

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Tire King Truck Repair 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: Richard Grounds

FILE No.: 2020/103

DATE OF DECISION: March 02, 2021

DECISION

SUBMISSIONS

Jagmeet Virk	counsel for Tire King Truck Repair Ltd.
Rodney J. Strandberg	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Tire King Truck Repair Ltd. carrying on business as Tire King Truck Repair (the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “ESA”) regarding a Determination issued on June 2, 2020, by Rodney J. Strandberg, a delegate of the Director of Employment Standards (the “Delegate”). The Delegate determined that the Appellant owed Harnek Singh (the “Complainant”) wages and interest in the amount of \$20,580.66. The Delegate imposed mandatory administrative penalties in the amount of \$2,500.00.
2. The Employer appealed the Determination on the basis that the Delegate erred in law and failed to observe the principles of natural justice in making the Determination.
3. For the reasons that follow, the Employer’s appeal is dismissed, and the Determination is confirmed.

ISSUE

4. The issues are whether the Delegate erred in law or failed to observe the principles of natural justice in making the determination.

ARGUMENT

5. The Determination was issued on June 2, 2020. The Delegate determined that the Appellant owed the Complainant wages, overtime, annual vacation pay, compensation for length of service and recovered wages.
6. The Employer submits that the Delegate erred in law including: failing to allow testimony by additional witnesses; allowing the Complainant to present new evidence mid-hearing; determining credibility based on affidavits, determining that the Employer required the Complainant to pay back wages; determining compensation for length of service; and determining the unpaid regular wages.
7. The Employer submits that the Delegate failed to observe the principles of procedural fairness in making the Determination including: allowing a friend of the Complainant to act as an interpreter which resulted in mistranslations of the Complainant’s evidence; not allowing an in-person hearing; allowing the Complainant to present fresh evidence on the first day of the hearing but not allowing the Employer to call a witness on the second day of the hearing; allowing the complainant’s claim for compensation for length of service when it was not claimed; and that the Delegate exhibited bias in favour of the Complainant.

8. Submissions on the merits of the appeal were requested from the parties and the Delegate. The Employer and the Delegate provided submissions on the merits of the appeal, but no submissions were received from the Complainant. The various submissions are considered in more detail below.

THE FACTS

Background Facts

9. The Employer operates a retail tire store and truck repair business in Surrey, British Columbia and Jagdeep Cheema is a Director of the Employer. The Complainant worked as a mechanic in India. The Employer applied for a Labour Market Impact Assessment and hired the Complainant under the Temporary Foreign Worker Program while the Complainant worked towards becoming a Permanent Resident. The Complainant was employed by the Employer from July 11, 2018, to July 29, 2019, and he took unpaid vacation from January 15, 2019, to April 22, 2019, to return to India. The Complainant's employment was terminated when he was discovered to be recording a conversation with Mr. Cheema over safety concerns, and for engaging in abusive and aggressive behaviour.
10. On May 17, 2019, the Complainant filed a complaint under section 74 of the *ESA* for undetermined regular wages, overtime, annual vacation pay, statutory holiday pay and unauthorized deductions. The complaint form stated that the Complainant was offered a job if he paid \$25,000.00 and that the Employer demanded "cash back" each month. The Complainant was still employed at the time of the complaint.
11. The complaint proceeded to a hearing which was conducted by telephone on February 11, 2020 and March 13, 2020. The Employer provided written closing submissions to the Delegate on March 24, 2020. The Delegate completed a Determination dated June 2, 2020.

The Determination

12. The Delegate addressed the issue of using interpreters in the Determination and was "satisfied that each participant relying on an interpreter understood the hearing process and was able to take part in it fully." The Delegate allowed an affidavit tendered by the Employer for the second day of hearing but outlined reasons for not allowing the Employer to call the affiant as a witness. The Delegate considered the evidence in the affidavit and found it was neither credible nor reliable. The Delegate decided not to rely on the evidence in two other affidavits tendered by the Employer because the identical language in the affidavits made it impossible to assess their credibility and reliability and their evidence would not assist with assessing how the Employer dealt with the Complainant.
13. The Delegate concluded that the Employer required the Complainant to repay part of his wages in the total amount of \$11,662.00. The Delegate accepted the evidence of the Complainant that Mr. Cheema gave him post-it notes with the amounts to be repaid each paycheque and that the Complainant's banking records supported the cash withdrawals used for repayment. The Delegate relied on two audio recordings provided by the Complainant where "three cheques" and the amount of \$4,000.00 were discussed. The Delegate rejected Mr. Cheema's evidence that the \$4,000.00 referred to unpaid work by a customer for work performed by the Complainant. The Delegate found that Mr. Cheema did not give a "meaningful, responsive answer" to explain what he meant by words he used during this conversation. The Delegate found that there was an absence of motive for the Complainant to fabricate the complaint.

14. The Delegate considered the Employer's three reasons for terminating the Complainant's employment and concluded that: Mr. Cheema's concern was that the recording would support the Complainant's position and was not related to any erosion of mutual trust; the Employer did not meet "its onus to show that the Complainant's work performance was so inadequate, or that he was a safety concern, to justify its decision to end his employment" without paying compensation for length of service; and there was no evidence that the Employer took remedial disciplinary steps relating to the Complainant's behaviour. The Delegate found that the Complainant was not issued a Record of Employment when he travelled to India and, therefore, was continuously employed for more than 12 consecutive months.
15. The Delegate concluded that the pay records provided by the Employer were not accurate because they did not match the amounts actually paid to the Complainant. In addition, the Employer's evidence that the time records were provided to its accountant to prepare the pay cheques was inconsistent with the fact that the cheques were prepared on the same date as the last day of the pay period. The Delegate accepted a photograph of a timecard provided by the Complainant as accurately representing the hours he worked, including some overtime hours. This timecard differed from the timecards provided by the employer which included no overtime hours. The Delegate concluded that the Employer had altered its copy of the timecard records for the Complainant.
16. The Delegate did not accept the Complainant's evidence that he worked an additional 320 hours on Saturdays or that he worked on two Sundays when he did not record his time and was not paid. The Delegate found that the Complainant's evidence on that issue was too unreliable to rely on.
17. The Delegate found that the Employer owed the Complainant \$11,662.00 for indirect payments recovered as wages, \$2,138.44 for Compensation for Length of Service, \$4,004.56 for regular wages (based on information provided by the Employer and based on the manipulated timecard reports), \$1,769.46 for overtime wages (based on information provided by the Employer and based on the manipulated timecard reports) and annual vacation pay of \$388.18. The Delegate awarded interest in the amount of \$618.02 and imposed mandatory administrative penalties in the amount of \$2,500.00 for contraventions of the *ESA*.

ANALYSIS

18. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
19. The Employer appeals the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Employer's appeal submissions contain extensive review of the witness evidence at the hearing. For the purposes of this appeal, the Determination and the Director's Record are the primary sources for review of the evidence.

Error of Law

20. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.
21. The Employer submits that the Delegate erred in law including: failing to allow testimony by additional witnesses; allowing the Complainant to present new evidence mid-hearing; determining credibility based on affidavits, determining that the Employer required the Complainant to pay back wages; determining compensation for length of service; and determining the unpaid regular wages.
- 1. Failure to allow testimony by additional witnesses*
22. The Complainant presented an affidavit from Gary Sandhu who stated that he was a friend of the Complainant. According to Mr. Sandhu's affidavit, the Complainant told him that Mr. Cheema told him he had to pay back money each month. Mr. Sandhu told the Complainant that this was wrong and helped him file complaints with Service Canada and with the Employment Standards Branch. According to the Employer's submissions, Mr. Sandhu contacted the Employer before the second day of the hearing and swore a new affidavit. In this second affidavit, Mr. Sandhu stated that the Complainant had made up the allegation about being required to pay money back to Mr. Cheema.
23. The Employer provided the second affidavit to the Director before the second day of the hearing. At the start of the second day of the hearing, the Employer sought to call Mr. Sandhu as a witness. In its appeal submissions, the Employer submitted that the evidence "must be allowed, in the form of personal testimony and cross-examination, to test the veracity of the very serious allegations" by the Complainant. The Employer submits that the "evidence is pivotal and crucial to allow the Delegate to make proper findings".
24. The Delegate allowed the affidavit into evidence but denied the request to call Mr. Sandhu as a witness. The Delegate considered that the Employer did not advise the Director of its intention to call Mr. Sandhu as a witness in advance of the hearing which was contrary to one of the purposes of the *ESA* to provide fair procedures for resolving disputes.¹ The Employer could have advised the Director of its intention to call Mr. Sandhu as a witness when it provided the affidavit but did not do so. The Delegate also considered the impact on the efficiency on the proceedings, which could have involved an adjournment of the proceedings.

¹ Subsection 2(d) of the Act.

25. It was within the Delegate's discretion to decide whether or not to allow the Employer to call Mr. Sandhu in person to testify as opposed to considering his affidavit evidence alone. The Delegate considered the purposes of the *ESA* and the impact on the efficiency of the hearing which are both relevant factors. There is no basis to conclude that the Delegate exercised his discretion in a fashion that was wrong in principle.
26. The Employer also submitted on appeal that it sought to call Inderjit Singh as a witness on the second day of the hearing to respond to the Complainant's evidence that he worked on Sundays and to respond to the claim of compensation for length of service but that this request was denied.
27. The Delegate submitted on the merits of the appeal that the Employer's assertion is the only indication that it sought to call additional witnesses such as Mr. Singh on the second day of hearing and that such request was refused. The Delegate submitted that the Director's Record does not support the Employer's assertion, the Employer did not identify Mr. Singh as a potential witness in advance of the second day of hearing and the evidence of Mr. Singh "would have made no material effect on the calculation of wages owed by the Employer to the Complainant".
28. The party alleging an error of law or breach of procedural fairness must provide some evidence in support of the allegation. It does not appear that there is evidence to support the Employer's assertion that it sought to call Inderjit Singh as a witness and that this request was refused. Some evidence of this would be if the Employer informed the Director in advance of the second day of hearing that it was seeking to call Mr. Singh to testify. The Employer did not do so. Advance notice is a requirement outlined in the Notice of Complaint Hearing which includes a "List of Witnesses for Complaint Hearing" form.
29. The Employer has not provided any evidence to support its assertion that it requested to call Mr. Singh as a witness on the second day of hearing and that this was refused. Even if there was evidence to support this assertion, the Delegate's position that the evidence from this witness would have made no material effect on the calculation of wages owed by the Employer to the Complainant is reasonable. Such an exercise of discretion would not amount to an error of law.

2. Allowing the Complainant to present new evidence mid-hearing

30. The Complainant gave evidence at the hearing that he had taken a photograph of a timecard and produced this photograph after the hearing commenced. The hearing commenced at 9:00 am on February 11, 2020, and the photograph was sent to the Employer's legal counsel by email at 9:59 am.² The Employer submits on appeal that, like the evidence from Mr. Sandhu discussed above, this photograph should not have been allowed. The Employer also raised an issue on appeal that it was sent a photograph of the timecard, but the Director's Record contains a photograph of a cell phone showing the photograph of the timecard.³
31. The Delegate submitted on the merits of the appeal that the photograph of the timecard was not new evidence but was physical evidence that corroborated the Complainant's oral evidence and that the Employer was able to cross-examine the Complainant about the photograph. The Delegate submitted that he properly exercised his discretion to allow the timecard into evidence.

² Page 121 of the Director's Record.

³ Page 119 of the Director's Record.

32. The discovery of the photograph of the timecard was as a result of the Complainant's oral evidence about the timecard. The timecard was disclosed to the Employer immediately by email and the Employer was provided with an opportunity to question the Complainant about the photograph. The Employer was also able to call evidence on the second day of the hearing about its timecard processes. It was within the Delegate's discretion to allow the photograph into evidence. There is no basis to conclude that the Delegate exercised his discretion in a fashion that was wrong in principle.
33. The photograph of the cell phone showing the photograph of the timecard was apparently not disclosed to the Employer and, instead, the Employer was only provided with the photograph of the timecard. In addition, the Employer was apparently not provided with another photograph of a cell phone showing a photograph of two pay cheques and attached pay stubs with post-it notes.⁴ The two post-it notes are contained in the Complainant's complaint (with additional handwriting on them to identify the corresponding pay period) and the pay stub information was reproduced by the Employer as part of the payroll records.⁵
34. The fact that these photographs were not disclosed to the Employer is a concern, but the non-disclosure does not support that an error of law occurred. The content of the information in the photographs was disclosed.

3. Determination of credibility based on affidavits

35. The Employer provided two essentially identical affidavits to the Delegate from Ravinderpal Sandhu and Anshula Gaur that both stated they had come to Canada under similar circumstances as the Complainant and Mr. Cheema did not demand any money from them in exchange for the employment opportunity. In its submissions on the merits of the appeal, the Employer submitted that these witnesses could have testified about how they received their paycheques to confirm that they were not given out by Mr. Cheema, as stated by the Complainant.
36. The Delegate did not rely on the evidence of these two witnesses and found that the content of their affidavits was essentially that of the legal counsel who drafted them. The Delegate concluded that this made it impossible for him to assess their credibility or reliability. The Delegate also noted that he was concerned with how the Employer dealt with the Complainant and not with other employees whose personal and work circumstances were not disclosed.
37. The Delegate exercised his discretion not to rely on the evidence from these two other employees. The factors he considered are not unreasonable. Regardless of whether or not the content of the affidavits was the work of the drafter as opposed to the affiants, the fact that other employees stated they had not been required to pay money to Mr. Cheema does not assist the inquiry into whether or not the Complainant was required to do this.
38. The Employer's submission that these witnesses could have offered evidence about how the paycheques were distributed was not raised in the Employer's closing submissions to the Delegate. The Employer was not prohibited from providing evidence on this point because Ms. Cheema gave evidence about how the

⁴ Page 120 of the Director's Record.

⁵ Pages 49, 175 and 177 of the Director's Record.

paycheques were left at the front desk. The Delegate accepted the Complainant's evidence that he received the paycheques from Mr. Cheema. It was within his discretion to make such a finding.

39. There is no basis to conclude that the Delegate exercised his discretion in a fashion that was wrong in principle when he decided not to rely on the evidence of Ravinderpal Sandhu and Anshula Gaur.
40. The Employer submitted that the Delegate incorrectly summarized the affidavit evidence of Gary Sandhu as "making conclusions". The Employer submitted that Mr. Sandhu's affidavit evidence was what he had observed and had been advised by the Complainant. The Delegate submitted on the merits of the appeal that if Mr. Sandhu had no direct personal evidence then his evidence was only relevant to the issue of the Complainant's credibility and the Employer could have cross-examined the Complainant on the contents of Mr. Sandhu's evidence.
41. The Delegate provided detailed reasons about why he was not accepting the second affidavit evidence of Mr. Sandhu. The Delegate found that, in addition to making conclusions, many aspects of Mr. Sandhu's affidavit evidence were inconsistent with evidence he accepted, assumed facts not in evidence and were not put to the Complainant by the Employer. The Delegate found that Mr. Sandhu's evidence was neither credible nor reliable except that he helped the Complainant file complaints with Service Canada and the Employment Standards Branch and that the Complainant had difficulty understanding documents and required interpretation assistance.
42. The Delegate also noted in the Determination that the Complainant stated that he paid Mr. Sandhu \$4,000.00 before the first day of the hearing and that Mr. Sandhu asked him for a further \$6,000.00 before the second hearing date or he would "go against him". There is no other reference in the Record or the Determination to this aspect of Mr. Sandhu's evidence.
43. The fact that Mr. Sandhu's second affidavit evidence contradicted the Complainant's evidence does not change that it was within the Delegate's discretion whether or not to rely on Mr. Sandhu's affidavit evidence. He provided details reasons why he did not find Mr. Sandhu's evidence to be reliable or credible. It is not the Tribunal's role to second guess the Delegate's exercise of discretion or to freshly assess Mr. Sandhu's reliability and credibility. Instead, the issue on appeal is to decide whether or not the Delegate committed an error of law. I am not satisfied that the evidence supports such a finding.

4. Whether the Employer required the Complainant to pay back wages

44. The Employer submits that the Delegate erred in law when he determined that Mr. Cheema required the Complainant to return part of his wages. In support of this, the Employer submits that there was no evidence about the content of the Complainant's complaint to Service Canada, the transcript from one of the audio recordings was not accurate⁶, the Delegate's findings were without any evidentiary basis, the Delegate accepted all of the Complainant's evidence without considering the Employer's evidence which showed inconsistencies in the Complainant's evidence and the Delegate relied unjustifiably on the audio recordings.

⁶ This submission was in response to the Determination where the Delegate stated that Mr. Cheema did not dispute the accuracy of the transcript. Page R12.

45. The Delegate submitted on the merits of the appeal that his conclusions were supported by the evidence.
46. The Employer's submission that there was no evidence about the content of the Complainant's complaint to Service Canada ignores that the Complainant gave evidence that he made such a complaint about being required to return wages to Mr. Cheema. The Employer's submission about the accuracy of the transcript relates to very minor changes (outlined in the submissions) which do not change the overall meaning of the transcript.
47. The Employer's submission about there being no evidentiary basis revolve around the Delegate's finding that the Complainant's complaint arose because he was short on cash after returning from India and so stopped returning cash to Mr. Cheema. There was, however, some evidence of this because the Complainant gave evidence at the hearing that he was short of cash after paying money to an immigration consultant to bring his children to Canada.
48. The Employer also highlighted that the reference to three cheques in the audio recording, even if it was made in June 2019, is not correct because the Complainant had received a total of six pay cheques at that point, three before he went to India and three since he returned from India. However, the Delegate's finding was that the three cheques in the audio recording referred to the three cheques after the Complainant's return from India.
49. The Employer's submission that the Delegate accepted all of the evidence from the Complainant without considering the evidence of the Employer was unsuccessfully raised by the Employer in closing submissions before the Delegate.⁷ The Employer's submission on appeal is really an invitation to the Tribunal to re-weigh the evidence and substitute its own findings. The fact that the Delegate was not persuaded by the Employer's evidence does not itself support that the Delegate committed an error of law. It is the Delegate's role to weigh the evidence and decide what evidence to accept.
50. The Employer's submission that the Delegate relied unjustifiably on the audio recordings is based on its disagreement with the weight that the Delegate placed on the evidence in the audio recordings. The transcripts from the audio recordings do not clearly state that Mr. Cheema required the Complainant to pay him back money each paycheque, but it also does not clearly state that he did not. The Employer had the opportunity to make detailed submissions on the interpretation of the audio recordings in closing submissions before the Delegate. The Delegate relied heavily upon Mr. Cheema's inability to reasonably explain his own words when he told the Complainant that three cheques had been provided to the Complainant, but he had not returned anything from them. It was within the Delegate's discretion to weigh the evidence about the audio recording and reach a conclusion about its relevance.

5. Compensation for Length of Service

51. The Employer's submission that the Delegate erred in law in concluding that the Complainant was owed compensation for length of service is premised on a disagreement with the impact of the alleged

⁷ In the appeal submissions the Employer referred to the content of the post-it notes (that there was no explanation about how the amount related to the wages), the Complainant only had six post-it notes when he should have received nineteen post-it notes and the Complainant's bank statements confirmed that some withdrawals (to pay back money) occurred before the Complainant received his pay cheque.

behaviour on the employment relationship. The Employer submitted that the Complainant was a safety hazard and was given “enough chances”. In addition, the Employer submitted that the clandestine recordings done by the Complainant amounted to just cause.

52. The Delegate considered that the Employer allowed the Complainant to return to work when the Complainant returned from India and did not provide any meaningful remedial discipline or correction to the Complainant which should have been done if the Complainant was truly a safety hazard or had engaged in abusive behaviour. In addition, the Delegate considered that the audio recordings were made by the Complainant in furtherance of his complaint about being asked to pay money to Mr. Cheema. The Delegate found that the Complainant’s employment was terminated not due to a breakdown in the employment relationship but because of Mr. Cheema’s concern that a record of the conversation would support the Complainant’s position.
53. The Employer disagrees with the Delegate’s assessment of the factors related to just cause. The Employer had the opportunity to make detailed submissions to the Delegate in its closing submissions to the Delegate, including relevant caselaw. The fact that the Employer’s submissions were not successful is not evidence that the Delegate erred in law. The Delegate’s role was to decide whether or not the facts supported termination and, in doing so, he considered many relevant factors.

6. Unpaid regular wages

54. The Employer’s submission that the Delegate erred in law in regard to determining the unpaid regular wages is based on the Delegate’s finding that the Employer manipulated one timecard and that this timecard represented a reasonable extrapolation for other pay periods. The Complainant provided a photograph of one timecard which was used to find that the Employer manipulated its copy of the timecard. The Employer submitted that the Complainant should have produced timecards for other pay periods if they were also manipulated by the Employer.
55. The Delegate considered the issue of the timecard information in some detail. Briefly, the Complainant provided a photograph of a timecard that he asked to see at the front desk and then photographed. The Employer provided payroll records for the Complainant and Ms. Cheema gave evidence about its payroll procedures. The Delegate concluded that the payroll records and Ms. Cheema’s evidence were not reliable. This was based on an objective review of the Employer’s own payroll records including that the hours worked by the Complainant on its timecards did not match the corresponding amounts he was paid in his paycheque. In addition, Ms. Cheema’s evidence about providing the timecards to an accountant to prepare cheques did not make sense given the cheques were prepared and distributed on the last day of the pay period.
56. The Delegate had the discretion to decide the significance of the photographed timecard and whether or not it represented an overall pattern of underpaying the Complainant. Undoubtedly, the Delegate’s assessment could have been different if the Employer had been able to produce accurate payroll records, but it did not do so. The Delegate drew an inference about the hours worked by the Complainant which was not unreasonable given the evidence. It should also be noted that the Delegate did not simply accept the Complainant’s assertion that he was underpaid but relied on objective evidence. The Delegate did not accept the Complainant’s evidence that he worked overtime on Saturdays and on two Sundays because there was no additional evidence to support his claim.

Conclusion regarding Error of Law

57. The Employer's submissions about error of law are primarily based on its disagreement with the Delegate's assessment of the evidence. While such disagreement is understandable, the fact that the Delegate reached conclusions that the Employer does not agree with is not itself evidence that the Delegate committed an error of law. In order to have committed an error of law, the Delegate must have misinterpreted or misapplied the *ESA*, misapplied an applicable principle of general law, acted without any evidence, acted on a view of the facts which could not reasonably be entertained or exercised discretion in a fashion that is wrong in principle.
58. The Delegate was presented with detailed evidence from witnesses and was provided with closing submissions from the Employer. The Delegate considered various factors and provided detailed reasons for his conclusions. There is no basis to find that the Delegate misinterpreted or misapplied the *ESA* or a principle of general law. Although the Employer has submitted that the Delegate acted without any evidence (including relating to the Service Canada complaint and relating to the Complainant's reasons for not returning cash after his return from India), there was some factual foundation, direct or by inference, for the Delegate's findings. The Delegate did not exercise his discretion in a fashion that was wrong in principle.
59. I am satisfied on a balance of probabilities that the Delegate did not commit an error of law in making the Determination.

Failure to Observe the Principles of Natural Justice

60. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
61. The Employer submits that the Delegate failed to observe the principles of procedural fairness in making the Determination including: allowing a friend of the Complainant to act as an interpreter which resulted in mistranslations of the Complainant's evidence; not allowing an in-person hearing; allowing the Complainant to present fresh evidence on the first day of the hearing but not allowing the Employer to call a witness on the second day of the hearing; allowing the complainant's claim for compensation for length of service when it was not claimed; and exhibiting bias in favour of the Complainant.

1. Errors in Translation

62. The Employer has raised serious concerns about the interpretation of the Complainant's evidence at the hearing. The Employer submitted that it had requested that a certified interpreter be made available to the Complainant, but the Delegate refused this request and allowed the Complainant's friend to provide translation services. The Employer submitted that the Complainant's friend failed to translate the testimony of the Complainant in "full" and "fixed" his evidence. The Employer objected to the translation during the hearing but was cautioned by the Delegate to stop objecting as it was disrupting the testimony. In its submissions on the merits of the appeal, the Employer stated that it was told to raise its objections

after the conclusion of the evidence or during final submissions but that this would have been “unpracticable”.

63. The Employer submitted that the mistranslations related to the Complainant’s evidence on the issue of the demand for money, the photographed timecard and the two audio recordings. The Employer made detailed submissions on the alleged mistranslations in its appeal submissions. These alleged mistranslations have been raised for the first time on appeal and the issue was not raised in the Employer’s closing submissions to the Delegate. The Employer provided an email with its appeal submissions which confirm that it did raise an issue with the Employment Standards Branch about its translation concerns.⁸ In the email, the Employer’s legal counsel stated that “the contents of this email are not for the officer conducting the hearing but my opinions/concerns are regarding the conduct of the hearing without certified translators”.
64. It is understandable that the Employer would have wanted to address the interpretation issues as they were occurring but it is equally understandable that the Delegate would have wanted to allow the Complainant to complete his evidence without constant interruption before being challenged on his evidence about the mistranslations. There is no evidence that the Employer was prevented from cross-examining the Complainant on the mistranslations. The fact that the Employer may have found it difficult to address the mistranslations at the end of the Complainant’s evidence is not a compelling argument because it was incumbent on it to do so if it did not agree with the Complainant’s evidence. In addition, the issue should have been raised with the Delegate in the Employer’s closing submissions, but the Employer did not do so. It was not sufficient to raise a general objection to the Employment Standards Branch on the use of non-certified translators.
65. The Delegate did caution the Employer’s legal counsel about providing translation services for the Employer which is what prompted the Employer’s email reply about its concerns with the Complainant not using a certified translator. This approach is consistent with information contained in the Employment Standards Branch Factsheet – Complaint Hearings. The Tribunal has found a breach of procedural fairness where the Director allowed the complainant’s sister to provide interpretation for the complainant because the sister was also a witness at the hearing.⁹ There is no evidence that the Complainant’s friend was involved in the hearing.
66. There is no requirement that certified translators be used for adjudication hearings conducted by the Employment Standards Branch. Whether to use a non-certified translator is a matter of discretion for the Delegate conducting the hearing. To interfere with the Delegate’s exercise of discretion would require some evidence to support that there was procedural unfairness. While the Employer does appear to have objected to the translation of the Complainant’s friend during the hearing, any procedural irregularity was addressed when the Employer was provided with an opportunity to cross-examine the Complainant on the translations and to make submissions to the Delegate about the translations.

⁸ Schedule “B” of the appeal submissions, email dated February 28, 2020.

⁹ Chang, D082/16 at paragraphs 34-37.

2. Lack of in-person hearing

67. The Employer has submitted that the seriousness of the matter rendered a telephone hearing inapplicable and that the hearing should have been conducted in person. The Employer submits that it requested an in-person hearing and that this was refused by the Delegate. The Employer submits on appeal that it was evident that there was someone else present with the Complainant other than the interpreter. The Employer submits that “justice must not only be done, it must appear to be done”.
68. The Delegate submitted on the merits of the appeal that there is nothing in the Record suggesting that the Employer requested an in-person hearing or objected to a telephone hearing on either day of the hearing. The Delegate notes that the *ESA* does not provide a right to an in-person hearing and that the Notice of Hearing sent to the Employer specifically stated that there was no right to an in-person hearing.¹⁰ The Delegate submitted that the Director’s exercise of discretion was bona fide, and not arbitrary or based on irrelevant considerations.
69. There is no evidence that the Employer raised this issue before the Delegate. Even if it had, this choice of procedure clearly involves a matter of discretion on the part of the Delegate. The Tribunal will not interfere with the exercise of discretion by the Delegate unless it can be shown that there was an abuse of power, the Delegate made a mistake in construing the limits of authority, there was a procedural irregularity or the decision was unreasonable.¹¹ There is no basis to interfere with the Delegate’s exercise of discretion to hold a telephone hearing.

3. Fresh evidence during the hearing

70. The Employer submitted that the Complainant was allowed to enter a photograph in evidence on the first day of the hearing.¹² The photograph was of a timecard that the Complainant said he had taken at the Employer’s front desk after he asked to see it. The Employer submitted that it did not have an opportunity to inspect the photograph to determine its authenticity. In its submissions on the merits of the appeal, the Employer submitted that it had not actually received the photograph of the timecard which is contained in the Director’s Record.¹³ The Employer received a photograph of the timecard while the Director’s Record includes a photograph of a cell phone showing the photograph of the timecard. The Employer also submitted that it did not receive another photograph of two pay cheques with attached pay stubs and post-it notes.¹⁴
71. The Employer submitted on the merits of the appeal that it would need to see and review the evidence relied on by the Delegate in making the Determination in order to make a proper assessment of the evidence and respond to it.

¹⁰ This is outlined in the Employment Standards Branch Factsheet: Complaint Hearings, pages 19-21 of the Director’s Record.

¹¹ See *Right Choice Products Inc.*, 2018 BCEST 56, citing *Goudreau and Desmarais*, D066/98 at paras. 62-63.

¹² See the discussion above relating to the allegation of error of law that the Complainant was allowed to present new evidence mid-hearing.

¹³ Page 119 of the Director’s Record.

¹⁴ Page 120 of the Director’s Record. See also the discussion above relating to the allegation of error of law that the Complainant was allowed to present new evidence mid-hearing.

72. The Employer submitted that it sought to present additional witnesses on the second day of the hearing to rebut the evidence of the Complainant from the first day of the hearing, but this request was refused by the Delegate. The Employer noted that the Complainant had made certain allegations on the first day of the hearing which it was not aware of prior to the commencement of the hearing. These included Compensation for Length of Service and that the Complainant worked on Sundays. The Employer also sought to call Mr. Sandhu as a witness who had earlier provided an affidavit in support of the Complainant case but provided a second affidavit in support of the Employer. The issue of calling Mr. Sandhu was discussed above in the section related to error of law for failure to allow testimony by additional witnesses.
73. The Employer submitted that the Delegate made his Determination without hearing from witnesses who had relevant evidence and could challenge the credibility of the Complainant.
74. The Delegate submitted on the merits of the appeal that the photograph of the timesheet was not new evidence but instead was “physical evidence corroborating his oral evidence”. The Delegate submitted that the only witness identified by the Employer on the second day of the hearing was Mr. Sandhu but he exercised his discretion to not allow him to testify. The Employer submitted that Mr. Sandhu’s evidence was only relevant to the issue of the Complainant’s credibility and the Employer had the opportunity to put the contents of Mr. Sandhu’s affidavit to the Complainant. The Delegate submitted that there is nothing in the Director’s Record or any evidence that the Employer identified other witnesses to call and that such a request was refused.
75. It is a concern that the Employer was not provided with photographs that were submitted by the Complainant and contained in the Director’s Record. However, the Employer was provided with the photograph of the timesheet and with all of the information found in the photograph of the pay cheques/pay stubs with post-it notes. Nothing reasonably would turn on the format of the provided information as long as the information was accurate. There is no indication that the information that was disclosed to the Employer was not accurate. While the procedure utilized by the Delegate to convey the photographs was not perfect, it was not procedurally unfair.
76. As discussed above in the section relating to error or law, it was within the Delegate’s discretion to decide whether or not to allow the Employer to call Mr. Sandhu in person to testify as opposed to considering his affidavit evidence alone. The Tribunal will not interfere with the exercise of discretion by a delegate unless it can be shown that the exercise was an abuse of power, the delegate made a mistake in construing the limits of his/her authority, there was a procedural irregularity or the decision was unreasonable. There is no basis to make such a finding.
77. As also discussed above, the party alleging an error of law or breach of procedural fairness must provide some evidence in support of the allegation. It does not appear that there is evidence to support the Employer’s assertion that it sought to call additional witnesses and that this request was refused. Some evidence of this would be if the Employer informed the Director in advance of the second day of hearing that it was seeking to call additional witnesses. The Employer did not do so. Accordingly, there is no evidentiary basis to consider a finding that the Delegate failed to observe the principles of natural justice fairness by refusing to allow the Employer to call additional witnesses.

4. Compensation for Length of Service

78. The Employer submitted that it was not provided with an opportunity to respond to the Complainant's claim for Compensation for Length of Service and that this was not part of the initial complaint. The Employer submitted that it attempted to present evidence from Inderjit Singh on this issue, but the Delegate refused to allow the Employer to call this witness as well as Mr. Sandhu. As discussed above, the Delegate was entitled to exercise his discretion in regard to the witnesses called at the hearing and this did not amount to a breach of procedural fairness.
79. The fact that the Complainant's initial claim did not include a claim for Compensation for Length of Service is explained by the fact that the complaint form was submitted with the Employment Standards Branch while the Complainant was still employed with the Employer. Failure to provide a party with an opportunity to respond to a complaint would raise concerns about procedural fairness. In this case, however, the Employer was provided with an opportunity to respond to the claim for Compensation for Length of Service. This is evidenced by the fact that the Employer was entitled to cross examine witnesses and present evidence on the issue. The Employer also made extensive closing submissions on the issue to the Delegate.
80. The Delegate considered the merits of each supporting ground for the Employer's termination of the Complainant's employment. The Delegate ultimately decided that the Employer's purported concerns about the Complainant as a safety hazard, engaging in abusive / aggressive behaviour and audio recording conversations were not sufficient to justify the Complainant's termination. As discussed above, the Delegate did not commit an error of law in reaching his conclusion about Compensation for Length of Service or that the Complainant was employed for more than twelve months.
81. There is no reasonable basis to find that the Delegate failed to observe the principles of natural justice when he concluded that the Complainant was entitled to Compensation for Length of Service.

5. Bias

82. The Employer submitted that the Delegate exhibited bias because he allowed the Complainant to present new (photographic) evidence but did not allow the Employer to call additional witnesses and also allowed the Complainant to use a friend to translate his evidence but did not allow the Employer's objections to mistranslations. The Employer submitted that the Delegate had one set of rules for the Complainant and one for the Employer.
83. The Complainant's photograph, the additional witnesses and the interpretation issue have already been discussed and found not to individually support a finding that the Delegate failed to observe the principles of natural justice. The issue for consideration of bias is whether or not these issues support a finding that the Delegate was biased in favour of the Complainant and against the Employer. In this case, the Delegate did not accept every claim made by the Complainant and denied his claim for unpaid work on Saturdays and Sundays. This strongly suggests that the Delegate was not biased in favour of the Complainant.
84. A party alleging bias on the part of a decision maker must provide some evidence in support of the allegation. The fact that a decision maker does not accept one or more of the arguments of a party does

not by itself support a finding of bias. When viewed objectively, there is simply no evidence to support the allegation that the Delegate was biased in favour of the Complainant and against the Employer.

Conclusions regarding Procedural Fairness

85. The Appellant was provided with notice of the complaint and an opportunity to respond to the complaint. There is no evidence to support that the Delegate was not an impartial decision maker or was biased. There is no reasonable basis to conclude that the Delegate failed to observe the principles of natural justice in making the Determination.

ORDER

86. The Employer's appeal is dismissed, and the Determination is confirmed under section 115(1) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal