



Citation: Balwinder S. Hari (Re)
2021 BCEST 27

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Balwinder S. Hari
carrying on business as Golden Drywall Company
("Mr. Hari")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Shafik Bhalloo

FILE NO.: 2021/004

DATE OF DECISION: March 15, 2021

DECISION

SUBMISSIONS

Balwinder S. Hari on his own behalf, carrying on business as Golden Drywall Company

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Balwinder S. Hari (“Mr. Hari”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 7, 2020 (the “Determination”).
2. The Determination found that Mr. Hari contravened Part 3, sections 17 (paydays), 18 (payment of wages if employment terminated), and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Gurinder Singh (“the Complainant”).
3. The Determination ordered Mr. Hari to pay the Complainant wages totalling \$5,465.68 including accrued interest.
4. The Determination also levied two administrative penalties of \$500 each against Mr. Hari, pursuant to section 29(1) the *Employment Standards Regulation* (the “ESR”), for breaching sections 17 and 18 of the *ESA*.
5. The total amount of the Determination is \$6,465.68.
6. Mr. Hari appeals the Determination on the “natural justice” and “new evidence” grounds of appeal under section 112(1)(b) and (c) of the *ESA*.
7. In correspondence dated January 18, 2021, the Tribunal notified the Complainant and the Director that it had received Mr. Hari’s appeal and it was enclosing the same for informational purposes only and no submissions on the merits of the appeal were being sought from them at this time. The Tribunal also requested the Director to provide a copy of the section 112(5) record (“the record”).
8. On February 9, 2021, the Tribunal received the record from the Director and forwarded a copy of it to the Complainant and Mr. Hari. Both parties were provided an opportunity to object to the completeness of the record, but neither objected. Accordingly, the Tribunal accepts the record as complete.
9. On March 1, 2021, the Tribunal sent correspondence to the parties advising them that a panel had been assigned to decide the appeal.
10. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other party. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Determination, the Reasons for the Determination (the “Reasons”), Mr. Hari’s appeal submissions, and my review of the record when the Determination was being made. If I am satisfied that Mr. Hari’s appeal or part of it has some presumptive

merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite the Complainant and the Director to file reply submissions on the merits of the appeal. Mr. Hari will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

11. The issue at this stage of the proceeding is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

BACKGROUND – THE DETERMINATION

12. Based on an online BC Registry Services Search conducted on September 25, 2019, Balwinder S. Hari is a sole proprietor registered in British Columbia on August 26, 2013.
13. Mr. Hari operates a drywall installation business in Surrey, British Columbia.
14. Mr. Hari hired the Complainant as a drywall installer starting on or about July 5, 2017. The Complainant performed work for Mr. Hari under a two-year temporary foreign worker closed permit, which had a start date of July 5, 2017 and an expiry date of July 4, 2019. The work permit specified he could only work for Mr. Hari.
15. At the time of the termination of his employment, the Complainant's hourly rate of pay was \$25.50. The parties agree that the Complainant worked for Mr. Hari, and was paid for work, until at least the end of May 2019, but they disagree on the end date of the Complainant's employment.
16. On September 18, 2019, the Complainant filed a complaint under section 74 of the *ESA* claiming that Mr. Hari failed to pay him regular wages (the "Complaint").
17. The delegate decided to proceed with the Complaint by investigation.
18. In the investigation, the delegate identified two issues, namely: (i) what is the Complainant's period of employment with Mr. Hari? (ii) Is the Complainant owed any wages?
19. The delegate received evidence from the Complainant and Mr. Hari, as well both parties' witnesses during the investigation of the Complaint before making the Determination. I will only set out those aspects of the factual background directly relevant to the issue on appeal.
20. In the Reasons, the delegate notes that the Complainant made the following assertions and provided the following evidence in the investigation of the Complaint:
- He worked for Mr. Hari until July 7, 2019, but he was not paid for the work performed past May 31, 2019.
 - He did not continue to work for Mr. Hari after July 7, 2019, because he had not been paid.
 - He did not renew his work permit with Mr. Hari because the latter did not pay him after May 31, 2019.

- He was supposed to be paid by Mr. Hari semi-monthly, but there had frequently been problems with late payments.
- Mr. Hari provided him with wage statements for each cheque, which stated the pay date, but the actual pay cheque was sometimes delayed.
- At times he received both cheques at the end of the month, or his pay for one month would be delayed until the middle of the next month.
- His bank records for 2019 show that he deposited only one amount for wages per month, at a date after the wage statement date. The deposits consistently followed a pattern of two pay amounts deposited four weeks after the date of the first corresponding pay statement.
- His bank statements show that his account was frequently in arrears prior to the deposit of his pay cheques; he was often overdrawn, incurred non-sufficient funds (NSF) and overdraft fees and interest charges. In particular, between April 12 and May 10, 2019 wage deposits, he had two ICBC insurance payments returned for non-sufficient funds, on April 16 and April 25, 2019. He incurred \$96 in NSF fees, as well as \$4.56 in overdraft interest and paid a \$4.00 overdraft protection fee.
- On May 30, 2019, he took out a personal loan of \$5,000.00 to cover his ongoing arrears.
- His bank statements for June, July, and August 2019 do not show deposits consistent with pay cheques after the June 18, 2019 deposit. On or about June 18, 2019, was the last time the Complainant was paid by Mr. Hari for work.
- His contract with Mr. Hari stated he was to work a minimum of 37.5 hours a week but he usually worked around 40 hours weekly and would inform Mr. Hari verbally of the additional hours he worked, and he would later be compensated for them.
- He did not keep an independent record of the days and hours he worked, but he estimated that between June 1 and July 5, 2019, he was not paid for 197 hours based on his work schedule of Monday to Friday, 40 hours per week, totaling approximately 200 hours, minus three hours for some time off he might have taken.
- Mr. Hari called him every morning prior to picking him up for work including in June and July 2019 but his (Complainant's) telephone records obtained from his telephone company, Fido, only provide a statement of outgoing calls because of privacy issues. The telephone statements did show early morning incoming calls from unknown callers and outgoing calls to telephone numbers belonging to Mr. Hari.
- He called Mr. Hari many times trying to get paid his outstanding wages in June 2019.
- He denied receiving a \$700 cash advance from Mr. Hari at any time and further denied that any outgoing calls on his phone to Mr. Hari, in June or July 2019, related to any cash advance. His bank statements also do not show a deposit of \$700 in May 2019.
- In June and July, he worked at three locations – 2 in Abbotsford and 1 in Surrey – for Mr. Hari.
- He did not want to quit his job with Mr. Hari, and had asked Mr. Hari in March 2019 to renew his work permit to work with him longer but he decided to not renew the work permit because Mr. Hari frequently delayed paying him.

- On July 7, 2019, he worked for Mr. Hari but due to an urgent matter he had to return to his home and had a long discussion at work with Mr. Hari about his need to return home. Mr. Hari told him then there was no need for him to come back to work.
- Subsequently, he applied to Immigration, Refugees and Citizenship Canada for a visitor visa extension in order to remain in the country, but he was refused.
- He then met his current employer, Crystal Consulting (Drywall), and the latter offered him employment and he received a work permit and started working for them on March 9, 2020.

21. As concerns Mr. Hari, the delegate notes in the Reasons, he provided the following evidence and made the following assertions in the investigation of the Complaint:

- His accountant was responsible for making the wage statements which were then sent to him and he would then write a cheque.
- He checked his records and his final paycheque for the Complainant was May 31, 2019, as the Complainant did not work for him in June and beyond.
- He had the hourly work records for his other employees for June and July 2019, but not for the Complainant.
- He submitted work records showing employee hours worked for April-July 2019, and an ROE for the Complainant. The employee hours of work records were in the form of copies of pages of handwritten tables in a notebook.
- For April and May 2019, the work records show the names and hours worked for five employees, including the Complainant with the starting times for employees varying between 8:00 a.m. and 10:00 a.m., between Monday and Saturday. The hours worked by employees varied between 4 hours and 10.5 hours per day. The average day was longer than 8 hours. All employees did not work every day.
- For April and May 2019, the Complainant is shown as working between three and five days per week. A summary of the Complainant's hours is in the following table:

Week (2019)	Total hours worked	Regular hours	Daily overtime x1.5
Apr 1-15	62.5	55	7.5
Apr 16-30	67.5	52	15.5
May 1-15	105.5	91	14.5
May 16-31	84	76	8

- For June and July 2019, the Complainant's name is not in the work record while the other employees who were shown in the records for April and May are showing for June and July 2019.

- The ROE, issued on April 17, 2020, to the Complainant was prepared by Mr. Hari's accountant and it indicates the Complainant's last day of work was May 31, 2019, and that the reason for issuance was that that he had quit.
- The multiple calls between him and the Complainant in June and July 2019, do not relate to work. He was trying to obtain repayment of the \$700 cash advance he made to the Complainant against future wages back once the Complainant decided not to work for him. It took him a about a month to obtain repayment from the Complainant.
- The cash advance is not indicated in the Complainant's wage statement for May.
- At the end of May 2019, the Complainant told him that he was not going to come into work because he had some relatives coming into town to visit. Thereafter, the Complainant was absent from work because his wife was sick and thereafter, the Complainant did not answer several calls from Mr. Hari who then concluded that the Complainant no longer wanted to work perhaps because he just did not like the work in general.
- He was willing to renew the Complainant's work permit and told the Complainant to get his own lawyer to do the paperwork himself, but the Complainant never renewed the work permit.
- He said that he always paid wages to the Complainant on time and on the dates indicated in the Complainant's wage statements. The Complainant was responsible for any tardiness in the deposit of the pay cheques into his bank account.
- He offered to pay the Complainant by direct deposit, but the Complainant preferred to receive the physical cheques.
- His company never performed drywall work in Abbotsford, contrary to the Complainant's assertion.

42. In addition to their testimonies and evidence, the Complainant and Mr. Hari also relied on the testimonies of their witnesses. While I do not find it necessary to set out, in any detail, the evidence of the witnesses here, I note that the delegate found the evidence of the witnesses of little value in determining the Complainant's length of employment. In the case of the Complainant's witness, Ajit Singh ("Mr. Singh") whom the Complainant met at the Sikh temple and was friends with for about two years, the delegate noted that his evidence was in the nature of general information only. Mr. Singh was not an employee of Mr. Hari and he did not see Mr. Hari work and lacked any specific evidence relating to the Complainant's end date in his employment with Mr. Hari. As concerns Mr. Hari's accountant, Napinder Pandher ("Ms. Pandher"), the delegate notes that she did not have any details of the Complainant's employment that were of value in assisting with the determination of the length of employment. She did not have personal knowledge of whether the Complainant worked for Mr. Hari during June and July 2019. The Complainant did not contact her or have any reason to contact her as the problem he had was not with the pay statement or pay amount, but with Mr. Hari's failure to make payment to him. As concerns the other two witnesses of Mr. Hari, namely, Sandeep Singh ("Sandeep") and, Kamalpreet Singh Batth ("Mr. Batth"), both coworkers of the Complainant, the delegate notes that while they did testify that they did not work with the Complainant after May 2019, their evidence had "reliability problems" as both witnesses are "not disinterested parties". Sandeep is Mr. Hari's son and Mr. Batth is Mr. Hari's cousin and both are

employees continuing with Mr. Hari. In the result, the delegate decided to give little weight to the witness evidence in determining the length of the Complainant's employment.

43. As concerns the hours of work records relating to the Complainant that Mr. Hari presented in the investigation, the delegate found them problematic in determining the Complainant's length of employment, for the following reasons:

The hours of work records evidence has reliability issues as they are hand-written in a notebook, produced by Mr. Hari, without an authenticating time/date, or corroboration from an additional source. More importantly, there are inconsistencies between the hours of work indicated on Mr. Hari's records and the Complainant's statement of wage amounts. The pay statements for April and May 2019 submitted by the Complaint show he was always paid for 88 hours per pay period at his regular wage rate of \$25.50 per hour. However, the work record Mr. Hari submitted for April 2019 shows that the Complainant worked only 62 hours from April 1-15, including 7.5 hours over overtime. From April 16-30, the Complainant worked 67.5 total hours, including 15.5 hours of overtime; and from May 1-15, he worked 105.5 total hours, including 14.5 hours of overtime. The wage statements do not indicate the overtime the Complainant worked according to Mr. Hari's work records; they also do not indicate the two statutory holidays the Complainant worked during April and May 2019. Taken as a whole, the wages paid and actually owed to the Complainant, accounting for overtime and statutory holiday pay, are quite close. However, the inconsistency between the Complainant's wage statements and Mr. Hari's work records reduce the reliability of those records and, subsequently, affects the weight I can assign to them as an accurate representation of the Complainant's work schedule. I will assign little weight to the hours of work records submitted by Mr. Hari.

44. The delegate also found the ROE Mr. Hari issued the Complainant on April 17, 2020, several months after the termination of the latter's employment, and only after the Director's Demand for Records was made, also unhelpful in determining the Complainant's employment period. The delegate assigned no weight to the May 31, 2019 date showing on the ROE as the end date of the Complainant's employment because the document was "a non-contemporaneous document produced well after the end of the Complainant's employment, in response to an Employment Standards complaint investigation."

45. The delegate also found the Complainant's telephone records for June and July 2019 unhelpful in determining whether the Complainant worked for Mr. Hari in June and July 2019. While the records show early morning incoming calls to the Complainant in June and July, 2019, consistent with the Complainant's contention that Mr. Hari called him before he picked him up every morning, the caller's identity is not showing on the records and there is not any regular pattern of calls in terms of the timing of the calls each day. Further, as for the identifiable calls between the parties in the June and July records, it is not certain whether the discussions in those calls related to work wage payment, or, as Mr. Hari contended, his attempts to obtain repayment of the case advance he allegedly made to the Complainant. Therefore, the delegate gave little weight to the telephone record evidence.

46. With respect to the Complainant's evidence that he worked for Mr. Hari at three different addresses in June and July 2019, the delegate found this evidence persuasive because the BC Assessment database confirmed all three properties were under construction in 2019, and their sale dates in August 14, 2019, and January 2020, respectively, were consistent with construction being at the mid to latter stages of completion in June and July 2019, such that drywall could be installed. The delegate also felt that it was

unlikely that the Complainant would be able to accurately recall specific project addresses, if he did not perform work on these projects. In the result the delegate found it reasonable to conclude that the Complainant knew of these under-construction properties because he worked on them in 2019. Further, the delegate notes that while Mr. Hari denied working on these projects, he did not provide any evidence of different projects that he worked on in June and July 2019.

47. The delegate also found that the bank statements of the Complainant corroborate his assertion that there were ongoing problems he was experiencing with timely payment of wages by Mr. Hari and decided to quit when he was not paid for his work in June 2019. More particularly, the delegate, states:

The bank statements submitted by the Complainant do not demonstrate why the Complainant deposited his pay cheques after the dates of the corresponding wage statements. The Complainant explains that he deposited his pay cheques when he received them. Mr. Hari explained that his accountant would issue the wage statements, and then he would write the cheques. The bank statements do establish that the Complainant frequently experienced inadequate funds issues prior to the deposit of his pay cheques, leading to refused payments, NSF fees and interest charges. I do not find it reasonable that the Complainant would have purposely, and consistently, deposited his pay cheques late given these negative consequences. As the Complainant was having ongoing problems meeting his expenses between pay deposits, it is reasonable to assume he would have deposited his cheques as soon as possible to avoid the additional payment of over \$100.00 in NSF fees. Further, if the Complainant had deposited his \$3630.74 pay amount for May close to the dates indicated on his May 13 and May 31, 2019 wage statements, that pay would have adequately covered his arrears and immediately transferred amounts. I find it unlikely that the Complainant would have chosen to take out a \$5000.00 loan to meet his expenses rather than deposit his pay cheques in a timely manner.

I find the circumstances demonstrated by the bank account statements are consistent with the Complainant's assertion that there were ongoing problems with timely payment by Mr. Hari. I also find that Mr. Hari's assertion that he wrote the paycheques only after the wage statements were created further supports that it is more likely than not that the Complainant was not actually paid semi-monthly in accordance with section 17 of the Act.

48. In concluding on the preponderance of evidence that the Complainant worked for Mr. Hari in June and July 2019, and the latter failed to pay him for the said period, the delegate reasons as follows:

I prefer the Complainant's evidence regarding the reason he terminated his employment. As, in January 2020, the Complainant accepted a drywalling job with a new employer, I find Mr. Hari's suggestion that maybe the Complainant "just did not like the work in general" is not persuasive. Further I find it unreasonable that the Complainant would have failed to renew his work permit with Mr. Hari without a compelling reason, due to the serious consequences. Being without a work permit would make the Complainant legally unable to work in Canada. Likewise, given the Complainant's ongoing financial difficulties, I find it unlikely he would have suddenly stopped working for Mr. Hari two months before the end of his work permit expiry, after working steadily on a full-time basis for the previous 22 months. Because he did not enjoy the work. As the Complainant was only legally entitled to work for Mr. Hari, quitting would have left him unable to work until he obtained a new work permit with a new employer, or an open work permit. Rather, I find it likely that the Complainant stopped worked at the expiry of his work permit for Mr. Hari and did not renew the permit because he was not getting paid.

Based on the totality of the evidence, I find it more likely than not that the Complainant did work for Mr. Hari in June and July of 2019 and was not paid. The Complainant's assertion that he continued to work during those months is supported by the fact that he had previously worked for Mr. Hari for 22 months of a 24 month work permit, and had no immediate employment capacity outside that closed worked permit. The Complainant's information regarding his work locations in June and July 2019 also corroborates his position. That the Complainant was not paid for work done in June and July 2019 is supported by his bank statement evidence indicating that Mr. Hari was consistently late in making wage payments to the Complainant. I find there is no reliable evidence that demonstrates the Complainant did not work for Mr. Hari in June and July 2019.

49. The delegate then went on to determine the Complainant's wages owing based on the latter's assertion that he is owed 197 hours, calculated on the basis of 8 hours of work a day and 40 hours per week, in the absence of reliable documentary evidence from Mr. Hari. The delegate did note that although the Complainant said that his employment with Mr. Hari ended on July 7, 2019, July 7 was a Sunday and Mr. Hari and his employees did not work on Sundays and only occasionally worked on Saturdays. Therefore, the delegate concluded that the Complainant's last day was likely on July 5, 2019, and determined his wages and vacation pay accordingly. The delegate also levied administrative penalties of \$500 each for Mr. Hari's violation of section 17 and 18 of the *ESA*.

SUBMISSIONS OF MR. HARI

50. Mr. Hari appeals on the "natural justice" and "new evidence" grounds of appeal.
51. Under the natural justice ground of appeal, he asserts that the delegate was "biased" throughout her investigation of the Complaint and "ignored" or failed to "take important information into consideration" for the following reasons:
- The Complainant said his last day of work was July 7, 2019, which is a Sunday when the business is closed but the delegate failed to consider this or "decided to ignore and be biased".
 - The Complainant provided a random friend's name, Mr. Singh, as a witness and the delegate failed to "verify" the information in Mr. Singh's witness statement and "use(d) it in the determination". Conversely, the delegate rejected or "ignored" the evidence of his witnesses (Sandeep and Mr. Batth) who were "real verified people" who worked in his business and "had more close details" relating to the Complainant because they were related to him.
 - The delegate "took (the Complainant's) word" over his regarding the wage cheques being issued to the Complainant later than the date shown on the cheques. He states the cheques were given to the Complainant on the dates indicated on the cheques and the Complainant deposited them late, but the delegate did not believe his evidence because she was biased.
 - The delegate did not believe that the loan obtained by the Complainant from his bank could have been for his car instead and not to cover his personal expenses (because of late payment of wages) but the delegate failed to "ask for explanation of the loan".

52. With respect to the new evidence ground of appeal, Mr. Hari states that the work locations for June and July 2019 provided by the Complainant were “random” addresses. He states that he has now “gathered new evidence of actual work locations” where he and his employees worked in June and July 2019. The addresses are in Surrey, Richmond, Vancouver, and Burnaby. He states that he did “subcontract work” at these places. He submits three pages of texts exchanged with individuals he says, “are regular contractor[s] for me that work ... some parts of the year”. The texts do not say much but simply set out the four addresses without any real context for why they contain these addresses and they are dated various dates from June 14 to July 30, 2019.
53. He states that his business consists of a team of four to five employees, and they usually work on three to four houses a month.

ANALYSIS

54. The grounds of appeal under the *ESA* are set out in section 112(1):

Appeal of director's determination

- 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.

55. The Tribunal has consistently held that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).
56. Section 112(1) does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.* BC EST # D260/03.
57. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
58. In this case, as indicated, Mr. Hari appeals the Determination on the basis of the “natural justice” and the “new evidence” grounds of appeal. I am not persuaded with the merits of either ground, and I dismiss the appeal for the reasons set out below.

Natural Justice

59. With respect to the natural justice ground of appeal, the often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explains that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.
60. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.
61. In this case, there is ample evidence in the record that the delegate afforded Mr. Hari an opportunity to respond during the investigation of the Complaint, before the Determination was made. More particularly, the delegate received submissions from Mr. Hari and also shared with him (and the Complainant) her written investigation report and afforded him an opportunity to make a response by September 7, 2020, before the Determination was made. The record indicates that on September 11, 2020, Mr. Hari requested a meeting time to discuss the investigation report and the delegate obliged on the same date. There is also a note in the record that the delegate had further discussions with Mr. Hari on September 17, 2020, regarding her findings in the investigation report. There is absolutely no basis to conclude that Mr. Hari was denied any opportunity to know the case against him or the right to present his evidence.
62. Having said this, the focus of Mr. Hari's appeal under the natural justice ground is singularly grounded in his contention that the delegate was biased in making the Determination. This Tribunal has consistently and repeatedly stated that an allegation of bias must be proven on the evidence. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact. Also:
- . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.
63. An allegation of bias cannot be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias always lies with the person who is alleging its existence, in this case Mr. Hari. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

64. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:

Regardless of the precise words used to describe the test (of bias or apprehension of bias), the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the **personal** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

65. Mr. Hari has not provided any evidence that would demonstrate to an objective observer that the delegate in this case was biased in the above sense against him. Under the *ESA*, if an investigation is conducted, findings of fact must be made and, as a practical reality, those findings will be adverse to the interests of one of the parties. That reality does not make the delegate involved in the complaint process bias against the party against whom the findings are made. Having said this, I find that none of Mr. Hari's reasons for alleging bias on the part of the delegate, summarized in paragraph 51 above, in the slightest, support his claim that the delegate acted in a biased manner. Contrary to Mr. Hari's contention, the delegate did consider his evidence that the business did not operate on Sundays and therefore the Complainant could not have worked on Sunday, July 7, 2019.

66. Secondly, it was open to the delegate to determine whether or not the evidence of the parties' witnesses was reliable and credible. The delegate found the evidence of the Complainant's witness, Mr. Singh, was of little value as it was only general information and he did not work for Mr. Hari to provide useful evidence relating to the employment end date of the Complainant. Contrary to Mr. Hari's contention, the delegate did not "use [Mr. Singh's evidence] in the determination" to the benefit of the Complainant. In the case of Mr. Hari's witnesses, they were both his relatives - one was his son and the other his cousin - and they both continued working for him. They both had vested interest in the outcome of the Complaint and, therefore, it was open for the delegate to question the reliability of their evidence and in so doing she cannot be said to be biased.

67. Thirdly, it was open for the delegate in her adjudicative capacity to assess the evidence of the parties and prefer the Complainant's evidence that the wage cheques he received from Mr. Hari, when he received them, were not timely or later than the dates shown on the cheques.

68. Finally, it was also open to the delegate, on the evidence, to prefer the evidence of the Complainant that the bank loan of \$5,000 taken out by the Complainant, when it was taken out, was to cover his personal expenses because of late payment of wages by Mr. Hari. I find the delegate's analysis of the bank statements of the Complainant, at page R10 of the Reasons, very persuasive. In summary, there is not a shred of evidence of bias on the part of the delegate in her assessment of the parties' evidence. I find Mr. Hari's baseless allegation of bias against the delegate reckless as it impugns the personal integrity of the delegate as well as the integrity of the system of adjudication of the Employment Standards Branch. In conclusion, I resoundingly reject Mr. Hari's allegation of bias against the delegate and dismiss his natural justice ground of appeal.

New Evidence

69. The test for admitting “new” of fresh evidence on appeal is delineated in the tribunal’s decision in *Re: Merilus Technologies Inc.*, BC EST # D171/03, and involves the consideration of the following conjunctive factors:
- a) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing;
 - b) the evidence must be relevant to a material issue in the appeal;
 - c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue
70. Mr. Hari submitted some three pages of texts dated June 14 to July 30, 2019, from three individuals, purportedly containing addresses of properties that he performed work in June and July 2019. He says he now “gathered new evidence of actual work locations” where he and his employees or his “regular contractor[s]” worked in June and July 2019. These addresses are different than what the Complainant provided in the investigation and therefore, Mr. Hari contends that the Complainant’s evidence that he worked for him in June and July 2019, must be a fabrication or a lie.
71. The texts in question predate the Complaint and there is no explanation why they were not submitted earlier during the investigation of the Complaint. Therefore, the “new” evidence of Mr. Hari fails on the first prong of the four-part test in *Re Merilus* for admitting fresh evidence. Mr. Hari was simply not duly diligent in obtaining this evidence and submitting it to the delegate during the investigation or after he reviewed the delegate’s investigation report or even before the Determination was made.
72. I also find the “new” evidence of Mr. Hari fails on the fourth prong of the four-part test, in that, the texts are not of high probative value that if believed, they would have led the delegate to a different conclusion on the very material issue of the end date of the Complainant’s employment. The texts do not say much, but simply set out the four addresses without any real context for why they contain these addresses. I find they raise more questions than they answer, and they certainly do not lead an objective observer to the conclusion that Mr. Hari and his employees or contractors must have worked at those addresses in June and July 2019.
73. While failing to meet one of the requirements for the admission of evidence set out in *Re Merilus* is sufficient to disqualify the admissibility of such evidence, in this case there are two requirements Mr. Hari’s “new evidence” fails on – the first and fourth elements of the *Re Merilus* test. In the circumstances, I do not admit the “new” evidence of Mr. Hari and reject his new evidence ground of appeal.
74. In summary, I find this appeal has no reasonable prospect of succeeding and I dismiss it under section 114(1)(f) of the *ESA*.

ORDER

75. Pursuant to section 115(1) of the *ESA*, I order the Determination dated December 7, 2020, be confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal