Employment Standards TRIBUNAL

Citation: Dayton Boots Company Ltd. and Eric Hutchingame (Re)
2022 BCEST 23

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Dayton Boots Company Ltd. and Eric Hutchingame
("Dayton Boots" and "Mr. Hutchingame")

- of Determinations issued by -

The Director of Employment Standards

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

PANEL: David B. Stevenson

FILE NOS.: 2021/084 and 2021/085

DATE OF DECISION: April 8, 2022

DECISION

SUBMISSIONS

Nazir T. Mitha, QC and Graeme A. Hooper	counsel for Dayton Boots Company Ltd. and Eric Hutchingame

OVERVIEW

1. This decision addresses appeals filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by Dayton Boots Company Ltd. ("Dayton Boots") and Eric Hutchingame ("Mr. Hutchingame") of determinations issued by Tara MacCarron, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on September 10, 2021 (the "Corporate Determination" and "Director Determination" respectively; the "Determinations" collectively).

2. The complaints that resulted in the Corporate Determination were filed by persons who requested, under section 75 of the *ESA*, their identities be kept confidential (the "confidential complainants"). On January 20, 2021, the Director notified Dayton Boots of an intention to conduct a Director-initiated investigation under section 76(2) of the *ESA*. From that date until the issuance of the Determinations, the Director conducted an investigation that included communicating with Mr. Hutchingame, Clarence Gali ("Mr. Gali"), who was for a time the CFO of Dayton Boots, Stephanie Soros ("Ms. Soros"), a bookkeeper working with Mr. Gali, and Jim Wu ("Mr. Wu"), a lawyer acting for Dayton Boots for a period of time during the complaint investigation, and included collecting and analyzing the employment records of 71 employees of Dayton Boots.

3. The Corporate Determination found Dayton Boots had contravened Part 3, sections 17, 20, 21 and 28 of the *ESA* in respect of the employment of 71 persons (the "Employees") and ordered Dayton Boots to pay wages to the Employees in the amount of $610,417.68, an amount which included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of $2,000.00. The total amount of the Corporate Determination is $612,417.68.

4. The Corporate Determination was sent to Mr. Hutchingame, who is listed as the sole director of Dayton Boots in the BC Corporate Registry.

5. Dayton Boots and Mr. Hutchingame have filed appeals of the Determinations, raising all of the available grounds of appeal under section 112(1): error of law; failure to observe principles of natural justice; and that evidence has come available that was not available when the Determinations were being made. The appeals and appeal submissions are identical for both.

6. In correspondence dated November 3, 2021, the Tribunal, among other things, acknowledged to Dayton Boots and Mr. Hutchingame as having received their appeals, including supporting documents, requested the section 112(5) record (the "Record") from the Director, and invited the parties to file any submissions on personal information or circumstances disclosure. The acknowledgement also listed several Employees to whom the correspondence had not been sent, as the Tribunal did not have current contact information on file for them.

7. The Record has been provided to the Tribunal by the Director and a copy has been delivered to the parties for whom the Tribunal had contact information. Those parties have been provided with the opportunity to object to the completeness of the Record.

8. On December 22, 2021, counsel for Dayton Boots and Mr. Hutchingame filed a submission relating to the Record. In it, counsel raises several matters.

9. First, that the Record submitted by the Director did not contain documents that were provided to the Director by Dayton Boots on February 24, 2021. Counsel says Dayton Boots no longer has access to those documents. The submission makes specific reference to "select screen shots" taken of the February 24, 2021 documents, which the Delegate had advised counsel for Dayton Boots and Mr. Hutchingame on August 17, 2021, had been taken and kept by the Delegate.

10. Second, counsel submitted the Record provided did not contain any communications the Delegate may have had with any person related to the complaints after September 10, 2021 – the date of the Determinations. Counsel says this information is important if it indicates one or more of the Employees contacted the Delegate to advise her the Determinations relating to them was in error, because they had not worked and were not owed anything.

11. Third, Dayton Boots and Mr. Hutchingame objected to the inclusion of the confidential complainants' documents in the Tribunal's copy of the Record while severing those documents from the copy of the Record provided to Dayton Boots and Mr. Hutchingame, relying in its argument on their right to "know the case against them" and the Tribunal's *Privacy and Anonymization Policy*. Counsel submits all the confidential complainants' documents should be included in the Record and provided to Dayton Boots and Mr. Hutchingame or, alternatively, struck entirely from the Tribunal's copy of the Record.

12. On January 5, 2022, the Tribunal advised counsel for Dayton Boots and Mr. Hutchingame that the requested submission on the Record was solely in respect of its completeness. The Tribunal indicated that part of counsel's submission that questioned whether documents were missing from the Record had been referred to the Director for response. In the same correspondence, the Tribunal advised counsel that any communication received by the Director after the issuance of the Determinations would not form a part of the Record, as it is described in section 112(5) of the *ESA*.

13. The Delegate provided a response, dated January 6, 2022, in which she advised that the February 24, 2021 set of documents provided by Dayton Boots had been deleted by Dayton Boots, were no longer available to the Director, and had not been relied on when making the Determinations. The "select screen shots" referred in the submission by counsel for Dayton Boots and Mr. Hutchingame were intended to be attached to the August 17, 2021, e-mail which has been included in the Record, but did not appear when the e-mail was converted to PDF. A copy of the screen shots was provided with the submission.

14. Counsel for Dayton Boots and Mr. Hutchingame made a final reply on February 2, 2022, in which, among other things, it is submitted that Dayton Boots did not "delete" any documents and explained that they had provided a link to the documents for download which had expired and, apparently, cannot be retrieved. In the submission, counsel asks the Tribunal to determine that the screen shots provided were related to the confidential complainants.

15. On February 11, 2021, in response to that request, the Tribunal referred counsel to a portion of the Delegate's January 6, 2022 reply submission.

16. Following examination of the correspondence related to *the completeness of the Record*, I am satisfied the Record is complete. The submissions made on behalf of Dayton Boots and Mr. Hutchingame by counsel that bear on the redactions from the Record to protect the identity of the confidential complainants actually go to the natural justice ground of appeal and will be addressed in that context.

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

> 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:
>
> (a) the appeal is not within the jurisdiction of the tribunal;
>
> (b) the appeal was not filed within the applicable time limit;
>
> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the appeal was made in bad faith or filed for an improper purpose or motive;
>
> (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
>
> (f) there is no reasonable prospect the appeal will succeed;
>
> (g) the substance of the appeal has been appropriately dealt with in another proceeding;
>
> (h) one or more of the requirements of section 112(2) have not been met.

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

ISSUES

19. The issues in these appeals are whether Dayton Boots and Mr. Hutchingame have shown errors in the Determinations on any of the grounds of appeal that have been advanced: error of law, failure to observe principles of natural justice, and evidence coming available that was not available when the Determinations were being made.

THE DETERMINATIONS

20. Dayton Boots operates a shoe factory and store in Vancouver BC. A BC Registry Services search, conducted May 13, 2021, showed Dayton Boots was incorporated in the province on April 1, 2018, and that Mr. Hutchingame was listed as its sole director.

21. The confidential complainants filed complaints under the *ESA* asserting Dayton Boots was deducting 50% of Employees' wages each pay period and "re-paying" these wages to Employees in the form of a Dayton Boots store gift card (the "Dayton gift card").

22. On January 20, 2021, Dayton Boots was sent a Notice of Investigation and a Demand for Employer Records. Communications with Mr. Hutchingame and other persons representing Dayton Boots followed.

23. The Corporate Determination sets out, in summary form, the substance of the communications relating to the complaints and investigation. My examination of the Record indicates the Corporate Determination fully and fairly captures the essential elements of the investigation and the communications with Dayton Boots. The Corporate Determination, supported by the Record, reveals Dayton Boots was advised of the nature of the complaints, the relevant provisions of the *ESA* engaged by the complaints, and provided with an opportunity to respond.

24. The Corporate Determination notes that, in the initial conversation between the Delegate and Mr. Hutchingame on January 20, 2021, Mr. Hutchingame explained to the Delegate that because employees are required to wear Dayton Boots product, the Dayton gift cards were developed as a way for Dayton Boots to pay for the cost of the employees' clothing by incorporating it into their pay structure.

25. In a subsequent communication from Mr. Hutchingame to the Director, dated February 2, 2021, he provided a further explanation of the pay structure, which was restated in a communication from Mr. Gali on February 24, 2021. These communications are summarized in the Corporate Determination.

26. The investigation was complicated by the failure of Dayton Boots to keep a record of hours worked by their Employees or to provide any employment agreements showing the Employees had, as alleged by Dayton Boots, agreed to be paid minimum wage.

27. All of the Employees were employed by Dayton Boots in various positions for varying periods of time between January 10, 2020, and December 26, 2020. Dayton Boots provided wage statements for this period on two occasions: first via a link attached to the communication from Mr. Gali on February 24, 2021; and second, by Mr. Wu on August 6, 2021. The Director analyzed only the records provided by Mr. Wu in making the Corporate Determination.

28. The Corporate Determination indicates that starting June 2020, "the wage statements began to show a deduction being made from some employees' gross wages, first labeled "other deduction", then "Dayton Card", and finally "Dayton Gift Card"". The records showed these deductions, after CPP, Employment Insurance and Federal Income Tax withholdings, amounted to "exactly half or all of the employees' wages" in a pay period.

29. The investigation initiated by the Director on January 20, 2021, was ongoing for more than seven months, during which time Dayton Boots presented its position to the Director in several different ways and through several different persons. The Corporate Determination sets out the various arguments made by, or on behalf of, Dayton Boots: that the gift cards were never meant to be wages; that the Employees received a salary and the gift cards were paid on top of that salary; that the wage statements were issued by accident and it was never intended that the Employees were to receive the gross amount; and that it would be unreasonable to require Dayton Boots to pay the amounts shown as deducted as many Employees did not work a full 40 hours in a week.

30. The Director found, based on the information provided in Dayton Boots' records, a breach of section 20 of the *ESA*, and stated in the Corporate Determination that the records provided by Dayton Boots showed "half or all of Employees' wages in a pay period were consistently deducted, without authorization, and then "paid back" in another form other than Canadian currency."

31. The Director also found, because the gift card amounts were consistently being deducted, without appropriate authorization, from the Employees' wages each pay period, Dayton Boots contravened the prohibition found in section 21(1) of the *ESA* and the amounts deducted were owed as wages.

32. The failure of Dayton Boots to keep payroll records for each employee which require, among other things, a record of the hours worked by each employee, each day, was found to be a contravention of section 28 of the *ESA* and the failure to pay all wages earned by employees within eight days after the end of the pay period, which the Director found to be the last full pay period encompassed by the investigation, December 26, 2020, was found to be a contravention of section 17 of the *ESA*.

33. The Director imposed administrative penalties for the contraventions.

34. The Director also issued a determination against Mr. Hutchingame under section 96 of the *ESA.*

ARGUMENTS

35. In their appeals Dayton Boots and Mr. Hutchingame have raised all of the allowable grounds of appeal: error of law; failure to observe principles of natural justice in making the determination; and evidence coming available that was not available when the determination was being made, colloquially described as the "new evidence" ground of appeal.

36. The appeal submissions of Dayton Boots and Mr. Hutchingame are identical; the responses in this decision to the appeal submissions will apply equally to both.

37. In the appeal of the Director Determination, Mr. Hutchingame has not addressed any of those issues that arise under section 96 of the *ESA* (see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST #D180/96). The absence of any argument addressing those issues eliminates the need for any analysis of the Director Determination. The Director Determination may be affected by changes in the Corporate Determination resulting from an assessment of the appeal on that Determination.

Error of Law

38. Dayton Boots and Mr. Hutchingame argue the Director made several errors of law:

1. The Director erred in treating the Dayton gift cards as "wages", as that term is defined in the *ESA*, because they were not provided to Employees in exchange for "work" nor were they related to "hours of work, production or efficiency";
2. The Director erred in failing to recognize, and find, on the evidence, that the Dayton gift cards were a gratuitous benefit and excluded from the definition of wages on that basis;
3. The Director erred in law by failing to recognize, and find, the Dayton gift cards were provided to the Employees as an incentive to remain employed with Dayton Boots, rather than leaving Dayton Boots for CERB benefits, and to increase on-line awareness of Dayton Boots' products;
4. The Director erred in law by "erroneously" relying on Dayton Boots' payroll records where the Dayton gift cards were recorded as a "deduction"; and
5. The Director erred in law by including wages owed to out-of-province Employees in the calculation of total wages owed by Dayton Boots under the *ESA*.

Natural Justice

39. Dayton Boots and Mr. Hutchingame contend the Director failed to observe principles of natural justice by conducting a deficient investigation, which includes failing to interview any employee other than the confidential complainants and one other complainant, failing, or refusing, to consider all relevant evidence, thwarting Dayton Boots efforts to obtain relevant evidence, and failing to maintain records necessary for the appeals.

New Evidence

40. The appeal submissions from Dayton Boots and Mr. Hutchingame have attached two affidavits with each of their appeals. The appeal submissions raise the ground of appeal set out in section 112(1) (c), which is colloquially referred to as the 'new evidence' ground of appeal, but do not specifically identify the evidence that is submitted under this ground of appeal, or address the principles that operate in respect of it, in their arguments.

41. I note at this juncture that the appeal submissions themselves contain several assertions of fact on matters that are not referred to in the Determinations and, on a review of the Record, were not established as matters of fact to the Director during the investigation. It may well be that Dayton Boots alluded during the investigation to matters stated as "fact" in the appeals – Dayton Boots made many assertions in their communications with the Director that were not borne out by objective facts or accepted by the Director on analysis of all the material – but these assertions are not "evidence", and on that basis alone, do not warrant analysis under this ground of appeal.

42. I shall briefly identify the material which appears, most directly, to have been submitted under this ground of appeal and will later assess it on the basis of the operative principles for accepting new evidence.

43. The first is an affidavit deposed by Mr. Hutchingame. Much of what is asserted in it was before the Director when the Corporate Determination was being made. The affidavit makes a general reference to documents and records, but no 'documents or records' are provided with the affidavit, either by way of attachment or otherwise.

44. The second is an affidavit deposed by Ms. Soros and attaches three exhibits: an excerpt from a Government of Canada webpage titled "*Employers Guide – Taxable Benefits and Allowances"*; a webpage published by QuickBooks Small Business Centre, titled "Your Easy Guide to Payroll Deductions"; and a webpage published by QuickBooks Support titled "How to set up a non cash taxable fringe benefit for payroll in Canada". Ms. Soros says she viewed the three exhibits on September 30, 2021.

45. As with Mr. Hutchingame's affidavit, Ms. Soros' affidavit makes a general reference to documents and records that are said to be either Dayton Boots' records or stored in her personal files, but apart from the three attachments, no other 'documents or records' are provided with the affidavit, either by way of attachment or otherwise.

ANALYSIS

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

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law:
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

47. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on an appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

New Evidence

48. I shall first address the new evidence ground of appeal, as conclusions on this ground of appeal will have some impact on arguments made in support of other grounds of appeal.

49. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03. New evidence which does not satisfy these conditions will rarely be accepted. This ground

of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

50. As I have indicated above, the appeals, and specifically the affidavits filed within, do not identify what material or information is being sought to be introduced under this ground nor do they address such material in the context of the principles expressed in the above statement.

51. The appeals obviously seek to have information and documents added to the Record and considered in the appeal as matters of fact. Much of the information and material relates to matters that are not "new" but could have, and if Dayton Boots and Mr. Hutchingame believe them to be relevant, should have, been provided to the Delegate during the investigation. I view much of the argument on this ground of appeal to be nothing more than attempting to establish some credence and weight to assertions made to the Director during the investigation but not demonstrated on the material found in the Record.

52. As well, I do not find the affidavits, including the attachments to Ms. Soros' affidavit, satisfy the conditions for allowing them as "new evidence". I make this finding for the following reasons.

53. First, the affidavit of Mr. Hutchingame makes several assertions of fact that are not part of the Record and were not provided to the Director during the investigation. The comments I made above are applicable here.

54. Second, in some places, the affidavit contradicts statements made by Mr. Hutchingame to the Director during the investigation. For example, in paragraph 14 of the affidavit, Mr. Hutchingame asserts, "the Gift Card was an incentive for employees to stay employed as opposed to going on CERB . . .". That assertion contradicts what he represented to the Director on two occasions: first in his January 20, 2021 telephone discussion with the Delegate (recorded in the Record and in the Corporate Determination), where he said the gift cards were developed as a way for Dayton Boots to pay for the cost of the Employees' clothing by incorporating it into their pay structure; and second, in his February 2, 2021 e-mail, which tied the payment of the "merchandise credit" to what would otherwise have been a "performance payment", more particularly described as, "production bonuses to factory staff and commission sales to store staff".

55. Another example lies in Mr. Hutchingame's reference to the Delegate having "lost" documents that were provided by Mr. Gali on February 24, 2021, when what appears to have happened was that Dayton Boots provided the delegate with a link to the documents submitted on February 24, 2021, and the link expired, rendering access by the Director to those documents impossible.

56. On the basis of the above analysis, I find the additional information provided by Mr. Hutchingame that is not found in the Corporate Determination or the Record, is not "new" but was reasonably available and could have been provided during the complaint process. I also find much of his affidavit is not credible; it contradicts statements made to the Director and is not reasonably capable of belief.

57. Third, the affidavit of Ms. Soros, while identifying her as the current bookkeeper for Dayton Boots, does not state how long she has been in that position. That information is relevant because she purports to provide evidence on the bookkeeping practices at Dayton Boots through the year 2020, but states the

information she is providing is based on "understandings" about those bookkeeping practices; the source of those "understandings" is not identified.

58. In his February 24, 2021 communication with the Delegate, which is in the Record, Mr. Gali says:

> The administrative process was in disarray, the accountant resigned in the first quarter of 2020 and we hired staff to fill the position, who later resigned during August of 2020. We recently just found plenty of errors in our system, the accounting was not maintained and updated. There were no records left, everything was full of holes. (Record, page 92)

59. I add this is the same communication that provides the link to the payroll records in response to a request by the Delegate on February 3, 2021, that, at some undetermined point in time, the Director could no longer access. It also appears from information in the Record, that Mr. Gali left the employ of Dayton Boots sometime during the investigation.

60. In the context of the comments of Mr. Gali and other evidence in the Record, it is doubtful that Ms. Soros can credibly comment on the payroll practices of Dayton Boots in 2020.

61. For example, at paragraph 9 of her affidavit, she says:

> I understand the value of gifts was included in "salary" to ensure that source deductions were made on the value of the taxable benefit and were then shown as a "deduction" to avoid double payment to the employee.

62. Ms. Soros' does not provide the source of her "understanding"; it is improbable such understanding was acquired from any person doing the bookkeeping or accounting at Dayton Boots in 2020 because all those persons seem to have parted ways with Dayton Boots. Her affidavit gives no information about the scope of the knowledge of any of the persons who kept the books for Dayton Boots. We do know, from Mr. Gali, that there were "plenty of errors in our system" and, from August 2020, "the accounting was not maintained and updated".

63. Even if some unknown source provided information to Ms. Soros, she does not provide any insight on how she can discern it was the intention of the persons who prepared the payroll and tax records for Dayton Boots to include the value of gifts in "salary", as opposed to what the Director found – based on the records provided – which was that "half or all of employees' wages in pay period was consistently deducted, without authorization, and then "paid back" in another form" – Dayton gift cards.

64. As with the affidavit of Mr. Hutchingame, I find Ms. Soros' affidavit does not satisfy the conditions necessary to be accepted under the "new evidence" ground of appeal; it does not provide any "new" evidence, but simply re-works arguments advanced by Dayton Boots during the investigation, but not accepted by the Director; it is neither credible nor probative.

65. Based on my decision to refuse to accept the affidavits or the attachments provided as "new evidence", this ground of appeal is dismissed as having no reasonable prospect it will succeed and the appeals will be addressed and decided on the facts found in the Determinations unless those findings raise an error of law.

Natural Justice

66. Dayton Boots and Mr. Hutchingame have raised the natural justice ground of appeal.

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

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

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

69. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determinations.

70. On the face of the material in the Record and in the information submitted to the Tribunal in the appeals, Dayton Boots and Mr. Hutchingame were advised of the nature of the complaint against them. I am supported in this view by the contents of an e-mail sent to Mr. Gali following his production of the 2020 payroll records, which outlines the preliminary observations of the Director of her review of the payroll records, her concerns, the provisions of the *ESA* that were engaged on her initial review, and an invitation for Dayton Boots to conduct a self-audit (Record, pages 103 – 104). As well, on January 20, 2021 Dayton Boots and Mr. Hutchingame were given notice of the complaints and of the intention of the Director to initiate an investigation under section 76(2) of the *ESA*, which was accompanied by the Director's Demand for Records (Record, pages 7 – 12).

71. Dayton Boots and Mr. Hutchingame were clearly provided with the opportunity required by principles of natural justice to present their position to the Director. Dayton Boots and Mr. Hutchingame have provided no objectively acceptable evidence showing otherwise. This also substantially answers the contention that the redactions from the material relating to the confidential complainants was a denial of natural justice.

72. There are several other points to make in response to this contention.

73. The first is to affirm that section 75 of the *ESA* specifically allows a person filing a complaint to request their identity not be disclosed. The confidential complainants made this request and it was granted by the Director of Employment Standards.

74. The second is to confirm, perhaps more emphatically than what was stated above: there is no set level of procedural protection that must accompany a function of the Director. What is required is that the parties know the case being made against them and be given an opportunity to reply. It is not required that a

party be provided with full particulars of the claim. It is sufficient that the person under investigation be provided with enough details of the claim to make the opportunity to respond meaningfully. Dayton Boots and Mr. Hutchingame had this opportunity.

75. Third, the requirement, which arises under both section 77 of the *ESA* and under common law principles of natural justice for the Director to make reasonable efforts to give a person under investigation an opportunity to respond, is not characterized in absolute terms. The Tribunal has recognized that under the *ESA*, there is no specific legislative requirement that the Director disclose all information received by the Director to all parties involved and has repeatedly stated the *ESA* does not, nor was it intended to, create a "discovery" obligation such as that found in the B.C. Supreme Court Rules whereby documents are presumptively inadmissible - and therefore cannot be relied on by a party - in the absence of prior disclosure.

76. Fourth, to paraphrase the comments of the Court in *Downing and Graydon et al.* 1978 CanLII 1424 (ON CA), the arguments made by Dayton Boots and Mr. Hutchingame under this aspect of the natural justice ground of appeal suffer from the misconception that the right to know and to reply requires adherence to the full panoply of natural justice rights that might arise in a judicial context. This is not so. The appropriate procedure depends on the provisions of the statute – which allows the confidential complainants to request their identity not be disclosed – and the circumstances in which it has to be applied. It is well established, however, that there is no "discovery" or "disclosure" obligation in the *ESA*: see, for example, *Cyberbc.com AD & Host Services Inc. c.o.b. 108 Temp and La Pizzaria*, BC EST #RD344/02.

77. Dayton Boots and Mr. Hutchingame allege the Director's investigation was deficient. At its root, however, the allegation is nothing more than an expression of disagreement with the result of the Director's investigation and analysis. In this respect, it is worth repeating that the findings of the Director on the character of the Dayton gift card and the calculation of wages owing were made on information provided by Dayton Boots. While Dayton Boots and Mr. Hutchingame have attempted to distance themselves from the payroll records provided to the Director by them – arguing the wage statement were simply part of a misunderstanding and were issued by mistake – those wage statements were the product of the statutory obligation found in section 28 of the *ESA*. While it is apparent on their face there was a failure to keep an accurate record of the Employees' wage rate or to record hours worked by each Employee for each day, that does not mean the Director may not rely on them in other respects. Dayton Boots and Mr. Hutchingame cannot resile from every element of the information that is contained in the payroll records provided, particularly where that information does indicate adherence to the statutory requirements listed in section 28.

78. Dayton Boots and Mr. Hutchingame have presented nothing that shows the information which was contained in the payroll records could not be taken at face value. There was a reference to an August 3, 2021 e-mail from Matthew Preston to Mr. Hutchingame which Dayton Boots said was confirmation "he did not do anything" for Dayton Boots and accordingly no wages were owed. I agree completely with the Director's response, dated August 23, 2021, that "if Dayton Boots claims he performed no work and, therefore, is not entitled to any wages, can you please explain why there are 2 wage statements created for Mr. Preston showing the payment of wages (and corresponding deductions of wages)?" That does not show an error or deficiency in the investigation, but a choice to accept objective evidence over other, less believable, information.

79. In that same response, the Director says:

> Furthermore, can you please provide an update and explanation as to what process Dayton Boots is currently taking regarding this investigation? The Branch has yet to make or issue a "determination" (as referenced in your previous e-mail), and it is not clear what you mean by "proceed with the remaining employees". In our previous conversation on August 17, 2021, it was agreed Dayton Boots would send me the records showing what wages were actually paid to Dayton employees, as well as Dayton Boot's written response referencing the specific pieces of legislation that permitted it to make these gift-card deductions from employees wages. However, no further documentation has yet to be provided. (Record, page 175-176)

80. The above exchange is not atypical of the nature of the communications between the Director and Dayton Boots during the nearly seven months of the investigation, with Dayton Boots being provided with numerous extensions and opportunities to provide their response to matters arising during the investigation and doing little with those opportunities.

81. In sum, I reject completely the assertion by Dayton Boots and Mr. Hutchingame that the investigation done by the Director denied them the opportunity to answer the allegations made in the complaints.

82. Dayton Boots and Mr. Hutchingame submit the Director interfered with Dayton Boots and Mr. Hutchingame being able to respond to the allegations. I disagree. Such a suggestion, as recorded above, is disingenuous; it ignores that Dayton Boots and Mr. Hutchingame had more than seven months from the time they were notified of the confidential complaints and the intention of the Director to broadly investigate the allegations made in the complaint (which were communicated to Dayton Boots and Mr. Hutchingame on January 20, 2021) to provide their response and did little with that opportunity beyond develop new theories to explain the deduction from wages and the corresponding repayment of it with gift cards. What Dayton Boots and Mr. Hutchingame are saying is that there was an inadequate response by them to the complaint and they now wish this failure should be visited on the Director.

83. Dayton Boots and Mr. Hutchingame contend the disappearance of the records provided by Mr. Gali in February 2021, has denied them an opportunity to assess whether the investigation was properly conducted and has denied the Tribunal the opportunity for a meaningful review of the Director's conclusions.

84. There are two very obvious problems with this argument.

85. First, Dayton Boots and Mr. Hutchingame have provided no evidence showing the disappearance of the first set of payroll records interfered with any natural justice principles that operate in the complaint process. To reiterate, the burden they bear in alleging a denial of natural justice in the process is to provide some objectively cogent evidence in support of it. Any assertion relating to the first set of records is purely speculative, although one may fairly ask why Dayton Boots or Mr. Hutchingame could not have obtained a copy of the records to which Mr. Gali had access.

86. Second, while the Director had viewed the payroll records and made a preliminary assessment of them in February 2021, the Director says they were neither before her nor considered in making the Determinations. It was the payroll records provided to the Director by Mr. Wu on August 6, 2021, that

were fully examined and formed the basis for the conclusions and calculations made in the Determinations.

87. In sum, nothing in the arguments made by Dayton Boots and Mr. Hutchingame on this ground of appeal that shows it has any reasonable chance of succeeding and it is dismissed.

Error of Law

88. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BCCA):

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

89. It is well established that the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's factual findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03.

90. Except for one aspect of the appeals, I also find this ground of appeal has no reasonable prospect of succeeding.

91. The arguments made by Dayton Boots and Mr. Hutchingame allege an error in the interpretation and application of the definition of "wages" in section 1 of the *ESA*; acting without evidence; and adopting a method of assessment which is wrong in principle. In this last category are two arguments: first, that the Director wrongly included the Dayton gift cards in wages and, as a result, incorrectly found they were "deducted" from wages; and second, that the calculations of wages owed included employees whose addresses were not, on the face of the material provided to the Director, in the province. This latter argument invokes a question of whether the Director had jurisdiction over the employment of those persons who appear to have resided out of province.

92. As a general statement of principle, the Tribunal has held that findings of fact are reviewable as errors of law under prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal has noted that the test for establishing an error of law on this basis is stringent, citing the reformulation of the third and fourth *Gemex* factors in *Delsom Estates Ltd. v. Assessor of Area #11 - Richmond/Delta*, 2000 BCSC 289 (CanLII) at para. 18:

> ... that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable

> person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" ….

93. I do not accept the contention that the Director "acted without evidence".

94. There is simply no room for dispute that the Corporate Determination and the material in the Record demonstrate an ample evidentiary basis for the Director finding, "that half or all of employees' wages in a pay period were consistently deducted, without authorization, and then "paid back" in another form other than Canadian currency". Dayton Boots conceded as much at the outset. As noted in the Corporate Determination, Dayton Boots acknowledged amounts were deducted from Employees' wages for Dayton gift cards, but "after being educated about section 20 and 21, . . . claimed the deduction made from employees' wages for the gift cards was just a big misunderstanding and accounting error".

95. The conclusion that the gift cards were a "wage" paid in another form other than Canadian currency is one the Director was entitled to make based on the evidence which was initially provided by Mr. Hutchingame in a telephone conversation with the Delegate on January 20, 2021, where he said the gift cards were developed as a way for Dayton Boots to pay for the cost of the Employees' clothing by incorporating it into their pay structure, and then in his February 2, 2021 e-mail, which tied the payment of the "merchandise credit" to what would otherwise have been a "performance payment", described as, "production bonuses to factory staff and commission sales to store staff".

96. The common thread to the statements made by Mr. Hutchingame is that, under section 25 of the *ESA*, monies deducted from an employee by an employer to provide "special clothing" is deemed to be wages and a "performance payment" falls within those items included in the definition of wages in section 1 of the *ESA*.

97. There was other evidence that allowed the Director to find the Dayton gift cards were included in what are considered "wages" in the *ESA*.

98. The amounts that include the gift cards are consistently shown in the wage statements provided by Dayton Boots as "salary" or "commission". There is no disagreement from Dayton Boots and Mr. Hutchingame that the amounts shown under those designations on the wage statement did include the Dayton gift card amounts.

99. There are frequent references by Dayton Boots to paying Employees' "wages", "commissions" and "salary", which is by definition paid for "work". It beggars belief and defies logic to suggest the amounts paid under the headings of "salary" and "commission" on the wage statements – which included the amounts which were deducted and repaid as Dayton gift cards – was not payment for "work".

100. Based on the evidence, I find the Director committed no error of law in accepting the amounts paid to Employees as "salary" and "commission" included amounts which were to be deducted and paid out as Dayton gift cards and those amounts quite comfortably fit the definition of "wages" under the *ESA*.

101. It also bears noting that the definition of "wages" is inclusive. Clearly the Dayton gift cards were not within those matters that are excluded from "wages" as defined. As well, while it may be trite, the Director, in issuing the Determinations, had to apply relevant provisions of the *ESA*. The fact the Dayton gift cards

might be characterized as a taxable benefit under the federal *Income Tax Act* is irrelevant when determining if they constitute "wages" as defined in the *ESA*.

102. The question of whether an amount paid to an employee by an employer falls within the definition of wages is one of mixed law and fact, requiring applying the facts as found to the relevant provisions of the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco Structures Ltd.*, BC EST #D260/03, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748:

> …questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

103. A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

104. Another element of the error of law ground lies in the argument made by Dayton Boots and Mr. Hutchingame that the Director failed to correctly interpret and apply the definition of "wages" under the *ESA* to the Dayton gift card resulting in the Director wrongly finding the Dayton gift cards were "wages".

105. This element of the error of law ground only incidentally examines the legal principles and the test applied under the *ESA* for addressing what are wages under the *ESA*.

106. Dayton Boots and Mr. Hutchingame say the Director's error was in finding the Dayton gift cards were "wages" without considering, and make a finding on, whether they were related to "work, production, or efficiency", which it is submitted, is an essential to finding amounts paid to an employee is wages.

107. It must be obvious from my treatment of, and conclusion on, the argument that the Director acted without evidence, that I find no merit to the submissions on this aspect of the error of law ground.

108. If it is not obvious, I re-state that the finding by the Director of the amounts paid in Dayton gift cards as "wages" was based on justifiable findings and conclusions of fact made by the Director, adequately supported by the evidence, and was not a matter that depended on deciding the correct interpretation of the definition of "wages" in the *ESA*.

109. This aspect of the error of law argument is entwined in the argument that the Director erred by adopting a method of assessment that is wrong in principle. As I find no error of law in the Director's conclusion on the character of the Dayton gift cards as payment for wages, then I cannot find Dayton Boots and Mr. Hutchingame has shown the Director's method of assessing the Dayton gift cards, by considering them to be wages in the calculations, was an error. I find this aspect of the error of law ground of appeal has no reasonable prospect of succeeding and it is dismissed.

110. The submissions made here simply confirm my view that the appeals are doing no more than disputing the findings and conclusions of fact made by the Director. The submissions do no more than restate the position into which Dayton Boots' response had evolved in the latter part of the investigation, that the Dayton gift cards were never intended to be wages.

111. As indicated above, however, there is one aspect of the appeals that, on review, I find has presumptive merit. Dayton Boots and Mr. Hutchingame submit the Director's calculation includes Employees whose address is out of province. That information is confirmed in the Record.

112. Dayton Boots and Mr. Hutchingame are correct in their appeal that persons who reside and perform work outside of the province may not be considered employees for the purpose of *ESA*. The appeals also correctly identify the test for deciding whether the *ESA* applies to person who are resident outside of the province has been established in *Re Can-Achieve Consultants Ltd.*, BCEST #D463/97.

113. The Director did not address the question of whether the provisions of the *ESA* apply to those employees identified on pages 6 – 7 of the Dayton Boots and Mr. Hutchingame appeal submissions as Brand Ambassadors and as having addresses outside the province (the "out-of-Province Employees"). The question of whether the provisions of the *ESA* can apply to the out-of-Province Employees is a matter which goes to the Director's jurisdiction to process a claim under the *ESA* relating to them.

114. I am not prepared to dismiss the appeal against the wage calculations without giving the parties, which would only include Dayton Boots, Mr. Hutchingame, the Director, and the out-of-Province Employees, an opportunity to address my concern.

115. To summarize, except for the question of the correctness of the wage calculations as it relates to the out-of-Province Employees, the appeals by Dayton Boots and Mr. Hutchingame are dismissed. On the remaining matter, I retain jurisdiction to decide the question once I have received submissions.

116. As suggested above, my conclusions on this question may also impact the Director Determination.

117. The Tribunal will notify the parties and provide them with a schedule and process for responding.

ORDER

118. Pursuant to section 115 of the *ESA*, I order the Determinations dated September 10, 2021, be confirmed, with the amount owing to out-of-Province Employees to be determined following submissions from the parties.

David B. Stevenson
Member
Employment Standards Tribunal