

Citation: Nu West Resource Services Ltd. (Re)
2020 BCEST 57

An appeal

- by -

Nu West Resource Services Ltd.

- 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: Maia Tsurumi

FILE NO.: 2019/207

DATE OF DECISION: June 2, 2020

DECISION

SUBMISSIONS

Harsha Sandu

on behalf of Nu West Resource Services Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Nu West Resource Services Ltd. (“Nu West”) has filed an appeal of a determination (the “*Determination*”) issued by Sarah Vander Veen, a delegate (the “*Delegate*”) of the Director of Employment Standards, on November 6, 2019. In the *Determination*, the *Delegate* found Nu West contravened sections 21, 40 and 45 of the *ESA*. In the result, she ordered it to pay \$6,164.21 to Katherine Rourke (the “*Complainant*”) and \$1,500 in administrative penalties.
2. Nu West appeals the *Determination* on the following grounds: (1) an error in law; (2) a failure to observe principles of natural justice; and (3) new evidence has become available that was not available at the time the *Determination* was made.
3. I dismiss the appeal, and pursuant to sub-section 115(1) of the *ESA*, I confirm the *Delegate’s* *Determination*.
4. This decision is based on the submissions made by Nu West in its Appeal Form, response submissions from the *Delegate* (the “*Delegate’s* Submissions”), reply submissions from Nu West (the “*Reply Submissions*”) the sub-section 112(5) record (the “*Record*”), the *Determination* and the Reasons for the *Determination* (the “*Reasons*”).

ISSUE

5. The issue before the Employment Standards Tribunal is whether the appeal should be granted or dismissed.

THE DETERMINATION

Background

6. The *Complainant* filed a complaint (the “*Complaint*”) under section 74 of the *ESA* alleging Nu West failed to pay her overtime wages, statutory holiday pay and owed her amounts for some of its costs of doing business.
7. Nu West is a British Columbia company incorporated on November 19, 2014. Mr. Harsha Sandhu (“Mr. Sandhu”) is listed as its sole director and officer. Nu West provides safety services to construction companies in and around Prince George, BC.
8. The *Delegate* held a hearing on September 30, 2019, and issued her *Determination* on November 6, 2019.

9. The Complainant was employed as a first aid attendant from June 27 to November 2, 2018. Her rate of pay was in dispute and she did not have a written contract of employment.
10. The Complainant provided timesheets setting out the hours she worked each day and Nu West agreed that the hours reflected in the timesheets were correct.
11. The parties also agreed that if the Complainant worked: (1) less than 4 hours a day, she was paid for 4 hours; (2) less than 6 hours a day, she was paid for 6 hours; (3) 6 to 8 hours a day, she was paid for 8 hours; (4) more than 8 hours a day, she was paid for 12 hours; and (5) more than 12 hours a day, she was paid for the exact time she worked. The Complainant was also paid an allowance of \$150 per day she worked to pay for her food, room and board.
12. The Complainant was paid \$33,197.48, including daily allowances of \$150, during her employment with Nu West. She did not work any statutory holidays and was not paid statutory holiday pay but was entitled to 4% of total wages on each paycheque as vacation pay.
13. On October 17, 2018, Company X, which had contracted Nu West to provide first aid services (which Nu West provided through the Complainant), told the Complainant she was no longer needed. Nu West gave her notice and she did some additional work for it until November 2, 2018.

Issues Before the Delegate

14. The issues before the Delegate were whether the Complainant was entitled to: (1) overtime wages; (2) statutory holiday pay; and (3) reimbursement for expenses.

Evidence and Submissions at the Hearing

The Complainant's evidence

15. Before she was hired by Nu West, the Complainant and Mr. Sandhu had a telephone conversation. He asked her what her current pay was, and she told him it was \$24 per hour. Mr. Sandhu said he would pay her more than that, but he would not know her exact wage rate until Nu West signed a contract with Company X, the construction company she would be providing services to. He did not tell the Complainant she would be paid \$25 per hour, but when they discussed her overtime pay in late August 2018, he said she would be paid \$25 for 30 minutes of overtime. The Complainant said she understood this to mean her wage was \$25 per hour.
16. The Complainant was paid bi-weekly by e-transfer or direct deposit.
17. The Complainant said she accessed her first wage statement online in early October 2018, but it made no sense to her because it did not include any overtime. The hourly wage was \$20 per hour, but she said she did not notice this because she found the whole statement confusing. She testified that she was not able to access any other wage statements until Mr. Sandhu provided some in January 2019 (after her employment ended). When she asked Mr. Sandhu why the statements said her wage was \$20 per hour when it was supposed to be \$25, he said it was \$25 per hour taking into account her daily allowance.

18. The Complainant provided the following evidence:
- a. timesheets with the hours she worked;
 - b. copies of her wage statements;
 - c. receipts for gas totalling \$293.90 (she claimed another \$96 in gas, but did not provide receipts);
 - d. a receipt for \$1,176.62 from a tire and auto centre;
 - e. wage statements prepared by AET Bookkeeping for the purpose of her Complaint and which assumed a \$25 per hour wage and the hours of work in her timesheet; and
 - f. spreadsheets a friend prepared that represented her best estimates of what she was entitled to under the *ESA*, assuming a wage rate of \$25 per hour and the hours worked in her timesheets.
19. The Complainant said Mr. Sandhu told her to pick up a co-worker's company truck and take it to the tire and auto centre to get new tires. She said Mr. Sandhu told her he pre-paid for the tires, but when she got there she was told he had not and she could not reach him by phone. She paid for the tires herself.
- Nu West's evidence*
20. Mr. Sandhu denied he told the Complainant her wage would be \$25 per hour. He said he told her she would be paid \$300 for a 12-hour day: 8 hours at her regular wage of \$20 per hour and 4 hours at \$30 per hour. He did not recall saying he would pay her more than her previous employer.
21. Mr. Sandhu admitted the Complainant's wage statements were incorrect: he had problems with his previous payroll software and eventually hired someone to do the wage statements for him. He did not know the Complainant was not getting correct wage statements until she told him about this on October 5, 2018.
22. Nu West's position was that the \$33,197.22 paid to the Complainant was full compensation for all of her work, gas reimbursements, tire reimbursement, vacation pay and statutory holiday pay. The reimbursements were paid, but not reflected properly on her wage statements because of the problems with the payroll software.
23. Nu West provided the following evidence:
- a. a set of wage statements Nu West produced after the Complainant's employment ended, prepared for the purpose of the Complaint;
 - b. a text message, dated January 29, 2019 where the Complainant asked for her wage statements; and
 - c. other documents.
24. Nu West submitted the text message showed the Complainant had seen her previous wage statements (the one she viewed on October 5, 2018, and the ones he e-mailed to her in January 2019) on which her wage was stated as \$20 per hour. The Complainant never complained about her wage of \$20 per hour.

Delegate's Findings and Analysis

Overtime wages

25. The Delegate found the Complainant's hourly wage was \$20. The wage statement the Complainant viewed in October 2018 stated her wage rate was \$20 and if the wage was truly \$25 per hour, she would likely have noticed this discrepancy and raised it with her employer, especially as she raised other problems in her wages statements with him. However, the Complainant did not do this.
26. The Delegate then considered whether the Complainant was owed any overtime wages. She noted section 40 of the *ESA* requires employers pay employees 1.5 times their regular wage for hours worked between 8 and 12 hours a day and over 40 hours per week and 2 times the regular hourly wage for more than 12 hours per day. When calculating weekly overtime, only the first eight hours worked in a day are counted.
27. The Delegate found the hours in the timesheets provided by the Complainant, which Nu West agreed were correct, were the Complainant's daily hours of work for the purposes of calculating overtime.
28. The Delegate found the Complainant worked 618 hours at her regular wage of \$20 per hour; 362 hours at 1.5 times her regular wage; and 14.42 hours at 2 times her regular wage. Thus, she earned: \$12,360.00 in regular wages (618 x \$20) and \$11,436.80 in overtime wages (362 x \$30 plus 14.42 x \$40); total wages of \$23,796.80. The calculation details were set out in an Appendix to the Reasons.
29. Nu West submitted the \$150 daily allowance should have been considered part of the wages she was paid. The Delegate found the Complainant's daily allowance was an "*allowance*" within the meaning of wages as defined in section 1 of the *ESA* and therefore could not be considered wages. According to the timesheets she worked 84 days and therefore she was paid \$12,600.00 in allowances.
30. The Parties agreed the Complainant was paid a total of \$33,197.22 during her employment. The Delegate thus found this amount included \$20,597.22 in wages and \$12,600.00 in allowances.
31. The Delegate concluded the Complainant was owed \$3,199.58 in deemed overtime wages (\$23,796.80 earned minus \$20,597.22 paid as wages).
32. Nu West's contravention of section 40 of the *ESA* for failing to pay the Complainant all overtime wages owing to her within 48 hours after her last day of work was subject to a mandatory \$500 administrative penalty.

Statutory holiday pay

33. The Delegate noted that under section 45 of the *ESA*, an employee who does not work on a statutory holiday must be paid an average day's pay for each statutory holiday if they were employed for the 30 calendar days preceding the holiday and worked for at least 15 of these 30 days. An "*average day's pay*" is calculated as the amount of wages earned in the 30 days preceding the holiday (not including overtime) divided by the number of days worked in that period.

34. The Delegate found the Complainant earned \$2,176.00 (not including overtime) during 16 days of the 30 preceding the BC Day 2018 holiday (August 6, 2018) and was therefore entitled to \$136.00 as statutory holiday pay.
35. The Delegate also found the Complainant earned \$3,680 (not including overtime) during 23 days of the 30 days before the Labour Day 2018 holiday (September 3, 2018) and was therefore entitled to \$160.00 as statutory holiday pay.
36. The total owing to the Complainant for statutory holiday pay was \$296.00.
37. Nu West's was subject to a mandatory \$500 administrative penalty for its contravention of section 45 of the *ESA* for failing to pay an average day's pay for the Labour Day 2018 statutory holiday.

Reimbursement for expenses

38. The Delegate stated section 21 of the *ESA* prohibits an employer from requiring an employee to pay any of the employer's costs of doing business. The Complainant provided receipts for \$293.90 in fuel and \$1,176.62 for tires (\$1,470.52 in total). Nu West agreed these were costs of doing business but said it had reimbursed the Complainant for them. It said these reimbursements were not reflected in her wage statements because of the problems Nu West had with its payroll system.
39. The Delegate explained the employer bears the burden of establishing it has reimbursed an employee. Nu West did not provide evidence of reimbursement. Based on this and the fact the Delegate found the total paid to the Complainant was less than she was owed in wages, the Delegate concluded she was not reimbursed for the \$1,470.52. The Delegate did not find the Complainant incurred the \$96.00 gas expense because she did not provide receipts.
40. Nu West's contravention of section 21 of the *ESA* was subject to a mandatory \$500 administrative penalty because it required the Complainant to pay for costs of doing Nu West's business and it failed to reimburse the Complainant within 8 days of the end of the pay period.

Vacation pay

41. The Delegate found the Complainant was not paid vacation pay. The Complainant was entitled to \$963.71 in vacation pay (4% of \$24,092.80 in wages, including statutory holiday pay, she earned during her employment).

Accrued interest

42. The Complainant was entitled to \$234.00 in interest pursuant to section 88 of the *ESA*.

ARGUMENT

43. On appeal, Nu West submits that:
- a. it reimbursed the Complainant for the costs of doing business expenses (for tires and for miscellaneous items) she was awarded by the Determination;

- b. it told the Complainant not to pay for the tires herself, but she ignored this direction;
- c. the Appendix to the Delegate's Reasons, which set out the hours the Parties agreed the Complainant had worked, are incorrect in the following ways:
 - i. July 1, 2018 – the total of agreed upon 36 hours is listed as 48 hours;
 - ii. September 2, 2018 – the total should be \$1,426.80, not \$1,586.80 (a difference of \$160); and
 - iii. October 7, 2018 – the total should be \$1,760, not \$1,909.57 (a difference of \$149.57);
- d. the Delegate's calculation of total salary for the Complainant of \$23,796.80 needed to be adjusted for the errors in the Appendix above;
- e. the Delegate's calculation of total salary of \$23,796.80 reflected gross wages, but Nu West paid income tax on the amounts it paid to the Complainant;
- f. it overpaid the Complainant \$1,815.54;
- g. the Complaint Form referenced amounts owing for fuel and not for the tires and then the Complainant later said she was paid for fuel, but owed for the tires;
- h. the Delegate should not have imposed administrative penalties for violations of sections 21 and 40 of the *ESA* because Nu West did not violate the *ESA*;
- i. the Delegate should not have imposed an administrative penalty for violation of section 45 of the *ESA* because the failure to pay statutory holiday pay was unintentional; and
- j. the Delegate was biased against Nu West because at the hearing the Complainant was allowed to interrupt Nu West's representative and make allegations against it, the Delegate advised the Complainant to file a claim against Nu West in Small Claims Court and the mistakes in the calculations.

44. In Reply Submissions, Nu West submitted that it agreed with the Delegate's Submissions about the hours of work for July 1 – 7, 2018, and asked me to disregard this aspect of the Appeal (i.e. sub-paragraph 43(c)(i), above).

ANALYSIS

45. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-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; and/or
- c. evidence has become available that was not available at the time the determination was being made.

46. Nu West relies on all of these grounds in its appeal.

47. I sought submissions from the parties on the new evidence (RBC records and e-transfer records) regarding reimbursements / payments made to the Respondent for the tires and about a “*correction*”, which was not before the Delegate when she made her Determination; on the Appellant’s claims about various discrepancies between the hours worked set out in the Appendix to the Reasons versus the Respondent’s timesheets; and on the Delegate’s calculation on how much overtime was owing on the Respondent’s gross earnings, without taking into account taxes paid by the Appellant on behalf of the Respondent.

Error of law

48. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] CanLII 6466 (BCCA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of an administrative tribunal’s determination. In this context, an error of law occurs in the following situations:
- a. A misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
 - b. A misapplication by the decision-maker of an applicable principle of general law;
 - c. Where a decision-maker acts without any evidence;
 - d. Where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
 - e. Where the decision-maker is wrong in principle.
49. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.
50. The *ESA* does not allow appeals based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors of factual findings unless such findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing an error of law because of factual error is stringent, requiring the appellant to show that the findings are perverse and inexplicable in the sense that they were made without any evidence, that they were inconsistent with, and contradictory to, the evidence or they were without any rational foundation: *Britco Structures Ltd.*, BC EST # D260/03 at p. 17.
51. Nu West’s first alleged error of law (see paragraph 43(b) above) is that Mr. Sandhu told the Complainant not to pay for the tires, but she did so anyway. I find the Delegate did not err in law in finding that the Complainant paid for the tires and was entitled to be reimbursed for them. Nu West agreed the Complainant paid for the tires and that this expense was a cost of doing business. In fact, Nu West’s evidence on appeal (see New evidence below) shows it reimbursed her, which supports the Delegate’s conclusion that the Complainant was entitled to reimbursement.
52. Nu West also alleges the Complainant did not say she was owed money for the tires in the Complaint Form (see paragraph 43(g) above) and so the Complainant is not entitled to reimbursement. I find the Delegate did not err in law in finding the Complainant had to be reimbursed for this cost of doing business. Once a complaint is made, the Director must accept and review the complaint (subject to the exceptions in sub-section 76(3) that did not apply here): *ESA*, sub-section 76(1). Nothing in the *ESA* limits the Director to only investigating the specific claims set out when a complaint is filed. The powers of the Director to

respond to complaints and conduct investigations are broad. In fact, the Director may conduct an investigation whether or not he or she has received a complaint. Regardless of when the issue about reimbursement for the tires was first raised, Nu West had notice before the hearing that this was part of the Complaint.

53. Nu West submits its non-payment of statutory holiday wages for the BC Day and Labour Day holidays in 2018 (see paragraph 43(i) above) was not intentional and so the Delegate should not have imposed the \$500 administrative penalty for its violation of the *ESA*. I find the Delegate's Determination about the \$500 penalty was not an error of law. Under the *ESA* and its *Regulation*, once a contravention has been found, the penalties are mandatory.
54. Nu West's remaining allegations about errors of law are two-fold: (1) the Delegate made mistakes in calculating the hours of work and resulting wages owed to the Complainant; and (2) the Delegate considered the \$23,796.80 salary in gross wages and did not account for income taxes paid by Nu West.
55. In response to my request for submissions, with respect to the week of July 1 – 7, 2018, the Delegate says the timesheets indicate the Complainant worked a total of 41.75 hours for July 4 – 7, 2018, working more than 8 hours for each of the four days. As the Parties agreed the Complainant was to be paid for 12 hours a day if she worked more than 8 hours, the Complainant was entitled to payment for 48 hours for that time period.
56. I have reviewed the Record and the documents submitted by Nu West in its Appeal Form and I find the Delegate did not err in law. Her conclusion was based on the evidence and had a rational foundation. In any event, in its Reply Submissions, Nu West retracted this aspect of its Appeal.
57. With respect to the week of September 2 – 8, 2018 and week of October 7 – 13, 2018, the Delegate points out that Nu West does not say the number of hours worked as shown in the Appendix to the Reasons are wrong for these weeks. Rather, Nu West says the amounts are wrong. The number of hours worked for September 2 – 8, 2018, was 60.67 and for October 7 – 13, 2018, was 72. Nu West does not challenge these numbers. The Delegate acknowledged she erred in the entries in the "*Wages for Week*" column of her Appendix to the Reasons for the weeks of September 2 – 8 and October 7 – 13, 2018. However, she says she did not use the "*Wages for Week*" numbers in calculating the Complainant's entitlement to regular and overtime wages. She used the number of hours worked, which are not in dispute.
58. Nu West says the Delegate's Submissions are wrongly trying to correct errors in her Determination and I should not accept the alleged corrections.
59. I find the Delegate did not err in law. Her conclusion was based on the unchallenged evidence and had a rational foundation.
60. Finally, Nu West alleges it had paid taxes and benefits amounts before remitting the \$33,197.22, and so it, in fact, paid more than \$33,197.22 to the Complainant. Nu West also referred to a miscalculation because daily allowances were only paid where the Complainant worked 6 – 12 hours and so she did not get a daily allowance for every day she worked.

61. The Delegate states that her obligation was to determine the gross wages owed to an employee and not the net wages: *Serendipity Winery Ltd.*, BC EST # D073/15 at para. 26. The Delegate goes on to say that, as noted in the Determination on p. D2, Nu West may take statutory deductions from the wages it has been ordered to pay to the Director on behalf of Ms. Rourke as long as it provides a wage statement listing each deduction and the reasons for it.

62. The Delegate found, and the Parties all agreed, that Nu West paid \$33,197.22 in wages and daily allowances to the Complainant. As the Delegate noted, her obligation was to determine the gross wages owed to the Complainant and that is what she did, taking into account the agreed-upon amount of \$33,197.22 in wages and daily allowances that the Complainant had already received. Nu West's argument out the amount being based on net earnings appears to be made for the first time on appeal. In support of its appeal, Nu West provides website printouts about what the Complainant's net earnings were for 2018. However, these documents are not admissible as evidence in this appeal (see my decision on new evidence further below).

63. Based on the evidence and arguments before the Delegate, I find she did not err in law in her Determination of gross wages owed to the Complainant.

Failure to observe principles of natural justice

64. Nu West says the Delegate was biased against it. Its basis for this submission is that at the hearing the Complainant was allowed to interrupt Nu West's representative and make allegations against Nu West, that the Delegate advised the Complainant to file a claim against Nu West in Small Claims Court and the mistakes it says the Delegate made in calculating the wages owed. In Reply Submissions, Nu West also said the Delegate was biased against it because the Delegate's Submissions argue that Nu West's new evidence should be not be accepted by the Tribunal.

65. I find that Nu West's suggestion that the Delegate was biased is entirely unfounded.

66. The Director and his delegates must act in an unbiased and neutral fashion when investigating complaints under the *ESA*: *Milan Holdings Inc.*, BC EST # D559/97 at p. 3. Being unbiased means that the Director's delegates must conduct themselves professionally and exercise objective good judgment by proceeding where the evidence takes them in the course of an investigation. A delegate cannot enter upon an investigation with a personal agenda, with a financial stake in the outcome or with a mind closed to the outcome. The Director or delegate must keep their mind open in good faith to the particular facts and evidence before them in individual cases and make an independent Determination that reflects their best judgment in light of their experience and expertise.

67. The test for bias in procedural fairness terms is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator. This is because not only must administrative decision-makers like the Director actually be unbiased, they also must not appear to be biased: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at pp. 636-637 (underlining added). To meet the test for the reasonable apprehension of bias, a real likelihood or probability of bias must be shown; a mere suspicion is not enough: *R. v. R.D.S.*, [1997] 3 S.C.R. 141 at para. 112.

68. It is also important to note that although the duty of fairness applies to all administrative bodies, the extent of that duty depends on the nature and the function of the particular tribunal. Thus, the strictness of the test for whether there was a reasonable apprehension of bias depends on the nature and function of the Director: *Milan Holdings Inc.*, BC EST # D313/98 at pp. 12 – 13 and 16 (Reconsideration of BC EST # D559/97). In *Milan Holdings*, the Tribunal explained that this means that the standards of bias, which apply to determinations under the *ESA* must take into account the practical reality of the Director’s investigative function and the overlap of investigative and decision-making functions, which is specifically authorized by the legislation. This overlap in functions means that persons exercising these dual functions cannot be expected to function like courts or quasi-judicial tribunals and the standards for reasonable apprehension of bias must reflect that reality. Thus, except where the case for bias is clear and strong, candour and transparency on the part of a delegate should not taint his or her decision.
69. I find there was no reasonable apprehension of bias in the Determination or the Delegate’s Submissions. First, as described above, the Delegate did not make a mistake in her calculations for the three weeks disputed by Nu West in this appeal. Second, although Nu West complains that during the hearing the Delegate did not restrain the Complainant from making negative comments about Nu West and may have said she could sue Nu West in Small Claims Court, these allegations do not show a reasonable apprehension of bias. The Reasons indicate the Delegate considered the *ESA* and reviewed the evidence before her and made her Determination based on this evidence and the *ESA*. The Reasons satisfy me that, in light of the statutory function she was exercising, the Delegate decided the Complaint objectively and on its facts. Also, the Delegate’s Submissions appropriately address Nu West’s attempt to provide new evidence on appeal, including by referring to relevant Tribunal decisions.
- New evidence*
70. On appeal, Nu West submitted fresh evidence indicating the Complainant had in fact been reimbursed for the expense of the new tires. This evidence consisted of Nu West’s bank account statement for the period of December 31, 2018, to January 31, 2019, and a record of an INTERAC e-Transfer, which indicates the transfer was for “*Tire Payment -02/10/2018*”, for \$1,176.62 and accepted by the Complainant. This was the same amount claimed by the Complainant as reimbursement for the tires.
71. Nu West also submitted a bank statement for January 1 to 31, 2019, and a similar INTERAC e-Transfer receipt for \$727.27. The Details of Transfer say, “*Pay Oct 31, Nov 1, Nov 2*”.
72. Nu West says it had not yet found this evidence by the time of the hearing before the Delegate. In its reply submissions, Nu West said the documents are relevant and because the Complainant’s initiating Complaint form did not refer to the tires, Nu West could not have known it had to address this issue and therefore could not have provided this evidence.
73. The Delegate’s Submissions agree the disputed evidence was not before the Delegate at the hearing. The Delegate refers to Tribunal decisions, which state the test for accepting new evidence on appeal.
74. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, subsection 112(1)(c).

75. The decision in *Bruce Davies et al.* provides guidance on how the Tribunal applies sub-section 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence...[The evidence] must meet four conditions:

- (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 culpable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue:

Bruce Davies et al., BC EST # D171/03 at p. 3.

76. While I am sympathetic to Nu West's position that the Complainant has likely been awarded payment for the tires and for some other expenses, Nu West's new evidence does not meet the Tribunal's test for admitting fresh evidence.

77. While the evidence is relevant to a material issue arising from the Complaint, is credible and has a high potential probative value, the first, and most important, condition was not met. This is the condition that the fresh evidence provided on appeal could not, with the exercise of due diligence, have been discovered and presented at the time the Determination was made. This requirement comes from the assumption that proceedings under the *ESA* are likely to be fairer and more efficient if the parties are encouraged to take care to seek out all relevant information during the investigation phase: *Ocean Pointe Realty Ltd.*, BC EST # D097/11 at paras. 26 – 27.

78. Nu West says it had to sift through several hundred documents and ensure it did not release any confidential information. However, this does not mean it could not without due diligence have found the relevant bank statements and the INTERAC e-Transfer receipts and presented them to the Delegate before she made her Determination. Due diligence means time, sometimes even a lot of it, must be spent in carefully looking for evidence before a delegate makes his or her determination.

79. On appeal, Nu West also submitted printouts from a "*Payroll Deductions Online Calculator*" from the Canada Revenue Agency website. Nu West says the printouts show the taxes it would have withheld from the Complainant's pay in 2018 and thus shows the \$20,597.22 the Delegate found the Complainant was paid was based on net earnings and was not gross wages. The printouts are not admissible as new evidence. With an exercise of due diligence, Nu West could have put evidence before the Delegate at the hearing about what the \$33,197.22 included in terms of pay, including whether it was gross or net pay.

Summary

80. In summary, I dismiss Nu West's appeal and confirm the Determination under sub-section 115(1) of the *ESA*.

ORDER

81. Pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated November 6, 2019, confirmed in the amount of \$7,664.21, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal