

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Stephen Brooks
(the “Complainant”)

- 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: Robert E. Groves

FILE No.: 2021/054

DATE OF DECISION: December 16, 2021

DECISION

SUBMISSIONS

Anita Atwal	counsel for Stephen Brooks
Yuntongfei Huo	on behalf of Finale Entertainment Inc., carrying on business as Levels Nightclub
Dawn Rowan	delegate of the Director of Employment Standards

OVERVIEW

1. Stephen Brooks (the "Complainant") appeals a determination issued by Arun Mohan, a delegate ("Delegate Mohan") of the Director of Employment Standards (the "Director"), on April 6, 2021 (the "Determination").
2. The Determination followed an investigation of a complaint (the "Complaint") delivered by the Complainant pursuant to section 74 of the *Employment Standards Act* (the "ESA") alleging that the Complainant's former employer, Finale Entertainment Inc., carrying on business as Levels Nightclub (the "Employer"), had contravened the statute when it failed to pay him the wages and benefits promised in his employment contract.
3. Delegate Mohan concluded that the Employer had contravened sections 17, 18 and 58 of the *ESA*. The Determination ordered the Employer to pay the Complainant \$6,765.27 for wages, \$4,746.92 in vacation pay, and \$411.26 for interest. It also required the Employer to pay \$1,500.00 in mandatory administrative penalties. The total found to be owed was, therefore, \$13,423.45.
4. The Complainant delivered his appeal to the Tribunal six weeks late. There is, therefore, a preliminary issue to be determined: should the time for appeal be extended pursuant to the Tribunal's jurisdiction under section 109(1)(b)?
5. Regarding the merits of his appeal, the Complainant asserts that errors of law and a failure to observe the principles of natural justice by Delegate Mohan mean that the Determination should be varied to provide that the Employer be required to pay \$79,111.38 in wages instead of the \$6,765.27 figure noted in the Determination, along with the \$4,746.92 in vacation pay, and adjusted interest.
6. I have before me the Complainant's Appeal Form, its submissions in support of it, the submissions of Dawn Rowan, a delegate ("Delegate Rowan") of the Director, correspondence between the Tribunal and the parties generated in the appeal proceedings, and the record the Director was required to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. Included within these materials are the Determination and Delegate Mohan's Reasons for the Determination (the "Reasons").

ISSUES

7. There are two issues presented in the appeal.
8. As a preliminary matter, the Tribunal must resolve whether the period for the Complainant's requesting an appeal should be extended pursuant to section 109(1)(b) of the *ESA*.
9. If the answer to the first question is "yes", the Tribunal must then determine whether the Determination should be varied to increase the Complainant's award for wages.

THE PRELIMINARY ISSUE

10. The Determination was issued on April 6, 2021. The time for filing an appeal expired on May 14, 2021.
11. The Employer filed its own appeal of the Determination on May 14, 2021 (the "Employer's Appeal"). The Employer's Appeal is considered elsewhere.
12. The Complainant asserts that he sought legal advice regarding the Determination on April 23, 2021. He says that he was advised, incorrectly, that he had no grounds for an appeal under the *ESA*, and that he should pursue his claims against the Employer in the civil courts. He was then referred to counsel who might represent him in preparing a civil claim. Those referrals were unsuccessful due to the existence of conflicts of interest.
13. On June 3, 2021, the Complainant had an initial consultation with legal counsel he had sought out on his own. That counsel's review of the proceedings before Delegate Mohan led to the Complainant being advised that an appeal under the *ESA* was warranted.
14. On June 4, 2021, the Complainant emailed the Employment Standards Branch (the "Branch") indicating a desire to appeal the Determination.
15. On June 11, 2021, counsel for the Complainant emailed the Branch advising that she had been retained by the Complainant to appeal the Determination.
16. On June 14, 2021, counsel for the Complainant emailed the Employer with a copy of her previous email to the Branch advising that the Complainant intended to appeal the Determination. On June 24, 2021, counsel for the Complainant emailed copies of this correspondence to the lawyer who prepared the termination letter delivered to the Complainant by the Employer.
17. On June 25, 2021, counsel for the Complainant delivered the Complainant's appeal documentation to the Tribunal.
18. Section 109(1)(b) of the *ESA* permits the Tribunal to extend the period for requesting an appeal even though the period has expired. A decision made under section 109(1)(b) involves an exercise of a discretionary power. A non-exhaustive list of the criteria the Tribunal will consider on applications for an extension were identified in *Re Niemisto*, BC EST # D099/96. They include:

- There is a reasonable and credible explanation for failing to request an appeal within the period specified in the statute;
- There has been a genuine and ongoing *bona fide* intention to appeal a determination;
- The respondent party and the Director have been made aware of the intention;
- The respondent party will not be unduly prejudiced by the granting of an extension;
- There is a strong *prima facie* case in favour of the appellant.

19. Other decisions of the Tribunal regarding the application of these criteria have stated the following:

- Applications are not granted as a matter of course, even where there has only been a comparatively modest delay from the date the appeal period expired until an appeal is filed with the Tribunal (see *Re Unimaxx Networks Inc.*, BC EST # D098/12, confirmed BC EST # RD130/12).
- Even if the reason for a late filing of an appeal is attributed to incorrect legal advice, it is the appellant who is ultimately responsible for adherence to the requirements of the statute. Matters relating to the professional liability of legal advisers arise independently, and they should have no effect on the consideration of an application to extend (see *Re Craftsman Collision (1981) Ltd.*, BC EST # D030/10). Further, the failure to secure the services of legal counsel is not an adequate explanation for a failure to file a timely appeal (see *Re Mauryabistro Ltd. (c.o.b. Maurya Bistro)*, BC EST # RD023/15).
- An extension will not prejudice a respondent, in terms of the delayed resolution of a dispute, if the respondent has also filed an appeal that will be adjudicated (see *Re Walker*, BC EST # D140/05, and *Re Hollyburn Properties Ltd.*, BC EST # D138/05).
- When assessing the *prima facie* strength of the case, the Tribunal need not decide that the appeal will fail or succeed. Rather, it need only assess the relative merits of the grounds of appeal having regard to the established principles that inform the discussion when those grounds are engaged (see *Re Kendall Jefferson Treadway*, 2019 BCEST 18, confirmed 2019 BCEST 32).
- The overriding principle is whether an injustice would result if the Tribunal declines to grant an extension (see *Re Dollenkamp's Bakery Ltd.*, BC EST # D103/07).

20. In the case now before me, the delay should be characterized as modest, by which I mean it was neither brief, nor so long that it shocks one's conscience.

21. The Complainant has shown that he was disposed to consider an appeal within the statutory time limit because he sought the advice of legal counsel regarding the Determination. That said, he was dilatory in filing his appeal, notwithstanding that he and his legal counsel took urgent steps, after the appeal period had expired, to inform the Branch, the Employer, and the Tribunal that the Complainant intended to appeal once they decided there were plausible grounds for him to do so. As the Director argues, the fact the Complainant followed legal advice within the appeal period that was contrary to the advice he later received should not provide a compelling reason to extend the time for filing an appeal.

22. However, since the Employer has filed the Employer's Appeal, there is little, if any, prejudice to the Employer in permitting an extension of time for the Complainant to file an appeal of his own. Moreover, as noted by the Complainant, the Employer has delivered no submission indicating that it will suffer prejudice if the Complainant's appeal is permitted to proceed.
23. I am also persuaded that the Complainant has established a strong *prima facie* case for his appeal, and that a miscarriage of justice may occur if an extension is not granted. In this instance, it is this factor which I believe to be the most important in determining how the discretion granted in section 109(1)(b) should be exercised. The submissions of counsel for the Complainant, grounded in the record, allege errors of law and failures to observe the principles of natural justice on the part of Delegate Mohan. The substance of these concerns will become apparent in the discussion of the merits of the appeal which follows. As will be seen, I have found the submissions of counsel to be compelling.
24. For these reasons, I grant the Complainant's request that the time for him to appeal the Determination be extended to June 25, 2021, the date on which his appeal form and supporting documents were delivered to the Tribunal.
25. Before proceeding further, I note that counsel for the Complainant has argued it was inappropriate for the Director to deliver a submission regarding the timeliness of the appeal. Counsel asserted that the delivery of the Director's submission was inconsistent with the Director's obligation to maintain a posture of neutrality after a determination is issued. Since I have decided that the appeal period should be extended in this case, I do not believe it is necessary that I address counsel's submission in substance. Suffice to say, I requested that the parties, including the Director, deliver submissions regarding the timeliness question (see *Re D. Hall & Associates Ltd.*, BC EST #D354/99).

THE DETERMINATION

26. The Complaint arose from the Complainant's employment as general manager of the Employer's nightclub establishment (the "Club") from November 1, 2017, until December 21, 2019, when his employment was terminated for cause.
27. During his employment the Complainant paid sums out of his own pocket to purchase equipment and inventory necessary for the operation of the Club. The Employer also failed to pay significant portions of the Complainant's wages.
28. On December 12, 2019, the Complainant removed much of the operating equipment and alcohol inventory from the Club's premises. He notified the Employer he would return what he had taken when monies he alleged were owed to him were paid.
29. On December 18, 2019, representatives of the Employer delivered a \$50,000.00 bank draft to the Complainant (the "Draft"). The representatives of the Employer who provided information to Delegate Mohan regarding this payment told Delegate Mohan that it was made to settle with the Complainant all his claims for wages as well as his out-of-pocket expenses.
30. The Complainant understood the Draft to be the reimbursement of but a part of the \$72,350.11 sum he alleged he was owed in respect of the expenses he had incurred on behalf of the Club, and not for any

unpaid wages. He said he was told by the representatives of the Employer at the December 18 meeting that the balance of the sum owed to him for expenses would be paid to him on December 20, 2019. The Complainant then promised to return all the equipment and inventory to the Club when that further payment was made.

31. By the end of December 20, 2019, the Complainant had returned all the equipment and inventory to the Club. On the same day he received a personal cheque for \$22,350.11 (the "Cheque") from another representative of the Employer.
32. The Complainant asserted that the Draft and the Cheque (together, the "Payments") were reimbursement to him for the expenses he had incurred on behalf of the Club. He told Delegate Mohan that he had provided a list and detailed Excel spreadsheet to the Employer setting out the expenses he had incurred on its behalf. The expenses he noted amounted to \$72,350.11, the exact sum he later received in the form of the Payments when he returned the equipment and inventory to the Club.
33. The representatives of the Employer who provided information to Delegate Mohan regarding the Payments either stated they were unaware of the Cheque, or they could not recall what it was for. Delegate Mohan received no information regarding the Cheque from the representative of the Employer who prepared it.
34. Delegate Mohan determined that no compensation for length of service was owed to the Complainant pursuant to section 63 of the *ESA* because the Employer acted lawfully when it dismissed the Complainant for just cause due to his removal of the equipment and inventory from the Club. The Complainant has not appealed this finding.
35. A further issue Delegate Mohan considered was the Employer's argument that the Complainant was not entitled to wages prior to May 31, 2019, because the Club did not open until that date. Delegate Mohan found that the evidence did not support the Employer's contention. Instead, the evidence established that the Complainant had performed the duties to be expected of a general manager of a nightclub that was preparing to open from the date in November 2017 when the Complainant was first hired. Delegate Mohan's finding on this point played no part in the Complainant's appeal.
36. The principal focus of Delegate Mohan's analysis in his Reasons related to the Employer's submission that all the financial issues raised by the Complainant, including his claims for wages and expenses, were settled by verbal agreement and the delivery of the Draft to the Complainant at the meeting of the parties on December 18, 2019. The Complainant argued, by contrast, that the Draft, and the Cheque he later received, were paid to settle the matter of his outstanding expenses alone, and not his claim for unpaid wages.
37. Despite statements from representatives of the Employer that the Draft was provided to settle all the Complainant's claims for wages and expenses, Delegate Mohan noted that the Draft contained no wording that identified its purposes, no documents were prepared that evidenced a settlement on this basis had been reached, and the termination letter delivered to the Complainant made no reference to the purpose for the delivery of the Draft, or that any such settlement had occurred.

38. As for the Complainant's contention that the Draft and the Cheque were provided to settle his claims for unreimbursed expenses only, Delegate Mohan acknowledged the Complainant had delivered an Excel spreadsheet to the Employer itemizing his alleged expenses in an amount that matched exactly the \$72,350.11 sum the Complainant received from the Employer in the form of the Payments. However, Delegate Mohan observed that the Complainant had neglected to provide any receipts or other evidence establishing what his alleged expenses were for, and he had submitted no documentary material that revealed the purpose behind the Payments he later received. It was also telling for Delegate Mohan that the representatives of the Employer either said they had no knowledge the Cheque had also been paid, or they could not recall what it was for.
39. Delegate Mohan concluded that no binding settlement of any aspect of the Complainant's claims was reached by the parties. Delegate Mohan said this in his Reasons (R17):
- As there is no clear evidence regarding the purpose of the bank draft and personal cheque, I find that both were provided for services rendered to the Employer. The Complainant admits that the draft was provided by a co-owner of the nightclub, Mr. Zhang, whereas the cheque was provided to him by Ms. Jiang, the daughter of the co-owners and one of the signing authorities on the cheque (the other being Mrs. Jiang). The Complainant also stated that it was not provided for personal reasons, outside the course of his employment.
- As a result, I find that the bank draft and the personal cheque were not provided to settle the dispute or any component of it, be it wages, expenses, or both. Instead, since they were provided for services rendered to the Employer, both amounts will [*sic. be*] treated as wages....
40. Delegate Mohan determined that the Complainant's lawful claim for wages was \$79,115.38, a figure that was not disputed by the Employer.
41. Having found that the Payments totalling \$72,350.11 were wages, Delegate Mohan determined that they should be deducted from the \$79,115.38 figure, leaving the sum of wages owed at \$6,765.27.

ARGUMENT

42. The Complainant submits that Delegate Mohan erred in law and failed to observe the principles of natural justice when he determined that the Payments should be deducted from the wages the Complainant claimed were owed to him. The Complainant asserts that the Determination should be varied to provide that the Complainant is entitled to be paid \$79,115.38 in wages, plus vacation pay in the amount of \$4,746.92, and interest.
43. The Complainant argues that it was a palpable and overriding error of fact, and therefore an error of law, for Delegate Mohan to find that the Payments constituted "wages" under the *ESA*. The Complainant says that Delegate Mohan made this finding without any evidence and on a view of the facts that could not reasonably be entertained.
44. The Complainant states that he made no claim in his Complaint for reimbursement of his expenses. Instead, his Complaint related to unpaid wages and benefits. The Complainant's claim for reimbursement of his expenses was a separate matter which the Complainant pursued with the Employer on his own.

Further, there is no indication the Employer was aware of the Complaint the Complainant had filed with the Branch before the Complainant's employment was terminated.

45. The Complainant asserts he advised the Employer on several occasions in 2019 that he was owed \$72,350.11 for his expenses. He says, too, that he provided written particulars of his expenses claim to the Employer, supported with receipts, verifying this figure. During the investigation of his Complaint, the Complainant delivered copies of text messages, letters and emails to Delegate Mohan confirming these communications. The Employer did not deny that it owed the Complainant reimbursement for his expenses, as well as payment for outstanding wages.
46. The Complainant also states he provided Delegate Mohan with a spreadsheet which identified the specific expenses for which he had sought reimbursement from the Employer, in the total amount of \$72,350.11. The Complainant says that he advised Delegate Mohan he possessed receipts that supported the expenses he had identified, but Delegate Mohan did not request copies of his receipts. Then, as noted above, Delegate Mohan relied on the fact that the Complainant had not supplied receipts to Delegate Mohan as part of his rationale for concluding that there was "no clear evidence" regarding the purpose of the Payments, and so they should be characterized as payments of wages.
47. The Complainant argues that the Payments represented reimbursement to him of his unpaid expenses because the discussions with the Employer concerning the Payments occurred within the context of his removing equipment and inventory from the Club, which the Complainant said he had paid for with his own money. In addition, the Payments totalled \$72,350.11, the very sum the Complainant had informed the Employer he was owed for expenses. Once that sum was paid, the Complainant returned all the equipment and inventory he had removed.
48. The Complainant notes that neither he nor the Employer characterized the Payments solely as reimbursements for unpaid wages. Even the Employer alleged that the Payments were meant to compensate the Complainant for expenses, as well as unpaid wages.
49. The Complainant observes, too, that the *ESA* definition of "wages" specifically excludes "allowances or expenses". Given the evidence, therefore, it was a misapplication of the statute for Delegate Mohan to characterize the Payments as "wages", and nothing more.
50. The Complainant refers to the Record of Employment ("ROE") the Employer issued for the Complainant. The ROE makes no reference to the Payments. In his Reasons (R14), Delegate Mohan stated that the matter of any deficiencies in the ROE was irrelevant to the issues in the investigation. The Complainant argues that the ROE was relevant, and it should have been considered by Delegate Mohan. He submits that if the Payments are to be characterized as wages, or income, paid to the Complainant, they should have been documented in the ROE as insurable earnings. The inference the Complainant seeks the Tribunal to draw is that the reason the Payments were not alluded to in the ROE is because the Employer must not have considered them to be wages.
51. The Complainant makes a similar argument relating to a T4 he says he received later from the Employer, which also makes no reference to the Payments. The Complainant says that Delegate Mohan should have made inquiries regarding any T4 the Complainant may have received.

52. Regarding the Complainant's submission that Delegate Mohan failed to observe the principles of natural justice, the Complainant states that he was not represented by legal counsel during the investigation of his Complaint, and that he had never made a complaint to the Branch previously. He argues that Delegate Mohan ought to have asked him appropriate questions and requested relevant documents. He says that Delegate Mohan had a duty to ensure that the Complainant understood all aspects of the complaint process, which Delegate Mohan failed to do.
53. The Complainant submits that Delegate Mohan failed to observe the principles of natural justice when he neglected to inform the Complainant that the receipts for the Complainant's expenses Delegate Mohan knew the Complainant had in his possession should be submitted as an aid to prove the Complaint for unpaid wages. The Complainant says Delegate Mohan's failure to identify that the receipts were necessary to prove that the Payments were reimbursements for expenses deprived the Complainant of an opportunity to make his case.
54. The Complainant submits further that Delegate Mohan failed to observe the principles of natural justice when he neglected to interview key witnesses and failed to ask key questions of some of the witnesses.
55. The Complainant notes that Delegate Mohan did not interview the representative of the Employer who wrote the Cheque. Since the purpose of the Cheque was material to a key question in the investigation – whether the Payments were meant to reimburse the Complainant for expenses, or wages, or both, the Complainant says the failure to interview the author of the Cheque was a serious omission.
56. The Complainant also questions the failure of Delegate Mohan to interview another employee of the Employer ("Mr. C.") who was present at the December 18, 2019, meeting involving the Complainant and representatives of the Employer. Mr. C. confirmed in a statement provided to Delegate Mohan that the Draft delivered to the Complainant on that date was a reimbursement for expenses, and not a payment of wages. Mr. C.'s statement was not contained in the record delivered to the Tribunal pursuant to section 112(5) of the *ESA*, but counsel for the Complainant says, in an email, that it was delivered to Delegate Mohan. Delegate Rowan subsequently acknowledged in correspondence that there was no objection to the inclusion into the record of the emails from the Complainant's counsel in the appeal, including, I infer, the email referring to Mr. C.'s statement. In any event, the Complainant alluded to Mr. C.'s evidence regarding the purpose of the Payments in an email to Delegate Mohan dated March 28, 2021, which does appear in the record (page 114).
57. The Complainant also questions the failure of Delegate Mohan to consider, in his Reasons, a subsequent statement of another witness ("Mr. M.") which the Complainant says he provided to Delegate Mohan, and which, he alleges, voiced support for the position of the Complainant regarding the Payments in a manner that clarified an earlier more equivocal statement.
58. The Complainant argues further that Delegate Mohan failed to ask explanatory questions of witnesses for the Employer who provided statements, and who might, with probing, have provided more information regarding the purpose of the Payments. In addition, the Complainant queries the failure of Delegate Mohan to interview, or to press for information, some of the representatives of the Employer who were present for important discussions but provided no evidence at all.

59. A final submission made by the Complainant addresses Delegate Mohan's statements in his Reasons (R12 and R13) that he did not listen to a recording of the December 18, 2019 meeting the Complainant submitted, due to a technical issue that prevented Delegate Mohan from opening it. Delegate Mohan also stated that the Complainant failed to provide a transcript of the recording. The Complainant's response to these statements is that the recording contained evidence relating to the purpose of the Draft that was delivered on that date. The Complainant submits that it was unreasonable for Delegate Mohan to ignore the evidence of the recording, and to comment on the failure of the Complainant to provide a transcript, when Delegate Mohan never asked for a transcript, or advised the Complainant that the recording could not be opened.
60. The Director has delivered a submission in the appeal.
61. Regarding Delegate Mohan's observation in his Reasons (R16) that the Complainant provided no receipts to support his claim that the Payments represented reimbursements for his unpaid expenses, the Director submits that Delegate Mohan, during his investigation, informed the Complainant of his preliminary findings, which included a statement that, aside from the spreadsheet the Complainant had provided, there was no clear evidence as to what the Payments were for, and so it was most likely Delegate Mohan would find that the Payments should be subtracted from any wages found owing.
62. The Director notes that in his response to Delegate Mohan's preliminary findings, the Complainant did not include receipts for his expenses despite his having been advised in the preliminary findings that Delegate Mohan believed there was insufficient evidence to prove the amounts the Complainant was claiming for expenses.
63. As for the recording Delegate Mohan could not open, the Director states that it does not reveal a dollar amount which might have been owed by the Employer for expenses.
64. All of that said, the Director's submission goes on to state the following:
- However, the total amount of the cheques given the Appellant in December when compared with the total amount on the itemized spreadsheet the Appellant submitted as evidence is compelling.
- Upon review of the Determination, if an extension to the appeal deadline is granted, the Director of Employment Standards concedes that there may be aspects of the issuing delegate's Determination, regarding the nature of the payments received in December, worthy of reappraisal and will be guided by the Tribunal on this matter with respect to the merits of the appeal.
65. The Employer has delivered no submission regarding the merits of the Complainant's appeal.

ANALYSIS

66. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:
- 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.

67. Subsection 115(1) of the *ESA* should also be noted. It says this:

- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

68. I have concluded that the Determination must be varied. Delegate Mohan erred in law and failed to observe the principles of natural justice, which resulted in what I am persuaded was an improper deduction by Delegate Mohan of the sum of the Payments from the amount of the wages Delegate Mohan found were owed to the Complainant for the work he had performed for the Employer.

69. It is trite to say that the *ESA* provides no opportunity for the Tribunal to correct a delegate's errors of fact, except in cases where those errors can be said to constitute errors of law. Errors of fact may amount to errors of law in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Another way of stating this principle is to say that the delegate has acted on a view of the facts that cannot reasonably be entertained, because no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the findings of fact supporting the determination (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* (1998), 62 BCLR (3d) 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331; *Re Britco Structures Ltd.*, BC EST # D260/03).

70. In this case, Delegate Mohan determined that the paucity of "clear evidence" regarding the purpose of the Payments meant that they must be characterized as having been provided to the Complainant for "services rendered" to the Employer, and therefore as wages.

71. The difficulty with this formulation is neither the Complainant nor the Employer characterized the Payments as wages. The Complainant understood the Payments to be reimbursements to him of his unpaid expenses. The statements Delegate Mohan received from the representatives of the Employer revealed a perception that the Draft was intended by them to be a settlement of all outstanding financial matters involving the Complainant and the Employer, including wages *and* expenses. The evidence from the Employer regarding the Cheque was entirely inadequate to explain its purpose. The representatives of the Employer who provided information regarding the Cheque said either that they were unaware the Cheque had been delivered, or that they did not know what it was for.

72. In these circumstances, I have decided there was no evidence on which Delegate Mohan could reasonably conclude that the Payments represented payments to the Complainant solely for wages.

73. I am also of the opinion that the only reasonable conclusion which could have been drawn from the evidence before Delegate Mohan was that the Payments represented reimbursements to the Complainant for his expenses incurred on behalf of the Employer.
74. The principal issue animating the Complainant in December 2019 was a reimbursement of his unpaid expenses. The Complainant had provided a spreadsheet to the Employer itemizing his unreimbursed expenses in a total amount of \$72,350.11. An email from the bookkeeper for the Employer to the Complainant regarding the Complainant's expenses is contained in the record (page 76). It is dated July 3, 2019. It acknowledged that the Complainant had provided receipts in support of his claim. Later, by letter to the Employer from a lawyer he had retained dated November 13, 2019, the Complainant made it clear that a balance of his expenses remained unpaid (record, pages 86 – 87). The letter also advised the Employer that the Complainant was "not prepared to finance the business" and that a commitment to a repayment plan for the debt owed to him, among other items, needed to be put in place by November 27, 2019, failing which he would "have to consider his alternatives including but not limited to ending his relationship with [the Employer] and/or commencing a Supreme Court action."
75. A few weeks later, on December 12, 2019, the Complainant removed equipment and inventory from the Club because he believed he had purchased it, or its equivalent, and so it belonged to him, unless the Employer reimbursed his expense costs to acquire it. The record (page 85) contains a copy of an email from the Complainant to a principal of the Employer dated December 14, 2019, stating that the assets taken would be returned upon reimbursement, in part, for "the receipts totaling \$72,350.11."
76. The evidence regarding the substance of what was communicated by the Complainant and representatives of the Employer at the December 18, 2019 meeting and in the days that followed was in conflict. The witnesses for the Employer told Delegate Mohan they informed the Complainant that the Draft was to persuade him to return the equipment and inventory he had removed from the Club and to settle all the outstanding financial issues, including wages and expenses. However, the witnesses for the Employer had no satisfactory explanation for the payment of the Cheque. For his part, the Complainant asserted that the discussion concerning the Draft affirmed it was but a partial payment to him for his expenses, and that the subsequent payment of the Cheque rendered the total of the Payments a reimbursement to him, to the penny, of the \$72,350.11 he had previously sought for his expenses. He asserted further that the Payments closed the account regarding his claim for expenses, in return for which he delivered back to the Club the equipment and inventory he had removed previously.
77. While the substance of the evidence from the parties relating to the communications between the parties following the Complainant's removal of the equipment and inventory from the Club was, for Delegate Mohan, insufficient to provide "clear evidence" of the purpose of the Payments, Delegate Mohan made no reference in his Reasons to the statement of the employee, Mr. C., who was also present at the December 18, 2019 meeting. The statement of Mr. C. says this, in part:
- Steve was reimbursed \$50,000 via bank draft as partial payment for expenses he had paid with the understanding that another \$22,351.11 [sic.] would be paid to fully reimburse him for all expenses. At no time did he state the money was for anything other than reimbursement. He stated that he was excited to finally be reimbursed and to move forward as the club's General Manager.

At no time in the meeting did he accept any money for any back salary owed or any outstanding salary. When asked Steve said the back salary could be settled at another time. The meeting seemed to end on a positive note as it appeared all parties were looking forward to continuing to work together.

78. In an email to the Complainant dated November 9, 2020 (record, page 149), Delegate Mohan stated, correctly, that "the onus is on Finale Entertainment to show what the \$50,000 was for, as they state that it was to settle everything that was owed to you." The only evidence submitted by the Employer regarding the Draft was that it was designed to settle all the financial issues, including the Complainant's claims for wages and expenses, but Delegate Mohan declined to find that the Employer's interpretation had been proven.
79. It follows in my view that Delegate Mohan's conclusion there was also no clear evidence supporting the Complainant's assertion that the Payments were a reimbursement for his expenses was perverse. The evidence before Delegate Mohan to which I have referred established that the Complainant was claiming \$72,350.11 in expenses, that the Employer knew this was the sum the Complainant was claiming for his expenses, that the Complainant had removed the equipment and inventory from the Club because he believed he had paid for them, or their equivalent, that the Payments the Employer's representatives made to the Complainant for the return of the items that had been taken matched the exact sum the Complainant was seeking for his expenses, that the Complainant promptly returned the equipment and inventory to the Club once the \$72,350.11 was fully paid, and the ROE issued by the Employer after the Complainant was terminated contained no reference to the Payments as having been made to the Complainant as insurable earnings.
80. Having found, however, that neither the Complainant nor the Employer had established the purpose for the Payments, Delegate Mohan decided that they must represent wages, an outcome that had been sought by neither party. In my view, Delegate Mohan's determination on this point was based on a view of the facts that could not reasonably be entertained.
81. I have decided, in addition, that Delegate Mohan failed to observe the principles of natural justice, which contributed to the error into which Delegate Mohan fell when he issued the Determination.
82. Persons who file complaints under the *ESA* are expected to submit evidence to support their claims. That said, a failure to observe the principles of natural justice can occur if a delegate denies a complaint on the basis that a complainant does not provide additional evidence where the delegate has not asked the complainant to provide it (see *Re Hadilou*, BC EST # D004/06).
83. A purpose of the *ESA* set out in section 2 is the "fair treatment" of parties engaged in its processes. In *Kyle Freney*, BC EST # D130/04, the Tribunal made the following comments, which I believe are apt when considering what transpired in the case before me:

There is a valid legislative interest in finality, and a legitimate interest in ensuring that parties are subject to appropriate discipline in pursuing and documenting their claims. It is, however, part of the beauty of the law of natural justice that it forces decision-makers to look beyond inconvenience, understandable frustration and the need for clarification and efficiency, to a broader conception of fair play in action, which is not far from asking how any of us would reasonably expect to have been treated in similar circumstances.

84. Here, the Complainant provided Delegate Mohan with a detailed spreadsheet itemizing the particulars of the claim for expenses he had made to the Employer. The documents and information Delegate Mohan received during the investigation revealed that the Complainant had receipts for the expenses he had itemized, which he had previously provided to the Employer. Delegate Mohan did not request the receipts from the Complainant, nor did he allude to the provision of receipts when he delivered his preliminary findings to the Complainant, where he stated that there was no clear evidence regarding the purpose of the Payments. Then, later, Delegate Mohan declined, in his Reasons, to find that the Complainant had established his claim for expenses totalling \$72,350.11 because the Complainant "did not provide the receipts or any other evidence regarding what he stated he purchased on behalf of the Employer."
85. I find Delegate Mohan failed to observe the principles of natural justice when he neglected to explicitly ask the Complainant for the receipts, but then decided that the Complainant had not established his claim for expenses because no receipts or other forms of proof in support of them had been submitted. In doing so, Delegate Mohan deprived the Complainant of an opportunity supply evidence Delegate Mohan knew was available to prove his principal contention that the purpose of the Payments was to reimburse him for his expenses totalling \$72,350.11.
86. A similar failure to observe the principles of natural justice occurred when the Complainant tendered a recording of a portion of the December 18, 2019 meeting to Delegate Mohan which Delegate Mohan did not hear because he could not open it due to a technical issue. In his Reasons (R12 and R13), Delegate Mohan made it a point to say that the Complainant did not provide a transcript of the recording. However, Delegate Mohan never advised the Complainant that the recording would not open, nor did he ask the Complainant to provide a transcript. Delegate Mohan's failure to act meant that the Complainant was treated unfairly. In my view, Delegate Mohan needed to apprise the Complainant of the technical difficulty, and to request a transcript from the Complainant if the difficulty could not be cured. Since Delegate Mohan did not do so, the Complainant was left with the false impression that there was no issue regarding the ability of Delegate Mohan to listen to the recording.
87. While it is correct to say that a failure to refer to all the evidence a delegate considers does not, by that fact alone, result in a reviewable error, it may constitute a failure to observe the principles of natural justice if it is shown that a delegate has ignored relevant evidence (see *Re Gutierrez*, BC EST # D108/05; *Re Welch operating as Windy Willows Farm*, BC EST # D161/05). It may also constitute an error if the delegate has failed to interview witnesses who could be expected to provide relevant and potentially dispositive evidence, particularly where the delegate has decided to conduct an investigation rather than a hearing of a complaint, because an investigation by its nature incorporates a fact-finding approach that is more inquisitorial (see *Re Whitaker Consulting Ltd.*, BC EST # D033/06).
88. The Complainant's submission that Delegate Mohan failed to consider clarifying evidence provided by Mr. M. supporting the Complainant's case is less compelling because Delegate Mohan did, in fact, interview Mr. M. during his investigation.
89. However, as mentioned earlier, Delegate Mohan did not interview Mr. C., and made no substantive attempt in his Reasons to evaluate the evidence of Mr. C., whose statement regarding the substance of the December 18, 2019 meeting supported the Complainant's position regarding the purpose of the payment of the Draft. Instead, Delegate Mohan stated (Reasons, at R13) that Mr. C. was not interviewed because the Complainant had also commented that Mr. C., among others, could attest to the

Complainant's professionalism and competence, which Delegate Mohan considered not to be at issue. Delegate Mohan's focus on this aspect of what the Complainant had said Mr. C. might say, and Delegate Mohan's failure to address the more critical part of what Mr. C. had to offer relating to the discussion at the December 18, 2019 meeting establishes, in my view, that Delegate Mohan misdirected himself regarding the potential import of the evidence that Mr. C. could provide. Mr. C.'s evidence regarding the December 18, 2019 meeting was material. It warranted investigation, and Delegate Mohan should have addressed the substance of it in his Reasons. The inference to be drawn from the failure of Delegate Mohan to address Mr. C.'s evidence on this point is that he did not consider it.

90. While I am not disposed to give effect to the Complainant's assertion that Delegate Mohan did not probe witnesses more aggressively, at least without transcripts of the interviews he did, in fact, conduct, I am persuaded that given Delegate Mohan's conclusion there was no "clear evidence" regarding the purpose of the Payments, Delegate Mohan committed a natural justice error when he failed to interview, in addition to Mr. C., some of the representatives of the Employer who were present for discussions relating to this issue during the events in the fall of 2019 leading to the Complainant's dismissal. In particular, Delegate Mohan's finding regarding the purpose of the Cheque was fundamental to his conclusion that it represented a payment for services rendered, and not for expenses, yet Delegate Mohan did not interview the representative of the Employer who wrote the Cheque, and he has provided no explanation why he did not do so.

ORDER

91. Pursuant to section 115(a) of the *ESA*, I order that the Determination be varied to provide that the Employer be required to pay the Complainant the sum of \$79,115.38 in wages, \$4,746.92 for vacation pay, and accrued interest.

Robert E. Groves
Member
Employment Standards Tribunal