Citation: John Curry (Re)
2021 BCEST 92

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

John Curry carrying on business as Garden City Autobody
(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: Jonathan Chapnick

FILE NO.: 2021/063

DATE OF DECISION: November 23, 2021

DECISION

SUBMISSIONS

John Curry — on his own behalf

I. OVERVIEW

1. On November 7, 2019, Jamie Page (the "Employee") filed a complaint (the "Complaint") under section 74 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [***ESA*** or **Act**]. On June 9, 2021, a delegate of the Director of Employment Standards (the "Delegate") issued a determination regarding the Complaint (the "Determination").

2. In the Determination, the Delegate found that John Curry, carrying on business as Garden City Autobody (the "Employer"), contravened various sections of the *ESA* in respect of the Employee's employment. The Delegate ordered the Employer to pay the Employee $5,465.87 in wages and interest and to pay a total administrative penalty amount of $2,500.

3. Under section 112(1) of the *ESA*, the Employer was allowed to appeal the Determination 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.

4. On July 19, 2021, the Employer appealed the Determination to the Employment Standards Tribunal (the "Tribunal"), selecting all three grounds of appeal set out in section 112(1). The Employer also asked the Tribunal to extend the appeal period deadline from July 19, 2021 to August 25, 2021, stating that he had another witness who would be available by that time. As I discuss below, under the circumstances, I have opted to deny the Employer's extension request and to decide this appeal based on the appeal submissions and materials delivered by the Employer to the Tribunal within, but not after, the appeal period deadline.

5. To succeed in his appeal, the Employer must show that at least one ground under section 112(1) of the *ESA* has been met. He has not done so. In light of my analysis below, I have not found it necessary to seek submissions from the Delegate or the Employee in this matter. Nor do I find it necessary to conduct an oral hearing. (The Tribunal is not obliged to hold an oral hearing: *ESA*, s. 103(d); *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 36; see, *e.g.*, *Dykes*, BC EST # D022/04, reconsideration denied BC EST # RD094/04).

6. For the reasons that follow, the appeal is dismissed.

II. ISSUES

7. In this part of my decision, I set out the issues I must decide in this appeal.

8. First, I must decide whether to grant the Employer's request to extend the appeal period deadline to submit additional evidence in this proceeding.

9. Second, I must make decisions regarding the merits of the appeal. The Employer challenged the Determination on each of the three grounds set out in the *ESA*. As a result, expressed as questions, the issues on the merits in this appeal are as follows:

   (a) Has the ground of appeal set out in section 112(1)(a) of the *ESA* been met? In other words, did the Delegate err in law?

   (b) Has the ground of appeal set out in section 112(1)(b) of the *ESA* been met? In other words, did the Delegate fail to observe the principles of natural justice in making the Determination?

   (c) Has the ground of appeal set out in section 112(1)(c) of the *ESA* been met? In other words, has evidence become available that was not available at the time the Determination was being made?

10. The onus is on the Employer to satisfy the Tribunal, on a balance of probabilities, that the answer to at least one of these questions is "yes": *Robin Camille Groulx*, 2021 BCEST 55 at para. 9 and authorities cited therein.

11. In deciding the issues in this appeal, I have considered the Employer's July 19, 2021 appeal submission, comprising the appeal form, the Employer's written reasons and arguments supporting the appeal, the documents provided by the Employer in support of the appeal, a copy of the Determination, a copy of the written reasons for the Determination (the "Reasons for Determination"), and the Employer's explanation for his request to extend the appeal period deadline. I have also considered the record that was before the Delegate at the time of the Determination, which was provided to the Tribunal by the Delegate under section 112(5) of the *ESA* (the "Record").

12. In addition, as I discuss below, I have reviewed, but not considered, the documents provided by the Employer to the Tribunal on August 23, 2021.

13. In the discussion below, I do not refer to all of the information and submissions that I have considered. Rather, I only recount the portions that I have relied upon to reach my decision.

III. BACKGROUND

14. In this part of my decision, I set out the background facts and circumstances that preceded the Determination made by the Delegate and the Employer's subsequent appeal.

A. Circumstances giving rise to the Complaint

15. The Employer operated an auto body business in Victoria, BC. The Employee was employed by the Employer from June 1, 2012 to September 17, 2019. The Employer dismissed the Employee on September 17, 2019. At the time of his dismissal, the Employee worked as a painter at the auto body business.

16. The Employee's dismissal gave rise to the Complaint. The following is a brief summary of the circumstances surrounding the dismissal, as evident from the materials before me:

(a) The Employer suspended the Employee on September 17, 2019. The Employee told the Delegate that he was suspended following an incident with a co-worker. According to the Employee, he had a work-related argument with the co-worker, and the co-worker confronted, and offered to fight, the Employee. The Employer did not dispute the occurrence of this incident.

(b) In the afternoon on September 17, 2019, the Employee and the Employer exchanged a series of text messages, in which the Employer advised that the Employee was terminated, and the Employee questioned the Employer regarding the reason for his termination (the "Text Messages").

(c) The following day, on September 18, 2019, the Employee visited the auto body shop and confronted the Employer, questioning the Employer again regarding the reason for his termination. The interaction was recorded by the Employee on his cell phone and includes the Employer stating that the Employee should leave, or the Employer would call the police. The Employee retained the video recording of this interaction (the "Video").

(d) A report of a Victoria Police Department constable (the "Police Report") indicates that on September 19, 2019, the Employer called the Victoria Police Department to report that the Employee "had returned" to the auto body shop and "was again being verbally aggressive and was unwanted," and that this occurrence was "a continuation of the events from September 18, 2019."

B. Complaint process

17. The Employee submitted the Complaint on November 7, 2019. In his complaint form, the Employee alleged that he was "fired [by the Employer] for … reasons you can't fire someone without notice." He further alleged that he had "never received a real pay stub" or been paid overtime, and that he had "missed lunch breaks – as well as lots of other things." The Employee asserted that he was owed regular wages, overtime wages, and pay for working through lunch breaks. In addition, he indicated that he was owed an estimated amount of $11,809 as compensation for length of service. Attached to his complaint form, the Employee included printouts of salary calculation results from the Government of Canada's "Payroll Deductions Online Calculator" (the "PDOC printouts").

i. Investigation: initial contact with the parties

18. On February 10, 2021, the Delegate spoke to the Employee on the telephone and the Employee provided oral evidence in support of the Complaint. Among other things, the Employee took the position that he was terminated without just cause. The Delegate summarized the Employee's evidence in his

investigation notes and in a follow-up email to the Employee. The Delegate's investigation notes and email correspondence with the parties were included in the Record.

19. On February 11, 2021, the Delegate spoke to the Employer on the telephone and the Employer provided oral evidence in response to the Complaint. The Employer disputed the Employee's claims regarding wages owed and took the position that the Employee was dismissed for just cause. The Employer also advised that he had since sold his auto body business. The Delegate summarized the Employer's evidence in his investigation notes and in a follow-up email to the Employer, in which he recounted the Employer's evidence regarding the Employee's termination as follows:

> You provided serval [sic] examples why you felt you had "cause 10 x's over" to dismiss Mr. Page, which included issues related to his past work performance and attitude. You advised me that the final reason you decided to dismiss Mr. Page was because of a violent altercation in the workplace. You informed me that there were several witnesses who could speak to what occurred, and that a police report was opened with the Victoria police department.
>
> I had advised that … an employer has a burden to demonstrate just cause if they wish to relive [sic] themselves of any liability to pay an employee compensation for length of service. As such, it would be helpful if you provide any records or evidence … you wish to rely upon to establish just cause for termination.

20. The Delegate asked the Employer to provide relevant records, evidence, information, and reliance documents by February 19, 2021.

ii. Investigation: gathering of information and evidence

21. In the morning on February 16, 2021, the Employer emailed the Delegate to request additional time to prepare his information and evidence in response to the Complaint. Later that morning, the Delegate emailed the Employer to extend the February 19, 2021 deadline to March 1, 2021,

22. On February 19, 2021, the Employee provided additional evidence in support of the Complaint, in the form of the Video and screenshots of the Text Messages.

23. On February 26, 2021, the Employer faxed 19 pages of information and evidence to the Delegate, including a witness statement, a four-page submission in response to the Complaint, and hand-written records of the Employee's daily work hours from September 2018 to September 2019. The witness statement was from a "repeat customer" of the Employer ("DP"), who described, in general terms, the Employee's "poor and careless workmanship" and other misconduct. DP also stated that "[a]fter Jamie's firing my son noticed … on [the online classifieds site] Used Victoria, a very slanderous post about Garden City Auto Body, no doubt posted by Jamie, apparently later confirmed by Used Victoria."

24. In the Employer's submission in response to the Complaint, he stated that the Employee was suspended "on or about September 17, 2019, after numerous warnings re; issues with workmanship and attitude, threats and company rules at Garden City." According to the Employer, when he spoke to the Employee about these issues, the Employee "lost it, saying he didn't care, cursing and swearing, calling me and others names," at which point the Employer, "after listening to [the Employee's] toxic language and threats," decided to dismiss the Employee.

25. The Delegate spoke to DP on the telephone on March 23, 2021 and summarized DP's evidence in his investigation notes. On March 25, 2021, the Delegate emailed the Employer to provide the Text Messages and to advise that he was having difficulties disclosing the Video due to its large size. During a subsequent telephone conversation on March 27, 2021, the Delegate described the content of the Video to the Employer in detail. The Delegate also spoke to the Employee on the telephone on March 27, 2021, at which time the Employee disputed "any claims there was cause for termination."

iii. Investigation: analysis and preliminary assessment

26. The Delegate next spoke to the Employer on April 14, 2021, summarizing their conversation in his investigation notes as follows:

> Provided a verbal assessment based on information available to date. A review of the available records appears to indicate that vacation pay was not paid at 6% after 5 consecutive years of employment, and that CLOS [compensation for length of service] may be owed … There appears to be insufficient evidence which demonstrates cause. Advised Mr. Curry that there appears to be several contraventions which include but are not limited to issues such as paydays, pay statements, meal breaks, vacation pay, vacation time, record keeping, and [compensation for length of service]. Mr. Curry requested a written preliminary assessment and additional time to consider the information provided. He advised me that he wishes to speak with counsel before making a final decision. Advised Mr. Curry that the police report he referred to has not been submitted and he would have an opportunity to provide additional information (final submissions) after written assessment is provided to all parties. Mr. Curry expressed interest in voluntary resolution but had concerns with CLOS entitlements. Advised Mr. Curry that a colleague could reach out to him to discuss potential voluntary resolution; however, in the interim my investigation will continue. Advised Mr. Curry the written preliminary assessment will be issued asap so he could review it with counsel if need be.

27. In the morning on May 6, 2021, the Delegate sent a written preliminary assessment of the Complaint to the parties (the "Assessment Letter"). In the Assessment Letter, the Delegate set out in detail the information and evidence gathered in his investigation of the Complaint, as reflected in his investigation notes and correspondence with the parties. The Delegate also discussed the merits of the Complaint. In his assessment of Employee's termination, he stated that "it appears Mr. Page was terminated without cause" and would therefore "be entitled to seven (7) weeks compensation for length of service."

28. The Delegate concluded the Assessment Letter to the Employer as follows:

> If you wish to provide a response in dispute of this preliminary assessment, please forward any evidence to me by email … **by no later than 4:00 pm May 20, 2021.** If there is no response to this assessment or if further evidence does not support a change to the preliminary assessment, I will issue a Determination with applicable monetary administrative penalties for wages owed plus interest based on the evidence currently on file [emphasis in original].

iv. Employer response to preliminary assessment

29. In the early evening on May 6, 2021, the Employer emailed the Delegate in response to the Assessment Letter. The Employer indicated that a colleague of the Delegate at the Employment Standards Branch

(the "ESB Representative") had contacted the Employer regarding possible settlement discussions, but they were unable to reach the Employee. The Employer went on to assert as follows:

> … in my opinion under the circumstances there is no case here, almost 2 years after filing, now no one can even reach [the Employee], please consider dropping this matter, it's very unfair that its [sic] a one way street …

30. On May 7, 2021, the Delegate replied to the Employer's May 6 email, describing his role under the *ESA* and advising that the investigation process would continue. The Delegate again invited the Employer to provide further submissions and evidence in response to the Assessment Letter by May 20, 2021.

31. On May 12, 2021, the Employer emailed the Delegate to provide a screenshot of the Police Report. In his email, the Employer repeated previous requests and assertions related to the fairness of the investigation process and the merits of the Complaint. The next morning, on May 13, 2021, the Delegate emailed the Employer, reiterating their previous conversations regarding the Delegate's preliminary assessment of the Complaint, the option to discuss potential voluntary resolution, and the role of the Delegate in investigating the Complaint. The Delegate confirmed that he would consider the Police Report in his determination of the Complaint and reiterated his previous information to the Employer regarding next steps in the Complaint investigation process.

32. At 10:07 AM on May 18, 2021, the Employer emailed the Delegate to request an extension of "a couple of weeks, maybe to June 5th, to seek some legal information," as he had "been bed ridden for a couple of weeks." He also inquired as follows:

> … what if I agreed to all your findings, but not to the wrongful dismissal part, thereby if I were to take it to a tribunal I would only be responsible for one penalty …

33. In an email to the Employer at 11:28 AM on May 18, the Delegate addressed the Employer's inquiry regarding administrative penalties as follows:

> It is important that you understand that certain administrative penalties included in Determinations may still be applicable even if Employer's [sic] choose to resolve portions of complaints voluntarily. Administrative penalties are non discretionary and may include, but are not limited to, matters which relate to paydays, wage statements, payroll records, the timing of annual vacation, etc.

34. In his email, the Delegate did not grant the Employer's request for an extension of the May 20, 2021 deadline for providing further submissions and evidence in response to the Assessment Letter but offered to speak to the Employer or his legal representative by telephone. In the afternoon on May 18, 2021, the Delegate emailed the Employer to answer questions the Employer had asked regarding monetary penalties.

35. On May 19, 2021, the Employer emailed the Delegate, indicating that he was willing to make certain payments, but that he planned "to fight this wrongful dismissal to the end." The Delegate responded by email that same day, asking the Employer to contact the Delegate's colleague at the Employment Standards Branch (the "Branch") if the Employer wished to make a settlement offer to the Employee. The Delegate also advised the Employer of the requirements for making "a partial payment in response to the preliminary assessment." Moments later, the Employer responded with a further email, asking the

Delegate for "a breakdown of all the items that you wanted me to pay by the 20th," to which the Delegate replied by providing "the figures which were included in [the Assessment Letter," totalling $678.96 gross wages. The Employer subsequently delivered a cheque for $678.96 to the Branch, payable to the Employee. On the Branch's "Cheque to Trust for Deposit" form, the Employer's payment was marked as "Voluntary Compliance (no Settlement Agreement)."

IV. REASONS FOR DETERMINATION

36. With the above background facts and circumstances in mind, I now move on to outline relevant information regarding the Reasons for Determination.

37. The Delegate issued the Determination and Reasons for Determination on June 9, 2021. In the Reasons for Determination, the Delegate set out the issues in the Complaint and the findings and analysis that formed the basis for his determination of each issue. He also described, in detail, the information and evidence gathered during his investigation.

38. The Delegate identified six issues for his determination:

1. Was Mr. Page paid all wages earned in each pay period?
2. Did Mr. Page receive wage statements?
3. Did Mr. Page receive meal breaks, and if not, was he paid for his meal breaks?
4. Was Mr. Page paid all hours worked including overtime, and if not, is he owed wages?
5. Did Mr. Page receive annual vacation pay, and if not, is he owed wages?
6. Was Mr. Page terminated for just cause and if not, is he owed compensation for length of service?

39. The Delegate decided each issue as follows.

A. Was the Employee paid all wages earned in each pay period?

40. The first issue related to the payday requirements under the *ESA*.

41. The *ESA* requires an employer to pay an employee at least twice per month: *ESA*, s. 17. Under section 17 of the *ESA,* within eight days following the end of each "pay period" (which the *ESA* defines as a period of up to 16 consecutive days of employment: *ESA*, s. 1), the employer must pay the employee all wages earned by the employee in that pay period. The Delegate concluded that the Employer contravened this requirement.

42. The Delegate's conclusion was based on the following findings and analysis of the evidence:

(a) When the Employee was terminated, his hourly wage was $22.00.

(b) The Employer's evidence was that he paid the Employee twice per month. "He provided mid-month cash advances of approximately $600 to $800 and paid all remaining wages at the end of the month."

(c) The "payroll records" provided by the parties (i.e., the hand-written records of the Employee's daily work hours from September 2018 to September 2019 provided as evidence by the Employer, and the PDOC printouts submitted as evidence by the Employee) showed one total amount of wages earned per month, with "no indication of what … advances were paid, if any."

(d) Even if the Employer consistently paid the Employee "mid-month advances of … $800," this payment "would cover a maximum of 36.36 hours per pay period at the rate of $22.00 per hour," yet the Employee "consistently worked greater than these hours in every pay period."

43. Given his conclusion that the Employer contravened the section 17 payday requirements, the Delegate ordered the Employer to pay a fine of $500.00.

B. Did the Employee receive wage statements?

44. Next, the Delegate considered section 27 of the *ESA*, under which an employer must, on each payday, give an employee a written wage statement for the corresponding pay period, and the wage statement must include various information, including the employer's name and address, the hours worked by the employee, and the employee's wage rate. The Delegate concluded that the Employer contravened these requirements.

45. The Delegate's conclusion was based on the following findings and analysis of the evidence:

(a) The wage statement evidence comprised PDOC printouts submitted by the Employee and hand-written records of the Employee's daily work hours (with notations of total wages paid) provided by the Employer.

(b) The Employer's evidence was that Canada Revenue Agency had assured him that the PDOC printouts were valid wage statements. However, a notation at the bottom of each PDOC printout stated as follows: "The printed calculations created by PDOC are not intended to be used as a statement of earnings. Please contact your employment standards representatives for all information legally required on a statement of earnings specific to your province or territory."

(c) The wage statement evidence provided by the parties "only included a total income for the month with vacation pay," but did not include other information required under section 27.

46. Given his conclusion that the Employer contravened the section 27 wage statements requirements, the Delegate ordered the Employer to pay a second fine of $500.

C. Did the Employee receive meal breaks, and if not, was he paid for his meal breaks?

47. The third issue related to the meal break requirements under the *ESA*.

48. Under section 32 of the *ESA*, employers must make sure their employees do not work more than five consecutive hours without a meal break. If an employee must work or be available for work during a meal break, their employer must count the meal break as time worked by the employee. On the evidence, the Delegate concluded that the Employer complied with these requirements.

D. Was the Employee paid all hours worked including overtime, and if not, is he owed wages?

49. The fourth issue involved a consideration of whether the Employee was paid all wages owed to him, including overtime wages. On the evidence, the Delegate concluded that he was.

50. The Delegate's conclusion was based on the following findings and analysis of the evidence:

(a) The parties agreed that the Employee may have worked late and/or on weekends occasionally. However, "neither party was able to identify what those additional hours were or when they were worked."

(b) The "payroll records" provided by the parties did not specify any overtime hours worked; however, "the records did indicate there was a slight shortfall in regular wages."

(c) During the Complaint investigation process, the Employer agreed there was a slight shortfall in wages paid, and issued payment to rectify this shortfall.

E. Did the Employee receive annual vacation pay, and if not, is he owed wages?

51. Next, the Delegate considered section 58 and section 28 of the *ESA*.

52. Among other things, section 58 requires an employer to pay an employee, after five consecutive years of employment, a vacation pay amount of at least 6% of the employee's total wages. Section 28 requires an employer to keep payroll records for each employee, which must include various information, such as the dates of the annual vacation taken by each employee, the vacation pay amounts paid by the employer, and the vacation days and vacation pay amounts owing. Payroll records must be retained by the employer for four years after the date on which the payroll records were created: *ESA*, s. 28(2)(c).

53. The Delegate concluded that the Employer contravened the section 58 and section 28 requirements.

54. The Delegate's conclusions were based on the following findings and analysis of the evidence:

(a) The Employee was employed by the Employer from June 1, 2012 to September 17, 2019. The parties agreed that the Employee worked for the Employer for more than five consecutive years.

(b) The Employer admitted to having been unaware of the *ESA* requirement to pay an employee, after five consecutive years of employment, a vacation pay amount of at least 6% of the employee's total wage, and the "payroll records" for the period between September 2018 and September 2019 reflected this omission.

(c) During the Complaint investigation process, the Delegate asked the Employer to disclose payroll records for the period between June 1, 2017 and September 1, 2018, to allow the Delegate to determine the amount of vacation pay owing for that timeframe. The Employer did not provide the requested disclosure.

(d) During the Complaint investigation process, the Employer paid the vacation pay amount owed for the period between September 2018 and September 2019. (The Employer paid $664.12, which represented the 2% difference between the 4% vacation pay the Employer paid and the 6% vacation pay the Employer was required to pay).

55. In light of the above, the Delegate resolved the fifth issue before him as follows:

(a) He found that the Employer failed to pay the Employee the required amount of vacation pay, which was a contravention of section 58. He therefore ordered the Employer to pay a third fine of $500. However, because the Employer did not disclose the payroll records for June 1, 2017 to September 1, 2018, the Delegate found that there was "insufficient information to accurately determine what amount of vacation pay remains outstanding for the period prior to September 2018."

(b) He found that the Employer failed to keep payroll records as required under section 28 the *ESA*, which was a contravention of section 28. He therefore ordered the Employer to pay a fourth fine of $500.

56. The Delegate then went on to consider the final issue in the Complaint.

F. Was the Employee terminated for just cause, and if not, is he owed compensation for length of service?

57. The final issue in the Complaint related to section 63 of the *ESA*. Section 63 requires an employer to pay an employee wages as compensation for length of service upon termination of the employment relationship, subject to certain exceptions. The amount of compensation depends on the length of service of the employee. For example, after seven consecutive years of employment, the employer's liability for compensation for length of service is seven weeks' wages: see *ESA*, s. 63(2)(b).

58. Instead of paying wages as compensation for length of service, an employer who dismisses an employee can give the employee a corresponding amount of advance, written notice of their dismissal: *ESA*, s. 63(3)(a). Or the employer can give the employee a combination of pay and notice: *ESA*, s. 63(3)(b).

59. One exception to the section 63 requirement to compensate an employee for their length of service relates to the circumstances of the employee's dismissal. Under the *ESA*, if an employee is "dismissed for just cause," the employer is not required to pay the employee wages as compensation for length of service, nor is the employer required to give the employee any advance, written notice of their dismissal: see *ESA*, s. 63(3)(c). As a result, oftentimes when an employee is dismissed, a key question under the *ESA* is whether their dismissal was "for just cause." If the dismissal was not for just cause, then the section 63 requirement to compensate the employee for their length of services applies. In the present case, the Delegate concluded that this requirement applied and was contravened by the Employer.

60. In his findings and analysis of the evidence, the Delegate noted that the burden of proving that the Employee was dismissed for just cause is on the Employer. He also explained that the Employer may prove just cause on the basis of serious misconduct by the Employee or ongoing instances of minor misconduct. In the case of the former, the Employer must demonstrate that the Employee acted in a manner that was inconsistent with the continuation of the employment relationship. In the case of the latter, the Employer must show that he communicated a reasonable performance standard to the Employee, he gave the Employee sufficient time to meet the standard, he warned the Employee that failure to meet the standard could result in termination, and still the Employee did not meet the standard.

61. The Delegate then went on to reason as follows:

> At the beginning of the investigation, Mr. Curry stated that he terminated Mr. Page because of a violent altercation at the workplace. He informed me there were several witnesses to this event and that he had to contact the Victoria Police department: however, he provides no further explanation. He later informed me Mr. Page was suspended before he was terminated, and that the suspension related to poor workmanship, attitude, threats, and breach of company rules and practices.
>
> Garden City Auto's witness … states there were several issues which relate to Mr. Page's workmanship, performance. and attitude; however, he believes Mr. Curry was aware of these issues and was very accommodating with Mr. Page. He also recalls an instance where Mr. Page showed up to the workplace yelling, swearing and making threats; however, he could not recall being around on Mr. Page's final date of employment and stated he could not be too specific with the details as this happened so long ago. Additionally, he heard of the slanderous online post from his son, only after Mr. Page was terminated.
>
> Mr. Curry informs me he should have terminated Mr. Page months prior to his last day worked as there were continuous issues with absenteeism, attitude, behavior, and poor performance. He states he put up with these types of issues for years and that he had just cause "ten times over". He claims numerous verbal warnings were issued to Mr. Page; however, he was unable to identify what those warnings were, if any standards were set, or when these conversations occurred.
>
> All parties inform me Mr. Page's suspension occurred sometime on or around September 17, 2019 … The police report … indicates Mr. Curry reported Mr. Page was verbally aggressive and unwanted at the business after he was already terminated.
>
> Garden City Auto has provided numerous reasons why Mr. Page was terminated; however, has failed to demonstrate how his actions constitute either serious willful misconduct or a culminating incident in a pattern of minor misconduct. I find that Garden City Auto has failed to demonstrate that they had just cause to terminate Mr. Page.
>
> …
>
> Based on the available evidence, I find Mr. Page was terminated without just cause on September 17, 2019 …

62. Having found that the Employee was "terminated without just cause," the Delegate went on to find that the Employee was "owed seven (7) weeks compensation for length of service as per the calculation contained in section 63(4) of the Act, totalling $4,909.52 gross wages" plus "6% vacation pay on this amount in accordance with section 58 of the Act totalling $294.57." The Delegate also found that, in failing to pay the Employee these amounts, the Employer had contravened section 63 of the *ESA*. He therefore ordered the Employer to pay a fifth fine of $500, in addition to the amount payable as compensation for length of service.

V. APPEAL PROCESS

63. In this part of my decision, I briefly describe the process of the appeal and the Employer's appeal submissions.

64. The Tribunal received the Appellant's appeal submission on July 19, 2021. Pursuant to section 112(2) of the *ESA*, the Employer delivered to the office of the Tribunal a copy of the Reasons for Determination and a written request specifying the grounds on which the appeal was based. He also asked the Tribunal to extend the appeal period deadline from July 19, 2021 to August 25, 2021.

65. The Employer attached a separate, two-page letter to the appeal form, on which he provided written reasons and arguments in support of both his appeal itself and his request for an extension of the statutory appeal period:

(a) The Employer stated that he felt the Delegate "did not do his job properly," asserting that the Delegate should have contacted him sooner following the initiation of the Complaint. The Employer said that, had he been contacted more promptly, he "would have been better equipped to deal with this case." He noted that he is now "retired and more handicapped and have a fixed income."

(b) The Employer said that he "was not very impressed with the unprofessional way [the Delegate] performed his job." He suggested that the Delegate provided him with incomplete information regarding the appeal process: "He didn't tell me that I would have to pay the Determination amount up front."

(c) The Employer asserted that, in the Determination, the Delegate "added all the amounts, including the items I paid," and explained that "all I am contesting is the wrongful dismissal amount, including fines for the items I paid."

(d) The Employer indicated that the Delegate made "mistakes" and a "flawed decision," and did not understand the evidence, adding that the Delegate "missed/misread evidence."

(e) The Employer stated that he had "a new witness to bring forward."

66. Upon receiving the Employer's appeal submission, the Tribunal contacted the Employer by telephone on July 19, 2021, to request further written reasons for his request for an extension of the statutory appeal period. Later that day, the Employer faxed an additional letter to the Tribunal, on which he listed four reasons why he was requesting more time:

(a) The Employer stated that he had "an additional witness that will be available in August [2021]."

(b) He asserted that he had asked the Delegate "many times to give me more time." He said he is "disabled" and needs "assistance to walk and move around."

(c) He asserted that there "are several mistakes" in the Determination, which require correction.

(d) He said that, at the present time, he was not physically able to attend the Tribunal's "office in Victoria."

67. On July 20, 2021, the Tribunal emailed the Employer to confirm receipt of his additional letter. The Tribunal also clarified that its office is in Vancouver, not Victoria, and noted that "absent exceptional circumstances, the Tribunal's appeal process proceeds by written submissions only."

68. On July 28, 2021, the Tribunal wrote to the Employer, the Employee and the Delegate to acknowledge the Employer's appeal. In its letter, the Tribunal indicated that the Employer had requested an extension of the statutory appeal period and asked the Employer to provide the Tribunal with any additional documents or evidence in support of his appeal by August 25, 2021. The Tribunal noted, however, that the August 25 deadline was "not an extension to the statutory appeal period," stating that the panel assigned to decide the appeal will also decide the Employer's request for an extension of the appeal period.

69. On August 23, 2021, the Employer emailed the Tribunal, attaching two witness statements, dated August 23, 2021 and August 20, 2021, respectively (the "Additional Witness Statements").

70. On August 31, the Tribunal wrote to the Employer, the Employee and the Delegate to disclose the Record. The Tribunal asked each of the Employer and the Employee to review the Record to ensure that it was complete, and to let the Tribunal know, by September 15, 2021, if any documents were missing. On September 17, 2021, the Tribunal wrote to the Employer, the Employee and the Delegate to advise that it had not received any objections to the completeness of the Record.

VI. ANALYSIS: REQUEST FOR EXTENSION OF APPEAL PERIOD DEADLINE

71. In this part of my decision, I explain my findings regarding the first issue before me in this appeal; namely, the Employer's request to extend the appeal period deadline to submit additional evidence in this proceeding.

72. Section 112 of the *ESA* sets a deadline for appealing a determination of a delegate of the Director of Employment Standards. Within this "appeal period," an appellant is required to deliver to the office of the Tribunal a copy of the delegate's written reasons for determination and a written request specifying the grounds on which their appeal is based. The Employer met this requirement; the Tribunal received his appeal submission by the specified deadline of July 19, 2021. Nevertheless, the Employer chose to ask the Tribunal to extend the appeal period deadline to August 25, 2021, stating that he had another witness who would be available by that time.

73. Section 109(b) of the *ESA* empowers the Tribunal to grant the Employer's extension request. However, the Tribunal does not grant extension requests as a matter of course; there must be "compelling reasons" for the extension request, and it is up to an appellant to show the Tribunal that an extension is warranted: *Patara Holdings Ltd. carrying on business as Best Western Canadian Lodge and/or Canadian Lodge*, BC EST #RD053/08 [***Patara***].

74. In considering whether to grant an extension request, the Tribunal will consider the following factors:

(a) Is there a reasonable and credible explanation for the appellant's failure to meet the appeal period deadline? If there is, this factors in favour of the extension request.

(b) Has there been an ongoing, genuine intention, on the part of the appellant, to appeal to the Tribunal? If there has, this factors in favour of the extension request.

(c) Were the respondent and the Director of Employment Standards (or their delegate) made aware of the appellant's intention to appeal? If they were, this factors in favour of the extension request.

(d) Will the respondent be unduly prejudiced if the Tribunal grants the extension request? If they will, this factors against the extension request.

(e) Does the appellant have a strong case that might succeed? If they do, this factors in favour of the extension request. (Note: This factor is traditionally expressed as an inquiry into whether there is "a strong *prima facie* case in favour of the appellant." However, I prefer to use the simpler language of "a strong case that might succeed.")

See *Niemisto*, BC EST #D099/96 [***Niemisto***]; *Patara*; *C.G. Motorsports Inc.*, BC EST # RD110/12.

75. This list of factors is not exhaustive; depending on the circumstances of the particular case before it, the Tribunal may consider other factors: *Niemisto*.

A. The Employer's extension request

76. In the present case, I find that certain factors favour granting the Employer's extension request. For instance, I find that the Employer demonstrated (in his correspondence with the Delegate, and in his delivery to the Tribunal of his appeal submission by the specified deadline of July 19, 2021, and his request for an extension to submit additional evidence) an ongoing, genuine intention to appeal the Determination, and I find that the Employee and the Delegate were made aware of this intention. In addition, in my view, the timeliness of the Employer's July 19 appeal submission and the relatively short length of the requested extension factor against a finding that the extension would unduly prejudice the Employee. Despite these factors, however, I have decided to deny the Employer's extension request for the following reasons.

77. First, I find that there is no reasonable explanation for the Employer's failure to meet the appeal period deadline. As I discuss below, I have no reason to conclude that the Additional Witness Statements could not, with the exercise of due diligence, have been put forward during the Complaint process, let alone in advance of the appeal period deadline. Second, under the circumstances, the Employer's stated mobility limitations, in and of themselves, are not compelling reasons for granting his extension request. In addition, while the Employer's stated concerns regarding the fairness of the Complaint process and the Delegate's conduct, analysis and reasoning are grounds for his appeal, they are not compelling reasons for extending the appeal period deadline. Finally, based on my examination below of the merits of the appeal, the "strong case" consideration listed above does not factor in favour of the Employer's extension request.

78. The appeal period deadline under section 112 of the *ESA* furthers a key purpose of the *ESA*; namely, the goal of providing fair and efficient procedures for resolving employment standards disputes: see *ESA*, s. 2(d). It is "in the interest of all parties to have complaints and appeals dealt with promptly": *Tang*, BC EST #D211/96. On the other hand, the *ESA* has several additional purposes, including the promotion of fair treatment of employees and employers: *ESA*, s. 2(b). In this case, on balance, and considering the factors discussed above, I conclude that the purposes of the *ESA* are best served by not granting the Employer's

extension request. The Employer has not provided compelling reasons for his request, and he has not shown me that an extension is warranted.

79. The Employer's request for an extension of the appeal period deadline is therefore denied.

B. The Additional Witness Statements

80. Despite my denial of the Employer's extension request, I have reviewed the Additional Witness Statements, which were submitted by the Employer on August 23, 2021, in response to the Tribunal's July 28, 2021, request for any additional documents or evidence in support of his appeal. The Employer made no other submissions and provided no other documents or evidence to the Tribunal before August 25, 2021.

81. The first witness statement, dated August 23, 2021, is from a long-time customer of the Employer's, and is very similar to DP's evidence; it attributes, in general terms, substandard work performance, attendance problems, and aggressive behaviour to the Employee. Similarly, the second witness statement, dated August 20, 2021, speaks to the Employee's "insubordination and terrible workmanship and work habits." The second statement is from a former co-worker of the Employee's, who describes offensive language used by the Employee, attendance issues, and work performance problems. The co-worker also asserts that the Employee yelled and swore at the Employer, refused to take direction, and, at some point in time, "started to threaten other people."

82. I find that the content of the Additional Witness Statements is very similar in nature and substance to the information and evidence that was before the Delegate during the Complaint investigation process, and which forms part of the Record. As a result, I am not persuaded that, if the Additional Witness Statements had been provided to and believed by the Delegate, they would have led the Delegate to reach a different conclusion on any material issue in the Complaint.

83. Thus, even if I had granted the Employer's extension request and considered the Additional Witness Statements in deciding this case, I would have still dismissed the Employer's appeal.

VII. ANALYSIS: MERITS OF THE APPEAL

84. Having dismissed the Employer's request for an extension of the appeal period deadline, I now turn to the merits of the Employer's appeal. In deciding the issues on the merits of the appeal, I have only considered the appeal submissions and materials delivered by the Employer to the Tribunal within the appeal period deadline; I have not considered the Additional Witness Statements.

A. Did the Delegate err in law?: *ESA*, section 112(1)(a).

85. Under section 112(1)(a) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "the director erred in law."

86. This ground of appeal centres on questions of legal analysis and reasoning. In deciding whether a delegate of the Director of Employment Standards has erred in law, the Tribunal considers whether the delegate has made any of the following errors:

(a) Misinterpreting or misapplying a section of the *ESA*.

(b) Misapplying an applicable principle of law.

(c) Acting (e.g., making a decision) without any evidence, or on an unreasonable view of the facts.

(d) Adopting a method of analysis or exercising a discretion in a way that is wrong in principle.

See, e.g., *Britco Structures Ltd.*, BC EST # D260/03; *Jane Welch operating as Windy Willow Farm*, BC EST # D161/05; *C. Keay Investments Ltd. c.o.b. as Ocean Trailer*, 2018 BCEST 5.

87. The Tribunal takes a large and liberal approach to appeals under the *ESA*, which means inquiring into the nature and substance of the appellant's challenge to the impugned determination, to determine whether the grounds of appeal have been met: *Triple S. Transmission Inc.*, BC EST # D141/03. Taking such an approach to my review of the Employer's appeal submissions, I discern two arguments under the error of law ground of appeal. First, the Employer asserts that the Delegate erred in his application of the monetary penalties' provisions of the *ESA* and the *Employment Standards Regulation*, B.C. Reg. 396/95 [***Regulation***]. Second, the Employer contests the Delegate's "just cause" analysis, asserting that the Delegate's decision-making was "flawed," and that the Delegate missed, misread and misunderstood evidence.

i. Application of monetary penalties provisions

88. The Employer's appeal submissions suggest that the Determination imposed fines for "items" the Employer previously paid. I disagree.

89. Section 98 of the *ESA* makes a person who contravenes the *ESA* "subject to a monetary penalty prescribed by the regulations." Section 29(1)(a) of the *Regulation* prescribes a fine of $500.00 if a delegate of the Director of Employment Standards "determines that a person has contravened a requirement under the Act." Under these provisions of the *ESA* and the *Regulation,* a monetary penalty must be imposed if a contravention of the *ESA* is found.

90. In the present case, the Delegate concluded that the Employer contravened five *ESA* requirements and, in turn, ordered the Employer to pay five fines of $500.00. This was not a misinterpretation or misapplication of the monetary penalties' provisions under the *ESA* and the *Regulation*. Nor was it an imposition of fines for items the Employer previously paid.

91. The Employer delivered a voluntary compliance payment to the Branch before the Determination was issued. The payment comprised two amounts: a small amount for a slight shortfall in wages paid, and a larger amount for the vacation pay owed for the period between September 2018 and September 2019. The Delegate accounted for both these amounts in the Reasons for the Determination. Partially on the basis of the former amount, the Delegate concluded (in the Employer's favour) that the Employee was paid all wages owed to him, including overtime wages. On the basis of the latter amount, the Delegate found (in the Employer's favour) that the Employer paid the vacation pay owed for the period of the Employee's employment between September 2018 and September 2019. On the other hand, however, the Delegate found that the Employer failed to pay the required rate of vacation pay for at least one other

period of the Employee's employment, which was a contravention of section 58 of the *ESA* and accordingly gave rise to a fine of $500.00.

ii. "Just cause" analysis

92. In his brief appeal submissions, the Employer asserts, in general, that the Delegate made "mistakes," issued a "flawed decision," and "missed/misread evidence." He does not particularize these assertions; however, he does specify that he takes issue with "the wrongful dismissal amount." Taking a large and liberal approach (and in light of the Employer's submissions to the Delegate in response to the Assessment Letter), I take the Employer's assertions to mean that he challenges the "just cause" analysis in the Reasons for Determination.

93. The Tribunal gives a sympathetic reading to a delegate's reasons for determination. For instance, in examining the reasons for a delegate's determination, the Tribunal will assume (unless there is a good reason not to) that the delegate considered and weighed all the evidence and – based on that evidence – found every findable fact necessary to support the conclusions they reached: see *Budget Rent-a-Car of Victoria Ltd.*, BC EST # D021/12. In their reasons for determination, a delegate "need not explain every finding and conclusion" and need not "expound on each piece of evidence or controverted fact," as long as their "findings linking the evidence to the result can logically be discerned": *Michael L. Hook*, 2019 BCEST 120 at para. 40 [***Hook***]. Like those of other administrative decision-makers, a delegate's written reasons are not assessed against a standard of perfection: see *1170017 B.C. Ltd.*, 2021 BCEST 23.

94. In the present case, the Reasons for the Determination address whether the Employee was dismissed "for just cause" within the meaning of section 63 of the *ESA*.

95. Two categories of questions come up in cases where a delegate is determining whether an employee was dismissed for just cause. First, there are questions of fact: What happened? Why was the employee dismissed? What actually took place between the employer and the employee? Second, there are questions of law: What is the legal test for proving just cause? How is the legal test applied? What are the relevant legal principles? Because both categories of questions come up in just cause cases, the issue of whether an employee was dismissed for just cause is said to be a question of "mixed law and fact": Do the facts of the dismissal satisfy the legal test for proving just cause? A determination by a delegate on this type of question is given deference by the Tribunal: *Hook* at para. 31.

96. Thus, in considering the Employer's challenge to the Delegate's just cause analysis, I have taken a deferential approach and given a sympathetic reading to the Reasons for the Determination, to decide whether the Delegate erred in law. For the following reasons, I find that he did not.

97. First, I find no misinterpretation or misapplication of section 63 of the *ESA* or any applicable principle of law in the Delegate's just cause analysis. The Delegate's discussion of section 63 and just cause principles adequately reflected the well-established framework and principles that have been developed and consistently applied under the *ESA* (see *Hook* at paras. 32 – 34 for a discussion of the just cause analysis). For instance, the Delegate noted that the burden of proof was on the Employer, and he explained how an employer may prove just cause on the basis of an act of serious misconduct or ongoing instances of minor misconduct. He also touched on a central consideration in the just cause analysis, namely whether the conduct of the employee has undermined or was inconsistent with the continuation of the employment

relationship. I find that there was nothing wrong, in principle, with the method of analysis adopted by the Delegate.

98. Second, I find that the Delegate decided the issue of whether the Employee was dismissed for just cause based on the evidence and submissions provided by the parties, and not on an unreasonable view of the facts.

99. To establish just cause on the basis of inadequate performance or ongoing instances of minor misconduct, the onus was on the Employer to prove all of the following:

(a) **Reasonable standards.** The Employer must prove that he established reasonable performance standards and clearly communicated those standards to the Employee.

(b) **Reasonable opportunity.** The Employer must prove that he gave the Employee a reasonable opportunity, including sufficient time and support, to meet the performance standards; however, despite this opportunity, the Employee demonstrated an unwillingness or inability to meet the performance standards.

(c) **Reasonable warning.** The Employer must prove that he advised the Employee that his employment was in jeopardy, and that the Employee's continuing failure to meet the performance standards would result in his dismissal.

(d) **Ongoing failure.** The Employer must prove that, despite the above, the Employee continued to demonstrate an unwillingness or inability to meet the performance standards.

See *Hook* at para. 32; *565682 B.C. Ltd.*, BC EST # D292/02 [***565682 B.C.***] and cases cited therein.

100. The Employer did not meet this onus of proof. In particular, there were no documents or other cogent, sufficiently particularized evidence before the Delegate to show that, during the Employee's seven-year term of employment, the Employer established reasonable performance standards (regarding, for example, appropriate workplace communication, professionalism, attendance and punctuality, conflict management) and clearly communicated those standards to the Employee. As the Tribunal has explained before, an employer's "dissatisfaction with an employee's performance, no matter how strenuously or repeatedly communicated, is not enough" to establish just cause. Unless the employer's dissatisfaction "flows from the employee's failure to achieve objective, reasonable and achievable … performance criteria, that dissatisfaction does not give the employer a right to summarily dismiss the employee without having to pay compensation or give written notice in lieu of compensation" under section 63 of the *ESA*: *565682 B.C.*

101. Thus, I find no error of law in the Delegate's determination that the Employer failed to prove he had just cause to dismiss the Employee for inadequate performance or ongoing instances of minor misconduct.

102. Similarly, I find no error of law in the Delegate's determination that the Employer failed to prove just cause based on an act of serious misconduct. To establish just cause on the basis of an act of serious misconduct, the onus was on the Employer to prove that the Employee's act of misconduct amounted to "a fundamental failure … to meet their employment obligations" or that it was "impossible to reconcile" the act of misconduct with the Employee's "obligations under the employment contract": *Re Employer*, 2021 BCEST 58 at para. 51 [***Re Employer***]. This onus of proof does not exist in a vacuum. The Employer was

required to prove just cause within the specific context and circumstances of the Employee's employment and alleged act of misconduct: *Re Employer* at para. 52. I find no error of law in the Delegate's determination that the Employer failed to do so.

103. The Reasons for the Determination indicate that the Delegate gave full consideration to the Employer's stated reasons for summarily dismissing the Employee, but found they lacked strong, credible evidentiary support. For instance, the Delegate observed that the Employer equivocated regarding the trigger for the Employee's dismissal; he found the Employer's evidence regarding the alleged "violent altercation" lacking; and he found that the Police Report appeared to relate to conduct that took place following the Employee's dismissal. I see no reviewable error in these findings and observations.

104. In addition, the Reasons for the Determination indicate that the Delegate was not compelled by the Employer's description of a single conversation with the Employee, involving "toxic language and threats," which the Employer, in the Video and Text Messages and in his February 26, 2021 submission, suggested was the deciding factor in the Employee's dismissal. It was reasonable that the Delegate's just cause determination did not turn on this alleged conversation, given that the Employer's overall evidence indicated that these types of exchanges occurred routinely throughout the Employee's seven year tenure. This indication in the Employer's evidence would have undercut the credibility of the Employer's submission regarding the seriousness and significance of the alleged conversation.

105. In sum, then, I reject the Employer's two arguments under the error of law ground of appeal. I therefore find that the ground of appeal set out in section 112(1)(a) of the *ESA* has not been met. The Employer has not shown me, on a balance of probabilities, that the Delegate erred in law.

B. Did the Delegate fail to observe the principles of natural justice in making the Determination?: *ESA*, section 112(1)(b).

106. Under section 112(1)(b) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "the director failed to observe the principles of natural justice in making the determination." This is the second ground of appeal identified by the Employer.

107. This ground of appeal centres on the principles of natural justice and goes to whether the Delegate's process in making the Determination was fair.

108. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker. In the context of the complaint, investigation and determination processes under Part 10 of the *ESA*, questions of procedural fairness may arise in a variety of circumstances. For example, in some instances, if a delegate of the Director of Employment Standards fails to consider relevant evidence in making their determination, this could amount to a denial of natural justice: *Economy Movers (2002) Ltd*., BC EST # D026/07. In other cases, a delegate's failure to provide adequate reasons for their determination may constitute a breach of natural justice: *Regent Christian Academy Society, c.o.b. Regent Christian Online Academy*, BC EST # D011/14. In addition, depending on the circumstances, sometimes delay in the complaint, investigation and determination processes may rise to the level of procedural unfairness: see *Garrick Automotive Ltd*., 2020 BCEST 85 [***Garrick Automotive***].

109. Taking a large and liberal approach to my review of the Employer's appeal submissions, I discern three arguments under the natural justice ground of appeal. First, the Employer challenges the timing of the Delegate's process, asserting that the Delegate should have contacted him sooner following the initiation of the Complaint. The Employer says that, had he been contacted more promptly, he "would have been better equipped to deal with this case." Second, the Employer takes issue with the Delegate's treatment of his requests for additional time during the investigation process. Third, the Employer argues that the Delegate provided him with incomplete information regarding the appeal process.

i. Delay in the process

110. The Employee filed the Complaint on November 7, 2019. The Delegate contacted the Employer over 15 months later, on February 10, 2021. This delay in the Delegate's process, in and of itself, does not offend the principles of natural justice. Rather, to meet the ground of appeal set out in section 112(1)(b) of the *ESA* on the basis of delay, an appellant must prove each of the following:

(a) The delay was unacceptable or inordinate in the context of the appellant's specific case, considering factors such as the nature and complexity of the case, the facts of the case and the issues for determination, the purpose and nature of the proceedings, and whether the appellant contributed to or waived the delay.

(b) The delay directly resulted in significant prejudice to either the fairness of the process or the appellant themselves, of such a magnitude that the public's sense of decency and fairness is affected.

See *Garrick Automotive* and cases cited therein, including *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 SCR 307 [***Blencoe***].

111. I am mindful that I have not sought submissions from the Delegate in this matter. As a result, the Delegate has not had an opportunity to provide an explanation for the over 15-month gap between the filing of the Complaint and the Delegate's first contact with the Employer.

112. However, for the following reasons, even if I were to find that the delay in this case was unacceptable or inordinate, I would still conclude that it does not run afoul of the principles of natural justice, on the basis that the Employer has not established that the delay resulted in significant prejudice to the Complaint investigation process or to the Employer himself.

113. An unacceptable or inordinate delay may significantly prejudice the fairness of the complaint, investigation and determination processes under Part 10 of the *ESA* when the delay impairs a party's ability to answer the case against them because, for example, memories have faded, essential witnesses have become unavailable, or evidence has been lost: see *Blencoe* at para. 102. In addition, even where there has not been significant prejudice in a procedural or evidentiary sense, an appellant may be able to prove serious prejudice to themselves if the impugned delay has directly caused them significant personal or psychological harm, such that the processes under Part 10 of the *ESA* have been brought into disrepute: see *Garrick* at para. 29; *Blencoe* at para. 115.

114. I am sympathetic to the Employer's frustration with the initial timing of the Delegate's process in this case. In general, a 15-month gap between the filing of an *ESA* complaint and first contact with the respondent

is too much and is inconsistent with the *ESA* goal of providing fair and efficient procedures for resolving employment standards disputes. I also appreciate that the Employer feels that, but for this delay, he "would have been better equipped to deal with this case," owing to the fact that he is "now retired and more handicapped" and on "a fixed income." However, the Employer has not established that the delay deprived him of the ability to fully respond to the Complaint. On the contrary, despite the delay, the Employer was actually able, for example, to provide information and submissions to the Delegate, as well as witness and other documentary evidence in answer to the case against him. Moreover, given the *ESA* requirement to maintain the Employee's payroll records for four years after their creation, the delay should not have impaired the Employer's ability to make all such records available to the Delegate in response to the Complaint.

115. Overall, having carefully considered all the materials before me, including the Employer's appeal submissions, I am not persuaded that the initial delay in the Delegate's process directly resulted in significant prejudice in a procedural or evidentiary sense. Nor do I find that the delay has directly caused the Employer significant personal or psychological harm, such that the processes under Part 10 of the *ESA* have been brought into disrepute. Even if I accept, for instance, that the Employer's health declined during the period of delay, there is no basis for concluding that the decline directly resulted from the delay.

ii. Requests for additional time

116. In addition to challenging the initial delay in the Delegate's process, the Employer, in his appeal submissions, appears to take issue with the Delegate's treatment of his requests for additional time during the course of the Complaint investigation, perhaps asserting that the Delegate breached section 77 of the *ESA*.

117. Section 77 is a "legislated minimum procedural fairness requirement": *Azad*, BC EST # D107/06 at para. 43, reconsideration denied, BC EST # RD125/06. Under section 77, a delegate of the Director of Employment Standards is required to "make reasonable efforts to give a person under investigation an opportunity to respond." In the present case, there is no evidence that the Delegate contravened this requirement. Rather, the materials before me show that during the investigation process the Delegate responded promptly and reasonably to the Employer's various requests for additional time, information and clarification. The Delegate was in frequent contact with the Employer during the investigation process; he was responsive to the Employer's inquiries; he repeatedly encouraged the Employer to provide additional information and submissions in response to the Complaint; and he kept the Employer apprised of the evidence and arguments submitted by the Employee. Accordingly, I find no error or unfairness in the Delegate's treatment of the Employer's requests for additional time during the course of the Complaint investigation.

iii. Information regarding appeal process

118. The third discernible argument under the natural justice ground of appeal arises from the suggestion in the Employer's appeal submissions that the Delegate provided him with incomplete information regarding the appeal process. Specifically, the Employer asserts as follows:

> … I had asked [the Delegate] how the appeal would work. He explained, just file the appeal, they will contact you with a date. He didn't tell me that I would have to pay the determination amount up front …

119. I reject the suggestion that the information provided by the Delegate regarding the appeal process gave rise to a breach of natural justice. First, I am not convinced that the principles of natural justice required the Delegate to specifically advise the Employer regarding the Tribunal's appeal process. Second, and in any event, the Employer's assertion that the Delegate "didn't tell [him] that [he] would have to pay the determination amount up front" is simply not true. The Delegate, in fact, advised the Employer in writing regarding this matter. On the second page of the Determination, the Delegate stated the following:

> I order John Curry … to pay **$7,965.87**. Please send certified cheque or money order payable to the Director of Employment Standards … **within five working days**.
>
> …
>
> If payment is not received within five working days, **collection proceedings may be commenced without further notice** …
>
> If you appeal this determination funds paid or collected will be held in the Director's trust account during the tribunal appeal process … [emphasis in original].

120. In sum, then, I reject the Employer's three arguments under the natural justice ground of appeal. I therefore find that the ground of appeal set out in section 112(1)(b) of the *ESA* has not been met. The Employer has not shown me, on a balance of probabilities, that the Delegate failed to observe the principles of natural justice in making the Determination.

C. Has evidence become available that was not available at the time the Determination was being made?: *ESA*, section 112(1)(c).

121. Under section 112(1)(c) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "evidence has become available that was not available at the time the determination was being made." This is the final ground of appeal identified by the Employer.

122. This ground of appeal is not meant to simply allow an appellant to seek out additional evidence to supplement the materials that were before a delegate of the Director of Employment Standards during the complaint, investigation and determination processes, if that additional evidence could have been provided to the delegate before they made their determination: *Merilus Technologies Inc.*, BC EST # D171/03 [***Merilus Technologies***]. The threshold for meeting this ground of appeal is higher than that. Specifically, the evidence that the appellant puts forward to the Tribunal must satisfy each of the following four criteria:

(a) The evidence is new, in the sense that it could not, with the exercise of due diligence, have been discovered and presented to the delegate during the complaint, investigation and determination processes and before the delegate made their determination.

(b) The evidence is relevant. More specifically, the evidence must be relevant to a particular material issue in the complaint that was before the delegate.

(c) The evidence is credible, in the sense that it is reasonably capable of belief.

(d) The evidence has high potential probative value. This means that, if the evidence had been provided to, and believed by, the delegate, it could have led the delegate to reach a different conclusion on the particular material issue in the complaint: *Merilus Technologies*.

123. For the following reasons, I find that the Employer has not succeeded in satisfying these criteria in this appeal.

124. First, the Additional Witness Statements are the only supplementary evidence put forward by the Employer in his appeal. As I discussed above in my analysis of the Employer's request to extend the appeal period deadline, I have no reason to conclude that the Additional Witness Statements could not, with the exercise of due diligence, have been put forward during the Complaint investigation process and before the Delegate made the Determination. Second, as discussed above, the Additional Witness Statements lack sufficient potential probative value, given that their content is very similar in nature and substance to the information and evidence that was before the Delegate during the Complaint investigation process. I am not persuaded that, if the Additional Witness Statements had been provided to and believed by the Delegate, they would have led the Delegate to reach a different conclusion on any material issue in the Complaint.

125. I therefore find that the ground of appeal set out in section 112(1)(c) of the *ESA* has not been met in this appeal, without the need to consider matters of relevance and credibility. The Employer has not shown me, on a balance of probabilities, that evidence has become available that was not available at the time the Determination was being made.

VIII. ORDER

126. For all of the above reasons, the Employer's appeal is dismissed, and the Determination is confirmed: *ESA*, section 115(1).

Jonathan Chapnick
Member
Employment Standards Tribunal