Employment Standards TRIBUNAL

Citation: J. Cross & Company Ltd. (Re)
2023 BCEST 29

EMPLOYMENT STANDARDS TRIBUNAL

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

\- by -

J. Cross & Company Ltd.

\- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/012

DATE OF DECISION: May 15, 2023

DECISION

SUBMISSIONS

Travis Sippel	legal counsel for J. Cross & Company Ltd.
Renée Rogers	legal counsel for Cathryn Vidal
Mitch Dermer	delegate of the Director of Employment Standards

OVERVIEW

1. On September 19, 2020, Cathryn Vidal (the "complainant") filed an unpaid wage complaint seeking compensation for length of service (see section 63 of the *Employment Standards Act*; the "*ESA*") from her former employer, J. Cross & Company Ltd. (the "appellant"). The complainant asserted that the appellant terminated her employment without just cause.

2. About 2 years and 3 months after the complaint was filed, Mitch Dermer, a delegate of Director of Employment Standards (the "Adjudicating Delegate"), issued a Determination ordering the appellant to pay the complainant the total sum of $4,378.55 representing 4 weeks' wages payable under section 63 together with concomitant vacation pay and section 88 interest. The Adjudicating Delegate also levied a single $500 monetary penalty against the appellant based on its contravention of section 63. Accordingly, the total amount payable under the Determination is $4,878.55. The Adjudicating Delegate issued his "Reasons for the Determination" (the "Reasons") concurrently with the Determination.

3. This was a relatively straight-forward dispute, and there is nothing in the material before me that adequately explains why this complaint was not addressed in a much more expeditious manner. In my view, the delay involved in this matter is not in keeping with sections 2(b) and (d) of the *ESA*.

4. Insofar as this appeal is concerned, the appellant says that the Adjudicating Delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *ESA*). The appellant also says that it now has evidence that was not available when the Determination was being made (subsection 112(1)(c) of the *ESA*).

5. In my view, this Determination cannot stand and must be cancelled. In light of the delay involved in adjudicating this matter, I am reluctant to refer this matter back to the Director of Employment Standards. However, given the record before me, I am unable to issue a final determination regarding the complainant's section 63 claim. That being the case, I believe the only proper course of action is to refer this matter back to the Director.

FACTUAL BACKGROUND

6. The appellant operates a bookkeeping and accounting business in Nanaimo. The complainant worked as a bookkeeper with the firm from December 7, 2015 to August 26, 2020. At the point of her termination, she was earning $24.62 per hour. The appellant does not challenge the amount of the section 63 award,

assuming she is entitled to section 63 compensation. In her complaint, the complainant stated that she was apparently "fired because I had set up a competing business", but that she had not, in fact, done so. Rather, she maintained that she had only informed the appellant that she "was interested in starting my own business".

7. On August 26, 2020, the appellant issued a formal letter of termination to the complainant. This letter reads, in part, as follows:

> This letter confirms our meeting of today, August 26, 2020, wherein you were advised of our decision to terminate your employment effective immediately.
>
> Our contract of employment impressed on you a duty of fidelity and good faith to Cross & Co. Implied in this duty is the requirement that you faithfully serve your employer and not compete with your employer. This duty is in addition to the obligations set out in your employment contract with us. In your meeting with Jared Cross on August 21, 2020, you informed him that you had already set up your own bookkeeping business which is in direct competition with Cross & Co. This conduct is a clear breach of your obligations to Cross & Co and justified our decision to terminate your employment for cause.
>
> In that same meeting, you suggested that if Mr. Cross did not agree to amend your terms of employment that you would have to 'part ways'. Cross & Co had already issued a directive to all employees that they were required to resume full-time work at Cross & Co's office as of September 1, 2020.
>
> In addition to the above noted breach of your employment obligations, you have also engaged in insolent behavior. You have made derisive and contemptuous communications which were inappropriately critical of both your superiors and the operation of Cross & Co. We have also received numerous complaints concerning the insolent nature of your oral and written communications to your fellow staff and superiors. The unfounded allegations you have levelled against your superiors has undermined the employment relationship and is grounds for termination of your employment for cause.
>
> You have also breached the workplace policies of Cross & Co on multiple occasions. Such instances include, among others, taking vacation in excess of one week during tax season without approval and working overtime in breach of Cross & Co's policies without approval. In addition, your insubordination resulted in a significant financial payment on behalf of Cross & Co which you were directly told not to make.

8. On September 14, 2020, the appellant issued a Record of Employment ("ROE") to the complainant. This ROE indicated that the complainant had been "dismissed" (code "M" on the form), and would not be returning.

9. It appears from my review of the section 112(5) record that Femi Ojo, also a delegate of the Director of Employment Standards (the "Investigating Delegate"), first contacted the complainant with respect to her complaint on July 13, 2022, about 1 year and 10 months after the complaint was first filed.

10. On October 11, 2022, the Investigating Delegate issued an Investigation Report (the "Investigation Report") which, as I understand it, was intended to summarize the parties' positions with respect to the complainant's entitlements, if any, under the *ESA*. The Investigation Report noted that the parties agreed

that a meeting between the complainant and Jared Cross, the appellant's principal, occurred on August 21, 2020, but that the parties disagreed about what transpired at that meeting.

11. The Investigating Delegate summarized the appellant's evidence as follows:

> During the meeting on August 21, 2022 [*sic*], the Complainant informed the [appellant] that she had already set up her own bookkeeping business. This is in direct competition with the [appellant], and a breach of the Complainant's obligations to the [appellant]. The [appellant] provided no evidence that the Complainant had established a competing business upon request [*sic*]. The Complainant suggested that if the [appellant] does not amend the terms of their employment, the Complainant would have to "part ways" with the [appellant]. The Complainant engaged in insolent behaviour, by making "derisive and contemptuous communications which were inappropriately critical" of both her superiors and the operation of the [appellant].
>
> The [appellant] provided a supervisor's notes [*sic*] regarding a conversation about the company's overtime policy. The [appellant] further provided two counselling notes. The first dated July 14, 2020, for unnecessary reproduction of work and the second dated August 21, 2020, for the Complainant informing the [appellant] of her bookkeeping firm and her request to pursue her own clients.

12. The Investigating Delegate summarized the complainant's evidence as follows:

> On August 21, 2020, the Complainant met with Mr. Cross, director of the [appellant] wherein the Complainant proposed working as a contractor. The [appellant] wanted to take time to think about the proposal and was to respond on August 24, 2020. On the afternoon of August 21, 2020, the Complainant sent an email with an alternate proposal. The Complainant proposes going to part time and amending her contract to allow her to work for outside clients.
>
> On August 24, 2020, the Complainant followed up with Mr. Cross on the topic previously discussed. On August 25, 2020, the Complainant and Mr. Cross agreed to meet on August 26, 2020.
>
> On August 26, 2020, at approximately 8:30 am the Complainant received a message from Mr. Cross of the meet time. The Complainant responded that she was already at the office, no response was received from Mr. Cross. At approximately 9:30 am, the Complainant was met by a manager and an associate in her office, she was terminated with immediate effect. The Complainant requested to speak with Mr. Cross, however, she was informed that Mr. Cross was not available.
>
> The Complainant later emailed some of her bookkeeping clients to inform them of her departure from the [appellant]. The Complainant's severance pay was revoked at approximately 8:30 pm, the revocation letter alleges that the Complainant was soliciting the [appellant's] clients upon her termination.

13. Despite the clear conflict in the parties' evidence, the Investigating Delegate did not make any factual findings; rather, he simply summarized the information each party provided to him. The Investigating Delegate does not appear to have made any effort to test the evidence provided to him, or to assess the parties' relative credibility even though the parties' evidence provided starkly conflicting statements about certain key events.

14. I consider the Investigating Delegate's "investigation" to have been inadequate, and not in keeping with the delegate's statutory investigative mandate. In particular, I note that section 78.1 (1)(a) of the *ESA* states: "After completing the investigation of a complaint, the director must (a) summarize the director's *findings of the investigation* in a written report…" (my *italics*). In my view, a simple uncritical summary of the parties' respective positions does not constitute a proper investigation in which requisite factual findings, especially in the face of obviously conflicting evidence and concomitant credibility concerns, must be made.

15. Although the Investigating Delegate referred to the complainant's August 21, 2020 e-mail to the appellant in his report, this document is not contained in the section 112(5) record and, apparently, neither the complainant nor the appellant submitted a copy of it to the Employment Standards Branch. This e-mail was submitted to the Tribunal as part of the appellant's appeal submission. The relevant text of the e-mail, sent to Mr. Cross on August 21, 2020 at 12:35 PM, is as follows:

> Thank you for taking the time out of your day today to meet and hear what I had to say. This meeting was in no way to back you into a corner; Cross & Co has been amazing for me and my family for almost five years, and I've always enjoyed working with and learning from you. If you left our meeting feeling in any way upset or threatened, please reach out over the weekend, as that was absolutely not my intention.
>
> I want to propose an alternative idea for you to consider.
>
> What if I remain an employee of C&C, but as a part-time employee – I could commit to being in the office during the hours my children are in school. I would request that my contract be changed to stipulate that I'm allowed to work for outside clients, so that I can pursue my business in the hours that I'm not in the C&C office. In return, any new bookkeeping clients that I find would be referred to C&C for accounting. Cross & Co clients will always take priority, and if anything was needed of me outside of 9-2 (school hours), I would attend to this first, over external clients.

16. As noted in the Investigation Report, the termination meeting between the complainant and two staff members from the appellant's firm took place at 9:30 AM, following which the complainant "emailed some of her bookkeeping clients [*sic*] to inform them of her departure from the [appellant]." It should be noted that while the complainant may have provided bookkeeping services to these individuals, they were not her "clients"; rather, these persons were the *appellant's* clients. Although referenced in the Investigating Delegate's report, it appears that none of the e-mails from the complainant to the appellant's clients was submitted to the Investigating Delegate, and none appears in the section 112(5) record.

17. In any event, one of these e-mails, from the complainant to one of the appellant's clients, was included in the appellant's appeal submissions. This e-mail was sent from the complainant to the client at 10:48 AM on August 26, 2020, and then forwarded to the appellant by the client about 25 minutes later. This e-mail reads as follows:

> After handling your bookkeeping for several years at Cross & Co, I want to reach out personally to inform you of my plans.
>
> I have enjoyed getting to know you and taking care of your comprehensive bookkeeping and payroll needs. I am now taking what I have learned from my time there to launch my own company, Crema Bookkeeping Inc.

> I also want to reassure you that you are in great hands with Lindsay or Joyce, whom I've taught and worked with closely since they started at Cross & Co.
>
> It has been a pleasure working with you.

18. It is important to note that the complainant's August 26, 2020 e-mail that was sent, as noted above, only about 25 minutes after the meeting at which the complainant was dismissed, had a signature line describing the complainant as the "Owner" of "Crema Bookkeeping", and it also included an e-mail address with the complainant's name ("[name omitted]@cremabookkeeping.ca"), a website URL ("https://cremabookkeeping.ca"), and a business telephone number. The appellant says that the timing of this e-mail "is telling", since it demonstrates that at the point of her termination, the complainant had already established a competing business. The appellant notes that "it would be unreasonable to accept that the Complainant obtained a web domain, created a website, secured an e-mail address and a telephone number, all within an hour of termination."

THE DETERMINATION

19. The Determination and the Adjudicating Delegate's Reasons were both issued on December 30, 2022. The Adjudicating Delegate did not undertake any further factfinding prior to issuing the Determination. As recorded in his Reasons:

> Another delegate of the Director of Employment Standards (investigating delegate) completed an investigation into the Complainant's allegations. I have conducted a review of all information on the file, which includes the investigation report issued on October 11, 2022; summarizing the information collected from the investigation.

20. The Adjudicating Delegate appears to have simply reviewed the evidence that was gathered by the Investigating Delegate as summarized in the Investigation Report, and then issued a decision. The only issue before the Adjudicating Delegate was whether the appellant had "just cause" for dismissing the complainant. Pursuant to section 63 of the *ESA*, a dismissed employee is presumptively entitled to compensation for length of service ("CLS"), but the employer's obligation to pay CLS is "deemed to be discharged" if the employer had "just cause" for dismissal. "Just cause", a phrase not defined in the *ESA*, is a repudiatory breach of the employment contract by the employee, and is a well-developed common law doctrine. The Tribunal has consistently applied the common law when interpreting the phrase "just cause" in the *ESA*. The Investigating Delegate correctly determined that the appellant bore the burden of proving just cause.

21. The Adjudicating Delegate seemingly accepted that if the complainant had opened a competing bookkeeping business while still employed with the appellant, that likely would have constituted just cause for dismissal (Reasons, page R4): "I accept that, if the Complainant did open a competing business while employed by the Employer, this would have breached the [parties' written employment] Agreement and may have constituted major misconduct." However, the Adjudicating Delegate rejected the appellant's just cause allegation for want of proof (Reasons, page R4-R5):

> … I do not have significant evidence before me other than the assertions of each of the parties, with respect to whether the Complainant had opened a competing business prior to her being terminated. All things essentially being equal, I find that the Employer has not satisfied me that it is more likely than not the Complainant committed major misconduct.

22. The Adjudicating Delegate did not have the benefit of hearing from both parties directly, and, as previously noted, the Investigating Delegate did not make any credibility findings. Neither party was ever afforded the opportunity to question the other. Nevertheless, and in my view, without proper consideration of the factors set out by the B.C. Court of Appeal in *Faryna v. Chorney*, 1951 CanLII 252, [1952] 2 D.L.R. 354, the Adjudicating Delegate stated that he "generally prefer[ed] the Complainant's version of the facts" (page R5).

23. The appellant also alleged that the complainant was soliciting its clients for her new business after she was dismissed. On this issue, the Adjudicating Delegate stated: "I make no finding in this respect, other than to say that conduct that occurred after the Complainant's termination has no bearing on whether compensation for length of service is owed" (page R4).

24. An employee who solicits their employer's clients for their own competing business is in breach of their duty of loyalty and faithful service owed to their employer. This conduct, in turn, could give the employer just cause for dismissal. However, the Adjudicating Delegate stated that "I am satisfied, at the least, that there is no material evidence [the complainant] solicited clients of the Employer prior to being terminated" (page R4).

25. The appellant also argued that there were other incidents of misconduct on the complainant's part, but the Adjudicating Delegate ultimately found that these events did not justify the complainant's summary dismissal without payment of compensation for length of service (page R5-R6):

> The Employer has provided evidence regarding instances of alleged misconduct by the Complainant that I have fulsomely considered. While I make no finding as to whether they, in aggregate, could constitute the basis for minor misconduct, I do note that they appear to be fairly limited for an employee with a tenure of over four-and-a-half years, and do not, in my mind, readily demonstrate a pattern of misconduct.
>
> Nonetheless, there is almost no evidence that the Employer took the necessary corrective steps with the Complainant, which would include corrective discipline as contemplated above (in particular, meetings with the Complainant where she was told her misconduct was serious and could result in dismissal, attempts to provide the Complainant with the resources necessary to complete her tasks in accordance with the Employer's wishes and policies, and the Complainant still not meeting the standard). Typically, in order to prove minor misconduct, there must be significant evidence supporting that each step of the disciplinary requirements were [*sic*] carried out, so that the employee in question had the opportunity to meet the standard, and understood the consequences if they did not. There is no evidence she was ever told that her conduct could lead to dismissal, or that she was provided with support of any sort to improve her conduct. In this case, I find that, at the least, the Employer has failed to satisfy steps 2, 3, and 4 described above, at least based on the record in this matter. The evidence before me is insufficient for me to make a finding of minor misconduct.

THE APPELLANT'S ARGUMENTS ON APPEAL

26. The appellant relies on all three statutory grounds of appeal: error of law; breach of natural justice; and "new evidence". Since the appellant's "error of law" ground of appeal is predicated to a significant degree

on its “new evidence” and “natural justice” grounds (both of which, to a degree, are based on overlapping arguments), I shall first outline these latter two grounds of appeal.

The appellant’s “new evidence” and “natural justice” grounds of appeal

27. The appellant’s new evidence consists of the two e-mails, referred to above, from the complainant to the appellant (dated August 21, 2020), and from the complainant to one of the appellant’s clients (dated August 26, 2020). The appellant says that if these documents had been provided to the Investigating Delegate (and thus would have been included in the section 112(5) record that was before the Adjudicating Delegate), this evidence “could have led the Delegate to the conclusion that significant evidence did, in fact, exist to warrant a further examination of whether a competing business had been opened prior to termination.” In the absence of this evidence, the Investigating Delegate simply “relied on and accepted the Complainant’s blanket statement that she had not started a business prior to her termination.”

28. The appellant further says that the Investigating Delegate’s investigation was unnecessarily perfunctory and that the appellant was never advised “that the decision of the [Adjudicating] Delegate hinged on evidence relating to the competing business (or that the Complainant's statement was or would be preferred over the Appellant)” and that if this key concern had had been explicitly identified during the investigation, “the Appellant would have made concerted efforts to hone in on that issue and provide documentation which, *prima facie,* could prove otherwise.”

29. With respect to the two e-mails now tendered on appeal, the appellant says that these documents are credible, have significant probative value, and were “not produced as part of [the complainant’s] document disclosure”. The appellant notes that “it is at a disadvantage in the proceedings given the status of the Complainant’s business prior to termination, and the documents required to prove the business was started before the termination, are largely with the Complainant.”

The appellant’s error of law ground of appeal

30. The appellant says that the Adjudicating Delegate erred in law by making “determinations on central issues without evidence”, and by “making key findings of facts unsupported by evidence, namely, with respect to the Complainant’s business activities prior to termination”.

31. The appellant also says that the Adjudicating Delegate “appears to have ignored in its reasoning the note created August 21, 2020 (page 67 of the Investigation Report)”. This note is found at page 82 of the section 112(5) record. The appellant says that this document is a contemporaneous record regarding the complainant’s admission that she had started a competing business while still employed with the appellant. The appellant says that the Adjudicating Delegate “ignored [it] in the Determination [and] did not weigh the evidence appropriately, nor even mention or detail the evidence contrary to the Complainant’s position [and gave it] no weight [because it] simply is not referenced in the findings.” The appellant says that “given the evidentiary gap referred by the [Adjudicating] Delegate, it would have been expected that the note would have been a material consideration in the decision-making process.”

32. By way summarizing its position, the appellant says:

> The process was, unfortunately, marred by a lack of procedural fairness: no witnesses were interviewed, no preliminary findings were reported in the investigation, the investigation was largely incomplete (and the [Adjudicating] Delegate relied exclusively on it and the attached documents), no requests for unaddressed or unanswered issues were asked of the parties, no opportunities were provided to give additional evidence where gaps existed/were identified (including those outlined by the [Adjudicating] Delegate), the process itself took over two years, and relevant evidence that had been submitted was not readily considered or weighed by the [Adjudicating] Delegate

THE RESPONDENTS' POSITIONS

33. The complainant did not provide any direct evidence by way of response to the appellant's submission. Her legal counsel filed a submission on her behalf. The Adjudicating Delegate filed a submission on behalf of the Director of Employment Standards.

The complainant's position

34. The complainant's counsel says that the appellant's new evidence is not admissible on appeal since this evidence was available and could have been produced during the investigation into the complaint. Counsel does not explain why the complainant did not produce these obviously relevant documents during the investigation.

35. With respect to the probative value of this evidence, the complainant's counsel says that neither e-mail proves that the complainant was operating a competing business when she was dismissed. The complainant's counsel says that the first e-mail (to the appellant, dated August 21, 2020) simply confirms "her interest in starting her own business….but does not establish that she had actually begun operating a new business".

36. As for the second e-mail, dated August 26, 2020 to one of the appellant's clients, the complainant's counsel says that the complainant "could easily [have] completed within an hour" the process "of setting up a phone number, email address, and website". Curiously, counsel does not say exactly when the complainant started attending to, and then completed, these preliminary steps to opening her new competing bookkeeping business. Further, counsel says that even if these steps were completed prior to the complainant's dismissal, these "actions…would have been reasonable preliminary steps for someone contemplating establishing their own business" and "do not prove she was operating a competing business". Counsel says that the complainant filed to incorporate her new business, Crema Bookkeeping Inc., on September 3, 2020, "and this was the date [the complainant] began operating her own business".

37. As noted above, the appellant says that the Adjudicating Delegate erred in law in finding that he preferred the complainant's evidence that she did not open a competing business until after she was dismissed (see Adjudicating Delegate's Reasons, page R5). In response, the complainant's counsel says that this allegation is belied by the Adjudicating Delegate's Reasons which refer to the various "pieces of evidence" upon which he relied.

38. The complainant's counsel says that there was no breach of the principles of natural justice in this matter since the appellant was heard by an independent adjudicator who considered all relevant evidence.

The Director's Position

39. While conceding that the two e-mails submitted by the appellant are "probative" (i.e., "having the quality or function of proving or demonstrating something", according to the *Oxford Dictionary*), the Adjudicating Delegate also says that these documents are "ambiguous as well as circumstantial". The Adjudicating Delegate maintains that these documents "could as easily be indications of an intention or plan to open a business as indicating an already extant business".

40. The Adjudicating Delegate further argues that "the major delict that may have constituted a breach of the employment agreement was the solicitation of clients, not the existence of tools that could be used to solicit clients." Ultimately, the Adjudicating Delegate says that "even if the fresh evidence [were] admitted, it is unlikely that it would have changed the outcome of the determination."

FINDINGS AND ANALYSIS

New Evidence

41. Since the appellant's position critically hinges on the two e-mails, I shall first turn to those documents. Neither e-mail was included in the section 112(5) record. However, the August 21, 2020 e-mail to the appellant is explicitly noted in the Investigating Delegate's Investigation Report (at page IR 7): "On the afternoon of August 21, 2020, the Complainant sent an email with an alternate proposal. The Complainant proposes going part time and amending her contract to allow her to work for outside clients." The complainant's August 21, 2020 e-mail is also obliquely referenced in the Adjudicating Delegate's Reasons (at page R3): "The Complainant also proposed that day [i.e., August 21, 2020] that she could work part-time for the [appellant], and work independently during the balance of the time."

42. The second August 26, 2020 e-mail from the complainant to one of the appellant's clients is also mentioned in the Investigation Report (at page IR 7): "The Complainant later emailed some of her [*sic*] bookkeeping clients to inform them of her departure from the Employer. The Complainant's severance pay was revoked at approximately 8:30 pm, the revocation letter alleges that the Complainant was soliciting the [appellant's] clients upon her termination." This reference to the complainant's communications with the appellant's clients, and the appellant's response, is reproduced nearly verbatim in the Adjudicating Delegate's Reasons (at page R3).

43. As previously noted, although both e-mails are referenced in the section 112(5) record, neither document was, apparently, ever submitted to the Employment Standards Branch during the investigation and, thus, was not included in the record. I am somewhat puzzled as to why the Investigating Delegate did not obtain these e-mails during his investigation, since he was aware of their existence. There is nothing in any of the parties' submissions explaining why the parties did not provide, or why the Investigating Delegate failed to request, these documents. This latter omission is particularly concerning in light of the Adjudicating Delegate's observation that the "significant issue" in this dispute concerned and "was directly triggered by the events surrounding the Complainant disclosing to the Appellant that she wished to be in business for herself".

44. Although, as noted above, these two e-mails were never disclosed to, or obtained by, the Investigating Delegate, the *evidence* contained in these two documents *is* in the record and, accordingly, the contents of the two e-mails cannot be fairly characterized as "new" evidence. Either of the complainant or the appellant could have disclosed these documents to the Investigating Delegate, had they wished to do so. Despite this non-disclosure, at this point in time, I am not satisfied that the Complainant would be prejudiced if these two documents were to be included in the record on appeal, particularly since these two e-mails are the complainant's own documents. The two e-mails are both relevant and credible. As the Adjudicating Delegate concedes, they are also probative, even if the appropriate inference to be drawn from their contents may open to debate. In light of all of these separate considerations, I will admit the two e-mails into evidence for purposes of this appeal.

Natural Justice and Error Law

45. The central thrust of the appellant's argument under these two grounds of appeal is that the Adjudicating Delegate erred in finding that the appellant did not have just cause to terminate the Complainant's employment. Insofar as this latter issue is concerned, the Investigating Delegate was faced with two wholly incompatible versions of what transpired at the critical August 21, 2020 meeting between the complainant and the appellant's principal, Jared Cross.

46. The complainant's version of that meeting, set out above, was recounted in the Investigation Report (at page IR 7), and then essentially repeated verbatim in the Adjudicating Delegate's Reasons (at pages R2-R3). According to her evidence as recounted in these latter documents, the complainant stated that during this meeting she informed Mr. Cross that she wished to work as an "independent contractor", and that Mr. Cross responded by saying that he needed time to consider her proposal. In her complaint, the complainant stated:

> All that my final discussion with my employer entailed was that I had taken a couple of courses to further my education, on my own time, and that I was interested in starting my own business. Jared [Cross] said he would think about the options of working with me as a subcontractor, or keeping me as a part-time employee and changing the employment contract to allow me to work for outside clients, and we set a date for a follow-up conversation.

47. The appellant's evidence, as recorded in the Investigation Report (at page IR 7), was as follows: "…the Complainant informed the [appellant] that she had already set up her own bookkeeping business…[and] suggested that if the [appellant] does not amend the terms of their employment, the Complainant would have to 'part ways' with the [appellant]." This evidence was repeated, more or less verbatim, in the Adjudicating Delegate's Reasons, together with some additional information (at pages R3-R4):

> During the meeting on August 21, 2022 [*sic*], the Complainant informed Mr. Cross that she had already established a competing bookkeeping business. The Complainant told Mr. Cross that if the employment agreement between the parties could not be amended the Complainant and the Employer would need to part ways…
>
> There is also a hand-written note which I understand to describe the disagreement with the Complainant respecting overtime hours (described above) as well as two documents titled "Counselling Notes", the first describing, on July 14, 2020, that the Complainant was unnecessarily duplicating work even after being instructed not to do so, and the second stating,

> dated August 21, 2020, that the Complainant had opened a competing bookkeeping business, and that she had been given 5 days to consider her position with the Employer.

48. The complainant's most recent employment contract, dated September 25, 2019 (signed and accepted by the complainant on September 26, 2019), included several terms that may be relevant to this dispute (although not necessarily relevant to the complainant's CLS claim). The complainant agreed that she would "not bill any person for accounting work except in our firm name", and to be bound by a 2-year non-competition covenant regarding work undertaken for any of the appellant's existing clients. I express no view whatsoever regarding the validity of the non-competition agreement.

49. I am satisfied that the Adjudicating Delegate identified the appropriate legal principles regarding just cause as they concerned the complainant's conduct in this case. In particular, if the complainant opened a competing business while still employed with the appellant, that conduct could constitute just cause for dismissal. Further, if there was evidence before the Adjudicating Delegate that the complainant was soliciting the appellant's clients for her new business, while still employed with the appellant, that conduct could justify summary dismissal without pay or notice. Additionally, if the complainant told the appellant, while still employed, that she *intended* to establish a competing business (in breach of her noncompetition covenant and her implied duty of good faith and loyalty), that conduct could be characterized as an anticipatory breach of contract justifying her summary dismissal (see, for example, *Restauronics Services Ltd. v. Nicolas*, 2004 BCCA 130 and *Baraty v. Wellons Canada Corp*., 2019 BCSC 33).

50. As noted above, the appellant and the complainant had two mutually exclusive versions of what transpired during the critical August 21, 2020 meeting. The Adjudicating Delegate stated, at page R5 of his Reasons, that "I generally prefer the Complainant's version of the facts". While the Adjudicating Delegate rightly noted that the appellant had the burden of proving just cause, he did not adequately address the appellant's evidence regarding what the complainant stated at the August 21, 2020 meeting – evidence that, as the Adjudicating Delegate observed, would support the appellant's just cause argument. The Adjudicating Delegate did not expressly address the complainant's alleged admission that she had already established (or, at the very least – even on the complainant's evidence – that she fully intended to soon establish) a competing business. The Adjudicating Delegate only suggested there *could* have been a "miscommunication" between the parties.

51. As I view the evidentiary record (and I have exactly the same record before me as was before the Adjudicating Delegate), I simply cannot appreciate how one could reasonably conclude that the complainant was more credible than Mr. Cross. If the Adjudicating Delegate wished to reject outright – as he seems to have done – Mr. Cross's evidence – then some explanation for rejecting his evidence was called for. In my view, given the incomplete state of the evidentiary record, I am not persuaded that one could confidently make any judgment about the two individuals' relative credibility. I am not satisfied that the Adjudicating Delegate's finding regarding the complainant's credibility (relative to Mr. Cross) meets the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (at page 357, D.L.R.):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

> real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

52. The complainant, in her complaint, conceded that she told Mr. Cross that she planned to start her own competing business, but also wished to continue working with the appellant "as a contractor". While both the Investigating Delegate and Adjudicating Delegate referred to the complainant's August 21, 2020 e-mail, the actual content of that document was not before them. We now know, in the complainant's own words, that Mr. Cross was "upset", felt "threatened" and perhaps "backed into a corner" at this meeting. It seems to me that this sort of reaction is more consistent with the appellant's position that the complainant stated she had set up a competing business, than with the complainant's version of events. The complainant's reference to an "alternative idea" in her August 21, 2020 e-mail – that she wished to continue on as a "part-time" employee (or, according to Mr. Cross, the parties would "part ways" if the appellant did not agree to amend the complainant's employment contract to allow her to have a competing business) – also seems more consistent with Mr. Cross's version of events.

53. The complainant's August 26, 2020 e-mail to one of the appellant's clients is also concerning. This document shows that only an hour or so after her dismissal, the complainant had incorporated a business, created a website, secured a business e-mail address, and had a new business telephone number. The August 26, 2020 e-mail could be characterized as supporting an "after discovered cause" argument (see *Director of Employment Standards*, BC EST # RD074/17, 2017 CanLII 149793).

54. The complainant's counsel says that the complainant filed her incorporation papers for her new competing business on September 3, 2020, and commenced business operations as of that date. This assertion appears contradictory to the August 26, 2020 e-mail, which refers to an *already incorporated* business – Crema Bookkeeping Inc. The complainant's legal counsel never indicated when the name reservation for the company was secured; counsel did not provide a copy of the certificate of incorporation; counsel did not provide a copy of the original application for incorporation; and counsel did not provide a copy of the company's business licence to operate in Nanaimo. The fact that these documents have not been provided leaves me very uncertain about when the complainant's competing firm was actually established. I certainly am not prepared to accept that the complainant's new competing business was not created until September 3, 2020. In my view, the obvious connotation of the August 26th e-mail to one of the appellant's clients is that the complainant was soliciting work for her newly-established business.

55. On the basis of the record before me in this appeal, I am of the view that the Determination cannot stand. However, although I have my suspicions about the veracity of the complainant's position that she did not establish a competing business while employed with the appellant, I cannot find that she did so on the basis of the existing record, even as supplemented. The complainant, at the very least, appears to have informed the appellant on August 21, 2020, that she fully intended to establish a competing business, and that statement could perhaps be characterized as an anticipatory breach of contract.

56. To the extent that the complainant either actually established a competing business, or advised the appellant of her immediate plan to do so, that conduct could be characterized as a conflict of interest justifying her summary dismissal (see, for example, *Unisource Canada, Inc.*, BC EST # D172/97, 1997 CanLII 25754, *MacMillan Bloedel Limited*, BC EST # D214/99, 1999 CanLII 35785, *Rialta Management Investments*

Limited, BC EST # D151/01, 2001 CanLII 61309, *Westburne Industrial Enterprises Ltd. Les Entrepri (Nedco)*, BC EST # RD235/02, 2002 CanLII 78671, *Clarkson*, BC EST # D103/10, 2010 CanLII 151197, and *Gibson*, BC EST # D054/13, 2013 CanLII 148529). The Adjudicating Delegate did not address whether the complainant's decision (on her own evidence) to immediately establish (to be contrasted with having already established) a competing business constituted a conflict of interest of sufficient severity to justify her summary dismissal.

57. Nevertheless, I do not believe it would be appropriate for the Tribunal to issue an order cancelling the Determination on the basis that the appellant had just cause for dismissal. In light of the scanty evidentiary record which, in turn, is a result of the rather perfunctory investigation that was originally undertaken in this matter, I believe this matter should be referred back to the Director of Employment Standards. I propose to cancel the Determination and refer the original complaint back to the Director for a fresh investigation.

58. I understand that on October 11, 2022, the appellant filed a Notice of Claim in the B.C. Provincial Court seeking relief in relation to the parties' employment agreement and, particularly, the non-competition covenant. The Director of Employment Standards does not have any jurisdiction with respect to the interpretation and enforcement of non-competition covenants. On October 26, 2022, and by way of response, the complainant filed a counterclaim seeking damages for wrongful dismissal, including aggravated and punitive damages. Both parties have retained legal counsel in that litigation.

59. Section 76(3)(f) of the *ESA*, authorizes the Director of Employment Standards to "stop or postpone reviewing or investigating a complaint" if "a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator". In the circumstances of this case, and in light of the Director's limited jurisdiction regarding the entire subject matter of the dispute between the parties (and also in light of sections 2(b) and (d) of the *ESA*), the preferable course might be to simply defer the CLS claim to the Provincial Court since, if the complainant were to succeed on her wrongful dismissal claim, it is virtually certain that her damages award would wholly overlap with (and, depending on the court's view regarding the termination provision in the parties' employment contract, could even exceed) the CLS to which she might be entitled under the *ESA*. However, I have no jurisdiction to issue such a deferral order – that is entirely within the Director's discretion.

ORDER

60. Pursuant to section 115(1)(a) of the *ESA*, the Determination is cancelled. Pursuant to section 115(1)(b) of the *ESA*, the complainant's complaint is referred back to the Director of Employment Standards.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal