Citation: Copper Mountain Operating Company Ltd. (Re)
2021 BCEST 69

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Copper Mountain Operating Company Ltd.
("Copper Mountain")

- 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: David B. Stevenson

FILE NO.: 2021/053

DATE OF DECISION: August 17, 2021

DECISION

SUBMISSIONS

Andrea L. Zwack on behalf of Copper Mountain Operating Company Ltd.

OVERVIEW

1. Copper Mountain Operating Company Ltd. ("Copper Mountain") has filed an appeal under section 112 of the *Employment Standards Act* (the *"ESA"*) of a Determination issued by Kenneth Proulx, a delegate of the Director of Employment Standards (the "Director"), on May 3, 2021.

2. The Determination found Copper Mountain had contravened Part 8, section 63 of the *ESA* in respect of the employment and termination of employment of David Makowichuk ("Makowichuk") and ordered Copper Mountain to pay Makowichuk wages in the amount of $15,895.65, an amount that also included interest under section 88 of the *ESA* and concomitant vacation pay, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $16,395.65.

3. This appeal is grounded in error of law and a failure by the Director to observe principles of natural justice in making the Determination. Copper Mountain seeks to have the Tribunal allow the appeal and cancel the Determination entirely or, alternatively, cancel the Determination and have the Tribunal conduct its own hearing on Makowichuk's complaint.

4. In correspondence dated June 10, 2021, the Tribunal acknowledged having received an appeal and, among other things, requested the section 112(5) record (the "record") from the Director and notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal.

5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Copper Mountain and to Makowichuk. An opportunity has been provided to both to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.

6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 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.

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Makowichuk will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the ESA.

THE FACTS

9. Copper Mountain operates a copper mine near Princeton, BC.

10. Makowichuk was employed by Copper Mountain as an electrician from November 29, 2010 to January 22, 2020, when he was terminated.

11. Makowichuk filed a complaint alleging Copper Mountain had contravened the *ESA* by failing to pay compensation for length of service.

12. Copper Mountain contended Makowichuk was terminated for just cause. There is a letter of termination, dated January 22, 2020, stating the reason for termination as "3 days AWOL in a 12 month period". The days in question were December 25, 26 and 27, 2019. Makowichuk had asked for those three days off in March 2019 and had been denied.

13. On April 22, 2019, Makowichuk was issued a stage 2 corrective discipline letter for his reaction and responses to being denied those days off, which were deemed "inappropriate". That letter indicates Makowichuk's response included a statement that he "would be off those days whether they were approved or not". The letter was issued over the signature of Jon Wood ("Mr. Wood"), who was the Electrical General Foreman and Makowichuk's supervisor, who was the only other participant to the March 2019 conversation. Makowichuk refused to sign the letter.

14. The Director conducted an investigation. The record shows the investigation commenced in early February 2021.

15. The Director communicated with Kim Vokey ("Ms. Vokey"), the Human Resources Manager for Copper Mountain, who provided most of the information and documents on behalf of Copper Mountain. The

record indicates several discussions and e-mails between the Director and Ms. Vokey. The information she provided is summarized in the Determination. The Director also spoke with Mr. Wood. The information he provided is also summarized in the Determination and contained in the record; it did not entirely align with the contents of the April 22, 2019 letter.

16. Makowichuk phoned in sick on December 25, 26 and 27. Copper Mountain was suspicious of Makowichuk's absence on those three days and, on December 27, 2019, asked him to provide a doctor's note verifying his illness on those days. Makowichuk provided a doctor's note, which Copper Mountain did not consider to be satisfactory; he was asked to provide further information from his doctor. He signed an "Authorization for Information Release" form which was forwarded by Copper Mountain to his doctor and elicited a reply, which advised that Makowichuk had been seen by the doctor on two occasions in December for the same condition, advised the doctor that he felt more ill during this period (December 5 to 30) and had to miss work on the three days in question. Copper Mountain did not accept the doctor's notes as an adequate explanation of Makowichuk's absence and, combined with his reaction and response to being denied those three days in March 2019 and that he did not seek out medical attention immediately, concluded he was AWOL on those three days, providing cause for termination.

17. The Director found Copper Mountain had failed to show there was just cause to terminate Makowichuk, either by demonstrating a single act of serious misconduct or the culmination of a pattern of minor misconduct, and awarded him compensation for length of service in the amount set out in the Determination.

18. Copper Mountain takes issue with the finding and award under section 63 of the *ESA*.

THE DETERMINATION

19. Much of what is said in the Determination is contained in the above recitation of the facts.

20. The Director identified the issue: whether Makowichuk was terminated for just cause; set out the information provided by each party during the investigation; set out the principles applied to the issue; analyzed the position of the parties in the context of those principles and the evidence provided; and reached a conclusion on the analysis undertaken.

21. Within the analysis, the Director found the evidence supported a conclusion that Makowichuk was ill on December 25, 26 and 27, unable to attend work and had followed the reporting requirements to the best of his ability when he left messages each day on his supervisor's work phone. The Director notes that while Copper Mountain questioned the medical information provided, it was evidence supporting Makowichuk's position that he was ill on the days in question.

22. The Director acknowledged that Copper Mountain had reason to be suspicious of Makowichuk's absence on those days, but their suspicion did not show he was not ill or establish he was AWOL and fell short of meeting the burden placed on them.

ARGUMENT

23. Copper Mountain argues two grounds of appeal: error of law; and failure to observe principles of natural justice in making the Determination.

24. The appeal submission provides a recitation of "relevant facts" and a summary of the complaint and its investigation, both of which will be addressed later in this decision.

Error of Law

25. Copper Mountain submits the Director erred in law in interpreting and applying the test for just cause for termination in the circumstances and, as a result, wrongly concluded Copper Mountain had not shown there was just cause for Makowichuk's termination.

26. Copper Mountain says the Director failed to appreciate the following circumstances of the case:

a. The safety sensitive nature of Copper Mountain's business and the need for reliable and appropriate staffing levels;

b. The supervisory nature of Makowichuk's position and the obligations inherent to his position;

c. Makowichuk's earlier (March 2019) attempts to obtain three days off at Christmas and his *repeated statements to other employees that he intended to take those days and call in sick* (emphasis added); and

d. The lack of evidence from <u>any</u> source that he was ill and unable to attend work on those days (emphasis included in original).

27. Copper Mountain submits the Director erred by failing to assess Makowichuk's credibility and, by failing to do so, reaching conclusions not justified in all the circumstances.

Failure to Observe Principles of Natural Justice

28. Copper Mountain submits it was denied a fair hearing by the Director investigating the complaint rather than conducting an oral hearing, which would have allowed Makowichuk's credibility and assertions to be tested. Copper Mountain refers to "evident credibility issues", and the differing versions of events offered by Makowichuk to the employer, as the basis for requiring an evidentiary hearing.

29. Copper Mountain also asserts in argument that they were not advised of information provided or of many of Makowichuk's assertions. Four matters are mentioned in this argument: that Makowichuk never told anyone he intended to take the three days off; that he told his car pool mates on December 22 he was ill and may not be able to work on December 25; that he attempted to get the staffing policy changed by speaking to managers up the chain; and that Makowichuk had reported a different illness to the Director during the investigation than what he told his doctor.

30. Copper Mountain contends that had this information and these assertions been provided, they would have submitted further information and argument in response.

31. Copper Mountain contends all of these various circumstances denied them the opportunity required by principles of natural justice to respond to Makowichuk's claims.

ANALYSIS

32. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> *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.*

33. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

34. 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, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

35. The objective of this appeal is to have this panel of the Tribunal accept, contrary to the finding made by the Director, that Makowichuk was not ill on the three days in question – that he was absent without leave – and his absence provided just cause for terminating his employment.

36. Before addressing the grounds of appeal, it is necessary to address some of what has been submitted under the rubric of "relevant facts" and the summary of the complaint investigation.

37. A general comment concerning the facts is appropriate. The facts upon which this appeal will be based are those found by the Director in the Determination, and supported by the record, unless such findings constitute an error of law.

38. Most of what Copper Mountain identifies as "relevant facts" are identified in the Determination and are found in the material.

39. It would be fair, however, to question whether some of the assertions of fact made in the appeal submission are grounded in the evidence presented to the Director and how "relevant" some of these assertions of fact might be to the issue before the Director, which to reiterate, was whether Copper Mountain had met the burden of showing there was just cause to terminate Makowichuk.

40. For example, the argument asserts the Copper Mountain operation is a "highly safety-sensitive worksite". There is nothing in the record supporting that assertion, but even if that is so, Copper Mountain has what appears to be a comprehensive Company Handbook (the "Handbook"), the presumably relevant portions of which were provided to, and considered by, the Director. To say, as Copper Mountain does in its argument, that the Director failed to consider the "highly safety-sensitive" nature of the operation

suggests the Director failed to consider the relevant provisions of the Handbook, which is simply wrong. There is nothing that can be drawn from the reasons found in the Determination to indicate the Director was unaware of the nature of Copper Mountain's worksite or "failed" to consider it. In any event, the argument does not identify how this "fact" would add anything to what was provided to and considered by the Director.

41. Also, the assertion by Copper Mountain, in para. 18 of their argument, of what Makowichuk indicated to Mr. Wood, is not borne out by the summary made by the Director of the evidence of Mr. Wood, who described to the Director the exchange in March 2019 in the following way:

> … Mr. Makowichuk replied "ok, I get it" and imitated a coughing motion with a smirk on his face as he walked out of his office. Mr. Wood stated Mr. Makowichuk's actions *made him think he was going to call in sick . . .* (emphasis added)

42. This evidence is recorded in the Determination as Mr. Wood, having "the impression that Mr. Makowichuk would call in sick regardless of approval".

43. The difference in the facts as set out in the Determination and the notes of Mr. Wood's evidence, as opposed to how they are described in the argument, is important because, the argument concerning Makowichuk's credibility is based on a presumed conflict between what Makowichuk is supposed to have said to Mr. Wood against his denial of having said what was attributed to him in the April 22 disciplinary letter. There is no area of conflict. On the evidence, the words from the March 2019 meeting which have come to be attributed to him, were based on Mr. Wood's impression, not on words spoken.

44. Mr. Wood also alluded to the fact that Makowichuk refused to sign the disciplinary letter. The information provided by Mr. Wood provides a reason for Makowichuk's disagreement with the wording in the April 22, 2019 letter and perhaps explains his refusal to sign it.

45. As well, there is no indication in any part of the record or in information provided by Copper Mountain that "[s]everal different people reported to management that they heard Mr. Makowichuk say he intended to call in sick on these dates if he was not given the days off".

46. Copper Mountain's assertion that Makowichuk leaving a voice message on his supervisor's phone on each of the three days in question was "contrary to Copper Mountain's policies" does not accord with the Director's finding that in the circumstances Makowichuk followed the reporting requirements to the best of his ability (Determination, page R10).

47. Some of the purported "relevant facts" are no more than argument. At para. 25 of their argument, Copper Mountain submits, "[t]his medical note was clearly insufficient in the circumstances", which is in direct opposition to the finding made by the Director, which is that the cumulation of the medical information provided by Makowichuk, "supports that Mr. Makowichuk was ill and unable to attend work due to an illness".

48. The appeal submission, at para. 31, says Makowichuk was dismissed for being AWOL, which is consistent with the contents of the termination letter, and for "dishonesty", which is not; based on my review of the Determination and the record, dishonesty was never provided to the Director as a basis for Makowichuk's termination.

49. Some of the description set out in Copper Mountain's argument of the complaint investigation process suffers from the same problems. I make the following points:

- During a March 3, 2021 telephone discussion with Ms. Vokey, the record, page 88, indicates the Director "reviewed additional statements and documents received to date [from Makowichuk] including text messages". The Director's notes say, "Ms. Vokey will review this infomraition [*sic*] and contact me with a response within a week. She was advised that she is welcome to provide additional evidence or information if there is a dispute to this verbal assessment; however, I would expect this information to also be provided within a week". The point here is that Copper Mountain had the information contained in Makowichuk's statements and documents as of March 3, 2021.
- In a later telephone discussion on March 9, 2021, from Ms. Vokey, the Director's notes, pages 88 – 89, say: "Ms. Vokey advised me that she reviewed all information with the General Manager of the mine. They have made the decision to proceed with a determination for clos. Ms. Vokey advised me that there is no further information to provide".
- The documents provided to Ms. Vokey on March 9, 2021 had been discussed with her on March 3, 2021.
- There was additional communication between Copper Mountain (Ms. Vokey) and the Director on March 16, 18 and 23, 2021. Those communications do not indicate any concern on the part of Copper Mountain that they had not received a sufficient opportunity to respond to Makowichuk's claim.
- There is no evidence that Makowichuk told anyone he intended to take the three days off at Christmas.
- Whether Makowichuk spoke to other managers about the staffing policy has, in my view, no relevance to the issue before the Director. I have not been persuaded by anything in the argument that Copper Mountain needed that information to effectively respond to Makowichuk's claim.
- Copper Mountain had the information about Makowichuk "reaching out" to his car pool co-workers on March 3, 2021 and a copy of the e-mails passing between them on March 9, 2021. The notes of the March 3 discussion between Ms. Vokey and the Director are clear that it was open to Copper Mountain to provide further evidence or information if they so chose. The Director's notes reveal Copper Mountain reached an informed decision not to provide further evidence or submissions on the information provided by Makowichuk.
- Copper Mountain argues the documents and some of the information was provided by the Director after the Director had already concluded they did not have just cause to terminate Makowichuk. That contention is not borne out by the record. In the March 3 discussion with Ms. Vokey, the Director records he said, based on what he had received from both parties, "it appears that the employer has not demonstrated just cause", but that she was "welcome to provide additional evidence or information, if there is a dispute to this verbal assessment" (record, page 88). Also, the decision by Copper Mountain not to provide any further evidence or submissions was communicated to the Director on March 9, after a review of all the information provided.

50. It follows that the four matters set out in Copper Mountain's argument – and listed at para. 29, above – that Makowichuk never told anyone he intended to take the three days off; that he told his car pool mates on December 22 he was ill and may not be able to work on December 25; that he attempted to get the staffing policy changed by speaking to managers up the chain; and that Makowichuk had reported a different illness to the Director during the investigation than what he told his doctor, were conveyed to Copper Mountain during the investigation. Copper Mountain chose not to respond to them.

51. I add at this point that is not the role of the Director to advise Copper Mountain what is required to meet its burden or to tell them what evidence might be required to answer the information and assertions provided by Makowichuk. Placing the Director in such a role can create potential problems that might be objectively viewed as advocating for one party or another and support allegations of bias: see *James Hubert D'Hondt operating D'Hondt Farms*, BC EST # RD021/05 (Reconsideration of BC EST # D144/04).

52. As with the statement of "relevant facts" much of the submission, under the auspices of reviewing the complaint investigation, descends into argument against the factual findings made by the Director and are appropriately addressed under error of law.

Error of Law

53. 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.

54. The question of whether an employee has been dismissed for cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco Structures Ltd.*, BC EST # D260/03, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

55. There are two elements to this ground of appeal. The first is that the Director erred in interpreting and applying the test for determining just cause under the *ESA*. This element of the error of law ground only incidentally examines the legal principles and the test applied under the *ESA* for addressing the issue of just cause under section 63.

56. The principles for examining cases raising the question of whether there is just cause for dismissal that have been developed under the *ESA* are well-established, have been consistently applied and are expressed 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. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
>   1. A reasonable standard of performance was established and communicated to the employee;
>   2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
>   3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
>   4. The employee continued to be unwilling to meet the standard.
> 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
> 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.
>
> (*Kruger*, BC EST # D003/97)

57. I will note here that while the Tribunal has been guided by the common law on the question of just cause, the principles of cause for dismissal used by the Director and the Tribunal have been developed and applied to reflect the purposes and objectives of the *ESA* and to provide effective and efficient administration of the provisions of the *ESA* relating to termination of employment.

58. The Tribunal has also been consistent in stating that the objective of any analysis of just cause is to determine, from all the facts provided, whether the misconduct of the employee has undermined the employment relationship, effectively depriving the employer of its end of the bargain. In *Jim Pattison Chev-Olds, a division of Jim Pattison Industries Ltd.*, BC EST #D643/01 (Reconsideration denied in BC EST #RD092/02), the Tribunal made the following comment:

> While any number of circumstances may constitute just cause, the common thread is that 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 recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract" (see *McKinley v. B.C. Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a "repudiatory" breach.

59. In the appeal submission, Copper Mountain has extracted the above principles from the Tribunal decision in *Gaspar et al*, 2018 BCEST 48. There are many other decisions that confirm the same principles.

60. While the above principles are not fully elaborated in the Determination, I am entirely satisfied the Director was aware of, and applied, the established legal principles to the question of just cause. I am not persuaded the Director erred in that regard.

61. Copper Mountain does not identify where, within the established legal principles, the Director erred. Rather, at its core, the argument made by Copper Mountain seeks to fundamentally alter the established legal principles.

62. Copper Mountain submits the Director erred in deciding the medical information supported a finding that Makowichuk was ill and unable to be at work on December 25, 26 and 27, 2019. Copper Mountain contends this was an error in interpreting section 63 and supports this contention with various submissions and propositions.

63. Copper Mountain submits, "the crucial question is whether Mr. Makowichuk was in fact unable to work due to illness". The short response to that submission is that the Director, based on the evidence provided, decided Makowichuk *was* unable to work because of illness. To suggest the Director did not answer that question is wrong; to say the Director answered it incorrectly simply challenges a conclusion drawn from the evidence.

64. Expanding on the above submission, Copper Mountain suggests that the Director, rather than addressing whether Makowichuk's claim of illness was valid, "directed himself to considering whether the Employer ought to have accepted Mr. Makowichuk's doctor's note". Once again, the short answer to this argument is that the Director *did* address whether Makowichuk's claim of illness was valid and found support for it in the medical information provided. To be absolutely clear, the Director examined the evidence provided and found Makowichuk was ill during the period in question. The Determination says nothing of whether Copper Mountain ought to have accepted the medical information and, as a matter of law, it is irrelevant; it is sufficient for the purpose of deciding the issue that the Director accepted it.

65. The argument goes on to state the proposition that an employer is not required to simply accept a doctor's note as proof of illness. That may be so in many circumstances, depending on any number of factors which do not arise here, but has no application to this case, where the Director *did* find the medical information was proof that Makowichuk was ill and unable to attend work.

66. The circle is closed on this argument with the assertion by Copper Mountain that "the law is clear that it is up to an employee to establish the veracity of a claim of illness justifying an absence from work". Notwithstanding the dubious existence of such a "law", Makowichuk, through the medical information acquired on the instructions of Copper Mountain, was found by the Director to have established he was ill and unable to work during the period in question. In other words, the medical information Makowichuk provided did "establish the veracity" of his claim of illness to the Director.

67. The point advanced above comes very close to saying there are circumstances where the burden is on the employee under the *ESA* to show there was no cause for termination. That is not so; the legal burden under the *ESA* is on the employer to show just cause for dismissal. That burden never shifts.

68. Copper Mountain cites the Tribunal's decision in *Carlo Magno*, BC EST # D121/08, as supporting some of its points of argument. While *Magno* was a completely different case on its facts, that decision plows no new ground or deviates from the well-established principles applied to assessing just cause. The determination in that case found, and the appeal panel of the Tribunal confirmed, that the facts demonstrated a fundamental failure by *Magno* to meet his employment obligations. The case does not stand for the principle which is attributed to it in para. 65 of the appeal submissions. The complainant in *Magno* did not attempt to provide a medical reason for his three-week unexplained absence from work or seek to justify his absence on a claim of illness: see para 19 of *Magno*. In fact, he had no answer to his unauthorized absence.

69. There is nothing in the Determination that deviates from the legal principles developed under the *ESA* on the question of cause or the analysis the Director was required to undertake. I find no error by the Director in the interpretation or application of the legal principles applying to section 63 of the *ESA*.

70. While the argument advances the error of law as a misinterpretation or misapplication of section 63 of the *ESA*, its actual objective is to have this panel of the Tribunal ignore the central finding made by the Director – that Copper Mountain had not met the burden of showing just cause – and reach a different conclusion than was made by the Director.

71. Provided the established principles have been applied, and I find they were, a conclusion on just cause is essentially a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is, as noted above, a question over which the Tribunal has no jurisdiction. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco*, *supra*.

72. The application of the law, correctly found, to the facts as found by the Director does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

73. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on the facts, Copper Mountain is required to show the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.

74. What Copper Mountain is really saying here is that *on the facts* the Director ought not have accepted the doctor's note as proof Makowichuk was ill. That is challenging the facts and conclusions of fact made by the Director without establishing an error of law on the facts and I find no merit is this aspect of the appeal.

75. Copper Mountain also states the Director erred in law by failing to address issues of credibility. The difficulty for Copper Mountain in this argument is that the so-called issues of credibility are tenuous, one might even say speculative; they do not exist on the record or in the findings made by the Director.

76. On the facts provided there is no conflict in any of the evidence that is found in the record and incorporated into the Determination. Copper Mountain points to the statement attributed to Makowichuk in the March 2019 meeting – that he said he would take that time off regardless – and his subsequent denial during the investigation of having made that statement as the basis for requiring his credibility be tested through an oral hearing. The evidence provided in the record and recorded in the Determination, however, does not show the evidentiary conflict relied upon by Copper Mountain on this point. The other allegations against Makowichuk's credibility are grounded in assertions made by Copper Mountain that are not found in the record: what he may or may not have told "other employees"; who he may have talked to regarding the company's staffing requirements for the days in question; what he may or may not have told his doctors; and what the text message from his co-worker did or did not mean.

77. There is no absolute right to an oral hearing and no principle that issues of credibility, even if they are shown, are required to be decided through an oral hearing. The decision of what process will be applied is within the discretion of the Director and is not generally reviewable unless there is an improper exercise of that discretion: see *Takarabe et al.*, BC EST # D160/98, and *Jody L. Goudreau et al.*, BC EST # D066/98. Failure by the Director to meet the requirements of section 77 of the *ESA* or failure to observe principles of natural justice will likely not be viewed as a valid exercise of discretion, but I need not address that here, because, as explained below, I am satisfied the Director complied with the requirements of section 77 of the *ESA* and the principles of natural justice that operate in the context of this case in deciding how Makowichuk's complaint would be processed and in conducting the complaint investigation.

78. Both parties have accepted that the record before the Director was complete. Neither party sought to introduce "new" evidence. Copper Mountain has failed to show that the findings of fact made by the Director lacked any evidentiary foundation.

79. It is apparent from the appeal submission that the only reason for Copper Mountain's argument for an oral appeal hearing would be to allow them to lead the sort of evidence they failed to present to the Director in the complaint investigation. The evidence Copper Mountain suggests they would provide in an oral hearing – whether there were discussions between Makowichuk and managers about changing staffing requirements and there are other persons who may say Makowichuk said he was taking the three days regardless – was available evidence that could have (and should have) been presented to the Director during the complaint investigation. As such, it is not admissible on an appeal to the Tribunal: see section 112(1)(c) of the *ESA*. An oral appeal hearing is not a viable mechanism to rescue Copper Mountain from their failure to properly document their case to the Director.

80. I find no merit in the error of law ground of appeal.

Natural Justice

81. Copper Mountain has raised the natural justice ground of appeal.

82. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.

83. I am able to address Copper Mountain's natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> 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 to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

84. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Copper Mountain was provided with the opportunity required by principles of natural justice to present their position to the Director. Copper Mountain has provided no objectively acceptable evidence showing otherwise.

85. It is not a breach of principles of natural justice to make a finding on the evidence that does not accord with the position of one of the parties in the complaint process, which in the circumstances of this case was that Copper Mountain had not met the burden imposed on it in section 63 of the *ESA* to show cause for terminating Makowichuk.

86. There is simply no factual or legal basis for this ground of appeal and no reasonable prospect it will succeed.

87. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

88. Pursuant to section 115 of the *ESA*, I order the Determination dated May 3, 2021 be confirmed in the amount of $16,395.65 together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal