Citation: Angela Christine Zavediuk (Re)
2023 BCEST 116

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Angela Christine Zavediuk

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/154

DATE OF DECISION: December 27, 2023

DECISION

SUBMISSIONS

Gregory Ivan Zavediuk — on behalf of Angela Christine Zavediuk

INTRODUCTION

1. This is an appeal filed pursuant to section 112 of the *Employment Standards Act* ("*ESA*") by Angela Christine Zavediuk ("appellant"). The appellant appeals a determination that was issued by Mitch Dermer, a delegate ("delegate") of the Director of Employment Standards ("Director"), on August 31, 2023 ("Determination").

2. The delegate issued his "Reasons for the Determination," comprising 23 single-spaced pages ("delegate's reasons"), concurrently with the Determination.

3. By way of the Determination, the appellant's former employer, Bioriginal Food & Science Corp. ("employer"), was ordered to pay the appellant a total sum of $95,115.26, including section 88 interest. Further, and also by way of the Determination, the delegate levied five separate $500 monetary penalties against the employer based on its contraventions of sections 17 (failure to pay wages at least semimonthly), 18 (failure to pay wages on termination of employment), 28 (failure to keep payroll records), 58 (failure to pay vacation pay), and 83 (mistreatment of an employee who filed complaint) of the *ESA*. Accordingly, the employer's total liability under the Determination is $97,615.26.

4. In her Appeal Form filed with Tribunal the appellant indicated that her appeal was based solely on section 112(1)(b) of the *ESA* (the Director failed to observe the principles of natural justice in making the determination). However, in her written submissions filed together with her Appeal Form, she clearly indicated that she is also appealing the Determination under sections 112(1)(a) and (c) of the *ESA* (the Director erred in law; and evidence has become available that was not available at the time the determination was being made). Accordingly, I will address all three grounds of appeal.

THE APPELLANT'S *ESA* COMPLAINTS AND THE DIRECTOR'S INVESTIGATION

5. As noted in the delegate's reasons, the employer "sources and markets ingredients for health supplements to manufacturers and distributors throughout North America" (page R3). The appellant was employed in, essentially, a sales role during her tenure with the company, which spanned nearly six years, ending in November 2020. Throughout her employment, she was paid a salary together with a form of commissions and bonuses, the precise particulars of which varied over the course of her employment.

6. The appellant's employment commenced in December 2014 when she accepted an offer of employment as the employer's "West Coast Territory Manager." The appellant's compensation included an annual salary and other benefits, and also a "corporate bonus and commission plan [with] participation subject to plan provisions and corporate achievements as well as based on achieving annually determined goals and objectives." As will be seen, a central issue in this dispute concerns the interpretation and application

of these annual commission/bonus plans. These annual plans provided for various forms of contingent compensation based on such things as year-over-year sales growth and attracting new customers.

7. This matter has a long, and one might even say, tortuous, history with the Employment Standards Branch, dating from April 22, 2018, when the appellant filed her first complaint (claiming she was owed various sums under her employment contract), at which point she was still employed with the employer. Later, several other complaints were filed, which I have summarized below. As will be seen, as time moved on, the appellant filed additional complaints as the relationship between her and the employer deteriorated and ultimately ended, when the appellant resigned in November 2022.

The Complaints

8. The following summary is taken from the section 112(5) record (which is over 2,000 pages), submitted to the Tribunal by the delegate, and which the Tribunal provided to the appellant and the employer on November 9, 2023. The appellant and the employer were directed to provide, by November 24, 2023, any additional documents that should be, but were not, contained in the record. Neither the appellant nor the employer provided any further documents, or otherwise objected to the completeness of the record. Accordingly, I consider the record to be complete.

9. As noted above, the appellant's first complaint was filed on April 22, 2018, at which point in time she was still employed. She claimed about $48,000 in unlawful wage deductions (which she identified as "retroactive calculations"), a further approximately $44,000 for unpaid commissions earned in late January 2018, and about $15,000 representing bonuses payable to the appellant, which were itemized as "new customer bonus," "new product bonus," and "territory margin growth."

10. In November 2020, the appellant filed three additional complaints. In her complaint filed November 4, 2020, the appellant claimed $100,000 on account of "mistreatment." This claim was based on section 83 of the *ESA*. In her complaint filed November 6, 2020, the appellant claimed $200,000 under section 66 of the *ESA* (the so-called "constructive dismissal" provision). On November 16, 2020, the appellant advanced a claim for an unspecified amount, alleging that the employer had contravened sections 17 and 18 of the *ESA*.

11. Apart from the above four complaints – all formally filed using the Employment Standards Branch's "Employment Standards Complaint Form" – the appellant, as summarized in the delegate's reasons (at pages R5-R6), also sent two separate emails, both with attachments, to an Employment Standards Branch officer on June 24, 2019 (concerning her 2019 earnings) and April 9, 2020 (concerning her 2020 earnings). The delegate accepted both emails as valid complaints (page R6): "I am satisfied that these emails from the [appellant] to the Branch constitute complaints as contemplated by the [*ESA*], as they were delivered to the Branch via email, and included, in essence, allegations that the Employer had contravened the [*ESA*] with respect to the [appellant's] compensation."

12. With respect to the November 6, 2020, complaint, the appellant indicated that her last day of work was November 5, 2020, and that she was seeking $200,000 under section 66 of the *ESA*. I should note that the November 6th complaint was legally misconceived, at least with respect to the damages sought. I do not pass any judgment on whether the appellant could have recovered $200,000 as *common law damages* for constructive dismissal. However, and assuming her section 66 claim was valid, her compensation

would be based on section 63 of the *ESA* (compensation for length of service), and thus would be limited to 5 weeks' wages (based on the appellant's five completed years of service as of November 2020).

The Investigation

13. The Director of Employment Standards, acting through the Director's delegates (see section 117), may assist the parties in an effort to reach a settlement agreement (see section 78). The Director may, but is not required to, hold an oral hearing regarding a complaint, or may simply investigate the complaint without an oral hearing.

14. I understand that a mediation took place on August 8, 2018, in an effort to resolve the April 22, 2018, complaint, but that this process did not result in a mutual agreement to resolve the dispute. As detailed in the delegate's reasons (at page R2):

> …Rodney Strandberg ("Mr. Strandberg") was assigned this complaint in or about July 2018. Mr. Strandberg conducted a hearing of this matter on October 10, 2018, which continued October 18, 2018. On April 1, 2019, Mr. Strandberg informed the parties that, rather than reaching a decision based on the information provided prior to, and during, the hearing, he would convert the process to an investigation.

15. The Employment Standards Branch, during the course of the investigation into the appellant's various complaints, issued eight separate "preliminary findings" reports. The parties were invited to provide their responses to each of the various reports that were issued during the investigation.

16. The first of these reports was issued by Mr. Strandberg on September 24, 2019, in which he stated that the annual commission/bonus plan formed part of the appellant's "conditions of employment" as defined in section 1(1) of the *ESA*. Although Mr. Strandberg did not reference the definition of "wages" in the same section of the *ESA*, it should be noted that both "commissions" and "money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency" are included within the definition of "wages."

17. On October 2, 2019, Mr. Strandberg advised the parties that he was "confirming" the following preliminary finding, namely: "[The appellant's] right to receive incentive payments was a term of her employment contract with, and a condition of her employment by, [the employer and] the incentive plan governing the incentive payments to which [the appellant] was entitled when her employment began was the 2015 incentive plan provided to her by [the employer] in January 2015."

18. On March 5, 2020, Mr. Strandberg issued a further "preliminary findings" report. In particular, he addressed whether the appellant's employment had been terminated, effective May 10, 2017, under section 66 of the *ESA*: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." Mr. Strandberg concluded, on a preliminary basis, that the appellant's employment was terminated under section 66. I note that the appellant, despite this finding, continued to work for the employer until November 6, 2020 (i.e., for a period of about 3 ½ years), when she submitted her resignation.

19. On June 8, 2020, Mr. Strandberg issued further preliminary findings addressing the appellant's wage recovery period and, once again, section 66 of the *ESA*. With respect to the former, Mr. Strandberg

indicated that the wage recovery period was the 12-month period "preceding [the appellant's] delivery of her complaint to the Director on April 22, 2018." As for the latter section 66 claim, Mr. Strandberg confirmed his earlier finding that the appellant's employment had been terminated under section 66, and he calculated her section 63 compensation for length of service entitlement to be $12,739.83 as of June 8, 2020.

20. On October 21, 2020, Mr. Strandberg issued what he called his "final findings." Mr. Strandberg revised his section 63 calculation, finding that the amount owed to the appellant on account of compensation for length of service was $14,254.47 plus section 88 interest. He calculated the appellant's unpaid wage entitlement to be $180,293.65, including vacation pay. After accounting for section 88 interest, Mr. Strandberg fixed the appellant's total unpaid wage entitlement to be $201,061.97 as of October 21, 2020. Mr. Strandberg also stated that the employer had contravened sections 17, 18, 27, 28, 58, and 63 of the *ESA*, as well as section 46 of the *Employment Standards Regulation*. However, he also stated that no monetary penalties would be issued if the employer delivered a bank draft, certified cheque, or lawyer's trust cheque, in the amount of $183,502.82, less itemized statutory deductions, to the Employment Standards Branch by no later than November 3, 2020. Mr. Strandberg indicated that if the funds were not delivered by the November 3rd deadline, he would "issue a determination." On October 22, 2020, Mr. Strandberg sent a clarifying e-mail to the employer, indicating that the amount to be paid was $201,061.97 (presumably, less statutory deductions, although this was not stated in the email), rather than $183,502.82. The funds were not delivered as requested, but for reasons that are not clear to me, Mr. Strandberg did not issue a determination in 2020, nor did he issue a determination in 2021 or 2022.

21. As previously noted, the appellant resigned her employment on November 6, 2020, claiming that she had been constructively dismissed, and that she had been subjected to unlawful retaliatory actions, contrary to section 83 of the *ESA*. The appellant also filed further complaints, discussed above, on November 4 and 16, 2020.

22. As detailed in the delegate's reasons (at page R2), Mr. Strandberg continued to have conduct of the appellant's complaints until March 2022, at which time another Employment Standards Branch officer, Sarah Vander Veen, assumed conduct of the investigation. Ms. Vander Veen apparently gathered some further information and then issued her own "Interim Investigation Report" on August 26, 2022, apparently the same day that her employment with the Employment Standards Branch ended.

23. In her August 26, 2022, report, Ms. Vander Veen outlined several issues that she understood required adjudication. She also summarized the facts that were not apparently in dispute; however, she did not make any affirmative determination with respect to the matters that were in dispute between the parties.

24. As set out in his reasons, in late September 2022 the delegate (who, on August 31, 2023, finally issued the sole Determination in this matter) assumed conduct of the dispute. On October 19, 2022, the delegate advised the parties that he would be seeking further submissions, and would prepare another investigation report. On November 17, 2022, the delegate issued this latter "Interim Investigation Report." In this report, the delegate summarized the legal issues that required adjudication as well as the parties' evidence and argument with respect to those issues. This report was provided to the parties who were invited to respond to it, and both did so.

THE DETERMINATION

25. On August 31, 2023, the delegate issued the Determination and his accompanying reasons. The delegate addressed several separate issues in his reasons: i) the wage recovery period; ii) whether the appellant was terminated in April 2017; iii) whether the appellant was owed wages under one or more of the 2016, 2017, 2018, 2019, and 2020 incentive plans; iv) whether the employer made unauthorized deductions from the appellant's wages contrary to section 21 of the *ESA*; v) whether the appellant was owed vacation pay for either of 2019 or 2020; and v) whether the appellant's resignation was a *bona fide* resignation or a "constructive dismissal" which, in turn, constituted unlawful section 83 retaliation.

26. The delegate's findings with respect to the issues before him were as follows:

- Wage recovery period: The wage recovery period was from April 18, 2017, to the end of the appellant's employment in November 2020 (page R6).
- Section 66 termination: The appellant's employment was not deemed to have been terminated under section 66 of the *ESA* as of May 10, 2017 (page R10).
- The Incentive Plans: With respect to the appellant's claims for wages due under the various incentive plans, the delegate concluded that no wages were recoverable under the 2016 plan because any wages earned under this plan fell outside the wage recovery period (page R11). The appellant was entitled to $16,042.00 (Territory Margin Growth Incentive and New Product Bonus) under the 2017 incentive plan, together with concomitant vacation pay in the amount of $1,235.23 (page R13). As for the 2018 and 2019 incentive plans, the delegate noted that "there is no dispute that the [appellant] was paid all incentive amounts earned during 2018 and 2019" (page R14). The appellant was awarded $9,000 under the 2020 incentive plan together with concomitant vacation pay in the amount of $693.00 (page R15).
- Section 21 deductions: The employer never made any unlawful wage deductions contrary to section 21 (page R14).
- Vacation pay: The appellant was awarded $13,025.22 in vacation pay for 2019 (page R16), but was not owed any vacation pay for 2020, other than vacation pay attributable on the 2020 incentive pay award (page R17).
- Section 83: The delegate determined that the appellant was "constructively terminated" when she "tendered her resignation on November 17, 2020" (page R19) [*sic*, the appellant submitted her resignation on November 6, 2020, and on November 16, 2020, the employer accepted her resignation, effective November 13, 2020]. Insofar as section 83 was concerned, the delegate held that it was "more likely than not that the [appellant's] dismissal was retaliatory, in contravention of section 83 of the [*ESA*]." (page R20). The delegate then awarded the appellant a "make whole" remedy under section 79(2)(c) of the *ESA*, ultimately awarding the appellant the equivalent of three months' wages based on her 2020 earnings ($45,975.56) (pages R20-R21).

27. Accordingly, the appellant was awarded a total of $95,115.26, including section 88 interest, an amount the appellant now challenges as being too low. However, as I understand the appellant's submissions on appeal, she is not seeking to have the Determination varied to some higher amount. Rather, she says that due to the many natural justice breaches that occurred during the course of the investigation and

adjudication of her several complaints, the Determination should be cancelled. The appellant asks the Tribunal to refer this matter back to the Director of Employment Standards so that an entirely new investigation may be conducted by a new delegate.

28. I should note, prior to proceeding to the appellant's reasons for appeal, that the appellant does not challenge the delegate's findings with respect to his award of regular wages (plus vacation pay) under the 2020 incentive plan, but does challenge virtually every other finding made by the delegate.

THE APPELLANT'S REASONS FOR APPEAL

29. The appellant relies on all three statutory grounds of appeal, namely, that the delegate erred in law, the delegate (as well as other employment standards officers involved in the investigation) failed to observe the principles of natural justice, and on the ground that she now has evidence that was not previously available. The appellant's submissions are contained in a 35-page (single-spaced) memorandum that is supplemented by 30 additional pages consisting of various documents including correspondence, employer documents, and wage statements.

30. The appellant's submission is somewhat repetitive and prolix, but nonetheless sets out the appellant's points of concern regarding the complaint investigation process and the asserted errors in the delegate's reasons. At this juncture, I will only briefly summarize the appellant's arguments, but will more fully address them, below, under the heading "Analysis and Findings."

31. The appellant's fundamental "natural justice" argument is that the complaint investigation process was so deeply flawed that the Determination cannot stand. Apart from that broad assertion, the appellant raises several other matters that she says each constitutes a failure to observe the principles of natural justice. The alleged errors of law largely relate to the delegate's calculations of the appellant's entitlements, but also concern matters that were not expressly addressed in the Determination (for example, whether any vacation pay was owed for 2017 and 2018). The appellant also says that the delegate erred in his determination of the wage recovery period, and in his interpretation and application of sections 66 and 79(2)(c) of the *ESA*. The "new evidence" relates to the company that the appellant established after her employment ended.

ANALYSIS AND FINDINGS

32. Several of the arguments advanced by the appellant are, on their face, entirely without merit and can be readily dismissed. I shall first address the "new evidence" submitted by the appellant.

New Evidence

33. Having determined that the appellant had a valid section 83 "mistreatment" claim, the delegate then turned his mind to the appropriate remedy under section 79(2)(c) of the *ESA*. This latter provision provides for an alternative remedy in lieu of reinstatement, namely: "compensation instead of reinstating the person in employment." The appellant resigned her employment in early November 2020, but did not immediately commence a search for new employment. The appellant never sought reinstatement. Rather, she commenced a new business with a partner, and the employer's position was that this constituted a failure to mitigate her damages. The delegate made the following observations with respect

to the appellant's decision to commence a new business rather than search for another employment position (at page R21):

> The Complainant was selling a fairly specialized product set to a limited market, but in my view, this is balanced by the fact that general sales skills are transferable…I see no reason why the [appellant] could not have at least sought to secure alternate employment within a few months of her termination at most, if she had chosen to do so. She chose to explore an alternate business venture, which is completely reasonable, but I need to take this into account when considering an appropriate award…In my view, the Complainant could likely have found alternate employment within two or three months had she diligently pursued such.

34. In light of the above findings, the appellant now submits additional evidence that further explains why she chose to enter into a new business venture, instead of commencing a new job search, and also some information regarding the early revenue stream of the new business. The employer had specifically put mitigation in issue during the investigation, and thus the appellant could have provided evidence by way of reply to this argument had she wished to do so. In her appeal submission, the appellant disputes the delegate's finding that she could have secured new employment "within a few months of her termination," and now asserts, without any underlying corroborative evidence, that it would have taken her eight months to secure a position with "comparable compensation." However, all of the appellant's "new evidence" submitted on appeal was "available" and could have been submitted to the Employment Standards Branch during the investigation. Accordingly, the appellant's "new evidence" (section 112(1)(c) of the *ESA*) ground of appeal is dismissed. I further address the delegate's determination of her section 79(2)(c) award, below.

Frivolous or trivial "natural justice" and "error law" grounds of appeal

35. Grounds of appeal that are "frivolous" or "trivial" may be summarily dismissed under section 114(1)(c) of the *ESA*. In my view, some of the appellant's grounds of appeal should be dismissed under this latter provision. The appellant says that the delegate failed to issue a section 78.1 report prior to issuing the Determination. This allegation ignores the fact that, as summarized in the delegate's reasons (at page R2), several written reports were prepared and provided to the parties for their review and reply, including a report from the delegate, prior to the Determination being issued, which summarized the findings of the various investigative reports. I am satisfied that the Director of Employment Standards, through her delegates, complied with section 78.1 of the *ESA*.

36. The appellant says that there was a breach of the principles of natural justice flowing from the fact that the Determination was served on the appellant via electronic mail rather than regular mail. The short answer to this alleged natural justice breach is that the Director has the discretion to serve the Determination using any of the permitted modes of service set out in section 122 of the *ESA*.

37. In addition to the appellant and employer, the Determination was also served on seven individuals who, as I understand it, were directors and officers of the employer when the appellant's unpaid wage claims crystallized. I am not aware if any of these individuals were separately named in a determination issued under section 96(1) of the *ESA*. The appellant says that the Determination should have also been served on directors and officers of a separate corporation – Omega Protein Corporation. I am not aware of what precise relationship this latter corporation may have vis-à-vis the employer, although there is brief

reference in the record to this corporation being the "parent company" of the employer. In addition, the record contains a 2016 Annual Report filed by the corporation with the U.S. Securities and Exchange Commission in which the employer is mentioned. In any event, this corporation was not named as a party liable under the Determination pursuant to section 95 of the *ESA*. That being the case, the Determination was not required to be served on this corporation or on its directors and officers.

38. The final matter I shall address in this section of my reasons concerns the appellant's assertion that the employer contravened section 21 by making an unlawful $10,000 wage deduction. This matter is addressed at page R14 of the delegate's reasons. The delegate found that the $10,000 was paid on October 13, 2017, as an advance against future commissions. The delegate noted that when the employer later debited this amount, against the $51,000 in commissions that were paid to the appellant in January 2018, this did not amount to a wage deduction. Rather, this accounting was "an expression of the Employer's calculation of the balance still owed to the [appellant and] I find that this was not a deduction, as contemplated by section 21 of the Act." I am not persuaded that the delegate erred in making that finding. The appellant also says that the delegate was obliged to issue a monetary penalty against the employer for having contravened section 21. However, since there was no contravention of section 21, a monetary penalty could not have been lawfully levied on that account.

39. Each of the above grounds of appeal is dismissed pursuant to section 114(1)(c) of the *ESA*.

Additional Natural Justice Grounds of Appeal

40. As previously noted, the appellant's overarching "natural justice" ground of appeal is that the investigation of the appellant's complaints was "inadequate." While the investigation was cumbersome and time-consuming, and complicated by the fact that several Employment Standards Branch officers were involved in this matter over time, I am unable to conclude that the investigation was inadequate to the point that there was a failure to abide by the principles of natural justice.

41. The appellant's initial complaint, and her subsequent complaints, were each reviewed and investigated. My review of the section 112(5) record shows that throughout this dispute, the appellant was given a fair and reasonable opportunity to present her evidence and argument, and to respond to the evidence and argument submitted by the employer.

42. The appellant says that the delegate was obliged to accept preliminary findings contained in earlier investigation reports (in particular, whether there was a deemed termination under section 66 of the *ESA* as of May 17, 2017). On May 5, 2020, Mr. Strandberg issued a "preliminary finding" that the appellant was terminated under section 66 as of May 17, 2017. It is important to note that this was only a preliminary finding, not a final determination of the issue. The delegate was not legally bound by that preliminary finding. Further, he explained in detail, at pages R6-R10 of his reasons, why he determined that there had not been a section 66 "deemed termination" in May 2017. It was not a breach of the principles of natural justice for the delegate to make his own independent determination of the matter. Indeed, he was obliged to independently assess the matter. I might add that I agree with the delegate's determination on this point. Since the appellant also says that the delegate erred in law in finding that the appellant's employment was not terminated on May 17, 2017, I will defer further discussion of this matter here, but will address it, below, under the "Alleged Errors of Law" subheading.

43. The appellant says that the delegate breached the principles of natural justice when he "refused to investigate" any issues relating to the 2020 incentive plan.

44. The appellant submitted a letter of resignation on November 6, 2020. On and around this date, the appellant also filed three additional complaints with the Employment Standards Branch – on November 4, 6, and 16, 2020. In her November 4th complaint, the appellant alleged that she had been the subject of retaliatory actions by her employer, which constituted mistreatment as defined in section 83, following the issuance of a preliminary finding that there was a section 66 "deemed termination" as of May 17, 2017. In her November 6th complaint, the appellant alleged that there had been another section 66 "deemed termination," based on the employer having made "unilateral and substantial changes" to her compensation (which I understand refers to her incentive plan compensation), and was engaging in a course of harassment and created a "toxic work environment" contrary to section 83. The November 16th complaint was a complaint relating to the payment of her outstanding wages following her November 6, 2020, resignation. Section 18(2) of the *ESA* states that all outstanding wages must be paid "within 6 days after the employee terminates the employment." In her November 16th complaint, the appellant alleged: "My last day of employment was November 5th, 2020 and I have not been contacted by my employer, Bioriginal Food and Science [and] no payment of any wages, as required under Section 17 and Section 18 of the Act, have been made."

45. Prior to filing the November 2020 additional complaints, the appellant, in an email dated April 2020 to Mr. Strandberg, raised the matter of compensation allegedly due under the 2020 incentive plan. The delegate accepted this email as constituting another complaint for purposes of section 74 of the *ESA* (pages R5-R6). The appellant also argued that the 2020 incentive plan was "unconscionable" in the manner that it addressed her vacation pay entitlement. This argument does not appear to have been raised until it was included in the appellant's appeal submission. This entirely new argument is not properly before the Tribunal and, in any event, there is absolutely no evidentiary foundation to support it.

46. Accordingly, it seems clear that the appellant did raise – and that the Employment Standards Branch had accepted – a claim relating to her compensation as set out in the 2020 incentive plan. I am unable to accept the appellant's assertion that the delegate "refused to investigate" her entitlements under the 2020 incentive plan. The delegate expressly addressed the appellant's entitlements, if any, under the 2020 incentive plan (see page R15). In fact, the delegate awarded the appellant $9,000 (the exact amount of her sales commission claim) plus $693 in vacation pay, as money due and payable under the 2020 plan. The delegate rejected the appellant's claim for further payments based on "Territory Margin Growth" incentives. I am not persuaded that the delegate erred in rejecting that additional claim (see page R15).

47. The delegate's determination of the monies due to the appellant under the 2020 incentive plan was predicated on the evidence and argument that the parties had submitted during the course of the investigation. As I conceive the appellant's submissions, and despite her assertion that her entitlement under the 2020 incentive plan was "never investigated," it appears that her principal argument is not that the matter was not investigated and then adjudicated – it clearly was – but, rather, that the delegate misinterpreted the terms of the 2020 plan (i.e., an alleged error of law). This issue (among many others) is addressed, below, under the subheading "Alleged Errors of Law", the subject to which I now turn.

Alleged Errors of Law

48. Many of the appellant's arguments in support of her position that the Determination should be cancelled were framed as both natural justice breaches and alleged errors of law. However, in my view, the arguments that I will now address are more appropriately addressed as alleged errors of law, rather than breaches of the rules of natural justice.

49. The first of these issues concerns the wage recovery period. The delegate determined that the wage recovery period in relation to the appellant's first complaint, in light of the amendment to section 80 effected by the *Employment Standards Amendment Act, 2019*, ran from April 18, 2017, to April 18, 2018 (page R5). This period was predicated on the first complaint having been filed on April 18, 2018, although the record shows that the first complaint was actually filed on April 22, 2018. I do not believe that anything consequential flows from the delegate's error in this regard. The delegate then determined that the subsequently filed complaints had the effect of extending the wage recovery period, and held that the wage recovery period ultimately spanned the period from April 18, 2017, to the end of the appellant's employment in November 2020 (page R6).

50. The appellant now contends that the delegate should have determined that the wage recovery period commenced on January 31, 2017, based on her assertion that her employment was terminated under section 66 as of January 31, 2018. This submission, in my view, is fundamentally misconceived. First, there is nothing in the record to show that a complaint was ever filed in relation to an asserted section 66 termination of employment as of January 31, 2018. Second, there is nothing in the record that clearly demonstrates that the appellant's employment was terminated as of January 31, 2018, under section 66 of the *ESA*. Among the appellant's four formal complaints, and the two other emails that the delegate accepted as valid complaints, only one – the appellant's November 6, 2020, complaint – claimed that there had been a section 66 termination. In her resignation letter submitted shortly before this latter complaint was filed, the appellant asserted that she considered herself to have been constructively dismissed as of November 6, 2020, not in January 2018.

51. The appellant says that the delegate erred in determining that the appellant's employment was not terminated under section 66 as of May 10, 2017. The delegate's analysis of this issue is set out at pages R6-R10 of his reasons. As will be seen, while I do not necessarily share the delegate's view about the effect of the annual incentive plans, and changes made to them from one year to the next, I agree with the delegate's conclusion that there was no deemed termination within section 66 of the *ESA* in May 2017.

52. Since several of the appellant's arguments concern the interpretation and application of her annual incentive plans, I will now review these agreements, following which I will address the appellant's arguments regarding those agreements.

53. The appellant was originally hired in December 2014, at which time she executed an employment agreement (on December 9, 2014). This agreement provided for an annual salary, a pension, and yearly vacation. The agreement also provided for incentive pay as follows:

> Corporate bonus and commission plan participation subject to plan provisions and corporate achievements as well as based on achieving annually determined goals and objectives. You will

> be qualified to participate in [the employer's] incentive program. Details of the incentive program will be released on or before January 1, 2015. [my underlining]

Accordingly, although the appellant was entitled to potentially receive additional compensation by way of a commission/incentive plan, the terms of that additional compensation were to be fixed solely by the employer on an annual basis.

54. The 2015 incentive plan, in effect for the 2015 calendar year, provided for separate incentive payments based on several different metrics, which encompassed both the employer's and its employees' performance. The 2016 incentive plan was much the same as the 2015 plan, although adding a "new product bonus." An addendum to the 2016 plan, at issue in this appeal, modified the 2016 plan, effective February 1, 2016. The 2016 plan, as well as the 2017, 2018, and 2019 plans, contained the following provision: "This incentive plan supersedes all incentive plans from prior years."

55. Although the precise terms of the plans changed from year to year, each year's plan was much the same as the prior year's plan in terms of the basic structure and operation of the incentive program. Under these plans, the employer reserved considerable discretion to itself regarding payment. For example, in the 2019 plan, the employer set monthly "margin budget" targets that had to be achieved, it reserved "the right and sole discretion to evaluate paying compensation on legacy business," it reserved "the right and sole discretion to review compensation paid as a result of major fluctuations related to margin based on timing of sales," it reserved the right to make "compensation adjustments" on "cross channel sales," and it reserved "the right and sole discretion to approve all projects including new customers and new products that qualify for bonus calculation." The 2020 plan stated that "in 2020, to expand the opportunities for increasing variable pay, there have been several changes made from the 2019 plan noted." The 2020 plan also included this proviso:

> Discretionary Annual Bonus: This element of the Channel Manager Variable Compensation Incentive Plan is 100% at the discretion of the CEO. Where Bioriginal North America has exceeded overall expectations related to sales, margin and growth, Sales Channel Managers may be eligible to receive a lump sum bonus. Overall Company performance and individual performance are considered when determining whether any type of annual bonus is being awarded. Any payment of this component of the plan is subject to the approval and authorization of Cooke Aquaculture.

56. The 2019 and 2020 plans contained the following provisions:

> By signing the [2019 or 2020] variable pay plan, each channel manager is acknowledging that all payments have been made for the prior year, [2018 or 2019] and that they are in agreement with their [2018 or 2019] statements.
>
> Any disputes or corrections to monthly statements must be documented within 30 days of receipt of each statement. Thereafter they will not be reviewed and are considered final.

57. In light of these provisions in the 2019 and 2020 incentive plans, it is arguable that the appellant was not entitled to any additional monies based on incentive payments allegedly payable under the 2019 and 2020 plans, at least with respect to incentives that were set out in statements that were not challenged. On the other hand, section 4 of the *ESA*, which prohibits any "contracting out" of *ESA* minimum standards, may also be relevant here. In any event, the employer has not appealed the Determination, and this matter has not been argued before me.

58. I should also note that the annual incentive plans were, by their express terms, only in effect for the period stated (typically, the calendar year), and the employer reserved the sole discretionary right to determine the precise contours of the incentive plan each year. Even though a new year's incentive plan might have provided for potentially overall less generous remuneration than the prior year's agreement (and, on the evidence before me, I cannot unequivocally state that ever actually occurred), that situation was not, of itself, unlawful, since that is precisely what the parties had agreed to. I reject the appellant's position that, to the extent the employer unilaterally instituted year-to-year changes in the terms of the incentive plans, that action constituted a breach of contract and, possibly, a "constructive dismissal."

59. The delegate made several findings regarding these various annual incentive plans, finding that the appellant was not entitled to any monies under the 2016 addendum, and was entitled to monies under the 2017 and 2020 plans. The delegate noted, at page R14, that the appellant agreed that she had been paid all monies due under the 2018 and 2019 incentive plans, save for vacation pay payable for 2019. I should note that the interpretation and application of a contract is a matter of mixed fact and law (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633). That being the case, on appeal, a decision-maker's decision regarding a contractual provision should only be set aside if it is tainted by a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

60. The appellant says that she is entitled to monies under the 2016 addendum, however, this argument is based on her argument that the delegate erred in determining the wage recovery period. As noted above, I do not find that the delegate erred in this regard. Accordingly, the appellant's argument with respect to the 2016 addendum cannot succeed.

61. The appellant accepts the delegate's determination as it relates to the 2017 incentive plan ($16,042.00 plus $1,235.23 in concomitant vacation pay). The delegate determined that this latter amount was due under the "Territory Margin Growth incentive" and the "New Product Bonus incentive" (page R13). However, the delegate rejected the appellant's claim for additional payments and vacation pay (pages R13-R14). I am not satisfied that the delegate made any palpable or overriding errors in this latter regard. In light of that finding, the appellant's claim for additional vacation pay for 2017 cannot succeed.

62. The appellant claims additional vacation pay for 2018, 2019, and 2020. The delegate awarded the appellant additional vacation pay of $13,025.22 for 2019 and $693.00 for 2020. The delegate did not award any additional vacation pay for 2018, and it should be noted that the appellant never filed any complaint regarding this particular matter. In my view, the delegate's treatment of the vacation pay issue is not tainted by any palpable or overriding error. The delegate's reasons are intelligible and are based on the evidence that was before him.

63. Finally, although not challenging the delegate's finding regarding the section 83 "mistreatment" issue, the appellant nonetheless says that the delegate's compensation award is too low, although she has not provided her own estimate of what an appropriate section 79(2)(c) award would be. For my part, I see no error in fact or principle in the delegate's approach to the matter of remedy, and thus I would not set it aside.

64. After considering all of the appellant's grounds of appeal, I am satisfied that this appeal has no reasonable prospect of succeeding, and that the Determination should be confirmed.

ORDER

65. Pursuant to subsections 114(1)(c) and (f) and subsection 115(1)(a) of the *ESA*, this appeal is dismissed, and the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal