Citation: Employer (Re)
2021 BCEST 58

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

"Employer"

- 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: Carol L. Roberts

FILE NO.: 2020/153

DATE OF DECISION: June 30, 2021

DECISION

SUBMISSIONS

Shelley-Mae Mitchell	counsel for the Employer
Employee Z	on his own behalf
John Dafoe	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by an Employer (the "Employer") of an October 2, 2020 Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director").

2. The delegate found that the Employer had contravened sections 18, 21, 58 and 63 of the *Employment Standards Act* ("*ESA*") in failing to pay a former employee ("Employee Z") wages, business costs, annual vacation pay and compensation for length of service. The delegate determined that the Employer owed wages and interest in the total amount of $74,347.45. The delegate also imposed three $500.00 administrative penalties on the Employer for the contraventions, for a total amount payable of $75,847.45.

3. The Employer does not dispute the portion of the Determination dealing with unpaid commissions and the Employer's business costs. The disputed amount, that is, the amount found by the Director to be owed as compensation for length of service, is $30,836.76.

4. The facts and issues on appeal relate to a sexual harassment complaint brought by an employee ("Employee A") of the Employer against Employee Z. The Employer conducted an internal investigation, following which Employee Z's employment was terminated. Employee Z filed a complaint with the Director alleging that the Employer contravened the *ESA* by failing to pay him compensation for length of service. The delegate found that the Employer did not have just cause to terminate Employee Z. The Employer argues that the Director erred in law in arriving at this conclusion.

5. For the reasons outlined in *Employer* (2021 BCEST 10), I have anonymized the names of the Employer, Employee Z and all other employees of the Employer.

6. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the submissions of the parties, the Determination, and the Reasons for the Determination (the "Reasons").

FACTS

7. Employee Z's complaint was decided by way of a hybrid process. Initially, the delegate held two days of oral hearing into the issue of whether the Employer had just cause to terminate Employee Z's employment. Following those two days, the delegate decided to complete the hearing by way of an

investigation because of "[t]he rancour and ill-will" which had characterized the first two days of hearing and because of Employee Z's difficulty in ensuring that his witnesses would be available for hearing dates.

8. The facts relevant to the issue on appeal may be summarized as follows.

9. The Employer is a company registered extra-provincially in British Columbia. Employee Z commenced his employment on February 1, 2015. Employee Z and Employee A worked in the Employer's offices in separate provinces.

10. In late 2017, the Employer held a three-day training session in the United States which both Employee Z and Employee A attended, as did a number of other company employees. Employee Z and Employee A met for the first time at the training session.

11. Following the first day's session, the Employer hosted a dinner, following which a group of approximately 15 employees went out for drinks. All the employees except one employee ("Employee B"), who was a non-drinker, consumed a considerable amount of alcohol. During a taxi ride back to the hotel, Employee Z sat in the back seat with Employee A. Employee B sat in the front seat. Employee A alleged that during the short taxi ride, Employee Z kissed her neck and kissed or licked her face. Employee A pushed Employee Z away and told him to stop. Employee B, who observed some of the interaction, also told Employee Z to stop, which he did.

12. Upon arrival at the hotel, Employee A invited everyone to her room to continue drinking. Employee B left the room for a short time to deal with an issue involving another employee. While Employee B was gone, Employee Z once again began to, as characterized by the delegate, make "advances," towards Employee A. Employee A told Employee Z to stop, explaining that she was married and that she and Employee Z worked together.

13. Employee B returned to Employee A's room after which he and Employee Z left. Employee A locked her hotel room door.

14. Employee A then invited a male she had met earlier that evening to her room for a short time. After that male left, Employee A said that she received a text from Employee Z stating "I can't believe you fucked that guy instead of me. I hope your husband is going to be very happy." Employee A spoke to Employee Z first by telephone and then at the door to her room, because she was afraid he would tell her husband or her co-workers about the other male. As recounted by the delegate, Employee A alleged that Employee Z continued to "make advances" towards her, screaming at her and asking why she would not be with him. Employee A said that Employee Z pushed her against her door and tried to kiss her. Eventually, Employee Z left and Employee A closed her door.

15. Employee A was afraid Employee Z would tell her husband or her boss about the events of that evening, so the following morning she told Employee Z that he needed to forget everything that had happened the previous evening.

16. Employee A did not report Employee Z's conduct to her Employer because she was ashamed and embarrassed, and attempted to continue her work as normal.

17. Approximately six weeks later, Employee A's supervisor decided that they would do a "road show," which would bring Employee A into contact with Employee Z. Employee A was distressed about her potential interaction with Employee Z and sought advice from the Employer's Human Resources department. She ultimately filed a formal complaint under the Employer's Harassment and Discrimination Policy (the "Policy").

18. The Employer's employment agreements provided that all employees have a duty to familiarize themselves with, and abide by, the Employer's policies as well as its Code of Business Ethics and Conduct. All employees were required to take web-based training on its policies every two years.

19. According to the Employer's commitment to ensuring a work environment free of harassment and discrimination, employees were obligated to undertake training, after which they were expected to, among other things, recognize their role and responsibilities at the Employer, understand the Employer's harassment policy and understand their role and responsibilities when issues were raised. Employee Z had last taken the Employer's sexual harassment web-based training in May 2017.

20. In her complaint filed with the Employer, Employee A alleged that Employee Z had kissed her on the lips, cheek and neck before she pushed him off, and that Employee B asked him to stop. Employee A further alleged that, once back at the hotel, Employee Z pushed her against a wall and called her "a fucking nobody."

21. The Employer's Human Resources officer conducted an internal investigation into the complaint. The Employer provided Employee Z with a copy of Employee A's complaint and asked him to respond in writing. The Employer also conducted interviews with witnesses. The Investigation Report concluded that Employee Z violated the Policy and had made unwanted sexual advances of a physical nature towards Employee A. The finding was based primarily on the evidence of Employee B, the only sober individual on the evening of the events. The Human Resources officer noted that Employee Z was "aggressive and argumentative" during the investigation, and more concerned with his complaints about his expenses and commissions than the harassment investigation. The Employer decided there was "no way" to put Employee Z and Employee A back together in the workplace.

22. The Employer terminated Employee Z's employment because of his violation of the Policy.

23. The Employer submitted its internal Investigation Report as part of its evidence at the hearing. The delegate decided he would give the report "the weight appropriate to hearsay as the authors of the report were not going to be called as witnesses."

24. At the hearing, Employee Z asserted that Employee A only complained about his conduct because she was afraid that her spouse would hear about an "affair" with the other male. He also argued that Employee B could not have observed what he testified to from the front seat of the taxi. Employee Z claimed that the events did not occur as claimed. Employee Z contended that Employee A was very drunk, that she asked him if he was gay, and that the only physical contact he had with Employee A in the taxi was "incidental contact that occurs while sitting next to someone in a taxi." Employee Z denied that he had kissed Employee A, pushed her against a wall, called her a "fat old loser" or that he sent her a text saying "I can't believe you fucked that guy."

25. Employee Z testified that when Employee B left Employee A's room, he sat on a chair and spoke to Employee A, after which he went downstairs to have a cigarette. Employee Z said that he observed a male coming downstairs "look[ing] happy." He said that Employee A then texted him saying "don't tell," then asked him to come to her room and talk.

26. Employee Z said that he did not hear anything after returning home until some months later, when the Human Resources department contacted him about the complaint. He asked for time to respond as he was about to leave on vacation but was told that was not possible. He said that he also spoke with Human Resources about the commission payments, and they were of no help. He said that he began to feel targeted.

27. Employee Z said that he received a call on June 8, 2018 telling him that his employment had been terminated because of his interactions with Employee A. He said that he sought, but was denied, the opportunity to review the statements of any of the witnesses and that he was only given the complaint to respond to.

THE DETERMINATION

28. The delegate noted that whether the Employer had just cause to terminate Employee Z's employment depended on whether the Employer was able to prove "that the misconduct which led to the termination occurred and whether the nature of the misconduct was such that termination was the appropriate response." (Reasons, p. R27) The delegate noted that this required "a contextual and proportional analysis which examines whether, in light of the existing circumstances, [Employee Z's] misconduct has been sufficiently serious that the employment relationship is irredeemably breached." (Reasons, p. R27)

29. The delegate noted that the parties' versions of the events at the training session differed significantly. He found that assessing the credibility of the parties was complicated by the fact that Employee A and Employee Z had consumed significant quantities of alcohol. He found the evidence of Employee B to be credible and preferred it over the evidence of the other parties where their evidence diverged.

30. The delegate determined that Employee B observed what he testified to while in the taxi. He found Employee Z's argument that Employee A invented the incidents to keep the details of her interaction with the unrelated male to be implausible, given that filing a complaint would likely increase the risk that the details of the events might become known. The delegate also found that Employee B corroborated much of what occurred in the taxi and that Employee A would have no reason to invent a second incident in the hotel room.

31. The delegate concluded, on a balance of probabilities, that Employee Z attempted to kiss Employee A in the taxi, that she and Employee B asked him to stop, and that he did so. The delegate also found that Employee Z made another attempt to kiss Employee A in the hotel room.

32. The delegate next considered whether the misconduct, in its entire context, warranted summary dismissal. He noted the Employer's position was that it terminated Employee Z's employment because he had violated its Policy. The delegate noted that the Policy referred to discipline up to and including termination, acknowledging that not all contraventions of the Policy warranted termination. He also noted that the Employer was of the view that, "following the investigation, there was no way in which

they could bring [Employee Z] and [Employee A] back together in the workplace, which was why they had decided that termination was the appropriate action." (Reasons, p. R28)

33. The delegate noted that "[i]nstances of sexual harassment, which can include unwanted sexual advances, which involve non-consensual touching fall on the more serious end of the spectrum and may be found to be serious enough that a single incidence (sic) justifies summary dismissal (*Render v. ThyssenKrupp Elevator (Canada) Limited*, 2019 ONSC 7460)." (Reasons, p. R28)

34. The delegate noted that the parties' level of impairment was an important factor to consider in assessing the appropriateness of the Employer's response. He considered that "the incident was fuelled largely by the excessive alcohol intake of everyone that night" and that their lack of sobriety "impaired both the judgement of the individuals on that night and their ability to accurately recollect the events of the night." He considered this neither a mitigating nor aggravating factor. (Reasons, pp. R28 – R29)

35. The delegate determined that Employee Z's "denial that anything occurred" either in the taxi or the hotel room, and his "failure to express any remorse" to be an aggravating factor. The delegate found that "the incident in the taxi" stopped when Employee Z was told to stop, and that Employee Z's attempt to kiss Employee A a second time was also an "aggravating factor" but stated that "this incident appears to have been quickly shut down when [Employee A] said 'No'."(Reasons, p. R29)

36. The delegate noted that there was no evidence of previous misconduct by Employee Z, that Employee Z was not in a supervisory or senior position relative to Employee A, that they worked in offices in two different provinces and that the Employer could have made arrangements to ensure that Employee A was not required to work with Employee Z.

37. The delegate determined that Employee Z engaged in serious misconduct, that it constituted a breach of the Policy and that it warranted discipline. However, he concluded that "in the context of the events and the employment structure, termination was excessive in the circumstances and that [the Employer] did not have just cause to terminate [Employee Z]." (Reasons p. R29)

POSITIONS OF THE PARTIES

38. The Employer argues that the delegate erred in his application of the law and the facts in concluding that the Employer did not have just cause to terminate Employee Z.

39. Specifically, the Employer contends that the delegate failed to take into account Employee Z's short service as an employee as well as his dishonesty throughout the Employer's investigation of the complaint, which led to a fundamental breakdown in trust in the employment relationship.

40. The Employer also argues that the delegate erred in his just cause analysis as follows:

* engaged in flawed reasoning in the just cause analysis with respect to the fact that the misconduct occurred when the parties were under the influence of alcohol;
* taking into account as a mitigating factor in the just cause analysis that the first act of misconduct stopped when Employee Z was asked to stop;

* taking into account as a mitigating factor in the just cause analysis that Employee A appeared to shut down Employee Z's attempt to kiss her a second time after he had already been told to stop;
* failing to act on a view of the facts that could not be reasonably entertained relating to Employee Z's act of licking Employee A;
* failing to act on a view of the facts that could not be reasonably entertained in concluding that Employee Z could continue to work with the Employer; and
* failing to conclude that the Employer had just cause to terminate Employee Z's employment.

41. The delegate says that that the Employer's recounting of the evidence at the hearing was incorrect in one respect. He says that although the Employer's investigation report found that Employee B said that Employee Z attempted to lick Employee A's face, that was not his evidence at the hearing before the delegate.

42. The delegate submitted that the Determination and the Record addressed the issues raised by the Employer and made no further submissions on the merits of the appeal.

43. Although invited to do so, Employee Z made no submissions on the merits of the appeal. He stated that he was under significant personal stress due to family circumstances which affected his conduct and responses at the hearing, and that both the delegate and counsel for the Employer took unfair advantage of those circumstances.

ANALYSIS

Errors of law

44. Section 112 of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:

(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.

45. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.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.

46. For the reasons that follow, I find that the Director erred in law by misapplying section 63 of the *ESA* and I allow the appeal.

47. The delegate found that Employee Z attempted to kiss Employee A in the taxi and made another attempt to kiss her in the hotel room. Although his analysis of the conduct in light of the Employer's policy was cursory, he nevertheless found that Employee Z's actions constituted serious misconduct and a breach of the Policy.

48. The delegate made no clear findings about whether Employee Z's failure to cooperate with the Employer's investigation also constituted a breach of the Policy, although he seems to suggest that Employee Z's denial that anything occurred, either in the taxi or at the hotel were "aggravating factors."

49. Section 63(3)(c) of the *ESA* provides that an employer must pay an employee compensation for length of service unless the employee is dismissed for just cause.

50. On the question of whether an employer has just cause to dismiss an employee, the Tribunal is guided by common law principles to reflect the purposes and objectives of the *ESA*. In *Dr. Paula Winsor-Lee Inc.*, (2019 BCEST 63, at para 24) those principles were outlined as follows:

> 1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
> 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal.
>
> …
>
> …
>
> 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

51. The Tribunal has found that, to constitute just cause, the behaviour in question "must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract." (*McKinley v. B.C. Tel*, 2001 SCC 38 at para. 30, and *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST # D643/01 (Reconsideration denied in BC EST # RD092/02)).

52. The common law requires the Director to take a contextual approach to assessing an employee's conduct, and to consider both the nature and circumstances of the misconduct, whether or not there was any dishonesty, as well as the employee's length of service.

The nature of the misconduct

53. Having concluded that Employee Z subjected Employee A to two instances of unwanted physical contact of a sexual nature, the second instance occurring after being told by both Employee A and Employee B to stop, the delegate found that the conduct had to be assessed in light of the alcohol intake of the parties:

> I consider that the incident was fuelled largely by the excessive alcohol intake of everyone that night with the exception of [Employee B]… I find that this impaired both the judgement of the individuals on that night and their ability to accurately recollect the events of the night. I find that this is neither an aggravating nor mitigating factor. The individuals were each responsible for failing to regulate their alcohol intake and therefore are responsible for their actions while intoxicated but it is an important part of the context in which the events transpired.

54. Despite stating that the alcohol use was neither a mitigating nor aggravating factor, the delegate nevertheless appears to have concluded that the alcohol use mitigated Employee Z's actions.

55. In *British Columbia Hydro and Power Authority v. International Brotherhood of Electrical Workers*, 258, 2020 CanLII 76271 (BC LA), the arbitrator stated that "A female employee should be able to socialize with her male colleagues and consume alcohol without the risk of engaging in unwanted sexual activity." (para. 258)

56. In *van Woerkens v. Marriott Hotels of Canada Ltd.* (2009 BCSC 73), the BC Supreme Court found that an employer was entitled to take into account the employee's alcohol consumption at a work event in assessing its response to the employee's sexual harassment:

> While the plaintiff's consumption of alcohol at the holiday party was not, in itself, a sufficient cause for dismissal, it was a factor which the defendant was entitled to take into account in assessing its response to his misconduct. The plaintiff consumed alcohol to the point where it impaired his judgment and affected his behaviour that evening. His consumption of alcohol showed very poor judgment when he was one of two senior managers responsible for the supervision of the holiday party. That lack of judgment and its consequences, all contributed to Marriott's loss of trust and confidence in the plaintiff. (at para. 196)

57. Alcohol consumption does not excuse or mitigate the seriousness of an employee's sexual harassment. Consequently, I find that the delegate erred in failing to expressly consider Employee Z's alcohol consumption as an aggravating factor.

58. The delegate stated that he found Employee Z's second attempt at unwanted physical contact to be an aggravating factor:

> I find that [Employee Z] trying to kiss [Employee A] a second time in the hotel room to be an aggravating factor although I also note that this incident appears to have been quickly shut down when [Employee A] said "No."

59. Despite this finding, it appears the delegate did not consider Employee Z's conduct as an aggravating factor. Furthermore, the delegate's finding that Employee A "shut down" the unwanted contact should not have factored into the delegate's analysis; rather, the focus ought to have been the fact that Employee Z made a second attempt to have physical contact after having been told it was unwanted only a short time before.

60. I find that the delegate erred in concluding that Employee Z's conduct was, in and of itself, insufficient for the Employer to terminate the employment relationship. The delegate's conclusion is inconsistent with both Tribunal jurisprudence as well as the common law.

61. A single act of misconduct can justify dismissal if the misconduct is sufficiently serious to cause the irreparable breakdown of the employment relationship (*McKinley v. BC Tel*, 2001 SCC 38 (2001) 2 S.C.R. 161, and *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127). Just cause exists where the misconduct 1) violates an essential condition of the employment contract; 2) breaches the faith inherent to the work relationship; or 3) is fundamentally or directly inconsistent with the employee's obligations to his or her employer. Length of service is a relevant factor that may mitigate the effect of the misconduct and must be considered in the analysis.

62. In *Clarke v. Syncrude Canada Ltd*., 2013 ABQB 252 (affirmed in 2014 ABCA 362) the court found there was just cause to terminate an employee of over 20 years of service and no prior history of complaints when the employee, after having consumed several alcoholic beverages, grabbed/slapped a woman's buttocks, placed his hand on a second woman's knee under the table, pulled a third onto his lap and made inappropriate comments to other women in attendance. During a cab ride back to his hotel, the employee touched a woman's thighs. After being told to stop, he did so. The court concluded:

> While not all the allegations were completely confirmed at trial, I find that Mr. Clarke's behaviour was egregious. The incident in the cab is critical. The question of bruising to Ms. LS's leg is uncorroborated and unconfirmed. However, I am convinced on a balance of probabilities that Mr. Clarke made an unwanted sexual advance. This invasion of Ms. LS's personal space effectively amounted to a sexual assault. (at para 29)

63. I find that the circumstances before the delegate and those before the court in *Clarke* to be substantially similar on the first incident of unwanted contact. Employee Z made a second attempted unwanted sexual advance after being clearly told by Employee A and Employee B to stop. In my view, the fact that Employee Z made a second attempt shortly after being told that the first contact was unwanted constituted an aggravating factor.

64. As a condition of his employment, Employee Z was subject to the Policy, which prohibited any kind of harassment.

65. The Policy defined Workplace Sexual Harassment to include:

> …unwelcome sexual advances and other visual, verbal, or physical conduct of a perceived sexual nature specifically pertaining to the sex…of an employee that is known or ought reasonably be known to be unwelcome, likely to cause offense or humiliation to the employee; …, or where 3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment. The actions, conduct or comment need not be deliberate or conscious to be interpreted as workplace sexual harassment.

66. I find that the delegate failed to properly consider Employee Z's obligations under the Employer's Policy. Although the delegate determined the misconduct was both serious and a breach of the Policy, he nevertheless found termination to be "excessive" "in the context of the events."

67. I find this conclusion to be unsustainable in light of the common law as well as Tribunal jurisprudence. In my view, Employee Z's misconduct was a failure to comply with an essential condition of the employment contract in addition to being inconsistent with his obligations to the Employer.

68. I also find that the delegate failed to consider Employee Z's conduct during the Employer's investigation. The evidence was that Employee Z denied sexually harassing Employee A during the Employer's internal investigation. This was consistent with Employee Z's evidence at the hearing, in which he claimed that Employee A had "made up" the complaint, and that Employee B could not have observed what he testified to. Employee Z also took the position before the delegate that the process was biased against him and in favour of the Employer. I also note the delegate's decision to investigate Employee Z's complaint after two days of hearing because of the level of acrimony between the parties.

69. Although the delegate treated the Internal Investigation report as hearsay, the Employer's Human Resources Director gave evidence regarding the making of the report. The report noted that Employee Z was defensive during the investigation and, again consistent with his evidence before the Director, responded by making allegations of harassment against both the Employer as well as Employee A.

70. In my view, Employee Z's denial that the events occurred as testified to by Employee A and Employee B was a breach of the Employer's Policy which required all employees interviewed by Human Resources as part of an investigation to be truthful and fully cooperative. The delegate failed to consider this obligation in his analysis.

71. In *van Woerkens* (*supra*) the Court found that the employee's serious sexual harassment of a subordinate, combined with his dishonesty during the investigation, "breached the faith essential to the working relationship between Marriott and the plaintiff, and was fundamentally inconsistent with the continuation of the employment relationship."

72. Furthermore, even if an employee's misconduct may not be sufficient to constitute just cause, their denial and evasive behaviour afterwards may. (*Poirier v. Wal-Mart Canada Corp.* 2006 BCSC 1138 at para. 59, and *Chisamore v. Molson Brewery of Canada Ltd*., [1991] B.C.J. No. 3668 (B.C. S.C.)

73. Employee Z denied that the events occurred as testified to by Employee A and Employee B during the Employer's internal investigation. The Policy required all employees interviewed by Human Resources as part of an investigation to be truthful and fully cooperative.

74. I find that the delegate erred in law in failing to consider Employee Z's dishonesty in his analysis of whether the Employer had just cause to end the employment relationship. In my view, Employee Z's conduct during the Employer's internal complaint process breached his good faith obligation to the Employer and was inconsistent with a continuation of the employment relationship.

75. Having concluded that Employee Z's actions were both a breach of the Employer's workplace policies and constituted serious misconduct, the delegate nevertheless found that the Employer's decision to terminate Employee Z was "excessive." In my view, having arrived at the conclusions he did, it was not possible for the delegate to nevertheless find that Employee Z could continue to work for the Employer. I find that Employee Z's conduct was fundamentally inconsistent with a continuation of the employment relationship.

76. For all of these reasons, I find that the delegate's conclusion that the Employer's termination was "excessive" to be an error of law.

Employee Z's length of service

77. In *Alleyne v. Gateway Co-operative Homes Inc*., 2001 CanLII 28308 (ON SC), (cited with approval in *van Woerkens* (*supra*)) length of service was considered a factor to be considered in assessing whether sexual harassment amounts to just cause. The BC Supreme Court in *van Woerkens* (*supra*) also found that length of service is a relevant factor that may mitigate the effect of the misconduct and must be considered in the analysis.

78. Employee Z had been employed for approximately 3.5 years at the time of these incidents, a factor that was not considered by the delegate.

79. In *Re Dale Kent* (2019 BCEST 119) an employee with nine years of service during which he had never been disciplined, sent a sexually inappropriate text message to a female co-worker. The Tribunal upheld the Director's conclusion that the employer had just cause to terminate the employee's employment, finding that "there are some kinds of misconduct, including sexual harassment, that could not be overcome no matter how long and how good an employee's service record is". (para. 43)

80. Given that the nature of the misconduct in *Re Dale Kent* was much less serious than Employee Z's in that he subjected Employee A to unwanted physical contact of a sexual nature, and that the employee in *Re Dale Kent* had a substantially longer length of service than Employee Z, I find that the Delegate's conclusion was inconsistent with both the common law as well as Tribunal jurisprudence.

81. Finally, I find that the delegate also erred in considering whether Employee Z and Employee A were required to work together in considering whether the Employer had just cause for dismissal. The delegate noted that Employee Z and Employee A worked in two different offices a province apart and concluded that:

> While they may have been required to work together at distance on some files, the surrounding evidence is that [the Employer] has the ability and the established practice of changing sales staff assignments and could have done so to ensure that [Employee A] was not required to work with [Employee Z]. (Reasons, p. R29)

82. The delegate considered that, "in the context of the events and the employment structure, termination was excessive in the circumstances". I find that the delegate erred in considering whether Employee Z and Employee A were required to continue to work together in deciding whether there was just cause for termination.

83. Further, after considering that Employee Z did not supervise Employee A and that they worked in different provinces, the delegate concluded that the Employer had the ability to change staff assignments to accommodate the continued employment of Employee Z. There was no evidence before the delegate on which he could arrive at this conclusion. As noted in the Determination, the Human Resources Director's evidence was that the Employer was unable to bring Employee Z and Employee A back together in the workplace, particularly because of Employee Z's continued denial that the events under investigation occurred as alleged. The delegate also noted Employee A's evidence that she was required to attend telephone conference calls with Employee Z, and that seeing Employee Z in chance encounters caused her humiliation and upset. I find that the delegate's conclusion that the Employer could change staff assignments to be without any evidentiary foundation.

CONCLUSION

84. I find that the delegate erred in concluding that the Employer did not have just cause to terminate Employee Z's employment. After finding that Employee Z's behaviour constituted misconduct, he nevertheless found that it was not sufficiently serious to end the employment relationship. In doing so, he failed to consider Employee Z's length of service, his dishonesty and lack of cooperation with the Employer during the investigation, the Employer's Policies regarding workplace conduct, and the common law. I also find that the delegate erred in considering whether Employee Z was required to continue working with Employee A.

ORDER

85. Pursuant to section 115 of the *ESA*, I cancel the portion of the Determination relating to just cause and compensation for length of service.

Carol L. Roberts
Member
Employment Standards Tribunal