



Citation: Mammoth Landscaping and Masonry Ltd. (Re)
2021 BCEST 31

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Mammoth Landscaping and Masonry Ltd.
("Mammoth")

- 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.: 2021/005

DATE OF DECISION: April 6, 2021

DECISION

SUBMISSIONS

Ashley Xu

on behalf of Mammoth Landscaping and Masonry Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Mammoth Landscaping and Masonry Ltd. (“Mammoth”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 11, 2020 (the “Determination”).
2. The Determination found that Mammoth contravened Part 3, sections 18 (payment of wages if employment terminated); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability for length of service) of the *ESA* in respect of the employment of Michael Shane Soderberg (“the Complainant”).
3. The Determination ordered Mammoth to pay the Complainant wages totalling \$4,970.07 including accrued interest.
4. The Determination also levied four administrative penalties of \$500 each against Mammoth, pursuant to section 29(1) the *Employment Standards Regulation* (the “ESR”), for breaching sections 17, 18, 27, and 63 of the *ESA*.
5. The total amount of the Determination is \$6,970.07.
6. Mammoth appeals the Determination on the “natural justice” grounds of appeal under section 112(1)(b) of the *ESA*.
7. In correspondence dated January 21, 2021, the Tribunal notified the Complainant and the Director that it had received Mammoth’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 11, 2021, the Tribunal received the record from the Director and forwarded a copy of it to the Complainant and Mammoth. 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 5, 2021, the Tribunal sent correspondence to the parties advising them that a panel is 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”), Mammoth’s appeal submissions, and my review of the record when the Determination was being made. If I am satisfied that Mammoth’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. Mammoth 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*.

OVERVIEW

12. Based on an online BC Registry Services Search conducted on June 17, 2019, with a currency date of May 17, 2019, Mammoth was incorporated in British Columbia on June 4, 1991. Yuqing Zhao (“Mr. Zhao”) is listed as its sole director and officer.
13. Mammoth operates a landscape and masonry business in Victoria, British Columbia.
14. Mammoth employed the Complainant commencing on September 21, 2015. Over the course of his employment with Mammoth, the Complainant was involved in scheduling, hiring, training, quoting and all the duties that were associated with being a manager, although he was not formally appointed to a management position.
15. On November 29, 2017, the Complainant entered into a new employment contract with Mammoth under which he was promoted to the position of Maintenance Division Manager commencing December 1, 2017. Under this contract, he was to work a set schedule, and receive an annual salary of \$56,160.00, 4% vacation pay and profit sharing.
16. The Complainant and Mammoth agreed that in lieu of receiving an additional 4% of his wages for vacation pay, from and after the time he was promoted to his position as Maintenance Division Manager, he would receive paid vacation days, also known as salary continuance.
17. On December 4, 2018, Mr. Zhao, by a text message, informed the Complainant that his salary was increasing by 2% (\$1,123.20) to \$57,283.20. Mr. Zhao also informed him of the formula Mammoth would use to calculate his annual bonus, namely:
$$\text{Gross profit for the year} - \$99,000 = \text{Sum} \times 4\% = \text{Bonus}$$
18. At the same time, Mr. Zhao also indicated to the Complainant that he would receive a reimbursement of \$40.00 per month for his use of his personal cell phone for business purposes. Mammoth also supplied him with a company laptop.
19. On January 30, 2019, the Complainant suffered an injury while at work which interfered with his ability to perform physical labour and impeded his ability to do his job.
20. The last day the Complainant worked for Mammoth was April 11, 2019. Thereafter, starting on April 12, 2019, he began receiving worker’s compensation benefits.

21. On April 22, 2019, he underwent surgery for his injury and the complication from this surgery prevented him from returning to work.
22. In July 2019, approximately three months after the Complainant stopped working, he learned that his employee health benefits with Mammoth had been terminated. When he inquired as to why this had occurred, Mr. Zhao texted him on July 24, 2019, with the following explanation:
- “Group benefits is for the current employees who still working for Mammoth. You did not work since April but receive wage loss benefits from WCB since then, and WCB pay your medical expenses”.
-
- “I know your [sic] a good person and agreed for company to pay you the half of the premium from April to June but it is not fair to the other employees”.
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- “As I mentioned to you before, you are not longer [sic] Mammoth’s employee, so we cancelled your group benefits. Wish you will recovery[sic] soon. When your health has 100% functions back[sic] and you still wish to work for Mammoth, you can contact me directly, I will find out if we will have any position available for you.
23. Mr. Zhao’s response led the Complainant to believe that his employment had terminated. When he subsequently sought clarification whether Mammoth had terminated his employment, he did not receive a reply. He was also not issued a Record of Employment and he did not receive any termination pay. He ultimately reached the conclusion that his employment had been terminated by Mammoth.
24. On August 20, 2019, pursuant to section 74 of the *ESA*, the Complainant filed a complaint against Mammoth alleging that the latter contravened the *ESA* by failing to pay him wages for additional hours worked; wages with respect to his 2018 and 2019 annual bonuses; compensation for length of service; reimbursement for the use of his personal telephone for business purposes; reimbursement for the cost of repairs to his personal computer that he used for business sometimes (despite Mammoth providing him a laptop); and reimbursement for expenses incurred as a result of the cancellation of his employee benefits (the “Complaint”).
25. The delegate proceeded by way of an investigation of the Complaint and spoke with the Complainant and Ashely Xu (“Ms. Xu”) on behalf of Mammoth. Ms. Xu, at all material times, was an employee of Mammoth and her responsibilities included handling of the bookkeeping responsibilities for Mammoth.
26. In her investigation, the delegate considered the following questions:
- I. Is the Complainant owed any wages, and if so, what is the amount?
 - II. Is the Complainant entitled to reimbursement for expenses incurred as a result of the cancellation of his employee benefits?
 - III. Is the Complainant owed compensation for length of service?
27. As the appeal of Mammoth only disputes the awards made to the Complainant in the Determination, this decision will only focus on the factual background directly relevant to the issues on appeal.

28. With respect to the first issue, whether Mammoth owed the Complainant any wages, the delegate notes in the Reasons that he reviewed the record of the Complainant's hours provided by Mammoth as well as his wage statements. While Mammoth's record shows that he worked hours outside of his regular schedule – five days per week, eight hours per day – set out in his written contract of employment, the Complainant disputed the accuracy of Mammoth's records. However, because the Complainant did not indicate what his actual hours should be, the delegate relied on Mammoth's records as the most reliable evidence of the hours he worked. Based on these records, the Complainant worked more than eight hours per day on many occasions and fewer than eight hours a day and less than five days a week even more frequently.
29. While Mammoth proposed an offset of any wages owing to the Complainant for the additional hours he worked by the amount of wages he was overpaid as a result of failing to complete an entire shift on many days, the delegate said she could not do that as section 21(3) of the *ESA* prohibits the deduction of wages by an employer in the event of an overpayment, unless that employee provided written consent and, in this case, there was no written consent from the Complainant. However, the delegate noted that he could consider whether an employee has been paid for all hours regardless of which day or week they were worked. He reviewed both the wage statements of the Complainant as well as the record of hours worked by the Complainant for each pay period, within the recovery period, for the purpose of assessing whether there were any pay periods in which the Complainant worked more than 80 hours. He found that the Complainant worked in excess of 80 hours during nine pay periods and that the total number of additional hours he accumulated is 46.92.
30. The Complainant also contended that he was owed overtime wages for the additional hours he worked. The delegate noted that the Complainant's written contract of employment provided that he would be paid overtime in accordance with the *ESA*, however, section 34 the *ESR* excludes managers from the overtime requirements of the *ESA*. The delegate then considered the definition of "manager" in section 1(a) of the *ESR*, namely, "a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources". He observed that since the definition of manager is found in the *ESR* it must be interpreted in a manner which acknowledges the limited scope of its exclusion from the *ESA*. He then sought to examine the Complainant's primary duties to determine if the latter exercised the authority typical of a manager noting that typically:
- ... a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business and is personally accountable for the results. Accountability in this context is linked to the employer's business objectives as opposed to the routine completion of a task.
31. In concluding the Complainant was indeed a manager and therefore, excluded from the overtime requirements of the *ESA*, the delegate reasoned as follows:
- The degree to which Mr. Soderberg exercised authority and discretion in the context of project management duties was not disputed by the parties. Mr. Soderberg considered himself to be a manager, stating that he was doing everything required in terms of managing the maintenance division, including hiring, firing, training, purchasing, and quoting.

I find that Mr. Soderberg exercised a significant amount of authority and discretion in relation to the supervision and direction of human, material and financial resources. I am satisfied that he was indeed a manager and is excluded from the overtime requirements of the Act on this basis.

32. While the Complainant was not entitled to overtime pay as a manager, the delegate said that he was entitled to be paid for all hours worked according to his terms of employment. The Complainant's contract of employment with Mammoth set out a specific number of hours of work- 8:00 a.m. to 4:30 p.m.- and therefore he would be entitled to extra wages for the extra time worked over the contractually agreed number of hours. Having already determined that the Complainant worked 46.92 additional hours during the recovery period, the delegate then went on to decide the effective regular hourly rate for each additional hour he worked as some of the hours worked were before the Complainant received his 2% salary increase in December 2018 and other hours after. Based on Mammoth's own records of the Complainant's hours worked, the delegate determined that the Complainant worked 37.42 hours at a rate of \$27.00 per hour, and 9.5 hours at a rate of \$27.54 for a total award to the Complainant of \$1,271.97 for the additional hours worked. The delegate also added vacation pay of 4% (\$50.88) to the award.
33. While Mammoth sought an offset of the award contending that the Complainant had received significantly more paid vacations days than he was entitled to, the delegate declined to entertain Mammoth's request stating that section 21 (3) of the *ESA* prohibits the deduction of wages by an employer in the event of an overpayment, unless that employee provides written consent which there was not in this case.
34. As for the Complainant's claim for Bonus for 2018 and 2019 years, the delegate determined that he was not owed any additional wages for either years. I need not go into the delegate's reasons for her decision here as the bonus claims are not the subject of Mammoth's appeal.
35. The delegate also denied the Complainant's claim for reimbursement for orthotics expenses he incurred as a result of the cancellation of his employee benefits by Mammoth. As this claim is not the subject of Mammoth's appeal because the latter obtained a favourable result, I will not explain the delegate's reasons for his decision.
36. With respect to the Complainant's claim that his employment was terminated by Mammoth and he was entitled to compensation for length of service, the delegate notes that Mammoth disputed his claim contending that it did not terminate his employment and it does not owe him any compensation for length of service. In deciding whether the Complainant's employment was terminated by Mammoth, the delegate observed that the employer bears the onus of proving an employee is disentitled to compensation for length of service. Having said this, he notes that the Complainant claimed that when he inquired about the cancellation of his health benefits by Mammoth, Mr. Zhang, sent him the following text message on July 24, 2019, notifying him that his employment had been terminated:

As I mentioned to you before, you are not longer [sic] Mammoth's employee, so we cancelled your group benefits. Wish you will recovery [sic] soon. When your health has 100% functions back [sic] and you still wish to work for Mammoth, you can contact me directly, I will find out if we will have any position available for you.

37. While Ms. Xu contended on behalf of Mammoth that the Complainant's employment had not terminated and that there was a miscommunication between Mr. Zhao and the Complainant as a result of the language translation software Mr. Zhao was using to translate Chinese into English, she admitted that she had ignored the Complainant's subsequent inquiries as to whether he had been terminated.
38. In concluding that Mammoth indeed terminated the Complainant's employment by way of Mr. Zhao's text on July 24, 2019, the delegate reasoned as follows:
- ... I have considered the text message he received and do not find compelling the notion that interpretation software resulted in a misunderstanding. I note that there two are [sic] instances in the message which appear to confirm termination. The first was that Mr. Soderberg was "not [sic] longer Mammoth's employee". The second was that Mr. Zhao "will find out if we will have any position available for you" if he still wished to work for Mammoth once his health recovered.
- If in fact the communication had been translated erroneously, Mammoth could have been quickly and easily rectified the miscommunication by responding to Mr. Soderberg's inquiries regarding termination. It did not do so. I find the fact that Mammoth chose to ignore Mr. Soderberg's vital inquiries regarding his employment further diminishes the credibility of its argument that there was a translation error.
- I find the notion of termination is reinforced by Mammoth's decision to cancel his group benefits, which as Mr. Zhao explained in his text were only for "current employees who still working [sic] for Mammoth." Ms. Xu sought to clarify this statement adding that Mr. Soderberg [sic] that health benefits were only for employees who were actively performing their duties. I find the suggestion that benefits would be cancelled for injured employees to be counterintuitive in that this would potentially reduce employee access to services and products intended to provide a health benefit, and as a result might further diminish an individual's prospects for returning to work.
39. The delegate also rejected Ms. Xu's assertion that, based on a letter from WorkSafe BC dated July 10, 2020, Mammoth learned the Complainant was permanently disabled and he would receive permanent disability benefits until the age of 65 years and therefore, he need not work as result. While, according to the delegate, section 65(1)(d) of the *ESA* provides that section 63 notice of termination or compensation for length of service does not apply if it is impossible for work to be performed due to a change in circumstances that could not have been anticipated, temporary illness, injury or disability is not considered to be an unforeseeable event or circumstance that would discharge an employer's obligations under sections 63. In this case, the delegate observed that there was no medical evidence showing that the Complainant was permanently disabled and will never be able to return to the workplace. Furthermore, the delegate said he did not agree with Ms. Xu's interpretation of the WorkSafe BC letter which only indicated that the Complainant was determined to have a permanent functional impairment of 2.5% and that he was to receive a lump sum payment for the said impairment. There was no evidence showing that he was permanently disabled in terms of not being able to return to the workplace. The delegate also notes that the WorkSafe BC letter that Mammoth relies on was issued almost a year after the Complainant was terminated and could not have served as a basis for his termination at that time. Accordingly, the delegate concluded that the Complainant was entitled to termination pay pursuant to section 63.
40. Since the parties agreed that the Complainant began his employment with Mammoth on September 21, 2015, and the delegate determined that Mammoth terminated that employment on July 24, 2019, the

Complainant's length of service was more than three years but less than four. Therefore, pursuant to section 63 of the *ESA*, the delegate determined that the Complainant was entitled to three weeks' termination pay and vacation pay of 4% totaling \$3,436.99.

41. The delegate also awarded the Complainant interest in the amount of \$210.23 on all outstanding wages ordered, pursuant to section 88 of the *ESA*.
42. The delegate also levied four administrative penalties of \$500.00 each for Mammoth's violations of sections 17, 18, 27, and 63 of the *ESA*.

SUBMISSIONS OF MAMMOTH

43. Mammoth has checked off the natural justice ground of appeal in its appeal form and attached Ms. Xu's written submissions on behalf of Mammoth. The written submissions appear in a document entitled "Reasons and Argument Supporting Appeal". The document is 31 pages long and consists of quoted paragraphs from the Reasons, largely in the nature of the delegate's findings of facts, that Mammoth is disputing interspersed with Ms. Xu's comments and arguments. I have carefully reviewed the entire document and while I do not find it necessary to reiterate each comment she makes regarding the delegate's findings of fact, I will attempt to summarize her submissions below.
44. Under the background heading in the Reasons, Ms. Xu seems to suggest the BC Registry Service Search of Mammoth conducted by the delegate on June 17, 2019, with a currency date of May 17, 2019, showing Mr. Zhao is the sole Director and Officer of Mammoth is incorrect and the "(c)orrect information" is that Mr. Zhao acquired Mammoth on December 1, 2016, and prior to that date Mammoth was under a different ownership. I fail to see how the corporate search is incorrect. It is current as of May 17, 2019, and Mr. Zhao was the owner of Mammoth at that time. Whether or not he purchased Mammoth on December 1, 2016, does not change Mammoth's obligations to the Complainant.
45. Ms. Xu also disputes the delegate's findings relating to the duties and responsibilities the Complainant performed over time, since commencing his employment with Mammoth on September 21, 2015. While the delegate notes at page R2 of the Reasons that the Complainant, over time, did scheduling, hiring, training, quoting and all other duties that come with being a manager even though he was not formally appointed in that position, Ms. Xu says the "(c)orrect information" is that the Operations Manager, Seth Rudolph, performed those duties and the Complainant was simply a maintenance worker who only became a manager later, when Mr. Zhao established Maintenance division and promoted him to managerial position on December 1, 2017. If Ms. Xu is correct, nothing of substance changes here as the recovery period of wages for the Complainant started twelve months prior to his termination date on July 24, 2019, namely, on July 25, 2018, when the Complainant was undeniably a Manager with Mammoth.
46. Ms. Xu disputes the delegate's summary of facts at Page R3 of the Reasons, namely, that in July 2019, three months after the Complainant stopped working, he ceased receiving employee health benefits and when he inquired as to why this had occurred the answer he received made him believe that his employment had terminated. She directs the Tribunal to consider section C of her written submissions at pages 10 to 12 inclusive. In section C, she states, unlike the previous owners, Mr. Zhao provided group health benefits to Mammoth's employees as of July 2018 and the cost of the premiums was shared 50-50 by employees. However, she says that the group benefits policy was "only available for working

employees” and that Mammoth had no responsibility to pay its share of the premium for the policy once the Complainant’s claim was accepted by WorkSafe BC in April 2020. It is only then when she asked the Complainant to pay 100% of the monthly premium if he wanted to maintain his group benefits but the Complainant appealed to Mr. Zhao who agreed to continue paying the employer’s portion of the premium for 3 more months from April to June 2019. At the end of this period, the Complainant asked Mammoth to pay 100% of the premium but Ms. Xu refused, and she emailed Sunlife on July 19, 2019 to terminate his health insurance policy.

47. Ms. Xu submits that Mammoth is a private company and she does not know how many private companies, if any, provide group benefits to employees when the company has a big loss like Mammoth. She states that cancelling the Complainant’s group benefits policy does not mean Mammoth terminated his employment. He can join “right away, when he come [sic] back to work, and we always (still) keep the Maintenance division Manager position for him, up to today”. She states that the Complainant has been advised that “when he recovers from his injury his job will be waiting for him”. She states that the complainant is Mr. Zhao’s favourite employee and the only one Mr. Zhao promoted to a Managerial position.
48. Ms. Xu also contends, as she did during the investigation of the Complaint, that the text of July 24, 2019 from Mr. Zhao to the Complainant (set out at page R4 of the Reasons) stating, among other things, that “[g]roup benefits is for the current employees who still [sic] working for mammoth...” and “you are not longer [sic] Mammoth’s employee” is a miscommunication due to “translating problem” with the translation program that Mr. Zhao was using. She states Mr. Zhao only meant to say to the Complainant that he “is no longer working employee at the time”, otherwise he would not have paid three months of employer’s premiums to continue group benefits of the Complainant during April to June, 2019, inclusive.
49. At pages 3 to 5 of Ms. Xu’s submissions, she explains that she was only a part time employee of Mammoth and she was not involved in the preparation of the Complainant’s recorded hours at work. She states it was another employee, Terra Baird, whose job it was to check employee’s hours recorded and prepare time sheets for payroll. She did not edit any of the hours contrary to the Complainant’s contention that they were inaccurately recorded. She also contends that the program used to record the hours would also show how many times the Complainant himself edited his hours. I do not find these submissions relevant to the appeal simply because the delegate did rely on Mammoth’s records as the best available evidence in determining the Complainant’s hours worked during the recovery period. There is also no finding made by the delegate that Ms. Xu tampered with the Complainant’s recorded hours worked.
50. At pages 5 to 6 of the appeal submissions, Ms. Xu states the delegate incorrectly stated that she was responsible for “handling much of the bookkeeping responsibilities for Mammoth”. It was Ms. Baird, she says, who did bookkeeping, accounts receivable, accounts payable, employees’ time sheets, and employees’ reimbursements for Mammoth from Monday to Friday until she quit her employment on April 3, 2019.
51. At page 6 of her submissions, Ms. Xu contends that the delegate has it wrong when he states at page R7 of the Reasons that she said to Mr. Zhao “Why did you tell Shane we fired him?” Ms. Xu states she told the delegate twice that she never said this.

52. At pages 6 and 7 of her submissions, Ms. Xu states that the subject of the termination of his employment arose from the Complainant himself who kept calling Mammoth's office and told her that the WorkSafe BC case manager told him that Mammoth had terminated his employment. Ms. Xu states that she called the manager and the latter said she never told him that he was fired by Mammoth. Ms. Xu then says that the second time the subject of the termination of the Complainant's employment came up was when "I removed his group benefits". The third time the subject resurfaced, she says, was when the translating software caused the miscommunication which she was not aware about until she was at the mediation of the Complaint. She states she has "NEVER SEEN any employee ... so eager to be fired by a company with not any reason".
53. At page 7 of her submissions, Ms. Xu expresses her exasperation with the delegate. She states that she told him three times, presumably in the investigation of the Complaint, that she misunderstood the letter from WCB dated July 10, 2020, when she thought it said the Complainant was permanently disabled. She also states that the delegate distorted the meaning of what she was saying and that she did not say that the WCB letter (as interpreted by her) should be considered in the context of the Complainant's claim for compensation for length of service. She says English is her second language and she "never meant this".
54. At pages 7 to 9 of her submissions, Ms. Xu alleges, based on her review and understanding of letters received by Mammoth from WorkSafe BC in January and February, 2020, the Complainant lied to WorkSafe BC and to Mammoth about the extent of his injury at work in January 2019. As a result, she contends he was overpaid by WCB. She also says that as a result of his lies, Mammoth's 2020 WCB rate increased. I do not find these submissions are relevant to the awards the delegate made to the Complainant in the Determination, namely, compensation for additional hours the Complainant worked during his employment with Mammoth and termination pay under section 63 of the *ESA*. If, as Ms. Xu says, WCB made an overpayment to the Complainant or *if* the Complainant lied to WCB in advancing his WCB claim, then it is for WCB to look into that. I do not find Ms. Xu's submissions material or relevant to Mammoth's appeal of the Determination and do not find it necessary to go any further into these submissions here.
55. At pages 9 to 10 of her submissions, Ms. Xu effectively reiterates Mammoth's argument during the investigation that the Complainant took more vacation than he was entitled to and the resulting overpayment he received should be offset from any wages owed to him on account of any additional hours he worked during the recovery period. Ms. Xu also adds that while no written agreement was made between Mammoth and the Complainant, there was a verbal agreement between the parties that the Complainant would work additional hours to make up for the vacation overage. It is for this reason, she states, Mammoth agreed to pay the Complainant full wages or did not deduct vacation overages in the pay periods when the Complainant had taken more vacation than he had earned.
56. At pages 13 and 14 of her submissions, Ms. Xu disputes the evidence the delegate attributed to her on the bonus issue, although Mammoth prevailed on the bonus issue because the delegate concluded, on all the evidence, that the Complainant was not owed any bonus for 2018 and 2019. Ms. Xu's submissions simply dispute what she said to the delegate during the investigation and she also defends herself against the Complainant's allegations that she was concealing the amount of profit and inflating expenses of Mammoth which negatively impacted his bonus entitlement. While I appreciate Ms. Xu wants to defend her professional reputation, Mammoth is not appealing the favourable outcome it received on the bonus claims in the Complainant and I find it unnecessary to go any further into Ms. Xu's submissions here.

57. At pages 15 to 22, Ms. Xu advances arguments reiterating Mammoth’s position in the investigation of the Complaint, namely, that the Complainant’s employment was never terminated by Mammoth and he is not entitled to termination pay under section 63 of the *ESA*. She questions why the delegate did not contact the WCB manager during his investigation of the Complaint as he would have discovered that the WCB manager did not tell the Complainant he was fired. Curiously, in her submissions, Ms. Xu also quotes what appears to be an email from the delegate informing her that while he appreciates her position that WCB informed the Complainant that he had been terminated and later indicated it was mistaken in so informing him, his preliminary assessment that the Complainant was terminated by Mammoth is not based on WCB’s assessment but his own conclusion “based upon the messages send [sic] to [the Complainant] by Mr. Zhao”. The delegate also says in the same communication to Ms. Xu that Mammoth may dispute his assessment to the Employment Standards Tribunal, which evidently Mammoth has done.
58. Ms. Xu also contends that in her 18 years of work in Victoria for several companies, she has never seen any company needing to fire an employee who is on WCB, especially a good employee. She is suggesting that Mammoth did not fire the Complainant as he was receiving WCB benefits.
59. At pages 23 to 26 of her submissions, Ms. Xu throws in everything but the proverbial kitchen sink. Most of her submissions reiterate the arguments she has made in the previous 22 pages of her submissions. She also peppers those submissions with accusations of deceit and lies on the part of the Complainant in his dealings with the Employment Standards Branch and WorkSafe BC. For the reasons set out below, I do not find it necessary to summarize any of these submissions here.

ANALYSIS

60. 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.

61. 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).
62. 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.

63. 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.
64. In this case, as indicated, Mammoth appeals the Determination on the basis of 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.
65. 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 *BWI Business World Incorporated* BC EST #D050/96).
66. Having reviewed Ms. Xu’s submissions and the record, I find there is no basis in this appeal for alleging that the Director failed to observe the principles of natural justice in making the Determination. Nowhere in the appeal or the material on file is there any objective foundation for suggesting that Mammoth was denied full and fair opportunity to know the case against it and to respond to the Complaint. To the contrary, the lengthy record in this case, totaling 549 pages, amply shows the delegate afforded Mammoth ample opportunity to respond during the investigation of the Complaint, before the Determination was made. It is abundantly clear from the record that Ms. Xu was intimately involved in the investigation process on behalf of Mammoth, responding to the Complaint, making written submissions and adducing records throughout the process. On September 11, 2020, the delegate also sent Ms. Xu his preliminary assessment and asked her to provide him any further evidence by September 21, 2020. In an undated document, about 6 pages long, Ms. Xu provided her response to the preliminary assessment. Subsequently, on October 16, 2020, the delegate issued his revised preliminary assessment and afforded Ms. Xu a further opportunity to respond with any additional evidence by October 23, 2020. There is absolutely no basis to conclude that mammoth was denied any opportunity to know the case against it or the right to present its evidence.
67. What is abundantly clear in this case is that Mammoth and Ms. Xu disagree with the Determination. At its core, they dispute findings of fact and conclusions of the delegate in the Determination which findings and conclusions are not unreasonable in my view. With respect to whether Mammoth owed any wages to the Complainant, the delegate relied on Mammoth’s records as the most reliable evidence of the hours the Complainant worked. According to these records, the delegate found the Complainant worked more than 80 hours during nine pay periods, during the recovery period, for a total of 46.92 additional hours. The delegate also found that the Complainant was a “manager” and not entitled to be paid overtime wages for the additional hours worked. I find nothing wrong with the delegate’s conclusions of facts here.

I also agree with the delegate's interpretation of the applicable law, namely, that section 21(3) of the *ESA* prohibits deduction of wages by an employer in the event of an overpayment, unless that employee provided written consent which there was not in this case. Therefore, any overpayments to the Complainant by Mammoth on account of the Complainant taking more vacation than he was entitled to could *not* be offset against wages determined to be owing to him for additional hours worked during the recovery period.

68. I also find that it was open to the delegate to conclude, as he did, that the Complainant's employment was terminated as a result of the text from Zhao on July 24, 2019, informing the Complainant that he was "not [sic] longer Mammoth's employee" and he (Mr. Zhang) "will find out if we will have any position available for [him]" if he still wished to work for Mammoth once his health recovered. It was also open for the delegate to reject Ms. Xu's contention that the translation software Mr. Zhu was using resulted in a misunderstanding. I find the delegate's explanation that if in fact Mr. Zhao's text message was translated erroneously, Mammoth could have quickly and easily rectified the miscommunication by responding to the Complainant's inquiries regarding termination very compelling and persuasive. I find there is no basis to interfere with the delegate's conclusions here.

69. I also find there is no error and therefore, no basis to interfere with the delegate's calculation of wages owed to the Complainant for additional hours worked and compensation for length of service.

70. In summary, I find that Mammoth has not met the burden of showing there is any reviewable error in the Determination. This is simply a case of Mammoth rearguing its entire case in the appeal. It is not only improper for the appellant to rehash and re-argue its case in the appeal but it is also contrary to the spirit and intent of the *ESA* to allow such as it is inconsistent with and defeats the statutory purpose of providing fair and efficient procedures for resolving disputes delineated in section 2(d) of the *ESA*.

71. In the result, I find this appeal has no reasonable prospect of succeeding and I dismiss it under section 114(1)(f) of the *ESA*.

ORDER

72. Pursuant to section 115 of the *ESA*, I order the Determination dated December 11, 2020, be confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal