Employment Standards TRIBUNAL

Citation: Home2Stay Accessibility Ltd. (Re)
2023 BCEST 76

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Home2Stay Accessibility Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/087

DATE OF DECISION: September 18, 2023

DECISION

SUBMISSIONS

Rahim Lakhani on behalf of Home2stay Accessibility Ltd.

OVERVIEW

1. This is an appeal by Home2stay Accessibility Ltd. ("Employer") of a decision of a delegate of the Director of Employment Standards ("Director") issued on May 4, 2023 ("Determination").

2. On March 8, 2022, Anatoli Kopatchev ("Employee") filed a complaint under section 74 of the *Employment Standards Act* ("*ESA*") with the Director alleging that the Employer had contravened the *ESA* by failing to pay him sufficient regular wages and annual vacation pay, as well as requiring him to pay the Employer's business costs ("Complaint").

3. The Director followed a two-step process in investigating the Complaint and making the Determination. One delegate of the Director ("Investigative Delegate") corresponded with the parties and gathered information and evidence. Once that process was completed, the Investigative Delegate prepared a report ("Investigative Report") summarizing the results of the investigation which was sent to the parties for review and comment. Upon receiving the responses to the Investigative Report and the replies to those responses, the matter was sent to a second delegate ("Adjudicative Delegate") who assumed responsibility for reviewing the responses and replies and issuing the Determination pursuant to section 81 of the *ESA*.

4. The Determination found that the Employer violated Part 3, section 17 (paydays) and 18 (wages) and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of the Employee.

5. The Determination ordered the Employer to pay wages in the total amount of $3,442.84, consisting of regular wages, vacation pay, and accrued interest.

6. The Determination also levied two administrative penalties of $500.00 each against the Employer for contravention of sections 17 and 18 of the *ESA*.

7. The Employer was served the Determination by ordinary mail and a copy of the same was sent to Rahim Lakhani ("Mr. Lakhani"), the sole director and officer of the Employer, on the same date by email and ordinary mail.

8. The deadline for the Employer's appeal of the Determination was 4:30 p.m. on June 12, 2023. The Employer filed its incomplete appeal by email on June 12 at 4:59 p.m. According to section 5(3) the Tribunal's *Rules of Practice and Procedures*, documents received outside of the Tribunal's business hours are filed as of the next business day. Accordingly, the Employer's appeal is considered received by the Tribunal on June 13, 2023, after the expiry of the appeal deadline.

9. The Employer has applied for an extension of the appeal deadline to June 30, 2023.

10. The Employer has checked off a single ground of appeal in the Appeal Form, namely, evidence has become available that was not available at the time the Determination was being made.

11. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I find it is unnecessary to seek submissions on the merits from the Employee or the Director.

12. My decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions of the Employer, and the Determination and the Reasons for the Determination ("Reasons").

ISSUE

13. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or dismissed under section 114(1) of the ESA.

THE DETERMINATION AND THE REASONS

Background

14. According to a BC Registry Services Search conducted online on March 19, 2023, with a currency date of September 20, 2022, the Employer was incorporated in British Columbia on March 19, 2007, and Mr. Lakhani is listed as its sole director and officer.

15. The Employer operates a renovation company in Vancouver.

16. The Employee worked for the Employer as a carpenter/installer from September 18, 2019, to January 31, 2022, when his employment was terminated by the Employer.

17. At the time of termination of employment, the Employee was earning an annual salary of $66,650.00 and worked an average of 40 hours per week.

18. The Employee filed the Complaint with the Director on March 8, 2022, alleging that the Employer failed to pay him sufficient regular wages and annual vacation pay, and required him to pay the Employer's business costs.

19. In the Reasons, the Adjudicative Delegate delineated the following three issues before him:

    i) Did the Employer require the Employee to pay its business costs?

    ii) Is the Employee owed regular wages for the period of January 1 to 31, 2022?

    iii) Is the Employee owed annual vacation pay?

20. In deciding these issues, the Adjudicative Delegate considered the evidence received from both the Employee and the Employer, as summarized in the Investigative Report, together with the responses of the parties to the Investigative Report.

21. With respect to the first issue, the Adjudicative Delegate noted that section 21(2) of the *ESA* provides that an employer must not require an employee to pay any of the employer's business costs. The Employee complained that he was required by the Employer to purchase glass to install for one of the Employer's clients. The Employer refuted the claim contending that they paid for the glass that was installed on the project in question.

22. In deciding in favour of the Employer and dismissing the Employee's "business costs" claim, the Adjudicative Delegate explained that the Employee's evidence was that the glass he was required to purchase was actually purchased by his wife, Marianna Grobovenko ("Ms. Grobovenko"), who is not the Employer's employee. While the Employee adduced into evidence a TD Visa card statement showing Ms. Grobovenko paid Bronco Industries Inc. ("Bronco") $707.62, which amount matched Bronco's invoice for glass, purchase order, and receipt, these documents also showed the glass from Bronco was shipped to Aurora Glazing Solutions Ltd. ("Aurora") and not to the Employer or the Employee. Furthermore, Ms. Grobovenko's signature on the emails pertaining to the glass purchase identify her as a project manager for Aurora and she purchased the glass on behalf of Aurora. The Adjudicative Delegates states that, even if Aurora had provided the glass to the Employee and it had been installed for the Employer's client, any dispute over the costs associated with the glass would be between Aurora and the Employer and not a subject of the Employee's Complaint. The Adjudicative Delegate adds that if Ms. Grobovenko bore a business cost of Aurora in purchasing the glass on its behalf, her remedy would have been to file her own Employment Standards complaint.

23. With respect to the Employee's complaint that he was not paid all regular wages for January 2022 (i.e., the pay periods of January 1-17, 2022, and January 18-31, 2022), the Adjudicative Delegate observed that pursuant to section 28 of the *ESA*, employers are required to maintain payroll records for each employee, including a record of the hours worked each day and a record of the wages paid for each pay period. Except for wage statements for the pay periods ending on October 17, 2021, and November 17, 2021, and the spreadsheet summarizing the Employee's vacation days, the Employer did not provide payroll records for the Employee, despite being requested to do so.

24. The Investigative Delegate noted that on February 3, 2022, the Employer used one payment to pay the Employee for both pay periods in January 2022. The wage statement for this payment indicated the Employee was paid $5,466.66 in regular wages and worked 175.00 hours. No vacation payment to the Employee was indicated on this wage statement.

25. The Adjudicative Delegate also noted that while the Employer submitted that the Employee received a day of paid vacation entitlement on January 5, 2022, the Employee contended that that he did not take any days off in 2022. In deciding whether the Employee worked on January 5, 2022, or received a day of paid vacation, the Adjudicative Delegate reasoned that given the Employer's failure to submit a record of the Employee's daily hours, the best available evidence on this issue was the final wage statement. The Adjudicative Delegate then went on to note that the pay periods ending on October 17, 2021, and November 17, 2021, indicate paid vacation pay on the wage statements, while the wage statement for the payment on February 3, 2022, did not indicate any vacation pay paid to the Employee. In the result, the Adjudicative Delegate found the Employee did not receive a day of paid vacation on January 5, 2022, but worked his normal hours.

26. In calculating the regular wages owed by the Employer to the Employee, the Adjudicative Delegate considered the Employee's annual salary of $66,650.00, he was paid semi-monthly, and he earned

$2,777.08 per pay period ($66,650.00 / 24). For the pay periods of January 1 to 17, 2022, and 18 to 31, 2022, the Adjudicative Delegate found the Employee earned $5,554.16 in regular wages ($2,777.08 x 2). On February 3, 2022, the Employee was paid $5,466.66 in regular wages for the work performed in January 2022. Therefore, according to the Adjudicative Delegate, the Employee was owed $87.50 in regular wages ($5,544.16 - $5,466.66) for the work he performed on January 5, 2022, and so ordered the Employer to pay the Employee in the Determination.

27. With respect to the matter of annual vacation, the Adjudicative Delegate noted that the Employee contended that he was not paid all outstanding vacation pay with his final wages. The Employer, on the other hand, argued that the Employee received vacation pay in excess of his entitlements and is not owed any annual vacation pay.

28. The Adjudicative Delegate observed that section 80 of the *ESA* allows for the recovery of wages that were payable in the 12-month period prior to the earlier of the date of a complaint or the termination of the employment relationship. Therefore, based on the date the Employee was terminated, any wages that were payable to the Employee between January 31, 2021, and January 31, 2022, would be recoverable. Any vacation pay that was earned between September 18, 2019, and January 31, 2021 (i.e., the entire employment relationship) also falls within the recovery period and is recoverable, according to the Adjudicative Delegate.

29. Having said this, the Adjudicative Delegate noted that the Employer did not submit payroll records for the Employee, and the Employee's T4 documentation for 2019 to 2021 are the best available evidence of the wages he was paid between September 18, 2020, and December 17, 2021, and show that the Employee was paid a total of $153,217.49 during this period. The wage statement for the period of December 18 to 31, 2021, showed the Employee was paid $2,484.84 during this period and a further $5,554.16 during the period of January 1 to 31, 2022. In the result, the Adjudicative Delegate determined the Employee earned a total of $161,256.49 in wages between September 18, 2019, and January 31, 2022, and was entitled to 4% of this amount – $6,450.26 – in annual vacation pay ($161,256.49 x 4%), pursuant to section 58 of the *ESA*.

30. The Adjudicative Delegate then went on to determine the amount of vacation pay the Employer actually paid the Employee. He noted the Employer submitted a spreadsheet it sent to the Employee on February 2, 2022, which shows the Employer's position that the Employee took 25 days of vacation in 2020, 17.5 days in 2021, and 1 day in 2022. On the Employee's part, the Adjudicative Delegate noted the Employee disputed the accuracy of the Employer's spreadsheet as a record of his annual vacation. The Employee contended he was absent from work for 5 days in 2019, 10 days in 2020, 8 days in 2021, and 0 days in 2022. Further, while the Employee stated that he received paid vacation for some of these days, some were also unpaid absences from work.

31. By way of a specific example, the Adjudicative Delegate noted the Employee submitted evidence that showed he worked on December 24, 2021, when he inventoried the Employer's tools and equipment, but the Employer's spreadsheet shows this date was a vacation day for the Employee. While the Employer did not dispute that the Employee performed the said work on December 24, 2021, the Employer said the Employee was not explicitly directed to do the work on December 24, 2021. According to the Adjudicative Delegate, regardless of the Employer's explanation, because the Employee performed work for the Employer on December 24, 2021, the Employee must be compensated by the Employer. The Adjudicative Delegate also noted that the wage statement for the pay period of December 18 to 31, 2021, did not

record any paid vacation pay, unlike the wage statement for pay period of November 1 to 17, 2021, which recorded paid vacation pay. Having said this, the Adjudicative Delegate observed that there was no information as to the total hours the Employee worked on December 24, 2021, or whether he worked a full day. Notwithstanding, the Adjudicative Delegate concluded that the Employee did indeed perform work for the Employer on December 24, 2021, and did not receive a day of paid vacation.

32. The Adjudicative Delegate also noted that the Employer's spreadsheet showed the Employee used a half day of vacation on November 12, 2023. However, this evidence was contradicted by the wage statement for the pay period of November 1 to 17, 2021, which showed the Employee received $248.48 in vacation pay, which is payment for a full day of vacation.

33. The Adjudicative Delegate also noted that the Employer did not submit the "corporate calendar" it used to create the spreadsheet; the GPS records it stated would confirm the accuracy of the spreadsheet; and a daily record of the Employee's hours (a record it is required to maintain by section 28 of the *ESA*). According to the Adjudicative Delegate, the Employer's spreadsheet was inconsistent with other evidence and documentary evidence the Employer claimed would support the spreadsheet but was not submitted during the investigation. Accordingly, the Adjudicative Delegate went on to find the Employer's spreadsheet to be unreliable and gave it no evidentiary weight in determining the amount of paid vacation the Employee was provided or the amount of vacation pay he was paid.

34. As concerns the Employee's evidence on the matter of vacation and vacation pay, the Adjudicative Delegate noted that while the Employee provided information as to the total number of days he was absent from work, he did not explain which of these days were specifically days he received a paid vacation day, and which were sick days or days he was otherwise absent from work.

35. Having identified that neither party provided determinative evidence on the matter of vacation pay, the Adjudicative Delegate noted that the Employer claimed the wage statements created by its payroll provider, ADP, did not accurately document all vacation pay paid to the Employee, and the wage statement for the pay period ending December 31, 2021, showed more vacation pay had accrued than what the Employee was entitled to. Notwithstanding the Employer's contention above, the Adjudicative Delegate concluded that the only reliable evidence before him that showed the amount of annual vacation pay the Employee received from the Employer were the wage statements for the pay periods of October 1 to 17, 2021, and November 1 to 17, 2021, which showed that as of November 17, 2021, the Employee had been paid a total of $3,276.66 in annual vacation pay in 2021. In the absence of any other payroll records from the Employer that could be used to determine what other amounts of vacation pay, if any, the Employee had been paid, the Adjudicative Delegate concluded that the Employee was only paid $3,276.66 in annual vacation pay. This amount was $3,173.60 less than the Employee's full vacation entitlement minus already paid vacation pay ($6,450.26 - $3,276.66). Accordingly, the Adjudicative Delegate ordered the Employer to pay the Employee $3,173.60 in vacation pay.

36. The Adjudicative Delegate also levied two administrative penalties of $500.00 each against the Employer for violations of section 17 of the *ESA* for failing to pay the Employee all wages earned in a pay period within eight days after the end of the pay period and section 18 for failing to pay all wages owed to the Employee within 48 hours of the termination of his employment on January 31, 2022.

37. The Adjudicative Delegate also awarded the Employee interest of $181.74 on the amounts owing pursuant to section 88 of the *ESA*.

EMPLOYER'S SUBMISSIONS

38. In his written submission received by the Tribunal with the Employer's incomplete appeal application on June 13, 2023, Mr. Lakhani, makes submissions in support of the Employer's application for an extension of the appeal period to June 30, 2023. He states he will provide his reasons and arguments for the appeal to the Tribunal by June 19, 2023. I presume he is referring to the reasons that go to the merit of his appeal.

39. As concerns the reasons for his application for an extension of the appeal period, Mr. Lakhani presents three specific reasons with the Appeal Form. First, he states that "our office has recently undergone a relocation, which caused some disruption in our operations." Second, he shares that he "experienced a personal loss" with the passing of his cousin at the end of May which required him "to take some time off to grieve and subsequently regain [his] focus upon returning to work." Lastly, he says he has "now obtained access to the ADP records" and thinks that they "clearly demonstrate that the claimant was indeed compensated for some, if not all of the vacation period mentioned in the [D]etermination."

40. On June 19, 2023, Mr. Lakhani emailed the Tribunal brief written submissions with 49 pages of pay stubs for various pay periods of the Employee ending between January 17, 2020, and December 31, 2021. He states that he has "gone into the paystubs and spoken with ADP." He says that based on the second to last paystub for January 2022 (payment date January 14, 2022, to be precise), there is accrued vacation owing to the Plaintiff of $630.94. He says he does not know "why the accrued vacation disappeared on [the Employee's] last paystub." He says, "ADP says they do not know what happened." In the circumstances, Mr. Lakhani admits that the Employee is owed $630.94 and an additional $218.66 for his final pay statement for a total of $894.60, plus interest and penalties.

41. On June 29, 2023, Mr. Lakhani emailed the Tribunal further submissions with what is presumably the "corporate calendar" that he was going to produce during the investigation but failed to, and some GPS records of the Employee's vehicle during workdays. He also includes a spreadsheet of the Employee's vacation days with handwritten changes identifying previous errors in the spreadsheet.

42. In the accompanying written submissions, Mr. Lakhani states:

> I got thinking about what may help you see things a little clearer, I have taken screenshots of the calendar, not all days were marked in the calendar that Anatoli took off, there were times that he would call in or text me that he wanted to take the next day off, or just call me in the morning and say that he is taking the day off. I know this is hard for you to adjudicate, but I have learned my lesson, and everything is now noted. I have also screenshotted some of the GPS reports that show that there was no activity on his vehicle on his days off. And then I have screenshot of the 24th December, 2021. This shows how he was at his home until 12:00-ish pm and then went to the office for a couple of hours, and then went to what seems to be the grocery store. I know that this is not clear, but I am asking you to look at all of this in your decision on the appeal, as he said he was working the entire day. We do not work on weekends, so any GPS activity on the weekends is him using the company vehicle for his own purposes (which was not allowed). Sometimes when projects were entered in the calendar, like vacations, ran for the time period allotted, including weekends, just to book people off.
>
> There were also some mistakes on our original spreadsheet, we showed weekend days as vacation days, we made a mistake on the dates, but I have changed these dates by hand on the spreadsheet, and you will be able to see the actual dates that were taken on the screenshots of Anatoli's calendar.

> I hope this makes things a little clearer, to be honest, he took more vacation than was allowed, and as ADP was not the easiest to use, sometimes the vacation would show up as regular pay. I understand you can only go by what you see on paper.

ANALYSIS

43. Having reviewed the Determination, the section 112(5) record, and Mr. Lakhani's submissions on behalf of the Employer, I find this is not a proper case for extending the appeal period and, in any event, this appeal is wholly without merit. My reasons for so concluding follow.

(i) Request to extend the statutory appeal period

44. In the present case, there is a preliminary issue of the late filing of the appeal. As previously indicated, the deadline for filing the appeal was 4:30 p.m. on June 12, 2023, but the Tribunal received the Employer's submission after 4:30 p.m. on June 12, 2023. As noted at section 5(3) of the Tribunal's *Rules of Practice and Procedures*, documents received outside of the Tribunal's business hours are filed as of the next business day. Accordingly, the Employer's submission is considered received by the Tribunal on June 13, 2023.

45. Section 109(1)(b) of the ESA provides that the Tribunal may extend the time period for requesting an appeal.

46. The burden is on an appellant, the Employer in this case, to demonstrate the appeal period should be extended. In determining whether to extend the appeal period, the Tribunal considers the following inclusive factors: whether there is a reasonable and credible explanation for the failure to file the completed appeal on time; whether there has been a genuine and ongoing *bona fide* intention to appeal the determination; whether the respondent party and the Director have been made aware of the intention to appeal; whether the respondent party will be unduly prejudiced by granting the extension; the length of the delay; and whether there is a strong *prima facie* case in favour of the appellant (see, for example, *Niemisto*, BC EST # D099/96; *Patara Holdings Ltd*., BC EST # RD053/08).

47. This Tribunal has indicated previously, and I reiterate in this case, that a delay of one (1) day is not excessive. I do not conceive the Employee, in the present case, would be seriously prejudiced if the statutory appeal were to be extended given the relatively short duration of the delay. Of course, this is not to disregard the prejudice that the Employee has already suffered as a result of not having been paid for his work for over one-and-a-half years since the termination of his employment on January 31, 2022.

48. As to whether there is reasonable and credible explanation for failure to file the completed appeal on time, I am not persuaded with the Employer's first submission. A bare assertion by Mr. Lakhani that the Employer's office "has undergone a relocation, which caused some disruption [to their] operations" without more specifics, in my view, is insufficient explanation justifying an extension of the appeal period. I am not sure how intricate and long the process was to relocate the Employer's office and when precisely relocation of the office started and completed and how involved Mr. Lakhani was in the process that he could not file the Appeal in a timely fashion. Considering what Mr. Lakhani ultimately submitted in the Employer's appeal in terms of the written submissions and documents (particularly those that should have been produced during the investigation of the Complaint), it does not appear that extraordinary time would have been required to file the appeal.

49. Having said this, I am more sympathetic to Mr. Lakhani's second reason for the delay in filing the appeal, namely the loss of his cousin at the end of May 2023 which required him "to take some time off to grieve and subsequently regain [his] focus upon returning to work." While the Determination was made on May 4, 2023, and Mr. Lakhani was emailed the Determination on the same date, if he left the appeal for later in May or early June, I could reasonably surmise that he would be impacted by the death of his cousin, particularly if he was close to him, and likely require some time to mourn and refocus.

50. However, as sympathetic as I am to Mr. Lakhani's predicament with the untimely passing of his cousin, there is no evidence whether the Employee and the Director were made aware of the intention to appeal before the expiry of the appeal deadline. Further, and perhaps more determinative for me, there is *not* a strong *prima facie* case in favour of the Employer. More specifically, I have reviewed Mr. Lakhani's submissions on behalf of the Employer and independent of my rejecting the documentary evidence he adduces as "new evidence" in the Appeal (which I will discuss under the heading *Merits of the Appeal* below), I am ***not*** persuaded that the ADP records (that admittedly contain inexplicable errors); the screenshots of the "corporate calendar" for the Employee (that is admittedly incomplete and "hard for [the Tribunal] to adjudicate"); the GPS records that are "not clear"; and the copy of the original vacation spreadsheet for the Employee with hand corrected mistakes, make for a strong *prima facie* case in favour of the Employer.

51. It is important to note that section 112(1) of the *ESA* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director, unless the Director's findings raise an error of law: see *Britco Structures Ltd*., BC EST # D260/03. The Employer (in Mr. Lakhani's submissions above) is doing just that - rearguing and challenging factual findings of the Adjudicative Delegate and using evidence that admittedly is questionable. In the result, I find the Employer does not have a strong *prima facie* case to appeal the Determination. It is contrary to the purposes of the *ESA* for the efficient and timely resolution of appeals to prolong cases with little merit (see *0388025 B.C. Ltd. (cob as Edgewater Inn)*, BC EST # D019/12, and *U.C. Glass Ltd.,* BC EST # D107/08).

52. Therefore, I decline to extend the appeal period.

53. Having said this, even if I had not declined to extend the appeal period on the basis that the Employee does not have a strong *prima facie* case, as explained below, I would have dismissed the appeal on the merits.

(ii) The Merits of the Appeal

54. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

a) the director erred in law;

b) the director failed to observe the principles of natural justice in making the determination;

c) evidence has become available that was not available at the time the determination was being made.

55. As previously indicated, the Employer appeals the Determination on the sole ground in section 112(1)(c) of the *ESA*, namely, that evidence has become available that was not available at the time the

determination was being made. This ground of appeal is commonly referred to as the "new evidence" ground of appeal.

56. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations. More particularly, in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

57. The requirements above are conjunctive and the Tribunal will rarely accept evidence on appeal that does not satisfy all the requirements.

58. It is also noteworthy that the new evidence ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

59. In the present case, the Employer seeks the Tribunal to consider the following evidence as "new evidence" in the Appeal:

> a. the ADP records (that admittedly contain inexplicable errors);
>
> b. the screenshots of the "corporate calendar" for the Employee (that is admittedly incomplete and "hard for [the Tribunal] to adjudicate");
>
> c. the GPS records that are "not clear"; and
>
> d. the copy of the original vacation spreadsheet for the Employee with hand corrected mistakes.

60. I find that none of the proposed "new evidence" satisfies the first requirement in *Davies, supra*, because it is evidence that was available during the investigation of the Complaint and before the Determination was made and could have, with the exercise of due diligence, been presented to the Investigative Delegate during the investigation or to the Adjudicative Delegate before the Determination. In the result, I find the evidence in question does not qualify as "new evidence" and the appeal fails on this ground of appeal.

61. I also wish to observe that a review of the record produced by the Director in the appeal shows that the Employer had many opportunities to produce the documents it now seeks to produce in the appeal. There is also evidence of a pattern of delays by the Employer in responding to the Investigative Delegate's

request for information including in the case of some of the information now adduced by the Employer in the appeal. As concerns the Investigative Delegate's request for a record of daily hours worked by the Employee during his entire employment, the Employer appears to have completely neglected to respond to the Investigative Delegate. The Tribunal has said on many occasions that an employer cannot lie in the weeds, fail to properly participate in an investigation and seek to adduce evidence on appeal which should have been presented to the Director during the investigation: *Tri-West Tractor,* BC EST # D268/96. What the Employer is doing now by adducing the proposed "new evidence" currently, in the appeal, only prejudices the fairness of this process. Had the Employer presented the said evidence during the investigation of the Complaint, the Adjudicative Delegate would have been able to test the veracity of the evidence.

62. While I find that the Employer's new evidence ground of appeal fails based on the first criteria in the *Davies* test and I am not required to consider the other elements of the test, I also find the Employer's proposed new evidence lacks high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue. My decision here is supported in part by Mr. Lakhani's own acknowledgment in his submissions that the ADP records admittedly contain inexplicable errors; the screenshots of the "corporate calendar" for the Employee are admittedly incomplete and "hard for [the Tribunal] to adjudicate"; the GPS records are "not clear"; and the copy of the original vacation spreadsheet for the Employee required hand correction of mistakes by the Employer. This does not give me any confidence that the proposed new evidence is reliable or has any probative value that could have led the Adjudicative Delegate to a different conclusion on the issues of wage and vacation payments owed to the Employee.

63. In the result, I find that there is no basis for this Tribunal to interfere with Determination under the new evidence or any other ground of appeal.

ORDER

64. The application to extend the appeal period is refused. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination dated May 4, 2023, is confirmed as issued together with whatever further interest that has accrued, under section 88 of the *ESA*, since the date of issuance.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal