and when he returned on Monday, September 16, for the sales meeting, they would "collective[ly] decide" if he was ready to "rock and roll" to go out and make money. It would be a stretch to say that this exchange only shows that Mr. Dhillon was still under consideration for employment with Coast and not yet employed. While I have already ruled that this document is inadmissible, even if I were to admit it, it does not support Mr. Iakovlev's contention that Mr. Dhillon was not yet hired.

70. As for the materials Mr. Iakovlev has submitted from the previous complaint against Coast to support his allegations that the delegate was biased or impartial inv this case, I find the materials neither probative nor relevant in this case.

71. Lastly, I find that Mr. Iakovlev, throughout the appeal submissions, whether by way of introduction of "new evidence" which I have rejected or by way of elaborating on arguments that he has already made in his email of March 26, 2020, is effectively disputing the findings or conclusions of fact of the delegate. The Tribunal has consistently stated that it 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 rational and grounded in the parties' evidence and I find them persuasive. I find there is no basis for the Tribunal to interfere with the delegates findings of fact.

72. I find Coast'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

73. 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 July 9, 2020, confirmed together with any interest that has accrued under section 88 of the ESA.

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