Employment Standards TRIBUNAL

Citation: Evergreen Demolition Ltd. (Re)
2023 BCEST 24

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Evergreen Demolition Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Robert E. Groves

FILE NO.: 2022/198

DATE OF DECISION: May 1, 2023

DECISION

SUBMISSIONS

Liam Robertson	counsel for Evergreen Demolition Ltd.
Robbie Kaufman	on his own behalf
Tara MacCarron	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Evergreen Demolition Ltd. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the "*ESA*").

2. The Employer appeals a determination dated October 13, 2022 (the "Determination") issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") in which the Delegate found that the Employer had contravened sections 18, 40, 46 and 58 of the *ESA* in respect of a complaint (the "Complaint") delivered by Robbie Kaufman (the "Complainant"). The issuance of the Determination followed an investigation of the Complaint by another delegate of the Director (the "Investigator"). The Investigator issued an Investigation Report of relevant facts dated August 5, 2022 (the "Report").

3. The Determination ordered the Employer to pay $18,148.09 for wages and accrued interest, together with penalties of $2,000.00. The total found to be payable was, therefore, $20,148.09.

4. The Employer asserts that its appeal should be allowed because the Delegate erred in law and failed to observe the principles of natural justice in making the Determination. It argues that the Determination be varied or cancelled.

5. I have before me the Employer's Appeal Form, its submissions in support of its appeal, submissions from the Delegate and the Complainant, correspondence to the parties from the Tribunal regarding the appeal, and the record the Director was required to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. Included within these materials are the Delegate's Determination and the Reasons for the Determination (the "Reasons").

ISSUES

6. Should the Determination be varied or cancelled because the Delegate erred in law or failed to observe the principles of natural justice?

THE DETERMINATION

7. The Delegate's Reasons reveal that the Employer operates a demolition business. It employed the Complainant as a project manager and estimator within its concrete cutting division from May 13, 2020, until July 17, 2020, when the Complainant resigned. The Complainant delivered the Complaint shortly thereafter.

8. The issues identified in the Complaint required the Delegate to decide whether the Complainant was a manager, and whether the Employer had failed to pay the Complainant regular and overtime wages, statutory holiday pay, and vacation pay.

9. Section 1 of the *Employment Standards Regulation* (the "*Regulation*") defines "manager" to mean "(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity."

10. The Delegate noted that if, as the Employer claimed, the Complainant was a manager for the purposes of the *ESA*, the Complainant would not be entitled to overtime wages or statutory holiday pay. The Delegate also observed, and I agree, that while the Complainant had been hired as a project manager, a job title and a description of duties are not determinative of an employee's managerial status. Instead, a finding that an employee is a manager requires that the employee exercises the powers and functions expected of an individual occupying such a position in the specific work context. Moreover, all the elements of the employee's work must be identified and characterized before a finding can be made that the employee is a manager under the *ESA*.

11. On the evidence presented to her, the Delegate was not persuaded that it was one of the Complainant's principal employment responsibilities to supervise or direct, or supervise and direct, human, or other resources. While the Delegate acknowledged that the Complainant did supervise employees and projects, the Complainant also stated, and the Delegate accepted, that at least half his time was spent performing manual work alongside his crew to finish jobs. That the Complainant was performing direct manual labour, rather than supervision and direction, was also supported by evidence from the Employer itself, when a principal of the Employer told the Delegate that he believed the Complainant was spending too much time working beside his crew, rather than seeking out new work, which the Employer would have preferred him to do.

12. The Delegate also found that the Complainant possessed no significant power or authority to act independently on behalf of the Employer. The Complainant had no power to approve larger dollar value projects, or purchases, and while the Complainant might have played a role in vetting prospective employees, or in recommending terminations, he had no final authority to hire or fire anyone. Indeed, the Complainant's lack of authority to hire employees was most clearly revealed by the fact that the main point of contention between the Employer and the Complainant – the fact that he was spending too much time working alongside his crew as a manual labourer instead of attending to his managerial duties – could have been resolved if the Complainant had possessed the power to hire another concrete cutter, and thus release himself. However, this was not a power the Employer had decided to provide to him.

13. In summary, the Delegate stated (R11):

> If an employee is to be denied statutory benefits because they are a manager, it should be apparent they meet the regulatory definition. In this case, I am not satisfied the evidence available meets the criteria set out in the Regulation. As such, I find the Complainant was not a manager.

14. Having found that the Complainant was not a manager, the Delegate determined that the Complainant was owed both regular and overtime wages, statutory holiday pay, and vacation pay. The Delegate's calculations were based on detailed records of hours worked kept by the Complainant, which the Delegate

found to be "most probable" since the Employer, believing that the Complainant was a manager, had maintained no similar types of records.

15. The dispute relating to unpaid vacation pay centred on a disagreement about a trip the Complainant had made to Alberta. The Employer claimed that the trip constituted vacation time, for which the Complainant had been paid his regular wage. However, the Complainant provided evidence of his hours of work which demonstrated to the satisfaction of the Delegate that at least some of the time the Complainant spent on the trip was utilized to perform work for the Employer, and accordingly vacation pay should have been paid to the Complainant when his employment was terminated.

16. The Delegate also imposed four $500 penalties to be paid by the Employer, one each for the failure to pay all wages owed in a timely way, the Employer's failure to keep records of the Complainant's hours of work, its failure to pay overtime wages, and its failure to pay vacation pay.

ARGUMENTS

17. The Employer's appeal submission attaches an affidavit, sworn on November 7, 2022, by a principal of the Employer, on which it relies to support significant portions of the arguments it has presented (the "Affidavit"). I note, parenthetically, that the Employer's appeal does not include a claim made pursuant to section 112(1)(c) that evidence has become available that was not available at the time the determination was being made.

18. The Employer argues that the Delegate erred in law when she misinterpreted and misapplied the language in the *Regulation* and decided the Complainant was not a manager. It argues further that the Delegate's analysis of the relevant evidence regarding this issue was perfunctory, the Delegate failed to make proper findings as to the degree to which the Complainant's work activities justified a finding that he was a manager, and so the Delegate acted on a view of the facts which could not reasonably be entertained.

19. More specifically, the Employer submits that the Complainant's own evidence in the form of his Time Logs and Work Orders generated for days the Complainant performed work were either prepared by the Complainant, and are uncorroborated, or they identify the Complainant being present at a worksite in his capacity as a supervisor or foreman. The Employer argues the Complainant exercised control over human resources, he prepared quotes and made purchases, and he enjoyed rights of independent action and autonomy common to persons performing management functions. The Employer states further that its position the Complainant was a manager was affirmed by other witnesses.

20. The Employer argues that the Complainant's claim for vacation pay regarding his trip to Alberta is flawed because it is based on contradictory evidence. It points to what it characterizes as the Complainant's attempt to "suck and blow" when he stated during the investigation that he performed work while in Alberta, in the form of his taking customer calls and managing employees, while at other times the Complainant said he fulfilled no duties as a manager.

21. The Employer also asserts that the Delegate failed to observe the principles of natural justice. It submits that:

- The Delegate acted unreasonably when assessing the weight to be attributed to the evidence of the parties, and her treatment of it;

- The Complainant presented unreliable evidence which the Delegate accepted, despite the fact that the Employer presented credible and reliable evidence to the contrary;
- The Employer was not provided with sufficient opportunity to rebut the Complainant's allegations, or aspects of the evidence on which the Delegate relied when making the Determination;
- The process employed in the investigation and determination of the Complaint reveals bias against the Employer, leading to a Determination that was unfair.

22. For these reasons, the Employer asserts that the Complainant's claims for unpaid wages are groundless, and that all but one of the penalties imposed in the Determination – a penalty for failure to keep proper payroll records – should not have been assessed.

23. The Delegate has responded to the Employer's submissions in the appeal. The Delegate asserts that the findings of fact made in support of the Determination with which the Employer disagrees do not constitute errors of law, and that the Employer simply wishes to re-argue evidentiary points the Delegate declined to accept at first instance.

24. Regarding the Employer's submission that the Delegate failed to observe the principles of natural justice, the Delegate says that the Employer was provided with a reasonable opportunity to respond to the Complaint, in accord with the prescription appearing in section 77 of the *ESA*.

25. The Complainant has also delivered a submission. It attempts to cast doubt on the veracity of a principal of the Employer, and repeats his evidence communicated to the Delegate that, while the Employer hired him as a project manager and estimator, he was soon pushed into a role as a labourer. He argues, too, that his claim for vacation pay is valid, as his trip to Alberta was work-related.

26. The Employer has delivered a reply submission. In it, the Employer asserts that it does not dispute the Delegate's findings of fact. Rather, it challenges the legal conclusions the Delegate drew from those facts. It submits that the "isolated instances" where the Complainant may have worked as a labourer were insufficient to warrant the Delegate's conclusion that the Complainant was not a manager.

27. The reply takes issue with the Complainant's assertion the Employer "pushed" him into a role as a labourer. Referring to the Affidavit, the submission denies the Employer ever asked or demanded that the Complainant perform labouring work, but even if it were found that this did occur, such a finding, on its own, would not of necessity lead to the conclusion that the Complainant's primary employment responsibilities were more consistent with his acting as a labourer and not as a manager.

28. The Employer again submits that it was provided with an inadequate opportunity to respond to the Report, or the Complaint in general, prior to the issuance of the Determination.

29. Finally, the Employer alleges the disclosure of the record in the appeal reveals that the Investigator provided legal advice to the Complainant regarding the probability of success for the Complaint and regarding an offer of settlement that had been made. The Employer argues the Investigator's conduct was "not conducive to a fair and unbiased investigation process."

ANALYSIS

30. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

31. Subsection 115(1) of the *ESA* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

Errors in Law

32. It is trite to state that an appeal is not a re-investigation of a complaint, nor is it intended to be an opportunity to re-argue positions taken during the investigation process in the hope that the Tribunal will come to a different conclusion. Rather, an appeal is an error correction process, with the burden of showing error on an appellant (see *MSI Delivery Services Ltd.*, BC EST D051/06). If the Tribunal were to re-investigate and re-hear every complaint on appeal it would act in a manner contrary to section 2(d) of the *ESA*, which states that one of the purposes of the statute is to provide fair and efficient procedures for resolving disputes over the application and interpretation of its provisions (see *McKay*, BC EST # D146/05).

33. Furthermore, agreeing that a delegate's analysis was somehow flawed or incomplete on a point, and saying it was wrong, are two different things. The objective of an appeal is not simply to demonstrate that that a delegate's treatment of a complaint was imperfect. It is also necessary to show that the defect has led the delegate to an incorrect legal conclusion, which would justify the Tribunal in exercising its remedial authority under section 115 (see *Identec Solutions, Inc.*, BC EST # D052/03).

34. Finally, the *ESA* provides no opportunity for the Tribunal to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law. Errors of fact do not become errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's findings of fact if the appellant establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments*

Corp. v. B.C. (Assessor) (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

35. Having regard to these principles, I have decided the Employer has failed to establish that the Delegate erred in law. It follows that I decline to find the Delegate's analysis of the evidence to have been perfunctory, that she gave improper weight to some aspects of the evidence over others, that she acted on a view of the facts that could not reasonably be entertained, or that she failed to apply the relevant legal tests properly.

36. In my view, the substance of the Employer's appeal challenging the Delegate's treatment of the evidence on the critical points at issue is that the Determination embodies factual conclusions with which the Employer disagrees. That, however, is an insufficient basis to support a successful appeal. The fact that a reasonable person, viewing the evidence that was presented, might have reached different conclusions is of no moment unless, as the authorities state, the conclusions drawn are perverse or inexplicable.

37. A review of the Delegate's Reasons, and the Report on which it is based, does not persuade me that the Delegate's factual conclusions in support of the Determination were perverse or inexplicable in the sense I have described.

38. The Report reveals a detailed consideration of the relevant evidence presented by the parties on multiple occasions over a period of months. The Report, and the Delegate's Reasons derived from it, exhibit no failure to assess relevant evidence, or to attribute to it a weight. The Employer does not dispute this. What the Employer questions is the weight attributed to evidence presented by the Complainant, which the Employer says was contradicted by other evidence it presented. It is a commonplace to state, however, that the weight to be given to evidence is an issue of fact that is within the exclusive authority of a delegate to decide. This means that the Tribunal may not interfere with a factual conclusion with which it may disagree where the disagreement stems from differences of opinion over the weight to be assigned to the underlying facts relating to the matter (see *Housen v. Nikolaisen*, 2002 SCC 33).

39. The Delegate acknowledged, as did the Complainant, that the duties contained in the Complainant's job description implied managerial functions. However, the Delegate also noted, correctly, in her Reasons (R10) that:

> …job title and description are not determinative of an individual's status as a manager. Rather, the question to be answered is whether the Complainant exercised the powers and functions of a manager, as opposed to merely possessing these powers notionally. It is the total characterization of the Complainant's employment duties that ultimately determines whether he should be considered a manager for the purposes of the Act.

40. The Delegate did observe that the Complainant performed certain actions that were consistent with managerial status. The Complainant did, for example, act as a supervisor and foreman on the projects for which he was responsible, he did prepare cost estimates, he did make price-limited purchases on behalf of the Employer, and he did assist in the search for other potential employees. Still, the Delegate concluded that these actions were not the Complainant's principal employment responsibilities, that is, they did not outweigh the significant amount of time he spent performing work as a concrete cutter labourer during much of his tenure.

41. The Employer argues that the Complainant's Time Logs and Work Orders are either unreliable because they were prepared by the Complainant, or they show a pattern of work behaviour that is inconsistent with his claim that much of his time was spent performing manual labour. However, the entries in the Time Logs are short on the details of all the duties the Complainant performed, and references to his presence at a work site in his capacity as a supervisor does not preclude a finding that he was also performing manual work there.

42. The Employer submits further that evidence of witnesses proffered by the Employer should have convinced the Delegate that the work the Complainant may have performed as a labourer was insufficient to preclude a finding his principal employment responsibilities were managerial. The Delegate's Reasons reveal that she was aware of the statements provided by these witnesses. The substance of the evidence the witnesses presented is that they did not observe the Complainant performing manual labour, which is different from their saying he did not perform any of that type of work. At the same time, the Complainant tendered evidence from a co-worker that supported his contention regarding his work as a labourer. The inference to be drawn from this is that the Delegate decided the evidence of the Employer's witnesses was inconclusive, and that the evidence of the Complainant and his witness regarding the amount of time, including overtime hours, he was spending working on tools should be given more weight when determining the principal question at issue in the Complaint.

43. In addition, there is evidence in the record on which the Delegate could reasonably rely in support of the Complaint regarding the Complainant's working overtime hours, and his status as a manager generally. There is, for example, evidence of a text message from the Complainant to the Employer's principal stating:

> I was wondering the status of any potential new cutting operators coming on board? I will be honest I don't mind going out in the field once in awhile but for the last couple weeks it's been leaving home at 5am and getting home anywhere from 8-10pm. Long days!!!! I'm getting tired and not wanting to do this full time. Let me know. Thank you.

44. In response to this message the Employer's principal texted: "Your [sic.] absolutely right Robb we'll talk soon." The Complainant asked the Investigator, rhetorically, why he would request help in this way if, as the Employer was asserting, he was a manager who could hire help on his own.

45. At the same time, the record includes statements from the Employer's principal to the Investigator that the Complainant "fell short from the beginning" because he was "spending more of his time with the men and not bringing in work." The principal also told the Investigator that the Complainant was hired to bring in more work, but instead the Complainant "wanted to talk about his productivity on the equipment". Elsewhere, the Employer's principal acknowledged to the Investigator that he did not know the proportion of his time the Complainant was working on tools rather than acting as a manager, or the number of hours the Complainant might be spending working as a labourer, because the Complainant "would come and go as he pleased" and since the Complainant was "a salaried employee" the principal "never kept track."

46. In my view, given the relative lack of knowledge on the part of the Employer regarding the extent to which the Complainant might be working as a labourer, it was not unreasonable for the Delegate to have relied on the evidence of the Complainant in support of her finding that the Employer had failed to establish that the principal employment responsibilities of the Complainant were managerial.

47. The Employer also submits that "if the Determination is upheld, the Tribunal will be sending a message to employees that, regardless of the responsibilities and duties you were hired to perform, if you fulfill other responsibilities and duties not in your job description and not at the request of your employer, then you will be compensated even to the detriment of your employer." Indeed, there are circumstances within the statutory framework where this might occur. For example, section 35 of the *ESA* expressly states that an employer must pay overtime wages if the employer requires, "or directly or indirectly allows," an employee to work overtime hours. Employers have an obligation to control the workplace, and if they do not want an employee to work overtime hours, they must not only direct the employee not to work beyond the hours of work set out in the employee's employment contract, they must also supervise the employee and record the employee's hours of work to ensure that no overtime hours are being worked (see *Re Geotivity*, BC EST #D056/05). Here, the Complainant's employment agreement set out his hours of work to be Monday to Friday from 7:00 am to 3:00 pm. The Employer admitted to the Investigator that he never advised the Complainant not to work overtime hours. Moreover, the Employer did not keep track of the Complainant's hours of work, nor did it record them as required by section 28 of the *ESA*. Indeed, it is the penalty for its failure to keep proper payroll records which is the sole penalty in the Determination the Employer does not dispute.

48. As for the Employer's submission the Complainant should not be awarded vacation pay because the Complainant was paid his salary for days spent on a trip to Alberta, I see no reason to disturb the Delegate's finding that the trip was not intended to be a vacation. The evidence the Delegate accepted was that the Complainant made the trip to take delivery of equipment to be used in the Employer's business. There was, in addition, no contemporary documentary record of the trip indicating it was to constitute vacation time, and it did not become an issue until the Employer removed the line for vacation pay in the Complainant's final paycheque at the time of his resignation. The fact that the Complainant performed what might be construed to be managerial tasks during his time in Alberta is of limited probative value, because the Complainant never disagreed, he was hired to work as a project manager and estimator, and he acknowledged he did perform work of that type. This was never in question. What the Complaint was meant to address was the inordinate amount of time the Complainant was spending in work as a labourer, and not as a manager.

Natural Justice

49. There are aspects of the Employer's submissions on this issue that overlap with its positions argued in respect of its claim that the Delegate erred in law. I refer to its assertions that the Delegate acted unreasonably when assessing the weight to be attributed to the evidence of the parties, and that the Complainant presented unreliable evidence which the Delegate accepted, despite the fact the Employer presented credible and reliable evidence to the contrary. For the reasons expressed above regarding these matters, I am not persuaded there was a failure of natural justice on either of these grounds.

50. The Employer goes on to say, however, that the investigatory process in this case was unfair, because the Investigator made "time-consuming" and "invasive demands" on the Employer for production of documents "without explanation", leading to a "dynamic wherein not only did the Employment Branch have all the power, but they were able to cater their demands for evidence based on what they anticipated the outcome to be." For these reasons, the Employer submits it was deprived of a sufficient opportunity to rebut the Complainant's allegations, or aspects of the evidence on which the Delegate relied, and further that the process employed in the investigation and determination of the Complaint reveals bias against the Employer.

51. I disagree.

52. My review of the record reveals an investigatory process in which the elements of the Complaint were communicated to the Employer, the Investigator was more than diligent in providing the Employer with the relevant evidence delivered by the Complainant, and the Employer was provided with ample time to respond to the Investigator's queries when the importance of the matter is considered, including, for example, time relief for the delivery of a response when the Employer's principal was ill. On this point, it is well to remember that section 77 of the *ESA* merely requires that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. This means that the right to respond is not absolute. It is sufficient that the person under investigation be provided with enough details of the claim to make the opportunity to respond meaningful (see *Bero Investments Ltd.,* BC EST #D035/06). In my view, that standard was met in this case.

53. An assertion by the Employer that its answer to the Complaint was incomplete because it believed further documents were to be disclosed and, by inference, other submissions made, when the Determination was issued is belied by the fact that when the Report was delivered to the parties the Investigator stated that the parties had been asked to provide all the information they believed to be relevant to the Complaint, but if a party wished to submit further information, or clarifications of information, they should do so by a fixed date thereafter. The Investigator also advised that the Report, and any further responses, would be considered in making a final determination of the Complaint. When the fixed date for further submissions had passed, with no communications having been received from the parties in response to the Investigator's request, the Investigator advised the parties that the Complaint was being assigned to a decision-maker, and a determination might occur at any time.

54. The Employer asserts further that there was evidence it submitted during the investigation which was not included in the Report. It states that this evidence is set out in the Affidavit, delivered now in support of the appeal. But when the Report was issued, the Investigator also advised the parties that if they believed there were documents they had delivered previously that were relevant and were not listed in the Report, they should identify the documents in any written response, together with an explanation why the documents should be included. As I have noted, the Employer did not respond to the Investigator's invitation. In these circumstances, it cannot be argued there was a failure of natural justice because relevant documents were not included in the Report.

55. The Employer submits that the appeal is warranted because the investigation and determination of the Complaint reveals bias. An allegation of bias against a decision-maker is serious and should not be made speculatively, which means it should not be made unless supported by sufficient evidence to demonstrate to a reasonable person there is a sound basis for apprehending that the person against whom it is made did not bring an impartial mind to bear upon the case (see *Re Zadehmoghadami (cob E-Hot Wired Computers)*, BC EST #D171/05, and *Re Dang*, BC EST #D184/05). The onus of demonstrating bias lies with the person who is alleging it. The burden is a heavy one. A real likelihood or probability of bias must be demonstrated; a mere suspicion or an impression of bias is insufficient to establish it (see *Re Gallagher (cob Mid Mountain Contracting)*, BC EST #D124/03).

56. The Employer's concerns relating to bias are outlined, primarily, in the Affidavit. In my opinion, they are largely based on subjective impressions of the Investigator's disposition regarding the substance of the Complaint, and they fall short of establishing bias to the requisite standard.

57. The Affidavit alleges, in addition, that the Investigator was "advocating" for the Complainant, and therefore acting unfairly, when the Investigator advised the Employer of the potential adverse outcomes that a final determination of the Complaint might incorporate, and then communicated a settlement proposal the Investigator had received from the Complainant. The Employer's submission in reply also claims that the record reveals the Investigator "favouring" the Complainant when the Investigator provided what the Employer characterizes as "legal advice" to the Complainant regarding the probability of success should the Complaint proceed to the issuance of a determination, and commentary as to the substance of a settlement offer proposed by the Employer.

58. These messages were delivered after the Report had been issued and the Complaint had been assigned for determination to a different delegate. I reject the submission that the Investigator's informing the parties of possible outcomes and the risks inherent in proceeding to a determination, or his communicating and commenting upon settlement offers can be construed as revealing a bias in favour of the Complainant. Since it was the Investigator who had performed the investigation, he was in the best position to express a view as to the Employer's potential exposure, not only to an order for the payment of wages, but also to an order that the Employer pay administrative penalties should the Complaint remain unresolved before a determination was issued. It was also open to the Investigator to explain to the Complainant the possibilities for failure regarding aspects of the Complaint. Moreover, section 78 of the *ESA* provides express authority to the Director, and therefore delegates, to assist in settling complaints.

ORDER

59. Pursuant to section115 of the *ESA*, I order that the Determination dated October 13, 2022, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal