

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Khalid Ahmad
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Maia Tsurumi

FILE NOS.: 2020/151

DATE OF DECISION: September 27, 2021

DECISION

SUBMISSIONS

Khalid Ahmad on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Khalid Ahmad (the “Appellant”) has filed an appeal of a determination (the “Determination”) issued by Sarah Beth Hutchison, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on November 2, 2020. The Delegate determined Horizon Hotels Ltd. carrying on business as The Met Bar & Grill (the “Respondent”) contravened section 28 (record of hours worked) of the ESA. The Delegate found the Respondent did not contravene the ESA by failing to pay the Appellant vacation pay, overtime wages, and statutory holiday pay.
2. The Appellant appeals the Determination on the grounds that: (1) the Director erred in law; (2) the Director failed to observe principles of natural justice; and (3) evidence has become available that was not available at the time the Determination was being made.
3. For the reasons set out below, I dismiss the appeal under sub-section 114(1)(f), because there is no reasonable prospect the appeal will succeed.
4. My decision is based on the appeal submission, the sub-section 112(5) record (the “Record”), and the reasons for the Determination (the “Reasons”).

ISSUE

5. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether the appeal should be dismissed pursuant to sub-section 114(1)(f) of the ESA.

THE DETERMINATION

Background

6. The Respondent is a British Columbia corporation, which operates a restaurant/pub (the “Restaurant”) in New Westminster.
7. At the time of the Determination, the Appellant was employed by the Respondent at the Restaurant.
8. The Appellant filed a complaint (the “Complaint”) on October 16, 2019, alleging the Respondent contravened the ESA by failing to pay him vacation pay, overtime wages, and statutory holiday pay. His last day of work before going on medical leave was September 30, 2019. At the time of the Determination, the Appellant was on medical leave.

9. The Complaint was initially scheduled for a hearing, but on the day of the hearing the Appellant said he was experiencing the consequences of a mental injury because of a workplace injury sustained at the Restaurant and this injury made it difficult for him to participate in the hearing. As a result, with the consent of the parties, the Delegate facilitated a fact-finding meeting instead of a complaint hearing and proceeded with the Complaint as an investigation (the “Investigation”).

Issues Before the Delegate

10. The issues before the Delegate were whether the Appellant was:
- (a) a manager and so excluded from entitlement to overtime and statutory holiday pay;
 - (b) properly compensated for all hours worked; and
 - (c) owed vacation pay (and if so, how much).

The Delegate’s Decision

11. On November 2, 2020, the Delegate issued the Determination. The Delegate concluded the Appellant was:
- (a) a manager and thus not entitled to overtime or statutory holiday pay;
 - (b) properly compensated for all hours worked; and
 - (c) not owed any vacation pay.

Overtime and statutory holiday pay

12. To decide whether the Appellant was entitled to overtime and holiday pay, the Delegate had to determine whether the Appellant was a “manager” as defined in the *Employment Standards Regulation* (the “*Regulation*”).
13. The Delegate referred to the definition of manager under the *Regulation* and said the characterization of a person’s employment rests on an examination of the total sum of employment responsibilities, whether the employee had and exercised the power and authority typical of a manager, and whether the primary reason for employment was supervision and/or direction of other employees and/or resources. She noted the well-accepted principle that an employee’s title is not determinative of the nature of their employment. She relied on Tribunal case law explaining a manager is someone who has independent discretion and authority to make final decisions relating to the supervision and direction of employees and the conduct of the business and who has exercised that authority: *Re Amelia Street Bistro*, BC EST #D479/97 (“*Amelia Street*”). *Amelia Street* also says the amount of time spent supervising and directing other employees is a factor but is not determinative. The central analysis rests on the authority to act, and the exercise of that authority, in respect of supervising and directing human or other resources.
14. The Delegate acknowledged credibility was central to her Determination of the Complaint. Both parties referred to inter-personal tensions among employees at the Restaurant and provided largely different versions of what occurred. The Appellant alleged the Respondent’s witnesses held personal animosity toward him that impacted the truthfulness of their evidence.

15. In deciding credibility of the various pieces of evidence, the Delegate looked at the witnesses' ability to recall details, the consistency of what was said, the reasonableness of the story, the presence or absence of bias, interest or other motive, and the witnesses' capacity to know about what they told her. Applying these factors, the Delegate decided which narratives were more reasonably likely in the circumstances.
16. The Appellant, the Restaurant's floor manager (the "Floor Manager"), and one of the Restaurant's kitchen employees (the "Kitchen Supervisor"), all worked daily at the Restaurant and were best placed to know what the Appellant did in his employment. The Delegate noted the Appellant had a clear interest in the outcome of the Complaint and the Floor Manager's evidence was likely shaded by her animosity towards the Appellant. Thus, where the Appellant's and the Floor Manager's evidence conflicted, the Delegate preferred the Kitchen Supervisor's evidence as someone in a position to know what occurred and who did not have an interest in the outcome or any personal animosity towards the Appellant.
17. Regarding the evidence of the Respondent's former Director of Operations (the "Former Director"), the Delegate preferred his evidence where it conflicted with the Appellant's regarding the Appellant's duties at work. The Former Director is no longer employed by the Respondent. While he did not work at the Restaurant, he and the Appellant agreed they worked extensively together and that he was aware of the scope of the Appellant's employment duties.
18. The Delegate spoke to the Appellant several times during the Investigation. She found his evidence inconsistent and said it changed over the course of the Investigation. Although he alleged the Respondent altered or edited evidence, the schedules of hours of work submitted by both parties were identical. The Appellant told the Delegate his capacity to recall and give evidence was affected by his mental health and the Delegate accepted this may have been the case.
19. The Appellant submitted he: (1) spent the majority of his time cooking; (2) spent about one-third of his time performing managerial duties; (3) identified himself as the general manager to third parties; (4) created schedules; (5) was responsible for the Restaurant's inventory; and (6) provided daily sales reports to the Respondent's owner and to the Former Director. About his responsibilities for hiring, disciplining, and firing staff, the Appellant at first said he had no independent authority to hire staff, then said he could hire staff but only according to corporate policy, and finally said he had the authority to hire and fire and did so. He made decisions to increase staffing levels and took action to hire new staff, which showed his exercise of authority with respect to staffing. This evidence was supported by testimony from the Former Director, the Respondent's owner, the Kitchen Supervisor, and the Floor Manager.
20. The Appellant's evidence about spending most of his time cooking was not supported by evidence from the Kitchen Supervisor, the Floor Manager, the Former Director, or the manager of the Respondent's hotel (the "Hotel Manager"), which was located in the same building as the Restaurant. The Hotel Manager shared an office with the Appellant. The Former Director's and Kitchen Supervisor's testimonies were consistent with a finding that the Appellant worked in the kitchen two or three times a week.
21. Every witness described the Appellant as the general manager of the Restaurant. However, the Appellant said the Floor Manager was in fact the general manager and the Appellant submitted text messages in support of this argument. The Delegate did not agree. She found that while the messages included the Floor Manager's instructions to staff, the messages supported a finding that the Floor Manager was

subject to the Appellant's authority and that she ran various managerial decisions past him for his consent or support.

22. E-mails provided by the Respondent showed the Appellant engaged in contract negotiations with vendors, approved payroll for staff, instructed the Floor Manager and the then-chef to comply with budgeting tools he provided, and requested additional job postings. The Delegate found these documents were objective evidence and so she gave them significant weight. The Appellant claimed the e-mails were partial or edited, but the Delegate found they were significant evidence of the Appellant exercising independent authority as a general manager, which supported a finding that he was a manager.
23. Based on the evidence and the weight she gave to it, the Delegate found the Appellant's duties included: (1) hiring new employees; (2) creating and sharing schedules for staffing; (3) disciplining staff; (4) negotiating contracts for services; (5) conducting inventories; (6) providing daily reports of sales and labour costs; and (7) directing staff, including assigning the Kitchen Supervisor to do the ordering for the back of house. His activities were fundamental to the operation of the Restaurant.
24. Therefore, the Delegate found that, although the Appellant performed some ancillary kitchen duties, a total characterization of his employment was as a general manager and he was a manager as defined by the *Regulation*. He was excluded from entitlement to statutory holiday pay and overtime wages.

Compensation for hours worked

25. The Delegate next considered whether under section 16 of the *ESA*, the Respondent had not paid the Appellant at least minimum wage for every hour he worked. Minimum wage was \$12.65 per hour until May 31, 2019, and \$13.85 after this date. The parties agreed the Appellant's salary was \$60,000.00 per year.
26. In calculating the Appellant's hours worked versus the amount he was paid, the Delegate relied on the Appellant's evidence he worked six days a week on average. Based on this and his salary of \$60,000.00 per year, the Delegate found the Appellant would have had to work an average of 91.21 hours each week prior to June 1, 2019 ($(\$60,000.00 / 52 \text{ weeks}) / \$12.65 \text{ minimum wage}$) and an average of 83.31 hours each week from June 1, 2019 ($(\$60,000.00 / 52 \text{ weeks}) / \$13.85 \text{ minimum wage}$). As he worked 6 days a week, he would have had to work an average of 15.2 hours a day, 6 days a week to have made less than minimum wage between April 17 and May 31, 2019, and an average of 13.9 hours a day, 6 days a week to have made less than minimum wage between June 1 and September 29, 2019.
27. The Delegate explained employers have an obligation to keep a record of hours worked by employees: *ESA*, section 28 (payroll records). The Respondent acknowledged it had no records of the Appellant's hours.
28. The evidence about the Appellant's hours of work differed significantly. Therefore, in making her findings, the Delegate relied first on evidence supported by multiple sources, preferring the evidence of disinterested parties with first-hand knowledge. In particular, she gave weight to the Kitchen Supervisor's evidence. There was no evidence of personal animosity between the Kitchen Supervisor and the Appellant, and the Kitchen Supervisor had personal and first-hand knowledge of the Appellant's kitchen hours. The Delegate gave limited weight to the schedules submitted by the parties because the Appellant

said they were not an accurate measure of the time he spent working and the Floor Manager said the schedules were constantly changing.

29. The Delegate preferred the Kitchen Supervisor's specific evidence over the Appellant's general evidence and found the Kitchen Supervisor's and Hotel Manager's evidence more likely to be an accurate description of the Appellant's working hours.
30. Although the Appellant worked on weekends when the Hotel Manager, the Kitchen Supervisor, and Floor Manager were not working, his evidence about his hours of work did not have the ring of truth when considered in light of the evidence provided by the Kitchen Supervisor and the Hotel Manager about his work during the weekday. These witnesses had no motive or interest in the outcome of the Complaint.
31. The Delegate found the Appellant did not work more than 83.31 hours during any particular week for the following reasons:
- (a) evidence provided by the Floor Manager and the Hotel Manager, who each observed the Appellant working, did not support finding he worked for a minimum or average of 83.31 hours each week;
 - (b) the Kitchen Supervisor only twice observed the Appellant closing the Restaurant's bar at 1:00 a.m. and did not recollect him ever working until 10:00 p.m. when the kitchen closed;
 - (c) the Kitchen Supervisor said the Appellant typically ended his workday by 6:00 p.m.;
 - (d) the Kitchen Supervisor's evidence about the Appellant's hours was specific, and the Appellant's evidence about his kitchen hours was general;
 - (e) the Appellant gave conflicting evidence about whether he opened the kitchen or not and closed the Restaurant every night at 1:00 a.m.;
 - (f) the Appellant said his estimate of hours was his best guess;
 - (g) it was not reasonable to conclude the Appellant's recollection of his working hours and the evidence of the Kitchen Supervisor, the Hotel Manager and the Floor Manager could both be correct;
 - (h) the Appellant's evidence of his hours was uncorroborated by other evidence;
 - (i) the text messages and e-mails both showed hours of work less than the six days a week the Delegate used in her calculations;
 - (j) even though the Delegate gave limited weight to the schedules submitted by the parties, the schedules indicated the Appellant was "off" on Sunday and Tuesday in some weeks and this was consistent with the Kitchen Supervisor's evidence;
 - (k) it was not reasonable to conclude the Restaurant was as under-staffed as the Appellant claimed given his e-mails showing he hired staff throughout the summer; and
 - (l) the Delegate did not believe the Appellant's description of being forced to work in the kitchen, as this was unsupported by testimony of other people working at the Restaurant.

32. The Delegate concluded the Appellant's wage rate exceeded the statutory minimum between April 17 and September 30, 2019.

Vacation pay

33. The Respondent's uncontroverted evidence was that it paid the Appellant vacation pay on all of his earnings except for on the bonuses he earned. The parties agreed the Appellant earned \$1,850.00 in bonuses between April and September 2019. On September 22, 2020, the Respondent voluntarily paid the Appellant \$75.00, which is 4% of \$1,850.00. Therefore, the Appellant was not entitled to vacation pay.

Penalty for contravention of section 28

34. Section 28 of the *ESA* requires employers keep records of hours worked by each employee on each day. The Respondent acknowledged it did not keep a record of the Appellant's hours. The Respondent violated section 28 and the Delegate imposed a mandatory administrative penalty of \$500.00.

ARGUMENT

35. The Appellant appeals the Determination saying (1) the Director erred in law; (2) the Director failed to observe principles of natural justice; and (3) evidence has become available that was not available at the time the Determination was being made. Specifically, the Appellant says the Director's Delegate:
- (a) was inattentive, careless and unfair in her Investigation, because she:
 - i. missed important evidence and notes required for a fair decision (appeal submission, p. 3, Item #1);
 - ii. did not demand documents from the Floor Manager's computer (appeal submission, p. 3, Item #3);
 - iii. did not interview a former chef at the Restaurant as requested by the Appellant (appeal submission, p. 3, Item #3);
 - iv. did not interview another former chef employed by the Respondent as requested by the Appellant (appeal submission, pp. 3-4, Item #3);
 - v. did not allow the Appellant to cross-examine the Kitchen Supervisor or otherwise refute her testimony, including on the basis she worked limited hours (appeal submission, p. 4, Item #3);
 - vi. did not review text messages between the Hotel Manager and the Appellant, which he alleges would have contradicted her evidence (appeal submission, p. 4, Item #3); and
 - vii. did not review text messages between the Appellant and the Respondent's owner, who the Appellant alleges asked the Appellant to work at a different property multiple times and controlled his schedule (appeal submission, pp. 4-5, Item #3);
 - (b) misunderstood and misapplied the *ESA* and *Regulation* regarding the definition of manager (appeal submission, p. 3, Item #2);

- (c) did not recognize the Appellant worked a statutory holiday (appeal submission, p. 3, Item #2);
- (d) accepted evidence from the Floor Manager who he alleges had performance and theft issues that he was investigating, facilitated drug dealing and prostitution at the Hotel, and had issues with the Appellant (appeal submission, p. 4, Item #3);
- (e) accepted evidence from the Kitchen Supervisor who he alleges was not at the Restaurant for long, was only there Monday to Friday, and worked limited hours (appeal submission, p. 4, Item #3);
- (f) accepted evidence from the Hotel Manager who he alleges was manipulated by the Respondent and the Floor Manager (appeal submission, p. 4, Item #3); and
- (g) did not find in his favour despite finding the Respondent contravened section 28 of the *ESA* (appeal submission, p. 3, Item #3).

36. The Appellant also made the following submissions:

- (a) the Respondent did not provide its payroll records because it has employees working under different names or without work permits who were involved in facilitating drug dealing at the Restaurant and prostitution at the Hotel (appeal submission, p. 5, Item #4);
- (b) he worked on a laptop in the kitchen (appeal submission, p. 5, Item #5);
- (c) the Floor Manager had her own computer and office space behind the bar and on the second floor (appeal submission, p. 5, Item #5);
- (d) during the Investigation, the Respondent took advantage of the impact of the Appellant's mental health on his ability to present his case (appeal submission, p. 5, Item #6); and
- (e) the Respondent manipulated the Investigation by not providing access to their payroll data and witness list and did not submit relevant documents or tampered with the evidence (appeal submission, p. 5, Item #7).

37. The Appellant provided more than 300 pages of documents with his appeal. Some of these were documents he provided to the Delegate during the Investigation, but many were not part of the Record.

38. The Appellant asks the Tribunal to re-investigate the Complaint.

ANALYSIS

39. Although the Appellant asks the Tribunal to re-investigate his Complaint, an appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination only on 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.

40. For the reasons that follow, I conclude the Delegate did not err in law or fail to observe principles of natural justice. I also conclude there is no admissible new evidence.

Error of law

41. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined questions of law in the context of an appeal of a board's determination. In this context, an error of law occurs in the following situations:

1. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
2. a misapplication by the decision-maker of an applicable principle of general law;
3. where a decision-maker acts without any evidence;
4. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
5. where the decision-maker is wrong in principle.

42. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.

43. The Delegate did not make an error of law.

44. First, she did not misinterpret or misapply the *ESA* and the *Regulation* or any applicable principle of general law and she was not wrong in principle.

45. As noted by the Delegate, managers are excluded from the *ESA*'s overtime and statutory holiday pay requirements: *Regulation*, sections 34(f) and 36. Under the *Regulation*, a manager means a person: (1) whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources; or (2) employed in an executive capacity: *Regulation*, sub-section 1(1). In coming to her conclusion that the Appellant was a manager within the meaning of the *Regulation*, the Delegate examined the evidence and considered the total sum of his employment responsibilities, including whether he exercised the power and authority typical of a manager, and whether his primary reason for employment was supervision and/or direction of other employees and/or resources. The Delegate considered whether the Appellant had the independent discretion and authority to make final decisions about supervision and direction of employees and the conduct of the Restaurant and whether he had exercised that authority: *Amelia Street*.

46. The Appellant submits the Delegate should not have accepted evidence from the Floor Manager, the Kitchen Supervisor, or the Hotel Manager and should have recognized the Appellant worked a statutory holiday.

47. These arguments are really that the Delegate should have made different findings than she did based on the evidence before her. The Tribunal's role is not to review the facts and make different findings of fact if there is a reasonable basis on which the Director or their delegate makes findings. The Delegate acted on evidence she had and did not take a view of the facts that could not reasonably be entertained. The Reasons explain the Delegate's review of the evidence and her conclusions based on that evidence,

including her determinations about credibility and how she decided which evidence had no, limited, or significant weight. The Delegate's credibility findings were reasonable and based on her assessment of the evidence in its entirety.

48. The Appellant further says the Delegate should have found in his favour because she found the Respondent contravened section 28 of the *ESA*. However, the basis on which the Delegate found the Respondent failed to keep payroll records for the Appellant is not legally or factually connected to the Delegate's basis for her Determination about the Appellant's claim to overtime, statutory holiday pay, compensation for hours worked, and vacation pay.

Principles of natural justice

49. A number of the Appellant's submissions go to the question of whether the Delegate's Investigation was fair.
50. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure parties have an opportunity to make their case, know the case against them, are given an opportunity to reply to the case against them, and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27. Procedural fairness requirements are not concerned with the merits or outcome of the decision. The duty of fairness requires different procedural rights in any given set of circumstances: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paras. 23 – 28.
51. There is nothing in the appeal submission, the Reasons, or the Record indicating the Delegate breached any principle of natural justice in making her Determination.
52. The Appellant's submission that the Delegate missed important evidence and notes, did not review certain text messages between the Hotel Manager and the Appellant, and did not review certain text messages between the Appellant and the Respondent's owner are essentially all aspects of an argument that the Delegate had a duty of fairness to consider these pieces of evidence and did not do so.
53. My review of the appeal submission, Determination, Reasons, and Record indicates the Delegate did not fail to consider relevant evidence. It is not clear from the Appellant's submission and the Record what important evidence and notes the Delegate did not consider or whether the text messages were before the Delegate or not. If the text messages and evidence/notes were not before the Delegate, then a failure to review them is not a breach of procedural fairness. The burden was on the Appellant to provide documents to support his Complaint. If the documents were not submitted to the Employment Standards Branch (the "Branch"), then the fact they were not referred to in the Reasons does not show the Delegate did not consider them along with all of the other evidence in the 731-page Record.
54. Further, even if the Delegate failed to consider some relevant evidence, it does not automatically follow that the Delegate failed to observe the principles of natural justice in making the Determination: *Welch (Re)*, BC EST # D161/05 at para. 42, citing *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at pp. 491 – 492. Whether a failure to consider relevant evidence amounts to a breach of natural justice is case-specific. Relevant factors include the importance of the case to the issue upon which the

evidence was sought to be introduced and the other evidence that was available on that issue: *Welch, supra*, para. 43.

55. In the circumstances of this case, even if the Delegate did not consider some of the relevant evidence, there was no breach of natural justice. The Delegate referred to the evidence that was relevant to her decisions on key issues and explained her basis for relying on that evidence to come to her conclusions.

56. I reject the submission that procedural fairness required the Delegate to demand documents from the Floor Manager's computer, to interview the two former chefs who worked at the Restaurant, or to allow the Appellant to cross-examine the Kitchen Supervisor or otherwise refute her testimony. As I said above, the duty of fairness requires different procedural rights in any given set of circumstances. In *Baker, supra*, the Supreme Court identified a non-exhaustive list of factors that "should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances." The factors are:

- (a) the nature of the decision being made, and the process followed in making it;
- (b) the nature of the statutory scheme and the terms of the statute under which the administrative decision was made;
- (c) the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated;
- (d) the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances; and
- (e) the choice of procedures made by the administrative-decision maker and its institutional constraints. Important weight must be given to the choices of procedures adopted by the decision-maker and its institutional constraints:

Baker, supra, at paras. 23 – 28.

57. The nature of the decision was whether or not the Appellant's rights under the *ESA* were breached.

58. The process here involved the Delegate making demands for documents, reviewing the documents and submissions, conducting a fact-finding hearing, and having several telephone interviews with the Appellant and other witnesses, including follow-up telephone calls.

59. Turning to the statutory scheme and the terms of the statute under which the Branch operates, the authority under the *ESA* is broad and includes investigative powers to ensure compliance with the *ESA* and its regulations. The Director also has considerable powers to compel persons to answer questions and order disclosure: *ESA*, sections 84 – 85. If an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond: *ESA*, section 77.

60. The importance of the decision to the Appellant is on the high end of the scale, given its potential financial and personal implications.

61. Regarding legitimate expectations, the Delegate's notes indicate the Appellant was expecting the Branch to go through all of the Respondent's records and computer system rather than relying on what was

provided after the demand for documents (Record, pp. 728 – 729). However, the notes indicate the Delegate explained how her Investigation would proceed.

62. Finally, and importantly, the choice of procedure here was within the discretion of the Delegate. The *ESA* does not require a hearing (section 84) and Branch decisions are made in a dynamic and fluid environment. While the legislative scheme provides the Branch with considerable powers to investigate, the statute gives decision-makers discretion in how they conduct investigations.
63. Considering the *Baker* factors above, I conclude there was no breach of procedural fairness because the Delegate did not demand documents from the Floor Manager’s computer, interview the two former chefs who worked at the Restaurant, or allow the Appellant to cross-examine the Kitchen Supervisor or otherwise refute her testimony.
64. The Director or her delegates determine how investigations will proceed based on the specific circumstances in issue and institutional constraints. Procedural fairness does not demand the Branch turn over every stone and do everything a party thinks it should do in an investigation. The Delegate initially convened a complaint hearing, but because the Appellant said his mental health made it difficult for him to participate in the hearing, with his consent, the hearing became a fact-finding meeting, and an Investigation was initiated. Over the course of her Investigation, the Delegate received documents from the Appellant and the Respondent and heard submissions and testimony from the Appellant and the Respondent and a number of third-party witnesses. The evidence from the Investigation was reviewed and summarized over almost nine pages of the Reasons. The Delegate’s efforts during the Investigation are also revealed through the Record. In addition to documents submitted by the Appellant and Respondent and the Delegate’s correspondence with the parties, the Record has 85 pages of notes from the Delegate’s interviews of the Appellant and other witnesses (Record, pp. 645 to 730). The Delegate spoke with the Appellant multiple times over the course of the Investigation and interviewed a number of witnesses, sometimes more than once. The Appellant was given a fair opportunity to make his case.

New evidence

65. On appeal, the Appellant makes new submissions and provides documents he did not provide to the Branch.
66. An appeal is decided on the Record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, subsection 112(1)(c).
67. The decision in *Bruce Davies et al.*, BC EST # D171/03, provides guidance on how the Tribunal applies subsection 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence . . . [The evidence] must meet four conditions:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Bruce Davies et al., supra, at p. 3.

68. With one exception, all the new documents in the appeal submission pre-date the Delegate's Determination and could, with the exercise of due diligence, have been discovered and presented to the Delegate during the Investigation. The exception is a WorkSafe BC Mental Health Treatment Progress Report (appeal submission, pp. 87 – 92). This document is not relevant to a material issue arising from the Complaint and could not have led the Delegate to a different conclusion on the material issues. Thus, I find the new documents are not new evidence admissible on appeal.
69. The submissions about the Appellant's and the Floor Manager's working arrangements are evidence the Appellant could, with the exercise of due diligence, have presented to the Delegate during the Investigation and thus are not new evidence admissible on appeal.
70. Finally, regarding the allegations about why the Respondent did not provide its payroll records, the Respondent's reliance on the Appellant's mental health, and the Respondent manipulating the Investigation, I find these allegations are not evidence. If they could be considered evidence, I find these allegations are not relevant to a material issue arising from the Complaint, are not credible in the sense that they are reasonably capable of belief, and do not have high potential probative value.

ORDER

71. Pursuant to sub-section 114(1)(f) of the *ESA*, the appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination dated November 2, 2020, is confirmed.

Maia Tsurumi
Member
Employment Standards Tribunal