Employment Standards TRIBUNAL

Citation: Blue-O Technology Inc. (Re)
2023 BCEST 58

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Blue-O Technology Inc.

(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Jonathan Chapnick

FILE NO.: 2023/034

DATE OF DECISION: July 27, 2023

DECISION

SUBMISSIONS

Hanson Ruan	on behalf of Blue-O Technology Inc.
Emad Shahnam	on his own behalf
Michael Thompson	delegate of the Director of Employment Standards

OVERVIEW

1. Blue-O Technology Inc. ("Company") is a research and technology company in Vancouver. Hanson Ruan ("Owner") owns the company and is its founder, chief executive officer, and sole director. Emad Shahnam ("Employee") was employed by the Company as a research scientist. He began working for the Company on September 29, 2020. On February 9, 2021, the Company terminated the Employee. On June 23, 2021, the Employee filed a complaint ("Complaint") to the Director of Employment Standards ("Director") alleging the Company had violated the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [***ESA***].

2. A delegate of the Director ("Adjudicative Delegate") adjudicated the Complaint and issued a determination with written reasons on February 10, 2023 ("Determination"). The Adjudicative Delegate found that the Company had violated the *ESA* and ordered the Company to pay the Employee $1,437.90 in wages and interest. The Adjudicative Delegate also ordered the Company to pay two $500 administrative penalties for its violations of the *ESA*. The deadline for appealing the Determination was March 20, 2023.

3. On March 22, 2023, the Company appealed the Determination to this Tribunal and asked the Tribunal to extend the appeal period deadline by two days, from March 20 to March 22, 2023. In its appeal submissions, the Company argues that the Adjudicative Delegate erred in law and failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. The Company cites various reasons for its extension request, including health issues experienced by the Owner, his busy work schedule, his lack of legal training, the Company's lack of experience with the appeal process and its inability to hire a lawyer, and the time-consuming nature of preparing an appeal. The Employee and the Director oppose the extension request.

4. For the reasons that follow, I am not compelled by the Company's explanation for its failure to meet the appeal period deadline and I find that it has not put forward a strong case on the merits of its appeal. The extension request is therefore denied, and the appeal is dismissed.

THE INVESTIGATION

5. Before the Adjudicative Delegate made the Determination, another delegate of the Director ("Investigative Delegate") investigated the Complaint and issued a report on November 10, 2022, setting out the "questions to be answered" in his investigation and the information provided by the parties that he deemed relevant to those questions. The Investigative Delegate identified three questions. First, did the Company owe the Employee unpaid wages for additional hours worked? Second, did the Company

violate section 17 of the *ESA*, which requires an employer to pay an employee all wages earned in a pay period within eight days following the end of the pay period? And third, did the Company owe the Employee wages as compensation for length of service ("CLOS") under section 63 of the *ESA*?

A. Unpaid wages and late payments

6. On the first question, the Employee claimed he was owed five hours of unpaid wages for additional hours worked. The Employee provided text messages in support of his claim. The Company submitted biweekly timesheets recorded by the Employee, which indicated the Employee had worked extra hours; however, the Company asserted that it had not authorized the Employee to work those hours.

7. On the second question, the Employee claimed the Company paid him and others late on several occasions. The Employee provided a January 18, 2021, email and related information in support of his claim. The Investigative Delegate asked the Company to submit wage statements and a record of the hours worked by the Employee. The Company submitted the Employee's biweekly timesheets but did not submit "wage statements" and "payroll records" within the meaning of sections 27 and 28 of the *ESA*.

B. Compensation for length of service

8. On the third question, the Employee claimed he was owed one week's wages as CLOS under section 63 of the *ESA*. According to the Investigative Delegate's report, the Employee said he was terminated for raising concerns regarding late pay and because he had a verbal dispute with the Owner on February 8, 2021 ("Dispute").

9. The Company disputed that it owed the Employee CLOS and asserted that it did not dismiss the Employee because of the Dispute. In a September 21, 2021, submission in response to the Complaint, the Company asserted that the Employee was terminated after an unsuccessful performance review based on various factors, including that he "showed unacceptable work attitude and ethic," his "daily work performance was not sufficient," he had a "lying attitude" regarding his need for religious prayer time in the workplace, and he socialized during work hours. According to the Investigative Delegate's report, the Company said that before hiring the Employee, the Owner told him he would be terminated if he failed his performance review.

10. Information and evidence in the record provided to the Tribunal by the Director under section 112(5) of the *ESA* ("Record") establishes that a performance review involving the Employee and the Owner took place on January 19, 2021. In its November 23, 2022, submission in response to the Investigative Delegate's report, the Company asserted that it would have terminated the Employee immediately following the January 19, 2021, performance review had it not been under a "pressing economic situation" at that time. Instead, the Owner "decided to watch [the Employee] and see whether he would change or improve his performance." The day after the Dispute, on February 9, 2021, the Owner emailed the Employee to provide the results of the January 19 performance review and terminate the Employee's employment. In his email, the Owner confirmed that the passing score for the performance review was 90 out of 100 and explained that the Employee had received a score of 81.25. The Employee was dismissed without notice or pay in lieu of notice.

11. Before issuing his report on November 10, 2022, the Investigative Delegate emailed the Company to advise that, in his opinion, the Company owed unpaid wages to the Employee and had violated section 17

of the *ESA* in respect of the Employee's employment. The Investigative Delegate also indicated that, in his opinion, the Company owed the Employee one week's wages as CLOS under section 63.

12. In the Company's submission in response to the Investigative Delegate's report, it included an October 12, 2020, email from the Owner to the Employee and others, in which the Owner advised that "90 points [out of 100] is needed to continue your work in every performance evaluation." The submission also included an October 5, 2020, email regarding the Employee's job duties, and seven "catalyst preparation" reports showing data (date, "log #," and "percentage yield") the Company described as demonstrating the Employee's poor performance of his "Weekly catalyst conversion work." The remainder of the submission was comprised of assertions of fact by the Company. The Company asserted that it gave all new employees ample opportunities to improve their performance "by timely reminders or through [a] weekly progress meeting." The Company said the Employee was failing to meet key performance requirements and that he was reminded of this "each week when his progress report was presented and discussed," but the Employee did not demonstrate an ability or willingness to improve. Finally, the Company said that its decision to terminate the Employee was "cemented" when, shortly after the Dispute, the Owner discovered that the Employee had made a procedural error or omission despite having previously provided assurances "that he followed all the [Company's] standards operating procedures."

13. The Employee replied to the Company's response submission on December 1, 2022. He denied the Company's version of events, took issue with the Company's reliance on his performance review score because the point system was not "clearly and thoroughly outlined within [his] employment contract," and said that the Owner was partly to blame for the poor results in the catalyst preparation reports.

THE DETERMINATION

14. In the Determination, the Adjudicative Delegate described the Complaint before him as comprising the same three issues identified in the Investigative Delegate's report. In determining these issues, the Adjudicative Delegate considered the parties' evidence and positions as set out in the Investigative Delegate's report and the documents included with the report. He also considered the Company's November 23, 2022, submission in response to the report, and the Employee's December 1, 2022, submission in reply.

A. Unpaid wages and late payments

15. On the late payments issue, in the absence of records from the Company contradicting the Employee's claim, the Adjudicative Delegate accepted the Employee's evidence that the Company sometimes failed to pay all wages within eight days of the pay period in which they were earned, in violation of section 17 of the *ESA*. The Adjudicative Delegate imposed a $500 administrative penalty for this violation.

16. On the question of whether the Employee was owed unpaid wages for five additional hours worked, the Adjudicative Delegate rejected the Company's argument that wages were not payable because it had not authorized the Employee to work the additional hours reflected in the biweekly timesheets. The Adjudicative Delegate found that the Company was aware the Employee was working additional hours, did not stop him from doing so, and benefited from the extra work. He therefore concluded that the Company was required to pay the Employee five hours of wages.

B. Compensation for length of service

17. Last, the Adjudicative Delegate considered the Employee's claim for one week's wages as CLOS under section 63 of the *ESA*. This claim centered on whether the Employee was dismissed for just cause. If the Employee was dismissed for just cause, the Company was not required to pay wages as CLOS: *ESA*, section 63(3)(c).

18. The Adjudicative Delegate determined that the Company had not met its burden of proving just cause. He said that to terminate an employee for just cause based on poor performance, "an employer must show that it clearly warned the employee of the standard they were required to meet, warned the employee that continued failure to meet the standard would result in termination, provided reasonable time and support for the employee to meet the standard, and finally that the employee ultimately failed to meet the standard." While he accepted that the Company established a minimum passing score for its performance reviews, the Adjudicative Delegate concluded that this was not sufficient to establish just cause. On the evidence before him, he was unable to find that the Company's various concerns regarding the Employee's performance were documented at any point or effectively communicated to the Employee before he was terminated. As a result, he determined that the Company failed to meet the test for proving just cause based on poor performance and was therefore required to pay the Employee one week's wages as CLOS. In addition, the Adjudicative Delegate found that, having failed to pay CLOS when it dismissed the Employee, the Company had violated section 63 of the *ESA*. The Adjudicative Delegate imposed a $500 administrative penalty for this violation.

ISSUES

19. The Company filed the present appeal two days late, on March 22, 2023, and then subsequently submitted its supporting documents and other information on March 28, following the Tribunal's prompting. The time period for filing an appeal of the Determination ended at 4:30 pm on March 20, 2023. Under subsection 114(1)(b) of the *ESA*, the Tribunal can dismiss an appeal because it was not filed within the applicable time limit. On the other hand, subsection 109(1)(b) of the *ESA* empowers the Tribunal to extend the time period for filing an appeal even though the period has expired.

20. The Company has asked the Tribunal to extend the appeal period deadline from March 20 to March 22, 2023. If I were to grant this extension, the Company's appeal would be mostly timely (the supporting documents delivered on March 28 would still be late). This would open the door for the Tribunal to make a decision on the merits of the Company's appeal. In a case like this one, the onus is on the appellant to show the Tribunal that the appeal period should be extended: *Dr. Eli Rosenberg Inc.*, 2023 BCEST 4 at para. 12 and *Tang*, BC EST #D211/96 [***Tang***]. The issue before me, then, is whether the Company has established that the Tribunal should extend the time period for appealing the Determination, even though the extension request was submitted after the deadline expired.

21. In deciding this issue, I have considered the Company's March 22, 2023, appeal submission, comprising the appeal form, the Company's written arguments, and other documents and materials ("Appeal Submission"), and I have considered the Company's additional submission on March 28, 2023. I have also considered the Record and each party's submission regarding the Company's extension request. 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

22. During these appeal proceedings, the Company has provided a variety of reasons for requesting an extension of the appeal deadline. In the Appeal Submission, the Company says that its appeal was late because of its lack of experience with the Tribunal's process, and because the Owner does not have legal training and the Company could not afford to hire a lawyer. The Company also says that the task of preparing the appeal was time-consuming and the Owner lacked the time and energy needed to complete this task within the prescribed period. In addition, in its June 22, 2023, reply submission regarding its extension request, the Company suggests that the Owner's ill health "was a key factor" in its delayed appeal, while also stressing the Owner's heavy workload.

23. The Director opposes the Company's extension request and disputes the Company's explanation for missing the appeal period deadline. In its May 24, 2023, submission to the Tribunal regarding the extension request, the Director asserts that the Company "was aware of the deadline but simply forgot." The Director supports this assertion by providing recent email correspondence between the Owner and the Adjudicative Delegate. In the correspondence, the Owner first inquires regarding the appeal process on February 10, 2023. In response, on February 13, the Adjudicative Delegate refers the Owner to instructions for filing an appeal and related information. Then, in an email exchange on February 24, the Owner indicates that he intends to file an appeal before the deadline. When no such appeal is received by the Director on March 20, the Adjudicative Delegate emails the Owner on March 21 to advise that the funds paid by the Company in compliance with the Determination would be released to the Employee. Roughly an hour later, the Owner responds to the Adjudicative Delegate's email by saying, "Thanks for reminding me. I thought [the deadline] was today. I will submit the appeal and request [an] extension today. Sorry for the delay."

24. Like the Director, the Employee also opposes the Company's request for an extension. Among other things, the Employee asserts that the request "is just [the Owner's] attempt to postpone and delay the inevitable." I disagree with this assertion. I believe the Company's request for an extension was made in good faith and the Owner genuinely intended to meet the appeal deadline. However, that is not a sufficient basis for me to grant the extension request.

25. The Tribunal does not grant extension requests as a matter of course; there must be "compelling reasons" for the extension request, and it is up to the appellant to establish that the extension is warranted: *Patara Holdings Ltd. carrying on business as Best Western Canadian Lodge and/or Canadian Lodge*, BC EST #RD053/08 [***Patara***]. In considering whether to grant an extension request, the Tribunal considers the following non-exhaustive list of factors:

a. Is there a reasonable and credible explanation for the appellant's failure to meet the appeal period deadline?

b. Has there been an ongoing, genuine intention, on the part of the appellant, to appeal to the Determination?

c. Were the respondent (in this case, the Employee) and the Director made aware of the appellant's intention to appeal?

d. Will the respondent be unduly prejudiced if the Tribunal grants the extension request?

e. Does the appellant have a strong case that might succeed? (This factor is traditionally expressed as an inquiry into whether there is a "strong *prima facie* case" in favour of the

appellant; however, I prefer to use the simpler language of "a strong case that might succeed"): *John Curry*, 2021 BCEST 92 at para. 74 (aff'd 2022 BCEST 2). See *Niemisto*, BC EST #D099/96; *Patara*; *C.G. Motorsports Inc.*, BC EST # RD110/12.

26. For the following reasons, I find that these factors favour against granting the Company's request, despite the very short length of the extension it seeks.

A. Reasonable and credible explanation

27. First, I am not satisfied that the Company's reasons for missing the appeal deadline amount to a "reasonable and credible explanation." I appreciate that a self-represented party without legal training or experience with the Tribunal's processes may face barriers in preparing an appeal, particularly in times of ill health and heavy workload. However, the requirement on an appellant to deliver their appeal within a specific time period is in section 112 of the *ESA* for several good reasons, one of which is to further the *ESA*'s purpose of providing "fair and efficient procedures for resolving disputes": *ESA*, section 2(d); see *Scott Andrews*, BC EST # D071/14 at para. 28 (aff'd BC EST # RD095/14). Accordingly, a party is obligated to exercise reasonable diligence in pursuing a timely appeal: see, *e.g., Roseg Management Corp.*, BC EST # D127/04, and *Tang*. On the information before me, I am not persuaded that the Company has met this standard. I find that a reasonably diligent party in the circumstances of the Company could have filed the appeal on time, or at least would have submitted an extension request before the deadline expired. Moreover, I find that the correspondence between the Owner and the Adjudicative Delegate in February and March 2023 undermines the credibility of the Company's explanation for its delay and suggests that the appeal was late as a result of inattention, which I find not to be a compelling reason for granting the requested extension.

B. Genuine intention and undue prejudice

28. Second, while I am satisfied that the Company's intention to appeal the Determination was genuine and was communicated to the Director during the appeal period, the information before me does not establish that the Employee was ever made of aware of the Company's intention. I am therefore sympathetic to the Employee's assertion, in his June 6, 2023, submission to the Tribunal, that granting the requested extension would deprive him of "the closure and finality" he needs, and which he seemingly achieved when the appeal deadline passed on March 20. On the other hand, given the very short length of the extension requested, I am reluctant to find that granting such an extension, on its own, would impose undue prejudice on the Employee. In any event, I have concluded that in the circumstances of this case, considerations regarding intention and prejudice are outweighed by the deficiencies in both the explanation for the delay and the case put forward on the merits of the appeal.

C. Strong case that might succeed

29. Finally, in addition to my dissatisfaction with the Company's reasons for missing the appeal deadline, I am not satisfied it has put forward a strong case in this appeal.

30. In considering whether an appellant has a strong case that might succeed, the Tribunal's task is to assess the appeal's merit on its face, given the grounds of appeal advanced by the appellant and the established principles related to those grounds: *Dr. Eli Rosenberg Inc.*, 2023 BCEST 4 at para. 19 [***Rosenberg***]; see *Craftsman Collision (1981) Ltd.*, BC EST # D030/10 at para. 29 and *Kendall Jefferson Treadway*, 2019 BCEST

18 at para. 26 (aff'd 2019 BCEST 32). In the present case, the Company advances three grounds of appeal in the Appeal Submission. It says that the Adjudicative Delegate erred in law and failed to observe the principles of natural justice, and that evidence has become available that was not available at the time of the Determination. I will address each ground of appeal in turn.

i. Error of law: ESA, section 112(1)(a)

31. 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: *Rosenberg* at para. 14; see, *e.g.*, *Britco Structures Ltd.*, BC EST # D260/03; *Jane Welch operating as Windy Willows 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.

32. At the outset of the Appeal Submission, the Company identifies the error of law ground of appeal in the appeal form and lists the ground in the first paragraph of its written arguments. However, in the remainder of its materials, its concerns regarding the Determination are exclusively framed as matters of natural justice, with only one exception. On the first page of its written arguments, the Company argues it was never asked to submit "records of ... wage statement[s] with dates," and the Director erred in law (and failed to observe the principles of natural justice) "by ignoring the availability of such records." I reject this argument because it is not accurate. The Record shows that the Investigative Delegate made several requests for wage statements, but the Company did not provide them. The Record also shows that the Company was made aware that the Employee alleged it paid him and others late on several occasions. If the Company had evidence to refute this claim, it should have proffered that evidence during the investigation process.

33. The Appeal Submission makes no other mention of alleged legal errors in the Determination. However, taking a large and liberal approach to the Company's submissions as a whole, I discern an additional argument under the error of law ground of appeal. In my view, the Company's submissions raise a question of mixed fact and law, namely whether the facts of the Employee's dismissal satisfied the legal test for establishing just cause based on inadequate performance. The Company clearly believes that they did, and that the Adjudicative Delegate erred in finding the opposite. The Company says that its termination of the Employee "due to his very poor work performance" was justified because the Company gave him "amble [*sic*] opportunity to improve and he failed." The Company says that it provided the Director's delegates with detailed performance records (i.e., the catalyst preparation reports), which clearly demonstrated the Employee's poor performance and lack of improvement.

34. Determinations by a delegate on questions of mixed law and fact are given deference by the Tribunal: *Michael L. Hook*, 2019 BCEST 120 at para. 31 [***Hook***]. Thus, in considering the Company's disagreement with the Adjudicative Delegate's just cause analysis, I have taken a deferential approach to the Determination, to decide whether the Adjudicative Delegate erred in law. For the following reasons, I find he did not.

35. First, I find no misinterpretation or misapplication of section 63 of the *ESA* or any applicable principle of law in the Adjudicative Delegate's just cause analysis. His analysis reflected the well-established framework and principles that have been developed and consistently applied under the *ESA* (see *Hook* at paras. 32-34 for a discussion of the just cause analysis). For instance, the Adjudicative Delegate placed the burden of proof on the Company, and he explained how an employer may prove just cause based on inadequate performance. I find there was nothing wrong, in principle, with the method of analysis adopted by the Adjudicative Delegate.

36. Second, I find that the Adjudicative Delegate decided the issue of whether the Employee was dismissed for just cause based on the evidence and submissions provided by the parties, and not on an unreasonable view of the facts. To establish just cause based on inadequate performance, the onus is on an employer to prove all of the following:

a. **Reasonable standards.** The employer must prove that it established reasonable performance standards and clearly communicated those standards to the employee.

b. **Reasonable opportunity.** The employer must prove that it gave the employee a reasonable opportunity, including sufficient time and support, to meet the performance standards; however, despite this opportunity, the employee demonstrated an unwillingness or inability to meet the performance standards.

c. **Reasonable warning.** The employer must prove that it advised the employee that their employment was in jeopardy, and that the employee's continuing failure to meet the performance standards would result in their dismissal.

d. **Ongoing failure.** The employer must prove that, despite the above, the employee continued to demonstrate an unwillingness or inability to meet the performance standards: *John Curry*, 2021 BCEST 92 at para. 99 [***John Curry***], citing *Hook* at para. 32 and *565682 B.C. Ltd.*, BC EST # D292/02.

37. The Company did not meet this onus of proof. While there is evidence that the Company established performance standards, it was not unreasonable for the Adjudicative Delegate to find that these standards – and the Company's concerns that the Employee could not meet them – were not clearly communicated to the Employee until the day he was terminated. Even accepting that the Company provided the Employee with the seven catalyst preparation reports during the course of his employment, there was no documentary evidence before the Adjudicative Delegate of any communications with the Employee regarding these reports or their potential implications for his continued employment. Moreover, the Record lacks compelling evidence that the Employee was warned that his employment was in jeopardy due to inadequate performance. On the contrary, the evidence suggests that the Company did not advise the Employee of the substandard results of his performance review until the moment of his termination.

38. Thus, I see no error of law in the Adjudicative Delegate's analysis in the Determination regarding the issue of just cause based on inadequate performance, and I find that the Company has not advanced a strong case that might succeed on the error of law ground of appeal.

ii. Natural justice: ESA, section 112(1)(b)

39. The second ground of appeal identified in the Appeal Submission 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 in making a determination. 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. The Company makes two discernible arguments under the natural justice ground of appeal, which I will address in turn.

40. First, the Company's submissions include assertions that the Director "ignored the facts" the Company put forward in the Complaint proceedings, which I interpret to be a claim that the Director failed to consider relevant evidence in making the Determination. In particular, the Company argues that the Director ignored evidence of the Employee's poor work performance and the Company's establishment of performance standards. In response to this argument, the Director submits that the Company has misapprehended the findings of fact in the Determination and "is attempting to reargue the points made during the investigation." I agree with the Director that the Company's submissions in this appeal largely comprise re-argument of the case it made during the Complaint proceedings. An appeal to the Tribunal is not meant to be an opportunity for this type of rehashing of information and arguments that have already been considered during the complaint, investigation, and determination processes under Part 10 of the *ESA*: see *Masev Communications*, BC EST #D205/04. I appreciate that the Company disagrees with the Adjudicative Delegate's assessment of the evidence before him and disputes the Adjudicative Delegate's findings and conclusions. However, this is not enough to establish a breach of natural justice. I find that the Company has not proven that the Adjudicative Delegate failed to consider relevant evidence and arguments in making the Determination, let alone failed in such a way that impacted the fairness of the Complaint proceedings.

41. Second, the Company argues that the Determination "on the termination of the employee was biased and unfair," and failed to adhere to principles of natural justice "by fabricating the facts, ignoring the [Employee's] extreme poor work performance, and brushing off the good patience and practise of the employer." More generally, in his submissions for the Company in these appeal proceedings, the Owner accuses the Adjudicative Delegate of lies, deception, and wanting to punish the Company. The Owner's various disagreements with the Adjudicative Delegate's assessment of the evidence, findings of fact, and conclusions form the basis for these accusations.

42. A party's disagreement with a delegate's decision, analysis, or reasoning does not justify an allegation of bias. An allegation of bias against a decision-maker is very serious and must be supported by sufficient evidence to establish a "reasonable apprehension of bias" based on the decision-maker's conduct: *Fara Ghafari*, 2018 BCEST 79 at paras. 28-32 [***Fara Ghafari***]. The onus of proving bias is on the person alleging it, and the threshold for a finding of bias is high. To establish bias, a "real likelihood" or probability of bias must be demonstrated; "[m]ere suspicions, or impressions, are not enough": *Fara Ghafari* at paras. 34-35. The Company's claims of bias do not come close to meeting this threshold; in my view, they are vexatious and offensive. They appear to be rooted entirely in suspicions and impressions formed by the Owner in response to the findings and determinations made against him and his business.

43. In sum, then, I find that the Company has not advanced a strong case that might succeed on the natural justice ground of appeal.

iii. New evidence: ESA, section 112(1)(c)

44. The final ground of appeal identified in the Appeal Submission falls under section 112(1)(c) of the *ESA*, which allows a person to appeal a determination to the Tribunal in situations where "evidence has become available that was not available at the time the determination was being made."

45. In this case, the evidence put forward by the Company is a five-page document ("Document") comprised of screenshots of emails from the Company to the Employee, each of which appears to attach an electronic biweekly wage statement. Most biweekly pay periods during the Employee's term of employment are accounted for in the Document; however, the Document does not include screenshots of emails attaching wage statements for pay periods ending December 25, 2020, January 22, 2021, or February 5, 2021. In addition to the screenshots, the Document includes some brief submissions from the Company.

46. In the Document, the Company admits (and the relevant screenshots show) that, on two occasions (the pay periods ending October 16, 2020, and January 8, 2021), the Company failed to pay the Employee all wages earned in the pay period within eight days following the end of the pay period. The Company says that it does not know why it paid the Employee late on the first occasion. With respect to the second occasion, the Company says it paid the Employee late because there were errors in the timesheet submitted by the Employee, which the Employee needed to correct before the Company could issue payment. In relation to the Document, the Company appears to take the position that it generally paid all employees on time, and it should not be punished for "one or two incidents" of delayed payments.

47. The Tribunal may only accept "new evidence" under section 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 Director 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 Director, and it must have high probative value, which means that if it had been accepted by the Director, they may have reached a different conclusion on the important issue: *Bruce Davies et al.*, BC EST # D171/03. I find that the evidence put forward by the Company does not meet all of these requirements.

48. First, I do not accept that the Document is "new" in the sense that it could not have been provided to the Director before the Determination was made. The emails shown in the Document were sent to the Employee between October 8, 2020, and January 18, 2021, and I have no reason to conclude that they were unavailable during the Complaint process. Furthermore, as I discussed above, the Investigative Delegate made several requests for wage statements and the Company knew about the Employee's allegation regarding late wage payments. If the Company believes that the contents of the Document are an answer to the late wage payments issue, it should have disclosed that evidence when the Complaint was being investigated. Second, I find that the Document does not have high probative value, because it would not have led the Adjudicative Delegate to reach a different conclusion on an important issue. In the Determination, the Adjudicative Delegate found that the Company sometimes failed to pay all wages within eight days of the pay period in which they were earned. The screenshots and information in the Document are consistent with this finding and support the Adjudicative Delegate's conclusion that the

Company violated section 17 of the *ESA*. Having reached this conclusion, the Adjudicative Delegate had no discretion as to whether to impose a $500 administrative penalty; that penalty was mandatory: see *ESA*, section 98 and *Employment Standards Regulation*, B.C. Reg. 396/95, section 29; see also *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04. Thus, I find that the Company has not advanced a strong case that might succeed on the "new evidence" ground of appeal.

49. Given my findings regarding the three grounds of appeal advanced by the Company, in my assessment the Company's appeal lacks merit on its face and is unlikely to succeed. Moreover, as I discussed above, I am not satisfied that the Company's reasons for missing the appeal deadline amount to a "reasonable and credible explanation." I therefore find that the Company has not provided compelling reasons for its extension request and has not met its onus to establish that the appeal period in this case should be extended.

50. For all of the above reasons, the Company's extension request is denied, and the appeal is dismissed under section 114(1)(b) of the *ESA*.

ORDER

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

Jonathan Chapnick
Member
Employment Standards Tribunal