Citation: Vancouver Dispensary Society (Re)
2023 BCEST 27

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Vancouver Dispensary Society carrying on business as Get Your Drugs Tested and/or The Medicinal Cannabis Harm Reduction & Education Centre

(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Jonathan Chapnick

FILE NO.: 2023/004

DATE OF DECISION: May 8, 2023

DECISION

SUBMISSIONS

Nathan Lidder	counsel for Vancouver Dispensary Society carrying on business as Get Your Drugs Tested and/or The Medicinal Cannabis Harm Reduction & Education Centre
Nikala de Balinhard	delegate of the Director of Employment Standards

OVERVIEW

1. The Vancouver Dispensary Society carrying on business as Get Your Drugs Tested and/or the Medicinal Cannabis Harm Reduction and Education Centre (the "Employer") provides free drug checking, harm reduction, and education services at and from its "Get Your Drugs Tested" location in Vancouver ("GYDT"). At GYDT, the Employer checks drugs for contaminants using a fourier-transform infrared ("FTIR") spectrometer. It also provides site visitors with information and education regarding substance use and safer consumption practices. And it offers snacks, personal care items, and first aid and harm reduction supplies to clients and visitors. Stephen (Gus) Fowler (the "Employee") was hired by the Employer on July 18, 2019 and was employed by the Employer as a FTIR technician and/or harm reduction worker until the Employer terminated his employment on September 9, 2020. When it terminated the Employee, the Employer did not pay him wages as compensation for length of service ("CLOS") under s. 63 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [***ESA***]. The Employer maintains that its liability for CLOS was discharged because the Employee was dismissed for just cause.

2. On February 24, 2021, the Employee filed a complaint (the "Complaint") to the Director of Employment Standards (the "Director"), seeking a CLOS payment from the Employer. His CLOS claim succeeded. On December 29, 2022, the adjudicator of the Complaint, Nikala de Balinhard (the "Adjudicative Delegate"), issued a determination with written reasons (the "Determination"), in which she concluded that the Employer owed the Employee CLOS and ordered the Employer to pay the Employee $1,570.71 in wages and interest and to pay an administrative penalty of $500 for violating the *ESA*. The success of the Employee's CLOS claim turned on the Adjudicative Delegate's finding that the Employer had not met its burden of proving that the Employee's dismissal was for just cause.

3. The Employer appealed the Determination to this Tribunal on January 13, 2023. In its appeal submissions, the Employer challenges the Adjudicative Delegate's legal analysis regarding just cause, questions the fairness of the process undertaken by the delegate who investigated the Complaint, Tiffany Chang (the "Investigative Delegate"), and puts forward "fresh evidence" for the Tribunal's consideration. In light of my analysis below, I have not found it necessary to seek submissions from the Employee or the Director. For the reasons that follow, I find no error of law in the Adjudicative Delegate's just cause analysis and no breach of fairness principles in the Investigative Delegate's process. In addition, I have decided that the Employer's "fresh evidence" 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

4. The Adjudicative Delegate decided two issues in the Determination. The first issue related to CLOS. The second issue related to s. 21 of the *ESA*. The Adjudicative Delegate decided the s. 21 issue in the Employer's favour and the parties did not appeal that decision. The CLOS issue before the Delegate centred on whether the Employee was dismissed for just cause. If the Employee was dismissed for just cause, then the Employer was not required to pay wages as CLOS: *ESA*, s. 63(3)(c).

5. The Employer took the position that the Employee was dismissed for just cause. The Adjudicative Delegate described the Employer's information and evidence, and the submissions of its legal counsel, in the Determination. The Employer argued that it terminated the Employee on September 9, 2020, for "insubordination and general non-adherence to company policies," the details of which comprised three incidents. The first incident took place on August 28, 2020 (the "First Incident") and involved the Employee giving food and water to a vulnerable GYDT client despite contrary directions from the Employer, which were based on instructions from Emergency Medical Services ("EMS") not to provide food or drink to the client. In its November 2, 2021 submission to the Investigative Delegate, the Employer asserted that the Employee's conduct on August 28, 2020 "was so egregious that it could have caused serious bodily harm [to] or even [the] death" of the client, "the expense of which would have ultimately been borne by the Employer."

6. The second incident occurred on September 7, 2020 (the "Second Incident") and involved the Employee returning to work at GYDT within a few days of informing the Employer that he could not attend work for an extended period because he was required to self-isolate for 14 days due to a potential COVID-19 exposure. The Employer claimed that the Employee lied about receiving a negative COVID-19 test prior to his return. In its November 2, 2021 submission, the Employer alleged that the Employee did not get tested for COVID-19 prior to his return to GYDT and did not obtain direct approval from the Employer to return to work. The Employee disputed these allegations. The Employer further asserted that the Employee "disregarded the instructions of Public Health" and "acted contrary to [the Employer's] Workplace Safety Plan." His conduct, in turn, "resulted in GYDT shutting down" temporarily, which was "detrimental not only to the Employer but also the community it serves." The third incident took place sometime after the Employee's termination (the "Third Incident") and involved a phone call between the Employee and an Employer representative regarding employment insurance ("EI") and/or the Employee's EI record of employment. In its November 2, 2021 submission, the Employer alleged that during this phone call, the Employee "essentially asked the Employer to fraudulently assist him in obtaining Employment Insurance by revising his Record of Employment." The Employee disputed this allegation.

7. After setting out the Employer's case, the Adjudicative Delegate turned to the Employee's information, evidence, and arguments, including the witness evidence of an Emergency Medical Call Taking Manager at BC Emergency Health Services (the "Witness"). The Witness was not an eyewitness to any of the three incidents. Rather, his evidence consisted of written answers to two questions posed by the Employee in relation to the First Incident. In the opinion of the Witness, given the circumstances of the First Incident (as outlined by the Employee in an email to the Witness on November 16, 2021), EMS's instructions not to provide food or drink to the GYDT client "no longer needed to be followed" at the point in time when the Employee gave food and water to the client. Furthermore, the Witness opined that he did "not believe that [the Employee] would be liable" for giving a person food or drink while waiting for EMS to arrive,

because in doing so the Employee would "simply [be] trying to help a person in need."

8. In the findings and analysis portion of the Determination, the Adjudicative Delegate accepted that the Employee's "disregard for the instructions of his managers and EMS" during the First Incident "was serious because it could have negatively impacted the health and safety of one of the Employer's clients." However, the Adjudicative Delegate found that there were circumstances that mitigated the seriousness and willfulness of the Employee's actions, and she concluded that the Employee's conduct on August 28, 2020 did not amount to just cause for dismissal. Similarly, the Adjudicative Delegate accepted that the Employee's actions during the Second Incident could have had serious negative consequences for the health and safety of clients and co-workers at GYDT. However, on her assessment and weighing of the evidence of each party, the Adjudicative Delegate found that the Employer had not proven that the Employee lied about receiving a negative COVID-19 test, returned to work without management approval, and/or willfully disobeyed direct Employer instructions not to return to GYDT. Given these findings and others, the Adjudicative Delegate concluded that the Employee's conduct during the Second Incident did not give the Employer just cause for his dismissal. Finally, the Adjudicative Delegate reasoned that the Employee's conduct during the Third Incident was immaterial to the question of just cause for the Employee's dismissal because the Third Incident occurred after the Employee had already been dismissed. In sum then, on the totality of the parties' evidence regarding the three incidents, and considering the incidents individually and collectively, the Adjudicative Delegate concluded that the Employer had not met its burden of proving it had just cause for the Employee's dismissal. She therefore determined that the Employer owed the Employee wages for CLOS.

ISSUES

9. There are three issues in this appeal:

   a. Did the Adjudicative Delegate err in law?: *ESA*, s. 112(1)(a).

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

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

10. I note that the Employer raised an additional issue during the course of these appeal proceedings. On March 1, 2023, the Employer objected to the completeness of the record that was before the Adjudicative Delegate at the time of the Determination (the "Record"), taking the position that six documents were missing from the Record: a printout of a screenshot of an unidentified webpage titled "Weather in Vancouver in August 2020," displaying a weather calendar; an EI record of employment issued by an Employer representative on March 16, 2020 for the maternity leave of a managerial employee; a May 14, 2020 Order of the Provincial Health Officer requiring BC employers to post their COVID-19 Safety Plans; WorkSafeBC's template COVID-19 Safety Plan; the Employer's "Workplace COVID 19 Safety Plan" for GYDT; and notes of a phone call between the Investigative Delegate and the Employee. In the Director's subsequent response submission regarding the completeness of the Record, the Adjudicative Delegate stated that the first five documents were "not provided by the Employer or any party during the investigation of the complaint and [were] therefore not before me at the time the Determination of the complaint was made." Further, the Adjudicative Delegate suggested that there were no missing notes of

a phone call between the Investigative Delegate and the Employee. She stated that all notes from the Investigative Delegate's telephone conversations with the Employee were documented in the Record, and "no additional notes were before me at the time the Determination of the complaint was made." In light of this information, the Employer, in its final reply submission regarding the completeness of the Record, recharacterized the first five documents as "fresh evidence" that should be accepted by the Tribunal in this appeal, and made no further mention of the call notes that apparently do not exist. I therefore consider the issue regarding the completeness of the Record to be resolved, and I will deal with the first five documents in my analysis regarding the "new evidence" ground of appeal.

11. In deciding this appeal, I have considered the Employer's letter and appeal form received by the Tribunal on January 13, 2023, and the Employer's March 1, 2023 appeal submission, comprising a revised appeal form, the Employer's written arguments regarding the merits of the appeal and the completeness of the Record, and a printout of the Supreme Court of Canada's judgement in *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 (the "Appeal Submission"). I have also considered the parties' additional submissions regarding the completeness of the Record, namely the Director's March 16, 2023 response submission, and the Employer's final reply submission, dated March 31, 2023. In addition, I have considered the Record itself. Last, as I discuss below, I have reviewed, but not considered, the five documents submitted by the Employer as "fresh evidence," which the Employer says should be accepted by the Tribunal in this appeal.

12. 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

13. 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 err in law?: *ESA*, s. 112(1)(a).

14. Under section 112(1)(a) of the *ESA*, a person can appeal a determination to the Tribunal on the ground that "the director erred in law." The error of law ground of appeal centres on questions of legal analysis and reasoning. In deciding whether a delegate of the Director erred in law, the Tribunal considers whether the delegate misinterpreted or misapplied a section of the *ESA* or an applicable principle of law, acted without evidence or on an unreasonable view of the facts, or adopted an analysis or exercised a discretion in a way that was wrong in principle: *Dr. Eli Rosenberg Inc.*, 2023 BCEST 4; see, *e.g.*, *Britco Structures Ltd.*, BC EST # D260/03; *Jane Welch operating as Windy Willow Farm*, BC EST # D161/05; *C. Keay Investments Ltd. c.o.b. as Ocean Trailer*, 2018 BCEST 5. The onus is on the appellant to address these considerations and establish, on a balance of probabilities, that the delegate erred in law.

15. The Employer makes three discernible arguments under the error of law ground of appeal, which I will address in turn.

1. Just cause for serious misconduct during the First Incident

16. The Employer's first argument raises a question of mixed fact and law, namely whether the facts of the Employee's dismissal satisfied the legal test for just cause. In its submissions, the Employer suggests that the Adjudicative Delegate erred in law in deciding that the Employer failed to prove just cause based on serious or willful misconduct in relation to the Employee's actions during the First Incident. In particular, the Employer takes issue with what it seems to see as a contradiction in the Adjudicative Delegate's findings and conclusions. On the one hand, the Adjudicative Delegate accepts the evidence of the Employee's knowing and serious disregard for management directions on August 28, 2020. On the other hand, the Adjudicative Delegate concludes that the Employee's misconduct did not amount to just cause for dismissal. The Employer appears to view these findings and conclusions as being in conflict and reflecting a misapplication of the legal test for just cause. I disagree.

17. To establish just cause on the basis of employee misconduct, an employer must prove not only that the misconduct occurred, but also that the proven misconduct "is of such a nature and degree so as to justify termination": *Storms Restaurant Ltd.*, 2018 BCEST 70 at para. 29. The just cause analysis "requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct could be reconciled with sustaining the employment relationship by imposing a more 'proportionate' disciplinary response": *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1 at para. 27 [***BC Ferries***], citing *McKinley v. BC Tel*, [2001] 2 S.C.R. 161. This assessment does not exist in a vacuum. As the Employer indicates in the Appeal Submission, the employment relationship must be considered as a whole. An employer is required to prove just cause within the specific context and circumstances of its employee's employment and the alleged acts of misconduct: *John Curry*, 2021 BCEST 92 at para. 102. In other words, "a 'contextual approach' governs the assessment of the alleged misconduct": *BC Ferries* at para. 27. This involves consideration of the nature and seriousness of the alleged misconduct, and the circumstances surrounding the employee's behaviour, including factors such as the nature of the employee's position and their disciplinary history: see generally Howard A. Levitt, *Law of Dismissal in Canada*, 3rd ed. (Toronto: Thomson Reuters Canada, 2003, loose-leaf), pt. I at ch. 6.

18. This is precisely the analysis in which the Adjudicative Delegate engaged in the Determination. She first determined that the evidence established the Employee's serious misconduct on a balance of probabilities, and then she properly went on to take a contextual approach in assessing whether the misconduct was inconsistent with the continuation of the parties' employment relationship. There was nothing wrong, in principle, with the Adjudicative Delegate's analysis, and I find no misinterpretation or misapplication of the *ESA* or any applicable principle of law in her reasons. Furthermore, I find that the Adjudicative Delegate decided the just cause issue before her based solidly on the information and evidence provided by the parties. Contrary to the Employer's assertions in the Appeal Submission, the Adjudicative Delegate did not "misapprehend the evidence" in relation to the First Incident. Rather, she expressly relied on the following findings of fact, drawn from the evidence, in concluding that the Employee's actions on August 28, 2020, were not of such a nature and degree as to justify the Employee's summary dismissal:

a. The Employee had first aid training and the Employer relied on him for his expertise during the First Incident. I note that this finding of fact was based on the Employer's evidence during the investigation (see Record at 8 and 9). The Adjudicative Delegate's reliance on this evidence was not unreasonable, and I therefore reject the assertion in the Appeal Submission that there is "no evidence on the record as to the [Employee's] first aid training."

b. The Employee gave food and water to a client in need, believing he was acting in accordance with his job duty to treat clients with care and compassion.

c. The Employee instructed the client to save the water for later, rather than consuming it right away.

19. Taken together, these findings suggest that the Employee disobeyed the Employer on August 28 not out of malice or with disregard for the safety of others (as alleged in the Employer's November 2, 2021 submission), but rather in an attempt to help a vulnerable client, utilizing his recognized training and experience. Consistent with general principles of the just cause analysis, the Adjudicative Delegate characterized the above findings as mitigating factors weighing against the Employee's summary dismissal: see generally P.M. Neumann & J. Sack, eText on Wrongful Dismissal and Employment Law (2020), Lancaster House, 2021 CanLIIDocs 1, pt II, c.7, at 7.1, online: <https://canlii.ca/t/nc> (retrieved on 2023-04-26). Given this context, it was not unreasonable for the Adjudicative Delegate to conclude that the Employee's misconduct during the First Incident did not need to be fatal to the employment relationship between the parties. I therefore find no error of law in the Adjudicative Delegate's decision that the Employer failed to prove just cause based on serious or willful misconduct in relation to the First Incident.

2. Witness evidence related to the First Incident

20. The Employer's second argument under the error of law ground of appeal relates to the evidence of the Witness. In the Appeal Submission, under the heading, "Ground of Appeal 2," the Employer claims that the Adjudicative Delegate "accepted the evidence" of the Witness in relation to the First Incident, and then "made a number of assumptions and inferences" based on the Witness' evidence, "which led to a misapplication of the evidence and ultimately an error of law." These claims hold no merit. There is no indication in the Determination that the Adjudicative Delegate made any findings of fact, assumptions, or inferences based on the opinions of the Witness regarding the First Incident; she simply recounted his evidence in her summary of the information and arguments provided by the parties during the investigation of the Complaint. The reasons for the Adjudicative Delegate's decision regarding the First Incident are set out clearly and logically in the Determination (at R12) and bear no resemblance to the Employer's assertions under its "Ground of Appeal 2."

3. Public health order

21. The Employer's final argument under the error of law ground of appeal relates to the Second Incident and the May 14, 2020 Order of the Provincial Health Officer requiring BC employers to post their COVID-19 Safety Plans (the "PHO"). The Employer seems to argue that the Adjudicative Delegate "misapplied the law with respect to the PHO" when she relied on the Employee's "evidence about his ability to return to work," despite the conflict between that evidence and the Employer's PHO-mandated COVID-19 Safety

Plan (the "Safety Plan"), which "did not allow for any latitude or discretion on the part of the [Employee] to decide when he could return to work safely." I reject this argument for the following reasons.

22. First, as I discuss below, the PHO and Safety Plan were not before the Adjudicative Delegate when she made the Determination, and the Employer has not established that these documents meet the criteria for acceptance by the Tribunal in this appeal. Second, the Employer's submissions regarding the Adjudicative Delegate's purported misapplication of "the law with respect to the PHO" do not specify which legal provisions were misapplied. As far as I can tell, the "law with respect to the PHO" was the Provincial Health Officer's order (at para. F(ii) of the PHO), pursuant to the *Public Health Act*, SBC 2008, c. 28, requiring the Employer to post a copy of its COVID-19 Safety Plan on its website and at GYDT so that it was readily available for review, and to provide a copy of the plan to a health officer or WorkSafeBC officer upon request. There is no misinterpretation or misapplication of this order in the Determination.

23. In sum, then, I reject the Employer's arguments under the error of law ground of appeal. The Employer has not shown me, on a balance of probabilities, that the Adjudicative Delegate erred in law.

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

24. The Employer's second ground of appeal relates to whether the process in coming to the Determination was fair. Under section 112(1)(b) of the *ESA*, a person can appeal to the Tribunal on the ground that the Director or their delegates failed to observe the principles of natural justice. 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.

25. In the present appeal, the Employer argues that the Investigative Delegate violated the rules of procedural fairness and the principles of natural justice by considering "additional submissions of the [Employee] after the case was closed." The Employer asserts that the "record shows that in November 2021 Ms. Tiffany Chang advised the [Employee] that the case was closed." In support of this assertion, the Employer relies on a November 10, 2021 email (the "Email") from the Employee to the Investigative Delegate, in which the Employee states that he "cannot end things here" and that it is "unacceptable" that the delegate "took over six months to get back to [him], and then closed a case." The Employer goes on to assert that "once the case was closed it was incumbent on Ms. Chang not to accept further submissions" from the parties. The Employer says that the Investigative Delegate breached this obligation: "Clearly, Ms. Chang accepted further submissions from the [Employee] and reversed the decision to close the case without hearing from the [Employer]," which amounted to a "violation of the rules of procedural fairness and principles of natural justice (right to be heard)."

26. I appreciate that the Employer is dissatisfied with the outcome of the Complaint; however, its natural justice argument is entirely without merit. The Record may well show that the Employee stated that the Investigative Delegate "closed a case," but it does not show that the Investigative Delegate actually told the Employee that the parties' case was closed in November 2021, nor does the Record show that the parties' case was, in fact, closed at that time. Despite the Employee's statement in the Email, the materials before me do not indicate that the Investigative Delegate "closed" or intended to "close" the complaint, investigation, or determination processes under Part 10 of the *ESA*. On the contrary, those processes

appear to have been very much "open" in November 2021. After receiving a detailed submission from the Employer on November 2, the Record shows that the Investigative Delegate spoke to the Employee on the phone on November 8, during which time the Employee advised that he did not want to withdraw the Complaint; he wished to continue. The Record shows that the Investigate Delegate then spoke to the Employer to present "all information and the next steps." The next day, on November 9, the Investigative Delegate emailed the Employer's legal counsel, advising that the Complaint process was proceeding, and that her next step was to prepare an investigation report. The Investigative Delegate stated that she would begin writing the report on November 10. She indicated that the parties would have an opportunity to review the report before she submitted it to the Adjudicative Delegate. She offered counsel an opportunity to confirm whether his clients were agreeable to proceeding in this way, or whether they wished to discuss the case with her further. In an email response later that day, counsel for the Employer agreed to the next steps outlined by the Investigative Delegate, and provided new evidence and related submissions for the Investigative Delegate's consideration. On November 10, shortly after receiving the Email, the Investigative Delegate wrote to counsel for the Employer, requesting a call to gather further information for her investigation report and assessment of the Complaint. The Record shows that the Investigative Delegate met by conference call with the Employer and its counsel on November 23, at which time the Employer and counsel provided additional information and submissions regarding the First Incident and the Second Incident. Given this timeline of events, no reasonable person would conclude that a decision had been made in November 2021 to close the Complaint, or that the Investigative Delegate subsequently "accepted further submissions" from the Employee and "reversed the decision to close the case" but did not advise the Employer of, or give the Employer an opportunity to respond to, these developments.

27. There is no evidence the Employer was deprived of its right to be heard in the Director's proceedings in this case. I therefore dismiss the Employer's argument under the natural justice ground of appeal. The Employer has not shown me, on a balance of probabilities, that the Investigative Delegate failed to observe the principles of natural justice.

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

28. The final issue in this appeal is whether evidence has become available that was not available at the time the Determination was being made. The evidence put forward by the Employer is comprised of the five documents identified earlier in this decision: a printout of a screenshot of an unidentified webpage titled "Weather in Vancouver in August 2020," displaying a weather calendar; an EI record of employment issued by an Employer representative on March 16, 2020 for the maternity leave of a managerial employee; WorkSafeBC's template COVID-19 Safety Plan; the PHO; and the Safety Plan (collectively, the "Documents"). In its Appeal Submission, the Employer says that the weather calendar document refutes the Employee's claim, made during the investigation of the Complaint, that August 28, 2020 was a very hot day and that the heat was a factor in his decision to give the GYDT client food and water during the First Incident. In its final reply submission regarding the completeness of the Record, the Employer argues that the Documents should be accepted by the Tribunal "as fresh evidence" because "they are relevant to a decisive issue," they are "documentary in nature" and "credible" in that they were "created by third parties or for the use of third parties," and they "could affect the outcome of the appeal" if accepted by the Tribunal.

29. 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.

30. I find that the evidence put forward by the Employer does not meet all of these requirements. Specifically, I do not accept that the evidence is "new" in the sense that it could not have been provided to one of the delegates during the complaint, investigation, and determination processes. On the contrary, with the exercise of due diligence, the Employer could have, for example, provided its weather calendar document to the Investigative Delegate on December 28, 2021, when counsel for the Employer first took issue with the Employee's claim that August 28, 2020 was a hot day. Similarly, the Employer could have attached the Safety Plan, the WorkSafeBC template, and the PHO to its November 2, 2021 submission to the Investigative Delegate, in which it asserted that the Employee "acted contrary to the Workplace Safety Plan that was implemented during the pandemic." And if the Employer believes that the ROE document is probative evidence in response to the Complaint, it could have disclosed that evidence in advance of the issuance of the Determination on December 29, 2022.

31. I therefore find that the ground of appeal set out in section 112(1)(c) of the *ESA* has not been met in this appeal, without the need to consider matters of relevance, credibility, or probity. The Employer has not shown me, on a balance of probabilities, that evidence has become available that was not available at the time the Determination was being made.

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

ORDER

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

Jonathan Chapnick
Member
Employment Standards Tribunal