Citation: CCON Recon Inc. and CCON Metals Inc. (Re)
2022 BCEST 26

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

CCON Recon Inc. and CCON Metals Inc.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Jonathan Chapnick

FILE NOS.: 2021/089 and 2021/090

DATE OF DECISION: May 9, 2022

DECISION

SUBMISSIONS

Sanjeev K. Patro	counsel for CCON Recon Inc. and CCON Metals Inc.
Jennifer Sencar	delegate of the Director of Employment Standards

OVERVIEW

1. On June 7, 2019, the Employee, Trent Truman, submitted a complaint (the "Complaint") to the Director of Employment Standards (the "Director") under section 74 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [***ESA***]. On September 3, 2021, a delegate of the Director, Jennifer Sencar (the "Delegate"), issued a determination regarding the Complaint and her written reasons for the determination (the "Determination").

2. In the Determination, the Delegate found that CCON Recon Inc. and CCON Metals Inc. (collectively, the "Employer" or the "CCON Companies"), contravened section 63 of the *ESA* in respect of the Employee's employment. The Delegate ordered the Employer to pay the Employee $7,817.23 in wages and interest and to pay an administrative penalty of $500.

3. Under section 112(1) of the *ESA*, the Employer was allowed to appeal the Determination on one or more of the following grounds:

   (a) the director erred in law;

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

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

4. On October 12, 2021, both CCON Companies appealed the Determination to the Employment Standards Tribunal, selecting all three grounds of appeal set out in section 112(1) and asserting that the Determination should be "set aside (including the penalty) and the matter remitted for a hearing *de novo*."

5. To succeed in its appeal, the Employer must show that at least one ground under section 112(1) of the *ESA* has been met. The Employer has not done so. For the reasons that follow, the appeal is dismissed.

ISSUES

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

7. In its appeal to the Tribunal, the Employer challenged the Determination on each of the three grounds set out in the *ESA*. As a result, expressed as questions, the issues in this appeal are as follows:

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

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

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

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

9. In deciding the issues in this appeal, I have considered the Employer's October 12, 2021, appeal submission, comprising the appeal form, the Employer's written reasons and arguments supporting the appeal, documents provided by the Employer in support of the appeal, and a copy of the Determination (the "Appeal Submission"). I have also considered the record that was before the Delegate at the time of the Determination, which was provided to the Tribunal by the Delegate under section 112(5) of the *ESA*. Finally, I have considered the Delegate's March 1, 2022 response submissions on the merits of the appeal (the "Response Submission") and the Employer's final reply submissions on the merits of the appeal (the "Reply Submission").

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

BACKGROUND

11. In this part of my decision, I set out the background facts and circumstances.

A. Circumstances giving rise to the Complaint

12. The Employer is comprised of the CCON Companies, two corporate entities engaged in the sale of catalytic converters, the recycling of batteries, and the recovery of valuable resources from these items. Tania (Grace) Dahl and Greg Dahl were the CCON Companies' sole shareholders, directors and officers. Mr. Dahl held the office of President of the CCON Companies and Ms. Dahl held the office of Vice President ("VP").

13. The President and the VP were married. The Employee was the son of the VP and the stepson of the President. The Employee was employed simultaneously by both CCON Companies from 2005 to 2012, and then from 2013 to May 23, 2019.

14. The Employer dismissed the Employee on May 23, 2019. At the time of his dismissal, the Employee held the roles of executive assistant, human resources administrator, and health, safety and environment manager at the CCON Companies. The Employee worked from an office at the Employer's business location in Abbotsford.

15. The Employee's dismissal gave rise to the Complaint. The following is a brief summary of the relevant circumstances surrounding the dismissal:

(a) The President and the VP separated in 2018 with divorce proceedings to follow. Around that time, the President asked the Employee not to allow the VP into the office that was used by the President, because it contained personal documents related to the divorce proceedings.

Subsequently, at the direction of the VP, the Employee entered the office with the VP to retrieve "cheques and tax documents." In response, the President directed another employee (his son, who was the VP's stepson) to install a lock on the door to the office.

(b) Between January and May 2019, the President repeatedly directed the Employee to provide training to an administrative employee of the CCON Companies (the "Administrator") in some of the Employee's job duties and functions, and to make other related arrangements. The Employee did not follow these directions to the President's satisfaction.

(c) In early May 2019, the VP directed the Employee to install a keypad lock on the door to the conference room at the Employer's Abbotsford location and not to open the door for others. The Employee installed the lock. He subsequently refused the President's request to open the conference room door and to share the lock's keycode with the President, instead referring the President to contact the VP.

(d) The VP and the Employee met with the Administrator during the work day on May 13, 2019. The Employee recorded the audio of the meeting without the Administrator's knowledge. During the meeting, the VP and the Employee confronted the Administrator regarding her training in, and performance of, some of the Employee's job duties and functions. The VP directed the Administrator to refuse the President's requests that she perform the Employee's functions and/or to report such requests to the VP. The VP asserted that she was the Administrator's "boss" and also the Employee's boss, and that all employees should listen to her. At the same time, the VP assured the Administrator that she was "doing a good job" and that her employment was not in jeopardy.

(e) The President spoke privately with the Employee outside the Employer's Abbotsford location on May 15, 2019. The Employee recorded the audio of the conversation. The President began the conversation by saying that he was giving the Employee "an olive branch of peace … because there's a shitstorm that's about to come down." The President indicated that "in a show of mercy" to the Employee and the VP, he was giving the Employee a one-time severance offer. He offered the Employee "eight weeks of severance and … 10 months of layoff," and suggested that if the Employee refused this offer, WorkSafeBC investigators would come in to investigate the May 13 meeting with the Administrator and other matters. The President indicated that this offer came with certain conditions, namely that the Employee continue working for the Employer for an additional two weeks in order to train a new employee. The Employee did not accept the President's offer and did not return to the workplace following this interaction.

(f) On May 18, 2019, the Administrator submitted a "Bullying and Harassment Questionnaire" to WorkSafeBC, alleging that she was bullied and harassed by the Employee and the VP. A WorkSafeBC officer conducted an inspection regarding the Employer's bullying and harassment policy, procedures, and training on May 23, 2019, and delivered a report to the President on May 24, 2019, issuing no orders.

(g) On May 23, 2019, the Employee received a letter from the Employer, signed by the President, terminating the Employee's employment with cause "for gross insubordination," effective immediately (the "Termination Letter"). The Termination Letter detailed the alleged

incidents of gross insubordination as well as "other issues that contributed" to the termination.

(h) In the Termination Letter, the Employer alleged the following instances of gross insubordination:

i. Failure to train other employees when requested by the President;

ii. Unauthorized installation of a lock on the conference room door and refusal of the President's request for the keycode;

iii. Breach of the Employer's policy regarding bullying and harassment during the May 13, 2019 meeting with the VP and the Administrator.

(i) The Employer also identified the following other issues that contributed to the termination:

i. Failure to notify the President and staff when leaving the Employer's Abbotsford location and excessive time absent from the Employee's administrative duties, amounting to "a blatant misuse of company time."

ii. Locking desks and cabinets containing Employer documents and not providing keys upon the President's request.

iii. Failure to attend work between May 15 and May 23, 2019, and failure to provide a doctor's note related to such absences.

(j) Finally, in the Termination Letter, the Employer indicated that the President was willing to offer the Employee "8 weeks' severance" if the Employee signed the letter to acknowledge its contents. The Employee did not sign the Termination Letter.

B. Complaint process

16. The Employee submitted the Complaint on June 7, 2019. In his complaint form, the Employee named the President and the VP as the owners of the CCON Companies and alleged that he was "wrongfully dismissed".

17. The parties to the Complaint engaged in mediation and, on January 8, 2020, they agreed to settle various matters, including matters related to regular wages and vacation pay. The Director subsequently appointed the Delegate to conduct an oral hearing into whether the Employer had contravened section 63 of the *ESA* by failing to pay the Employee wages as compensation for length of service (the "Oral Hearing").

18. The Delegate conducted the Oral Hearing by teleconference on April 22 and 23, 2020.

THE DETERMINATION

19. The Delegate issued the Determination on September 3, 2021. In the Determination, the Delegate set out the remaining issues in the Complaint as follows:

> Is the [Employee] owed wages for compensation for length of service; if so in what amount?

20. After setting out the issues, the Delegate described, in detail, the evidence presented at the hearing. She then set out the findings and analysis that formed the basis for her determination of the issues.

21. The central issue at the hearing related to section 63 of the *ESA*. Section 63 requires an employer to pay an employee wages as compensation for length of service upon termination of the employment relationship, subject to certain exceptions. One exception relates to the circumstances of the employee's dismissal. If an employee is "dismissed for just cause" the employer is not required to pay the employee wages as compensation for length of service: *ESA*, s. 63(3)(c). As a result, often when an employee is dismissed, a key question under the *ESA* is whether their dismissal was "for just cause." If the dismissal was not for just cause, then the section 63 requirement to compensate the employee for their length of services applies. In the present case, the Delegate concluded that this requirement applied and was contravened by the Employer.

22. In her findings and analysis of the evidence, the Delegate stated that an employer "bears the onus [of] proving, on a balance of probabilities, that it had just cause to terminate the employee." To do so, the Delegate explained, the employer "must establish that the employee's actions are inconsistent with the continuation of their employment." According to the Delegate, an employer may prove just cause on the basis of serious or wilful misconduct by an employee or repeated instances of minor misconduct.

23. The Delegate determined that the Employer had not met its onus of proof. Her decision was based on the following findings and analysis of the evidence:

(a) The President did not address the Employee's performance issues ("such as his failure to adequately train [the Administrator] and his absenteeism"), "nor did he discipline him for the same" or advise the Employee of potential disciplinary consequences.

(b) The VP had authority to direct employees, and she directed the Employee to install the keypad lock on the conference room door and not to share the lock's keycode with the President. When the President requested that the Employee open the door, the Employee "was going to be insubordinate no matter what he decided to do, open the door or not."

(c) The VP did not berate the Administrator at the May 13, 2019. Rather, as was her right "as an owner of the business," the VP questioned the Administrator regarding her work and instructed the Administrator not to perform certain functions. The VP – not the Employee – conducted the May 13, 2019 meeting with the Administrator. The Employee attended the meeting at the VP's request. His participation in the meeting did not amount to misconduct.

24. Given her findings and analysis, the Delegate concluded as follows:

> Mr. Dahl's evidence was that the meeting with [the Administrator] was essentially the final straw or culminating incident which led him to see termination of the [Employee's] employment as his only recourse. I have found that the [Employee] was not insubordinate in following Ms. Dahl's instructions, and that the [Employee] did not behave inappropriately towards [the Administrator] in the meeting. Therefore, based on the evidence of both parties, I find that the [Employee] was terminated without cause and is entitled to wages for compensation for length of service.

ANALYSIS

25. In this part of my decision, I explain my findings regarding the issues in this appeal. In doing so, I outline relevant legal principles and discuss some of the submissions and documents provided to the Tribunal by the parties during the appeal process.

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

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

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

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

(b) Misapplying an applicable principle of law;

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

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

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

28. The Employer makes two arguments under the error of law ground of appeal. First, the Employer asserts that the Delegate erred in law by "elid[ing] over key concepts of company law and the distinction between ownership of the shares of a company and management of a corporate body that has been delegated to specific persons by the shareholders and/or directors of a corporate entity." The Employer says that this "failure to properly grapple with basic company law concepts led the [Delegate] astray in the findings that underpin the determination that the [Employee] was terminated without cause."

29. Second, the Employer argues that "it was incumbent upon the [Delegate] to apply the rule in *Browne v. Dunn*" at the Oral Hearing, and her "failure to apply this rule is an error of law that taints the determination and the findings of fact that underpin the [Delegate's] decision."

1. Company law concepts

30. The Employer's first argument under the error of law ground of appeal relates to company law concepts.

31. The Employer argues that at various points in the Determination, the Delegate "has displayed an apparent conflation as between the shareholders of Companies and the Companies themselves." In this regard, the Employer points to the Delegate's use of the word "owner" in the Determination (e.g., "I find, that Ms. Dahl had authority to direct staff as an owner of the business"). The Employer says that "[c]ourts have consistently emphasized the distinct legal personalities and legal interests of companies from their shareholders," and the Delegate's "failure to recognize and apply this basic principle of company law is an error of law."

32. I am not compelled by the Employer's argument. The Tribunal gives a sympathetic reading to a delegate's determination: *Inderpal Singh*, 2021 BCEST 94 [***Singh***]. Like those of other administrative decision-makers, a delegate's written reasons are not assessed against a standard of perfection: see *1170017 B.C. Ltd.*, 2021 BCEST 23 and *Singh*. Assessing the Determination in context, I do not accept that in using the word "owner," the Delegate was applying, let alone misapplying, principles of company law. On the contrary, the Delegate was simply characterizing the VP as a representative of the Employer as a matter of fact, with sufficient authority over the business of the CCON Companies so as to exercise control or direction over their employees. This characterization was based on witness evidence and was consistent with the VP's status as a director, officer, and major shareholder, i.e. "owner", of the CCON Companies. It was not based on an unreasonable view of the facts and did not amount to an error of law.

33. I also reject the Employer's suggestion, in the Appeal Submission and the Reply Submission, that the Delegate's reasons were based on an erroneous "presumption of equality" between the President and the VP. With respect, the Employer is reading too much into the Determination. Contrary to the Employer's assertions, there is no indication in the materials before me that the Delegate presumed that the VP could necessarily override the President's instructions. The Delegate simply found, reasonably on the evidence, that the VP was able to exercise control or direction over employees, and that the VP did so in respect of the Employee, and that the Employee followed the VP's directions.

34. The rest of the Employer's submissions, under the umbrella of its company law and "corporate issues" argument, generally fall into three categories.

i. Rearguing the case

35. First, some of the Employer's submissions veer into the territory of rearguing the case that was before the Delegate. An appeal before the Tribunal is not an opportunity to reargue a case: *Masev Communications*, BC EST #D205/04. Insofar as the Employer's submissions attempt to do so, I reject them.

ii. Questions of fact

36. Second, the Employer's submissions raise questions of fact. These types of questions relate to what happened, and why.

37. The Employer's submissions include various overlapping suggestions and assertions that raise questions of fact and challenge the Delegate's assessment and weighing of the evidence that was before her. Most significantly, the Employer takes issue with the Delegate's finding that the Employee received conflicting directions regarding the keypad lock from persons in positions of authority at the CCON Companies (the VP and the President) and would have been insubordinate no matter which directions he followed. The Employer argues that the Employee knew that the directions given by the VP were improperly motivated by personal interests, and were, in any event, subordinate to the directions of the President. The Employer asserts that "it is untenable, on the evidence, to accept that the [Employee] was truly faced with a dilemma of having to choose" between the directions of the VP and the President. According to the Employer, it is "self-evident – from the actions taken by the [Employee] – that he aligned his interests with and preferred to follow the instructions of Ms. Dahl instead of Mr. Dahl."

38. Questions of fact "are only reviewable by the Tribunal as errors of law in situations where it is shown that a delegate has committed a palpable or overriding error." This is a stringent standard, which involves a finding by the Tribunal that "the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable": *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13; *Meher Trucking Ltd.*, 2019 BCEST 138. The questions of fact raised by the Employer do not meet this stringent standard.

39. I agree with the Employer's submissions regarding the significance of context in this case. However, there is important context that the Employer has omitted, which must be acknowledged in every case in which an employer purports to terminate an employee without notice. Namely, the "integral nature of work" in the lives of employees, and the substantial power imbalance that "is ingrained in most facets of the employment relationship," which places employees "in a vulnerable position vis-à-vis their employers": *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at para. 54 [***McKinley***]. In this case, the President and the VP each held and exercised power over the Employee, both personally and as his Employer. The events in issue took place at a uniquely vulnerable time in the Employee's employment at the CCON Companies. Against this backdrop, and on the evidence before her, the Delegate reasonably concluded that the Employee was in an "unfortunate situation," caught between the VP and the President – "who were also family members that were fighting due to a marital breakdown." In these circumstances, the Employee may well have, in the words of the Employer, "aligned his interests with and preferred the instructions" of the VP. But even if this was the case, there is nothing perverse or inexplicable about the Delegate's finding that the Employee received conflicting directions regarding the keypad lock from representatives of his Employer who were in positions of power and authority, and he had to disobey the directions of one to follow the directions of the other.

iii. Questions of mixed law and fact

40. Finally, some of the Employer's submissions regarding company law and corporate issues raise questions of mixed law and fact, namely whether the facts of the Employee's dismissal satisfy the legal test for just cause. Taking a large and liberal approach to the Employer's submissions, I discern two challenges to the Delegate's determination that the facts of the Employee's dismissal did not satisfy the legal test for just cause.

41. First, in the Reply Submission, the Employer suggests that the Employee's disobedience of the President's directions regarding the keypad lock, in favour of the VP's conflicting directions, amounted to just cause based on insubordination. Second, the Employer asserts that the Employee's cumulative actions and "clear alignment" with the VP "could only result in a total breakdown in trust required" to continue his employment with the CCON Companies.

42. Determinations by a delegate on questions of mixed law and fact are given deference by the Tribunal: *Michael L. Hook*, 2019 BCEST 120 at para. 31 [***Hook***]. Thus, in considering the above challenges to the Delegate's just cause analysis, I have taken a deferential approach to the Determination, to decide whether the Delegate erred in law. For the following reasons, I find that she did not.

43. First, I find no misinterpretation or misapplication of section 63 of the *ESA* or any applicable principle of law in the Delegate's just cause analysis. The Delegate's discussion of section 63 and just cause principles

reflected the well-established framework and principles that have been developed and consistently applied under the *ESA* (see *Hook* at paras. 32-34 for a discussion of the just cause analysis). For instance, the Delegate noted that the burden of proof was on the Employer, and she explained how an employer may prove just cause based on an act of serious or willful misconduct or ongoing instances of minor misconduct. She also touched on a central consideration in the just cause analysis, namely whether the conduct of the employee has undermined or was inconsistent with the continuation of the employment relationship. I find that there was nothing wrong, in principle, with the method of analysis adopted by the Delegate.

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

45. To establish just cause based on inadequate performance or ongoing instances of minor misconduct, the onus is on an employer to prove all of the following:

(a) **Reasonable standards.** The employer must prove that it established reasonable performance standards and clearly communicated those standards to the employee.

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

(c) **Reasonable warning.** The employer must prove that it advised the employee that their employment was in jeopardy, and that the employee's continuing failure to meet the performance standards would result in their dismissal.

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

John Curry, 2021 BCEST 92 at para. 99 [***John Curry***], citing *Hook* at para. 32 and *565682 B.C. Ltd.*, BC EST # D292/02.

46. The Employer did not meet this onus of proof. In particular, there was no evidence before the Delegate to show that the Employer established – let alone communicated or enforced – reasonable performance standards regarding any of the matters cited in the Termination Letter. As the Tribunal has explained before, an employer's "dissatisfaction with an employee's performance, no matter how strenuously or repeatedly communicated, is not enough" to establish just cause. "Unless the employer's dissatisfaction flows from the employee's failure to achieve objective, reasonable and achievable … performance criteria, that dissatisfaction does not give the employer a right to summarily dismiss the employee without having to pay compensation or give written notice in lieu of compensation" under section 63 of the *ESA*: *565682 B.C.*

47. Thus, I find no error of law in the Delegate's brief analysis in the Determination regarding the issue of just cause based on inadequate performance or repeated instances of minor misconduct.

48. Similarly, I find no error of law in the Delegate's decision that the Employer failed to prove just cause based on serious or willful misconduct.

49. To establish just cause on the basis of employee misconduct, an employer must prove not only that the misconduct occurred, but also that the proven misconduct "is of such a nature and degree so as to justify termination": *Storms Restaurant Ltd.*, 2018 BCEST 70 at para. 29. The just cause analysis "requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct could be reconciled with sustaining the employment relationship by imposing a more 'proportionate' disciplinary response": *Roe v. British Columbia Ferry Services* at para. 27 [***BC Ferries***], citing *McKinley*. This assessment does not exist in a vacuum. An employer is required to prove just cause "within the specific context and circumstances of the Employee's employment and alleged act of misconduct": *John Curry* at para. 102. In other words, a "'contextual approach' governs the assessment of the alleged misconduct": *BC Ferries* at para. 27. This involves consideration of the nature and seriousness of the alleged misconduct, and the circumstances surrounding the employee's behaviour, including factors such as the employee's length of service and work history: see generally Howard A. Levitt, *Law of Dismissal in Canada*, 3rd ed. (Toronto: Thomson Reuters Canada, 2003, loose-leaf), pt. I at ch. 6.

50. The Determination indicates that the Delegate considered the Employee's conduct in the keypad lock incident and, on the evidence before her, decided that it did not amount to just cause for dismissal, because the Employee was following the directions of the VP. This was an accurate – not an unreasonable – view of the facts. Regardless of their familial bond (and perhaps aligned interests), the Employee and the VP were engaged in an employment relationship. The VP – a person who the Delegate found was a representative of the Employer with sufficient authority over the business of the CCON Companies so as to exercise control over their employees – directed the Employee's conduct in the keypad lock incident. The relevant conduct took place in the Employee's workplace. Given this specific context, it was not unreasonable for the Delegate to conclude that the Employee's actions were not of such a nature and degree so as to justify his summary dismissal following over a decade of service with the Employer. Furthermore, I find that it was the Employer, through the behaviour of the VP and the President, who instigated the keypad lock incident – first, by the VP directing the Employee's impugned conduct related to the keypad lock; then, by the President confronting the Employee regarding same, rather than taking the matter up with the VP, who was the directing mind behind the conduct. The Employer put the Employee in an untenable situation and provoked an avoidable workplace confrontation. It was not an error of law for the Delegate to find that these circumstances did not amount to just cause on the ground of insubordination.

51. In addition, based on the materials before me, including my review of the Employee's recording of the May 13, 2019 meeting with the Administrator, I see no error in the Delegate's determination that the Employee's participation in the May 13, 2019 meeting did not amount to misconduct, let alone misconduct worthy of summary dismissal.

52. Finally, as for the Employer's assertion that the Employee's cumulative actions and "clear alignment" with the VP "could only result in a total breakdown in trust required" to continue his employment at the CCON Companies, I find that the Delegate implicitly determined otherwise, and that such a determination was not an error of law, because it was consistent with the Delegate's other findings and conclusions discussed above, which I have found were not in error. Moreover, I note that the Employee's cumulative actions

and apparent alignment with the VP pre-dated the May 15, 2019 conversation between the President and the Employee, in which the President asked the Employee not only to continue working for the Employer for an additional two weeks, but also to train another employee of the CCON Companies during that period. These facts would have contradicted the notion that the Employer's trust and confidence in the Employee had broken down to such an extent as to justify summary dismissal.

2. Rule in *Browne v. Dunn*

53. The Employer's second argument under the error of law ground of appeal relates to the rule in *Browne v. Dunn*. In the Appeal Submission, the Employer asserts that the "substantial conflicts" between the evidence of the President and the Administrator, on one hand, and the evidence of the Employee and the VP, on the other, obliged the Delegate to apply the rule in *Browne v. Dunn* at the Oral Hearing. Further, the Appeal Submission suggests that because the parties to the Complaint were "unrepresented and unsophisticated persons," the Delegate was obliged "to provide guidance to the parties on the importance and application of the rule."

54. The rule in *Browne v. Dunn* is a common law rule of evidence, which "is rooted in fairness": Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada Inc., 2018), ch. 16 at VII [**Lederman, Bryant & Fuerst**]. Under the rule, if a "cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, [they] must give the witness notice of [their] intention." The rule "applies not only to contradictory evidence, but to closing argument as well": *R. v. Drydgen*, 2013 BCCA 253 at para. 13 [***Drydgen***], quoting Lederman, Bryant & Fuerst. Its objective is to prevent the "ambush" of witnesses on essential matters.

55. The rule in *Browne v. Dunn* "is not an absolute rule," but rather "is grounded in common sense and fairness to the witness and to the parties": Lederman, Bryant & Fuerst. For instance, the rule does not require a party (or their lawyer) to ask a witness "contradicting questions about straightforward matters of fact on which the witness has already given evidence that [they are] very unlikely to change": *Drydgen* at para. 17, quoting *R v. Khuc*, 2000 BCCA 20. More generally, the rule is not engaged "when there can be no realistic possibility that the witness was 'caught by surprise' … or … treated unfairly": *Drydgen* at para. 18, citing *R. v. Ali*, 2009 BCCA 464.

56. For the following reasons, I find that the Delegate did not err in law by failing to apply the rule in *Browne v. Dunn* or to provide guidance to the parties regarding its application.

57. First, as the Tribunal has previously stated, the Director and their delegates are "not bound by the formal rules of evidence": *Alpha Neon Ltd.*, BC EST # D105/11 at para. 77. Moreover, the Tribunal has observed that the rule in *Browne v. Dunn*, in particular, is a "dubious" fit for the complaint process under the *ESA*, which is meant to be "relatively informal and efficient, with minimum possible reliance on lawyers": *Lyle Storey*, BC EST # RD107/14 at para. 23 [***Lyle Storey***]. The complaint process under the *ESA* must be fair, but fairness in this context does not require the "full panoply of procedural and technical rules" – such as the rule in *Browne v. Dunn* – which might otherwise operate in a criminal or civil court proceeding: see *Lyle Storey* at para. 24. Instead, section 77 of the *ESA* serves as a "legislated minimum procedural fairness requirement," under which a delegate is required to "make reasonable efforts to give a person under an investigation an opportunity to respond": *John Curry* at para. 117. In the present case, counsel for the

Employer chose not to specifically allege a breach of section 77. In any event, nothing in the materials before me indicate that the Delegate contravened this requirement.

58. Second, even if the Delegate had been bound by the formal rules of evidence in this matter, the Employer has not established that the rule in *Browne v. Dunn* was engaged in the circumstances of this case.

59. Whether or not the rule in *Browne v. Dunn* arises in a particular proceeding is a question of law: *Drydgen* at para. 22. In the present matter, the Employer asserts in the Appeal Submission that the rule was engaged as a result of the "substantial conflicts" in the evidence advanced by the parties. But evidentiary conflicts, in and of themselves, do not necessarily trigger the application of the rule in *Browne v. Dunn*. There must be some realistic possibility that a witness was caught by surprise by contradictory evidence or argument. Counsel for the Employer has not clearly asserted, and certainly has not established, that this was the case. The materials before me do not show that anyone at the Oral Hearing was "ambushed" on essential matters in issue in the Complaint.

60. In sum, then, I reject the Employer's two arguments under the error of law ground of appeal. The Employer has not shown me, on a balance of probabilities, that the Delegate erred in law.

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

61. The Employer's second ground of appeal is that "the director failed to observe the principles of natural justice in making the determination": *ESA*, s. 112(1)(b).

62. This ground of appeal is about whether the Delegate's process in making the Determination was fair. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker.

63. The Employer makes two arguments under the natural justice ground of appeal. First, it asserts that the reasons for the Delegate's determination are inadequate. Specifically, the Employer says the reasons "are inadequate because they provide no guide or basis for anyone reading them to understand how or why evidence tendered on behalf of the [Employee] was preferred and relied upon over the evidence tendered on behalf of the Companies." Second, the Employer argues that the Delegate failed to consider relevant evidence in making the Determination. In particular, the Employer questions whether the Delegate considered evidence related to managerial authority within the CCON Companies and the Employee's failure to follow the President's directions.

64. In response to these arguments, the Delegate asserts that the Employer "has overstated the discrepancies in the witness evidence because they disagree with the findings of fact." The Delegate says that the Determination engaged "with the relevant evidence where there were disputes over facts and reached findings consistent with the preponderance of reliable and relevant evidence."

65. I find the Employer's submissions under the natural justice ground of appeal to comprise largely of a rehashing and rearguing not only of the case that was before the Delegate, but also of its claims and

assertions elsewhere in the Appeal Submission. Regarding the Employer's two discernible arguments (inadequate reasons and failure to consider relevant evidence), I find as follows.

1. Inadequate reasons

66. In the context of the complaint, investigation and determination processes under Part 10 of the *ESA*, questions of procedural fairness may arise in a variety of circumstances. For example, in some instances, a delegate's failure to provide adequate reasons may constitute a breach of natural justice: *Regent Christian Academy Society, c.o.b. Regent Christian Online Academy*, BC EST # D011/14 [***RCOA***]. In general, a delegate's reasons and justification for their determination must be transparent and intelligible. If the reasons are deficient, the parties may not be able to assess the delegate's decision "in the sense of coming to an understanding of the basis for it," which, in turn, "undermines their ability to decide with confidence whether there are valid grounds for an appeal": *RCOA* at para. 40.

67. The Tribunal adopts and applies a "functional context-specific approach" when assessing the adequacy of a delegate's reasons: see *Golden Fleet Reflexology Ltd.*, 2018 BCEST 22 at para. 28 [***Golden Fleet Reflexology***]. A delegate's reasons must be read "as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they are delivered": *Golden Fleet Reflexology* at para. 28, citing *R. v. R.E.M.*, 2008 SCC 51. This means that every "finding and conclusion need not be explained" by the delegate, "and there is no need to expound on each piece of evidence or controverted fact." Rather, "it is sufficient that the findings linking the evidence to the result can logically be discerned" in the delegate's decision: *Golden Fleet Reflexology* at para. 28. In the present case, I find that the reasons set out in the Determination meet this standard.

68. In my view, the logic of the Delegate's decision is clear, particularly on a sympathetic reading of the Determination. The Delegate relied on witness testimony and documentary evidence to find that the VP exercised control or direction over staff, including the Employee. She relied on witness testimony to find that various impugned actions of the Employee (e.g., entering the President's office with the VP to retrieve documents, installing the keypad lock and refusing the President's request to open the conference room door and disclose the lock's keycode, attending the May 13, 2019 meeting) were directed by the VP, who was a representative of the Employer. She relied on witness testimony and the Employee's audio recording of the May 13, 2019 meeting to find that the Employee's participation in the meeting did not amount to misconduct. In addition, there was no evidence before the Delegate to show that the Employer communicated or enforced reasonable performance standards regarding any of the matters cited in the Termination Letter. Accordingly, in the result, the Delegate concluded that the Employer had not established just cause based on poor performance or repeated instances of minor misconduct, and the Employer had not proven that the circumstances of the Employee's termination amounted to just cause on the ground of insubordination or other serious misconduct. Read as a whole and in context – including in the context of an *ESA* complaint process that is meant to be relatively informal and efficient – the Determination adequately described the relevant evidence, the Delegate's conclusions, and the findings of fact connecting the two. The reasons and justification for the Delegate's decision can logically be discerned and understood.

69. I therefore reject the Employer's argument that the Delegate failed to provide sufficient reasons and that this constituted a breach of natural justice. In my view, the level of exposition demanded by the Employer was not required in the Determination, and is generally inconsistent with a functional and purposive

approach to the dispute resolution processes under the *ESA*, which should be accessible, timely, and proportionate.

2. Failure to consider relevant evidence

70. I also reject the Employer's argument that the Delegate failed to consider relevant evidence in making the Determination. The Tribunal must exercise caution when examining arguments of this nature, because "any attempt to determine whether an administrative decision-maker has considered 'all of the evidence' as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact": see *RCOA* at para. 36, quoting Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2009, loose-leaf).

71. Depending on the circumstances, if a delegate of the Director fails to consider relevant evidence in making their determination, this could amount to a denial of natural justice: *Economy Movers (2002) Ltd*., BC EST # D026/07. However, as I discussed above, the reasons for a delegate's determination "need not recite all of the evidence that is considered" by the delegate in making their decision. Accordingly, "the Tribunal should be reluctant to find that a delegate has failed to consider relevant evidence merely because it is not mentioned, expressly" in the reasons for the determination, except where the unmentioned evidence is highly relevant or particularly probative: see *RCOA* at para. 37. In addition, even if there is proof that a delegate failed to consider relevant evidence, that does not necessarily mean there will be a breach of natural justice. The finding of such a breach depends "on the impact the failure to consider the evidence has on the fairness of the proceeding," considering "factors like the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on the issue": *ROCA* at para. 38.

72. In the Appeal Submission, the Employer specifically asserts that there "is little in the determination that shows that the [Delegate] considered and addressed evidence that was relevant to both questions about managerial authority within the Companies or the [Employee's] admitted failures to adhere to directions he says were given to him by the [President]." I disagree. In the Determination, the Delegate expressly mentioned each witness's evidence regarding the VP's managerial authority. The Delegate's reasons also mentioned the Termination Letter and described evidence regarding the various impugned actions of the Employee that, in the Employer's view, amounted to insubordination and serious misconduct justifying summary dismissal. The Delegate's findings and analysis (e.g., "I find that Ms. Dahl had authority to direct staff", "Mr. Dahl did not discuss [with the Employee] the disciplinary consequences [of the Employee's failure to train the Administrator and make other related arrangements to the President's satisfaction]") indicate that she took these matters into account in reaching her decision.

73. I appreciate that the Employer disagrees with the Delegate's assessment and weighing of the evidence before her, and disputes her findings and conclusions. However, that is not enough to establish a breach of natural justice. I find that the Employer has not proven that the Delegate failed to consider relevant evidence, let alone that she failed in such a way that impacted the fairness of the Complaint proceedings. I therefore conclude that the ground of appeal set out in section 112(1)(b) of the *ESA* has not been met. The Employer has not shown me, on a balance of probabilities, that the Delegate failed to observe the principles of natural justice in making the Determination.

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

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

75. The threshold for meeting this ground of appeal is high. To be accepted on appeal, the evidence that the appellant puts forward to the Tribunal must satisfy each of the following four criteria:

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

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

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

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

Merilus Technologies Inc., BC EST # D171/03.

76. Under this ground of appeal, the Employer argues that evidence "that has come to light … since the complaint was adjudicated … is highly relevant to the credibility of the evidence tendered in support of the [Employee]." The Employer says that this evidence "has been only knowable in retrospect – specifically the time between the [Employee's] termination and the present appeal." The evidence put forward by the Employer in the Appeal Submission is comprised of an affidavit, sworn by the President on October 12, 2021.

77. In the Affidavit, the President affirms that subsequent to the Employee's termination, the VP "made no further attempts to direct any employees of the Companies," "made no effort to manage the business of the Companies," took no "operation [sic] role in the Companies whatsoever," and took "no steps to secure or use any part of the … business premises for her own use as an office." According to the Employer, this indicates that a significant portion of the VP's evidence at the Oral Hearing "was untrue or disingenuous." In particular, the Employer asserts that the information in the Affidavit contradicts the evidence of the VP and the Employee regarding the VP's managerial authority and motivation for directing the Employee to install the keypad lock on the door to the conference room at the Employer's Abbotsford location. The Employer says that the Affidavit evidence therefore "calls into question key findings of fact made in the Determination" and "ought to prompt a re-evaluation of the testimony" of the VP and the Employee.

78. In response to the Employer's arguments under this ground of appeal, the Delegate asserts that the information provided in the Affidavit "does not amount to new evidence which if considered would change the findings made in the Determination." The Delegate argues that there is "no way of knowing" why the VP has conducted herself in the manner described in the Affidavit. In any event, says the

Delegate, the Affidavit does not prove that the VP did not have authority to instruct and direct employees during the relevant time period surrounding the Employee's termination.

79. For the following reasons, I find that in putting forward the Affidavit, the Employer has not satisfied each of the "new evidence" criteria set out above.

80. First and foremost, the Employer has not established that the information in the Affidavit is "new" in the sense that it could not have been presented to the Delegate during the complaint, investigation and determination processes. The Employee was terminated on May 23, 2019, and the Oral Hearing took place almost a full year later, on April 22 and 23, 2020. Evidence regarding the VP's absence from the Employer's business operations and premises following the Employee's termination could – with the exercise of due diligence – have been provided to the Delegate at the Oral Hearing or at some other time when the Determination was being made, keeping in mind that the Determination was not issued until September 3, 2021.

81. Second, I agree with the Delegate's arguments regarding the questionable probative value of the Affidavit evidence. In addition, I find the potential probative value of the Affidavit evidence to be further undermined by its similarity, in nature and substance, to the information and arguments that were before the Delegate at the Oral Hearing. For example, at the hearing, the Employer gave evidence that the VP "never held an operational role in the office" and "did not have a functional position" with the CCON Companies. This evidence did not lead the Delegate to find in the Employer's favour in her decision on September 3, 2021, and I have no reason to believe that similar evidence of the VP's lack of involvement and presence following the Employee's termination would have compelled the Delegate to reach a different conclusion on a material issue in the Complaint.

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

83. For all of the above reasons, the Employer's appeal is dismissed.

ORDER

84. Pursuant to section 115(1) of the *ESA*, the Determination is confirmed.

Jonathan Chapnick
Member
Employment Standards Tribunal