Citation: Laura Prosko (Re)
2021 BCEST 66

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Laura Prosko
(the "Appellant")

- 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: Tamara Henderson

FILE NO.: 2021/036

DATE OF DECISION: August 9, 2021

DECISION

SUBMISSIONS

Laura Prosko — on her own behalf

OVERVIEW

1. This is an appeal by Ms. Laura Prosko (the "Appellant") of a determination (the "Determination") issued by Jeff Bailey, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on March 12, 2021.

2. The Determination found that the Appellant was not entitled to compensation for length of service pursuant to section 63 of the *Employment Standards Act* (the "*ESA*"). In reaching this conclusion, the Delegate found that the Appellant's employment was terminated with just cause.

3. The section 112(5) record (the "record") was provided to the Tribunal by the Delegate. A copy was delivered to the Appellant and the Respondent and they were provided an opportunity to object to the completeness of the record. Neither party provided an objection; accordingly, I accept the record as being complete.

4. The Appellant provided further unsolicited submissions to the Tribunal on May 13, 2021.

5. Having reviewed the Determination, the Appellant's submissions, and the Record, I dismiss the Appellant's appeal. My reasons follow.

ISSUE

6. The issue before the Employment Standards Tribunal (the "Tribunal") is whether this appeal should be allowed or dismissed pursuant to subsection 114(1) of the *ESA*.

THE DETERMINATION

7. The Appellant was employed as a community services director with the District of Taylor (the "Employer") from September 5, 2013 to July 20, 2018 when the Employer terminated her employment.

8. On January 18, 2019, the Appellant filed a complaint with the Director against the Employer. In her complaint, the Appellant submitted that she was terminated without cause and sought a reversal of that decision, severance and damages. The Director restricted the Determination to those matters which fall under the jurisdiction of the *ESA*—that is, whether the Appellant was entitled to compensation for length of service pursuant to section 63 of the *ESA* and, in determining that question, whether the Employer had just cause to terminate the Appellant's employment.

9. On September 11, 2019, one week prior to the scheduled oral hearing, the Appellant requested that the oral hearing be adjourned in light of a family emergency. The Director denied the Appellant's request.

10. The oral hearing took place on September 18 and 20, 2019. Both the Appellant and the Employer participated and presented evidence at the hearing.

11. The Employer took the position that the Appellant was not entitled to compensation for length of service because she was dismissed for just cause based on a single instance of misconduct wherein the Appellant deliberately breached the Employer's security in accessing confidential files without the necessary authorization.

12. The confidential files the Appellant accessed related to an allegation of unsafe work, made to the Employer on July 18, 2018, by an employee working within the Appellant's department.

13. The Delegate found that the Employer had just cause to terminate the Appellant's employment.

14. In arriving at this conclusion, the Delegate found that, after the departure of the Employer's Chief Administrative Officer (the "CAO"), the Employer's City Council established an Interim Management Team (the "IMT") composed of three senior managers, and the IMT was assigned the responsibilities and authority of the CAO, including the authority to grant staff access to confidential files.

15. The Delegate found that the Appellant did not have authorization to access the confidential files related to the complaint of unsafe work when she viewed them on July 18, 2018. The Delegate also found that the Appellant knew the appropriate manner in which to obtain authorization to view confidential files and did not obtain such authorization prior to viewing the files.

16. The Delegate reasoned that, in so doing, the Appellant breached the Employer's security and trust and that her actions were inconsistent with the continuation of her employment.

ARGUMENTS

17. In her Appeal Form, the Appellant indicated that she appeals the Determination on two grounds, namely that the Director failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time that the Determination was being made. She indicated this by checking off the above-noted statutory grounds of appeal listed on the Appeal Form.

18. Notwithstanding the foregoing, a review of the Appellant's written submissions reveals that the Appellant's grounds of appeal are not limited to those two grounds. The Appellant takes issue with many of the Delegate's findings of fact, his failure to address her evidence that she quit her employment, his summary of the testimony given at the hearing, and his conclusions generally.

19. While the Appellant did not mark the checkbox for "error of law" in her Appeal Form, the Tribunal takes a large and liberal view of the grounds of appeal asserted by an appellant, particularly an unrepresented one, rather than mechanically adjudicating an appeal based solely on the particular "box" that an appellant has checked off: see *Triple S Transmission Inc.*, *o/a Superior Transmissions*, BC EST # D141/03.

20. Accordingly, I have considered whether the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination, including whether the Director made an error of law.

21. With respect to her submission that the Director failed to observe the principles of natural justice, the Appellant says that the Delegate improperly denied her request to adjourn the oral hearing on September 18, 2020. The Appellant also alleges that the Delegate was directed by the Deputy Minister of Labour, Trevor Hughes (the "Deputy Minister") to decide the Appellant's complaint in the Employer's favour.

22. With respect to the new evidence that was not available at the time the decision was being made, the evidence on which the Appellant relies is her own report to the RCMP that the Employer's witnesses lied under oath at the hearing and that she was improperly fired without cause by the Employer. In addition, she relies on a screenshot of her LinkedIn account which indicates that the Deputy Minister viewed her LinkedIn profile on February 9, 2020.

ANALYSIS

23. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

24. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

25. For the reasons that follow, I find that there is no reasonable prospect that the appeal will succeed.

Error in Law

26. This Tribunal has adopted the definition of "error of law" set out by the Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* 1998 CanLII 6466 (BCCA), [1998] BCJ No (*Gemex Developments*) at para. 9, paraphrased as follows:

1. a misinterpretation or misapplication of a section of the governing legislation;

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.

27. The Tribunal has no ability to allow an appeal on the basis that it would reach a different factual conclusion that was made by the Director (or Delegate) (i.e. an error of fact) unless those findings of fact raise an error of law, as defined in *Gemex Developments*: see *Britco Structures Ltd. (Re)*, BC EST # D260/03.

28. Accordingly, an appeal is not a re-hearing of the complaint and it is not another opportunity for the parties to give their version of the facts.

29. In this case, for the following reasons, I find that the Delegate made no error in law.

(i) Misinterpretation or Misapplication of a Section of the Governing Legislation

30. First, the Delegate neither misinterpreted nor misapplied a section of the *ESA*. At the beginning of the Findings and Analysis section of his reasons, the Delegate correctly set out that section 63 of the *ESA* provides compensation for length of service to an employee whose employment is terminated except where that employee has been dismissed for just cause.

(ii) Misapplication of an Applicable Principle of General Law

31. Secondly, the Delegate also did not misapply an applicable principle of general law. He correctly noted that the employer bears the burden of proving just cause.

32. The Employer asserted that it had just cause to terminate the Appellant's employment on the basis of a single act of misconduct. The Delegate framed the law as follows:

> Where just cause is alleged, the employer must establish that the employee's actions were inconsistent with the continuation of their employment. An employer may rely on a single incident of provable misconduct on the employee's part if the behaviour was serious and deliberate, and the employee acted in a manner that breached the employment relationship which is based on trust.

33. When considering whether a single act of misconduct can justify immediate dismissal, the question to be asked was enunciated by the Supreme Court of Canada in *McKinley v. BC Tel*, 2001 SCC 38 (which addressed an employee's dismissal on the basis of dishonesty) at para. 48:

> In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

34. While *McKinley* addressed an employee's dishonesty, various appellate courts (including the British Columbia Court of Appeal) have applied the contextual approach set out in *McKinley* to cases involving various forms of misconduct, including accessing confidential information where the employee holds a position of trust: *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, leave to appeal to SCC refused: 2015 CanLII 58373.

35. In other words, the question is whether, in the totality of the circumstances, the single act of misconduct is of a sufficient character to cause the irreparable breakdown of the employment relationship.

36. While the Delegate did not frame the issue in exactly the same manner as *McKinley*, I find that he considered the correct principles of law—namely, whether the Appellant's conduct in deliberately and knowingly accessing confidential information without proper authorization was inconsistent with the continuation of her employment.

37. Furthermore, while the Delegate's analysis of the seriousness of the conduct in light of the Appellant's position with the Employer is not lengthy, a review of the Determination in its entirety reveals that the Delegate applied a contextual approach in arriving at his decision. His summary of the evidence details the Appellant's role with the Employer, her general authorization to access confidential files related to her department's operations, as well as the limits on that access where the files related to matters outside of her department, and the nature of the confidential files she accessed on July 18, 2018 which ultimately led to her termination. He also reviewed the Appellant's temporary suspension and the Employer's investigation of that misconduct prior to terminating the Appellant's employment.

38. With respect to the Appellant's submissions concerning the requirement for progressive discipline prior to dismissing an employee and the Employer's failure to conduct annual performance reviews, I would simply note that those principles are not applicable here in light of the fact that the Employer's position was that dismissal was warranted based on the Appellant's single act of misconduct. The Delegate correctly summarized the law in relation to dismissal on the basis of a single act of misconduct and considered whether the Employer had satisfied its burden to prove that it had just cause in terminating the Appellant's employment based on her accessing confidential information without authorization.

39. With respect to the Appellant's submissions that the Delegate failed to consider the fact that she quit her employment, the Appellant is correct that the Delegate did not explicitly address this in his reasons. He made no finding as to whether the Appellant had quit her employment on July 18, 2018 when she delivered her notice of resignation to the Employer's City Council on July 18, 2018 instead of to the IMT.

40. However, in my view, it was unnecessary for the Delegate to address whether the Appellant had quit her employment. The aforementioned letter of resignation, delivered on July 18, 2018, provided a working notice period until August 31, 2018. The Appellant was terminated by the Employer on July 20, 2018, during the alleged working notice period. In light of the foregoing, the question to be determined remained whether the Employer had just cause to terminate the Appellant's employment on July 20, 2018 (during the notice period), which is exactly the issue the Delegate considered.

41. Regarding the Appellant's submissions that the Employer generally condoned the inappropriate divulging of confidential information among its employees generally, it is unclear whether the Appellant provided evidence to establish such condonation at the time of the hearing. In any event, the Appellant relies on

an incident which occurred after the Employer's termination of her employment and therefore does not qualify as condonation: see *Staley v. Squirrel Systems of Canada Ltd.*, 2013 BCCA 201 at para. 40.

(iii) Acting Without Any Evidence or on a View of the Facts that could not Reasonably be Entertained

42. Thirdly, I find that the Delegate did not act without evidence or on a view of the facts which could not reasonably be entertained.

43. The majority of the Appellant's submissions are in effect allegations that the Delegate made incorrect findings of fact or simply a re-submission of the same assertions she made to the Delegate. These include her assertions that: the alleged complaint of unsafe work was fake and her termination was a "set up" by the Employer; that the IMT was not formed to provide direction to staff and/or grant access to confidential information after the CAO's departure; that the Appellant had unfettered access to confidential information in order to perform her duties; and that she did not inappropriately access the confidential information in question.

44. The Delegate, as the trier of fact and having heard the testimony first-hand, is best placed to evaluate a witness's reliability and credibility. This Tribunal will generally not interfere with a delegate's assessment of credibility or weighing of the evidence as those matters are questions of fact, not law.

45. I find that the Delegate had ample evidence on which to reach his findings of fact as well as his ultimate conclusion concerning the nature of the Appellant's dismissal.

46. While I recognize that the Appellant says that the Employer's witnesses lied under oath, the Delegate found the Employer's witnesses to be credible and preferred their evidence to that of the Appellant. As noted above, he provided clear and logical reasons for preferring the version of events proffered by the Employer's witnesses to that offered by the Appellant.

(i) Adopting a Method of Assessment Wrong in Principle

47. Finally, I find that the Delegate did not adopt a method of assessment which is wrong in principle. The Appellant has not made any submissions specific to this type of error of law and there is no apparent error.

Failure to Observe the Principles of Natural Justice

(i) Denial of the Appellant's Adjournment Request

48. As noted above, the Appellant requested an adjournment to the oral hearing one week before the hearing date. The Delegate addressed the Appellant's request for an adjournment at pages R2 and R3 of his Reasons for Determination as follows:

> On September 11, 2019, Ms. Prosko requested to adjourn the hearing date set for 9:00 a.m., on September 18, 2019. Ms. Prosko indicated that on September 3, her daughter had been bullied at school and consequently missed several days of school. Ms. Prosko requested changing the hearing date to anytime between October 7 and the end of November 2019, because she wished

to ensure her daughter's safety and well-being. I declined to adjourn the hearing for the following reasons:

- The hearing had been scheduled in May 2019, with the agreement of both parties.
- The situation that influenced the adjournment request occurred on September 3, 2019, and was not an imminent threat or emergency on September 18.
- It was in the interests of both parties to conduct the proceedings in a timely manner in accordance with section 2 of the *Employment Standards Act*.
- The District of Taylor indicated that it was ready to proceed and did not consent to an adjournment.
- Denying the request would not deprive the complainant of the opportunity to a full and fair hearing.

49. The record reveals that a "Notice of Complaint Hearing" (the "Notice") dated May 6, 2019, was sent to the parties and indicated that the oral hearing would take place on September 18, 2019 via teleconference. Page 3 of the Notice addresses adjournments as follows:

> **Adjournments**
>
> A request for an adjournment must be made in writing and be delivered to the Branch at least seven days before the scheduled hearing date. It must advise whether the other party consents and include reasons, alternative available dates and supporting documentation if applicable.
>
> Parties should remain prepared to attend the hearing on the originally scheduled date until advised in writing that the adjournment has been granted. If a party does not appear, the hearing may proceed in their absence

50. The Appellant made her request on September 11, 2019. She was then provided with a two-page document entitled "Adjournment Request Information" which provides that adjournment requests must be made in writing as soon as practicable and must include reasons and alternate available dates, as well as whether the other party consents. With respect to whether the adjournment will be granted, the document provides that:

> **Granting of denying adjournment requests**
>
> Discretion to grant or deny an adjournment request rests with a delegate of the Director. Adjournments are not given automatically. In deciding whether the grant an adjournment request, the delegate will consider whether the adjournment is necessary in order to provide an opportunity for a fair hearing. In making the decision, the delegate will balance the interests of both parties and the requirements of administrative fairness and natural justice.

51. The Appellant says that the Delegate erred in considering whether the Employer consented to her request for an adjournment.

52. The decision to grant an adjournment is a discretionary one.

53. This Tribunal has previously considered the extent to which it can interfere in the Director's exercise of discretion. Generally speaking, the Tribunal is reluctant to disturb discretionary decisions of the Director

unless it can be shown that the exercise of discretion was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity, or the decision was arbitrary, unreasonable or based on irrelevant considerations: see *Joda M. Takarabe et al.*, BC EST # D160/98 citing *Jody L. Goudreau et al.*, BC EST # D066/98.

54. In this case, I do not see any basis to interfere with the Delegate's exercise of discretion in denying the Appellant's request for an adjournment.

55. I acknowledge the Appellant's submissions that the Delegate should not have considered the Employer's lack of consent to the adjournment, however, I do not agree. While an opposing party's lack of consent to an adjournment should not be determinative of a Delegate's exercise of discretion in granting or refusing an adjournment request, it is clear from the Delegate's reasons that this was only one of several factors he considered in arriving at his decision. In my view, it was not inappropriate to consider the Employer's position on the Appellant's request.

56. The Delegate appropriately weighed all of the relevant circumstances, including: the circumstances which led to the Appellant's adjournment request, the Appellant's ability to fully and meaningfully participate in the hearing if it were to proceed as previously scheduled, and the purposes of the *ESA*, in particular, providing fair and efficient procedures for resolving disputes.

57. Furthermore, I note that the Appellant did apparently participate in the oral hearing not only on September 18, 2019 but at the continuation of the hearing on September 20, 2019. She gave testimony and several witnesses testified as part of her case. In addition, she questioned the Employer's witnesses on their testimony. There is nothing to suggest that her participation in the hearing was less than full.

(ii) Reasonable Apprehension of Bias or a Lack of Independence

58. The Appellant alleges that the Delegate was directed by other individuals to deny her complaint and find in favour of the Employer. The Appellant says the responsible individuals are Bob Zimmer, Member of Parliament (the "MP"), and the Deputy Minister.

59. At page 17 of her submissions, the Appellant alleges that the MP contacted the Deputy Minister to "flag" her complaint so that she loses, in order to protect members of the Employer's City Council. As evidence of this interference, the Appellant points to a LinkedIn notification she received that the Deputy Minister viewed her LinkedIn profile on February 9, 2020, hours after she contacted the MP and he contacted the Deputy Minister. She has not explained how she knows that the MP spoke to the Deputy Minister. She provided a screenshot of the LinkedIn notification as new evidence. She says that the Deputy Minister "has the power to dictate how decisions are determined and [she has] reason to believe that this happened in [her] case."

60. In addition to the LinkedIn evidence, the Appellant points to the Delegate's omission of portions of her testimony and her cross-examination of the Employer's witnesses. The Appellant says that "[a]ll of that information to help [her] with [her] case has been omitted." She also asserts that the Delegate's summary does not accurately reflect what was discussed or shown as evidence during the hearing that took place on September 18 and 20, 2019.

61. In effect, the Appellant argues that her complaint was improperly determined by individuals who neither heard the evidence nor the submissions. If true, this offends a long-standing principle in administrative law that "s/he who hears must decide" or, conversely put, "s/he who decides must hear."

62. This principle was explained in *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 (*Consolidated Bathurst*) at 329-330 in which the Supreme Court of Canada said this:

> The appellant argues that persons who did not hear the evidence or the submissions of the parties should not be in a position to "influence" those who will ultimately participate in the decision … I agree that, as a general rule, the members of a panel who actually participate in the decision must have heard all the evidence as well as all the arguments presented by the parties and in this respect I adopt Pratte J.'s words in *Doyle v. Restrictive Trade Practices Commission*, *supra*, at pp. 368-69:
>
> > The important issue is whether the maxim "he who decides must hear" invoked by the applicant should be applied here.
> >
> > This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the *audi alteram partem* rule. This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case . . . .
>
> [Emphasis added.]

63. The guiding principle from *Consolidated Bathurst* is that a decision-maker must be free to decide a case "in accordance with one's conscience and opinions": see *Consolidated Bathurst* at 332.

64. The Appellant's submission also inherently alleges that the Delegate was biased in determining her complaint.

65. This Tribunal has previously found that the Director and his/her Delegates are acting in a quasi-judicial capacity when conducting investigations into complaints filed under the *ESA* and, accordingly, must proceed in an unbiased and neutral fashion: see *Imperial Limousine Service Ltd. (Re)*, BC EST # D014/05.

66. It is trite law that quasi-judicial decision makers must not only be, but also appear to be, impartial.

67. As noted by the Ontario Court of Appeal in S*huttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)*, 2019 ONCA 518 at para 23, the test for a reasonable apprehension of bias or a lack of independence in the context of an administrative tribunal is the same test and remains as set out by the Supreme Court of Canada in *Consolidated Bathurst*, namely that the apprehension be "a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information." The question to be asked is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — concluded": see *Consolidated Bathurst* at 334.

68. An allegation of bias or lack of independence against a decision maker is a serious one and should not be made speculatively: see *Alpha Neon Ltd. (Re)*, BC EST # D105/11.

69. The onus of proof of demonstrating bias or an apprehension of bias lies with the individual making the allegation and the threshold for establishing real or reasonably perceived bias is high and demands clear and convincing evidence. This is because it calls into question the integrity of the individual decision maker as well as the entire system of adjudication: see *Berg (Re)*, BC EST # D121/16 at paras. 38 – 41.

70. I do not agree with the Appellant that the Delegate lacked independence, was biased, or that there is a reasonable apprehension of either in this case.

71. The Appellant's submissions make it clear that she contacted the MP, for what reason is not stated, and that she apparently was aware that the MP was going to contact the Deputy Minister that same day.

72. Assuming that the foregoing occurred and the Deputy Minister viewed the Appellant's public LinkedIn profile on February 9, 2020, a few hours after speaking to the MP, as the LinkedIn evidence suggests, this does not establish that the MP or the Deputy Minister interfered in any way with the Delegate's decision-making. It establishes only that the Deputy Minister viewed the Appellant's LinkedIn profile and that this likely occurred in the context of a telephone call he received from the MP regarding the Appellant. This occurred long after the oral hearing took place.

73. Contrary to the Appellant's submissions, the Deputy Minister does not have the power to dictate how complaints are decided. Delegates do not report to the Deputy Minister. They are delegates of the Director of Employment Standards and have the power to exercise the Director's functions, duties or powers as delegated by the Director pursuant to section 117(1) of the *ESA*.

74. In my view, an informed, reasonable, and right-minded person, viewing the matter realistically and practically, and having thought the matter through, would not conclude that the decision-making process was tainted as a result of the Deputy Minister's viewing of the Appellant's LinkedIn profile by virtue to the Appellant's own telephone call to her MP. Furthermore, if the Appellant had genuinely been of this view, she would have made this allegation prior to receiving the Determination some 13 months later.

75. With respect to the Appellant's assertion that the Delegate has omitted all evidence which is helpful to her claim, I note that a delegate is not required to recite all of the evidence presented. This was noted by this Tribunal in *Jane Welch operating as Windy Willows Farm (Re)*, BC EST # D161/05 (*Welch*) at para. 41 as follows:

> Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence. Although the Director and his delegates have a duty, both under the *Act* and at common law, to provide reasons for their determinations, "[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision": *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also *Manuel D. Gutierrez*, BC EST #D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination.

76. In my view, it is apparent that the Delegate did not fail to consider the Appellant's evidence. He provided a fairly detailed summary of the testimony of all witnesses, including the Appellant's questioning of the Employer's witnesses relevant to the legal issue to be determined.

77. The Delegate specifically noted that the Appellant asked irrelevant questions to two of the Employer's witnesses and that the Determination addressed the key aspects of the evidence and this is entirely appropriate.

78. Finally, there is no indication that the Delegate failed to consider relevant evidence presented by the Appellant for the reasons I have already set out above in my analysis on error of law.

New Evidence on Appeal

79. The Appellant points to two pieces of evidence which she says are new: first, a registered mail notice which she sent to the RCMP to report the employer's witnesses, Mr. Fraser, Ms. Pennell, and Mr. McPhail, as having broken the law by colluding to terminate her and by lying under oath. Second, the screenshot from LinkedIn indicating that the Deputy Minister viewed her LinkedIn profile, discussed above.

80. How to assess an appeal where an appellant asserts there is new evidence was considered by this Tribunal in *Bruce Davies et al.*, BC EST # D171/03, where it stated (at page 3):

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential 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 the material issue.

81. With respect to the Appellant's written notice to the RCMP that the Employer and its witnesses have violated the law, this does not satisfy the requirements above. Her letter is evidence of her own making, and the contents are merely assertions by the Appellant that she already advanced at the hearing held by the Director, and which she also makes as a basis for this appeal. In other words, the Appellant seeks to

do what this Tribunal in *Bruce Davies* said should not be done—that is, the seeking out (and in this case, the creation) of evidence to supplement what was already provided to the Director in the complaint process.

82. With respect to the screenshot of the Deputy Minister having viewed the Appellant's LinkedIn page, this is evidence that was discovered after the hearing was completed but prior to the Determination being issued. The Appellant could have submitted this to the Delegate prior to his issuing of his Determination.

83. In any event, however, I find that the evidence is immaterial to any issue arising from the complaint. The Determination addressed whether the Appellant was dismissed for cause and the LinkedIn screenshot has no bearing on that issue. It is only relevant to the Appellant's assertion that the Delegate lacked independence and/or was biased in his decision-making, which I have already dismissed for the reasons set out above.

ORDER

84. I dismiss the appeal and confirm the Determination pursuant to section 115 of the *ESA*.

Tamara Henderson
Member
Employment Standards Tribunal