Citation: Aldergrove-Langley Taxi Ltd. (Re)
2022 BCEST 42

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Aldergrove-Langley Taxi Ltd.
(the "appellant")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2021/065

DATE OF DECISION: July 04, 2022

DECISION

SUBMISSIONS

Catherine Coakley	legal counsel for Aldergrove-Langley Taxi Ltd.
Muhammad Khalid	on his own behalf
Sanel Kadiric	delegate of the Director of Employment Standards

OVERVIEW

1. On June 18, 2021, Sanel Kadiric, a delegate of the Director of Employment Standards (the "delegate"), issued a determination (the "Determination"), and his comprehensive (63 single-spaced pages) accompanying "Reasons for the Determination" (the "delegate's reasons"), with respect to two complaints (later consolidated) filed by Muhammad Khalid (the "complainant") against the present appellant, Aldergrove-Langley Taxi Ltd. (the "appellant"). The Determination and the delegate's reasons were issued in accordance with section 81 of the *Employment Standards Act* (the "*ESA*").

2. By way of the Determination, the delegate determined that the complainant was in an employment relationship with the appellant, and awarded the complainant $47,944.81 (including section 88 interest), of which $39,605.28 was awarded under section 21 of the *ESA* (unauthorized wage deductions and unlawfully requiring an employee to pay the employer's business costs). Further, and also by way of the Determination, the delegate levied nine separate $500 monetary penalties against the appellant (see section 98 of the *ESA*). Accordingly, the total amount payable under the Determination is $52,444.81.

3. The delegate dismissed the complainant's complaint that he had been mistreated by the appellant, contrary to section 83 of the *ESA*.

4. This appeal is grounded on subsections 112(1)(a) and (b) of the *ES*A, namely, that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. More specifically, the appellant says that the delegate erred in law in finding that the complainant, a taxi driver, was an "employee" for purposes of the *ESA* (the appellant says the complainant was an independent contractor). Alternatively, the appellant says that even if the parties were in an employment relationship as defined in the *ESA*, the delegate erred in calculating the complainant's *ESA* entitlements.

5. The appellant's "natural justice" ground of appeal relates to the decision-making process that resulted in the Determination. In particular, the appellant notes that there was undue delay in adjudicating the complaint attributable to the fact that three separate employment standards officers employed by the Employment Standards Branch (the "Branch") were involved in this matter.

6. In my view, the delegate did not err in finding the complainant and the appellant were in an employment relationship. Further, I am not satisfied that the delegate failed to observe the principles of natural justice in making the Determination. However, I am satisfied that the delegate erred in calculating the complainant's entitlements under the *ESA* and, that being the case, that matter will be referred back to

the Director of Employment Standards. In particular, in my view, the delegate erred in determining the complainant's wage rate for purposes of calculating his entitlements, and also incorrectly treated certain items as unlawful section 21 wage deductions.

7. I will address the appellant's natural justice and error of law grounds of appeal, in turn. The appellant's natural justice ground flows from the manner in which the complaint (in fact, as previously noted, there were two complaints that were consolidated for purposes of adjudication) was ultimately adjudicated. Accordingly, I will first summarize the adjudicative process that resulted in the Determination before turning to the appellant's natural justice argument.

THE ADJUDICATIVE PROCESS

8. The Director of Employment Standards (the "Director") may adjudicate a complaint via one of two quite separate mechanisms, namely, an *investigation* or a *complaint hearing* (section 77.1 of the *ESA* now provides that the Director is not required to conduct an oral hearing in relation to a complaint and an investigation is currently the default adjudicative process). In *Director of Employment Standards*, BC EST # RD100/15, the Tribunal reviewed the fundamental distinctions between these two adjudicative processes (at para. 19):

> …An unpaid wage complaint may be adjudicated via either process and the Director has a broad (but not wholly unfettered) discretion to determine which adjudicative path a given complaint will follow. At a complaint hearing, the parties attend (usually in person but in some cases by teleconference) and present *viva voce* evidence and submit relevant documentary evidence. In this adjudicative process, the delegate is a neutral decision-maker who does not gather evidence; rather, the delegate adjudicates the complaint based on the evidence and submissions presented by the parties. "The delegate then makes a decision on the basis of the evidence presented at the hearing rather than on the basis of whatever evidence or information he or she might have been able to gather through an investigation process" (*Healey*, BC EST # D207/04 at page 5; see also *Freney*, *supra*).
>
> Where the unpaid wage complaint is *investigated*, the delegate has a dual role as both investigator and decision-maker. The delegate, as investigator, is acting in a quasi-judicial capacity (*BWI Business World Incorporated*, BC EST # D050/96; see also *Mitchell v. British Columbia (Director of Employment Standards)*, 1998 CanLII 3983 (B.C.S.C.)) and "must make reasonable efforts to give a person under investigation an opportunity to respond" (section 77 of the *Act*).

9. The complainant drove a taxi cab under the appellant's operating licence from the spring of 2014 to early November 2019. The first complaint was filed on February 15, 2019. The complainant advanced an unparticularized claim for "thousands" of dollars, and the complaint was the subject of an unsuccessful mediation process. The complaint was then assigned to an employment standards officer (the "first delegate") for adjudication, and a complaint hearing was held on May 23, 2019. At the conclusion of the hearing, the first delegate indicated to the parties that he expected to issue his decision before the end of July 2019. However, the first delegate never issued his decision within that time frame, and he resigned his position with the Branch without ever issuing a determination.

10. On November 15, 2019, the first complaint was then assigned to another employment standards officer (the "second delegate"). However, rather than rehearing the matter, the second delegate intended to conduct an investigation. On January 19, 2020, the complainant filed a second complaint in which he referenced his earlier complaint and, effectively, advanced a claim for "constructive dismissal" and a section 83 mistreatment claim: "…now [the appellant has] created a very bad working environment, not possible for me to continue the work…so I was compelled to leave the company…on November 4, 2019, which was my last day of work". The complainant advanced a claim for $2.7 million, including $2 million for "pain & suffering, financial loss".

11. The second complaint was also assigned to the second delegate. The two complaints were consolidated for purposes of investigation but before this investigation could be completed, the second delegate resigned her position with the Branch. The consolidated complaint was then assigned to a third employment standards officer – the delegate – who conducted what he described as a "fresh investigation", which concluded with the issuance of the Determination.

THE NATURAL JUSTICE ISSUE

The Appellant's Arguments[1]

12. The first element of the appellant's natural justice argument concerns the delay between the completion of the complaint hearing, and when the appellant was notified that the first delegate had left the Branch, and that the complaint had been assigned to a new delegate (according to the appellant, a delay of almost one year). The appellant also complains about the ensuing delay prior to the issuance of the Determination. The key aspects of the appellant's delay arguments are as follows:

> • Once the first Delegate left his position with the Branch, the First Complaint should have promptly been transferred to a new Delegate…While some additional delays may be expected due to the limited resources of the branch, a delay of 10 months, being approximately five times the duration of the timeline that was given to the parties, is in excess of any reasonable delay that could be expected to result from a change of staff;
>
> • The failure to advise the [appellant] about the nature of the delay left them uninformed and unable to take appropriate actions to preserve information for additional hearings or investigations that were necessitated by the changes in delegates; and

[1] The appellant's legal counsel's initial submission was submitted "without prejudice". The Tribunal expects that parties will stand behind the arguments made in their submissions, and filing submissions on a "without prejudice" basis is inappropriate. "The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights, unaffected by anything stated or done in the negotiations" (*Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at p. 59). An appeal to the Tribunal is not akin to a settlement process where "without prejudice" communications are protected by a legal privilege (see also: *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 S.C.R. 623). Submissions to the Tribunal are not privileged communications, and parties must expect that their submissions will be disclosed to all parties involved in an appeal or a reconsideration application, subject to redactions that may be appropriate to protect, for example, overriding privacy concerns.

> • The decision of the Branch to consolidate the First Complaint and the Second Complaint resulted in additional delays in the resolution of the First Complaint, as the Third Delegate indicated that additional time was required to investigate the Second Complaint.

13. The second element of the appellant's natural justice argument concerns the change in the adjudicative process from a complaint hearing (where all evidence was submitted, but no decision was ever rendered), to an investigation. The appellant asserts:

> • Following the First Hearing, the Branch transitioned from an adjudicative role to an investigative role. Rather than holding an in-person hearing, the Third Delegate interviewed witnesses privately, and opposing counsel was not given the opportunity to cross-examine. Since witnesses had already given evidence and were cross examined during the First Hearing, they were able to give their evidence to the Third Delegate with the benefit of knowing any weaknesses in their statements that arose during the First Hearing. Since their statements to the Third Delegate were not subject to the scrutiny of cross-examination, the proceedings were fundamentally unfair due to the fact that the Branch transitioned roles in between the [complaint hearing] and the investigation of the Combined Complaint.

The Director's Response

14. The delegate did not specifically reply to the appellant's natural justice arguments. The delegate says that the appellant's concerns about natural justice were adequately addressed in his reasons, at pages R6 to R11. As previously noted, the delegate says he conducted a "fresh investigation", and that the delay involved in adjudicating this matter has been appropriately explained.

15. In particular, the delegate notes that each party was provided with the other party's submissions, and that the appellant was fully apprised of the nature of the complainant's claim consistent with section 77 of the *ESA* ("If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond"). At page R7 of his reasons, the delegate observed:

> …throughout the entirety of the investigation I cross-disclosed to the Complainant and [the appellant's legal counsel] all submissions, responses, evidence, and witness provided information. No party raised issues about not receiving any items or having an opportunity to respond.

The Complainant's Response

16. The complainant notes that he, too, was not informed in a timely manner about the resignation of the first delegate and the ultimate reassignment to the (third) delegate, and that if the Determination were cancelled, that result would be "procedural[ly] unjust to me…as I had no control over what was happening in the [Employment Standards] Branch's office". The complainant also notes that while he was not responsible for consolidating the two complaints into a single adjudicative process, "this combination should [not] be seen as procedurally unfair as even courts will join cases that have similar issues and parties together for the sake of efficiency."

17. With respect to the appellant's assertion that "the delay left [the appellant] uninformed and unable to take appropriate actions to preserve information for additional hearings or investigations", the complainant says:

> …given that no determination had been issued by the first delegate, one would assume that information should be preserved, especially given that even if a determination was issued there was still the possibility of appeals down the line. The delay was not so overly long as to make the Appellant think that the complaint was finished or would not be pursued; as such the argument that the delay in determination and combination of the complaints resulting in a further delay does not amount to procedural unfairness. The Appellant was aware of the initial complaint and until that complaint was fully determined and/or could still be appealed it was their responsibility to preserve information that they may need to rely upon.

Natural Justice – Analysis and Findings

18. One of the stated purposes of the *ESA*, set out in section 2(d), is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". This matter, without question, did not proceed as expeditiously as it should have. The Determination was issued 2 years and 4 months after the first complaint was filed, and 1 year and 5 months after the second complaint was filed.

19. In my view, the Director has not provided a satisfactory explanation for the first delegate's failure to issue a timely decision following the May 23, 2019 complaint hearing. The first delegate apparently advised the parties that they could expect a decision in the next 6 to 8 weeks, but never subsequently advised the parties that he would not be issuing a determination within that time frame. The first delegate never issued a determination, and the material before me does not indicate when the first delegate actually resigned his employment with the Branch. The section 112(5) record includes an e-mail thread from the appellant's legal counsel to the Branch. On May 30, 2019, counsel confirmed with the Branch that a determination would be issued within 6 to 8 weeks. On September 11, 2019, counsel again e-mailed the Branch inquiring about when a determination might be expected, and received a reply that same day stating that the file "was still in progress" and that "Determinations can take anywhere from 3 to 6 months to finalize".

20. The delegate attempted to explain the first delegate's failure to issue a timely determination as follows: "…delegates of the Director handle multiple cases and have limited resources to devote their full attention to one case, which sometimes results in timelines needing to be extended" (delegate's reasons, page R8). While I accept that this statement may be accurate, it should also be recalled that it was the first delegate himself who told the parties that they could expect a final decision within a 6- to 8-week period. He never updated the parties, as he should have, when that timeline appeared to be unachievable.

21. The matter was not assigned to the second delegate until November 15, 2019 (delegate's reasons, page R6), some 6 months after the complaint hearing concluded and "[b]efore having the opportunity to begin an investigation of the [consolidated] complaint, the Second Delegate also left her position with the Branch" (delegate's reasons, page R6). However, the appellant and the complainant were not informed about this further reassignment until March 31, 2020, when the (third) delegate wrote to the parties advising that the matter would continue as an investigation into the consolidated complaints. The Determination was not issued until June 18, 2021, nearly 15 months later.

22. On April 9, 2020, and by way of reply to the delegate's March 31, 2020 letter, the appellant's legal counsel raised several "procedural fairness" concerns, and asked that a new hearing be convened. On April 22,

2020, the delegate advised counsel that the matter would proceed as an investigation, and on April 30, 2020, asked counsel to submit her submissions regarding both the relevant legal issues and facts.

23. The delegate's explanation for the delay involved in issuing the Determination after the consolidated complaint was assigned to him is as follows (delegate's reasons, page R8):

> The Second Complaint is a more detailed continuation of the Fist [*sic*] Complaint. Given the complexity of the matter, the fact I was unable to obtain full agreement on the Summary, and the nature of the Second Complaint, I decided it was in the interest of all parties to moved [*sic*] forward with an investigation instead of a second hearing. I made the decision to move forward with a new investigation out of necessity, efficiency, and in the interest of procedural fairness, including the Complainant's right to have his Second Complaint heard and the right of all parties to a fair and impartial decision.

24. As noted above, the Determination was not issued until about 28 months after the first complaint was filed, and about 17 months after the second complaint was filed. The appellant's appeal submission identifies the various *sources* of the delay involved in this matter but, importantly, does not identify any *specific prejudice* that it suffered as a result of this delay. The appellant says that as a result of the delay from the date of the complaint hearing (May 23, 2019) until March 31, 2020 (when the delegate first advised the parties that he would be investigating a consolidated complaint), it was "unable to take appropriate actions to preserve information for additional hearings or investigations that were necessitated by the changes in delegates". However, I do not understand why relevant information (such as documents or witness statements) could not have been retained during that interim period, and the appellant has not provided any further explication regarding the information that was apparently not preserved, and why it was unable to retain that information.

25. Undoubtedly, this matter did not proceed as expeditiously as it might have. However, the delay involved here was attributable to circumstances wholly outside the control of the complainant and, indeed, to a degree, outside the control of the Branch. Certainly, when Branch officers resign before concluding a file, there will likely be consequential delays. Further, it is a matter of public record that the normal operations of British Columbia courts and tribunals were significantly and adversely affected by the still ongoing Covid-19 pandemic, especially after March 2020 when a province-wide state of emergency was declared.

26. The leading decision regarding administrative delay is *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, a case where sexual harassment complaints were not scheduled for hearing until about 32 months had elapsed from the date of the filing of the complaints (a greater delay than is involved here). The Supreme Court of Canada concluded that the delay involved did not constitute an abuse of process. The court observed (at paras. 102, 115, and 122):

> There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy…
>
> …unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation,

> such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process….It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process…
>
> The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

27. In *Robertson v. British Columbia (Teachers Act, Commissioner)*, 2014 BCCA 331, the B.C. Court of Appeal, applying *Blencoe*, held that a delay of *35 years* was insufficient to justify an order staying disciplinary proceedings against a teacher, in light of an absence of clear prejudice to the teacher in question attributable to the delay.

28. The Tribunal has considered *Blencoe* in several decisions, and has consistently held that even lengthy delay will not justify the cancellation of a determination, absent clear evidence of prejudice – see, for example, *Johnson*, 2021 BCEST 104 and *Vellaikamban*, 2021 BCEST 105 (3 years); *Besinger*, 2021 BCEST 76 (2 years); *Garrick Automotive Ltd.*, 2020 BCEST 85 (28 months); *Tung*, BC EST # D511/01 (4 years); and *Ecco Il Pane Bakery Inc.*, BC EST # D396/00 (39 months).

29. The appellant did not refer to *Blencoe*, or to any of the many Tribunal decisions dealing with administrative delay, in its submission. Critically, the appellant has not identified any specific prejudice that it has suffered as a result of the delay involved in this case. The complainant is not responsible for the delay and, as previously noted, the delay here was largely attributable to circumstances over which the Branch had little control. The appellant's section 88 interest obligation is undoubtedly higher than it might otherwise have been but for the delay involved here. On the other hand, and to the extent that the complainant has a valid monetary claim, the complainant has been deprived of his earned wages, and the appellant has had the use of those funds without lawful justification. Thus, it is entirely appropriate that the complainant recover section 88 interest spanning the entire deprivation period.

30. The appellant has not indicated, in its submissions, what sort of relief it seeks if I were to find in its favour on the delay issue. Generally, inordinate and prejudicial delay in issuing a determination would justify one of two orders – first, a cancellation of the determination outright or, second, a referral back to the Director if a new hearing could rectify the prejudice caused by the delay associated with the first decision. If I granted the first, an innocent complainant would have a significant unpaid wages order effectively cancelled (leaving aside the question of his status, addressed below). In my view, such an order would not be keeping with section 2(b) of the *ESA*. If I granted the second, this matter would be even further delayed.

31. The delay in this case *is* significant and, considered in isolation, could be characterized as inordinate. However, when one takes into account the entire context (as mandated by *Blencoe*), and the absence of any proven prejudice, I am not persuaded that the appellant is entitled to any sort of relief based on administrative delay.

32. Apart from prejudice flowing from delay *per se*, the only other possible prejudice identified in the appellant's submission flows from the delegate's decision not to hold a new hearing but, rather, to continue with a new investigation regarding the consolidated complaints. It should be remembered that the May 23, 2019 complaint hearing concerned only the first complaint, filed February 15, 2019. The complainant's claim was broadened, and otherwise amplified, by way of his second complaint, filed January 19, 2020. Since the delegate was not able to achieve an agreement between the parties regarding what evidence had been presented at the May 23rd complaint hearing, the delegate "moved forward with the matter by initiating a fresh investigation" (delegate's reasons, page R7). During the course of that investigation, the delegate provided each party with the other's response to a "summary" that he had prepared regarding the evidence tendered at the complaint hearing and, further, "throughout the entirety of the investigation I cross-disclosed to the Complainant and [to the appellant's counsel] all submissions, responses, evidence, and witness provided information [and] no party raised issues about not receiving any items or having an opportunity to respond" (delegate's reasons, page R7).

33. The appellant maintains that it was prejudiced because the delegate "interviewed witnesses privately, and opposing counsel was not given the opportunity to cross-examine". However, as noted in the preceding paragraph, the delegate provided counsel with copies of all witness statements (and all other evidence submitted to him). More importantly, counsel never complained about not having an adequate opportunity to respond to the evidence the delegate gathered and provided to the parties. Further, a party has no presumptive right to an oral hearing, or to participate in witness interviews: "There is also no entitlement to receive a transcript or other record of the evidence of complainants; to be present when complainants are questioned by a delegate; to meet with the delegate; to cross-examine complainants; or to be granted the same amount of time to respond to a complaint as complainants were given to present their cases." (*Beach Place Ventures Ltd.*, 2019 BCEST 23 at para. 58, confirmed on reconsideration: 2019 BCEST 61, judicial review dismissed: 2021 BCSC 1463, affirmed on appeal: BCCA 147).

34. The appellant also implies that the witnesses the delegate interviewed, and who also testified at the complaint hearing (it should be noted that not all witnesses the delegate interviewed testified at the complaint hearing), were able to effectively "tailor" their later statements to address any deficiencies that might have been exposed through cross-examination. The appellant says that this situation, in turn, caused the investigation to be "fundamentally unfair" to the appellant. I note that the appellant has not provided even one example of such "tailoring" having occurred. I am not satisfied that the delegate's decision to investigate the consolidated complaint, rather that hold a new hearing, was unfair. Virtually all of the salient facts of this case are not in dispute – the resolution of the central issue in this appeal, namely, the complainant's status, does not turn on making findings about fundamentally divergent evidence, or resolving questions of relative credibility. Rather, this latter issue will be determined based on an application of the largely uncontested evidence to the statutory scheme (in particular, the statutory definitions of "employee" and "employer").

35. In summary, I am not persuaded that the delegate failed to observe the principles of natural justice in making the Determination. The delay involved in this matter, while lengthy, has been adequately accounted for and, most importantly, did not result in any discernible prejudice to the appellant. I am not satisfied that the delegate breached the principles of natural justice by deciding to conduct a fresh investigation into the consolidated complaint, rather than convening a new complaint hearing. Nor am I

satisfied that the delegate failed to comply with section 77 of the *ESA*, or otherwise conducted an unfair investigation. It follows that the appellant's section 112(1)(b) ground of appeal is dismissed.

36. I now turn to the appellant's alleged errors of law.

THE ALLEGED ERRORS OF LAW

37. As noted at the outset of these reasons, the appellant says, firstly, that the complainant was not an "employee" as defined in the *ESA* and, secondly, even if he were, his entitlements were incorrectly calculated. I will address each issue in turn.

THE COMPLAINANT'S STATUS

38. The delegate determined that the complainant was an employee and not, as was (and continues to be) asserted by the appellant, an independent contractor. There is no dispute about the complainant's job – he drove a taxi for a living. The key question is whether he was operating his own taxi business, or was employed by the appellant for purposes of its business. In this latter regard, the appellant maintains that it does not, in fact, operate a taxi service; rather, it simply offers "dispatch and administrative services" to the taxi drivers on its roster.

Employee or Independent Contractor? – The Legal Framework

39. The following *ESA* definitions are relevant for purposes of determining the complainant's status:

> "employee" includes
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
> (c) a person being trained by an employer for the employer's business,
> (d) a person on leave from an employer, and
> (e) a person who has a right of recall;
>
> "employer" includes a person
> (a) who has or had control or direction of an employee, or
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "wages" includes
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
> (d) money required to be paid in accordance with
> (i) a determination, other than costs required to be paid under section 79 (1 (f), or
> (ii) a settlement agreement or an order of the tribunal, and
> (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include… [exceptions (f) to (j) are not relevant]

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

40. The combined effect of the above definitions is to create a somewhat more expansive view of what constitutes an employment relationship compared to the common law (see, for example, *CWC Immigration Solutions Inc.*, 2020 BCEST 74).

41. Apart from the above statutory definitions, the *Employment Standards Regulation* defines a "taxi driver" as meaning "a person *employed* to drive a taxi" (my *italics*). Section 37.1 of this regulation sets out specific entitlements, as well as certain *ESA* exemptions, for taxi drivers. It should be noted that a taxi driver must be *employed* as such (simply driving a taxi is not sufficient), and that while the definition of "taxi driver" is exhaustive, the *ESA* definitions of "employee" and "employer" are inclusive.

42. Section 8 of the British Columbia *Interpretation Act* states: "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." The Supreme Court of Canada has directed decision-makers in employment standards cases to interpret the statutory scheme "in a broad and generous manner [and that] any doubt arising from difficulties of language should be resolved in favour of the claimant" (see *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 36). Similarly, in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, the Supreme Court of Canada stressed that an interpretation of employment standards legislation "which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not" (page 1003).

43. *In Machtinger*, *supra*, the court also noted (at page 1003) "the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance". This is yet another reason why, in worker status cases (i.e., employee or independent contractor?), whether the worker has been described as an independent contractor in a services agreement (especially, where that agreement is a contract of adhesion), or has filed income tax returns as an independent contractor, are not particularly relevant considerations (see, for example, *Castlegar (1988) Ltd. v. British Columbia (Director of Employment Standards)*, 1991 CanLII 8187 and *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147).

The Parties' Relationship – The Delegate's Findings

44. During the course of the delegate's investigation, the appellant maintained that the complainant was not an employee but, rather, operated his own taxi business. The delegate rejected this position, finding that the appellant was operating a taxi business in which the complainant was employed as a taxi driver. In making that determination, the delegate relied on several considerations, discussed below, that have been identified in both the common law and in Tribunal decisions.

45. Direction and Control – The delegate, while accepting that many of the "control" elements exercised by the appellant over the complainant were related to legislative requirements (for example, the *Passenger Transportation Act*), as well as other requirements imposed by third parties (such as the Passenger

Transportation Board ("PTB") and Insurance Corporation of British Columbia), the appellant nonetheless exercised independent and unique control over the complainant in other areas such as discipline and discharge; the complainant "did not have the option to use the [taxi] Vehicle for other related employment" (page R49); "[the appellant] exercised control over [the complainant's] work by means of an elaborate system of written and unwritten rules and disciplinary responses, which could penalize the Complainant for failing to meet the requirements under the PTB Licence and [the appellant's] standards" (page R49); "[the appellant's] V & P System ["violation and penalty system" – see pages R20 and R37 for further details] functioned as a significant measure of control over the Complainant" (page R50); and "[the appellant] had full control over the dispatch system and direction over some of the trips that the Complainant received [and he] worked under the direction and control of [the appellant] because [it] reserved the authority to discipline the Complainant and impact the Complainant's work through the dispatch system" (page R51).

46. Discipline – The appellant reserved to itself considerable disciplinary authority over the complainant. For example, if the complainant accepted a fare from someone who "flagged" him on the street without first obtaining permission from the appellant, he would be suspended for 4 hours. Other penalties and sanctions, as set out in the appellant's "violation list" (see delegate's reasons, page R37) included: i) refusing a business account trip offered to him (4-hour suspension; banned from account trips for 2 weeks); ii) failing to submit trip sheets (1-day suspension; charges withheld until sheet submitted); iii) failing to work as per shift schedule (1-day suspension); iv) turning meter off when trip offered (4-hour suspension; banned from business account trips for 2 weeks); and v) non-emergency call to dispatch office (4-hour suspension). The delegate concluded (at page R50): "[The appellant] took it upon itself to implement a broader range of violations and penalties that supplemented the requirements [of legislative and other regulatory rules] rather than reflected them [and] accordingly, I find that [the appellant's] decision to implement a set of rules, policies, and a broader disciplinary system, and [the appellant] having control over the implementation and modification of the same with no involvement from drivers, is more reflective of an employer relationship than an independent contractor arrangement."

47. Ownership of tools and equipment – The delegate held that the "most essential tool" was the PTB Licence and carrier plate (page R25). Although the complainant (and another driver) purchased the vehicle that they drove (the complainant during the night shift; the other driver during the day shift), they were required to transfer title of the vehicle to the appellant "for insurance purposes" (page R4). The two drivers were equally responsible for all of the vehicle's maintenance and repair costs. Further, "[the appellant] required the Complainant to paint the Vehicle with [the appellant's] colours and affix [the appellant's] logo and number on the Vehicle" and this, in turn, constituted "free marketing at the expense of the Complainant, and any reasonable person looking at the Vehicle would assume the Vehicle belonged to [the appellant]" (page R52). The complainant's uncontested evidence was that after he stopped driving for the appellant, the latter "continued to operate the vehicle as if the Vehicle belonged to them [and] found a replacement driver to continue having the Vehicle operated for the day shift. During this time, and prior to the Vehicle being involved in a motor vehicle accident, [the appellant] did not compensate the Complainant for the Vehicle being used by [the appellant] and the replacement driver that they hired" (delegate's reasons, page R26). The delegate also noted, at page R52, the following with respect to the vehicle:

> …the Vehicle had one primary purpose, which was to be used as a tool to service customers who requested taxi services through the dispatch system or because of [the appellant's] marketing. In

> fact, [the appellant] continued to use the Vehicle for this purpose after the Complainant left his employment. For these reasons, I find that, despite the Vehicle being brought into the relationship by the Complainant, [appellant] had greater ownership of the Vehicle as a tool through its control.

48. The appellant owned and controlled access to a computerized dispatch system that operates as follows: "[The appellant] employs a computerized dispatching system which is designed to process smartphone app requests and telephone calls received from customers requiring a taxi, and to send taxi drivers to those customers to fulfil their requests" (delegate's reasons, page R19). The delegate noted (at page R53) "that [the appellant] alone made the business decision to modernize its taxi company and implement technology which became integral to its taxi service, is wholly owned by [the appellant], and which is used as a means of exercising control over drivers [and] for these reasons, I also find that [the appellant's] control over and providing of the aforesaid instrumentalities lends itself toward the direction of an employer and employee relationship."

49. The appellant also provided the following other tools used in the taxi business: a "TD credit/debit machine, radio, meter, toplight, internet/modem, and the dispatch system software installed on the computer tablet" (delegate's reasons, page R52). Although the complainant and his co-driver jointly owned a tablet that allowed them to connect to the appellant's dispatch system, "[after] the Complainant had installed [the appellant's] software onto the computer tablet, it was no longer the Complainant's computer tablet because it became controlled by [the appellant] and used exclusively for [the appellant's] behalf" delegate's reasons, pages R26-R27).

50. Opportunity to profit and economic dependence – The delegate's findings regarding these factors were as follows (at pages R49 and R54-R55):

> …much of the Complainant's income derived from [the appellant] providing its instrumentalities, including the dispatch service, and the Complainant did not have the option to use the Vehicle for other related employment. As such, [the appellant's] relationship with the Complainant is not comparable to an independent contractor who has multiple streams of income from different contracting companies and the freedom to take his/her services to other companies. In this regard, the relationship between [the appellant] and the Complainant was more akin to an employer and employee relationship, given the Complainant's economic dependence on [the appellant]…
>
> According to the Complainant he received most of his work through [the appellant's] dispatch system…[and the appellant] did not dispute this information other than submitting that the Complainant received 10-20% of his fares in cash payments and that the Complainant had the option to pursue self-sourced trips when he was available and not performing dispatched trips…
>
> Although the cash portion of the Complainant's fares did not flow directly to [the appellant], that situation is quite normal in the context of the taxi industry, and I find that it is of no real significance, given the cash payments made up a nominal portion of the Complainant's earnings.

51. Right to delegate work – The delegate held that the appellant "exercised some authority over sourcing replacement drivers [and] that this also limited the Complainant's opportunity for profit" (page R56).

52. The fundamental nature of the appellant's business – The appellant argued before the delegate that it was "not a taxi company, but only a provider of dispatch service" (page R49). The delegate rejected that position, holding that the appellant could not meet its licensing requirements without having drivers, such as the complainant, "perform taxi services under [the appellant's] banner" (page R56). Further, the complainant had no control over the revenues he generated as a driver since, when he "received payment directly from customers after performing a trip…[the appellant] required the Complainant to transfer the payments to [the appellant] who in turn had full control over the dispatch and lease fees and deducted the same before paying the Complainant" (page R56).

Employee versus Independent Contractor – The Appellant's and Complainant's Positions

53. The appellant relies on two Tribunal decisions and one Supreme Court of Canada decision to support its position that the complainant was an independent contractor: *Beach Place Ventures Ltd.*, 2019 BCEST 23, *Bahia* 2012 CanLII 150977 ("*Bahia*"), and *Yellow Cab Ltd. v. Board of Industrial Relations et al*., [1980] 2 S.C.R. 761 ("*Yellow Cab*"). The appellant asserts that "given the commonalities between these cases and the present matter, the characterization of the relationship between the [appellant] and the [complainant] as employer/employee is a misapplication of an applicable principle of law."

54. The appellant says that it exercised little control over the complainant; that the complainant controlled his hours of work; was responsible for maintaining and and repairing the vehicle he drove; had the authority to subcontract the vehicle to other drivers (and to set compensation rates for subcontracted drivers); and reported his income to the Canada Revenue Agency as an independent contractor.

55. The appellant also asserts that many of the factors the delegate weighed in determining that the complainant was an employee were attributable to licensing requirements, or otherwise required by its regulator, the PTB.

56. The complainant says many of the appellant's arguments simply constitute an effort to overturn findings of fact, and that the delegate correctly determined his status "based on the evidence and facts before him".

57. The complainant also notes that the appellant's reliance on *Beach Place Ventures*, *supra*, is entirely misplaced since the Tribunal actually found – contrary to the appellant's assertion – that the driver in question was an employee and not an independent contractor.

EMPLOYEE OR INDEPENDENT CONTRACTOR? – FINDINGS AND ANALYSIS

58. Since there is a dispute between the appellant and the complainant regarding the actual finding in the B.C. Court of Appeal's decision in *Beach Place Ventures*, I shall first turn to that decision, as well as the Tribunal and British Columbia Supreme Court decisions that preceded it.

The Beach Place Ventures Decisions

59. On July 28, 2021, two days after this appeal was filed, the B.C. Supreme Court issued its decision in a judicial review of the Tribunal's reconsideration decision in *Beach Place Ventures* (2021 BCSC 1463). On April 22, 2022, the B.C. Court of Appeal issued its reasons in the subsequent appeal of this latter decision

(2022 BCCA 147). Accordingly, I directed the parties to file further submissions with respect to the Court of Appeal's decision.

60. Although the appellant referred to the Tribunal's appeal decision in *Beach Place Ventures* (2019 BCEST 223) in its submission, it appears that it intended to cite the Tax Court of Canada's decision, *Beach Place Ventures Ltd. v. The Queen*, 2019 TCC 24. I will address the Tax Court of Canada's decision after first dealing with the Tribunal's decisions in *Beach Place Ventures* and the ensuing judicial review proceedings.

61. In 2019 BCEST 23 (the Tribunal's appeal decision), the Tribunal upheld a determination that three taxi drivers were employees of Beach Place Ventures Ltd. and Black Top Cabs Ltd. The latter firm held the relevant licenses and insurance while the former provided logistical and operational support. At paras. 95-96, the Tribunal observed:

> …The Appellants are correct that in *Bahia*, the Tribunal Member concluded on the facts of that case that there was not an employment relationship, whereas on the facts of the other case, *C and C Taxi Inc.*, the Tribunal Member concluded that an employment relationship did exist. However, the Tribunal's jurisprudence is consistent in that the same legal approach is taken to the issue, with the facts determining the differing outcomes.
>
> …while the outcome of Tribunal decisions vary depending on the facts, the Determination is far from the first decision the Tribunal has upheld on appeal to conclude that persons who lease the taxis they operate are employees under the *ESA*: see, for example, *Victoria Taxi (1987) Ltd.*, BC EST # D601/97; *Sunshine Cabs Ltd.*, BC EST # D012/04; and *Trendtham Group Enterprises Inc. carrying on business as Star Taxi*, BC EST # D032/08. The conclusion reached in the Determination with respect to the three Complainants is therefore not novel or particularly surprising in the context of determinations made under the *ESA*.

62. At para. 104, the Tribunal also cautioned:

> …The Complainants are distinguishable from other Black Top taxi drivers in that they are not taxi vehicle Owners and therefore shareholders of the Appellants. Rather, they are Spare or Lease Drivers. As such, their circumstances are clearly different from any other Black Top drivers who are Owners/shareholders. A finding that the Complainants are employees of the Appellants therefore does not necessarily equate to a finding that all Black Top taxi drivers are employees of the Appellants…

63. The employers' application for reconsideration was dismissed by a 3-person panel (2019 BCEST 61). The B.C. Supreme Court dismissed the employers' application for judicial review (2021 BCSC 1463), and the B.C. Court of Appeal dismissed the employers' further appeal of the judicial review decision (2022 BCCA 147).

64. There are several similarities between the positions advanced by the appellant in this appeal and that advanced by the employers in the *Beach Place Ventures* proceedings. The employers in the latter case, as does the appellant here, endeavoured to characterize the drivers as operating a taxi business, whereas the employers merely provided dispatch and other accounting services. The B.C. Supreme Court described the employers' business structure in *Beach Place Ventures* as follows (2021 BCSC 1463 at paras. 7-8):

> The shareholders of Black Top own and operate the taxis. Black Top holds the taxi licences on behalf of its shareholders. Black Top is also the sole shareholder of Beach Place, which provides administrative, accounting, and dispatch services to taxis owned by the shareholders of Black Top.
>
> The taxi owners have the option of leasing their taxis to another taxi driver, who is referred to as a "Lease Driver". A taxi driver who is not a taxi owner or Lease Driver can acquire a license to drive a taxi by paying a fee to the owner in exchange for the right to operate the taxi for a period of time. Those drivers are called "Spare Drivers". Lease Drivers and Spare Drivers are entitled to keep the fares earned while operating the taxi during the lease or license period, less the rent or license fee payable for that period.

65. Other similarities between *Beach Place Ventures* and the present appeal include: i) the delegate's finding that the putative employers used the dispatch system as a mechanism to direct, control and discipline the taxi drivers; ii) the drivers, at least at some point in time, filed income tax returns as self-employed contractors; iii) the drivers were required to use designated credit/debit card hardware and software; iv) the putative employers exercised control regarding replacement drivers; v) the taxi vehicles were registered in the names of the putative employers; vi) the vehicles were insured in the names of the putative employers; vii) the drivers were economically dependent on the putative employers; and viii) the putative employers unsuccessfully argued that the Tribunal should follow Tax Court decisions holding the drivers to be independent contractors.

66. In *Beach Place Ventures Ltd. v. The Queen*, *supra*, the Tax Court of Canada held that a taxi driver was an independent contractor. The delegate in this appeal was apprised of this decision, but did not follow it. Similarly, the Tribunal appeal panel in *Beach Place Ventures* refused to follow the Tax Court of Canada's decision, a determination that was consistently sustained on reconsideration and judicial review.

67. In a later decision, *Royal City Taxi Ltd. v. M.N.R.*, 2019 TCC 105, the Tax Court of Canada declined to follow the *Beach Place Ventures* decision, holding that the "lease-driver" in question was an employee for purposes of the federal pension plan and employment insurance regimes. In *Royal City Taxi*, Justice Hogan made two observations that are particularly apposite to this appeal – firstly, "Taxi companies do not appear to be operating under traditional employment structures but yet continue to maintain a large level of control over drivers" (para. 80); and secondly, "the most valuable assets in the taxi industry are the actual licences to operate taxicabs, which are owned by the Appellant [and] given the structure and governmental regulations of the taxi industry, licences are central to the business operations and without licence, the taxicab market is impenetrable" (para. 63).

Taxi Drivers – Other Decisions

68. Returning to this appeal, the complainant, as is noted in the delegate's reasons (at page R5), sought a ruling from the Canada Revenue Agency ("CRA") regarding his status. The CRA ruled that he was self-employed during 2019. However, the delegate did not consider himself bound by the CRA's determination (delegate's reasons, page R56).

69. The appellant also relies on the Supreme Court of Canada's decision in *Yellow Cab* and the Tribunal's 2012 decision in *Bahia*, where taxi drivers were held to be independent contractors. The appellant says that these decisions are factually similar to the present appeal and, as such, direct the Tribunal to a similar

result. In particular, the appellant asserts it "lacked the necessary control over the [complainant] to establish an employment relationship".

70. I do not find either *Yellow Cab* or *Bahia* to be particularly relevant to this appeal. *Yellow Cab* was a judicial review of a labour board decision regarding whether taxi drivers in Alberta were employees under that province's collective bargaining statute. The decision turned on an "exhaustive" – rather than, as is the case with the *ESA*, a broad and inclusive – definition of "employee", and a further finding that the putative employer did not pay any "wages" to the taxi drivers. The *ESA* is a markedly different statutory scheme than the one at issue in *Yellow Cab*.

71. As for *Bahia*, although the Tribunal upheld a determination that a taxi driver was an independent contractor, this decision was grounded on evidence showing that the putative employer exercised considerably less control over the taxi driver than is the case here. For example, the taxi company did not have any controls in place regarding, for example, accepting "flags", or "over where he drove the cab or picked up fares", and it did not exercise any disciplinary authority over the drivers (para. 40).

72. There are several Tribunal decisions holding that taxi drivers *are* employees – for example, *Victoria Taxi (1987) Ltd.*, BC EST # D601/97; *Fitzpatrick and Ledger*, BC EST # D061/99, reconsideration refused: *Ledger*, BC EST # D229/99; *House (Harbour City Taxi)*, BC EST # D194/01; *Sunshine Cabs Limited*, BC EST # D012/04; *Salmon Arm Taxi (1978) Ltd.*, BC EST # D122/06; *Trendtham Group Enterprises Inc. (Star Taxi)*, BC EST # D032/08; *C and C Taxi Inc. (Mayfair Taxi)*, BC EST # D074/15; *Cheam Taxi Ltd.*, BC EST # D103/17; *Rajendar Singh Parmar and Emerald Taxi Ltd*., 2021 BCEST 24, reconsideration refused: 2021 BCEST 47; and *Surdell Kennedy Taxi Ltd.* , 2021 BCEST 81. For the most part, these decisions turn on the twin findings, which equally apply here, that the taxi company exercised considerable control over the taxi driver, coupled with a determination that, essentially, the taxi company was operating a business in which the driver was an integral part.

73. In addition, the Tribunal has held that other drivers, working under arrangements not markedly dissimilar from the complainant's work situation, were employees under the *ESA* – see, for example, *Flash Courier Services Inc.*, BC EST # D094/00; *Freshslice Operating Ltd.*, BC EST # D286/02; *King*, BC EST # D037/05; *Barca Enterprises Ltd*., BC EST # D051/15; *Big Daddy's Capital Inc.*, BC EST # D061/16; *Burne (Agent 99 Express Services)*, BC EST # RD079/16; *Oliveira*, 2019 BCEST 14.

Did the delegate err in finding that the complainant was an employee?

74. As Lord Wright observed in *Montreal v. Montreal Locomotive Works Ltd*, [1947] 1 D.L.R. 161 at 169 (UK JCPC), the crucial question in many "employee versus contractor" cases is "whose business is it". The Tribunal has frequently posed this question in determining whether an individual is an employee or an independent contractor (see, for example*, Boss Management Inc.*, 2018 BCEST 49; *Golden Feet Reflexology Ltd*., 2018 BCEST 22; and *Chahal (Zip Cartage)*, BC EST # D109/14, reconsideration refused: BC EST # RD005/15).

75. The appellant says that the complainant was operating an independent taxi business "on his own account". In my view, it is abundantly clear that the appellant was operating a taxi business, not merely a dispatch service, and that the complainant was employed in, and economically dependent on, that

business as a taxi driver. I note that in its business plan, found at page 166 of the section 112(5) record, the appellant described itself as "a successful provider of taxi services".

76. One of, if not *the*, most valuable asset in a taxi business is the operating licence (see *Royal City Taxi*, *supra*), and this is held by the appellant. Although the complainant contributed to the purchase of a key operating asset, namely, the taxi vehicle, this vehicle was registered in the name of the appellant, decked out in the livery of the appellant, and the complainant was not permitted to make personal use of the vehicle. Although this latter restriction may have been a condition of the appellant's operating licence, it is important to stress that the *appellant*, not the complainant, required this licence in order to operate its taxi business. Although the complainant personally paid to acquire a half-interest in each of the taxis he operated while working for the appellant (delegate's reasons, pages R16-17), given that the registration of the vehicle was in the name of the appellant (i.e., the appellant had "legal" title; the complainant had "beneficial" title), combined with the significant control exercised by the appellant over the vehicle's use, the complainant's "ownership" of the taxi was far from absolute. He certainly did not have the freedom to use the vehicle as he saw fit – unlike the typical vehicle owner.

77. The appellant directed the complainant with respect to the cleanliness and condition of the vehicle. The appellant owned or controlled – and directed the complainant to use – a designated credit/debit card device. Revenues generated through credit card or debit payments (the payment system used by 80%-95% of customers) were remitted directly to the appellant and then, after certain adjustments and deductions were applied, paid to the complainant. The complainant was not permitted to refuse a customer's credit/debit card tender in favour of cash.

78. The appellant's customers generally booked their trips directly with the appellant, typically through a smartphone software application, through its website, or by telephone – the appellant owned and controlled the app, the website, and the business telephone number. The complainant did not, so far as I can determine, have a business telephone number or a website for customers to access. There is no evidence before me that the complainant ever drove his taxi for any firm other than the appellant's taxi company. The taxi business's customers were the appellant's customers, not the complainant's. If a customer had a service complaint, the evidence shows that it was lodged with the appellant who, in turn, addressed it directly with the complainant.

79. As detailed in the delegate's reasons, the appellant's dispatch system, which was the source of most customer fare requests (80% to 95% according to the evidence before the delegate), was also used to extensively monitor, control, and discipline its taxi drivers' activities. The appellant's own records suggest that it considered the complainant to be an employee – at page 778 of the section 112(5) record there is a letter from the appellant to the local police department referring to the complainant as an individual who "has applied for employment with our company" and who is being "considered for employment".

80. With respect to the relevant *ESA* definitions, in my view, the appellant had "control or direction" over the appellant and, in turn, the appellant was an employee as he was receiving wages (his share of the fares generated) from the appellant for the work he undertook on its behalf as a taxi driver. A taxi company cannot operate without taxi drivers and, in the context of that type of business, the complainant simply undertook work that would normally be undertaken by an employee.

81. I am satisfied that the delegate did not make an error of law when he determined that the complainant and the appellant were in an employment relationship. The determination of whether an individual is an employee is a matter of mixed fact and law (*Beach Place Ventures Ltd.*, 2022 BCCA 147). In my view, the delegate properly directed himself to the appropriate governing legal principles, and also properly weighed the evidence before him in determining that there was an employment relationship between the parties.

THE COMPLAINANT'S *ESA* ENTITLEMENTS

82. The appellant says that even if the complainant were an employee rather than an independent contractor during the relevant time frame, the delegate erred in calculating his *ESA* entitlements. The delegate awarded the complainant nearly $50,000, of which approximately $39,600 was for reimbursement of unlawful business expenses deducted from the complainant's wages (see section 21).

83. Section 21 of the *ESA* provides as follows:

> 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

The delegate's findings

84. The delegate, in calculating the complainant's *ESA* entitlements, did not apply section 37.1(1) of the *Employment Standards Regulation* because the appellant did not lease a vehicle to the complainant (delegate's reasons, page R58). However, the delegate did apply subsections 37.1(3) and (4) which state:

> 37.1 (3) An employer who requires or allows a taxi driver to work more than 120 hours within 2 consecutive weeks must pay the employee for the hours in excess of 120 at least 1 1/2 times the regular wage.
>
> (4) An employer must pay a taxi driver any shortfall that arises if
>
> (a) the taxi driver does not recover in fares an amount which, in total, is greater than or equal to the minimum wage for each hour worked, averaged monthly,
>
> (b) the taxi is not leased by the employer to the taxi driver, and
>
> (c) the taxi driver tracks hours under the employment arrangement on a daily basis.

85. The delegate held that the appellant unlawfully charged the complainant $50 for a "PTB decal" and $5,600 for the vehicle's "PTB plate lease". The delegate awarded the complainant $11,334.15 as recovery for vehicle fleet insurance payments charged to the complainant; $15,236.53 on account of "dispatch fees" charged to the complainant; and $912.41 on account of credit/debit card machine rental costs charged to

the complainant. The delegate allowed recovery of $4,078.77 on account of fuel charges paid by the complainant while working for the appellant as a taxi driver during 2019. The delegate also allowed recovery of $2,393.42 for vehicle repair and maintenance costs. These amounts total $39,605.28.

86. The delegate awarded the complainant $180.20 on account of wages not paid for October and November 2019.

87. The delegate made the following findings regarding the complainant's statutory holiday pay entitlements (at page R61):

> …I provided [the appellant] with a detailed calculation of the Complainant's statutory holiday entitlement. Because [the appellant] failed to provide evidence that the Complainant received any statutory holiday pay and refute my calculations, I find that the Complainant is entitled to $1,024.18 in statutory holiday pay. In addition, the records show that the Complainant worked several statutory holidays. For the same reasons, I find that the Complainant is entitled to statutory holiday premium pay for each statutory holiday he worked in the amount of $479.07.

88. The delegate awarded the complainant $860.25 under section 37.4(3) of the *Employment Standards Regulation* (at pages R61-R62):

> The Complainant's calculation of work hours and 2019 trip logs show that the Complainant worked more than 120 hours on four different two consecutive week periods. [The appellant] did not dispute the Complainant's calculation of the hours or provide evidence that [the appellant] paid the Complainant as per the Regulation. The Complainant did not have a regular wage. As such, I divided the Complainant earnings within the two-week consecutive periods by the hours the Complainant worked to determine the hourly wage for each period. I used the hourly wage for each period to determine the time and a half entitlement and deducted the same from the actual earnings to calculate the Complainant's outstanding wages under subsection 37.1(3). I find that the Complainant is owed $860.25 in total under subsection 37.1(3) of the Regulation.

89. Finally, the delegate awarded the complainant a total of $3,690.54 for vacation pay.

Findings and Analysis – The Complainant's ESA entitlements

90. With respect to the section 21 award, totalling $39,605.28, I am satisfied that each and every separate item included in this award constituted a cost of doing business. The appellant has not provided any cogent argument as to why these various items did not reflect the costs of operating a taxi business. Section 21(1) states that employers are not permitted make any deductions from an employee's wages, except as permitted by either provincial or federal legislation. Section 21(2) is crystal clear – an employer is not entitled to foist business costs onto an employee unless permitted by regulation (and no such regulatory authorization applies here). Section 21(3) is equally clear – business costs unlawfully paid by an employee are deemed to be wages recoverable in accordance with the *ESA*'s wage recovery provisions.

91. However, in this case, there are some confounding factors. While I accept that the items in question are "business costs" within section 21(2), it is not entirely clear that the complainant was "required to pay" for these costs, or that these costs were deducted from his "wages".

92. The complainant's wage recovery period was from February 16, 2018 to November 4, 2019 (delegate's reasons, page R9). As noted in the delegate's reasons (page R4), "between February 16, 2018 and October 5, 2019, the Complainant did not fail to recover in fares an amount that in total was greater than or equal to the minimum wage". "However, the parties disagree about overtime pay under section 37.1(3) of the Regulation for the entire recovery period and regular wages being owed between October 6, 2019 and November 4, 2019" (delegate's reasons, page R4).

93. There was no evidence before the delegate that the parties ever negotiated a specific wage rate (either salary or hourly) for the complainant's work. On the other hand, the delegate did not base the complainant's unpaid wage entitlements on the minimum wage. As noted by the delegate at page R2 of his reasons, the complainant's wage payments reflected an "adjusted" amount based on the credit/debit card fees he generated as taxi driver (at page R2):

> The Complainant did not have a set wage rate. Instead, [the appellant] deducted service and dispatch fees from the Complainant's earnings, which included equipment lease, dispatch, Passenger Transportation Board (PTB) plate rental, fleet plan insurance, and credit card transaction fees. The Complainant's earnings depended on several factors, including the number of trips he took, the type of trip he took or received from [the appellant] (i.e. flag, dispatch, or business account), and the length of each trip. [The appellant] required the Complainant to report all earnings except for cash payments.

94. The delegate treated all of the credit/debit card payments generated by the appellant as a taxi driver as constituting his "earnings". However, in my view, the delegate did not undertake a transparent, intelligible, and reasoned analysis of the evidence in finding that the complainant's monthly gross receipts constituted his monthly earned wages.

95. The appellant has been fixed with a significant liability as a result of its misclassification of the complainant, and the appellant says that this result reflects an "absurd interpretation" of the *ESA* since "the [appellant] was providing dispatch and administrative services for free while the Complainant earned all revenue generated by the vehicle through taxi fares and services". The appellant further submits:

> The Third Delegate provided no analysis in the Determination of the definition of wages under the *ESA* or reasoning as to why he concluded that the gross taxi fares generated by the Claimant's vehicle for credit card, debit, and contractor accounts were the appropriate calculation of the Claimant's wages under the *ESA* and why the gross revenue, less the cash taxi fares which the Claimant kept and did not track or report, was the appropriate measure of his wages. There was no evidence before the Third Delegate that the gross taxi fares generated by the taxi vehicle from the above sources was the correct measure of the Claimant's wages after finding that the Claimant was an employee under the ESA…Both parties…knew that the monthly [earnings] statements simply showed the taxi fares processed through the vehicle's debit and credit card machine and on contractor accounts, minus the Monthly Expenses…
>
> The Third Delegate failed to consider whether or not the gross taxi fares were "paid or payable by an employer to an employee for work" and whether or not the gross taxi fares were the appropriate measure for determining the Claimant's wages and providing no analysis as to why 100% of the fares collected from the Respondent's customers should be paid to the Claimant as wages.

96. In my view, the difficulty of determining the complainant's unpaid wage entitlements under the *ESA* stems from two, possibly related, circumstances. First, the appellant misclassified the complainant as an independent contractor despite his true status as an employee; second, the appellant paid the complainant monthly (rather than at least semimonthly – see section 17), using a formula that did not unequivocally comply with the wage payment requirements of the *ESA*.

97. The appellant issued monthly payment statements to the complainant which, as the delegate noted (page R62), did not comply with section 27 of the *ESA*. By way of example, the complainant's April 2019 statement (at page 196 of the record) shows that the complainant generated non-cash revenues of $3,095.28 for the month. This statement also shows a $1,086.50 deduction for "dispatch" and a $610 deduction for "insurance", leaving a balance payable of $1,398.78. This latter sum was actually paid to the complainant. For purposes of calculating the complainant's unpaid wage entitlements, the delegate treated the entire $3,095.28 gross revenue amount as earned "wages", and the "dispatch" and "insurance" deductions as unlawful section 21 wage deductions for business costs.

98. The delegate submits that he correctly calculated the complainant's entitlements and that "neither the Delegate nor the Tribunal can self-select which sections of the Act apply and do not apply to the [complainant] to ease the Appellant's costly liability of mistakenly organizing its business operations in contravention of the Act." The delegate further submits that he "calculated the outstanding wages based on the best available evidence" and "although the Appellant may have mistakenly believed it was in an independent contractor relationship with the [the complainant] and entered a payment arrangement that is more than the minimum standard and not reflective of a traditional employee-employer relationship, neither the Delegate nor the Tribunal can apply an arbitrary set wage rate that is more beneficial to the Appellant."

99. The complainant advanced a similar argument in support of the delegate's section 21 award:

> …in regard to the claim that the Determination results in an absurd outcome for the Appellant as it creates no economic benefit for the Appellant. I would like to submit that this lack of economic benefit is a result of the Appellant's own choice in business practices that contravened the ESA. The business was the Appellant's and they chose to run it in a way that left them open to the risk of regulatory action, it was their prerogative to impose their own business' expenses onto drivers while also taking "lease" separately at the same time. The Appellant could have operated their business in a way that did not contravene the ESA and did not dump their own operation expenses onto the drivers but they chose not to. As such I agree with the findings of the Delegate in regards to the expenses being business expenses and reimbursable and do not find this to be an absurd result of the findings.

100. The delegate held that that the parties never agreed on a "set wage rate" for the complainant's work (page R2). The evidence before the delegate was that the complainant was paid under a formula that was based on the gross revenues he generated during his shifts (excluding cash payments, which, apparently, the complainant was not obliged to report to the appellant, and was entitled to retain in full). On a monthly basis, the complainant was paid a sum that represented his gross non-cash revenues less amounts that were attributed to items such as "dispatch", "insurance" and credit/debit card machine fees. The complainant personally paid for vehicle fuel, maintenance, and repair expenses. The delegate's reasons indicate that the complainant personally paid $50 for a "PTB decal" and $5,600 on account of a $400 monthly "plate lease fee". This latter $400 monthly payment was paid directly to the appellant, in

cash, from February 2018 to March 2019 (delegate's reasons, page R57), and thereafter was embedded within the "dispatch fee" recorded on the monthly statements "for the ease of keeping better track of finances" (delegate's reasons, page R46).

101. The delegate treated the gross revenues (except for cash transactions) generated by the complainant as constituting the complainant's "wages" as defined in section 1(1) the *ESA*. The complainant was not paid a monthly salary or an hourly wage; rather, his wages were contingent and more or less took the form of a commission that was calculated, on a monthly basis, based on gross revenues less certain business expenses. In my view, the complainant's compensation arrangement was conceptually similar to a commissioned salesperson whose commissions are calculated on a "net profit" basis (see, for example, *Halston Homes Limited*, BC EST # D527/00, and *Steve Marshall Ford Ltd.*, BC EST # D382/99).

102. As the Tribunal noted in *Director of Employment Standards and Kocis*, BC EST # D331/98, the *ESA* does not define when a commission is earned, and parties are free to agree to any form of commission arrangement provided it is not prohibited by the *ESA* (for example, the arrangement cannot require a wage payment of less than minimum wage in a pay period, nor can it provide for only monthly wage payments). As noted above, a commission scheme can be based on a "net profit" calculation, even though a "net profit" may well (and typically does) involve deducting certain business costs from the gross sale amount in order to calculate a commissionable "net profit" on the sale (see, for example, *Hedmann*, BC EST # D249/02, and *Director of Employment Standards*, BC EST # RD348/01).

103. In my view, the delegate erred in law when he treated the monthly gross revenues generated by the complainant (and without accounting for any cash receipts) as the complainant's "wages". In accordance with the parties' wage agreement, the complainant's wages were calculated on a "net" rather than a gross basis. Although this agreement took into account certain business costs, that is quite a different matter from deducting business costs from earned wages. The former is presumptively lawful; the latter is not.

104. Even though there was no agreed wage rate, the delegate did not find that the complainant's earnings should be based on the minimum wage. The delegate treated the monthly statements provided to the complainant as evidence supporting an agreement that 100% of the complainant's debit/credit card receipts constituted his "earnings". Since these latter receipts represented the complainant's earnings, the delegate concluded that the "deductions" itemized on the monthly statements constituted unlawful section 21 wage deductions. However, as far as I can determine, there was no evidence before the delegate that the parties ever agreed that the complainant's monthly wage would be 100% of the credit/debit card receipts (plus any cash receipts) he generated as a taxi driver.

105. The only evidence before the delegate concerning the agreed wage rate was that the complainant's earned wages would be based on a net amount whereby the gross revenues would be subject to certain adjustments, and the balance would then be paid to the complainant (in addition, the complainant could retain any cash payments). In other words, the complainant's monthly wage – as agreed by the parties – was calculated on a "net" rather than a "gross" amount plus cash receipts. In my view, the delegate's approach to determining the complainant's wage rate was not grounded in the best evidence reflecting what the parties had actually negotiated. If the delegate's approach taken here was applied to, say, a commissioned salesperson, the latter's wage would be 100% of the sales revenue generated and any adjustments on account of "costs of sale" would amount to unlawful section 21 deductions. I agree with the appellant's submission that this approach leads to an absurd result such that the employee is entitled

to all of the gross revenues they generate, and the employer must absorb any and all associated costs of sale. Had there been clear evidence that this was the parties' mutual intention, then the delegate's approach could stand. But there was no such evidence in this case. The *only* evidence before the delegate regarding the complainant's wages was that he was *not* entitled, as a matter of contract, to retain 100% of the gross monthly fares he generated as a taxi driver.

106. As previously noted, in calculating the wages that the complainant actually received, the delegate does not appear to have taken into account any cash payments that the complainant received. The evidence before the delegate was that about 10-20% of all fares were paid in cash (page R39). These cash payments were not gratuities received (and thus outside the statutory definition of wages), and wages can be paid in cash (section 20(a) of the *ESA*). In my view, the delegate further erred by failing to take these cash fare payments into account for purposes of determining the complainant's actual earnings.

107. Section 21 of the *ESA* addresses two circumstances. First, section 21(1) prohibits the employer from making an unlawful *deduction* from the employee's *earned wages* (for example, it deducts a cash shortage or the cost of damaged property from the employee's paycheque – see, *Smith*, BC EST # D154/99, and *Rite Style Manufacturing Ltd.*, BC EST # D105/05). Second, section 21(2) prohibits the employer from requiring an employee to *pay* any of its *business cos*ts (except as allowed by regulation) – for example, requiring an employee to pay for office supplies (*Kariuki and Pin Services Ltd.*, 2020 BCEST 20), to personally pay for work-related travel expense (*Westmould Manufacturing and Distributing Ltd*., 2019 BCEST 8), or requiring an employee to personally pay the laundry costs for a company provided uniform (*Paladin Security Group Ltd.*, 2020 BCEST 135). Pursuant to section 21(3), monies improperly paid by an employee to an employer are deemed to be, and are recoverable as if they were, wages payable under the *ESA*.

108. There were some payments made by the complainant that run afoul of section 21(2). In particular, I am satisfied that the complainant's payment of "an additional $4,000.00 for equipment and having the Vehicle painted as per [the appellant's] specifications" (delegate's reasons, page R17) was a business cost that the complainant should not have been required to pay. However, it also appears that this payment was made outside the allowable wage recovery period. The complainant's vehicle's fuel, maintenance, and repair costs were business costs incurred during the recovery period, and thus were properly recoverable under section 21(2).

109. Insofar as the PTB decal and plate lease fees are concerned, to the extent that the complainant paid the appellant directly for these items (I understand he paid $400 per month directly to the appellant for a plate lease fee prior to April 2019), those payments constituted a portion of the appellant's business costs that were unlawfully charged to, and paid by, the complainant. According to the appellant, these monthly payments were later merged into the dispatch fee solely "for the ease of keeping better track of finances" (delegate's reasons, page R46). In light of that admission, I consider that even after these payments were no longer being paid directly by the complainant, the appellant continued to "indirectly" withhold or deduct these payments, without written consent, from the complainant's wages and, as such, they continued to be recoverable business expenses under section 21.

110. On the other hand, since the insurance costs, the dispatch fees (other than for the plate lease), and debit/credit card machine expenses were not deducted from the complainant's earned wages (and the complainant did not make any direct payments to the appellant on account of these items), in my view,

the delegate erred in treating these items as unlawful wage deductions (see page R60). These latter amounts were simply part of the formula that was used to calculate the complainant's wages, rather than being actual deductions from the complainant's earned wages.

111. The delegate calculated the complainant's statutory holiday pay, section 37.1(3) (*Employment Standards Regulation*), and his vacation pay, based on the complainant's taxi's gross receipts, rather than on his actual earned wages. That being the case, these calculations are inaccurate and must be revised.

112. Finally, I understand that in most (but perhaps not all) pay periods, the complainant was paid at least the minimum wage for all hours worked. The complainant is, of course, entitled to be paid at least the minimum wage for all hours worked in a pay period, and to the extent that did not occur, the complainant has an unpaid wage entitlement on that account.

113. Insofar as the section 98 penalties are concerned, it is clear that the appellant contravened sections 17, 18, 27, 28, 45, 46 and 58 of the *ESA* and section 37.1(3) of the *Employment Standards Regulatio*n, even if the amounts awarded on account of some of those contraventions may not be accurate. Accordingly, each of those penalties is confirmed.

SUMMARY

114. I am not satisfied that the delegate failed to observe the principles of natural justice in making the Determination. Although the two complaints were not adjudicated as as expeditiously as one would hope, that circumstance was not attributable to any particular fault on the part of the complainant, or the delegate. The appellant has not been able to identify any specific prejudice it suffered as a result of the delay involved here.

115. I am not satisfied that the delegate erred in law in determining that the complainant was an "employee" as defined in section 1(1) the *ESA*. However, I am satisfied that the delegate erred in law in finding that certain payments were deducted from the complainant's "wages". Accordingly, this matter will be referred back to the Director. Additionally, the complainant's unpaid regular wage entitlement, statutory holiday pay, excessive hours pay, and vacation pay will have to be recalculated to reflect his actual regular wage rate (including any cash fares paid directly to the complainant).

ORDERS

116. Pursuant to section 115(1)(b) of the *ESA*, the calculation of the complainant's section 16 (at least minimum wage for all hours worked), section 21 (unlawful deduction or payment of employer's business costs), section 45/46 (statutory holiday pay), section 58 (vacation pay) entitlements under the *ESA*, and the complainant's entitlement to compensation under section 37.1(3) of the *Employment Standards Regulation*, are referred back to the Director of Employment Standards to be recalculated in accordance with the directions set out in these reasons. These recalculations will also require the complainant's entitlement to section 88 interest to be re-calculated.

117. The Director shall prepare a report setting out the complainant's entitlements, as recalculated in accordance with the directions set out in these reasons. This report shall be delivered to the Tribunal

within 90 days of the date of this decision. The Tribunal will then afford the parties an opportunity to respond to the report following which a final decision will be issued in this appeal.

118. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed in all other respects.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal