Citation: AREV Life Sciences Global Corp. (Re)
2022 BCEST 36

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

AREV Life Sciences Global Corp.
("AREV" or 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: Ryan Goldvine

FILE NO.: 2022/008

DATE OF DECISION: June 28, 2022

DECISION

SUBMISSIONS

Negina Khalil	counsel for AREV Life Sciences Global Corp.
Cameron Fox	on behalf of Tiffany Poettcker
Shannon Corregan	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by AREV Life Sciences Global Corp. ("AREV" or the "Employer") of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the "Delegate"), on December 15, 2021 (the "Determination"). The appeal is filed pursuant to section 112(1)(b) of the *Employment Standards Act* (the "*ESA*").

2. In the Determination, the Delegate found that Tiffany Poettcker ("Ms. Poettcker" or the "Complainant") was an employee of AREV, and was owed five months' wages, compensation for length of service, and vacation pay. The Determination also imposed penalties for contraventions of the *ESA*, and interest pursuant to section 88 of the *ESA*.

3. The Employer submits the Delegate failed to observe the principles of natural justice in making the Determination by failing to make reasonable efforts to give AREV an opportunity to respond in accordance with section 77 of the *ESA*.

4. The Employer asks that I cancel the Determination on this basis.

5. Unable to make a determination based solely on the Appeal and the section 112(5) record (the "Record"), I asked for further submissions.

6. I received response submissions from both the Delegate and a representative for the Complainant, as well as reply submissions from the Employer.

ISSUE

7. Did the Delegate fail to observe the principles of natural justice in making the Determination?

8. If so, what is the appropriate remedy?

THE DETERMINATION

9. The Determination relates to a complaint filed by Ms. Poettcker on December 20, 2019 (the "Complaint"). Ms. Poettcker claimed she was owed wages for work performed from May to September 2019.

10. Ms. Poettcker initially ran her own business making and selling topical cannabis products. Ms. Poettcker sold her business to a company, Alternative Extracts Inc. (AEI). Ms. Poettcker also entered into a consulting agreement to provide consulting services to AEI.

11. In late 2018, the Employer purchased some of the assets of AEI, including those sold to it by Ms. Poettcker. At the same time, Ms. Poettcker entered into a new consulting agreement with AREV.

12. After a number of invoices from Ms. Poettcker to AREV went unpaid, Ms. Poettcker filed the present Complaint.

13. The Determination opens with a response to allegations by the Employer that the investigation was conducted in an unfair and biased manner. As will be reviewed below, the Employer complained of short timelines for response, and asserted that the Delegate had failed or refused to consider AREV's submissions on the basis of the very short time taken to respond to one of its submissions.

14. The Delegate set out her numerous efforts to obtain documents and submissions from the Employer, both in response to a demand for documents, and for the purpose of responding to the documents and evidence of the Complainant.

15. The Delegate began her investigation in August 2021, gathering information from both parties and giving each an opportunity to respond to the evidence of the other. On October 18, 2021, the Delegate advised AREV that she had reviewed all of the evidence available to her and had reached a preliminary assessment that wages were likely owing.

16. In response, the Employer advised they would be in touch with further documents and evidence.

17. On October 26, 2021, the Delegate emailed AREV and cross-disclosed further documents provided by the Complainant to AREV. Because the Delegate concluded that the further documents did not raise any new issues, but simply provided additional support for the Complainant's claim that she had worked during the period in issue, the Delegate gave the Employer a short timeline within which to respond to these new documents.

18. The Employer advised the Delegate that it had additional evidence to provide but would be delayed because their lawyer was busy. The Delegate declined to give an extension and confirmed the reason for this to be because either one or the other of the two contacts at the Employer should already be familiar with most of the documents provided in the second evidence package because either or both had been a recipient of them.

19. The Employer continued to advise that it had more evidence to provide, but declined to articulate to the Delegate the nature of such evidence, and, ultimately, no further evidence was provided to the Delegate by the Employer.

20. The Delegate explained to the Employer that "just because [she] was not persuaded by his evidence or arguments did not mean [she] had not considered them."

21. The Delegate confirmed she gave AREV the opportunity to know the case against it, to submit evidence, and to respond to the Complainant's evidence.

22. On the evidence reviewed by the Delegate, from November 2018, when AREV purchased the Bare Coconut product line from AEI and entered into a consulting agreement with Ms. Poettcker, Ms. Poettcker continued to work from home. The Delegate confirmed Ms. Poettcker used her own tools and equipment, and sourced and purchased her own ingredients. The Delegate confirmed that Ms. Poettcker used her own cell phone and laptop, and did not receive reimbursement for the use of her personal equipment.

23. Ms. Poettcker received direction from AREV, and initially discussed research and development with Mr. Withrow, and later received task lists from Ms. Greenslade, both of whom gave evidence in this investigation. Both Ms. Greenslade and Mr. Withrow were involved in AEI, and the Employer. Mr. Withrow was a director of AEI until August 20, 2019, and is a director of the Employer. Ms. Greenslade was added as a director of the Employer in December 2019.

24. AREV established timelines and completion dates for Ms. Poettcker and Mr. Withrow had the final say on things like logos. Ms. Poettcker communicated frequently with Ms. Greenslade to check in.

25. Ms. Poettcker worked full-time hours, though she did not track those hours, and invoiced AREV monthly. She was paid by cheque, but no deductions were made, nor was GST paid.

26. For a period of time Ms. Poettcker sold her products "on the side" on her own website, but when she was asked by AREV to stop, she complied.

27. Though Ms. Poettcker's pay was delayed in April 2019, she continued to perform work for AREV. She was paid for her April invoice in June, and this was the last compensation she received.

28. In July and August Ms. Poettcker continued to perform work for AREV and AREV continued to assign tasks for her to complete. During this time, Mr. Withrow continued to correspond with Ms. Poettcker and provide information and materials to support her in her work.

29. In September, Mr. Withrow asked Ms. Poettcker if she could come into the office for a portion of each week. Ms. Poettcker declined. The Delegate concluded that there had not been any previous requirement for Ms. Poettcker to attend at the office on any regular basis.

30. Ms. Poettcker and Mr. Withrow continued to have conversations about work in September 2019, and Ms. Poettcker continued to ask Mr. Withrow for payment.

31. On October 29, 2019, Mr. Withrow advised Ms. Poettcker by text message that her contract had ended in June.

32. The Delegate found a number of contradictions between the evidence of Ms. Poettcker and that of Ms. Greenslade and Mr. Withrow, and concluded that she preferred the evidence of Ms. Poettcker where such evidence conflicted, in part because the evidence of both Ms. Greenslade and Mr. Withrow were in several instances contrary to the documentary evidence provided.

33. The Delegate concluded that Ms. Greenslade did not provide any explanation as to why her evidence was contrary to what was contained in some of the text messages and emails provided, and found that Mr. Withrow refused to provide information on several key points and failed to respond directly to much of Ms. Poettcker's evidence.

34. After reviewing all of the evidence available, the Delegate conducted an assessment, based on the factors set out in the caselaw, of whether Ms. Poettcker was an employee or an independent contractor.

35. Although she found a number of factors would suggest Ms. Poettcker was an independent contractor, she was more persuaded by the factors that pointed to an employment relationship. These included the nature of the services she was providing, and the ongoing nature of the relationship, and that the work was integral to the business of AREV. The Delegate also noted that much of the direction and approvals related to Ms. Poettcker's work came from AREV.

36. The Delegate also noted that Ms. Poettcker bore no risk of loss, and earned a set monthly salary that did not decrease or increase based on the company's profits.

37. Ms. Greenslade also provided a letter to Ms. Poettcker claiming that Ms. Poettcker was an employee of AREV for the purposes of assisting with her banking needs. Although the Employer demonstrated that its board of directors did not approve of the letter, the Delegate found there was no evidence that AREV sought to correct this with the bank, nor that it disciplined Ms. Greenslade for having written the letter.

38. Although there were periods of time when Ms. Poettcker was selling the "Bare Coconut" products she had developed, on the side, the evidence before the Delegate was that the profits all went back into AREV either through paying AREV's consultants or buying materials to produce more product.

39. Based on an assessment of all of these factors, the Delegate determined that Ms. Poettcker was an employee of AREV.

40. The Delegate concluded that the contract between Ms. Poettcker and AREV was ambiguous with respect to the time frame of the initial two-year term; however, she nevertheless concluded that even if the initial two-year term was intended to end on June 21, 2019, the agreement clearly stated that the contract would continue on a month-to-month basis "[u]nless and until terminated in accordance with the termination provisions of this Agreement".

41. Although AREV and Mr. Withrow took the position that the contract terminated in June 2019, the Delegate confirmed that the evidence before her that the working relationship continued after June 2019 indicates that the contract continued.

42. The Delegate observed that there were no contemporaneous records to demonstrate when Ms. Poettcker's employment was terminated or for what reason. Accordingly, the Delegate relied on the evidence of Ms. Poettcker and Mr. Withrow to reach a conclusion on this point.

43. Faced with conflicting testimony, the Delegate accepted the evidence of Ms. Poettcker that it was during a phone conversation on September 19, 2019 that Mr. Withrow asked Ms. Poettcker to begin working in the office, and she declined. Following this, the Delegate concluded that the employment relationship

ended October 1, 2019, the date on which Mr. Withrow took the position by way of text message that he had terminated their contract in June.

44. Having found that the employment relationship ended on October 1, 2019, the Delegate also confirmed that the Complaint was filed in time on December 20, 2019, falling within the six month time limit set by section 74 of the *ESA*.

45. The Delegate then looked to the invoicing history, and the agreement that Ms. Poettcker would receive $3,000 per month regardless of the number of hours worked, and confirmed that Ms. Poettcker was owed $3,000 per month for the period of May to September 2019, totalling $15,000.

46. The Delegate also found that the Employer was liable to pay one week's compensation for length of service in the amount of $692.31, vacation pay in the amount of $1,347.69, and accrued interest.

47. The Delegate also assessed penalties of $500 for each of four contraventions of the *ESA*; namely of sections 17, 18, 58 and 63.

ARGUMENTS

48. The Employer argues the Delegate failed to observe the principles of natural justice in making the Determination, and appeals under section 112(1)(b).

49. Specifically, the Employer says the Delegate failed to make reasonable efforts to give the Employer an opportunity to respond in accordance with section 77 of the *ESA*.

50. As a result, the Employer seeks to have the Determination cancelled.

51. The Employer points to the fact that the Delegate advised early on in the investigation that she could not wait for Ms. Greenslade to return from vacation and needed to speak to someone earlier than September.

52. The Employer also points to the fact that the Delegate provided the Employer with an evidence package 133 pages in length on October 26, 2021, and gave the Employer only until November 1st to respond.

53. Because of the length of the materials, and the unavailability of its lawyer, the Employer asked for an extension to reply, but one was not granted.

54. The Employer relies on *Van Vapes Inc. (Re),* 2021 BCEST 46, and *Inshalla Contracting Ltd.,* BC EST #RD054/06, for the proposition that fairness requires a party to know the substantive elements of the case against it and be offered an opportunity to respond.

55. The Employer says the short timeline to respond in August was unfair as it was a time that many employees are away on holiday, and because the Employer had limited resources and personnel available to attend to the Complaint.

56. The Employer also says the five days to respond to the lengthy document package sent in October was unfair, particularly given the size of the package, the age of the documents (approximately two years old), and the fact that the time frame fell over a weekend.

57. The Employer impugns the Delegate's assertion that Ms. Greenslade "did not provide any other reason for her request for an extension other than the length of the document" by pointing to Ms. Greenslade's reference to her lawyer's unavailability.

58. The Employer relies on *Island Scallops Ltd.*, BC EST #D198/02, for the proposition that "the Delegate must provide an opportunity to the parties to provide information, and consider and respond to important allegations, on a critical matter in issue, before the Delegate issues a Determination."

59. The Employer contends that the second evidence package was critical to the Delegate's finding regarding when the Complainant's employment ended, and the fact that she worked steadily between June and October, 2019.

60. The Employer asserts the Delegate's finding based on the second evidence package made the difference between whether the Complainant was owed five months and one week of wages, or simply one week of severance.

61. The Employer says it responded diligently to all correspondence from the Delegate but was nevertheless denied adequate notice or an opportunity to respond to the evidence submitted by the Complainant.

62. The Delegate refers back to the Record and notes that notice of the Complaint and a copy of Ms. Poettcker's complaint form was provided to AREV on August 17, 2021. The Delegate then issued a demand for records on August 24, 2021, and although she had been advised that Ms. Greenslade would be away, she received a response that day. The Delegate then set up phone interviews with both Ms. Greenslade and Mr. Withrow in the second week of September, seemingly accepting that Ms. Greenslade was on vacation.

63. The Delegate asserts that the Employer has failed to identify how her exchanges with the Employer during August 2021 violated AREV's right to adequate notice of the Complaint or a reasonable opportunity to respond to it.

64. The Delegate noted that she provided the Employer with Ms. Poettcker's oral evidence and records on October 14, 2021. The Delegate asked the Employer to review the evidence and provide a response by October 18, 2021. The Delegate also noted that the Employer did not request an extension of time to this deadline.

65. The Delegate received some brief responses on October 18th and advised the Employer that after reviewing the evidence before her, she had reached a preliminary assessment that wages were likely owing to Ms. Poettcker.

66. The Employer advised that it would contact her later in the week with further information, but the Delegate received no further communication from AREV that week.

67. After receiving the documents provided by AREV, the Complainant disclosed a further package of documents to the Delegate. Upon review of these documents, the Delegate concluded that they consisted primarily of emails and text messages, the majority of which had included Ms. Greenslade or Mr. Withrow.

68. The Delegate provided the second evidence package to the Employer on October 26, 2021, and gave the Employer until November 1st to respond, and advised that she was still waiting for a response from the Employer to the preliminary assessment.

69. The Employer responded that they had further evidence to submit and asked for an extension to respond to the second evidence package.

70. The Delegate declined the Employer's request for an extension both because the documents in the second evidence package consisted primarily of emails and text messages, the majority of which had included either Ms. Greenslade or Mr. Withrow, and that the second evidence package raised no new issues.

71. In addition, the Delegate asserts that she asked Ms. Greenslade for further information about the evidence AREV was still looking to submit, but that Ms. Greenslade refused to disclose any further information about the evidence.

72. The Delegate disagrees that the Employer's lawyer's unavailability was related to the need for an extension to review the second evidence package, referring to other statements made by the Employer in which their lawyer was "putting together a presentation" and "has been tied up and has not been able to review our documents" which the Delegate interpreted to be related to the Employer's submissions and documents generally, and not specific to the review of the second evidence package.

73. The Delegate again advised the Employer on October 27, 2021, that her preliminary assessment was that the Complainant was an employee, and was owed wages, and in response to a request, provided the amount of wages owed, in her estimation.

74. The Employer made further submissions on October 27, 2021, identifying the aspects of Ms. Poettcker's contract that supported its view that she was not an employee. The Delegate understood this to be the "presentation" the Employer was waiting for from their lawyer.

75. The October 27, 2021 submission provided no response at all to the second evidence package, nor did the Employer provide any further response to those documents thereafter.

76. In response to the Employer's assertion that the finding of fact that Ms. Poettcker worked during the period of May to September 2019 was a critical issue based in the second evidence package, the Delegate asserts that the first evidence package also contained evidence that Ms. Poettcker had worked during that period, and that this was not a new issue raised by the second evidence package.

77. The Delegate says there is no support in the Record for the Employer's argument that the second evidence package is what grounded the difference between a finding of five months' wages owing and one of simply compensation for length of service.

78. In conclusion, the Delegate submits that she did not fail to observe the principles of natural justice and in fact provided the Employer with an adequate opportunity to know the case against it, to respond to Ms. Poettcker's claims and to provide its own evidence regarding the issues in dispute.

79. The Complainant's representative also made submissions in response to the Appeal.

80. The Complainant supports the Delegate's Determination and asserts that the Record and the reasoning set out in the Determination "clearly demonstrate that the Delegate's decision was fair to the [Employer] within the context of the overall investigation."

81. The Complainant also relies on *Re Inshalla, supra*, in which the Panel noted that "the attributes of natural justice may vary according to the character of the decision and the context in which it applies" and that "the Director during an investigation should not be placed in a procedural strait-jacket."

82. The Complainant also relies on *Bistro Aubergine Inc.,* BC EST #D163/04, and *Insulpro Industries Inc.,* BC EST #D405/98, for the proposition that the principles of natural justice do not prescribe a specific or universal procedural requirement, but instead ensure that an investigation as a whole demonstrates "fair play in action".

83. The Complainant points to this Tribunal's decision in *Van Vapes*, *supra* which was a decision in which a delegate declined to grant an extension for the submission of additional evidence. The Tribunal noted in that case "[t]he Delegate's declining to grant the extension was an exercise of discretion with which the Tribunal will be loath to interfere unless it can be said that the Delegate misdirected herself or made a decision that was so clearly wrong that it amounted to an injustice."

84. The Complainant says the Delegate's decision to decline an extension of time for the review of the second evidence package "was a reasoned and reasonable exercise of discretion within the context of a larger investigation."

85. In the alternative, the Complainant contends that the Determination should nevertheless be confirmed on the basis that the additional evidence in the second evidence package was not necessary for the Delegate to issue the Determination.

86. The Complainant disagrees with the Employer's contention that the additional evidence was essential to the Determination and points to the fact that a preliminary assessment was already disclosed to the Employer on October 18, 2021.

87. The Complainant asserts the Delegate relied on four pieces of evidence in concluding Ms. Poettcker was an employee as follows:

a. The "Consulting Agreement";

b. Correspondence between Ms. Poettcker and employees and directors of the Employer;

c. A representation made to Health Canada that the Respondent was part of the Appellant's "key personnel"; and

d. Financial records showing that the Respondent's finances were integrated with those of the Appellant.

88. The Complainant contends that, of these, only some records under item b. were included in the second evidence package.

89. The Complainant also walks through the key evidence on which the Determination grounds the finding that Ms. Poettcker was not terminated until October 1, 2019, and notes that all but a subset of emails and text messages were before the Delegate prior to the disclosure of the second evidence package.

90. The Complainant says that even if the Employer did not have a sufficient opportunity to review the second evidence package, the Determination would nevertheless have been justified based on the remaining evidence, absent the second evidence package.

91. In reply, the Employer asserts that with respect to the initial exchange, the Delegate did not provide a reason for denying Ms. Greenslade's request for an extension to speak with her.

92. In reply to the Delegate's assertion that the Employer has failed to identify precisely how the Delegate's actions in August 2021 violated the Employer's right to adequate notice and an opportunity to respond, the Employer directs my attention to the specific responses from the Delegate such as continuing to reach out after being told the key individuals were on vacation, not providing the Employer an opportunity to speak with the Delegate before issuing a demand for records, continuing to rush Ms. Greenslade and Mr. Withrow in the investigation process, refusing a one-week extension request in August to seek legal advice, and failing to account for the fact that Mr. Withrow was not receiving a number of the emails sent by the Delegate.

93. The Employer further asserts that the Delegate "refused opportunities for AREV to obtain similar assistance from legal counsel to help with navigating the Employment Standards Tribunal process and procedures." The Employer says the Delegate "either denied or discouraged AREV from obtaining legal advice on at least three separate occasions."

94. The Employer does not agree with the submissions of the Delegate and the Complainant that the second evidence package was not necessary for the Determination to conclude that the Complainant was owed five months' wages and says "it is not possible to determine, based on the record, at what point the Delegate found the evidence "sufficiently compelling" to arrive at a preliminary assessment that Ms. Poettcker was owed wages *for work performed during the period of May to September 2019*, as the details of such an assessment were only communicated to AREV on October 28, 2021, following the date the Second Evidence Package was made available."

95. The Employer again submits that "the Determination ought to be canceled."

ANALYSIS

96. As noted in *Inshalla, supra,* "[a]n investigation under the *Employment Standards Act*, does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context." (para. 22)

97. I note, as the parties have identified, "[t]he general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity **to present evidence and argument**, **and to respond to the position of the other party**." (para. 23) **(emphasis added)**

98. This does not require the same strict rules of evidence identification and cross examination as found in the judicial system.

99. While the Employer relies on a number of decisions of this Tribunal that set out the general principles underlying the duty of fairness required by the *ESA*, the cases on their facts are quite distinguishable.

100. In V*an Vapes, supra*, the Tribunal reviewed a determination in which an employer asked for an extension of two weeks to make further submissions. The employer in that case alleged the failure to grant the extension also denied it an opportunity to pay the disputed amount before the determination was issued, thus seeking to avoid paying the assessed penalties.

101. The Tribunal found the employer had sufficient opportunity to marshal its evidence in advance of the deadline given, and relied on the fact that the employer "offered no other information from which an inference might be drawn that the granting of the extension requested would have resulted in it delivering other evidence that might have assisted the Delegate in determining whether the findings she had made in the Assessment should be revised or reconsidered." (para. 25)

102. In *Inshalla Contracting Ltd., supra*, the Employer's argument that it did not have a reasonable opportunity to respond, and the finding which referred the matter back to the Director, was based on the fact that the bookkeeper the delegate interviewed on behalf of the employer had no actual, implied, or apparent authority to represent the employer.

103. The Employer also references *Island Scallops Ltd., supra,* which was a case in which the delegate interviewed the complainant, but chose not to interview the employer. Although in the present case the Employer asserted they were initially unavailable, the Delegate ultimately did interview both Ms. Greenslade and Mr. Withrow as part of her investigation, and continued to correspond with each during the course of her investigation.

104. The Delegate's initial introductory correspondence on August 17, 2021, disclosed to the Employer that she was investigating a complaint filed by Ms. Poettcker, that "she believes she is owed wages for May, June, July, August and September 2019", and attached the Complaint.

105. It is important to note that Ms. Poettcker's Complaint itself disclosed that she was seeking regular wages as an employee, and specifically identifies the time period as being from June 1 until September 30, 2019. The Complaint form indicated that she was seeking $12,000 for regular wages, and $1,500 for compensation for length of service.

106. In the present case, while I agree the Delegate may have been abrupt and come across as impatient when trying to advance her investigation in August 2021, soon after reaching out to the Employer, I note the Delegate did, ultimately, interview both Ms. Greenslade and Mr. Withrow early in September, despite her insistence that she could not wait that long.

107. Accordingly, I am unable to find that any opportunity to respond was foreclosed by the Delegate's initial assertion that she could not wait until September to speak with a representative of the Employer.

108. Attached to the Complaint was a schedule setting out a summary of the Complaint in which she describes her employment with AREV, and also asserts that she continued to work during the period of June to September 2019 even though she was not being paid.

109. At this point in time, while the Employer had not yet been presented with Ms. Poettcker's evidence, it would have been clear to them the position she was taking; namely, that she was an employee who was owed wages, for a defined period of time.

110. I also note the only documents provided by the Employer in the course of the Delegate's investigation appear to have been provided on September 8 and October 14, 2021. At this time, the Employer provided documents it said supported their position that Ms. Poettcker was an independent contractor, and not an employee.

111. While the Employer's September 8, 2021 submission does not reference any Tribunal jurisprudence, it nevertheless disputes a number of assertions made by the Complainant, including with respect to the extent of the work alleged between June and September 2019, and seeks to rely heavily on the contract between them to support their position that Ms. Poettcker was an independent contractor.

112. Based on this submission alone, it cannot be said the Employer did not understand the distinction between independent contractor and employee, nor lack a general understanding of the case against it.

113. Notwithstanding the urgency and, perhaps, impatience that may have been conveyed by the Delegate, it would have been incumbent on the Employer to provide any and all documents it had at that time to refute the Complainant's assertions, both that she was an employee, and that she worked during the period in issue.

114. Instead, this submission, coupled with the Delegate's interviews, and the Employer's further submissions on October 14 and 28, 2021, constitute the entirety of the Employer's response to the merits of the Complaint.

115. Nothing prevented the Employer from making further submissions or providing additional documents after September 8th, nor after October 14th when it was provided with the first package of evidence from the Complainant and given until October 18th to respond.

116. In the absence of any further disclosure or submissions from the Employer by the October 18th deadline, the Delegate advised the Employer that she had reached a preliminary assessment that "wages are likely owing" to the Complainant.

117. The only conclusion the Employer could have drawn from this was that at that point in time, the Delegate was at least persuaded, based on the evidence available, that Ms. Poettcker was more likely than not an employee. The Employer also would have known that the remaining question to be answered would be whether Ms. Poettcker worked, and continued to be an employee, during the period of May to September

2019. To that end, I note the summary of evidence provided to the Employer on October 14, 2021 included references to work Ms. Poettcker claimed she performed in and after June 2019.

118. Whether the Employer had extensively reviewed the evidence disclosed or not, it could not be said that the Employer was unaware of the position of the other party.

119. The Employer relies on *Re Medallion Developments Inc.,* BC EST #D235/00 (*Medallion*) and asserts that "Section 77 requires that reasonable efforts be made so that the person under investigation is made aware of the allegations and is given a reasonable opportunity to respond."

120. In that case, the employer complained of the delegate's failure to meet with the employer in person. The Tribunal nevertheless found that it was clear on the materials presented that "Medallion was very much aware of the nature of the allegations being advanced and was afforded a reasonable opportunity to respond to those allegations."

121. In the present matter, as in *Medallion, supra*, the Employer does not assert that it was unaware of the nature of the allegations being advanced, but only complains that it did not have sufficient opportunity to respond to some of the specific documentary evidence disclosed as part of the investigation.

122. In fact, the Employer wrote to the Delegate on October 26, 2021, as follows:

> Thank you for your email, we better understand your leanings/position and we believe we have the evidence and presentation that will show to you that the control and direction was de facto in the hands of Tiffany consistent with the historical case law in the area of employment law in Canada which in accordance with the principles of natural justice you ought to receive and review.

123. Further, even though the Employer asserted several times between October 26 and 27 that it had further evidence to disclose, the Employer did not respond to the Delegate's inquiries as to the nature of the evidence, nor was any further evidence submitted.

124. Instead, Ms. Greenslade wrote to the Delegate on October 28th setting out the Employer's view of the applicable legal principles and its view of how the facts should be applied to those principles.

125. Mr. Withrow then further replied alleging that the Delegate had ignored the contract between AREV and Ms. Poettcker and that she had "not taken the facts from both sides and hastily rendered a decision without fully looking at the facts from both parties."

126. Mr. Withrow does not allege that there was further evidence that had not yet been provided, but only appears to disagree with the conclusions reached by the Delegate based on the evidence before her.

127. Even if, as the Employer suggests, it was "not possible to determine, based on the record, at what point the Delegate found the evidence "sufficiently compelling" to arrive at a preliminary assessment that Ms. Poettcker was owed wages for work performed during the period of May to September 2019" it would have been incumbent on the Employer to provide any evidence it had to support the alternative conclusion and strengthen its case, rather than refraining from doing so because it may have believed the first evidence package did not support the Complainant's position.

128. This is not a case in which the Employer submitted evidence which was not considered for having been submitted late, in fact, as noted above, no further evidence was submitted by the Employer after October 14, 2021.

129. In this appeal, the Employer is asking that the Determination be cancelled. I note that it does not ask for the matter to be remitted, either to the same or a different delegate.

130. Even if I were persuaded that the short timelines provided to respond to the second evidence package significantly interfered with the Employer's ability to know the case against it and have an opportunity to respond to the position of the other party, such a finding would not render the Determination so fundamentally flawed as to warrant cancelling the Determination outright. The most common remedy on a successful appeal would instead be to remit the matter back to the Director with directions.

131. I am further persuaded that the short timelines provided for by the Delegate did not sufficiently impact the Employer's ability to present evidence and argument, and to respond to the position of the other party, by the fact that it did not provide any further evidence in response, after October 26, or at all.

132. Recognizing that this Tribunal's jurisprudence provides some latitude to expand the scope of an appeal beyond the 'box checked on the appeal form', to "take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director," (*Triple S Transmission Inc.*, BC EST #141/03) I nevertheless find that this appeal seeks only to overturn the Determination on the grounds of procedural fairness.

133. I note that nowhere in the Employer's submissions does the Employer assert, or even suggest, that the Delegate erred in law in determining the Complainant was an employee; nor does the Employer seek to introduce new evidence as part of its appeal.

134. Accordingly, and for all of the reasons set out herein, I find the investigation, as a whole, was conducted in a manner that provided the Employer a reasonable opportunity to present evidence and argument, and to respond to the position of the other party, all of which the Employer did.

135. I find the Delegate did not fail to adhere to the principles of natural justice as required by section 77 of the *ESA*.

136. Accordingly, the appeal is dismissed.

ORDER

137. Pursuant to section 115 of the *ESA*, I order that the Determination dated December 15, 2021, is confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal