Citation: 516400 B.C. Ltd. (Re)
2022 BCEST 73

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

516400 B.C. Ltd. carrying on business as Shady Tree Neighbourhood Pub
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Jonathan Chapnick

**FILE NO.:** 2022/127

**DATE OF DECISION:** December 19, 2022

# DECISION

## SUBMISSIONS

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| Eivind Tornes | on behalf of 516400 B.C. Ltd. carrying on business as Shady Tree Neighbourhood Pub |
| Dawn Rowan | delegate of the Director of Employment Standards |

## OVERVIEW

1. 516400 B.C. Ltd. carrying on business as Shady Tree Neighbourhood Pub (the "Employer") operates a neighbourhood pub in Squamish, BC (the "Pub"). Eivind Tornes owns the Pub and is the Employer's sole director and officer. On March 18, 2020, Mr. Tornes closed the Pub and the Employer temporarily laid off its employees as a result of the BC government's declaration of a provincial state of emergency in response to the novel coronavirus (COVID-19) pandemic. The temporary layoff period spanned almost 24 weeks. By operation of s. 1 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [***ESA***] and s. 45.01 of the *Employment Standards Regulation*, B.C. Reg. 396/95, the layoffs became permanent, and the employees were terminated when the Pub remained closed on August 31, 2020.

2. When the employees were terminated, the Employer did not pay them wages as compensation for length of service ("CLOS") under s. 63 of the *ESA*. Mr. Tornes told the employees that the Employer did not owe them CLOS because of an exception in s. 65(1)(d) of the *ESA*, which states that CLOS need not be paid to an employee who is "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance".

3. Seven of the employees (the "Complainants") filed complaints to the Director of Employment Standards (the "Complaints"), each seeking a CLOS payment from the Employer. Their Complaints were successful. On June 23, 2022, the adjudicator of the Complaints, Dawn Rowan (the "Adjudicative Delegate"), issued a determination with written reasons (the "Determination"), finding that the Employer owed CLOS to the Complainants, and ordering the Employer to pay the Complainants a total of $9,701.51 in wages and interest and to pay an administrative penalty of $500 for its violation of s. 63.

4. The Employer appealed the Determination to this Tribunal on July 13, 2022. In his appeal submissions for the Employer, Mr. Tornes argues that the Adjudicative Delegate and the delegate who investigated the Complaints (the "Investigative Delegate") failed to observe the principles of natural justice in coming to the Determination. He also argues that new evidence has become available, which should be accepted by the Tribunal.

5. Among other things, Mr. Tornes says in this appeal that the Adjudicative Delegate violated natural justice principles by failing to consider relevant evidence that proved it was impossible to operate the Pub safely when the Complainants were laid off and then terminated. And he says that there is new evidence regarding the Pub's reopening on July 2, 2022, which establishes that he always intended to reopen the Pub when it was safe to do so.

6. I have considered all of the information and submissions provided by the parties. I understand that fear and concern for the health and safety of employees and patrons was a key driver of Mr. Tornes' decision to keep the Pub closed through to August 31, 2020, and beyond. I commend him for taking to heart his health and safety responsibilities as an employer and a service provider, and I appreciate his cautious approach to reopening his business. However, for the reasons that follow, I find that the Adjudicative Delegate and Investigative Delegate did not violate natural justice principles, and I have decided that the "new evidence" put forward by Mr. Tornes does not meet the criteria for acceptance by the Tribunal in this appeal. The Employer's appeal of the Determination is therefore dismissed.

## THE DETERMINATION

7. The case before the Adjudicative Delegate centred on whether the exception in s. 65(1)(d) applied to the terminations of the Complainants. If s. 65(1)(d) applied, then the Employer was not required to pay CLOS.

8. The Employer took the position that s. 65(1)(d) applied. Mr. Tornes' evidence and submissions on behalf of the Employer are described by the Adjudicative Delegate in the Determination. He said that the Employer closed the Pub and laid off its employees because of the onset of the pandemic and the resulting public health order ("PHO") restrictions on food and drink establishments. Under the initial PHO restrictions issued on March 20, 2020, food and drink establishments were permitted to remain open, but could only provide "take out or delivery service" and were required to ensure two metres of physical distancing between people on their premises. Mr. Tornes said that the Pub could not remain open under these restrictions. He said that take out and delivery accounted for a very small percentage of the Pub's sales, so it was not an option to remain open without in-establishment food and drink services. Moreover, he said that even when in-establishment services were permitted as of May 15, 2020, it did not make sense to reopen due to the uncertainty of the pandemic and the safety risk to staff and patrons. In particular, Mr. Tornes said that employees could not work a safe distance apart in the Pub's small kitchen and office at necessary staffing levels. He provided photographs and diagrams of the Pub in support of the Employer's position. He said that the Pub's size, set-up, and necessary staffing levels precluded the development of a COVID-19 safety plan, so the Employer did not attempt to develop one.

9. In the Determination, the Adjudicative Delegate accepted that the pandemic and initial PHOs were the reason the Employer closed the Pub and laid off its employees on March 18, 2020, and could be considered an "unforeseeable event" under s. 65(1)(d) of the *ESA*. However, she concluded that the Employer had not met its onus to prove that this event rendered the Complainants' continued employment "impossible" within the meaning of s. 65(1)(d). She found that establishments like the Pub were permitted to reopen on May 15, 2020 "at reduced capacity, with social distancing in place, and with other restrictions and safety protocols as required by subsequent PHOs," but Mr. Tornes "chose not to reopen under these guidelines and protocols" because "he did not believe it would be safe … nor that it would be financially viable to operate at reduced capacity given [the Pub's] overhead." She reasoned that these circumstances did not meet the high threshold for establishing "impossibility" under s. 65(1)(d), finding that the Pub could have reopened "by adopting the safety protocols and reduced capacity requirements as required by the PHOs." In the result, the Adjudicative Delegate concluded that s. 65(1)(d) did not apply to the terminations of the Complainants, and the Employer was therefore required to pay CLOS.

## ISSUES

10. There are two issues in this appeal:

    a. Did the Adjudicative Delegate or Investigative Delegate fail to observe the principles of natural justice?: *ESA*, s. 112(1)(b).

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

11. These are the grounds of appeal identified by the Employer in the appeal form and argued by Mr. Tornes in his submissions and through his supporting materials. To succeed in this appeal, the onus is on the Employer to establish, on a balance of probabilities, that the answer to at least one of the above questions is "yes": *Robin Camille Groulx*, 2021 BCEST 55 at para. 9.

12. In deciding this appeal, I have considered the Employer's July 13, 2022, appeal submission, comprising the appeal form, Mr. Tornes' written arguments and supporting evidence, and other documents and materials (the "Appeal Submission"). I have also considered the record that was before the Adjudicative Delegate at the time of the Determination (the "Record"). In addition, I have considered the Adjudicative Delegate's October 5, 2022, response submission in this appeal, as well as the October 7, 2022, final reply submission of the Employer.

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

## ANALYSIS

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

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

15. Under section 112(1)(b) of the *ESA*, a person can appeal a determination on the ground that the delegate(s) of the Director of Employment Standards "failed to observe the principles of natural justice in making the Determination." This ground of appeal is about whether the process in coming to the Determination was fair. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker: *CCON Recon Inc. and CCON Metals Inc.*, 2022 BCEST 26 at para. 62.

16. On behalf of the Employer, Mr. Tornes makes several arguments under the natural justice ground of appeal, which I will address in turn.

**1. Witness evidence of general manager**

17. First, Mr. Tornes makes two interrelated arguments regarding witness evidence.

18. On page 1 of his written arguments in the Appeal Submission, Mr. Tornes asserts that the Adjudicative Delegate should not have considered the evidence of the Pub's general manager. Mr. Tornes says that the general manager should not have been a witness in the investigation of the Complaints because the general manager "is very partial in favour of the complainants" and "presented incorrect information" to the Investigative Delegate. I understand Mr. Tornes' concerns, but I do not accept these arguments.

19. In the Determination, the Adjudicative Delegate summarized the evidence of the general manager as follows:

a. The general manager stated that the Employer was not responsive to his inquiries regarding when or if the Pub would reopen.

b. The general manager provided copies of two emails from Mr. Tornes, dated March 26, 2020 and April 16, 2020.

c. The general manager claimed that the Pub's kitchen is a standard size and that restaurants with similar sized kitchens had reopened.

d. The general manager opined that it was not impossible for employees in the kitchen to work two metres apart from one another, employees could have worn masks, the Employer could have put in place a strategy to reopen the Pub, and the Pub's parking lot could have been used as a patio.

20. The Adjudicative Delegate's choice to consider this evidence, and the Investigative Delegate's choice to include the general manager as a witness in the investigation, were exercises of discretion in their respective processes of adjudication and investigation. The Tribunal will generally not interfere with these types of exercises of discretion by a delegate, except if the delegate misdirected themselves in their exercise of discretion or if their discretionary decision was "so clearly wrong that it amounted to an injustice": *Commonwealth Physiotherapy Clinic Physical Therapist Corp.*, 2019 BCEST 17 at para. 45. Neither of these exceptions apply in this case. Regardless of its probative value, the general manager's evidence was arguably relevant to the issues raised in the Complaints, including the s. 65(1)(d) issue. I therefore see no misdirection or injustice in the delegates' consideration of the general manager's evidence. This was not a breach of natural justice.

21. I also see no breach of natural justice in Mr. Tornes' assertion on page 2 of his written arguments that he was not told that witnesses other than the parties could provide evidence in the investigation of the Complaints. The rules of procedural fairness do not generally require a delegate to specifically advise a party of their ability to submit witness evidence in the complaint, investigation, and determination processes: see *9503 Investments Ltd. operating as Mountain View Service*, BC EST # D126/05 at para. 18. In any event, the Record shows that when he received the Investigative Delegate's report on October 20, 2021 (the "Investigation Report"), Mr. Tornes became aware that the Pub's general manager had provided witness evidence in the investigation of the Complaints. It was open to Mr. Tornes at that time – or at any time before the Determination was issued on June 23, 2022 – to put forward his own witnesses, or at least to ask the Investigative Delegate if he was permitted to do so.

### 2. Consideration of relevant evidence

22. Next, Mr. Tornes argues that certain information was not expressly mentioned in the Determination and on this basis, he asserts that the Adjudicative Delegate failed to consider relevant evidence, in breach of natural justice principles. I take a cautious approach when examining arguments of this nature, because attempts by this Tribunal to determine, as a matter of procedural fairness, whether a delegate considered "all of the evidence," can come very close to a reassessment of the delegate's findings of fact, which is not an assessment that the Tribunal is typically permitted to undertake: see *Regent Christian Academy Society, c.o.b. Regent Christian Online Academy*, BC EST # D011/14 at para. 36 [**RCOA**], quoting Donald J.M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada (Toronto: Carswell, 2009, loose-leaf).

23. Mr. Tornes says that the Adjudicative Delegate did not expressly reference and therefore did not consider "pertinent information," such as his information disputing the allegations that he had no intention of reopening the Pub, had removed chairs from the premises, and was not communicating with the Complainants during the temporary layoff period. He says she did not consider his information disputing the general manager's evidence regarding the dimensions of the Pub's kitchen and opinion evidence regarding the prospect of reopening during the temporary layoff period. Mr. Tornes says the Adjudicative Delegate did not consider parts of his response to the Investigation Report, in which he corrected or supplemented information regarding the Pub's financial situation, layout, dimensions, staffing levels, and operations. He asserts that the Adjudicative Delegate failed to consider the fourteen photographs and map of the Pub's kitchen he submitted, which he says establish that it was not possible for kitchen staff to work safely under PHO restrictions.

24. I appreciate Mr. Tornes' attention to detail and careful examination of the Determination. However, his claim that the Adjudicative Delegate failed to consider relevant evidence cannot succeed. In a delegate's reasons for their determination, they do not need to recite all of the evidence considered, nor do they need to explain every last one of their findings of fact and conclusions: *RCOA* at para. 37, *Golden Fleet Reflexology Ltd.*, 2018 BCEST 22 at para. 28 [***Golden Fleet Reflexology***]. Accordingly, the Tribunal is generally unwilling to find that a delegate has failed to consider evidence merely because it is not expressly mentioned in the determination: see *RCOA* at para. 37. In my view, the present appeal is not a case where I should depart from this general approach. I find that the recitation of information and evidence in the Determination was sufficiently detailed for the parties to logically discern the relevant evidence, the Adjudicative Delegate's conclusions, and the findings of fact connecting the two. This is the standard to which a delegate's reasons are held (*Golden Fleet Reflexology* at para. 28), and the Determination issued by the Adjudicative Delegate meets this standard. The logic of the Determination is clear. I am therefore willing to assume, as the Tribunal generally does, that the Adjudicative Delegate considered and weighed all the relevant evidence and – based on that evidence – found every findable fact necessary to support the conclusions she reached: see *Budget Rent-a-Car of Victoria Ltd.*, BC EST # D021/12.

### 3. Bias

25. Mr. Tornes' argument that certain information was left out of the Determination also forms the basis for his suggestion, in the Appeal Submission, that the Adjudicative Delegate considered and presented the

facts in a way that was not impartial and therefore breached the principles of natural justice. For example, he says that the Determination does not include a consideration of information and documents he submitted regarding the size, set-up, and operation of the kitchen. He also says that the Adjudicative Delegate selectively quoted portions of certain documents in the Determination, presenting information out of context and in a way that was unfavourable to the Employer, which skewed findings and impacted fairness.

26. I understand that Mr. Tornes takes issue with the way the Determination portrays the circumstances of this case. However, to the extent that his comments in the Appeal Submission regarding impartiality amount to an allegation of bias against the Adjudicative Delegate, I reject them.

27. An allegation of bias against a decision-maker is very serious and must be supported by sufficient evidence to establish a "reasonable apprehension of bias" based on the decision-maker's conduct: *Fara Ghafari*, 2018 BCEST 79 at paras. 28-32 [***Fara Ghafari***]. The onus of proving bias is on the person alleging it, and the threshold for a finding of bias is high. To establish bias, a "real likelihood" or probability of bias must be demonstrated; "mere suspicions, or impressions, are not enough": *Fara Ghafari* at paras. 34-35. Mr. Tornes' speculation in the Appeal Submission regarding the impartiality of the Adjudicative Delegate falls significantly short of demonstrating a real likelihood or probability that she was biased. As I discussed above, I am satisfied that the Adjudicative Delegate considered and weighed all the relevant evidence in this case, even if the Determination did not expressly reference all of the information provided by the Employer during the complaint process. The Adjudicative Delegate's choice not to recite all of the evidence considered does not establish a real likelihood of bias in her decision-making. Similarly, I see no bias issue in the Adjudicative Delegate's selection of quotes in the Determination. Her writing choices in preparing the Determination, without more, are not a sufficient basis for a finding of bias. In my view, Mr. Tornes' suggestions of bias are based on little more than suspicions and impressions, which is not enough to establish a breach of the principles of natural justice.

**4. Recitation errors**

28. In his final argument under the natural justice ground of the appeal, Mr. Tornes seems to assert that the Adjudicative Delegate's decision-making process was unfair because she erred in reciting certain information and evidence in the Determination. Specifically, Mr. Tornes says that the description of the Employer's financials in the Determination was wrong and disregarded the information he provided to the Investigative Delegate. Mr. Tornes also asserts that a statement in the Determination about when the Pub was listed for lease and/or sale was incorrect.

29. I find that even if the Adjudicative Delegate erred in these ways in the Determination, such errors would not amount to a breach of natural justice. As discussed, I have concluded that the Adjudicative Delegate properly considered and weighed all of the relevant evidence. The recitation errors alleged by Mr. Tornes do not change my conclusion. The errors alleged are inadvertent and do not go to the root of the Adjudicative Delegate's decision. They are not an indication that she misread the file before her, and they do not amount to a failure on her part to hear the Employer's case and issue a reasoned decision.

30. In sum then, I dismiss the Employer's arguments under the natural justice ground of appeal. The Employer has not shown me, on a balance of probabilities, that the Adjudicative Delegate or Investigative Delegate failed to observe the principles of natural justice.

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

31. The second issue in this appeal is whether evidence has become available that was not available at the time the Determination was being made. In the Appeal Submission, the evidence put forward by Mr. Tornes is a notice he issued to staff on July 13, 2022. The notice indicates that the Pub reopened safely on July 2, 2022. In the notice Mr. Tornes provides information and makes statements related to the circumstances of the Pub's closure in March 2020 and path to reopening in July 2022. In the Appeal Submission, Mr. Tornes says that several former Pub employees were rehired when the Pub reopened, and he asserts that the July 13 notice shows that he always intended to reopen the Pub when it was safe to do so.

32. The Tribunal may only accept "new evidence" under s. 112(1)(c) if the evidence meets certain stringent requirements. The evidence must be "new" in the sense that it could not have been presented to the delegate before they made their determination. It must also be credible in the sense that it is reasonably believable. In addition, the evidence must be relevant to an important issue in the complaint that was before the delegate, and it must have high probative value, which means that if it had been accepted by the delegate, they may have reached a different conclusion on the important issue: *Merilus Technologies Inc.*, BC EST # D171/03.

33. I find that the evidence put forward by Mr. Tornes does not meet all of these requirements. In particular, I find that the evidence does not have high probative value, because it would not have led the Adjudicative Delegate to reach a different conclusion on a material issue in the Complaints. The central question before the Adjudicative Delegate was not whether Mr. Tornes *wanted* to reopen the Pub and continue employing the Complainants; it was whether it was *impossible* for the Employer to do so at the end of August 2020, within the meaning of s. 65(1)(d) of the *ESA.* The evidence put forward by Mr. Tornes does not shed new light on this question, and so I find that if it had been provided to and believed by the Adjudicative Delegate before she issued the Determination, it would not have changed the outcome of the Complaints. I therefore conclude that the ground of appeal set out in section 112(1)(c) of the *ESA* has not been met in this case.

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

## ORDER

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

**Jonathan Chapnick**
**Member**
**Employment Standards Tribunal**