



Citation: Ulrike Roth and Benoit Brochu (Re)
2020 BCEST 44

An appeal

- by -

Ulrike Roth and Benoit Brochu
("Ms. Roth" and "Mr. Brochu")

- 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: David B. Stevenson

FILE NOS.: 2019/196 and 2019/197

DATE OF DECISION: May 13, 2020

DECISION

SUBMISSIONS

Ulrike Roth	on her own behalf and on behalf of Benoit Brochu
Joseph Park	on behalf of Livingstone RV Park Corporation
Sarah Vander Veen	delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses two appeals filed under section 112 of the *Employment Standards Act* (the “*ESA*”), one by Ulrike Roth (“Ms. Roth”) and the other by Benoit Brochu (“Mr. Brochu”), of a determination issued by Sarah Vander Veen, a delegate of the Director of Employment Standards (the “Director”), on October 16, 2019 (the “Determination”).
2. The Determination found Ms. Roth’s and Mr. Brochu’s former employer, Livingstone RV Park Corporation (“Livingstone RV”), had contravened Part 3, sections 16, 17, 21, 27, and 28; Part 4, sections 36 and 40; Part 5, sections 45 and 46; and Part 7, section 58 of the *ESA* in respect of their employment and ordered Livingstone RV to pay Ms. Roth and Mr. Brochu, collectively, wages in the amount of \$17,467.41, an amount that included wages and interest under section 88 of the *ESA*. The Director imposed administrative penalties for contraventions of the *ESA* in the amount of \$5,000.00. The total amount of the Determination is \$22,467.41.
3. Ms. Roth and Mr. Brochu have appealed the Determination on all of the available grounds of appeal found in section 112 of the *ESA*. The appeal submissions are virtually identical.
4. The appeals challenge several aspects of the Determination, including: the Director not finding Livingstone RV had contravened section 18 of the *ESA*; the Director’s calculation on compensable hours for both Ms. Roth and Mr. Brochu; and the finding that Ms. Roth and Mr. Brochu had residence in the RV park during their employment.
5. The appeals also seek an extension of the statutory appeal period. The first part of each appeal was received by the Tribunal on November 25, 2019, which is within the statutory appeal period. A second part (“Part 2”) of the appeals was delivered to the Tribunal on December 27, 2019, and a third, very brief, submission was added to the appeals on January 10, 2020. I do not perceive either of the latter two submissions to the Tribunal enlarge upon the grounds of appeal or raise substantially new arguments beyond what is contained in the appeals received on November 25, 2019.
6. In correspondence to Ms. Roth and Mr. Brochu, Livingstone RV and the Director, dated December 3, 2019, the Tribunal, among other things, acknowledged having received the appeals, requested the section 112(5) record (the “record”) on each appeal from the Director and notified the other parties that submissions on the request for an extension of the appeal period and on the merits of the appeal were not being sought from any other party at that time.

7. The record for each appeal has been provided to the Tribunal by the Director and a copy has been delivered to Ms. Roth and Mr. Brochu and Livingstone RV. All have been provided with the opportunity to object to its completeness.
8. There has been no such objection from any of the parties and, accordingly, the Tribunal accepts the record as being complete.
9. I have decided it is appropriate to consider these appeals under section 114 of the *ESA*.
10. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:

- (a) the appeal is not within the jurisdiction of the tribunal;*
- (b) the appeal was not filed within the applicable time limit;*
- (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) there is no reasonable prospect the appeal will succeed;*
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) one or more of the requirements of section 112(2) have not been met.*

11. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Ms. Roth and Mr. Brochu, the Director, and Livingstone RV will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.
12. After assessing the appeals, I sought submissions from the parties on whether, as alleged in the appeal, there was a contravention of Part 3, section 18 of the *ESA* and, if so, whether the Director erred in law in not determining Livingstone RV had contravened the statutory requirement found in that provision and not imposing an administrative penalty for the contravention. I shall address this issue in due course.

ISSUE

13. The issue is whether all or part of these appeals should be allowed to proceed or be dismissed under section 114(1) of the *ESA* and whether the Director erred in not finding and addressing the alleged contravention of Part 3, section 8 of the *ESA*.

THE FACTS

14. The facts outlined here are taken from findings and conclusions of fact made in the Determination.
15. Livingston RV operates an RV park (the “RV park”) in Langley, BC.
16. Ms. Roth and Mr. Brochu filed complaints with the Director alleging Livingstone RV had contravened the *ESA* by failing to pay regular wages, overtime wages, statutory holiday pay, and annual vacation pay. Ms. Roth also alleged Livingstone RV made unauthorized deductions from her pay.
17. Ms. Roth was employed as caretaker of the RV park from December 11, 2017 to September 11, 2018. She commenced her employment a rate of pay of \$1,400.00 a month and was receiving \$2,400.00 a month at the time of termination. She was also receiving a waiver on the monthly rent and hydro on a site pad on which Ms. Roth and Mr. Brochu situated their motorhome, in which they had been living full-time when their employment began.
18. Ms. Roth and Mr. Brochu lived together in their motorhome on a site in the RV park from the commencement of their employment until on or about June 10, 2018, when Mr. Brochu moved out of the motor home. Ms. Roth continued to live in the motorhome until the termination of her employment.
19. The Director found Mr. Brochu was an employee of Livingston RV from December 11, 2017 to June 24, 2018. This finding is not appealed.
20. The Director found Ms. Roth and Mr. Brochu were not “managers” of the RV park as that term is defined in the *ESA*. This finding is not appealed.
21. None of the parties kept a contemporaneous record of hours worked by Ms. Roth and Mr. Brochu.
22. Mr. Brochu presented evidence, in the form of a timesheet he compiled for the purpose of his complaint, indicating he had worked 212.5 hours during his employment. The Director accepted that evidence and found he was owed wages in the amount set out in the Determination. Ms. Roth later “updated” this evidence to add additional hours to it. The Director did not accept the “updated” hours of work, finding Mr. Brochu’s timesheet to be the best and most direct evidence of his actual hours of work.
23. The Director found Mr. Brochu was not entitled to be paid wages for 24 hours a day, 7 days a week, rejecting his claim and argument that he was “on-call” during the full period of his employment. This finding is, conditionally, not being appealed. In the appeal submissions, which are identical in form and content, it states:

Benoit Brochu is not appealing the Director’s decision that he should not be compensated for 24 hours on call as a compromise, provided I [Ms. Roth] am compensated for all my hours worked which was 24 hours a day on call without significant breaks, 14-18 hours were typically spent actively working in the line of duty.
24. The Director also found Mr. Brochu was not entitled to overtime pay but was entitled to statutory holiday pay of \$24.70 and annual vacation pay based on 4% of the wages found owing to him. The finding of entitlement to annual vacation pay is not appealed, although if his appeal on the issue of entitlement to

wages for 24 hours a day, 7 days a week, is considered and is successful, he would be entitled to overtime pay and the amounts of the all entitlements claimed will change.

25. To show her actual hours of work for the purpose of her claim, Ms. Roth compiled a schedule of duties and a daily calendar showing some of the duties she performed. She constructed the schedule and the calendar from text messages, e-mails, and her memory. The Director found Ms. Roth's evidence and summary of hours worked based on this information was not a reliable or credible source for determining her daily hours of work for the reasons set out at pages R27 – R28 of the Determination.
26. At the request of the Director, following a fact-finding meeting on April 2, 2019, Ms. Roth prepared a detailed summary of the hours she worked for each day of her employment. Joseph Park ("Mr. Park") was provided an opportunity to comment on the summary.
27. The Director found this summary to have "shortcomings"; the reasons for that finding are expressed at pages R28 – R29 of the Determination.
28. Based on an analysis of the evidence provided, the Director found Ms. Roth worked a total of 2,197.3 regular and overtime hours, earning \$18,138.97 in wages for regular hours worked and \$11,277.20 in wages for overtime hours worked. These findings are appealed.
29. For the same reasons as the decision on Mr. Brochu, the Director found Ms. Roth was not entitled to be paid wages for 24 hours a day, 7 days a week, rejecting her claim that she was "on-call" during the full period of her employment. This finding is appealed.
30. The Director found Ms. Roth was entitled to statutory holiday pay and annual vacation pay. The finding of entitlement to these matters is not appealed, although by logical extension, the amount of these entitlements is being appealed.
31. The Director found Ms. Roth was entitled to reimbursement of amounts improperly deducted by Livingstone RV. This finding is not appealed.
32. The Director found it was a condition of employment for Ms. Roth and Mr. Brochu to reside at the RV park and that the motorhome owned and occupied by Ms. Roth and Mr. Brochu on the RV park site over the period of their employment was their residence. This finding is disputed.
33. The Director found Livingstone RV had contravened ten sections of the *ESA* and imposed administrative penalties in the amount of \$5,000.00. The Determination did not specifically consider whether, or decide that, Livingstone RV contravened Part 3, section 18 of the *ESA*.
34. The administrative penalties imposed is appealed. The appeals contend the Director erred in law in not finding Livingstone RV had also contravened section 18 of the *ESA* and was liable for an additional administrative penalty for that contravention. The appeals also contend the Director erred by not imposing discreet administrative penalties relative to Mr. Brochu.
35. The Director conducted an investigation of the complaint. Included in the investigation were two fact-finding meetings. Ms. Roth and Mr. Brochu presented a list of 22 witnesses who, it was suggested, could

provide information relevant to their claims. The Director attempted to contact 12 of them. Many refused to be interviewed. Ms. Roth and Mr. Brochu initially presented written statements from two persons. After the Director issued a preliminary assessment of the complaints, they presented written statements from five additional persons.

36. Livingstone RV requested the Director interview three couples who, it was suggested, could provide information supporting their position. The Director spoke with each of those couples. After the Director issued a preliminary assessment of the complaints, Livingstone RV provided written statements from an additional six persons.
37. The Director did not rely on any the information provided through witnesses presented by the parties. The reasons of the Director are set out in the Determination at pages R4 – R5.

ARGUMENT

38. The litany of errors the Director is alleged to have made is lengthy, but warrants setting out.
39. Ms. Roth and Mr. Brochu have engaged all of the allowable grounds of appeal listed in section 112 of the *ESA*: error of law; failure to observe principles of natural justice in making the Determination; and evidence coming available that was not available when the Determination was being made.
40. Ms. Roth and Mr. Brochu say the Director committed the following errors of law:
- a. not finding Livingstone RV contravened section 18 of the *ESA*;
 - b. not finding Livingstone RV contravened section 39 of the *ESA*;
 - c. not imposing administrative penalties for each contravention relating to each of Ms. Roth and Mr. Brochu;
 - d. failing to consider the “abundance of clear and convincing evidence” of Ms. Roth and Mr. Brochu working 24/7 on call for Livingstone RV. The appeal submissions assert the Director “has a legal obligation to consider [the] evidence and not simply discredit all witness statements”;
 - e. finding the motor home occupied by Ms. Roth and Mr. Brochu on the RV park site during their respective periods of employment was their residence;
 - f. failing to request video recordings from the RV park which would show Ms. Roth’s daily activities;
 - g. failing to provide Ms. Roth with an opportunity to “clarify seemingly inconsistent and unrealistic statements made by me or recorded in my timesheets”;
 - h. failing to provide detailed reasons for findings made on hours of work done by Ms. Roth on each day;
 - i. exercising too much latitude in deciding what information to rely on and in using discretion to make adjustments to the timesheets provided by Ms. Roth;

- j. incorrectly calculating regular and overtime wages, statutory and annual vacation pay, and the 32-hour rule adjustment;
- k. finding Mr. Brochu had not submitted corrected timesheets; and
- l. failing to credit Ms. Roth and Mr. Brochu with two compensable hours for each time either was called to work “at night or other times”.

41. While there are some obvious questions of law within the arguments made on alleged errors of law ground, most of the arguments supporting of the alleged errors of law only challenge findings of fact made by the Director and do little more than re-state Ms. Roth’s and Mr. Brochu’s assertions of fact made to the Director during the investigation.

42. Ms. Roth and Mr. Brochu submit the Director breached natural justice principles in the following respects:

- a. failing to allow further clarification of “seemingly confusing and conflicting statements or situations”;
- b. failing to provide a rationale for the findings on hours worked;
- c. failing to request video recording from the RV park;
- d. stating Mr. Brochu did not submit the corrected time sheets, which added additional hours to his claim of hours worked;
- e. assuming the nature of the position was “live-in”; and
- f. exercising too much latitude in deciding what information to rely on and in adjusting the time sheets provided by Ms. Roth and Mr. Brochu;

43. As with the arguments supporting the error of law ground of appeal, this ground of appeal does little more than provide a launching point for re-arguing the facts upon which Ms. Roth’s and Mr. Brochu’s claim were based.

44. Ms. Roth and Mr. Brochu have provided material with the appeals and seek to have this additional evidence included in the material considered by the Tribunal in these appeals. This additional evidence comprises several witness statements that are found in the record, two new witness statements, one text message, two depictions of the entrance sign and layout of the RV park, a printout of the Livingstone RV website, including some of the history of the caretaker position, a copy of the Labour Day e-mail from Livingstone RV to Ms. Roth, an e-mail to the Director explaining the timesheets that were submitted and a travel reservation. There is also reference to phone records which are expected to be acquired and submitted at a later date. As of the date of this decision, no such records have been provided. In the submission identified as Part 2 of the appeals, Ms. Roth and Mr. Brochu have attached what is referred to as the on-line job posting for the caretaker position with Livingstone RV for which Ms. Roth applied and a copy of an e-mail to the Director.

45. Ms. Roth and Mr. Brochu have requested an extension of the statutory appeal period, submitting Ms. Roth was out of the country for three weeks, which covered some of the appeal period and did not receive a copy of the Determination until November 20, 2019 – just five days short of the end of the appeal period – and has not had sufficient time to fully prepare the appeal.

46. By correspondence dated February 13, 2020, the Tribunal advised the parties it was seeking submissions on the issue concerning Part 3, section 18 of the *ESA*. Submissions were received from all parties.
47. The Director acknowledges the facts showed a contravention of that provision but took no position on whether an error of law was made by making no finding in the Determination of a contravention and/or not imposing a penalty for it.
48. Mr. Park, submitting for Livingstone RV, contends no error was made. On March 10, 2020, the Tribunal received an additional, unsolicited submission from Mr. Park. This submission has not been disclosed to the other parties as, in addition to being unsolicited, it was not relevant to the question on which submissions were sought. It has been ignored in deciding these appeals.
49. Ms. Roth and Mr. Brochu have each filed a response on the question.
50. Ms. Roth's submission is non-responsive to the question asked, seemingly contenting herself to reiterating several elements of her appeal submission, alleging bias against the Director and asserting there were eight other contraventions for which Livingstone RV was not penalized, although her contention is in error in respect of section 36 and section 40, for which findings were made and administrative penalties imposed. Ms. Roth's submission also expands on the assertion that Livingstone RV contravened section 39 of the *ESA* and the Director erred by not finding this contravention.
51. I will note at this point that while there are allusions from Ms. Roth in her submissions to the Director during the complaint process about long hours of work – which were not accepted by the Director – there was no specific allegation from Ms. Roth that section 39 had been contravened. Attached to the submission on section 18 was an opinion, dated March 12, 2020, from a medical examiner summarizing the findings of a medical examination of Ms. Roth conducted on February 20, 2020. Ms. Roth submits this document for the purpose of “verifying that I was required to work excessive hours to the detriment of my health”.
52. I find the document does no such thing and as “new evidence”, it does not satisfy the conditions for being accepted and considered in her appeal. Even beyond that deficiency, however, her attempt to inject this document into her appeal has several problems. First, as indicated above, the document does not go to any issue that was before the Director in Ms. Roth's complaint; section 39 is raised for the first time in this appeal process. Second, the material on which Ms. Roth seeks to rely is only presented with a submission to the Tribunal, made on March 29, 2020, that sought a response from Ms. Roth on a question that was not addressed at all by her in the submission. That deficiency justifies my rejecting the entirety of the submission. Third, her argument is based on a view by her of hours worked which the Director found was not credible or reliable. I will say no more on either her section 39 argument or her submission.
53. Mr. Brochu's submission is also substantially non-responsive to the question asked and therefore largely irrelevant. He acknowledges the content of the Director's submission and makes the same allegations of bias against the Director as Ms. Roth. He contends the Director erred by failing to impose eight administrative penalties relating to his employment, questioning why the separate complaints filed by him and Ms. Roth should result in just one set of administrative penalties. He also reiterates elements of his appeal submission: natural justice; failure to provide reasons; and improperly disregarding evidence.

ANALYSIS

54. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which 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.*

Additional Evidence

55. Ms. Roth and Mr. Brochu have grounded their appeals on evidence becoming available that was not available when the Determination was being made. This ground of appeal is commonly referred to as the “new evidence” ground of appeal. I have described above the material which appears to be included in this ground of appeal.

56. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.

57. Most of the attachments to the appeals were before the Director during the complaint process. The material that does not appear to have been provided to the Director during the complaint process comprises two letters, both created in November 2019 and a document provided to support a request for an extension to the appeal period, confirming Ms. Roth’s absence from the province in October to November 2019.

58. I do not accept there is any merit to this ground of appeal, or, with the exception of the confirmation of Ms. Roth’s absence, the new evidence, for the following reasons.

59. First, the evidence is not “new”; it contains information that was available during the complaint process, some of which was provided to the Director and that which was not provided to the Director in the complaint process could have been. Second, the evidence – even that which is of recent origin – does not add anything to the information provided by Ms. Roth and Mr. Brochu to the Director. Third, it is not “credible”, containing predominantly anecdotal and unsupported commentary concerning Ms. Roth’s

work and the arrangement concerning a separate property. Fourth, it is not “probative”, in the sense that it is not capable of resulting in a different conclusion than what is found in the Determination.

60. Accordingly, this ground of appeal is denied and the appeals will be decided on the record that was before the Director when the Determination was being made.

Error of Law

61. The appeal asserts error of law. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [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.

62. While the list of alleged errors of law is lengthy, the primary focus of this ground of appeal is summarized in the following questions: did the Director err in law in finding their motorhome was their residence while each was employed by Livingstone RV; and, if the Director did not err on that question, did the Director err in law calculating the hours worked by Ms. Roth and Mr. Brochu.

63. Included in the above questions is whether the Director committed an error of law in the investigation of the complaints, in gathering and assessing the evidence, and in allegedly failing to provide reasons for the decisions in the Determination.

64. The secondary focus of this ground of appeal is whether the Director erred in law in not finding a contravention of Part 3, section 18 of the *ESA* and not imposing an administrative penalty for that and in not imposing administrative penalties for all possible contraventions relating to both employees.

65. The statutory grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals that seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

66. The test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

67. To expand the above point, in order to establish the Director committed an error of law on the facts, Ms. Roth and Mr. Brochu are required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or

inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant*, BC EST # D041/13 at paras. 26 – 29.

68. The question whether the motorhome was Ms. Roth's and Mr. Brochu's residence for the purposes of the definition of "work" in section 1 is a question of mixed law and fact. Questions of mixed law and fact are questions about whether the facts in a case satisfy the relevant legal tests. A question of mixed law and fact involves an error of law where an extricable error on a question of law can be identified in the legal analysis under review (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116; *Britco Structures Ltd.*, *supra.*).
69. The finding of the Director on whether Ms. Roth and Mr. Brochu were entitled to be paid for 24 hours a day, 7 days a week, is expressed in the Determination at pages R24 – R25. The Determination notes Ms. Roth and Mr. Brochu argued to the Director – and continue to argue in these appeals – that the caretaker position was not advertised as a live-in position, that living on site was optional, and living on site was never agreed. The Director found otherwise. That finding is rationally supported by the evidence referred to in the Determination.
70. The finding of the Director is also supported by other material in the record.
71. In the Director's notes of November 2, 2018, there is a summary of the overview provided by Ms. Roth where she said the position was not advertised as a live-in position, but also stated: "They were hired and they took their RV to Livingstone's RV Park (the "Park"). Having an RV was a requirement of the position": record, p. 44 – 45.
72. Mr. Brochu, when asked in the fact-finding meeting held on April 2, 2019, whether he lived at the RV park, said, "Yes, I lived there, but I also have my own place". Ms. Roth and Mr. Brochu presented a rental agreement on a separate property, but there was no evidence provided to the Director by either Ms. Roth or Mr. Brochu that either ever lived in or resided at any other location or premise while they were employed by Livingstone RV. Ms. Roth, in several places, stated she was never able to leave the RV park for any reason other than the occasional shopping trip and personal appointments; she sometimes referred to herself as being "chained" to the RV park.
73. There is ample support in the statements provided by Ms. Roth and Mr. Brochu in support of their claims and in the evidence generally that both resided continuously in the motorhome for the full period of their employment with Livingstone RV.
74. The appeals contend the Director ignored the "rental agreement" Ms. Roth and Mr. Brochu had on a separate property. That is not so. This document was shown to the Director frequently by Ms. Roth and Mr. Brochu during the investigation and was often referred to in written submissions, but in the absence of any evidence either of them lived at that property while employed with Livingstone RV, I find no fault with the Director for giving it no particular relevance.
75. As a matter of law under the *ESA*, the term "residence" is not defined in the *ESA* or the *Employment Standards Regulation* (the "*Regulation*"). Decisions of the Tribunal have taken an approach to what is a "residence" for the purpose of the definition of "work" in section 1 of the *ESA* that is captured in the

following excerpt from *Anne Elizabeth Lowan and Timothy James Lowan operating as Corner House*, BC EST # D254/98:

Residence seems to be a notion which the courts and legislatures have rarely clearly defined. It seems to be a notion which is accepted in a common sense way. Residence then is something short of domicile, i.e. the intention to remain in that place permanently, but something more than temporary or intermittent. It has some degree of permanence; it is the person's settled abode; it is the place they carry on the settled routines of life. It would be the place one hangs one's hat, keeps one's clothes, stores treasures and family memories; a place of privacy protected in law from state intrusions; and a place of retreat from the turmoil of the workplace. It would be a place to entertain one's friends. It would be an address of one's own, a phone number, and a place to receive mail.

...

For a workplace to also be considered a residence the place of work must assume some of the qualities of a residence. There must be some degree of privacy; a space, all be it limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to the intermittent or temporary.

76. The reasonable and logical conclusion from all the evidence provided to the Director is that the motorhome satisfied the legal concept, for the purpose of the *ESA*, of a residence. Ms. Roth and Mr. Brochu – while he was employed with Livingstone RV – carried out all of the routines of their life at and from the motorhome: they shopped from the motorhome; prepared and took meals there; slept there; and received mail there. It was their private space, subject only to the necessary intrusions of the employment. Ms. Roth and Mr. Brochu owned the motorhome. It was their protected space. There is no evidence they were required to cede any of their rights of privacy within their motorhome.
77. There was an element of permanence to their residing at the RV park that was ended only when their employment was.
78. In the circumstances, I do not find that concluding the motorhome was Ms. Roth's and Mr. Brochu's residence interferes with any of the purposes and objectives of the *ESA*. Notwithstanding the assertions made to the Director and re-asserted in the appeals, there is no doubt that Ms. Roth and Mr. Brochu understood the position required them to take up residence at the RV park, and they conducted themselves accordingly. It would be manifestly unfair to allow them to resile from their agreement and actions in order to acquire a benefit they were never intended to receive.
79. The appeals say the Director erred in law by failing to find a contravention of section 39 of the *ESA* relative to Ms. Roth's employment. I reject this contention for the following reason: there is no indication in the material that such a contention was ever made to the Director, but even if it was, there was absolutely no evidence presented to the Director to support finding a contravention of that provision. The Tribunal has accepted that the phrase "excessive hours" in section 39, based on its connection to the term "detriment", must take its meaning by reference to some *objectively* demonstrated adverse effect to an employee's health or safety: see *Kenneth Johnston*, BC EST # D071/10.

80. The argument that the Director erred in law by not issuing separate administrative penalties for each contravention for each employee is answered by reference to section 29(1.1) of the *Regulation*, which reads:

29 (1.1) *For the purposes of subsection (1), an act or omission of an employer constituting a contravention of a requirement under this Act is deemed to be a single contravention regardless of the number of employees affected by the contravention.*

81. This argument has no merit in fact or law and is rejected.

82. Ms. Roth and Mr. Brochu submit the Director erred in law by not making a finding of a contravention of section 18 of the *ESA* and by not imposing an administrative penalty for the contravention. In the submission on this point, the Director acknowledges there was a contravention of section 18. Implicit in this concession is that the Director could have made a finding to that effect in the Determination and imposed an administrative penalty for it, but did not. The Director has not provided any explanation for this apparent omission.

83. The Director found contraventions of ten provisions of the *ESA* including sections 16, 17, 21, 27, 28, 36, 40, 45, 46, and 58 and imposed administrative penalties.

84. The administration of the monetary penalty scheme in the *ESA* flows through section 79 of the *ESA*, which vests a statutory discretion in the Director to impose one or more of the requirements that are identified in section 79 upon a person who has been found to have contravened a requirement of the *ESA* or the *Regulation*. The Tribunal does not lightly interfere with a statutory discretion given to the Director, but can, if necessary, review discretionary decisions for abuse of power or process, mistake in construing the limits of the Director's authority, procedural irregularity, or unreasonableness – which tests whether the Director has considered immaterial factors or failed to consider material factors in making the discretionary decision.

85. In this case, the Director found contraventions of ten requirements of the *ESA* – most relating to non-payment of wages in a timely manner and non-payment of particular wage entitlements – but made no determination finding a contravention of section 18 or impose a requirement to comply with that provision. In not finding a contravention of section 18 of the *ESA* in the Determination and in not imposing a requirement under section 79, the Director was exercising a statutory discretion granted in the legislation.

86. Section 98 of the *ESA* contains provisions relating to monetary penalties; subsection (1) says, in part,

... a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty ...

87. In *Kimberley Dawson Kopchuk*, BC EST # D049/05, the Tribunal, while acknowledging the statutory discretion given to the Director in administering the administrative penalty provisions identified in sections 79 and 98 of the *ESA*, provided some commentary on the extent to which such discretion allowed the Director to characterize a particular set of facts as giving rise to one or more contraventions.

88. The Tribunal panel in *Kopchuk, supra*, noted that while delegates of the Director do not have any discretion regarding whether, and in what amount, to impose administrative penalties once they have found a contravention in a determination and imposed a requirement, delegates have exercised discretion concerning how to characterize a set of facts as giving rise to one or more contraventions. The panel suggests that if a delegate of the Director is exercising their discretion not to find every contravention that might be said to have occurred on the facts, they should say why they are doing so, and, similarly, if they are declining to impose penalties because some contraventions might be subsumed in others, they should state so expressly: see *Kopchuk, supra*, p. 16. See also, *Re 0697655 B.C. Ltd.*, 2019 BCEST 12.
89. While I agree with these suggestions, I find that failing to specifically set out the reasons for the exercise of discretion, either generally or in the circumstances of this case, does not negate the decision if it is apparent on the face of the Determination that the exercise of discretion does not show any of those defects upon which the Tribunal will interfere with the exercise of discretion.
90. Nothing in the materials, including Ms. Roth's and Mr. Brochu's submissions, indicate the exercise of discretion not to find a contravention of section 18 in this case was an abuse of process, a mistake in construing the limits of authority, or involved procedural irregularity. There is no indication that the Director considered irrelevant factors or failed to consider relevant factors. To the contrary, I find that such exercise of discretion was entirely reasonable in the circumstances of this case and was not tainted by an abuse of authority or procedural irregularity.
91. As well, although I make no finding on this point and raise it only for the sake of completeness, I question whether Ms. Roth and Mr. Brochu have any standing at all to challenge the Director's discretion in this case or, if they do, whether such challenge could be summarily dismissed as being vexatious and in bad faith. There is no apparent interest that either Ms. Roth or Mr. Brochu might have that compels their being able to intervene into what is essentially a matter of public interest between the Director and Livingstone RV.
92. In sum, I find no merit in the argument alleging error by the Director relating to the absence of a finding on section 18.
93. Ms. Roth challenges the Director's assessment of her spreadsheets of hours worked on each day of her employment, which were prepared by her at the request of the Director in the period after the April 2, 2019, fact-finding meeting.
94. I wish to dispense with one assertion made in the appeals submissions concerning those spreadsheets, which is that the timesheets, were "not comprised from memory, but primarily from tangible evidence" [emphasis in original]. That statement is grossly misleading and quite incorrect. As the Director noted in the Determination, none of the "sources" – the "physical evidence" referred to – which Ms. Roth presented in support of her hours of work – "provided any estimate of her daily hours of work" and her estimates developed from those sources, in the view of the Director, suffered from several limitations: see pages R27 – R28.
95. In fact, Ms. Roth had no evidence supporting her actual hours of work. In my view, her "recreation" of hours worked were both unrealistically detailed, considering they identified activities and hours of work attributed to each of those activities on each day of a period that ranged from approximately six months

to sixteen months before she created the spreadsheets, and inexplicably vague. Based on my review of the record, I agree completely with the Director that the shortcomings of her spreadsheets – that they were not a contemporaneous record; that there were large entries with minimal detail; that there was duplication and overlapping; and that some of the entries were for personal, recreational, and non-work activities – rendered the spreadsheets unreliable except to the extent there were objective factors that supported their reliability.

96. I will make two points at this time concerning Ms. Roth’s other arguments about the hours of work calculations, to which I will also return later when I address the natural justice ground of appeal.

97. First, the Director had no obligation to return to Ms. Roth for an explanation of statements the Director found to be inconsistent or unrealistic. It was Ms. Roth’s obligation to present a consistent and realistic framework for her claim. She alone bears the responsibility for the effect of the case she presented.

98. Second, the Director is not required to provide detailed reasons for every finding made for each day. The reasons in the Determination must be read as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they were delivered: *R. v. R.E.M.*, 2008 SCC 51 at paragraph 15. Every finding and conclusion need not be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned.

99. The reasons contained in a determination are adequate if:

- i. they are sufficient to allow for a meaningful appeal;
- ii. the reasons meet the parties’ “functional need to know” why the decision was made as it was; and
- iii. the reasons make it clear that the Director has understood and considered all the relevant factual and legal issues at issue.

100. In my view, which is reflected in the extensive and comprehensive appeal submissions filed by Ms. Roth and Mr. Brochu, the Determination provided enough information for Ms. Roth and Mr. Brochu to make a meaningful appeal of the findings of the Director on Ms. Roth’s hours of work.

101. It is also my view that the Determination expresses adequate reasons why the decisions on the various issues, and in particular on the hours of work, were made by the Director. If Ms. Roth considers otherwise, it is only because she disagrees with the findings and the reasons on which those findings were made.

102. Finally, the Determination is clear that the Director understood and considered all of the factual and legal issues and the requirement to make findings on the issues from *all* the evidence provided, not simply that provided by Ms. Roth or Mr. Brochu.

103. In respect of the Director’s calculation of Mr. Brochu’s wage entitlement, even if I agreed the Director was wrong in her assessment of the additional estimates of Mr. Brochu’s hours of work prepared by Ms. Roth, the Director found the timesheet Mr. Brochu initially presented – his direct evidence – was “the best evidence”, having the benefit of being neither obviously inflated or unreasonable. The onus on Ms. Roth

and Mr. Brochu attempting to attack that finding is to show it was an error of law and their appeals have failed to do that.

104. The above two arguments are shown to do no more than challenge findings of fact made by the Director from all of the evidence of hours of work performed by Ms. Roth and Mr. Brochu. While they may disagree with some of those findings, they have not raised their disagreement an error of law.

105. In sum, Ms. Roth and Mr. Brochu have not shown the Director's calculations of wages amount to errors of law.

106. Ms. Roth and Mr. Brochu submit the Director erred in law by failing to credit them with "two compensable hours" each time either was called out. This argument raises a question of the operation of section 34 of the *ESA*. It is established that section 34 refers to minimum daily hours of pay and does not separately apply to each and every defined segment of work (for example, each "working" period) within a particular day. In other words, it is not correct to suggest that each "working" segment in a working day separately triggers a minimum daily pay entitlement that, in turn, accumulates throughout the entire shift period: see *Michael Nicholas Hills carrying on business as Summerland Taxi*, BC EST # RD094/11. Neither Ms. Roth or Mr. Brochu have shown any evidence they were not provided with their minimum pay entitlement under the *ESA*.

107. This ground of appeal fails.

Natural Justice and Procedural Fairness

108. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99. Allegations of bias command a high evidentiary bar and require clear and objective evidence.

109. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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)

110. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Ms. Roth and Mr. Brochu were provided with the opportunity required by section 77 of the *ESA* and principles of natural justice to present their position and to respond to the position presented by Livingstone RV.

111. The principal arguments raised under this ground of appeal are that the Director did not request or allow Ms. Roth to provide further clarification of evidence provided by her that the Director found inconsistent, did not provide reasons for the findings made on her hours of work, and failed to request video recordings from Livingstone RV of the RV park. The first two matters have been addressed above. The last matter appears to be an afterthought. I have found nothing in the record that indicates Ms. Roth or Mr. Brochu contended the park video recordings were important, identified how they would advance their claims, or advocated for their production.
112. In any event, as indicated above, the onus on Ms. Roth and Mr. Brochu under this ground of appeal is to objectively demonstrate the conduct or decisions of the Director adversely affected the procedural rights protected by the *ESA* and principles of natural justice. They have not met this burden.
113. Ms. Roth and Mr. Brochu were provided a full and fair opportunity to present their positions. There is nothing in the circumstances of this case that would have required, as a matter of procedural fairness, the Director to seek “clarification” of the representations made by Ms. Roth of her hours of work.
114. Having reviewed the reasons provided in the Determination, I find they do not affect any natural justice consideration that generally accompanies a review of their adequacy; to reiterate, the reasons are sufficient to allow for a meaningful appeal – as evidenced by the fact of this appeal; they meet the parties’ “functional need to know” why the decision was made; and they indicate the Director understood and considered all the relevant factual and legal issues that needed to be considered.
115. In sum, I also find this ground of appeal has no reasonable prospect of succeeding.
116. I also find no merit to the allegation of bias. Such allegations bear a high evidentiary burden which I find is not met in this case.
117. For the above reasons, the appeals are dismissed under section 114(1).
118. Based on my disposition of the appeal, I do not need to consider the request for an extension of the statutory time.

ORDER

119. Pursuant to section 115 of the *ESA*, I order the Determination dated October 16, 2019, be confirmed in the amount of \$22,467.41, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal