Citation: Western Pacific Transport Ltd. (Re)
2021 BCEST 72

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Western Pacific Transport Ltd.
(the "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: Brandon Mewhort

FILE NO.: 2021/017

DATE OF DECISION: September 1, 2021

DECISION

SUBMISSIONS

Jacob E. Baziuk	on behalf of Western Pacific Transport Ltd.
Lovedeep Shukla	on his own behalf
Shannon Corregan	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Western Pacific Transport Ltd. (the "Employer") of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the "Delegate"), on January 15, 2021 (the "Determination"). The appeal is filed pursuant to sections 112(1)(a) and (b) of the *Employment Standards Act* (the "*ESA*").

2. In the Determination, the Delegate found that Mr. Lovedeep Shukla (the "Complainant"), who was a short haul truck driver for the Employer, was owed unpaid wages and that he was terminated as a result of a condition of his employment being substantially altered. The Delegate found that the Complainant was terminated while he was on protected leave and was entitled to, among other things, 22 weeks of wages in accordance with section 79 of the *ESA.*

3. The Employer submits that the Delegate erred in law in several ways, and she failed to observe the principles of natural justice in making the Determination. The Employer also sought an order extending the appeal period under section 109(1)(b) of the *ESA*, which I deal with as a preliminary matter in this decision.

4. For the reasons given below, I order that the Determination be varied so as to reduce the wages payable to the Complainant by $1,103.25, as well as the applicable interest.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

5. The Delegate issued the Determination and her Reasons for the Determination on January 15, 2021. The statutory deadline for appealing the Determination, as set out in that document and in accordance with section 112(3)(a) of the *ESA*, was February 22, 2021.

6. On February 22, 2021, the Employer filed "Preliminary Submissions" and requested an extension of one week, until March 1, 2021, to file "Completed Submissions". The Preliminary Submissions, among other things, gave reasons in support of the Employer's request that the appeal period should be extended. The Employer then filed the Completed Submissions on March 1, 2021.

7. On May 14, 2021, the Tribunal requested submissions from the Complainant and Delegate on the merits of the appeal and, on May 17, 2021, the Tribunal also gave the Complainant and the Delegate an opportunity to make submissions on the Employer's request for an extension of the appeal period. The

deadline for the Complainant and Delegate to make submissions on the merits of the appeal and the requested extension was June 7, 2021.

8. The Delegate did not object to the requested one-week extension of the appeal period and the Complainant did not address the requested extension in his submission.

9. While the Employer requested an extension of the appeal period in order to file more comprehensive arguments in support of its appeal, I note that its Preliminary Submissions included arguments supporting certain grounds of appeal. Section 112(2)(a) of the *ESA* states that the following must be delivered to the Tribunal within the appeal period in order to properly file an appeal of a determination:

> (i) a written request specifying the grounds on which the appeal is based under subsection (1),
>
> (i.1) a copy of the director's written reasons for the determination, and
>
> (ii) payment of the appeal fee, if any, prescribed by regulation.

10. In my view, the Employer's Preliminary Submissions complied with section 112(2)(a). However, in the Completed Submissions, the Employer added new grounds of appeal and did not address others that were included in the Preliminary Submissions. It therefore cannot be said that the Employer's Completed Submissions simply broadened and more fully particularized the Preliminary Submissions previously filed together with the appeal form (see *Paladin Security Group Ltd. (Re)*, 2020 BCEST 135, in which this Tribunal found that further submissions *did* simply broaden and more fully particularize preliminary submissions in that case). As a result, the Completed Submissions do not, in my view, comply with section 112(2)(a) of the *ESA* to the extent that they include additional grounds of appeal not included in the Preliminary Submissions.

11. However, despite my finding that the Completed Submissions did not entirely comply with section 112(2)(a) of the *ESA*, I grant the Employer's request to extend the appeal period for the following reasons.

12. The Tribunal has criteria to determine whether an appeal period should be extended, which are set out in the *Niemisto* decision (BC EST # D099/96). Those criteria are as follows:

> i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
>
> ii. there has been a genuine and ongoing bona fide intention to appeal the Determination;
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> iii. the respondent party, as well the Director, must have been made aware of this intention;
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> iv. the respondent party will not be unduly prejudiced by the granting of an extension; and
>
> v. there is a strong *prima facie* case in favour of the appellant.

13. In this case, most of those criteria have been satisfied. In particular, the Employer has demonstrated that it had an ongoing *bona fide* intention to appeal the Determination, and the Complainant and the Delegate were made aware of that intention. There has been no suggestion that the Complainant or the Delegate would be unduly prejudiced by the granting of a one-week extension. As noted above, the Complainant did not address the requested extension in his submission, and it is not readily apparent how he would be unduly prejudiced by such a short extension. The Employer's appeal is also not obviously without merit.

14. I am not convinced, however, that the Employer moved with all reasonable dispatch regarding this appeal. The Determination was issued on January 15, 2021. The Employer submits that it "became aware of the appeal deadline … several days after it was delivered, in or about late January of 2021." The Employer first asked for advice from its General Counsel and was advised that "it was not in the scope of their practice area to file the appeal." The Employer then retained their present counsel, but they were unable to meet together until February 11, 2021. The Employer's counsel was unable to collect and review most of the relevant documents until just before the end of the appeal period on February 22, 2021.

15. I appreciate that it can take time to retain counsel, collect and review documents, and prepare an appeal. However, the Legislature has purposefully established time frames for appealing a determination issued under the *ESA*. Although relatively short, the appeal period established is not unusual (see the *Niemisto* decision for examples), and parties must act accordingly. In my view, retaining counsel, collecting and reviewing documents, and preparing appeal materials do not constitute a reasonable and credible explanation for the failure to request an appeal within the statutory time limit.

16. That said, and taking into consideration the *Niemisto* criteria together as a whole, I exercise my discretion pursuant to section 109 of the *ESA* to extend the appeal period for one week from February 22, 2021 to March 1, 2021, as requested by the Employer.

ISSUES ON APPEAL

17. The Employer says that the Delegate erred in law in several ways and failed to observe the principles of natural justice in making the Determination. As discussed above, the Employer advanced certain arguments in its Preliminary Submissions that were not further addressed in the Completed Submissions, and then it added certain arguments in its Completed Submissions that were not advanced in its Preliminary Submissions.

18. In its Preliminary Submissions, the Employer says the delegate erred:

a. by determining that the Employer unilaterally terminated the Complainant's employment without any evidence;

b. by placing a reverse onus on the Employer to establish that the Complainant quit his employment;

c. by determining that the Employer terminated the Complainant due to protected leave and/or illness based on no evidence;

d. in calculating the "make whole" remedy;

e. by not considering new evidence; and

f. by failing to deduct the section 63 statutory pay from the "make whole" remedy.

19. In its Completed Submissions, the Employer says the Delegate erred in law by:

a. exercising discretion using a method that is wrong in principle, by not allowing the Employer to admit evidence because the Employer did not "take advantage" of an earlier opportunity;

b. concluding the Complainant was terminated based on no evidence and/or acting on a view of the facts that could not reasonably be entertained; and

c. misapplying section 66 of the ESA by placing a reverse onus on the Employer.

20. In its Completed Submissions, the Employer says the Delegate failed to observe the principles of natural justice by:

a. failing to give the Employer an opportunity to respond to evidence of the Complainant, and put relevant evidence to all parties;

b. failing to gather evidence material to the Delegate's reasoning on key legal issues;

c. acting arbitrarily in the use of discretion, by failing to explain a preference for the Complainant's evidence instead of the Employer's evidence;

d. failing to interview a relevant witness with respect to an important finding material to the Delegate's reasoning;

e. failing to maintain impartiality and exhibiting actual or perceived bias in advocating for the Complainant during settlement negotiations;

f. failing to maintain impartiality and exhibiting actual or perceived bias in not allowing relevant evidence; and

g. failing to facilitate settlement negotiations including failing to communicate a settlement offer to the Complainant.

21. Rather than address each alleged ground of appeal in its Completed Submissions in turn, the Employer addressed them in the following categories:

a. Alleged error #1: the Delegate breached principles of fairness and/or statutory duty;

b. Alleged error #2: the Delegate failed to gather evidence and explain reasoning and/or "hinged decision on contradicting evidence";

c. Alleged error #3: the Delegate breached fairness, failed to be impartial and/or exhibited bias in not admitting evidence;

d. Alleged error #4: the Delegate breached fairness, acted contrary to the *ESA* in not facilitating settlement and/or advocating for complainant; and

e. Alleged error #5: the Delegate made errors of law

22. The Employer did not explain why it addressed the alleged grounds of appeal in those categories rather than address each one of them in turn. Given that the arguments of the Employer and the Delegate were structured to address the alleged grounds of appeal in those categories, that is also how I have addressed them in this decision. After addressing them, I then turn to the issues in the Employer's Preliminary Submissions that were not addressed in its Completed Submissions.

THE DETERMINATION

23. The Employer operates a trucking business in the Lower Mainland and the Complainant was one of its drivers. The Determination arises from a complaint filed by the Complainant under section 74 of the *ESA*. The Complainant alleged that the Employer contravened the *ESA* by terminating his employment while he was on a protected leave and by failing to pay him all wages owing.

24. In the Determination, the Delegate found that the Complainant was a short haul truck driver as defined in the *Employment Standards Regulation* ("Regulation"). The Delegate also found that the Employer owed the Complainant unpaid wages for hours he spent unloading trucks, overtime, statutory holiday pay, and vacation pay. None of the findings made by the Delegate regarding the Complainant's classification as a short haul truck driver or the unpaid wages were appealed by the Employer.

25. The Delegate then considered whether the Complainant quit his employment or whether he was terminated by the Employer. I note that the evidence before the Delegate regarding this issue, as described in the Determination, was not unequivocal. There was conflicting evidence, which the Delegate had to attempt to reconcile when making her Determination. The way the Delegate made her findings in such circumstances is the subject of many of the Employer's grounds of appeal.

26. In particular, there was much discussion in the Determination about a certain truck of the Employer's that the Complainant often used, which was referred to as "Truck 1318". There was also discussion of a certain customer of the Employer's that the Complainant had, at times, worked for, which was referred to as "Vitafoam". The Employer claimed that the Complainant *refused* to work unless he could drive Truck 1318 and that he also *refused* to work for Vitafoam. However, the Delegate found that the Complainant *preferred* to drive truck 1318 and *requested* not to work for Vitafoam (a request that, according to the Complainant, the Employer had granted in the past) and that he also provided credible explanations for that preference and request.

27. The Delegate ultimately found, pursuant to section 66 of *ESA*, that the Complainant was terminated by the Employer. Section 66 provides that the director may determine that an employee has been terminated if a condition of employment has been substantially altered.

28. In this case, the Complainant's schedule was not set in advance; rather, the Employer would call the Complainant every evening and give him his schedule for the following day. The Delegate found that the Employer failed to schedule the Complainant for work as it had done in the past, which amounted to a condition of his employment being substantially altered. As a result, the Delegate awarded the Complainant one week of compensation for his length of service pursuant to section 63 of the *ESA*.

29. The Delegate then considered whether the Employer terminated the Complainant's employment because he took a leave from work due to illness or COVID-19 and, if it did, what the appropriate remedy was. Again, the evidence before the Delegate on that issue was not unequivocal. The Delegate ultimately found that the reason the Complainant was terminated was because he took leaves from work due to illness and COVID-19 under sections 49.1 and 52.12 of the *ESA*, respectively.

30. The Delegate then determined that the Complainant was entitled to 22 weeks of wages as a result of his termination in accordance with section 79(2)(c) of the *ESA*. In making that determination, the Delegate

found, among other things, that the Complainant made moderate attempts to mitigate his damages by applying to at least nine positions during the six months between the date of his termination and the date he began working on a temporary basis as a driver for a different employer. For one of those nine positions, the Complainant obtained what he believed to be full-time and permanent employment as a driver at another company, but he quit after two days because he believed the company was not obeying safety standards. The Delegate found that, given those safety concerns, it was not suitable alternative employment and, therefore, the section 79 remedy was not extinguished when the Complainant accepted and then quit his employment with the other company.

31. The Delegate also imposed penalties on the Employer as a result of six breaches of the *ESA*, none of which are the subject of the Employer's alleged grounds of appeal.

32. Lastly, as noted above, one of the Employer's alleged grounds of appeal is that the Delegate failed to maintain impartiality and exhibited actual or perceived bias in advocating for the Complainant during settlement negotiations. The following is an excerpt from the Determination summarizing those settlement discussions:

> On December 18, 2020, Mr. Shukla advised me that Western Pacific was attempting to the [sic] settle the matter with him for an amount that was significantly less that what I had found owing in the preliminary assessment. I advised Mr. Balwinder, Mr. Boparai and Mr. Jain [all representatives of the Employer] that Mr. Shukla wished any settlement conversation to take place through me.
>
> At 2:47 p.m. on December 18, 2020, Mr. Jain contacted me via email, advising Western Pacific wished to settle Mr. Shukla's complaint. He asked me to confirm the amount. I repeated the amount I had set out in my preliminary assessment. After my reply, Mr. Jain ceased communicating with me.
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> At 3:57 p.m. on December 18, 2020, I received an email from Simon Joo (Mr. Joo), who advised that he had been retained as counsel for Western Pacific. Mr. Joo requested a three-week extension to respond to the preliminary assessment letter. I declined to grant the extension requested but granted Western Pacific an extension until noon on December 23, 2020.
>
> On the morning of December 23, 2020, Mr. Joo contacted me to advise that Western Pacific wished to resolve the matter, but for less than the amount set out in the preliminary assessment. I advised that we would not be resolving the matter for less than that amount...

33. There do not appear to have been any settlement discussions beyond those that took place on December 18 and 23, 2020, as summarized in the Determination.

ARGUMENTS AND ANALYSIS

34. Given the number of alleged grounds of appeal that must be addressed, in order that each issue is addressed entirely in turn, I have combined my summary of the parties' arguments and my analysis into separate sections.

35. The Complainant filed brief submissions in this appeal via email twice, once on June 5, 2021 and then on June 24, 2021. In his submissions, the Complainant, among other things, explained why he preferred Truck 1318, he disputed the Employer's allegations that he had performance issues, and he attempted to

provide clarification regarding certain communications between himself and the Employer. While I appreciate the Complainant's efforts in providing his submissions, he did not specifically address the alleged grounds of appeal that are raised by the Employer, so I do not refer to the Complainant's arguments further below.

Alleged error #1: Delegate Breached Principles of Fairness and/or Statutory Duty

Argument of the Employer

36. The Employer argues that the Delegate never enquired in detail (or at all) about a purported agreement between the parties, specifically that the Complainant was to remain off work until further notice. The Employer argues that the Delegate did not put to the Complainant assertions made by Kam Boparai, who was the Employer's dispatcher, that the Complainant had agreed to remain off work and that he had refused work because Truck 1318 was unavailable or that he did not want to work at Vitafoam. The Employer argues that, accordingly, there is an insufficient basis to conclude that Mr. Boparai's evidence is untrue.

37. The Employer relies on *OE Construction Solutions Inc. (Re)*, 2019 BCEST 131, for the principle that it was incumbent on the Delegate to assist the Employer in appreciating the law of constructive dismissal and what evidence is most important to the legal conclusion on that issue. The Employer argues that: "at a bare minimum, the Delegate was required to adduce and explain all relevant evidence which formed the legal conclusions under section 66 in the present case". The Employer argues that the Delegate failed to do that in this case and, therefore, the Delegate breached their duty under the *ESA* and failed to provide procedural fairness to the Employer. The Employer further argues that the Delegate breached the principles of procedural fairness by failing to put all relevant evidence to all parties and by failing to seek unequivocal evidence to conclude that the Complainant was terminated in accordance with section 66 of the *ESA*.

Reply of the Delegate

38. The Delegate argues that neither party indicated there was an agreement between the parties that the Complainant would remain off work. The Delegate submits that she did not breach her statutory duty, or the Employer's right to procedural fairness, by failing to consider evidence that the Employer did not put before her.

39. The Delegate agrees that, during the investigation, she had a duty to assist the parties in understanding how the relevant sections of the *ESA* would apply. The Delegate argues that she fulfilled that obligation by issuing her preliminary findings letter to the parties, which set out the relevant evidence, the requirements of the *ESA*, and her preliminary findings. The Delegate specifically asked the Employer to "carefully review and consider the evidence regarding the section 79 remedy" and "whether there is any other evidence or any other relevant factors that you believe I should take into account". The Delegate also offered to have phone calls with the Employer, but the Employer did not take her up on that offer.

40. The Delegate argues that she did not fail to seek unequivocal evidence to support her conclusions in the Determination, as alleged by the Employer. The Delegate argues that she is not required to seek

unequivocal evidence to support her findings and that delegates often must make determinations without the benefit of unequivocal evidence.

41. The Delegate argues that: "After conducting a fair and reasonable investigation, and after giving the parties the opportunity know [*sic*] the case against them, to present evidence, and to respond to the other party's evidence, a delegate must consider the evidence before them and consider, on a balance of probabilities, what is reasonable in the circumstances." The Delegate argues that that is what she did in this case.

Final Reply of the Employer

42. The Employer argues that while Mr. Boparai did not use the exact language of "agreement" between the parties, the evidence clearly indicates that it was both the Complainant and the Employer's understanding that the Complainant would not work until Truck 1318 was fixed or until the Complainant was willing to come back to work. The Employer argues that by failing or refusing to enquire further about this purported agreement, the Delegate has breached the principles of fairness and/or her statutory duty under the *ESA*.

43. The Employer also argues that issuing a preliminary findings letter and offering to discuss her findings does not meet the obligation incumbent on her as described in *OE Construction*. The Employer says that it was a lay litigant and only retained legal advice after the Delegate issued her preliminary findings, so it was unreasonable for the Delegate to leave the burden of recognizing the importance of the possible agreement on the parties themselves.

44. The Employer further argues that, while it is not always possible to obtain unequivocal evidence, it is incumbent on the Director to *seek* unequivocal evidence rather than rely on equivocal evidence without further inquiry.

Analysis

45. The Employer relies on the *OE Construction* case. In that case, the employer was a software company, and the employee was a designer working long hours on complex projects. However, the Director did not consider, or make any findings on, whether the employee was a "high technology professional" as that term is defined in section 37.8 of the Regulation. If the employee was a "high technology professional", they would have been exempt from most of the overtime provisions of the *ESA*.

46. I agree with the statements of principle made in *OE Construction*, including two key aspects of the complaint and investigation process and the Director's role in it. Firstly, the "Director owes a duty of fairness to self-represented parties which goes beyond simply providing the normally accepted elements of fair treatment and will include actual efforts to accommodate the parties' unfamiliarity with the process": *OE Construction* at para 30. Secondly, "the Director has the primary statutory obligation of ensuring compliance with the *ESA.* The primary reason the Director is accepted as a party to the processes under the ESA is because he has an interest in protecting the integrity of the *ESA*": *OE Construction* at para 31.

47. In *OE Construction*, which was varied on other grounds, the Tribunal held that the Director not only made no apparent effort to recognize and accommodate the persons responding on behalf of the employer, but he actually *misdirected* them with the singular reference to the employee's overtime entitlement under section 35 of the *ESA*. In varying the determination, the Tribunal found that the delegate in that case breached their duty to ensure that the relevant, or potentially relevant, legislative provisions – e.g., the "high technology professional" exemption – were known to the parties.

48. The present case is distinguishable. The Delegate in this case did, in fact, ensure that the relevant, or potentially relevant, legislative provisions were known to the parties when she issued her preliminary findings letter. That letter set out the relevant evidence, the applicable requirements of the *ESA*, and the Delegate's preliminary findings. I agree with the Delegate that, in this case, she met her duty as described in *OE Construction*.

49. There is no allegation that the Delegate misdirected the Employer as the delegate did in *OE Construction*. Instead, the Employer is essentially arguing that the Delegate failed to inquire whether there was an agreement for the Complainant to remain off work, which may have been relevant to a determination under section 66 of the *ESA*, even though neither party suggested there was such an agreement.

50. In *Whitaker Consulting Ltd.*, BC EST # D033/06 (a case that is relied on by the Employer), this Tribunal held that a delegate is not responsible for seeking out and obtaining all possible evidence. The Director is entitled to expect that parties will participate in investigations. A party may not "sit in the weeds", refusing to cooperate in an investigation, and then appeal a determination based on evidence that could have been provided to the Director: see *Tri-West Tractor Ltd.*, BC EST #D268/96. In my view, the Delegate took reasonable steps to gather the relevant evidence and she did not fail to observe the principles of natural justice by not specifically asking about an alleged "agreement" that neither party mentioned to her.

51. As for whether the Delegate put all relevant evidence before the parties, I note that, after she conducted her initial interviews of the parties, the Delegate asked whether there was any other evidence or any other relevant factors that she should consider. The Delegate also disclosed to both parties a summary of their testimonies and she gathered the Complainant's response to that information in a follow-up interview. She then issued her preliminary findings letter, which the parties again had an opportunity to respond to. Accordingly, in my view, it cannot be said that the Delegate failed to put all relevant evidence to the parties.

52. It also cannot be said that the Delegate breached the principles of procedural fairness by failing to *seek* unequivocal evidence to conclude that the Complainant was terminated in accordance with section 66 of the *ESA.* The Delegate took reasonable steps to gather the relevant evidence as already discussed. As argued by the Delegate, it is often the case where the Director must make determinations without the benefit of unequivocal evidence.

53. I find that, in this case, the Delegate gave each party the opportunity to know the case being made and the opportunity to respond, and there was a full and fair consideration of the evidence and issues. I therefore dismiss this ground of appeal.

Alleged error #2: Delegate Failed to Gather Evidence and Explain Reasoning and/or "Hinged Decision on Contradicting Evidence"

Argument of the Employer

54. The Employer argues that the Delegate did not consider the need for an oral hearing and, in exercising her discretion to conduct an investigation, the Delegate did not explain why an investigation was sufficient. The Employer argues this point is especially important because credibility was an issue and, in particular, Mr. Boparai's evidence was found to be unreliable. The Employer argues that the Delegate did not explain how she assessed the parties' credibility.

55. The Employer also argues that the Delegate did not put to the Complainant Mr. Boparai's position that the Complainant refused work because he could not drive Truck 1318 and did not want to work at Vitafoam. The Employer states that the Delegate hinged their Determination on contradicting evidence and did not seek further evidence on whether the Complainant had agreed to stay off work or refused to return to work. The Employer argues that the Delegate did not appear to ask the Complainant about these certain evidentiary points and, by not providing reasons for the absence of such evidence or reasons for rejecting the Employer's evidence, the Delegate breached procedural fairness and acted contrary to the *ESA*.

Reply of the Delegate

56. Regarding the reasons for not having an oral hearing, the Delegate notes that neither party in this case specifically requested an oral hearing. The Delegate says that she would only need to provide reasons for not holding an oral hearing if one was requested. The Delegate states that, in this case, nothing before her indicated that an oral hearing was the best venue for determining the complaint. The Delegate argues that not every complaint that involves an issue of credibility must go to an oral hearing.

57. The Delegate argues that she did not fail to put to the Complainant Mr. Boparai's position that the Complainant refused work because he could not drive Truck 1318 and did not want to work at Vitafoam. The Delegate disclosed to both parties a summary of their testimonies and she gathered the Complainant's response to that information in a follow-up interview. The Delegate notes that, even if they accepted Mr. Boparai's statement as true, it would not have released the Employer from the obligation to either follow up with the Complainant after the truck was fixed to continue scheduling him for work on a regular basis, or to explain to the Complainant that those conditions were not acceptable, and his employment was being terminated.

58. Regarding why the Delegate rejected the Employer's evidence, the Delegate argues that the body of evidence she relied on in determining whether the Complainant quit or was terminated (issue #3 in the Determination) was the same body of evidence she relied on to determine the reason the Employer terminated their employment (issue #4 of the Determination). The Delegate states that these two issues are interrelated and her assessment of the evidence in respect of one issue is applicable to her analysis of the second issue.

59. The Delegate states that she explicitly found that Mr. Boparai made statements that conflicted with the payroll records, that he contradicted himself as to whether the Complainant identified COVID-19 as the

reason for his leave, that he provided three different narratives to explain the Complainant's lack of work, and that he failed to provide key information regarding the status of Truck 1318. The Delegate argues that she clearly addressed why she did not accept Mr. Boparai's evidence when determining whether the Complainant quit or was terminated, and she clearly referred to this assessment of Mr. Boparai's evidence when attempting to determine why the Employer ceased scheduling the Complainant for work.

60. Regarding the allegation that the Delegate "hinged" their decision on contradicting evidence by not seeking further evidence on whether the Complainant had agreed to stay off work or refused to return to work, the Delegate reiterates that they did not disregard Mr. Boparai's evidence of this agreement and, in fact, Mr. Boparai failed to indicate that such an agreement existed.

Final Reply of the Employer

61. The Employer argues that the Delegate's assessment of Mr. Boparai's credibility was not based on legitimate principles of credibility. For example, regarding the Delegate's finding that Mr. Boparai's explanations for the Complainant's lack of work changed over the course of the interview with the Delegate, the Employer says that was not evidence of Mr. Boparai "changing" his explanations, but rather an acknowledgement that there were a number of reasons why the Complainant was refusing to work, some of which were not readily clear to the Employer. The Employer then provides other examples criticizing how the Delegate arrived at her findings of credibility, specifically regarding Mr. Boparai's credibility.

62. The Employer also reiterates its argument that the Delegate should have considered proceeding by way of an oral hearing rather than an investigation. The Employer says that the Delegate's justifications put forward in her submissions for not holding a hearing are insufficient, there is no indication that the Delegate considered the merits of an oral hearing prior to her submissions, and any justification fails to rectify the breach of procedural fairness that resulted from her failure to consider an oral hearing.

Analysis

63. This Tribunal has summarized the natural justice principles that typically operate in the complaint process 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.

64. This Tribunal has also summarized the principles for considering whether an oral hearing is necessary, particularly when there are issues of credibility, in *Gaspar and others*, 2018 BCEST 48 at paras. 50 to 52:

> The Director has discretion over how a complaint will be addressed. There is no entitlement for any party to an oral hearing before the Director. Whether one, or both, parties would prefer to

> have an oral hearing is not particularly relevant. The question is whether the refusal to conduct an oral hearing, in the circumstances of the particular case, amounted to a breach of the principles of natural justice.
>
> Issues of credibility seem to create particular problems when considering if a party was denied fair process by the decision of a delegate to deny an oral hearing. It is fair to say that many, if not most, of Determinations are decided on an assessment of the credibility of the evidence presented by the parties to a complaint. As acknowledged by the Director this was one of those many cases. The Director is the decision-maker in the first instance and is the first to hear what people – witnesses – have to say. It is not for the Tribunal to second guess a finding of credibility that is otherwise grounded in the evidence before the Director and adequately reasoned but the Tribunal will, where called upon, decide whether it was or was not reasonable for the Director to reach conclusions on credibility using the complaint process adopted. In this case, I am satisfied that it was.
>
> The Tribunal will only compel an oral hearing where the case involves a serious question of credibility on one or more key issues, or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly. The concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the of the evidence and issues.

65. I further note that it is not a breach of principles of natural justice to make findings on the evidence that do not accord with the position of one of the parties in the complaint process: *Save-A-Lot Holdings Corp. (Re)*, 2020 BCEST 140 at para 37.

66. The Employer relies on *Saab Electric Ltd. (Re)*, 2020 BCEST 16, for this ground of appeal. The Employer argues, among other things, that in *Saab* the delegate also "hinged his decision in part based on contradictory evidence." In that case, the Delegate identified an obvious issue respecting two versions of time sheets provided to them. In essence, there were discrepancies between copies of time sheets that were photographed versus copies that were photocopied. The Delegate reached their conclusions about credibility in large part because the Appellant did not provide the original time sheets, which could have resolved the discrepancies. The Tribunal held that the delegate failed to observe the principles of natural justice, because they did not give the Appellant an opportunity to provide further evidence on the time sheets. The Tribunal also noted that the delegate could have ordered the Appellant to produce the original invoices, but they did not.

67. I find that *Saab* is distinguishable from the present case. *Saab* was a case dealing with the existence and production of documents (i.e., original copies of time sheets) that likely could have resolved contradictory evidence. There is no suggestion that the Delegate in this case failed to collect documents that could have resolved the contradictory evidence on the record. Rather, when making her findings of fact, the Delegate was, to a certain extent, left to rely on her assessment of the credibility of the Complainant and the witnesses of the Employer.

68. The Employer also relies on *Whitaker Consulting Ltd.*, BC EST # D033/06, for this ground of appeal. However, *Whitaker* is also distinguishable, because, in that case, the delegate failed to interview key witnesses. The Tribunal found that the delegate should have at least attempted to interview those

witnesses, given that they chose to proceed by way of an investigation. In the present case, there is no allegation that the Delegate failed to interview a particular witness.

69. Even though there were issues of credibility in this case, the Delegate's findings about the credibility of the witnesses were grounded in the evidence and adequately reasoned. It is not clear to me on the face of the record that an oral hearing was the only way of ensuring each party could state its case fairly. Each side was given an opportunity to know the case being made and an opportunity to respond. In particular, the Delegate conducted interviews of the relevant witnesses, disclosed the evidence to the parties and invited them to respond, issued a preliminary findings letter, and invited the parties to make submissions on that letter.

70. I agree with the Delegate that she was not required to include in her Determination reasoning for why she proceeded by way of an investigation rather than by way of an oral hearing. She may have been required to do so had one of the parties requested an oral hearing, but neither of them did so in this case.

71. I also agree with the Delegate that she adequately explained how she assessed the parties' credibility, particularly Mr. Boparai's. As the Delegate noted in her argument, she found that Mr. Boparai made statements that conflicted with the payroll records, he contradicted himself as to whether the Complainant identified COVID-19 as the reason for his leave, he provided different narratives to explain the Complainant's lack of work, and he failed to provide key information regarding the status of Truck 1318. It is not open to me to interfere with the Delegate's assessment of credibility without a strong basis on which to do so, which I do not find in this case.

72. I further agree with the Delegate that she did not fail to seek further evidence on whether the Complainant had agreed to stay off work or refused to return to work. As submitted by the Delegate in her argument, Mr. Boparai did not indicate that such an agreement existed. I note again that, as discussed in *Whitaker*, a delegate is not responsible for seeking out and obtaining all possible evidence. In my view, the Delegate took reasonable steps to gather the parties' evidence in this case.

73. I therefore dismiss this ground of appeal.

Alleged error #3: Delegate Breached Fairness, Failed to Be Impartial and/or Exhibited Bias in Not Admitting Evidence

Argument of the Employer

74. The Employer sought to provide additional evidence to the Delegate in the form of written statements from customers. These statements were to corroborate the Employer's assertion that the Complainant did not get along with customers and co-workers. This evidence was in support of the Employer's alternative argument that, in the event the Delegate found the Complainant was terminated, the termination was not for a protected reason.

75. The Delegate only granted a short extension to file such evidence, and, in the Determination, the Delegate explained her reasoning as follows: "Considering that Western Pacific had been given multiple opportunities to submit evidence and had not taken advantage of those opportunities, I declined to grant a significant extension for the provision of additional evidence."

76. The Employer argues that such rationale constitutes an error law and/or a breach of procedural fairness. That is because there is no juridical reason to deny evidence because a party did not "take advantage" of an earlier opportunity. The relevant principle for admitting evidence, the Employer says, is its probative value in determining the legal issue, balanced against the possibility of prejudice. The Employer argues that it is an error of law to adopt a method of assessment that is wrong in principle.

77. The Employer also argues that the Delegate's statement reveals a bias against the Employer, and that a reasonable bystander could conclude the Delegate appeared biased. The Employer states that the Delegate appeared to admonish the Employer for not acting faster and that displaying such frustration is not appropriate when acting in a quasi-judicial manner. The Employer argues that delegates must give latitude and assistance to lay litigants in navigating an unfamiliar process.

Reply of the Delegate

78. In response to the allegation she erred by refusing to grant an extension for the Employer to produce additional evidence, the Delegate set out the following brief timeline of events in her argument:

> To briefly summarize the timeline of events, in late October 2020 I informed Western Pacific of Mr. Shukla's claim and interviewed Mr. Dhanoa and Mr. Boparai. On November 5, 2020, I disclosed the evidence to the parties and invited them to respond. On December 8, 2020 I issued a preliminary findings letter to Western Pacific with a deadline for response of 4:00 p.m. on December 18, 2020. Western Pacific was given one-and-a-half months to review the evidence and respond to it.
>
> At 3:57 p.m. on December 18, 2020, Simon Joo (Mr. Joo) advised that he had recently been retained as counsel for Western Pacific and requested a three-week extension (Enclosure). He provided no explanation for the request other than the "serious and comprehensive nature" of the preliminary assessment. He made no indication that Western Pacific wished to submit any additional evidence. I declined to grant a three-week extension but granted an extension until noon on December 23, 2020. At approximately 11:00 a.m. on December 23, 2020, Mr. Joo called to attempt to negotiate a settlement amount (Record, pg. 164). Only after I declined to negotiate the amount did he ask for an extension to submit additional evidence. I declined this request, but gave him a second extension to December 24, 2020 to make a submission on the preliminary findings letter.
>
> Counsel suggests that I did not accept or consider the witness testimony that Western Pacific wished to submit. This is incorrect. Despite my decision not to give Western Pacific an extension for the production of evidence, on December 24, 2020 Western Pacific submitted a witness statement from Bupinder Singh (Mr. Singh), and I accepted this evidence and addressed it in the Determination.

79. In any event, the Delegate argues, by the time Mr. Joo asked to submit the witness statement, the Delegate had already gathered evidence from those representatives of the Employer who were best positioned to speak to the end of the Complainant's employment, and it had presented no evidence that it had ended his employment or stopped calling him into work because of his deficiencies as an employee. The Delegate argues that a party does not have the right to multiple extensions for the production of evidence, especially where the evidence is not probative of the issues in dispute, and they have not

provided cogent reasons as to why they were unable to produce the evidence within the original deadlines.

80. As for whether the Delegate demonstrated bias towards the Complainant, the Delegate argues that they have considerable discretion in how to conduct an investigation and she exercised her discretion reasonably in this case. The Delegate was not admonishing the Employer but justifying her refusal to allow the requested extension.

81. The Delegate states that the Employer was acting in bad faith by attempting to resolve the matter with the Complainant for an amount significantly less than what was owing. The Delegate states that, even though a delegate must be neutral and unbiased, a delegate is not prohibited from taking a party's behaviour into account when conducting an investigation – indeed, fairness to both parties requires that a delegate do so, in order to ensure that a party who may be acting in bad faith does not unduly compromise the other party's interests.

Final Reply of the Employer

82. The Employer argues that Delegate has incorrectly presupposed the Employer to be acting in bad faith on the basis that the settlement offer was an attempt for the Employer to avoid its legislative responsibilities. In any event, the Employer says, bad faith is irrelevant when considering an extension for the production of evidence, and it was a breach of procedural fairness for the Delegate to base her decision to not admit evidence on presumed bad faith.

83. The Employer also argues that the evidence it sought to admit was intended to corroborate Mr. Boparai's testimony and that, in light of the contradictory evidence and issues of credibility regarding Mr. Boparai's testimony, it was incumbent on the Delegate to seek evidence that could resolve equivocal evidence.

84. As for the Delegate's statement that she accepted a witness statement of Mr. Singh on December 24, 2020 and addressed it in the Determination, the Employer says that does not resolve the breach of procedural fairness, because the Employer would have given more compelling evidence had it been given an extension of more than one day.

85. The Employer also argues that the Delegate demonstrated pervasive bias against the Employer by presuming bad faith on the part of the Employer, rejecting sworn testimony contrary to legal principles, and making favourable inferences on the part of the Complainant.

Analysis

86. As discussed above, this Tribunal in *Gaspar and others* held that the "concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the of the evidence and issues."

87. In this case, I find that the Employer was given a meaningful opportunity to be heard and there was a full and fair consideration of the evidence and issues. The Employer was given ample opportunities and time to provide evidence in accordance with the deadlines set by the Delegate, as described in her argument.

The Delegate even considered and addressed evidence filed by the Employer on December 24, 2020, after the deadline to submit evidence had expired. I therefore find that the Delegate's exercise of her discretion to refuse the extension requested by the Employer did not constitute a breach of procedural fairness.

88. The Delegate's refusal to do so was also not an error of law. The Employer argues that the relevant principle for admitting evidence is its probative value in determining the legal issue, balanced against the possibility of prejudice. That, in my view, is mischaracterising the issue. The Delegate was not asked to admit a certain piece of evidence as a judge sometimes is in a civil proceeding. Rather, in this case, the Delegate was exercising her discretion about whether to extend a deadline that had been given to the Employer to file additional evidence. As discussed above, the Employer had already been given ample opportunity to file additional evidence. In my view, the Employer's failure to respond within the deadlines already given is a factor that the Delegate may consider in deciding whether to exercise her discretion to extend a deadline further.

89. I also do not find that the Delegate exhibited bias, or a reasonable apprehension of bias, in not further extending the deadline to provide additional evidence. I discuss the test for finding a reasonable apprehension of bias in more detail below when addressing the next issue, but, in summary, the test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator. In these circumstances, there must be a real likelihood or probability of bias shown, not just a mere suspicion. In my view, a reasonably informed bystander would not perceive bias on the part of the Delegate for refusing to accept further evidence when the Employer was already given ample opportunities and time to provide such evidence. Any frustration on the part of the Delegate that the Employer may perceive in the Determination also does not meet the test for a reasonable apprehension of bias.

90. This Tribunal has held in *Nu West Resource Services Ltd. (Re)*, 2020 BCEST 57 at para 68, that: "…except where the case for bias is clear and strong, candour and transparency on the part of a delegate should not taint his or her decision." The Employer has simply not provided any clear or strong evidence in this case that the Delegate demonstrated bias or a reasonable apprehension of bias by not granting the extension requested.

91. I therefore dismiss this ground of appeal. I would like to note, however, that I disagree with the Delegate's argument that the Employer was acting in bad faith by attempting to resolve the matter with the Complainant for an amount significantly less than what the Delegate found to be owing. In my view, such behaviour does not rise to the level of bad faith. This observation does not, however, change my conclusion on this ground of appeal.

Alleged error #4: Delegate Breached Fairness, Acted Contrary to the ESA in Not Facilitating Settlement and/or Advocating for Complainant

Argument of the Employer

92. The Employer states that the Delegate was engaged by the Employer's former legal counsel to explore settlement for an amount less than what was set out in the preliminary assessment. In the Determination, the Delegate stated that her response was as follows: "I advised that we would not be resolving for less than that amount." The Employer states that it was not apparent whether the Delegate communicated

the offer of settlement to the Complainant, which was problematic because, if it was not, it would be a failure to facilitate an efficient resolution and open communications between the parties as espoused by the *ESA*.

93. The Employer also argues that the Delegate appears to have advocated for the Complainant by negotiating on his behalf. The Employer argues that the Delegate failed to act in a quasi-judicial manner and such advocacy breached the principles of neutrality, fairness and natural justice. The Employer submits that such impartiality is also contrary to the *ESA*.

Reply of the Delegate

94. The Delegate argues that no party has the right to a settlement agreement under the *ESA*. While section 78 of the *ESA* provides that the Director may assist in settling a complaint, the use of the word "may" indicate that this ability is discretionary.

95. The Delegate also argues that the first enumerated purpose in section 2 of the *ESA* – "to ensure that employees in British Columbia receive at least basic standards of compensation" – suggests that the Director has a duty to *not* obtain a settlement in situations where one party wishes to settle for less than what a complainant is legally owed.

96. The Delegate concedes that she did not contact the Complainant after her conversation with the Employer's former counsel. However, she says it is not correct to say that the Employer made a "concrete" offer of settlement. Rather, she says, the Employer's counsel attempted to negotiate the amount, and the Delegate informed him that the amount was not up for debate. The Delegate states that she would not resolve the matter for less than what she believed the Complainant was legally owed. The Delegate also states that the Complainant was aware the Employer wished to resolve the matter by settlement, because the Employer had previously contacted him directly.

97. The Delegate argues that she did not advocate for the Complainant by negotiating on his behalf. Rather, as a delegate of the Director, it was her responsibility to ensure that the requirements of the *ESA* are met. In this case, the Delegate argues that she made reasonable attempts to gather the relevant information and arrived at a preliminary finding of what the Complainant was owed. The Delegate gave the Employer an opportunity to review her preliminary findings and to dispute them or to voluntarily resolve the complaint. The Delegate argues that: "My refusal to allow Western Pacific to resolve for less than what I believed was owing was not advocacy on behalf of Mr. Shukla, but an attempt to ensure that the requirements of the [*ESA*] were met, which is my primary duty as a delegate."

Final Reply of the Employer

98. The Employer argues that the Delegate erred in refusing to facilitate settlement, particularly by explicitly admitting to refusing to communicate the offer to settle with the Complainant. The Employer submits that the Complainant may actually be in better position if the Delegate had facilitated a settlement, because, presumably, it would not have been subject to appeal.

99. The Employer argues that the employment standards adjudicative system, as a whole, would benefit from such a settlement, because it would avoid costly submissions and process. Refusing to present a settlement offer is, the Employer argues, the antithesis of efficiency as espoused by the *ESA*.

100. In response to the Delegate's argument that she has a duty to *not* obtain a settlement in situations where one party wishes to settle for less than what a complainant is legally owed, the Employer submits that this is an error of law and contrary to *Bellman*, BC EST # RD003/04 (affirmed in *Bellman v The Queen*, 2006 BCSC 426 and *Coughlin*, 2019 BCEST 64), in which the Tribunal held:

> While there is a public policy interest in the enforcement of minimum employment standards, there is an equally compelling public interest in the enforcement of *bona fide* settlement agreements, even where the terms of that settlement may be something less than a party alleges they are entitled to under the Act. In our view, such settlements do not offend the Act.

101. The Employer argues that refusing to facilitate a settlement for less than what a delegate believes is owing would be the equivalent of removing the notion of settlement entirely. That is because employers would never engage in settlement discussions if the only possible result was whatever the delegate was likely to award in a determination.

102. The Employer goes so far as to argue that the Delegate's view of the complaint cannot enter settlement discussions and to do so breaches fairness and is contrary to the Delegate's quasi-judicial role.

Analysis

103. The test for whether there is a reasonable apprehension of bias was discussed in *Milan Holdings Inc.*, BC EST # D559/97, and it was more recently summarized well by this Tribunal in *Nu West Resource Services Ltd. (Re)*, 2020 BCEST 57, as follows:

> **The Director and his delegates must act in an unbiased and neutral fashion when investigating complaints under the ESA.** Being unbiased means that the Director's delegates must conduct themselves professionally and exercise objective good judgment by proceeding where the evidence takes them in the course of an investigation. A delegate cannot enter upon an investigation with a personal agenda, with a financial stake in the outcome or with a mind closed to the outcome. The Director or delegate must keep their mind open in good faith to the particular facts and evidence before them in individual cases and make an independent Determination that reflects their best judgment in light of their experience and expertise.
>
> **The test for bias in procedural fairness terms is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.** This is because not only must administrative decision-makers like the Director actually be unbiased, they also must not appear to be biased. **To meet the test for the reasonable apprehension of bias, a real likelihood or probability of bias must be shown; a mere suspicion is not enough.**
>
> It is also important to note that although the duty of fairness applies to all administrative bodies, the extent of that duty depends on the nature and the function of the particular tribunal. Thus, the strictness of the test for whether there was a reasonable apprehension of bias depends on the nature and function of the Director. **In *Milan Holdings*, the Tribunal explained that this means that the standards of bias, which apply to determinations under the ESA must take into**

> **account the practical reality of the Director's investigative function and the overlap of investigative and decision-making functions, which is specifically authorized by the legislation. This overlap in functions means that persons exercising these dual functions cannot be expected to function like courts or quasi-judicial tribunals and the standards for reasonable apprehension of bias must reflect that reality. Thus, except where the case for bias is clear and strong, candour and transparency on the part of a delegate should not taint his or her decision** [emphasis added, citations omitted].

104. In this case, as discussed above, the Employer alleges that the Delegate was bias in favour of the Complainant, or there was at least a reasonable apprehension of bias on the part of the Delegate, because she, among other things, advocated for the Complainant during settlement discussions.

105. Section 78 of *ESA* states, in part, that "the director may … assist in settling a complaint or a matter investigated under section 76".

106. I am not persuaded by the Delegate's argument that she has a duty to *not* obtain a settlement in situations where one party wishes to settle for less than what a complainant is legally owed. As cited by the Employer, the case law provides that, while there is a public policy interest in the enforcement of minimum employment standards, there is an equally compelling public interest in the enforcement of *bona fide* settlement agreements, even where the terms of that settlement may be something less than a party alleges they are entitled to under the ESA: *Bellman*, BC EST # RD003/04.

107. This case is distinguishable from *Bellman* because the parties did not reach a settlement agreement, but I find that the same principle applies to settlement discussions. There is a compelling public policy interest in encouraging parties to try and settle disputes, even if the terms are something less than a party may be entitled to under the *ESA*. I note that parties may have other interests beyond their rights under the *ESA*, including reaching an agreement that is not subject to appeal. Accordingly, in my view, a delegate may assist the parties in obtaining a settlement on terms that are less than a party may be entitled to under the *ESA*.

108. I agree with the Delegate that section 78 of the *ESA* is discretionary in that it states the director "may" assist in settling a complaint. However, once a delegate decides to exercise that power and assist in settling a complaint, they must at all times do so in an unbiased and neutral fashion.

109. The power to "assist" the parties in settling a complaint is one that courts and quasi-judicial tribunals do not normally exercise, so the standard for finding a reasonable apprehension of bias must reflect that reality, as discussed in *Nu West* and *Milan Holdings*.

110. In my view, the Director and their delegates have flexibility in how they assist the parties in settling a complaint or a matter being investigated. Having such flexibility is consistent with providing fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*, as well as encouraging open communication between employers and employees, which are both purposes set out in section 2 of the *ESA*.

111. I disagree with the Employer's argument that a delegate's view of a complaint cannot enter settlement discussions. To the contrary, a delegate's view of the complaint could be helpful in bringing the parties

together to facilitate a settlement. For example, in my view, a delegate could explain to a party their rights and what remedies they may be entitled to under the *ESA*. A delegate may even provide a party their view as to whether a settlement amount is reasonable, particularly if the party is self represented and relatively unsophisticated. Those specific situations are not before me, though, and each case would depend on its particular facts.

112. In this case, I find that a reasonably informed bystander would not reasonably perceive bias on the part of the Delegate in favour of the Complainant during the settlement discussions. The test for a reasonable apprehension of bias is particularly high in this case, given that section 78 of the *ESA* explicitly empowers the Director to assist in settling a complaint. Even if there was a mere suspicion of bias in this case, there was not a real likelihood or probability of bias, as described in *Milan Holdings*.

113. I do not necessarily agree with how the Delegate approached the settlement discussions. For example, in my view, the Delegate should have kept the Complainant more involved in the discussions, but the Complainant appears to have agreed that settlement discussions would take place through the Delegate. I also note that the "settlement discussions" being referred to only occurred on two separate days, specifically December 18 and 23, 2020. This was not a case where settlement discussions were ongoing over numerous days without the involvement of the Complainant.

114. The Employer argues there are other factors that support a finding of "a pervasive bias against the Employer", including the Delegate's refusal to admit certain evidence, her rejection of testimony from the Employer's witnesses, and her making favourable inferences on the part of the Complainant. I find that none of those factors support a finding of bias or a reasonable apprehension of bias. As discussed above, the evidence before the Delegate was not unequivocal and, in my view, she provided adequate explanations for why she preferred certain evidence, as well as why she made inferences when necessary. Preferring evidence from one party over another does not, in itself, suggest bias on the part of the Delegate. The Delegate also provided the Employer an adequate opportunity to know the case against it and an adequate opportunity to reply to that case. I do not find that any of the other factors raised by the Employer suggest a reasonable apprehension of bias on the part of the Delegate.

115. Accordingly, I dismiss this ground of appeal.

Alleged error #5: Errors of law

Argument of the Employer

116. The Employer argues that the Delegate incorrectly summarized the evidence, or failed to explain contradicting evidence, in support of the incorrect finding that Complainant was terminated under section 66 of the *ESA*. The Employer argues that, in doing so, the Delegate acted on no evidence, or acted on an interpretation of the facts that cannot reasonably be entertained.

117. The Employer argues that, in exercising discretion under section 66, a delegate must consider any relevant understanding between the parties which goes to the conclusion that an employer has unilaterally terminated an employee. The Employer states that the onus is on the employee in such cases to show they were constructively dismissed.

118. The Employer states that the Delegate, in essence, determined that the Employer was required to continuously contact the Complainant for work, the Employer did not contact the Complainant, and that the failure to do so constituted termination under section 66 of *ESA*. However, the Employer argues that there was uncontradicted evidence that the Complainant had refused to work for Vitafoam or to drive a truck other than Truck 1318, and the parties' agreed to postpone the Complainant's return to work. The Employer argues that the Delegate incorrectly concluded that the Employer stopped calling the Complainant for work, even though there was no evidence the Employer failed to call, and there was uncontradicted evidence that the Employer did call.

Reply of the Delegate

119. The Delegate argues that there was not uncontradicted evidence that the parties agreed to postpone the Complainant's return to work, as argue by the Employer. As described above, the Delegate argues that she made diligent and reasonable attempts gather all relevant information during her investigation, and neither party made any indication that such an agreement existed. The Delegate submits that she did not err by not considering evidence that was not before her.

Final Reply of the Employer

120. In its reply submissions, the Employer emphasises that the Delegate failed to recognize that the parties had an understanding to postpone the Complainant's return to work until further notice. Alternatively, says the Employer, due to the Complainant's several refusals to accept work, the parties did not expect check-ins for the Complainant's return to work to be daily. The Employer argues there was no evidence to conclude that constant check-ins were required and that this is a fundamentally important to a finding of termination under section 66.

121. The Employer states that it did attempt to contact the Complainant to schedule him for work once his leaves ended, at least four times. The Employer argues that the Delegate did not have a sufficient basis to determine Mr. Boparai's evidence was not compelling when there is no contradicting evidence. The Employer also argues it was not open to the Delegate to impose an arbitrary standard on the Employer to contact the Employee more than four times.

122. The Employer further argues that there was undisputed evidence that the Complainant refused work on several occasions and only wanted to be called back when Truck 1318 was ready. There was also undisputed evidence, the Employer says, that Mr. Boparai did call, at least two times to say the truck was ready, in addition to several other communications with the Complainant in which the Complainant also refused to work.

123. The Employer reiterated its argument that the Delegate committed an error of law by concluding that: (1) it was a condition of employment for Mr. Boparai to constantly call the Complainant; and (2) if there was a such a condition, that there is any basis to conclude Mr. Boparai did not in fact call the Complainant sufficient to uphold this condition.

Analysis

124. The Tribunal has adopted the following definition of an error of law, which was set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA):

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.

125. The Employer argues that the Delegate erred on the third and fourth basis – i.e., she acted without any evidence or she acted on a view of the facts which could not reasonably be entertained. In those regards, this Tribunal has recently provided the following guidance in *4R Pet Services Inc. (Re)*, 2020 BCEST 40 at para 32:

> …Credibility assessments are within the purview of the decision maker. The issue about what weight to be given to certain evidence and about credibility are questions of fact, not law. The Tribunal has no jurisdiction to decide appeals on alleged errors of findings of fact unless such findings raise an error or law. Such errors may include making findings of fact without any evidence or where the evidence does not provide any rational basis for the finding made. The occasions on which an alleged error of fact amounts to an error of law are few (see *Britco Structures Ltd.*, BC EST # D260/03).

126. Section 66 of the *ESA* states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." The Tribunal has described section 66 of the ESA as follows in *Isle Three Holdings Ltd.*, BC EST # RD124/08 at para 32:

> The foundation of Section 66 is the administration of a statutory provision found in the Act, which, as the Tribunal has repeatedly confirmed, is remedial legislation "that exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed" Barry McPhee, BC EST#D183/97. In reviewing the language of Section 66 of the Act, it is apparent that "termination" does not necessarily follow from a finding of "substantial alteration" of a condition of employment. It is for the Director to determine if the employment has been terminated. If the Director determines that the employment has been terminated, the employee is entitled to compensation for length service pursuant to the Act. However, the Director must be guided in that exercise of discretion by the purposes and object of the Act, and in particular to the statutory purposes and object of the provisions relating to the termination of employment.

127. This Tribunal has also held that a decision made by the Director under section 66 of the *ESA* is a discretionary one (see *501546 B.C. Ltd. (Labour Unlimited Temporary Services) (Re)*, BC EST # D083/13 at para 30) and that the Tribunal's authority over an exercise of discretion by the Director is limited (see *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98).

128. In this case, the Delegate found that a condition of the Complainant's employment had been substantially altered and she then exercised her discretion to determine that the employment of the Complainant had been terminated. In my view, there were facts, identified in the Determination, to support the Delegate's finding that a condition of employment had been substantially altered, and there were also facts on which she exercised her discretion under section 66. I do not find there is any basis for fettering that exercise of discretion. It cannot be said that the Delegate acted on no evidence or acted on a view of the facts that cannot reasonably be entertained when finding that the Complainant was terminated under section 66 of the *ESA*.

129. There is evidence on the record – in fact, it was the Employer's own evidence – that the Complainant's schedule was not set in advance. Instead, the Employer would normally call the Complainant every evening and give him his schedule for the following day. The Delegate found that the Employer therefore had an obligation to communicate frequently with the Complainant to schedule him for work – i.e., doing so was a condition of the Complainant's employment.

130. In determining that the Employer breached that obligation (i.e., determining that the Employer substantially altered the condition of employment), the Delegate discussed the evidence of the parties that conflicted and explained her reasons for preferring certain evidence over other evidence. For example, the Delegate made factual determinations regarding the number of times the Employer communicated with the Complainant after his protected leaves ended and whether that satisfied the Employer's obligation. The Delegate also explained why she did not find evidence of the Employer on those issues compelling. Again, it is not open to me to interfere with the Delegate's assessment of credibility without a strong basis on which to do so, which I do not find in this case.

131. The Employer argues at length that the Delegate failed to appreciate there was an agreement between the parties that the Complainant would not return to work until Truck 1318 was available or until further notice of the Complainant. However, in order for that failure to rise to an error of law, the Employer must satisfy me that, by not finding the existence of the alleged agreement, the Delegate either: (1) acted without any evidence; or (2) acted on a view of the facts which could not reasonably be entertained. In my view, it cannot be said that the Delegate did either of those things, particularly when neither party explicitly suggested to the Delegate that such an agreement existed.

132. It also cannot be said that the Delegate failed to turn her mind to the issues of Truck 1318 and Vitafoam. They were both discussed at length in her Determination. The Delegate found that the Complainant *preferred* to drive truck 1318 and *requested* not to work for Vitafoam (a request that, according to the Complainant, the Employer had granted in the past) and that he also provided credible explanations for that preference and request. The Delegate did not accept the Employer's claim that the Complainant *refused* to work unless he could drive Truck 1318 of *refused* to work for Vitafoam.

133. I therefore dismiss this ground of appeal.

Alleged reversal of onus on the Employer

Argument of the Employer

134. In its Preliminary Submissions, the Employer alleges that the Delegate erred by placing a reverse onus on the Employer to establish that the Complainant quit his employment. The Employer argues that common law principles regarding constructive dismissal are relevant to determining if the employer has substantially altered a condition of employment for the purposes of section 66 of the *ESA*. Accordingly, the Employer says, the onus is on the party asserting constructive dismissal, which, in this case, is the Complainant.

135. The Employer also alleges that the Delegate's reasons are devoid of the proper analysis that is applied in common law constructive dismissal cases, specifically the analysis discussed by the Supreme Court of Canada in *Farber v. Royal Trust Co.*, [1997] 1 SCR 846, which was summarized by this Tribunal in *Short (Re)*, BC EST # D061/04:

- first identify the terms and conditions (both express and implied) of the parties' employment contract;
- second, determine whether the employer breached one or more terms of that contract by way of a unilateral change; and, if so,
- third, determine if that breach was "substantial" (s. 66) or, in terms of the common law, "fundamental" or "repudiatory".

Reply of the Delegate

136. The Delegate argues that the Complainant bore the onus of to make out his claim that he was constructively dismissed and that he met that onus. The Delegate states that the Complainant provided evidence that the Employer had ceased scheduling him for work. The Employer had chosen to not schedule the Complainant ahead of time, but rather to give him his schedule the night before, so the Employer was obligated to communicate frequently with the Complainant to schedule him for work. The Delegate argues that, in order to make out its defence to the Complainant's claim, the Employer had to demonstrate that it had attempted to contact the Complainant and had been unable to schedule him for work. The Employer did not, in the Delegate's view, provide sufficient evidence to demonstrate that.

Final Reply of the Employer

137. The Employer did not address this issue in its reply submissions.

Analysis

138. I have already discussed section 66 of the *ESA* above, including that a decision made by the Director under section 66 of the *ESA* is a discretionary one and that the Tribunal's authority over an exercise of discretion by the Director is limited. This Tribunal has also held that section 66 is akin to the common law notion of "constructive dismissal", but it is not a perfect analogue: see e.g., *Arctic Pearl Fishing Ltd. (Re)*, 2021 BCEST 18 at para 30.

139. This Tribunal has discussed the burden of proof generally in *Cameron*, BC EST # RD100/06 at para 17:

> In civil proceedings, the legal burden of proof does not play a part in the determination if a determinate conclusion can be made based on the evidence. That is, the legal burden will not have a bearing on the decision unless, after considering all of the evidence, the evidence is so evenly balanced that the tribunal can come to no sure conclusion. In such case the party having the legal burden will not have satisfied the onus on it [citations omitted].

140. In this case, the Delegate found that a condition of the Complainant's employment had been substantially altered and she then exercised her discretion to determine that the employment of the Complainant had been terminated. In my view, there were facts, identified in the Determination and discussed above, on which the Delegate properly exercised her discretion under section 66 and I do not find there is any basis for fettering that exercise of discretion.

141. This is not a case where the evidence was so evenly balanced that the Delegate could come to no sure conclusion. Accordingly, in my view, the legal burden did not have a bearing on the decision regardless of how the Delegate described it in the Determination.

142. I next turn to whether the Determination was devoid of the proper analysis regarding a claim of constructive dismissal. Even though the Delegate did not discuss the case law in finding that the Complainant was "constructively dismissed" under section 66, I do not agree with the Employer that the Determination was devoid of the proper analysis. To the contrary, in the Determination, the Delegate found that a term of the parties' employment contract was that the Employer would communicate frequently with the Complainant to schedule work, given that his schedule was generally only set the night before each shift. The Delegate determined that the Employer breached that term of the contract by way of a unilateral change – i.e., the Employer failed to communicate with the Complainant frequently to schedule work. The Delegate then determined that failing to schedule an employee for work is a "substantial" alteration of the conditions of employment. In my view, although the Delegate did not specifically discuss the applicable case law, she properly applied the common law principles of constructive dismissal as they apply to section 66 of the *ESA*.

Whether the Complainant's termination was due to illness

Argument of the Employer

143. In its Preliminary Submissions, the Employer briefly argues that the Delegate's determination that the Complainant was terminated due to protected leave or illness was grounded in a conclusion based on no evidence or, at best, based on circumstantial evidence, despite there being actual evidence to the contrary.

144. The Employer did not expand on this argument in its Completed Submissions, the Delegate did not address it in her reply, and the Employer did not address it further in its reply submissions.

Analysis

145. I assume that the "actual evidence to the contrary" referred to by the Employer was, at least in part, the Employer's December 24, 2020 response to the Delegate's preliminary findings letter. In that response,

the Employer submitted that it had reasons to terminate the Complainant other than his protected leaves – e.g., he strongly preferred Truck 1318, he was demanding and difficult to please, and he was not as reliable and easy to deal with as other drivers.

146. In addressing the reasons for the Complainant's termination in the Determination, the Delegate stated, in part:

> … The reality of the situation is that there is no evidence clearly indicating *why* Western Pacific terminated Mr. Shukla's employment for the simple reason that up until Mr. Joo's December 24, 2020 letter, Western Pacific took the position that it had *not* terminated Mr. Shukla's employment. There is no evidence whatsoever that anybody at Western Pacific spoke to Mr. Shukla about his performance for any reason, disciplined him in any way, or explained why he was not being scheduled for work. In the absence of this evidence, I am left to consider what seems most likely in the circumstances.
>
> The evidence before me indicates that in 2020, Mr. Shukla typically worked over 50 hours per week, five to six days per week. There is no evidence that his workload was lessened or he was given fewer shifts over time in 2020, which one might expect for an employee who is argumentative and unreliable. He worked steadily until March 4, 2020, when he ceased working because he took a leave from work. He worked only two shifts afterwards: 8.5 hours on March 14, 2020 and 8.5 hours on March 16, 2020. In my view, these facts strongly indicate that Mr. Shukla was terminated because he took leaves from work. Whether this decision was made directly because of the leaves or because Mr. Shukla's decision to take the leaves led to an impression that was an unreliable employee is immaterial: either way, Western Pacific terminated his employment because of the leaves. There is no compelling evidence that Western Pacific ceased scheduling Mr. Shukla for any other reason.

147. In my view, it cannot be said that the Delegate acted without any evidence or acted on a view of the facts which could not reasonably be entertained when she found that the Complainant was terminated because he took protected leaves. In the Delegate's view, the evidence demonstrated that the Employer had no issue with the Complainant's work until he took the protected leaves, immediately after which he was terminated. It is not the function of this Tribunal to reweigh the evidence with a view to reaching an independent determination.

148. I also note that, in any event, section 126(4) of the *ESA* explicitly states that the burden is on the employer to prove that an alleged contravention of Part 6 or a leave allowed by the *ESA* is not the reason for terminating the employment or for changing a condition of employment without the employee's consent. Accordingly, the Employer had the burden to prove that the Complainant's employment was not terminated due to his protected leaves and, in the Delegate's view, it failed to do so.

149. I therefore dismiss this ground of appeal.

Alleged error in calculating the "make whole" remedy

Argument of the Employer

150. In its Preliminary Submissions, the Employer argues that the Delegate erred in law in calculating the "make whole" remedy under section 79 of the *ESA*. In particular, the Employer argues that, when the

Complainant started working at the other company, it "stopped the clock" for the make whole remedy. In other words, the Employer should not be liable for wages owed to the Complainant after the Complainant began that employment.

151. The Employer argues that there is no basis in law for the Delegate's finding that, because the new employer was not obeying safety standards, the employment at the other company was not suitable alternative employment. The Employer argues that it is trite law that when an employee finds new employment, the make whole remedy is satisfied.

152. In the Determination, the Delegate stated that: "It would be poor policy to extinguish a section 79 remedy where an employee – who has made a good-faith effort to mitigate their losses by searching for and accepting alternative employment – is compelled to quit that due to legitimate safety concerns". The Employer argues that such reasoning is unsupported by any legal principle and constitutes an error of law. The Employer also argues that it was not given an opportunity to challenge the Delegate's legal conclusion on this point, which amounts to a breach of natural justice.

153. The Delegate did not address these alleged errors in her reply. The Employer also did not address them further in its Completed Submissions or reply submissions other than to request that, in the event this Tribunal finds that the Delegate has not erred for any of the reasons raised in the appeal, then the Employer should be given the opportunity to make further submissions on alleged errors made regarding the remedy.

Analysis

154. I first note that this Tribunal recently held in *R.S. Gem Connection Ltd. (Re)*, 2021 BCEST 36 at para 79, that: "in determining the wage recovery period, the governing principle is to return an employee, as far as reasonably possible, in an economic sense, to the position the employee would have been in had the contravention not occurred."

155. A remedy chosen by the Director is discretionary, including an amount awarded under section 79(2)(c) of the *ESA: Maltesen Masonry Ltd. (Re)*, BC EST # D070/10 at para 67. As discussed above, the Tribunal's authority over an exercise of discretion by the Director is limited.

156. In this case, the Delegate considered several matters in deciding what compensation should be paid to the Complainant, including his mitigation efforts, whether he quit his employment at one point, and the effect of COVID-19 on the transportation industry. In my view, the Delegate reasonably exercised her discretion under 79 of the *ESA* and I do not find any basis for disturbing that exercise of discretion.

157. Moreover, in my view, whether the employment at the other company was suitable alternative employment was a finding of fact, so it is only appealable if the error rises to an error law, the test for which is discussed above. In my view, it cannot be said that the Delegate acted without any evidence or acted on a view of the facts which could not reasonably be entertained in finding that the employment at the other company was not suitable alternative employment. To the contrary, the Delegate gave reasons for her findings, specifically that it was not suitable alternative employment because there were significant safety concerns.

158. I also do not agree that the Delegate breached the principles of natural justice. The Delegate's preliminary findings letter (Appeal Record at page 114), a copy of which was provided to the Employer on December 8, 2020, discussed the Complainant's brief employment at the other company in June or July 2020 and how he quit after two days because the new employer was not obeying safety standards. The Delegate went on in the preliminary findings letter to conclude that the Complainant was entitled to an amount equal to wages he would have earned to September 2020, well after his brief employment at the other company. The Employer could have challenged this factual finding and legal conclusion before the Delegate issued the Determination, but it did not do so.

159. I therefore dismiss this ground of appeal. I address the Employer's request to file additional submissions on remedy below.

Error in calculation of remedy

Argument of the Employer

160. In its Preliminary Submissions, the Employer alleges that the Delegate failed to deduct the section 63 statutory pay from the section 79 "make whole" remedy. This alleged error was not addressed in the Employer's Completed Submissions, the Delegate's submissions or the Employer's reply submissions.

Analysis

161. In the Determination, the Delegate required the Employer to pay the Complainant, among other things, $1,103.25 compensation for length of service in accordance with section 63 of the *ESA*, which was equivalent to one week of wages. The Delegate also required the Employer to pay the Complainant 22 weeks of wages totalling $32,278.18 (less $2,817.20 for amounts received from other sources), as part of the "make whole" remedy in accordance with section 79 of the *ESA*.

162. I agree with the Employer that the Delegate appears to have failed to deduct the section 63 statutory pay from the section 79 "make whole" remedy, which resulted in a double payment to the Complainant for one week of wages.

163. I find the Director committed an error in law in the calculation of the wages payable to the Complainant. Accordingly, the wages payable to the Complainant should be reduced by $1,103.25.

REQUEST FOR ADDITIONAL SUBMISSIONS ON REMEDY

164. I will now address a request of the Employer to provide additional submissions on the section 79 remedy awarded by the Delegate.

Request of the Employer

165. As discussed above, in its Preliminary Submissions, the Employer argues that the Delegate erred in law in calculating the "make whole" remedy under section 79 of the *ESA*. The Employer did not address these arguments in its Completed Submissions, but it did request that, if the Tribunal finds that the Delegate

has not erred for any of the reasons raised in its appeal, then the Employer should be given the opportunity to make submissions on errors made in the Determination regarding the remedy.

Position of the Delegate

166. The Delegate objects to the Employer providing additional submissions on the section 79 remedy. The Delegate argues that the Employer has not provided any reasons why it was unable to make submissions on the section 79 remedy as part of its appeal submissions, for which it already received an extension.

Response of the Employer

167. The Employer states that its request to postpone submissions on the remedy was simply to avoid costs for all parties, and to increase efficiency for the Tribunal. In the Employer's view, the Determination should be cancelled, so there is no point for the parties to provide submissions on remedy, unless, of course, the Tribunal does not cancel the Determination. The Employer also states that it would not be an effective use of resources to provide submissions for each possible determination of this Tribunal on the merits, which may have different effects on the appropriate remedy.

Decision on request for additional submissions on remedy

168. I note that the Employer did not specify what submissions it intends to make if its request is granted. For example, it is not clear whether its submissions would: (1) simply broaden and more fully particularize its ground of appeal regarding whether the other employer was suitable alternative employment; or (2) go beyond that issue and perhaps even raise different grounds of appeal not yet identified. If it is the former case, then, in my view, my discretion in deciding whether to grant the request would be exercised pursuant to Rules 1 and 2 of the Tribunal's Rules of Practice and Procedure ("Rules"). If it is the latter case, then my discretion in deciding whether to grant the request would be exercised pursuant to section 109 of the *ESA*, because the appeal period would need to be extended.

169. I already exercised my discretion pursuant to section 109 of the *ESA* to extend the appeal period for one week from February 22, 2021 to March 1, 2021, as requested by the Employer. I discussed and considered the *Niemisto* criteria above in deciding to do so. I will again consider those criteria in the context of this request even though, in my view, I am only required to do so with respect to exercising my discretion under section 109 of the *ESA*.

170. I find that, in this case, there has been a genuine and ongoing *bona fide* intention to appeal the remedy granted in the Determination, given that the Employer raised alleged errors regarding the remedy in its Preliminary Submissions. The Complainant and Delegate were also aware of this intention.

171. However, the Employer has not provided a reasonable and credible explanation for its failure to file its submissions regarding the remedy within the statutory time limit (as extended). The Employer says that it requested to postpone submissions on alleged errors regarding the remedy because doing so would avoid costs for all parties and increase efficiency for the Tribunal. I disagree. In my view, it would be more efficient, particularly for the Tribunal, to consider all issues at once rather than in a piecemeal fashion. I appreciate that the Employer is concerned about its costs, but that is something parties must consider when deciding whether to file an appeal in accordance with the statutory timelines.

172. I also find that, for the reasons discussed above, the Employer does not have a strong *prima facie* case regarding the alleged error identified in its Preliminary Submissions regarding the Complainant's brief employment at the other employer. The Employer has not described any other alleged errors in any of its submissions.

173. For those reasons, when taking into consideration the *Niemisto* criteria together as a whole, I decline to exercise my discretion to allow further submissions on alleged errors in the remedy as requested by the Employer, whether pursuant to the Rules or section 109 of the *ESA*.

ORDER

174. Pursuant to section 115 of the *ESA*, I order the Determination dated January 15, 2021, be varied to show Lovedeep Shukla's wage entitlement to be $35,323.69 (as of January 15, 2021) together with any interest that has accrued under section 88 of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal