Citation: Teal-Jones Group (Re)
2022 BCEST 24

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by –

Teal-Jones Group, a partnership between Columbia River Shake & Shingle Ltd. and Teal Cedar Products Ltd.

(“TJG”)

- of a Determination issued by –

The Director of Employment Standards

pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Shafik Bhalloo

FILE NO.: 2022/094

DATE OF DECISION: April 27, 2022

DECISION

SUBMISSIONS

Jennifer Jones and Richard Press	on behalf of Teal-Jones Group, a partnership between Columbia River Shake & Shingle Ltd. and Teal Cedar Products Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Teal-Jones Group, a partnership between Columbia River Shake & Shingle Ltd. and Teal Cedar Products Ltd. ("TJG") has filed an appeal of a determination issued by Carrie Manarin, a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director"), on February 3, 2022 (the "Determination").

2. The Determination found that TJG contravened Part 8, section 63 (compensation for length of service) of the *ESA* in respect of the employment of Ron Armour ("Mr. Armour").

3. The Determination ordered TJG to pay Mr. Armour wages in the total amount of $12,084.39 consisting of compensation for length of service, vacation pay and accrued interest.

4. The Determination also levied an administrative penalty against TJG of $500 under the *Employment Standards Regulation* (the "*ESR*") for breach of section 63 of the *ESA*.

5. TJG appeals the Determination on the "natural justice" ground of appeal under section 112(1)(b) of the *ESA.*

6. The deadline to file the appeal of the Determination was 4:30 p.m. on February 28, 2022.

7. On February 28, 2022, the Tribunal received TJG's Appeal Form and a single page of written submissions in support of the appeal from Jennifer Jones ("Ms. Jones"), Human Resources Manager for TJG.

8. TJG did not include the Determination or the Reasons for the Determination (the "Reasons") with its Appeal Form and written submission.

9. Section 112(2)(a)(i.1) of the *ESA* requires any party who wishes to appeal a determination to the Tribunal to include with their appeal a copy of the Director's written reasons for the determination.

10. The Appeal Form also contains an Appeal Submission Checklist immediately below the signature line for the submitting party to check off the documents required for submission to the Tribunal in an appeal. Two of the required documents specified in the checklist are: a complete copy of the determination and a complete copy of the reasons for the determination.

11. On March 1, 2022, Richard Press ("Mr. Press") informed the Tribunal that he is counsel for TJG, and provided the Tribunal with a complete copy of the Determination and the Reasons.

12. On the same date, March 1, 2022, the Tribunal requested TJG to provide the Tribunal with a written request to extend the statutory appeal period and to provide an explanation as to why the Determination and Reasons were filed after the appeal deadline.

13. On March 3, 2022, the Tribunal received TJG's written request for an extension of the statutory appeal period from Mr. Press, and Ms. Jones written statement of same date.

14. Ms. Jones statement primarily focuses on the merits of TJG's appeal which I will summarize under the heading "*TJG's Submissions*" below.

15. In the last few paragraphs in her statement, Ms. Jones briefly explains why TJG's appeal application was incomplete at the time TJG's Appeal Form was filed on February 28, 2022. She explains that once she received the "Decision and Determination" she spoke with various members of TJG about whether or not to appeal and "[w]e decided late in the day to appeal". She says she has never appealed a matter to the Tribunal before and "made best efforts to comply with the directions on the Tribunal's website" but "inadvertently did not include the Branch's Decision and Determination" when filing TJG's appeal. She also says that TJG retained legal counsel after she filed the appeal and counsel, on March 1, 2022, filed the "Decision and Determination".

16. On March 7, 2022, the Tribunal corresponded with the parties advising them that it had received TJG's appeal of the Determination and application to extend the statutory appeal period. The Tribunal also informed Mr. Armour and the Director that, at this time, no submissions were being sought from them on TJG's request to extend the appeal period or on the merits of the appeal.

17. In the same correspondence, the Tribunal requested the Director provide the Tribunal with the *ESA* section 112(5) record (the "Record") that was before the Director at the time the Determination was being made.

18. The Director provided the Tribunal with the Record and on March 29, 2022, the Tribunal sent a copy of the same to TJG and Mr. Armour and both parties were provided an opportunity to object to its completeness by 4:00 p.m. on April 12, 2022.

19. On April 13, 2022, after not receiving any objections to the completeness of the Record from TJG or Mr. Armour, the Tribunal informed the parties that the appeal is assigned to a panel, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from the other parties on the merits of the appeal.

20. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based solely on TJG's appeal submissions, the Record, and the Reasons. Under section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any reasons listed in the subsection. If satisfied the appeal or part of it should not be dismissed, the Director and Mr. Armour will be invited to file submissions. On the other hand, if the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case I will consider whether the request to extend the statutory appeal period should be allowed or dismissed under section 114(1)(b) or (h). I will assess the relative strength of the appeal and also whether there is any reasonable prospect that the appeal will succeed.

ISSUE

21. The issue to be considered at this stage of the proceeding is whether the request to extend the statutory appeal period should be granted, and the appeal allowed to proceed, or should the appeal be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

22. I have reviewed the Determination as well as the submissions of TJG. I agree with Mr. Press that the "Appeal is narrow" in scope and therefore, I will only refer to the material facts necessary and relevant to determine the issues on appeal.

Background

23. A BC Registry Services Search conducted online on April 5, 2019, with a currency date of March 1, 2019, indicates that TJG is a partnership of Columbia River Shake & Shingle Ltd. and Teal Cedar Products Ltd. registered in British Columbia on January 21, 2003.

24. TJG operates a timber harvesting and lumber product manufacturing business in Surrey, British Columbia.

25. Mr. Armour was employed by TJG as a welder commencing on March 27, 2011.

26. In July 2015, Mr. Armour was temporarily laid off but returned to his position less than a month later without interruption to his employment.

27. On June 2, 2020, Mr. Armour received a one-week unpaid suspension for failing to report his absence from work in advance of his shift commencing May 30, 2020. He served the suspension on June 6, 7, 8 and 9, 2020.

28. On August 23, 2020, Mr. Armour was performing work on a quadrant feeder within the worksite and was not wearing fall protection equipment (fall safety harness).

29. On August 25, 2020, Mr. Armour was sent home pending an investigation into fall safety procedure compliance during his shift on August 23, 2020.

30. On August 28, 2020, Mr. Armour attended a disciplinary meeting and his employment was terminated without notice or pay in lieu of notice for failing to wear a fall safety harness on August 23, 2020, when he was working at a height above 10 feet.

31. At the time of termination, Mr. Armour's rate of pay was $37.77 per hour (plus a $0.50 per hour supplement for having his trade ticket) and he was entitled to 9% vacation pay.

32. On September 16, 2020, Mr. Armour filed a complaint under section 74 of the *ESA* alleging that TJG failed to pay him termination pay (the "Complaint").

33. A delegate of the Director (the "Investigative Delegate") investigated the Complaint and received submissions and evidence from the parties and their witnesses.

34. In the case of Mr. Armour, the Investigative Delegate interviewed him on September 13, 2021, and October 20, 2021. On October 20, 2021, the investigating delegate also interviewed Mr. Armour's witness, Mike Knopp, an employee of TJG who worked with Mr. Armour on the quadrant feeder on August 23, 2020.

35. In the case of TJG, Ms. Jones supplied the Investigative Delegate with: (i) her written submissions, on behalf of TJG, on October 18, 2021, October 22, 2021 and November 2, 2021; (ii) Mr. Armour's disciplinary record dating back to November 28, 2016; (iii) TJG's Disciplinary Step System policy; (iv) the written statements of Leo Villarante ("Mr. Villarante"), an employee who worked with Mr. Armour on the quadrant feeder on August 23, 2020, dated August 26, 2020 and October 29, 2021; (v) the written statement of Barry Savage, a supervisor on the worksite on August 23, 2020, dated August 25, 2020; (v) the written statement of Richard Loehndorf ("Mr. Loehndorf"), the immediate shift supervisor of Mr. Armour on August 23, 2020, dated August 26, 2020; and (vi) an audio recording taken by TJG during Mr. Armour's termination meeting on August 28, 2020.

36. In addition to the above, the Investigative Delegate interviewed Mr. Loehndorf on September 14, 2021, and was present by telephone on October 21, 2021, when Ms. Jones interviewed Mr. Loehndorf.

37. On or about September 29, 2021, after Ms. Jones provided the Investigative Delegate with TJG's evidence, including the first written statement of Mr. Villarante on August 26, 2020, the Investigative Delegate, on the same day, informed Ms. Jones by telephone that she required Mr. Villarante's contact information in order to interview him about his statement.

38. On October 4, 2021, the Investigative Delegate emailed Ms. Jones and asked the latter, among other things, to provide her with Mr. Villarante's contact information.

39. On October 5, 2021, Ms. Jones emailed Mr. Villarante's cell phone number to the investigating delegate.

40. On October 7, 2021, the Investigative Delegate called Mr. Villarante and left a voicemail message that she was an investigator with the Employment Standards Branch (the "Branch") and needed to speak with him about his written statement to TJG relating to a former employee, Mr. Armour. She said she needed to speak to him about what he observed on August 23, 2020, during his shift with Mr. Armour and the written statement he made subsequently. She left her name and telephone number for Mr. Villante to call her back forthwith.

41. When the Investigative Delegate did not receive a response from Mr. Villarante, she again called him the next day, on October 8, 2021, and left a further voicemail message. She said she was an investigator from the Branch and needed to speak with him about what he observed on August 23, 2020, during a shift with Mr. Armour. She said she wanted to confirm the written statement provided by TJG which he appears to have written and signed on August 26, 2020. She then read out the entire statement on the voicemail and asked him that if it was not accurate he needed to contact her by October 10, 2021, to advise of such, failing which she would accept it as the statement he made. She, again, left Mr. Villarante her name and telephone number but he did not call her back.

42. On October 21, 2021, during her telephone call with Ms. Jones, the Investigative Delegate asked Ms. Jones why Mr. Villarante had "not called [her] to provide testimony".

43. According to the Investigative Delegate's notes in the record, Ms. Jones said she is unsure why he has not called her and it may be his personality and desire to avoid being involved in conflict. Ms. Jones then informed the Investigative Delegate that Mr. Villarante is the brother-in-law of Dick Jones ("Mr. Jones"), one of the owners of TJG.

44. On October 27, 2021, the Investigative Delegate issued both parties her Investigation Report.

45. On October 29, 2021, Mr. Armour confirmed receipt of the Investigation Report and said he did not have any further evidence to add.

46. On November 2, 2021, Ms. Jones sent the Investigative Delegate her submissions in response to the Investigation Report, including a further written statement of Mr. Villarante.

47. At all material times during the investigation of the Complaint, the Investigative Delegate cross-disclosed to each party the other's evidence and both parties were afforded opportunities to respond to the other's evidence and did so.

48. On November 2, 2021, the Investigative Delegate forwarded the file containing the evidence of both parties she obtained during the investigation to the Adjudicative Delegate to decide the Complaint.

49. On February 3, 2022, based on a review of the information in the file, the Adjudicative Delegate issued the Determination and the Reasons.

The Reasons

50. In the Reasons, the Adjudicative Delegate considered whether Mr. Armour was owed compensation for length of service as a result of:

(a) a substantial alteration of a condition of his employment when he received an unpaid suspension from June 6 to 9, 2020; or

(b) the termination of his employment arising from the workplace incident on August 23, 2020.

51. With respect to the first question, the Adjudicative Delegate was not persuaded on the evidence that the suspension of Mr. Armour's employment from June 6 to June 9, 2020, although it "was a substantial alteration of a condition of the employment contract", it was *not* "sufficiently material that it could be described as a fundamental change in the employment relationship that constituted a termination". As this outcome in the Determination is not the subject of TJG's appeal, it is not necessary for me to go on any further into the reasons for the Adjudicative Delegate's decision here.

52. With respect to the second question, whether Mr. Armour was owed compensation for length of service arising from his termination for a workplace incident that occurred on August 23, 2020, the Adjudicative Delegate preferred the evidence of Mr. Knopp over TJG's witnesses to conclude that TJG's decision to terminate Mr. Armour for cause was "unjustified and disproportionate" and therefore, the latter was entitled to compensation for length of service. In so concluding, the Adjudicative Delegate reviewed the evidence of both parties and reasoned as follows:

> … I cannot conclude, given the following evidence, that the Complainant's failure to follow this safety protocol was deliberate or intentional. The Complainant's undisputed evidence was

that throughout his employment there were safety protocols for each equipment station at the worksite and that he had signed off on the protocols for other stations but there was no similar written protocol for the quadrant feeder. On August 23rd, he was following the same safety procedures that he had used for the quadrant feeder throughout his employment. There was a catwalk or walkway above the feeder which was used to go around it and look down in it. The quadrant feeder was different from other stations because while working inside it, there were planks covering voids so he could work safely on them. You were completely encased by machinery so falling wasn't an issue. Throughout his employment he didn't need to use a safety harness at that station; they always used planks. That was the procedure and he always followed it. The only time he ever used a harness on the quadrant feeder was when he was working on it from below. To get up to the feeder, you had to use a manlift basket and because it was moving, you had to hook yourself into the manlift basket.

I also cannot conclude that the Complainant's supervisor, Mr. Loehndorf, instructed the Complainant at the outset of the quadrant feeder job to wear a safety harness. In an interview on September 14, 2021, Mr. Loehndorf acknowledged that working on the quadrant feeder without a safety harness "may have been condoned in the past."

However, Mr. Loehndorf maintained that he advised the Complainant and others working on the quadrant feeder on August 23, 2020 that they needed to wear their safety harness while working inside the conveyor. They acknowledged the situation and retrieved their harnesses. When he observed the work being performed early that morning, all employees inside the conveyor had their safety harnesses on. It was not until he was notified later in the morning by Mr. Villarante and another supervisor, Mr. Savage, that he discovered the Complainant and Mr. Knopp weren't wearing fall harnesses. In his interview with the delegate on September 14, 2021, Mr. Loehndorf clarified that the Complainant and his co-workers were fully outfitted and tied off at the start of the job, worked for a couple of hours and then went on their 7:00 am break but when the Complainant and Mr. Knopp returned, they did not put their harnesses back on.

This was denied by the Complainant and the evidence of Mr. Knopp and Mr. Villarante was that they did not observe the Complainant wearing a safety fall harness. In response to this evidence, Mr. Loehndorf later stated that when he returned to the quadrant feeder to check on the work prior to the 7:00 am break, he was unaware the Complainant and Mr. Knopp were not wearing their fall harnesses inside the quadrant feeder because he could not see them. This was denied by the Complainant who gave a detailed explanation in support of his claim that Mr. Loehndorf would have had no problem observing him working inside the quadrant feeder especially given his vantage point from only 16 inches away. Mr. Knopp also claimed that Mr. Loehndorf saw them prior to the 7:00 am break, working without a safety harness.

Ms. Jones submitted that Mr. Villarante's evidence that the Complainant and Mr. Knopp were not wearing fall harnesses inside the quadrant feeder did not contradict the evidence of Mr. Loehndorf that they were. She claimed that when Mr. Loehndorf said he saw the Complainant wearing a harness, he was describing the events from earlier in the day than those referred to by Mr. Villarante. However, I find that the evidence does not accord with this assertion. In his interview on October 21, 2021, Mr. Loehndorf stated that he singled out Mr. Armour, Mr. Villarante and Mr. Knopp at the 5:00 am meeting to work on the quadrant feeder and accompanied them to the job. At 5:30 am all the men went into the quadrant feeder wearing their harnesses and lanyards at which point he left them to their job. Mr. Villarante's statement also suggests that he started working with the Complainant and Mr. Knopp on the

quadrant feeder from the outset when they put in some pins and boards to step and sit on. At no point in his two written statements does Mr. Villarante claim that Mr. Knopp and the Complainant were wearing safety harnesses at the start of the job. Instead, he states that until he asked Mr. Knopp to put on his safety harness when working inside the quadrant feeder, he was the only one prior to the 7:00 am break that was wearing a safety harness.

During his interview on September 14, 2021, Mr. Loehndorf said on the morning of August 23rd, he held a "toolbox meeting to discuss the jobs to be completed and the safety procedures and updates." At this meeting he discussed the need to use fall safety equipment when working at heights over 10 feet. He said these meetings usually happened on a Saturday, after the regular morning meeting. He also said everyone had to sign something stating that they understood this. However, the incident in question happened on August 23, 2020 which was a Sunday and therefore I find it likely that the toolbox meeting referred to by Mr. Loehndorf did not occur the morning of August 23rd. I find it more likely that it happened a month earlier, on Saturday, July 25th when the Complainant reviewed and signed the Employer's Fall Protection Equipment policy.

In his statement dated October 29, 2021 in response to the Investigation Report, Mr. Villarante added that there was a safety meeting at the start of the shift on August 23, 2020 during which Mr. Loehndorf told him and the others that they would need their safety harnesses while working on the "Debarker Singulator." However, Mr. Knopp and the Complainant denied that the use of safety harnesses was specifically discussed by Mr. Loehndorf for the quantum feeder job at the August 23rd morning meeting. Given that Mr. Villarante failed to speak to the delegate to be questioned about his written statements, the reliability of this evidence is in question. For example, Mr. Loehndorf described the quadrant feeder as a "waste conveyor that moves the bark and branch waste out." However, Mr. Villarante said Mr. Leohndorf told them at a safety meeting on August 23, 2020 to wear a safety harness when working on the "Debarker Singulator." It is unclear which equipment Mr. Villarante was referring to. It is also unclear to which meeting Mr. Villarante was referring when he claimed Mr. Loehndorf discussed wearing a safety harness; i.e. whether it was a morning safety meeting or a weekly toolbox meeting or just a discussion of the job(s) to be performed that day as the Complainant and Mr. Knopp claimed. Accordingly, I cannot give this disputed part of Mr. Villarante's evidence as much weight.

Mr. Loehndorf claimed that it was not until he returned to the quadrant feeder with Mr. Savage that he observed the Complainant had thrown his safety harness off to the side. However, the Complainant denied this and stated that he did not have a safety harness with him at the work site and denied that he had signed one out from the Employer as Mr. Loehndorf claimed. Mr. Knopp gave evidence that he obtained a fall harness after the job had already started but because it was too large for him, he took it off. The Employer did not provide any corroborating evidence that it had issued a safety harness to the Complainant that day.

Ms. Jones further submitted that at the termination meeting on August 28, 2020, the Complainant admitted to having worn his safety harness at the outset of the job on August 23rd. However, the Complainant denied this was the case. Mr. Loehndorf said to him, "you did wear a harness when you put the platforms in." In response, the Complainant said "yes, yes." The Complainant clarified that this exchange with Mr. Loehndorf was in reference to August 19th when he had been called into work on a day off to install boards to make a platform on the quadrant feeder so that they could make repairs to it. In order to install the boards, he had to use a manlift and the protocol for doing so required him to wear a safety fall harness.

> Consequently, when he said "yes, yes" he was agreeing with Mr. Loehndorf that he wore a safety fall harness on August 19th to install the platform.
>
> Finally, in his written submission dated October 25, 2021 (included in the investigation report), the Complainant stated that after he was sent home on August 25, 2020 but before his termination meeting on August 28, 2020, he called Mr. Loehndorf and asked him if he was aware of a protocol to wear a safety harness while working on the platform of the quadrant feeder and Mr. Loehndorf responded, "no." Neither the Employer nor Mr. Loehndorf responded to this evidence although given an opportunity to do so.
>
> For all these reasons, I find that the Complainant honestly but mistakenly believed that he was following the correct safety protocol for the quadrant feeder until he was advised otherwise by Mr. Savage on August 23, 2020…

SUBMISSIONS OF TJG

Merits

53. In its Appeal Form, TJG has checked-off the "natural justice" ground of appeal available in section 112(1)(b) of the *ESA*. In her accompanying written submissions on behalf of TJG, Ms. Jones contends that "the Determination turns on credibility" of Mr. Loehndorf:

> …the adjudicator found that Loehndorf was not credible in providing his evidence that he had directed the complainant to wear fall protection on the quadrant feeder, had seen the complainant get fall protection that morning prior to starting work, and that Loehndorf was unaware that the complainant was not wearing fall protection during mid-morning inspection.

54. This credibility determination against Mr. Loehndorf, she says, is based on the Adjudicative Delegate's "negative inference about the evidence of [Mr.] Villarante as a result of the investigator's failure to contact [Mr.] Villarante". She adds that the Investigative Delegate's failure to inform TJG that "she was abandoning efforts to contact [Mr.] Villarante" and her further failure "to give [TJG] the opportunity to either compel [Mr.] Villarante or at least try to persuade [Mr.] Villarante to provide evidence as required" is "unreasonable" and a breach of natural justice and TJG's "section 77 right to provide a full defence". In the circumstances, she says the appropriate remedy for TJG is to remit the matter back to an adjudicator with direction to obtain Mr. Villarante's evidence, either by subpoena or voluntarily. She says that "Mr. Villarante's evidence will collaborate [sic] [Mr.] Loehndorf's statements and result in a determination that [Mr.] Loehndorf is credible and [Mr. Armour] not credible…".

Application for extension of appeal

55. On March 1, 2022, Mr. Press submitted to the Tribunal both the Determination and the Reasons that were missing in TJG's appeal filed on February 28, 2022. In an email of same date, the Tribunal referred Mr. Press to the Tribunal's website and the Tribunal's Information sheets entitled "How to prepare and File and Appeal" and "How to Request an Extension to the Appeal Period". The Tribunal informed Mr. Press that TJG must provide a written request for an extension to the statutory appeal period and an explanation as to why the Determination and the Reasons were filed after the appeal deadline, by no later than 4:30 p.m. on March 4, 2022.

56. On March 3, 2022, Mr. Press, delivered his written submissions on behalf of TJG for an extension to the statutory appeal period together with Ms. Jones signed written statement of same date.

57. In his written submissions, Mr. Press contends that TJG has satisfied the criteria delineated in *Re Niemisto*, BC EST #D099/96 (described below under "Analysis") for granting an extension of time to file an appeal. More particularly, he submits that TJG has a reasonable and a credible explanation for the failure to request an appeal within the statutory time limit, namely "inadvertence". He says that TJG did not realize the "Decision and Determination" had to be included with the Appeal Form, but it did file its Appeal Form and argument within the statutory time limit and rectified its error by filing the missing documents "within 24 hours of the deadline, once counsel was retained."

58. Mr. Press also submits that there is a genuine and on-going *bona fide* intention on the part of TJG to appeal the Determination because TJG retained counsel and fully intends to proceed with its appeal. He also says the other parties, Mr. Armour and the Director, are aware of this intention because TJG filed the substantive part of its appeal in a timely manner, and therefore, the "other parties would have the same knowledge of the intention to appeal as if [TJG] had also filed the Decision and Determination."

59. Mr. Press also says that the responding parties will not be prejudiced by the granting of an extension because "the substantive part of the appeal was timely" and TJG only "seeks an extension of less then [*sic*] 24 hours".

60. Finally, he contends that TJG has a strong *prima facie* case. He says:

> The Appeal is narrow and has clear merit; the Decision turns on an adverse inference arising from the investigator's unilateral decision to abandon efforts to contact a witness without so advising Teal and without giving Teal an opportunity to compel that witness' testimony. This is not only a breach of Teal's natural justice rights, but also its statutory right to provide a full defence (section 77 of the ESA).

Ms. Jones' written statement of March 3, 2022

61. A significant part of the written statement of Ms. Jones in support of TJG's application for an extension of the statutory appeal period buttresses TJG's substantive submissions on the merits of its appeal that Ms. Jones submitted with TJG's Appeal Form on February 28, 2022. While nothing significant turns on this, I only make this observation because Mr. Press, at least twice in his written submissions in support of the application to extend the statutory appeal period, says that "[t]he substantive part of the appeal was timely". This begs the question why then is TGJ needing to add further submissions to "the substantive part of the appeal" after the expiry of the appeal period in context of the extension application?

62. More particularly, in her statement, Ms. Jones says that during the investigation of the Complaint, the Investigative Delegate called her a couple of times with respect to her efforts to contact Mr. Villarante and told her that Mr. Villarante had not responded to her messages. She says the Investigative Delegate asked her for Mr. Villarante's cell phone number and contact information, and she provided those to her. Subsequently, the Investigative Delegate called her to say that she was having difficulty contacting Mr. Villarante.

63. Ms. Jones says that she then called Mr. Villarante as she “knew he was an important witness for [TJG]”. She says he is a young man who immigrated from Asia to Canada and English is not his first language, but he speaks well enough that she could understand him. She further explains that he works a graveyard shift and is therefore difficult to reach by telephone, but she was able to get through to him and asked him if he had heard from the investigator. She says he told her he had but had not yet called the investigator back as he had been preparing for his final exams at BCIT and was really focused on that. Ms. Jones then told him “it was important to respond to the investigator” and he told her that he found the investigator’s messages “scary”. She said he was worried that he would get something wrong when he was speaking to her and would be misunderstood because of his language issues. She then told him to write a statement and to send to her which he did and she then sent the same (on November 2, 2021) to the Investigative Delegate who then sent it to the Adjudicative Delegate.

64. She says she does not recall either delegate - the Investigative Delegate or the Adjudicative Delegate - asking her for any assistance in getting Mr. Villarante to speak with them in person or warning her that if Mr. Villarante did not speak with them they would disregard his written statement or draw an adverse inference about his credibility.

65. Ms. Jones also, briefly, shares the reason for the delay in filing a completed appeal. She says that when she received “the Decision and Determination” (and she does not indicate when that was), she spoke with various members of TJG about whether or not to appeal and “decided late in the day to appeal”. While she “made best efforts to comply with the directions on the Tribunal’s website”, she “inadvertently did not include the Branch’s Decision and Determination when [she] filed [her] Appeal Form and reasons for appeal on February 28, 2022.”

ANALYSIS

66. Section 2 of the *ESA* sets out the purposes of the *ESA*. In subsection (d), one of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes over the application and interpretations of the *ESA*. Consistent with that purpose, the legislature has set out a deadline for filing an appeal of a determination to ensure they are dealt with promptly: see subsections 112(2) and (3). However, in subsection 109(1)(b) of the *ESA*, the legislature also allows the Tribunal the discretion to extend the period for requesting an appeal.

67. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

> Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

68. In *Re Niemisto*, *supra*, the Tribunal has developed a principled approach to the exercise of its discretion. The following criteria must be satisfied to grant an extension:

> i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
>
> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;

iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

v) there is a strong *prima facie* case in favour of the appellant.

69. While the above criteria have been consistently considered and applied in numerous decisions of this Tribunal, they are neither conjunctive nor exhaustive: *Re Joseph James Hirak*, 2021 BCEST 67. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time: *Re Wright, BC EST # D132/97*. No additional criteria have been advanced by TJG in this appeal.

70. While TJG has filed its Appeal Form with submissions on the merits of the appeal before the expiry of the appeal period, the considerations that apply to TJG's application are substantially the same: *Ctour Holiday (Canada) Ltd.*, 2021 BCEST 73.

71. Having said this, I note that criteria i), ii), iii) and iv) in *Re Niemisto* above do not factor significantly into whether an extension ought to be granted in this case. I find criteria v) more determinative in this case.

72. With respect to criteria i), while TJG filed its Appeal Form and submissions on the merits of the appeal together with its extension application before the expiry of the appeal deadline, I do not find TJG's reasons for seeking an extension of time to perfect its incomplete appeal reasonable or credible. Ms. Jones, the Human Resources Manager, acted on behalf of TJG throughout the investigation of the Complaint. There is no dispute that TJG and Ms. Jones received the Determination and the Reasons in a timely fashion. More particularly, Ms. Jones, along with all of the Directors and Officers of the companies constituting the TJG partnership, and the registered and records office of TJG, were emailed the Investigation Report of the investigating Delegate on October 27, 2021. Ms. Jones, on behalf of TJG, responded to that report on November 2, 2021. On February 3, 2022, the Determination and the Reasons were sent by email to Ms. Jones and to the Directors and Officers of the companies constituting the TJG partnership and to the registered and records office of TJG.

73. Ms. Jones states, in her written statement, that once she received the "Decision and Determination", she spoke with "various members of TJG about whether or not to appeal". She says "[w]e decided late in the day to appeal". While she says that she has "never appealed a matter to the ES Tribunal before" and that she "made her best efforts to comply with the directions on the Tribunal's website", she "inadvertently did not include the Branch's Decision and Determination". It should be noted that like Ms. Jones or TJG, most appellants, whether an employee or an employer, do not have previous experience with appealing a determination to the Tribunal or filing a complaint with the Branch.

74. As indicated in paragraph 9 above, section 112(2)(a)(i.1) of the *ESA* requires any party who wishes to appeal a determination to the Tribunal to include with their appeal a copy of the director's written reasons for the determination. The Appeal Form also contains the Appeal Submission Checklist prominently set out immediately below the signature line for the submitting party to enable the latter to checkoff and make sure the required documents for filing an appeal with the Tribunal are sent with the Appeal Form. Two of the documents specified in the checklist are a complete copy of the determination and a complete copy of the reasons for the determination.

75. Furthermore, the Determination that was sent to TJG and Ms. Jones on February 3, 2022, expressly directs the parties that "[i]nformation on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at 604-775-3512." The Tribunal's website, conspicuously sets out the resources and directions for appeal process on the main page of the site as follows:

> **APPEALS**
>
> - Overview of the appeal process
> - How to prepare and file an appeal
> - How to request an extension to the appeal period
> - Appeal Form
> - Appellant Contact Information Form

76. If one were to click the hyperlink to "How to prepare and file an appeal" a document will download and open. The document expressly states:

> **PREPARING THE APPEAL SUBMISSION**
>
> An appellant must do all of the following within the appeal period (for an appeal under the *ESA,* see section 112(3) of the *ESA*…)
>
> a) deliver the completed Appeal Form (Form 1), written reasons and argument supporting each ground of appeal, and any supporting documents to the Tribunal;
>
> b) **deliver a complete copy of the determination and a complete copy of the written reasons for the determination to the Tribunal** [*Bolding mine*]
>
> …
>
> **THE DETERMINATION AND THE WRITTEN REASONS FOR THE DETERMINATION**
>
> **The appellant must submit a complete copy of the determination and the written reasons for the determination to the Tribunal when filing the appeal.** *[Bolding mine].*
>
> If the appellant does not have a copy of these documents or wants to request information on how to obtain a copy of the documents, the appellant can contact the delegate who issued the determination or contact the Employment Standards Branch's Information Line toll-free at 1-833-236-3700.

77. While I do not doubt that Ms. Jones and TJG "inadvertently" failed to include the Determination and the Reasons with TJG's appeal, I am not convinced with the merits of Ms. Jones' reasons, namely, that she "never appealed a matter to the ES Tribunal before" and that she "made her best efforts to comply with the directions on the Tribunal's website". As indicated previously, most disputants - employees or employers - who come before the Tribunal are not experienced and most also do not have legal counsel to avail to. It is more probable than not that TJG's failure to file a perfected appeal within the statutory appeal period was because TJG "decided late in the day to appeal". While Ms. Jones does not explain why the decision to prepare and file the appeal was left to the last day by TJG, I am simply not persuaded that TJG has provided any reasonable or credible explanation for the failure to request an appeal within the statutory time limit.

78. With respect to criteria ii) and iv), TJG did file its incomplete appeal within the statutory appeal period, and I do not doubt that TJG had a genuine and *bona fide* intention to appeal the Determination and there is no more prejudice to Mr. Armour by the delay than if the appeal were filed within the appeal period.

79. With respect to criteria iii), neither Mr. Armour nor the Director were made aware of TJG's intention to appeal the Determination before the expiry of the statutory appeal period. However, I do not find this criteria determinative in this case, nor the others already discussed. Instead, I find criteria v), whether there is a strong *prima facie* case in favour of the appellant, determinative in this case.

80. With respect to criteria v), in *Re C.G. Motorsports Inc.,* BC EST # RD110/12, the Tribunal accepted that it is necessary to undertake some examination of the merits of an appeal in order to determine whether there is a strong *prima facie* case in favour of an appellant:

> … to the extent necessary to determine whether there is a "strong prima facie case" the Tribunal will examine the merits of the appeal. … An examination of the relative strength of an appeal considered against established principles necessarily requires some conclusions to be made about the merits.

81. Under this consideration, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but only to assess the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds. The analysis under this criterion is not dissimilar to that undertaken in assessing whether the appeal has any reasonable prospect of succeeding under section 114(1)(f): *Re Daniel J. Barker Law Corporation*, 2016 CanLII 153641 (BC EST)

82. In this case, as indicated previously, TJG appeals the Determination based on the "natural justice" ground in subsection 112(1)(b) of the *ESA*. However, before examining whether there is a strong *prima facie* case in favour of TJG under the natural justice ground of appeal, it is important, first, to delineate some of the relevant principles applicable to appeals.

83. In no particular order, one of those important principles is that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1): *Re GC's Door Express, supra.*

84. It is also important to note that section 112(1) does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: *Britco Structures Ltd.*, BC EST #D260/03.

85. Where the appellant is alleging a failure to comply with principles of natural justice, they must provide some evidence in support of that allegation: *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.

Natural Justice

86. As indicated above, TJG has invoked the natural justice ground of appeal conjunctively with its rights under section 77 of the *ESA.*

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

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

88. In *Select Introductions Inc.*, BC EST #D045/05, the Tribunal stated:

> …a challenge based on an alleged failure to observe the principles of natural justice normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in an appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence. While the requirements of natural justice permeate the field of administrative law generally, they are also made expressly applicable to investigations conducted pursuant to the provisions of the *Act*. In this regard, the relevant provision is section 77, which stipulates that if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

89. Section 77 of the *ESA* requires that the Director "…make reasonable efforts to give a person under investigation an opportunity to respond". Section 77 is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the *ESA* "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (see sections 2(b) and (d) of the *ESA*).

90. Having said this, the issue here is two-fold: (i) whether, under section 77, the Investigative Delegate made "reasonable efforts" to give TJG an opportunity to respond to the investigation being conducted by the Investigative Delegate, and (ii) (under a more broader duty to act fairly than contemplated in section 77 of the *ESA*) did the Investigative Delegate and the Adjudicative Delegate adhere to the principles of natural justice or administrative fairness during the investigation and in making the Determination?

91. Having reviewed the Record and particularly the "EMPLOYMENT STANDARDS BRANCH WORKFLOW SHEET" at pages 7 to 11 of the Record delineating particulars of all email and telephone exchanges including attempted exchanges by the Investigate Delegate with both parties and their witnesses, I am sufficiently convinced that there is not a strong *prima facie* case in favour of TJG and my reasons follow.

92. TJG's substantive argument on appeal is that the Investigative Delegate made a credibility determination against Mr. Loendorf based on the "negative inference about the evidence of [Mr.] Villarante" after failing to contact Mr. Villarante. TGJ contends that in failing to inform TGJ that she was "abandoning efforts to contact [Mr.] Villarante" and in failing "to give [TJG] the opportunity to either compel [Mr.] Villarante or at least persuade [Mr.] Villarante to provide evidence as required", the Investigative Delegate acted unreasonably and committed both a breach of natural justice and

TJG's "section 77 right to provide a full defence". I find these arguments, *prima facie*, unpersuasive and without any merit for the following reasons.

93. On or about September 29, 2021, after Ms. Jones provided the Investigative Delegate Mr. Villarante's written statement of August 26, 2020 (the first statement), the Investigative Delegate, on the same day, by telephone, informed Ms. Jones that she needed the contact information for Mr. Villarante to interview him about his statement. Subsequently, on October 4, 2021, the Investigative Delegate followed up with Ms. Jones by email and asked her for Mr. Villarante's contact information. The next day, on October 5, 2021, Ms. Jones emailed Mr. Villarante's cell phone number to the Investigative Delegate. Two days later, on October 7, 2021, the Investigative Delegate called Mr. Villarante and left him a voicemail message that she was an investigator with the Branch and needed to speak with him about his written statement to TJG about Mr. Armour and what he observed on August 23, 2020, during his shift with Mr. Armour. She left her name and telephone number for Mr. Villarante to call her back forthwith. However, Mr. Villarante did not call her back.

94. On the next day, on October 8, 2021, the Investigative Delegate again called Mr. Villarante and had to leave a voicemail message. The Investigative Delegate said on the voicemail that she was an investigator from the Branch and needed to speak with him about what he observed on August 23, 2020, during a shift with Mr. Armour. She said she wanted to confirm the written statement provided by TJG which he appeared to have written and signed on August 26, 2020. She then read out the entire statement on the voicemail and asked him, if it was not accurate, that he needed to contact her by October 10, 2021, to advise of such, failing which she would accept it as the statement he made. She, again, left Mr. Villarante her name and telephone number so that he could her back. However, she received no response from him.

95. On October 21, 2021, during her telephone call with Ms. Jones, the Investigative Delegate asked the latter why Mr. Villarante had "not called[her] to provide testimony". According to the Investigative Delegate's notes in the Record, Ms. Jones said she is unsure why he has not called her and it may be his personality and desire to avoid being involved in conflict. Ms. Jones also confirmed that Mr. Villarante is the brother-in-law of Dick Jones ("Mr. Jones"), an owner of TJG.

96. In her written statement, on March 3, 2022, in support of the extension of time to appeal, Ms. Jones admits that she "knew he [Mr. Villarante] was an important witness for [TJG]". She says he is a young man who immigrated from Asia to Canada and English is not his first language, but he speaks well enough that she could understand him. She further explains that he worked a graveyard shift and is therefore difficult to reach by telephone, but she was able to get through to him and asked him if he had heard from the investigator. She says he told her he had but had not yet called the investigator back as he had been preparing for his final exams at BCIT and was really focused on that. Ms. Jones then told him "it was important to respond to the investigator" and he told her that he found the investigator's messages to him to be "scary". She said he was worried that he would get something wrong when he was speaking to her and would be misunderstood because of his language issues. She then told him to write a statement and to send to her which he did and she sent the same to the investigating delegate (when she responded to the Investigative Delegate's Investigation Report of October 27, 2021, on November 2, 2021).

97. While I do not find, on the evidence, that the Investigative Delegate "had decided to abandon efforts to contact [Mr.] Villarante", it is clear to me that Mr. Villarante was not interested in contacting the

Investigative Delegate (after receiving her voicemail messages) and Ms. Jones was aware of that first hand from Mr. Villarante when she spoke to him and found out why he did not respond to the Investigative Delegate's telephone messages. Clearly Ms. Jones was able to connect with Mr. Villarante who was the brother-in-law of one of the owners of TJG (according to the Investigative Delegate's information from Ms. Jones). Ms. Jones "knew he was an important witness for [TJG]" and she knew that the Investigative Delegate wanted to speak to him about his first statement of August 26, 2020. It is unclear what efforts, if any, beyond what is in her statement, Ms. Jones made to impress upon Mr. Villarante or the ownership of TJG to persuade Mr. Villarante to return the Investigative Delegate's calls during the investigation. It is also curious that Ms. Jones, knowing that the Investigative Delegate wanted to speak to Mr. Villarante about the first statement (of August 26, 2020) would seek out another written statement of Mr. Villarante on November 2, 2021. Why did Ms. Jones not set up an interview with Mr. Villarante by telephone and invite the Investigative Delegate to attend? She did this in the case of another employee of TJG, Mr. Loehndorf, whom she interviewed in the telephone presence of the Investigating Delegate.

98. I do not find that the Investigative Delegate violated the panoply of procedural rights contemplated under natural justice or section 77 of the *ESA* as delineated above. There is nothing under either section 77 or the principles of natural justice that requires the Investigative Delegate to more specifically inform a party who, in this case, was informed previously that their (admittedly "important") witness is unresponsive to the Investigative Delegate's telephone calls, that this may affect how the Adjudicative Delegate will weigh that party's evidence when making a credibility determination and possibly adversely affect the party's prospects in the appeal itself.

99. In the circumstances, I refuse to exercise my discretion under section 109(1)(b) to extend the time period for TJG to request the appeal. I also find that an extension of the appeal for the reasons identified in TJG's extension application would only subvert the purposes and objectives of fairness, finality and efficiency set out in subsections 2(b) and (d) of the *ESA*.

100. Pursuant to sections 114(1)(b) and (h) of the *ESA*, the Tribunal has the discretion to dismiss the appeal where the appeal is not filed within the applicable time limit and where the appellant has failed to meet one or more of the requirements of section 112(2) of the *ESA* respectively. In this case, TJG, has failed to file a completed or perfected appeal within the applicable time limit and also failed to meet the requirements of section112(2)(a)(i.1) of the *ESA* in filing its appeal. Therefore, I dismiss TJG's appeal.

101. In the alternative, if I am wrong in denying TJG's extension application and in dismissing its appeal under sections 114(1)(b) and (h) of the *ESA*, I also find that TJG's appeal has no prospect of succeeding under section 114(1)(f) of the *ESA*. I find the Adjudicative Delegate's reasons for preferring the evidence of Mr. Armour and his witness, Mr. Knopp, over TJG's witnesses, as set out in paragraph 52 above, persuasive and her decision to award Mr. Armour compensation for length of service plus accrued vacation pay and interest thereon compelling.

ORDER

102. Pursuant to section 115 of the *ESA*, I order the Determination dated February 3, 2022, be confirmed together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal