Employment Standards TRIBUNAL

Citation: EF Holdings Ltd. (Re)
2022 BCEST 55

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

pursuant to section 112 of the

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

\- by -

EF Holdings Ltd. carrying on business as Electronic Futures

\- of a Determination issued by -

The Director of Employment Standards

PANEL: Jenny Ho

FILE NO.: 2022/069

DATE OF DECISION: August 26, 2022

DECISION

SUBMISSIONS

Kenneth Chemko	on behalf of EF Holdings Ltd. carrying on business as Electronic Futures
Donald Agnew	on his own behalf
Deanna Ward and Dawn Rowan	delegates of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought by EF Holdings Ltd. carrying on business as Electronic Futures (the "Employer"), pursuant to section 112 of the *Employment Standards Act* (the "*ESA"),* of a determination that was issued on January 20, 2022 (the "Determination") by Dawn Rowan, a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director").

2. This decision is based on the Determination, the written submissions on behalf of the parties, and the material on the section 112(5) record (the "Record").

BACKGROUND

3. The Employer operated a computer store from October 1994 to February 9, 2020, when the computer store closed operations.

4. Donald Agnew (the "Employee") was employed at the computer store as an Outgoing Service Technician from April 28, 2014 to February 8, 2020.

5. On February 28, 2020, the Employee filed a complaint under the *ESA* alleging that the Employer owed him compensation for length of service and annual vacation pay.

6. At issue in the complaint was whether the Employer sent an email on December 16, 2019 (the "Notice Email"), to the Employee. The Employer said the Notice Email was sent on December 16, 2019, to advise the Employee and two other employees that the computer store was closing on February 7, 2020, at the latest. The Employer also said that, in the Notice Email, it was confirmed that the employees agreed to work reduced hours while receiving their full salaries until the computer store closed and allowed the Employer to deduct the difference in hours from their vacation pay owing.

7. The Employer argued the Notice Email constituted sufficient notice of termination, and that as a result, the Employer did not owe the Employee compensation for length of service. The Employer also said no vacation pay was owed because the employees agreed the Employer could deduct it while they worked reduced hours.

8. The Employee denied receiving the Notice Email or allowing the Employer to deduct vacation pay.

Complaint Investigation

9. Deanna Ward, a delegate of the Director (the "Investigative Delegate"), investigated the complaint. Between July 19, 2021 and October 26, 2021, the Investigative Delegate conducted phone interviews and exchanged emails with parties and witnesses. She also sent demands for production of records to the Employer, the Employer's accounting firm and the Employer's webhosting firm. As part of the Employer's submissions to the Investigative Delegate, Kenneth Chemko ("Mr. Chemko"), the Employer's representative throughout these proceedings, provided a copy of what he said was the Notice Email. The Investigative Delegate advised Mr. Chemko that there were indications the Notice Email was fabricated. She asked the Employer for more information to verify the Employer had sent the Notice Email to the Employee. On August 16, 2021 and September 3, 2021, the Employer responded with more information, including screenshots of the Notice Email and information about the server the Employer used to send company emails (Record, pp. 81, 83-85).

10. On October 26, 2021, the Investigative Delegate prepared an investigation report (the "Report"), in which she summarized the information she received from parties and witnesses. She sent the Report to the parties on November 2, 2021 and requested the parties provide their responses to the Report by November 9, 2021. The Investigative Delegate extended this deadline for the Employer, first to November 16, 2021 and then November 22, 2021. Before the Determination was issued, the Employer and Investigative Delegate exchanged emails and voicemail messages about voluntarily resolving the complaint.

The Determination

11. On January 20, 2022, the Adjudicative Delegate issued the Determination.

12. In the Determination, the Adjudicative Delegate found the Employee had not provided written authorization to deduct annual vacation pay and thus found the Employer owed vacation pay. The Adjudicative Delegate also found, on a balance of probabilities, that the Employer had not sent the Notice Email to the Employee on December 16, 2019. As a result, the Adjudicative Delegate found the Employer had not provided the Employee with written notice of termination, and owed compensation to the Employee for length of service. In addition, the Adjudicative Delegate found the Employer had not produced payroll records to the Director as required in response to the Director's Demand for Records.

13. The Determination concluded that the Employer had contravened sections 21, 63 of the *ESA,* and section 46 of the *Employment Standards Regulation* (the "*Regulation"*) in respect of the employment of the Employee and ordered the Employer to pay the Employee wages and interest in the amount of $5,099.00 and to pay administrative penalties in the amount of $1,500.00. The total payable in the Determination is $6,599.00.

14. On February 14, 2022, the Tribunal received the appeal from the Employer appealing the Determination. The Employer also requested an extension to submit additional materials under section 109(1)(b) of the *ESA.*

ISSUES

15. The issues to be decided in this appeal are:

    i. Should the Employer be granted an extension to submit additional materials?

    ii. Should the "new evidence" be permitted?

    iii. Did the Director err in law?

    iv. Did the Director fail to observe principles of natural justice in making the Determination?

ARGUMENTS

Employer's Submissions

16. The Employer checks off all three grounds of appeal on the appeal form; however, does not specify which allegations support each ground of appeal.

17. The Employer's submissions can be summarized as follows:

    i. The Employer appeals the Adjudicative Delegate's finding that it breached Section 46 of the *Regulation* by not producing payroll records and says its accounting firm did produce the records (Appeal Submissions of March 14th, paras. 21, 30, and 45).

    ii. The Employer submits that it gave the Employee written notice of termination through the Notice Email. The Employer says that it initially did not have access to the Notice Email as it no longer had access to the main computer but says it later retrieved the Notice Email via webmail (ibid, para. 27, 31). The Employer argues that one computer store employee did not specifically say whether she did or did not receive the Notice Email, but only said "I did not deny receiving it just don't recall receiving it" (ibid, para. 28). The Employer says a time stamp on the screenshot of the Notice Email it provided to the Director, showing it was sent at 6:32 am on December 16, 2019, supports its argument that the Employer sent the email following a discussion with the employees that morning. The Employer says the timestamp reflects Eastern Standard Time, and says 6:32 am is 9:32 am Pacific Standard Time.

    iii. The Employer submits three documents as new evidence to support its argument that the Notice Email was not fabricated:

        (a) a series of emails between the Employer and the webhosting company from January 25, 2022 to February 15, 2022 (ibid, pp. 10-19).

        (b) an unsigned letter dated February 15, 2022 from the legal counsel of the webhosting company advising that the last search was conducted only for the email address of the Employer, and that they had now conducted a search for the three recipients' email addresses, each of which appeared to contain a copy of the Notice Email (ibid, pp. 21-22); and

        (c) an unsworn affidavit of C.H. (the "C.H. Affidavit").

    iv. The Employer says that it had been a practice since the start of the business that employees would make up the time for sick days. The Employer submits that it discussed deductions

from wages with the employees in person and that it did not record these discussions via emails or text messages. The Employer admits that failing to document these discussions was an oversight (ibid, paras. 22 and 49).

v. The Employer also argues that the Investigative Delegate was biased. The Employer argues:

(a) she often said during the whole investigation process "I don't believe you" (ibid, para. 20);

(b) she relied on inaccurate information which led to the Adjudicative Delegate to make an uninformed Determination (ibid, para. 40);

(c) she never interviewed one of the computer store employees (ibid, paras. 18 and 41);

(d) she failed to advise the Employer in writing what documents the Employer was required to submit (Ibid, para. 19); and

(e) she relied on her memory to prepare the Investigative Report (ibid, para. 29).

vi. The Employer proposes a settlement amount of $1,288.73 (ibid).

Director's Submissions

18. The Director submits that the Employer failed to discharge its burden of demonstrating a breach of natural justice. The Director also submits that the Employer was given the right to know the case against him, including relevant legislation, the right to have an opportunity to respond to the complainants' arguments and evidence, and the right to have the matter decided by an unbiased decision maker.

19. The Director submits that, on November 17, 2021, the Investigation Delegate provided the Employer with a final opportunity to respond to her Report by November 22, 2021.

20. The Director states that an email from the Employer dated November 22, 2021, seemed to indicate that the Employer was interested in voluntarily resolving the complaint. When the Investigative Delegate telephoned the Employer, Mr. Chemko became "verbally aggressive" (Director's submission, p. 3). On December 9, 2021, the Employer telephoned the Investigative Delegate but did not leave a message. On December 13, 2021, the Investigative Delegate telephoned the Employer and left a message, but the Employer only returned the phone call after the Determination was issued.

21. In reply to the Employer's position that it does not owe compensation for length of service, the Director submits that the Notice Email was considered and the Adjudicative Delegate found it "problematic for numerous reasons" (ibid). The Director refutes the Employer's position that the time stamp on the screenshot of 6:32 a.m. reflects Eastern Standard Time, and notes 6:32 a.m. Eastern Standard Time is 3:32 a.m. Pacific Standard Time and not 9:32 a.m., as the Employer argues. The Director also notes differences in spacing and ellipsis points in screenshots of the Notice Email produced at different times by the Employer.

22. Alternatively, the Director argues that even if the Adjudicative Delegate had found the Employer had actually sent the Notice Email, this would not change the outcome in the Determination. This is because Section 67(b) of the *ESA* provides that a notice given to an employee is of no effect if the employment continues after the notice period ends (ibid, page 6). The Director says that in the Notice Email, the

wording as to when the computer store was closing was vague, as it said it would close on "07 February 2020 *at the latest*," (emphasis in Director's submission) and, in any event, the Employee worked until February 8, 2020. The Director thus argues that the Notice Email would have no effect even if the Employer had sent it.

Employee's submissions

23. The Employee's email to the Tribunal dated May 13, 2022 indicates he did not have further submissions.

Employer's final reply

24. On June 7, 2022, the Tribunal sent the Director's submissions to the parties, and requested a final reply from the Employer by June 21, 2022. The Tribunal did not receive a response.

ANALYSIS

Extension of appeal period

25. The first question to be decided is whether the Tribunal should grant an extension to the statutory appeal period under section 109(1)(b) of the *ESA* to March 14, 2022.

26. The appeal deadline in this appeal, as indicated in the Determination, is February 14, 2022.

27. Section 112(2) of the *ESA* specifies that a person filing an appeal must, within the appeal period:

(a) deliver to the office of the tribunal

(i) a written request specifying the grounds on which the appeal is based under subsection (1),

(i.1) a copy of the director's written reasons for the determination, and

(ii) payment of the appeal fee, if any, prescribed by regulation, and

(b) deliver a copy of the request under paragraph (a) (i) to the director.

28. On February 14, 2022, the Employer submitted the following documents:

i. the appeal form specifying the grounds on which the appeal is based;

ii. appeal submissions the Employer marked as a draft;

iii. emails between the Employer and the Employer's webhosting company, dated January 25, 2022 to February 10, 2022;

iv. the Employer's request for an extension to the appeal period to March 14, 2022; and

v. the Determination and Reasons for the Determination.

29. On March 14, 2022, the Employer submitted the following documents:

i. completed appeal submissions;

ii. copies of emails between the Employer and the Investigative Delegate dated November 17 and 22, 2021 – I note these emails are in the Record;

iii. additional emails between the Employer and the Employer's webhosting company dated January 25, 2022 to February 15, 2022;

iv. an email between the Investigative Delegate and the Employer's accounting firm dated August 10, 2021 – I note this email is in the Record;

v. a letter from the lawyer of the Employer's webhosting company, dated February 15, 2022; and

vi. the C.H. Affidavit.

30. Of the March 14, 2022 documents, the only new documents not in the Record or submitted on February 14, 2022 are: the February 15, 2022 emails in (iii), the letter dated February 15, 2022 in (v), and the C.H. Affidavit in (vi). In addition, the Employer completed its appeal submissions with additional arguments which were not previously included.

31. I find that the Employer has complied with section 112(2) of the *ESA,* by delivering the appeal form specifying the grounds on which the appeal is based, and the Director's reasons for determination, on February 14, 2022.

32. Given that the Employer submitted additional materials after the appeal period, the Tribunal must decide whether to accept the new materials submitted on March 14, 2022.

33. The extension to the appeal period was requested on February 14, 2022. The Employer submits that it is requesting the extension because the Employer had not received conclusive information regarding whether the Notice Email was sent from the Employer's webhosting company.

34. In these circumstances, I have decided to consider the additional submissions filed after the appeal deadline. The Employer's request was made in a timely way, and there is no reason to believe that granting the request will unduly prejudice the responding parties. However, I note that the Employer has submitted new documentary evidence which was not part of the Record before the Director. I will turn now to the question of whether these documents meet the Tribunal's test for new evidence, and whether I should accept this evidence.

New evidence

35. The new evidence ground of appeal is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made.

36. The Tribunal has considered the circumstances in which new evidence will be admitted in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BCEST #D171/03. The test is a strict one and all four conditions must be met before new evidence will be considered.

37. The appellant must establish that:

i. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

ii. the evidence must be relevant to a material issue arising from the complaint;

iii. the evidence must be credible in the sense that it is reasonably capable of belief; and

iv. the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

38. The documents the Employer has submitted as new evidence consists of correspondence from the webhosting company and its counsel, and the C.H. Affidavit.

39. I find the Employer could have obtained and submitted the correspondence from the webhosting company and its counsel before the Determination was made, if the Employer had made inquiries sooner. The time it took for the webhosting company to respond to the Employer's request was approximately 3 weeks, from January 25, 2022 to February 15, 2022. The Employer had ample time to obtain the new evidence from the time it was sent the Report on November 2, 2021 until the Determination was issued on January 20, 2022.

40. Similarly, the Employer could have obtained the C.H. Affidavit before the Determination was made.

41. I reject the submission of the new documents for the foregoing reasons.

Error of Law

42. First, the Employer alleges that the Adjudicative Delegate erred in imposing a penalty for the contravention of section 46 (1) of the *Regulation* for failing to produce or deliver records to the Director as and when required (Appeal submissions of March 14th, paras. 45).

43. Second, the Employer alleges that the Adjudicative Delegate erred in finding that the Notice Email was fabricated and never transmitted.

44. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope.

45. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

a) A misinterpretation or misapplication of a section of the Act;

b) A misapplication of an applicable principle of general law;

c) Acting without any evidence;

d) Acting on a view of the facts which could not be reasonably entertained; and

e) Exercising discretion in a fashion that is wrong in principle.

46. In relation to the section 46(1) contravention, the Employer submits that the information was provided by the company's accounting firm.

47. Turning to the first alleged error of law, on review of the Record, I note that on July 27, 2021, the Investigative Delegate sent a Demand for Records to the Employer, requesting payroll records pertaining to the Employee from February 9, 2019 to February 8, 2020. The deadline given to produce these records was August 10, 2021 (Record, p.19).

48. On August 10, 2021, the accounting firm sent some of the information requested by the Investigative Delegate, but not all of the requested information was sent. Specifically, the wage statements for the period between February 10, 2019 to January 25, 2020, were not provided.

49. Section 46 of the *Regulation* provides that, "A person who is required under section 85(1)(f) of the *[ESA]* to produce or deliver records to the director must produce or deliver the records as and when required."

50. The Employer has a statutory obligation to keep the records in its possession and produce them upon a demand made under section 85(1)(f) of the *ESA*. As all the records related to the Employee from February 1, 2019 to March 1, 2020 were not provided, I find that the Demand for Records was not fully complied with, and the Delegate did not err in finding that the Employer contravened with section 46 of the *Regulation.*

51. In relation to the second allegation regarding whether Notice Email was fabricated, it is important to note the limits in the power of the Tribunal in its review of a determination. The *ESA* does not provide for an appeal based on errors of fact. The Tribunal does not interfere with factual findings unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03 and *Gemex, supra*).

52. The Adjudicative Delegate provides the following reasons for her conclusion that the Notice Email was not sent:

> I find the email problematic for the following reasons:
>
> i. The email time stamp shows it was sent at 6:32 am and states, "Further to our discussion *this morning* (emphasis added). This would indicate that any discussion with Mr. Agnew would have taken place prior to 6:32 am on Monday December 16. Mr. Agnew stated he started work at 9:00 am (statement Aug 16) and this was undisputed.
>
> ii. [the webhosting company], when asked to produce the December 16 email Mr. Chemko stated was stored with them, advised that there was no record of the email ever being sent nor any responses to the email logged.
>
> iii. Email includes pay/personnel details that would not typically be shared with other employees.
>
> iv. … another recipient listed on the email, also denies receiving the email.
>
> v. Email says Mr. [the Employee] was sick on three days but does not give dates. [The Employer] had previously stated that [the Employee] had taken two weeks off sick and, in another interview, said [the Employee] had taken six days off sick in January 2020.

> I find, on a balance of probabilities, that the December 16 email was not sent out to [the Employee]. I find that [the Employee] was not provided with written notice of termination… (R8 of the Determination)

53. I find that the Adjudicative Delegate considered the Report and evidence in finding that the Notice Email was problematic. After these considerations, she made a finding that the Notice Email was not sent.

54. The Tribunal does not interfere with factual findings unless there has been an error of law, and I am not persuaded the Adjudicative Delegate has made an error of law in this case with respect to the Notice Email. As such, I do not need to consider the Director's submission that, even if the Adjudicative Delegate was wrong in finding that the Notice Email was sent, it would have no effect on the outcome of the Determination.

Natural Justice

55. The Employer alleges that the Investigative Delegate was biased. The Employer claims that the Investigative Delegate was biased because she did not interview one computer store employee to verify whether the Notice Email was sent, and "[t]his shows bias in choosing the information presented" (Appeal Submissions of March 14th, para. 41).

56. The Employer also claims that, during the whole discovery process, the Investigative Delegate often told Mr. Chemko that "I don't believe you" (ibid, para. 20). According to the Record, Mr. Chemko felt that he was being accused of being a dishonest person and was called a liar by the Investigative Delegate (Record, p. 9).

57. The Employer further states that it requested to voluntarily resolve the complaint.

58. In her submissions, the Director states that "[t]he burden of demonstrating a breach of natural justice rests with [the Employer]…[and] the [Employer] has failed to discharge this burden". The Director further submits "that the [Employer] was given the right to know the case and relevant legislation; the right to have an opportunity to respond to the [Employee's] arguments and evidence; and the right to have the matter decided by an unbiased decision maker", and that "the [Employer] has failed to produce any evidence to support an argument that the principles of natural justice have been breached" (Director's submissions, p. 1).

59. With respect to the Employer's claims that it requested to voluntarily resolve the complaint, the Director submits that an email from the Employer dated November 22, 2021, seemed to indicate that it was interested in voluntarily resolving the complaint. However, when the Investigative Delegate telephoned the Employer, Mr. Chemko became "verbally aggressive" (Director's submission, p. 3). On December 9, 2021, the Employer telephoned the Investigative Delegate but did not leave a message. On December 13, 2021, the Investigative Delegate telephoned the Employer and left a message, but the Employer only returned the phone call after the Determination was issued.

60. The principles of natural justice are procedural rights that ensure that parties know the case being made against them, given the opportunity to reply, and the right to have their case heard by an impartial decision maker.

61. The test of bias or apprehension of bias put forth in *R. v. S. (R.D.)* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 is whether a reasonably, informed bystander, viewing the matter realistically and practically, and having thought the matter through, could reasonably perceive bias on the part of the adjudicator. The Supreme Court of Canada in that case added the following to the test:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.

See also: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623* at 636-37; *Naturally Home Grown Foods Ltd. (Re),* 2020 BCEST 121; *Dusty Investment Inc.*, BC EST # D043/99.

62. I summarize the essential elements of the tests as follows:

i. The person considering the alleged bias must be reasonable.

ii. The apprehension of bias must be reasonable in the circumstances in the case.

iii. Real likelihood or probability of bias must be demonstrated [emphasis added]. Mere suspicion is not enough.

iv. The threshold for such finding is high.

v. The onus of demonstrating bias lies with the person who is alleging its existence. The party alleging disqualifying bias must establish that there is a pre-judgment of the matter, in fact, to the extent any representations at variance with the view which has been adopted would be futile.

63. On August 16, 2021, when the Investigative Delegate received a copy of the Notice Email from the Employer, she called the Employer to advise him that there were indications the Notice Email was fabricated and that she would "not be sharing the details of why she thought the email was fabricated at this time but [the Employer] will need to provide further information to support its veracity" (Record, p. 8). She then emailed the Employer and reiterated what she said in the phone call and requested that the Employer to provide a "screenshot of the inbox page…that shows the full column for incoming emails…If either [the Employee] or [another computer store employee] replied to this email, please forward me those replies" (Record, p. 79). Before her telephone call with the Employer, the Adjudicate Delegate interviewed the Employee and another employee; both denied having received the Notice Email.

64. On the same day, Mr. Chemko left a message with the Branch which said that he had been running an honest business for over 25 years and now he was being accused of being a dishonest person, and fabricating an email. He also requested that an email be sent to him documenting the accusations (Audio recording produced as part of the Records – A17).

65. In response to the Investigative Delegate's accusation, on September 3, 2021, the Employer submitted further screenshots of the Notice Email to support that it was sent. In the email, the Employer explained that the emails were on the webhosting company's website, and Mr. Chemko had them "walk [him] through how to access this website". Mr. Chemko also wrote, "I WILL not be called a liar by you".

66. On September 14, 2021, the Investigative Delegate sent a demand for Production of Records to the webhosting company requesting, among other things, records related to the delivery and receipt of the Notice Email. On September 21, 2021, the webhosting company's counsel submitted a letter advising that it had searched "for responsive records…including e-mails sent from accounts controlled by [the Employer] on December 16, 2019…It has no responsive e-mail records in its possession and also has no log records [in] its possession that include information about e-mail traffic sent by [the Employer] on December 16, 2009 [sic]."

67. The Investigative Delegate prepared the Report dated October 26, 2021 which was forwarded to the parties for their response. The Report included the evidence and documents gathered during the investigation.

68. On November 17, 2021, the Investigation Delegate provided the Employer with a final opportunity to respond to her Report by November 22, 2021.

69. On November 22, 2021, the Employer emailed the Investigative Delegate and indicated that it was interested in voluntarily resolving the complaint. On the same day, the Investigative Delegate telephoned the Employer, but that telephone call was cut short when Mr. Chemko became upset and the Investigative Delegate terminated the call. On December 9, 2021, the Employer telephoned the Investigative Delegate but did not leave a message. On December 13, 2021, the Investigative Delegate telephoned the Employer and left a message, but the Employer only returned the phone call after the Determination was issued.

70. In order to demonstrate bias or apprehension of bias, an appellant must provide clear and objective evidence that demonstrate there was a real likelihood or probability that there was bias.

71. I find the evidence contained in the Record demonstrates that the Employer was given the opportunity to know the case being made against him, and was given the opportunity to reply. Throughout the investigation, the Employer was kept apprised of the evidence, and was provided with ample opportunity to respond to, and refute the allegations made against him.

72. I acknowledge that Mr. Chemko may feel that the Investigative Delegate was biased. However, he has failed to present clear and cogent evidence to support that the Investigate Delegate was biased or appeared to be biased under the test expressed above. A mere suspicion of bias, or subjective evidence is not enough to support an argument that there was a real likelihood or probability of bias.

73. I cannot accept the Employer's argument that the Director was biased because she did not interview one computer store employee to verify whether the Notice Email was sent. First, the Investigative Delegate had already interviewed the Employee and another employee, and both denied receiving the Notice Email. This evidence is in direct contradiction to the Employer's position that the Notice Email was sent. Second, the Investigative Delegate instead chose to obtain further evidence through a third party, the webhosting company. The evidence provided by the webhosting company supports that the Notice Email was not sent. Third, under the *ESA,* the Investigative Delegate was not required to interview the computer store employee if the evidence showed the witness' evidence that would be obtained had no probative value. It is simply not feasible for an investigator to interview every witness, and dig out every piece of evidence if those evidence are more likely than not to be of no probative value.

74. In relation to the Employer's request to voluntarily resolve the complaint, I find that the Director also made reasonable efforts to contact the Employer, and the Employer was given ample time and opportunity to resolve the complaint before the Determination was issued.

75. The Employer did not make any arguments that the Adjudicative Delegate was biased. Having found that the Investigative Delegate was not biased, and that the Adjudicative Delegate considered all the evidence contained in the Report in making the Determination, I find that the Director did not breach the principles of natural justice.

ORDER

76. The appeal is dismissed under section 114(1)(h) of the *ESA*. The Determination is confirmed under section 115(1)(a) of the *ESA.*

____

Jenny Ho
Member
Employment Standards Tribunal