Citation: Robert Cornelius (Re)
2021 BCEST 74

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Robert Cornelius
("Mr. Cornelius")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Shafik Bhalloo

FILE NO.: 2021/052

DATE OF DECISION: September 1, 2021

DECISION

SUBMISSIONS

Robert Cornelius — on his own behalf

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the "*ESA*") by Robert Cornelius ("Mr. Cornelius") of a determination issued by Jake Kislock, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on April 27, 2021 (the "Determination").

2. The Determination and the accompanying Reasons for the Determination (the "Reasons") found that there was no employment relationship between Mr. Cornelius and his alleged employer, Shuswap Lakes Vacations Inc. carrying on business as Twin Anchors Houseboats ("SLVI"). Thus, Mr. Cornelius' complaint dated September 24, 2019 (the "Complaint"), in which he claimed overtime pay, unpaid vacation and compensation for length of service, was dismissed.

3. The deadline for filing the appeal of the Determination was June 4, 2021.

4. On June 8, 2021, the Tribunal received a request, by fax, from Mr. Cornelius for an extension until "Monday June 11 to provide new information to support [his] reasons for an appeal".

5. On June 9, 2021, Mr. Cornelius spoke with the Tribunal's Registry Administrator and the latter informed Mr. Cornelius that the Tribunal was granting him an administrative extension until Monday, June 14, 2021, to provide the Tribunal with his complete appeal submission. He was also informed that it would be the Panel who is assigned his appeal who would decide his request for an extension to the statutory appeal period.

6. On Thursday, June 17, 2021, the Tribunal received, by fax, Mr. Cornelius' appeal dated June 14, 2021.

7. Mr. Cornelius appeals the Determination on the grounds that the Director erred in law, failed to comply with principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was made.

8. Mr. Cornelius has also applied under section 109(1)(b) of the *ESA* for an extension of the appeal period to June 14, 2021, to appeal the Determination.

9. In correspondence dated June 22, 2021, the Tribunal acknowledged receiving the appeal and the request to extend the appeal period, requested the section 112(5) record (the "record") from the Director, and notified the Director and SLVI that submissions on the merits of the appeal were not being sought from them at that time.

10. The record was provided to the Tribunal by the Director. A copy was delivered to Mr. Cornelius and SLVI and both were provided with the opportunity to object to its completeness by July 30, 2021. No objection to the completeness of the record was received from either party as of July 30, 2021.

11. On August 6,2021, the Tribunal received an e-mail from Mr. Cornelius sent in response to the Tribunal's request for submissions on the completeness of the record. Mr. Cornelius advised that he did not agree with "some of the statements" provided by SLVI and wished to provide the Tribunal with additional documents in support of his appeal and to rebut the statements made by SLVI.

12. On the same date, August 6, 2021, the Tribunal replied to Mr. Cornelius, by e-mail, to advise that, at this stage of the appeal process, the Tribunal was not requesting supplementary material or submissions from him. The Tribunal requested that he should provide his objections to the completeness of the record by no later than 4:00 pm on August 6, 2021. However, the Tribunal did not receive a response from Mr. Cornelius.

13. On August 9, 2021, the Tribunal's Registry Administrator left a voicemail for Mr. Cornelius requesting that he contact the Tribunal to confirm that he does not have any objections to the completeness of the record.

14. On August 11, 2021, the Tribunal let all the parties know that it had not received any objections to the completeness of the record and the appeal was assigned to a panel.

15. On August 12, 2021, the Tribunal received an e-mail from Mr. Cornelius requesting an opportunity to provide additional documents in support of his appeal.

16. In both his emails to the Tribunal, on August 6 and August 12, 2021, it appears that Mr. Cornelius is under the impression that SLVI has made submissions to the Tribunal in the appeal. The Tribunal, by letter on August 12, 2021, informed Mr. Cornelius that SLVI has not made any submissions to the Tribunal on the merits of the appeal and that the documents that were disclosed to him on July 16, 2021, were documents that were before the Director at the time the Determination was made and were provided to the Tribunal by the Director as required under section 112(5) of the *ESA.* The Tribunal also invited Mr. Cornelius to provide any additional documents in support of his appeal by August 26, 2021.

17. On August 27, 2021, Mr. Cornelius sent the Tribunal additional submissions on the merits and some documents in support of those submission. I have reviewed these documents and they consist of either documents that were before the Delegate before the Determination was made or documents that were not. With respect to the latter, Mr. Cornelius wishes to rely upon them in the appeal of the Determination and I propose to deal with their admissibility in this appeal under the subheading "New evidence" in the "Analysis" section below. As for the record adduced by the Director in this appeal, Mr. Cornelius does not appear to raise any objections to its completeness and the Tribunal finds it is complete.

18. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons, the appeal, the written submissions of Mr. Cornelius, and my review of the material that was before the Director when the Determination was being made. Under subsection 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under subsection 114(1), the Director

and SLVI will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in subsection 114(1), it is liable to be dismissed. In this case, I will consider whether Mr. Cornelius should be granted an extension of the statutory time period for filing an appeal and whether there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS AND THE DETERMINATION

20. SLVI operates a houseboat rental business in British Columbia.

21. A BC Registry Search (the "Registry Search") conducted online on October 4, 2019, with a currency date of July 26, 2019, indicates that SLVI was incorporated on March 15, 1991, and underwent a name change on July 3, 1998. It has four directors, two of whom are also officers. The one director and officer who participated in the investigation of the Complaint is Todd W. Kyllo ("Mr. Kyllo").

22. Mr. Cornelius worked for SLVI from May 15, 2018, until June 26, 2019. He carried out fiberglass repair work on houseboats owned by SLVI at a rate of pay of $40.00 per hour.

23. On September 24, 2019, Mr. Cornelius filed the Complaint against SLVI. As indicated in the "Overview" section above, Mr. Cornelius claimed that he was owed overtime pay, vacation pay and compensation for length of service.

24. The Delegate investigated the Complaint.

25. In the Reasons, the Delegate notes that he was tasked with the following questions in the investigation of the Complaint:

    (i) Whether Mr. Cornelius is an employee defined under the *ESA*?

    (ii) If so, did SLVI owe him any overtime wages, vacation pay or compensation for length of service?

26. Mr. Cornelius, on his own behalf, and SLVI, through its representative, Mr. Kyllo, made submissions to the Delegate in the investigation of the Complaint.

27. Mr. Cornelius contended that although SLVI asserted that he was a hired as a contractor, he was an employee. He said his employment was terminated by SLVI the day after he shared with some of his co-workers that he had filed a discriminatory action complaint against SLVI with WorkSafe BC and sought their support.

28. It is not disputed between the parties that Mr. Cornelius' engagement with SLVI was terminated by the latter on June 26, 2019. Mr. Cornelius provided a document from SLVI which said that he had done his project and there was no more work for him. He also provided an email of June 26, 2019, from Mr. Kyllo,

the President of SLVI, advising him that he was fired and should remove his items off the property, or he would "have a tow truck there at 430 to remove it".

29. Mr. Cornelius claimed that he did not receive any vacation pay from SLVI and only received straight time for overtime hours he worked. He was also not paid any compensation for length of service upon termination.

30. In support of his contention that he was an employee of SLVI, Mr. Cornelius provided a ruling, dated September 12, 2019, from Canada Revenue Agency ("CRA") confirming that he was an employee and that his employment was insurable and pensionable under the *Employment Insurance Act* and Canada Pension Plan (the "ruling"). He also provided a letter dated March 9, 2020, from CRA, in response to SLVI's appeal of the ruling, wherein the CRA confirmed the ruling that Mr. Cornelius' employment was pensionable and insurable.

31. Mr. Cornelius also provided a copy of a document from WorkSafeBC confirming its original decision that Mr. Cornelius is a "worker under the Act" and that he was "an employee of [SLVI] and covered under their account".

32. Mr. Cornelius also submitted that:

- SLVI directed all the work he performed.
- He could not send an alternate worker in his stead if he was not available.
- SLVI would indicate the boat repairs that were required, and he would perform the necessary repairs.
- SLVI would inspect the work and sign off on it.
- Mr. Kyllo emailed him on January 31, 2019, advising that he report to work and be paid or that he (Mr. Kyllo) would find someone else to handle the work.
- SLVI provided the tools and the equipment for the work he was undertaking for SLVI.
- He had a relationship with SLVI going back to the previous summer and that there was no written agreement between the parties but only a verbal agreement about wages and housing.
- SLVI paid the rent and provided accommodation while he was working for SLVI.
- He and Mr. Kyllo had email exchanges since May 2018 wherein they discussed his (Mr. Cornelius') rate of pay and hours of work and Mr. Kyllo offered him accommodations.
- He only worked for SLVI and no other companies.
- The hours he worked, including overtime, would have prevented him from working elsewhere.
- His wholesale account for fiberglass supplies was cancelled for lack of use over the last two years because he did not have other customers during that period because SLVI was his only source of income.

- He sent an email to Mr. Kyllo on June 20, 2019, in which he asked Mr. Kyllo whether the latter will have work for him after Canada Day or should he be "booking other work."
- He submitted timesheets and invoices in his name and was paid weekly by SLVI, in the same time period and by the same method as other employees.
- He was paid by cheque.

33. Mr. Cornelius also provided the Delegate with a total of fourteen (14) invoices he sent to SLVI between February 11, 2019, to June 28, 2019. All of the invoices included his tax registration number. Based on these invoices, Mr. Cornelius appeared to work five days a week but his hours per day and hours per week varied during his engagement with SLVI.

34. He claimed he was owed $2,000 in annual vacation pay and $3,200 in compensation for length of service. He did not specify the amount he was owed for overtime wages.

35. On behalf of SLVI, Mr. Kyllo submitted that:

- Mr. Cornelius was hired as a contractor and not an employee.
- He had previously worked for SLVI, in the same role, four times.
- He was contracted to do all specialized fiberglass work on five houseboats of SLVI as he is an expert in the field.
- He brought his own tools and equipment to the worksite and SLVI would review the boats when Mr. Cornelius completed the work.
- SLVI never told Mr. Cornelius what to do as he was the expert in this field.
- He made his own work schedule and did not work every day and only came in on some days.
- He never attended any employee safety meetings and did not clock-in with facial recognition system that SLVI's employees were required to do.
- He was paid an hourly wage and never any overtime or vacation pay.
- He set his rate of pay and this was agreed to by SLVI.
- He was the only person at SLVI who was paid by cheque unlike SLVI's eighty employees who are paid through an electronic payment system.
- He submitted invoices to SLVI with a GST number.
- SLVI did not make any source deductions from his paycheques.
- He refused to become an employee of SLVI and refused to provide fiberglass technician services unless he was paid as a contractor on a contractor service arrangement.

36. Mr. Kyllo also submitted that Mr. Cornelius had other jobs and told SLVI, on different occasions, that he was doing other work and could not come in. SLVI provided a series of text messages between Mr. Cornelius and Robert Matthews ("Mr. Mathews"), an employee of SLVI, that purportedly show that Mr.

Cornelius had the freedom to come and go as he saw fit. The Delegate meticulously summarizes these texts at page R6 of the Reasons:

> In response to a message from Mr. Matthews on January 15, 2019, regarding his schedule for the day, the Complainant responded as follows: "Bob, I just got back from Kelowna, it took much longer to deal with selling off my van than I thought, missing paper work etc. I was off to get a bite when I seen you. I'm returning a bunch of messages and I don't see a point of coming in this afternoon. I'll be on track tomorrow. I don't like missing work for a lot of reasons but I had to get my buddy back on the road."
>
> On January 31, 2019, the Complainant sent the following text message to Mr. Matthews when asked If he was working on the boats: "No, I had to leave early yesterday to juggle some money around. I'm in town now."
>
> On March 20, 2019, the Complainant sent the following text message to Mr. Matthews when asked if he was coming into work: "Yes, I'm running behind schedule, I'm trying to get some cash to a friend in trouble in Salmon Arm".
>
> On May 14, 2019, the Complainant sent the following text message to Mr. Matthews: "Had to duck out early, will be in early tomorrow."
>
> On June 6, 2019, the Complainant sent the following text message to Mr. Matthews: "I just left the shop, working on another project for a few hours. Outdoor job, got to beat the rain, also I will be working this weekend for you guys, I think. But my gut tells me I'm done after this boat."
>
> On June 27, 2020, the Complainant sent the following text message to Mr. Matthews: "I have another invoice that I would like to get to you."

37. With respect to Mr. Cornelius assertion that he was fired by SLVI as a retaliatory measure for filing his WorkSafeBC complaint, Mr. Kyllo denied that claim. Mr. Kyllo said that Mr. Cornelius had finished his work on the last boat for SLVI when he got into an argument with another employee. An altercation ensued about a text message and Mr. Cornelius told SLVI to pay him $5,000.00 and he would not pursue a complaint about the issue. SLVI did not accede to Mr. Cornelius' request and therefore, he filed a complaint with WorkSafeBC. According to Mr. Kyllo, Mr. Cornelius was never fired; the work just came to an end.

38. In deciding whether Mr. Cornelius was an employee of SLVI or a contractor, the Delegate reviewed the evidence of both parties and applied the definitions of "employee" and "employer" in section 1 of the *ESA,* while being mindful of the instructive purposes of the *ESA* in section 2 and the remedial nature of the legislation. In concluding that Mr. Cornelius was not an "employee" under the *ESA* but in business for himself and the *ESA* did not apply to him, the Delegate reasoned as follows:

> The evidence indicates that the Complainant was performing work on his own account, not on behalf of [SLVI]. The Complainant negotiated the terms of his relationship with [SLVI], including the scope of his work and his rates. The arrangement agreed by the parties covered a specific period of time and was confined to fiberglass repair work on specific houseboats owned by [SLVI].
>
> [SLVI]'s business is the rental of houseboats for vacation rentals. The work done by the Complainant was not work normally performed by [SLVI] employees.

> The Complainant chose how he completed tasks which [SLVI] identified, and was responsible to [SLVI] only for completion of these discrete tasks. The Complainant provided evidence that he was working a set schedule mandated by [SLVI], however, the invoices provided by the parties as well as text messages sent-by the Complainant indicate that he came and went from the work site as he saw fit and did not maintain a work schedule that would be expected of an employee.
>
> Further, text message and email communication sent by the Complainant to various representatives of [SLVI] indicate that the Complainant was often absent from the worksite while working on other work projects not related to [SLVI]. The Complainant provided evidence that his only source of income was his work with [SLVI], however-his own communications directly contradict this as he makes several references to other jobs that he was working on. The best evidence on this point is an email the Complainant sent to Mr. Kyllo on June 20, 2019, where he asks if [SLVI] will have work for him after Canada Day or whether he should be, "booking other work."
>
> Additionally, based on the Complainant's communications, he frequently left work to deal with a variety of personal matters unrelated to his work with [SLVI].
>
> The Complainant provided evidence that he was paid in the same manner as the employees of [SLVI], however, the Complainant submitted invoices to [SLVI] which their employees did not do and he also did not clock in using the facial recognition system.

39. With respect to the CRA ruling finding Mr. Cornelius was an "employee" and his employment insurable and pensionable under the *Employment Insurance Act* and Canada Pension Plan and the decision of WorkSafeBC that he was a "worker" under the *Workers Compensation Act*, the Delegate gave both little weight because they are "decisions made in relation to other pieces of legislation and are not directly relevant to the issue before the Employment Standards Branch".

ARGUMENTS

40. Mr. Cornelius advances submissions on both the application to extend the appeal period and the merits of the appeal. With respect to his request to extend the appeal period, in his fax to the Tribunal on June 8, 2021, Mr. Cornelius says that he "was given the wrong fax #" and "Did Fax on Friday but to the wrong fax #". He does not say who gave him the wrong fax number. It is also not clear what precisely he faxed to the Tribunal on Friday (which was June 4, 2021, when the appeal period was expiring). His June 8 fax requests an extension to Monday June 11 "to provide new information to support my reasons for an appeal". This suggests that the purported fax of Friday, June 4, was most likely the same, namely, a request for an extension of the appeal period and not an appeal form or appeal submissions.

41. On June 17, 2021, Mr. Cornelius faxed a copy of his email of June 16, 2021, to the Tribunal. In that email, he provides additional submissions in support of his extension request. He states, "I was out of my prescription for sleep and became ill for a few days (sic) getting it renewed". He also submits that SLVI "has been granted many extension" (sic) and given "the length of time [the Delegate took] to do his report", he should get an extension of the appeal period. He says that he has "a right to a second opinion on this matter".

42. On June 17, 2021, Mr. Cornelius faxed the Tribunal his Appeal Form (dated June 14, 2021), and submissions on the merits of his appeal. In the Appeal Form, he has checked off all three grounds of

appeal available under section 112(1) of the *ESA*, namely, the Director erred in law, failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made.

43. While Mr. Cornelius does not clearly set out his submissions under each ground of appeal, it appears that under the error of law ground of appeal, he is disputing the Director's finding that he is *not* an employee of SLVI. He contends that the ruling of the CRA and the decision of WorkSafeBC and other "government agencies" that found him to be an "employee" or "worker" should have been determinative of the question of his status under the *ESA*. He then reiterates much of the evidence he provided to the Delegate during the investigation and summarized by the latter at pages R3 and R4 of the Reasons (and in paragraph 32 above). I have read those submissions carefully and do not find it necessary to reiterate them here.

44. Mr. Cornelius has also included, with his appeal submissions, emails from Mr. Kyllo of January 31 and June 20, 2019. Both emails are in the record and were considered by the Delegate before the Determination was made. In the first email, Mr. Kyllo says to Mr. Cornelius to "show up for work and you will be paid on time otherwise pack up your shit and fuck off" and in the second email Mr. Kylo indicates to him that he will have some time off until the next boat comes. Mr. Cornelius contends that these emails are proof of "a level of control [SLVI] had over [him]". He also says he did "not have access to the facilities" and could "not come and go" as he pleased, he had to abide by SLVI's schedule. He also reiterates that SLVI provided the tools and housing for him and he had "zero risk".

45. He says that his email exchanges with Mr. Mathews is evidence that he was reporting to his superior. He asks, if he was able to come and go as he pleased, why would he be reporting to Mr. Mathews?

46. With respect to the natural justice ground of appeal, Mr. Cornelius says "I do find a high probability that the [Delegate] may have been biased in his opinion [a]s I did lose my temper on him a couple of times via email" because he did not prepare a "timely report". He submits that he was told by the Delegate, last year, that the investigation of the Complaint was completed and that he was "top priority" and then "months go by" and he did not hear from the Delegate and was given more "false promises of a timely report [w]hich took forever". He states he feels "strange" that the Delegate would take SLVI's "word for it" over the rulings from governmental agencies that found he was an employee.

47. On August 27, 2021, Mr. Cornelius made further submissions on the merits of the appeal consisting of one (1) page of written submissions and ten (10) pages of documents. In the written submission, he reiterates his contention that he was an employee of SLVI and not a subcontractor. He submits that helping a friend on the weekend does not make him a subcontractor and asks whether it makes others employed with SLVI subcontractors when they "do side jobs". He also points to some email exchanges with Mr. Kyllo in May 2018, that were already adduced in the investigation of the Complaint and contained in the record and also referred to in the Reasons, at page R4, to contend that they show that he was "promised a wage", "a place to stay" and a month's work. He says it is untrue that he was offered "full time work in April 2018". He also resubmits Mr. Kyllo's emails of January 20 and 31, 2019, referred to above, to argue that these emails show that SLVI controlled his schedule and that the work at SLVI had not ended contrary to the latter's contention. He contends that he was fired by SLVI and that SLVI is not truthful. He says that SLVI and its counsel "will lie to suit their needs" and that he is "in the process of filing a complaint with the law society" against SLVI's counsel for lying to "employment standards and to the supreme court".

48. With respect to the new evidence ground of appeal, while Mr. Cornelius does not specifically set out what evidence he is proffering as "new evidence", in the 10 pages of documents he submitted with his additional submissions on the merit of the appeal on August 27, 2021, the following three do not appear to be in the record and were not before the Director when the Determination was made:

(i) An email of August 1, 2020, from a party called JD to Mr. Cornelius sympathizing with him that he is "still going through stuff with [SLVI]" and that he "did a good job" and was "easy to get along with";

(ii) A single page from a Notice of Civil Claim filed by SLVI against Mr. Cornelius wherein SLVI says that, in about April 2018, SLVI entered into a "Subcontractor Agreement" with Mr. Cornelius who turned down an offer of "exclusive employment" with SLVI and advised that "he wished to be free to do other contract work" and submitted invoices to SLVI for work based on hours worked and charged and received GST for work performed.

(iii) Page 3 from a letter dated April 29, 2021, from SLVI's counsel that appears to be submissions of SLVI to WorkSafeBC. Mr. Cornelius marks that part of the submission where counsel sys "SLVI maintains that Mr. Cornelius refused to be an employee and insisted on a contractor arrangement".

49. Based on the brief written submissions accompanying the documents, it would appear that the last two documents were adduced by Mr. Cornelius to show that SLVI was lying to Court and to WorkSafeBC when alleging that he was in a subcontractor relationship with SLVI and turned down SLVI's employment offer. As for the first document, the email from a "JD", it is not clear in the written submissions the purpose of this email except to show perhaps that Mr. Cornelius was ill treated by SLVI and he was a good employee.

ANALYSIS

50. The grounds of appeal under the *ESA* are set out in section 112(1):

Appeal of director's determination

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

a) the director erred in law;

b) the director failed to observe the principles of natural justice in making the determination;

c) evidence has become available that was not available at the time the determination was being made.

51. The Tribunal has consistently held that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).

52. Section 112(1) does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by

the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd*. BC EST # D260/03. The Tribunal has adopted the following definition of "error of law" in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the Assessment Act];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

53. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation. If allegations of bias are made against the adjudicator, the party alleging bias is subject to a "high evidentiary bar" and must adduce clear and objective evidence to demonstrate bias or apprehension of bias: See *Re Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98).

54. Having delineated some of the broad principles applicable in this appeal, I will consider all three grounds of appeal checked-off by Mr. Cornelius in the Appeal Form below.

(i) Error of law

55. The question of whether a person is an employee under the *ESA* is a question of mixed fact and law and requires application of the facts as found to the relevant legal principles relating to those provisions.

56. The Tribunal has often said that a decision by the Director on a question of mixed fact and law requires deference. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court explained that: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error: see *Re Microb Resources Inc.*, 2020 BCEST 93.

57. Having said this, an individual's status under the *ESA* is determined by an application of the provisions of the *ESA.* Common law tests for employment developed by the courts are subordinate to the definitions contained in the *ESA*. In *Kimberley Dawn Kopchuk,* BC EST # D049/05 (Reconsideration denied BC EST # RD114/05), the panel explained this succinctly as follows:

> The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLii), [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the

Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her own tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

58. In this case, I find that the Delegate correctly identified the legal framework within which the questions of whether a person is an employee under the *ESA* is assessed: see page R7 of the Reasons with relevant parts reproduced in paragraph 38 above. The facts and factors considered by the Delegate, at pages R7 and R8 of the Reasons, support the finding that Mr. Cornelius was an employee of SLVI. This Tribunal is not in a position to interfere with that finding. As indicated by the Tribunal in *Re Richard Place*, 2020 BCEST 10:

> Provided the established principles have been applied, a conclusion on whether a person is an employee under the *ESA* is a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is … a question over which the Tribunal has no jurisdiction. The application of the law, correctly found, to the facts as found by the Director does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal [in *Gemex*, *supra*].
>
> This question of whether the Director committed an error of law on the facts, framed in the words used in the definition of error of law, is whether the Director acted without evidence or acted on a view of the facts which could not reasonably be entertained.

59. I find the Delegate did not act without evidence nor on a view of facts which could not be reasonably entertained. As indicated previously, he identifies the evidence he obtained from the parties in the investigation and persuasively explains his reasons, at pages R7 and R8 of the Reasons, for reaching the conclusion he did on those facts, that Mr. Cornelius is *not* an employee of SLVI. I find the Delegate's findings on the facts were neither perverse nor inconsistent with the evidence but rationally grounded, compelling and persuasive. Accordingly, I find the Delegate did not commit an error of law in concluding that Mr. Cornelius is not an employee of SLVI. In the circumstances, I dismiss the error of law ground of appeal.

60. Having said this, I find that this is a case of the appellant, Mr. Cornelius, desiring to reargue his case before the appeal Tribunal, using largely the same evidence presented in the investigation of the Complaint, with a view to obtaining a more favorable result this time. As indicated in his faxed copy of the email of June 16, 2021, to the Tribunal, he believes he has "a right to a second opinion on this matter". However, the

arguments and emails Mr. Cornelius proffers in the appeal were presented to the Delegate during the investigation and were not only considered by the Delegate and but also referred to in the Reasons. The Tribunal has repeatedly said that an appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced in the investigation stage and properly rejected in the determination. As indicated by the Tribunal in *Chilcotin Holidays Ltd.*, BC EST # D139/00:

> The purpose of an appeal is not simply to allow an aggrieved party a second chance to argue the same case that was argued unsuccessfully to the Director during the investigation. A party appealing a Determination must show it is wrong, in fact or in law. In the context of an appeal based on an alleged error on the facts or the conclusion to be drawn from the facts, a party saying, in effect: "I don't disagree that these are the facts and that the Director had all these facts, but I disagree with the result", will not be successful. The Tribunal is not a forum for second guessing the work of the Director.

61. As indicated previously, the grounds of appeal, in section 112 of the *ESA* do not provide for an appeal based on errors of fact. The Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, *supra*. Here, as indicated above, there is no error of law on the part of the Delegate.

(ii) Natural Justice

62. In *Imperial Limousine Service Ltd.,* BC EST # D014/05, the Tribunal explained the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96).

63. The focus of Mr. Cornelius' appeal under the natural justice ground is based on his belief that there is "a high probability that [the Delegate] may have been biased in his opinion" because he (Mr. Cornelius) "los[t] [his] temper on him a couple of times via email" because he felt that the Delegate was taking too long to decide his Complaint. On a closer reading of the emails Mr. Cornelius sent to the Delegate, Mr. Cornelius, by any objective standard, was outright offensive and obnoxious to the Delegate threatening to file "a civil suit" against him; calling him "a joke"; threatening "to make sure] that he] is removed" from his position; leveling profanities against him; alleging that he was "paid off to rule against the CRA" and threatening to "bring [him] as much grief".

64. The Tribunal has consistently stated that an allegation of bias cannot be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias always lies with the person who is alleging its existence. Mere suspicions, or impressions, are not enough. In *Dusty Investments Inc. supra,* the Tribunal stated that the test for determining bias, either actual bias or a reasonable apprehension of bias, is an

objective one and the evidence presented should allow for objective findings of fact. The Tribunal also added that:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541

65. In *R. v. S. (R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, the Supreme Court added the following concern when allegations of bias are made against decision-makers:

> Regardless of the precise words used to describe the test (of apprehension of bias), the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the ***personal*** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

66. In this case, Mr. Cornelius' apprehension of bias on the part of the Delegate is but speculative; it is entirely based on his subjective assessment of the Delegate. He thinks there is "a high probability" that the Delegate "*may* have been biased in his opinion" (italics mine). He does not provide any objective evidentiary basis for his allegations. I find that a reasonable person, fully apprised of the relevant facts in this case, would not, or would not be able to, conclude that the Delegate was biased in making the Determination. I find Mr. Cornelius has not sufficiently demonstrated bias or proven his apprehension of bias on the part of the Delegate. Therefore, the natural justice ground of appeal also fails.

67. Having said this, I want to point out, based on my review of all of the correspondence between the Delegate and Mr. Cornelius, the Delegate maintained true professionalism and courtesy throughout his dealings with Mr. Cornelius, as difficult as I imagine it must have been for the Delegate to communicate with someone so disrespectful to him as to level profanities, threats and baseless accusations against him. There is absolutely no excuse for any complainant to so treat a delegate.

(iii) New Evidence

68. The test for admitting "new" evidence on appeal is delineated in the Tribunal's decision in *Re: Merilus Technologies Inc.*, BC EST # D171/03, and involves the consideration of the following conjunctive factors:

a) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing;

b) the evidence must be relevant to a material issue in the appeal;

c) the evidence must be credible in the sense that it is reasonably capable of belief; and

d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue

69. In this case, while Mr. Cornelius has checked-off the box for "new evidence" ground of appeal, all of the documents adduced in the appeal but three (3) submitted on August 27, 2021, are in the record and were presented to the Delegate before the Determination was made. The three documents that are not in the

record and not before the Delegate before the Determination was made are set out in paragraph 48 above.

70. I have reviewed these documents and none of them would qualify as "new evidence" under the test in *Re: Merilus Technologies Inc.* The first document, the email of August 1, 2020, from "JD" existed during the investigation and before the Determination was made and could have, with the exercise of due diligence, been presented to the Delegate before the Determination was made. The email is also lacking probative value, in the sense that, if believed, it could have led the Delegate to a different conclusion on the material issue, namely, whether or not Mr. Cornelius was in an employment relationship with SLVI.

71. With respect to the second document, a single page from a Notice of Civil Claim filed by SLVI against Mr. Cornelius, it existed before the Determination was made as Mr. Cornelius refers to the litigation commenced against him by SLVI in some of his email exchanges with the Delegate before the Determination was made. He could have, with due diligence, presented the document to the Delegate during the investigation and before the Determination was made. As with the first document, this document, too, is lacking probative value. The document is produced in the appeal by Mr. Cornelius to primarily argue that SLVI was lying to the Supreme Court in asserting in the pleadings that they had a Subcontractor Agreement with him and that he turned down an employment offer with SLVI and insisted he wanted to work as a subcontractor so as to be free to do other contract work. What SLVI alleges in its lawsuit against Mr. Cornelius, even if Mr. Cornelius is challenging the veracity of the allegation, is not probative or determinative of the issue before the Delegate in this matter.

72. With respect to the third document, a single page from a written submission of SLVI's counsel on April 29, 2021, to WorkSafeBC, while this document did not exist before the Determination was made, like the previous two documents, it is lacking any probative value. In the document, Mr. Cornelius draws particular attention to the submission of SLVI's counsel that "SLVI maintains that Mr. Cornelius refused to be an employee and insisted on a contractor arrangement". In his written submissions he contends that this is a "lie" on the part of SLVI and counsel. I do *not* find the submissions of SLVI to WorkSafeBC, adduced by Mr. Cornelius for the purpose of proving that SLVI and their counsel lied, is probative of the material issue in this case and could have led the Delegate to a different conclusion.

73. In the result, I find there is no new evidence and no basis for advancing the new evidence ground of appeal here.

(iv) Rulings and decisions of other governmental agencies

74. While Mr. Cornelius argues that the rulings or decisions made by the CRA and WorkSafeBC should have been determinative of his status as "employee" under the *ESA*, the enactments governing the CRA, and WorkSafeBC have different objects and purposes. More particularly, the opinion of CRA under the *Federal Income Tax Act*, the *Employment Insurance Act* or the *Canada Pension Plan* as to whether a person is an "employee" for tax, insurance or Canada Pension Plan purposes is not determinative as to whether a person is an "employee" within the meaning of the *ESA* for employment standards purposes. The purposes of those federal enactments are not the same as those of the *ESA*. As an example, one of the purposes of the *ESA*, set out in section 2(a), is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. This is certainly not a purpose of the federal acts delineated above and administered by the CRA. In the case of WorkSafeBC, the

determination of whether or not a person is covered by the *Workers' Compensation Act* turns on whether or not that person is a "worker" within the meaning of the statutory definition in the *Workers Compensation Act*. The statutory definition of "worker" is broad and includes persons who are not traditionally employees at common law. The definition of "worker" is also not identical to the definition of "employee" under the *ESA.* Therefore, I do not find any error on the part of the Delegate in giving the CRA ruling and WorkSafeBC decision little weight in deciding the status of Mr. Cornelius under the *ESA*.

75. In summary, the extension of the appeal period is denied. I find that the purposes and objects of the *ESA* in section 2 are not served by requiring the other parties to respond to it, particularly as I find the appeal has no reasonable prospect of succeeding.

76. The appeal is dismissed under section 114(1) (b) and (f) of the *ESA*.

ORDER

77. Pursuant to section 115(1) of the *ESA*, I order the Determination dated April 27, 2021, be confirmed

Shafik Bhalloo
Member
Employment Standards Tribunal