Citation: Nechako Lumber Co. Ltd. (Re)
2023 BCEST 8

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Nechako Lumber Co. Ltd.
("Nechako")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** David B. Stevenson

**FILE NO.:** 2022/190

**DATE OF DECISION:** February 27, 2023

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Janna Crown | counsel for Nechako Lumber Co. Ltd. |
| Clifton Pearce | on his own behalf |
| Mitch Dermer | delegate of the Director of Employment Standards |

## OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by Nechako Lumber Co. Ltd. ("Nechako") of a determination issued by Mitch Dermer, a delegate of the Director of Employment Standards (the "deciding Delegate"), on August 31, 2022 (the "Determination").

2. The Determination found Nechako had contravened section 63 of the *ESA* in respect of the termination of Clifton Pearce ("Mr. Pearce") and ordered Nechako to pay Mr. Pearce the amount of $11,656,14, an amount that included concomitant annual vacation pay under section 58 of the *ESA* and interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $12,156.14.

3. Nechako has appealed the Determination on the grounds the Director committed an error of law, and that evidence has come available that was not available when the Determination was being made.

4. In correspondence dated October 13, 2022, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the "record") from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to each of the parties. Both have been provided with the opportunity to object to the completeness of the record.

6. Counsel for Nechako has filed a submission indicating there was a discussion between the delegate investigating the complaint (the "investigating Delegate") and Jason Bourguignon ("Mr. Bourguignon"), who was representing Nechako during the investigation, which is not reflected in the record. The alleged omission relates to comments made by Mr. Bourguignon to the investigating Delegate of a 'common industry practice' of moving millwrights between shifts and, in the submission of counsel for Nechako, is relevant as it shows what Mr. Pearce "ought to have known" when he completed his millwright apprenticeship.

7. The response of the Director states that the record reflects all of the communications made during the investigation and, at page 55 of the record, that it contains a specific reference to a practice "within the worksite". There is also a general reference in the record to the "knowledge of tradespeople working mostly weekend and graveyard shift is wildly [sic] known".

8. I shall address this matter later in the decision.

9. There are no other objections to the completeness of the record.

10. My review of the submission received with the appeal, the record and the Determination indicated there was sufficient presumptive merit to some elements of the appeal to warrant seeking further submissions from the parties.

11. In correspondence dated December 19, 2022, the Tribunal invited the Director and Mr. Pearce to make submissions on the merits of the appeal.

12. The Tribunal received a submission from both the Director and Mr. Pearce.

13. In correspondence dated January 19, 2023, the submissions were provided to Nechako, who was invited to respond to those submissions. The Tribunal has received a response on behalf of Nechako, which has been disclosed to the Director and to Mr. Pearce.

## ISSUES

14. The issues in this appeal are whether Nechako has shown errors in the Determination on any of the grounds of appeal that have been advanced: error of law and evidence coming available that was not available when the Determination was being made.

## THE DETERMINATION

15. Nechako operates a lumber business in the province. Mr. Pearce was employed with Nechako from October 6, 2014, to April 9, 2021. At the time his employment ended, Mr. Pearce was employed as a millwright at a rate of pay of $44.19 an hour.

16. Mr. Pearce provided the following information:

i. He started with Nechako as a production employee. In September 2016, he began a millwright apprenticeship, which he completed in 2021;

ii. For his entire period of employment, Mr. Pearce worked what is known as the "swing shift", which comprises two weeks of days (6:30 am-3:00 pm) and two weeks of afternoons (4:00 pm-12:30 am);

iii. In early 2021, he completed his millwright apprenticeship;

iv. In March 2021, Mr. Pearce was told that commencing April 11, 2021, he would be moved to the graveyard shift (11:00 pm-7:00 am); he had never been told prior that he could be moved from his swing shift upon completion of his millwright apprenticeship;

v. He objected, informing Nechako he had childcare responsibilities (Mr. Pearce was a single parent with shared custody of his seven-year-old son) and working a graveyard shift would interfere with those responsibilities;

vi. Nechako would not alter their decision to move him to the graveyard shift, but indicated to him he might have the opportunity to return to a swing shift in the future or, alternatively,

he could return to production as a forklift operator, staying on a swing shift but incurring a reduction in wages to $35.00 an hour;

vii. He did not accept the move to graveyard and, in correspondence date-stamped April 13, 2021, submitted his resignation, noting it was being signed "under duress".

17. On April 9, 2021, Mr. Pearce filed a complaint with the Director of Employment Standards.

18. Nechako provided the following information:

i. Mr. Pearce was informed during the period of his millwright apprenticeship that upon its completion his shift could be changed;

ii. Nechako is sometimes required, for operational purposes, to change the shifts of the millwrights, which is typically done by seniority;

iii. Nechako employs 25 millwrights, six of whom work a swing shift; millwrights' schedules for January 2020 to June 2022, were provided by Nechako;

iv. These records are discussed under the heading, "Employer's Evidence" at page R3 of the Determination;

v. With limited exceptions, the records provided by Nechako showed there were no material changes to the scheduled working times for any of the millwrights during the period in 2020 and 2021 that coincided with Mr. Pearce's employment (January 2020 to March 2021);

vi. The two exceptions were a four-week period in February-March 2020 where Mr. Pearce is recorded as being moved from "Planer A" to "Planer B" while another employee was, coincidently, moved from Planer "B" to graveyard, and two periods where employees were at school.

19. The deciding Delegate found, based on the evidence provided by Nechako that no millwright's shifts had been changed from January 2020 to March 2021 and the evidence of Mr. Pearce (accepted by the deciding Delegate and not disputed by Nechako) that he had not worked any shift other than a swing shift during his employment with Nechako, that working a swing shift was a term of his employment agreement.

20. The deciding Delegate also found that moving Mr. Pearce to the graveyard shift was a substantial unilateral change to his conditions of employment that justified a finding under section 66 of the *ESA* that he should be deemed terminated and presumptively entitled to the benefit found in section 63.

21. The deciding Delegate considered section 65 of the *ESA* – specifically section 65(1) (f) – and found the alternative employment Mr. Pearce was offered as forklift operator at an hourly rate more than $9.00 less than his millwright rate was not 'reasonable' on the facts and did not disentitle Mr. Pearce to length of service compensation.

22. The deciding Delegate found Mr. Pearce entitled to wages in the amount stated in the Determination and imposed an administrative penalty on Nechako.

## ARGUMENTS

### Error of Law

23. Nechako asserts the deciding Delegate erred in law in his application of section 66 of the *ESA*. The following arguments are made on this point:

a. The deciding Delegate found he could rely on past practice to imply a term into Mr. Pearce's employment contract, but relied on incomplete and unreliable past practice in doing so – inappropriately limiting his assessment of past practice to only that period from January 2020 to March 2021, which Nechako submits was an atypical period affected by Covid-19 pandemic considerations, and not representative of normal or regular scheduling practice;

b. A review of past practice required the deciding Delegate to look at the entire past practice of Nechako in scheduling millwrights and the failure of the deciding Delegate to seek that information from Nechako and to consider it represents an error of law;

c. The section 66 analysis was flawed, by finding there was an implied term that Mr. Pearce would work a specific schedule and then finding the implied term had been breached;

d. The deciding Delegate failed to "follow the law" on the correct interpretation of section 66 of the *ESA*; and

e. The deciding Delegate failed to address two issues relevant to the analysis: whether there was an "explicit" agreement that Mr. Pearce would work a specific schedule; and that Nechako was legally entitled to change Mr. Pearce's shift provided notice was given.

24. Nechako also submits the deciding Delegate erred in law by failing to recognize that Mr. Pearce's new role as a certified millwright was in effect an advancement to a new position that required different terms and conditions of employment to those in place when he worked as a production employee and millwright apprentice. Nechako says that, "in effect, the Complainant [Mr. Pearce] was entering into a new employment agreement with different terms regarding duties, wages and title".

25. Nechako argues the failure of the deciding Delegate to recognize that the change in his position would require new terms and conditions, and would have included a change in his shift schedule, led the deciding Delegate to act on a view of the facts that could not reasonably be entertained.

### New Evidence

26. Nechako also grounds their appeal on new evidence coming available that was not available when the Determination was being made. Under this ground of appeal, Nechako has submitted two exhibits. The first is identified as a Human Resources Information Software ("HRIS") system report which Nechako says shows shift schedules for a period preceding the January 2020 to March 2021 schedule that was provided by Nechako during the investigation and used by the deciding Delegate in making the Determination.

27. Nechako says those documents are credible and reliable because they were generated by third-party software.

28. Nechako also submits these documents show that shift changes among millwrights was a common practice preceding the Covid-19 pandemic (and the period covered by the schedule provided during the investigation).

29. Nechako submits the documents are probative because they suggest Mr. Pearce was aware that millwrights moved through various schedules and they show a practice that is different than what the deciding Delegate apparently found.

30. The other exhibit comprises handwritten notes of what appears to be a job interview for Mr. Pearce that bears the date "Aug 13/14", which Nechako says shows Mr. Pearce was aware of the different shifts in the workplace and indicated he was "OK" to work any of them.

31. Nechako argues this exhibit is credible and probative.

32. Nechako says it was not aware of the documents comprising these two exhibits until after the Determination was made. Beyond saying it was unaware of the information contained in the documents, or in the case of the interview notes, "entirely unaware" of their existence, Nechako does not explain why this information could not reasonably have been found and provided during the investigation.

33. Mr. Pearce and the deciding Delegate have each filed a response to the appeal.

34. The response of Mr. Pearce is focused on Nechako's notice to move him to a graveyard shift and to any suggestion he had agreed to it. He re-asserts the position he took during the investigation – that he never agreed to work a graveyard shift as his personal circumstances would not allow it and any suggestion to the contrary is inaccurate.

35. The response of the deciding Delegate is focused on the "new evidence". The deciding Delegate says Nechako has not satisfied the conditions for the Tribunal to allow the material presented with the appeal to be accepted.

36. The deciding Delegate says the documents contained in the exhibits relate to matters for which Nechako was asked to provide information: Mr. Pearce's employment agreement; and the practice of shift movements among the millwrights. If, as argued by Nechako, these documents are highly probative to their position, it is less acceptable that they were not found and provided during the investigation.

37. Nechako has been afforded the opportunity to reply to the responses of Mr. Pearce and the deciding Delegate.

38. In respect of the submissions of Mr. Pearce, Nechako understandably disagrees, and in some respects strongly disagrees, with much of Mr. Pearce's response. Likewise in respect of the submissions by the deciding Delegate. Nechako re-asserts its position that their representative, Mr. Bourguignon, was not familiar with the HRIS Reports and "entirely unaware" of the handwritten job interview notes.

## ANALYSIS

39. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

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

40. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

### New Evidence

41. I shall first address the new evidence ground of appeal, as conclusions on this ground of appeal will inform several of the arguments made in support of the error of law ground of appeal.

42. 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, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03.

43. New evidence which does not satisfy any of these conditions will rarely be accepted. This 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*.

44. Nechako seeks to have the documents included in the exhibits considered in their appeal. For the reasons stated below, I do not find the documents provided satisfy the conditions for allowing them as "new evidence".

45. First, I find the documents in the exhibits are not "new"; they are documents that existed when the investigation was being conducted and, as the deciding Delegate has pointed out in his submission, if relevant and probative, could – and in my view should – have been provided to the investigating Delegate during the complaint investigation process.

46. Nechako seeks to avoid any inquiry about whether they ought to have been provided during the complaint process by having me characterize the documents submitted with the appeal as simply being 'late' as opposed to being available but not being provided.

47. Counsel for Nechako refers to and relies on the Tribunal's decision in *Senor Rana's Cantina Ltd.*, BC EST #D017/05, to support the proposition that the Tribunal may admit evidence that is discovered 'late' even if it is not "new evidence". This submission also refers to the decision in *Falcon Overhead Doors Ltd.*, BC EST #D405/99. Neither of these cases assist Nechako.

48. In the *Falcon Overhead Doors Ltd.* case, the employer had indicated *during the complaint process* that certain evidence existed, but they were having trouble locating it. That evidence, which was two cancelled cheques, was located after the determination was made and was presented with the appeal. On those facts, and in the particular circumstances of the case, the Tribunal Member accepted the employer had conveyed to the Director its difficulty locating the cancelled cheques and chose to characterize them as 'late' evidence as opposed 'new' evidence and accepted them. The decision to allow this evidence was an exercise of discretion, representing one of those 'rare' circumstances where evidence which was available but not provided during the complaint process was accepted in an appeal.

49. In the *Senor Rana's Cantina Ltd.* case, the Tribunal Member only alluded to the circumstances in *Falcon Overhead Doors Ltd.* case, but found those circumstances were not present in that appeal and, in result, did not accept the evidence sought to be introduced and dismissed the "new evidence" ground of appeal.

50. No overriding principle is established through the above cases.

51. Nechako says their representative, Mr. Bourguignon, was "not familiar with" the HRIS records and "entirely unaware" of the job interview notes.

52. Nechako says that following the Determination, Mr. Bourguignon "became aware" of the HRIS records and, fortuitously it seems, "found" the interview notes while reviewing Mr. Pearce's employment file for an entirely different document. No further explanation of the discovery of these documents is provided.

53. An examination of the Determination and the record provides a slightly different perspective on why those documents were not provided to the investigating Delegate.

54. In respect of the HRIS records, the Determination and record indicate Nechako provided "the spreadsheet showing the different shift changes of various trades people." Also stating, "these are common types of changes and it has evolved over several years as the ownership structure had changed 5 years ago": page 44, record. Based on notes found at page 55 of the record, the spreadsheet was provided by Nechako "to re-enforce constant change in shift at the worksite". The spreadsheet was not provided with any qualifying language limiting its application to a Covid-19 pandemic period and there is no evidence that the information contained in the spreadsheet provided by Nechako was skewed or otherwise affected by the Covid-19 pandemic. That is reinforced by language in the Determination, which makes no reference to the spreadsheet having conditional application or limited utility.

55. The irresistible inference from an assessment of the Determination and record is that Nechako provided all the information – the spreadsheet – it decided was necessary to make the point that, for operational

purposes, millwrights' shifts were commonly changed. For the reasons set out in the Determination, the deciding Delegate found the spreadsheet did not, as it related to Mr. Pearce's employment, demonstrate what Nechako asserted. The appeal submission is an attempt to alter that finding by seeking to introduce the HRIS records. I agree with the submission of the deciding Delegate: if Nechako felt it was important to demonstrate its assertion concerning shift changes by providing evidence over a longer period, it should have done so by applying greater diligence. Even if Mr. Bourguignon was not personally familiar with the HRIS record, it is apparent someone with the employer was, since they made him aware of them after the Determination was made.

56. In respect of the interview notes, Nechako alleges in the appeal that these documents were found while reviewing Mr. Pearce's employment file for an entirely different document. However, the record indicates that in a discussion with Mr. Bourguignon on May 30, 2020, and in response to an inquiry from the investigating Delegate about an employment contract, he stated there was "no formal written agreement/contract in his file": page 52, record. That statement appears to indicate Mr. Bourguignon looked at Mr. Pearce's employment file during the investigation. Also, Mr. Bourguignon did send a copy of Mr. Pearce's Record of Employment and resignation letter, which, one would expect, were found in his employment file.

57. This information raises some concern over the explanation provided for the failure to produce this new evidence in a timely way. In any event, there is simply no rational explanation why Mr. Pearce's employment file was not fully examined before the Determination was made (although elements of the record suggest it was) or why these notes, which the appeal submission says were "stapled to the back of another document in the Complainant's file", were not made available to the investigating Delegate during the investigation.

58. Nechako has provided no satisfactory explanation as to why, with due diligence, the evidence sought to be included with the appeal could not have been presented to either the investigating or deciding Delegate prior to the making of the Determination. I am not, therefore, in a position to accept that the evidence was "not available" at the time the Determination was made or the reasons for their failure to provide this information to the investigating Delegate.

59. Second, I do not find the HRIS records are shown to be relevant. It might be otherwise if those records were properly explained, but as they are presented with the appeal, they are virtually incomprehensible as showing "shift changes as a common practice among millwrights for a period of time preceding the Pandemic".

60. Nor do I find the interview notes to be relevant to any issue arising in the complaint. Simply put, even if Mr. Pearce responded to a question during the job interview in a certain way – and I am not convinced what is recorded in the interview notes is entirely accurate – the fact is, and Nechako agreed to this fact during the investigation, Mr. Pearce worked the same swing shift for the duration of his employment: page 22, record. Nechako has not provided a logical basis for my concluding in this appeal that the deciding Delegate ought to have been persuaded by anything contained in the job interview notes from finding that: first, that Mr. Pearce worked the same swing shift for the duration of his employment; second, that he was never told that when he completed his apprenticeship he could be moved to a graveyard shift; or third, that having worked the swing shift for more then six years, it became part of his employment agreement.

61. Although the argument made on behalf of Nechako contends the notations found in the interview notes "directly contradicts" findings made by the deciding Delegate, they do not identify the findings to which that contention applies.

62. Third, I do not find the HRIS records to be particularly credible. As suggested above, there is no explanation of how those records are to be read. On their face, those records show only that the millwright to whom each page applies has been 'coded' as being deleted, or added to a certain workgroup on a specific date, at a specific time. For example, for employee RW, the HRIS record shows that on 6-Feb-2020, at 13:52 (the time recorded on the page applying to him), he was, simultaneously deleted from a workgroup that is identified as WKND MAIN and added to a workgroup identified as MW GY. There is no indication that this change actually signifies and, in particular, whether it signifies a change in shift.

63. As well, if those records purport to identify a shift change, looking at the information contained in them that overlaps with the January 2020-March 2021 period from the spreadsheet presented during the investigation, the HRIS records are inconsistent with the information on the spreadsheet.

64. I will cite the evident examples in support of this conclusion.

65. On the page of the HRIS record relating to employee KM, there is a change shown in February 2020, where this individual transitions from MW GY to SAWMILL B; on the page for employee TM, there is reference to periods in January 2020 and March 2020 which appear to suggest that individual transitions in January from MW GY to WKND MAIN and in March from WKND MAIN to MW GY; and on the page for employee RW, there is reference to a period in February 2020, where he appears to transition from WKND MAIN to MW GY.

66. The submission made on behalf of Nechako is that the HRIS records indicate shift changes. The spreadsheet provided by Nechako to the investigating Delegate, however, shows no change in the shifts for any millwright in the above periods (except for a one-month period involving Mr. Pearce and one other millwright that is mentioned in the Determination, but for which no explanation was ever provided by Nechako – see page R3). Both documents cannot be correct or, if they are, how that can happen has not been explained.

67. In sum, I find Nechako has failed to satisfy the burden on it to demonstrate that new evidence has become available that was not available at the time the Determination was being made. I exercise my discretion and refuse to accept the documents submitted with the appeal.

68. Based on my decision to refuse to accept the documents provided as "new evidence", this ground of appeal is dismissed and the balance of the appeal will be addressed and decided on the facts found in the Determination unless those findings raise an error of law.

## Error of Law

69. Section 66 provides that "if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated."

70. In section 1 of the *ESA* "conditions of employment" are broadly defined in section 1(1) as meaning "all matters and circumstances that in any way affect the employment relationship of employers and employees". The Tribunal has determined that in order to find a termination of employment under section 66, any alterations to conditions of employment must be sufficiently material that it could be described as being a fundamental change in the employment relationship.

71. The Director, or in this case the deciding Delegate, is given a discretion to determine if the employment has been terminated. Section 66 creates entitlements separate and distinct from those that might be vindicated at common law and the discretion allowed by that section must be exercised having regard to the provisions of the *ESA*, and the principles underlying it, and not of necessity what a court might be inclined to consider in a common law action based on an alleged constructive dismissal: see *Isle Three Holdings Ltd. carrying on business as Thrifty Foods*, BC EST #RD124/08.

72. The Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, or a Director's delegate, only doing so in exceptional and very limited circumstances, as noted in the following passage in the Tribunal's decision in *Re: Jody L. Goudreau and Barbara E. Desmarais of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98:

> The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context has been described as being:
>
> > …a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223, at 229.

73. Part of the burden on Nechako in this appeal is to establish the deciding Delegate acted "unreasonably" in the sense described above in finding Mr. Pearce was terminated under section 66.

74. The focus of an examination under section 66 will be the employment relationship in place at the time of the alteration and must:

1) identify the terms and conditions (both express and implied) of the parties' employment contract;

2) determine whether the employer breached one or more terms of that contract by way of a unilateral change; and if so

3) determine if the change was substantial.

75. Identifying the terms and conditions of employment is a finding of fact.

76. Determining whether the change was substantial is a question of mixed fact and law. The Tribunal has consistently endorsed an objective test for determining what constitutes a substantial change which involves a consideration of the following matters:

a) the nature of the employment relationship;

b) the conditions of employment;

c) the alterations that have been made;

d) the legitimate expectations of the parties; and

e) whether there are any implied or express agreements or understandings.

77. If it is decided that the employment has been terminated, the employee is entitled to compensation for length service pursuant to section 63 of the *ESA*, unless one of the exceptions in section 65 applies.

78. Before commencing my analysis of this ground of appeal, it is appropriate to address the concerns raised by counsel for Nechako concerning what is alleged to be an omission from the record. Even if I were to accept the record has omitted a statement made by Mr. Bourguignon during the investigation, I find the particular statement alleged to have been omitted is irrelevant to the decision of the deciding Delegate, for two principal reasons: first there is simply no evidence in any of the material of an 'industry practice' or, even if there was, that Mr. Pearce knew it would affect his continuing to work on the swing shift if he ever became a millwright; and second, that the focus of an examination under section 66 is the employment relationship in place at the time of the alteration – that is, Mr. Pearce's terms and conditions of employment, not those which might apply to a millwright employed in the industry at large.

79. Returning to an analysis of the error of law arguments, Nechako's first argument under this ground is that the deciding Delegate inappropriately limited the past practice evidence by relying on incomplete and unreliable past practice to imply a term into Mr. Pearce's employment.

80. I will make three points about this argument: first, Nechako has not shown, and there is nothing in the material in the record, that the past practice evidence used by the deciding Delegate to identify Mr. Pearce's terms and conditions of employment was either incomplete or unreliable. It was not presented by Nechako as such in the investigation; second, the finding of past practice made by the deciding Delegate was not based only on the January 2020-March 2021 period in the records provided by Nechako, but also relied on the evidence of Mr. Pearce (which was agreed to by Nechako) that he had only ever worked a swing shift for the duration of his employment; and third, that the finding on past practice was one of fact that was adequately supported by the evidence before the deciding Delegate.

81. I do not accept this argument demonstrates an error of law by the deciding Delegate.

82. Next, Nechako argues the deciding Delegate's analysis of section 66 was flawed. I disagree.

83. In its appeal submission, Nechako acknowledges the deciding Delegate stated the correct approach to an examination under section 66. Notwithstanding, Nechako says the deciding Delegate erred in finding that working the swing shift was a term of his employment agreement.

84. As above, I reject this argument as it fails to demonstrate an error of law. The deciding Delegate, as an element of an examination under section 66, was required to identify the terms and conditions of employment (express or implied). As noted, what are "conditions of employment" is broadly defined in section 1(1) of the *ESA* as meaning "all matters and circumstances that in any way affect the employment

relationship of employers and employees". Those matters may be express of implied. It was agreed during the investigation that there was no written agreement between Nechako and Mr. Pearce. On the evidence, the deciding Delegate was clearly entitled to find that working the swing shift was a condition of employment which, not being expressed in any written form, was implied into the employment agreement.

85. Counsel for Nechako submits that even if past practice was correctly established, the deciding Delegate erred by failing to follow the law of the Tribunal on the correct interpretation of section 66. This is an odd argument considering it is conceded in the appeal submission that the deciding Delegate applied the correct test in considering whether section 66 might be invoked.

86. I can only presume the argument being made is that the deciding Delegate applied the correct test but reached the wrong result, but that argument is simply challenging an application of findings of fact to a correct legal test, which is not reviewable on appeal unless an error of law is shown. I find no such error in this case and do not accept this argument.

87. In re-asserting the position that working the swing shift was not a term of Mr. Pearce's employment, Nechako refers to the Tribunal decision in *Rosauro Abinoja*, BC EST #D012/07, which Nechako contends is similar, and relevant, to their case.

88. The facts of that case, however, are very different from this case. They are summarized in the following excerpt from para. 47 of that decision:

> I also wish to point out that the Director properly considered the question of whether or not Abinoja had been constructively dismissed within the meaning of section 66 of the Act and properly applied the general principles governing the said section. More specifically, the Director, properly analyzed the nature of the employment relationship between Abinoja and Home Depot throughout Abinoja's employment with Home Depot, the conditions of Abinoja's employment (particularly the fact that there was no guarantee of specific shifts or shift times from the very beginning of his employment with Home Depot and that he worked a variety of shifts during his employment), the alteration to Abinoja's shift (that it was not something an objective, reasonable person would find to be unfair, unreasonable and unacceptable), the legitimate expectations of Home Depot and Abinoja and whether there were any express or implied agreements or understandings between the parties.

89. On the last point, there was evidence that throughout his employment Home Depot could change the hours of work of Abinoja for business reasons with appropriate notice and did so.

90. This case does not assist Nechako's appeal. In this case the deciding Delegate found a term of Mr. Pearce's employment was that he would work the swing shift. I have found that conclusion was one the deciding Delegate was entitled to make on the evidence.

91. When examined against other decisions of the Tribunal, the circumstances in this case are not unlike those found in *Andy Tollasepp*, BC EST #D490/02, which involved an employee who had been working a set work schedule for fifteen years. Mr. Tollasepp's employer gave him notice of a change in his schedule as a result of which, like Mr. Pearce, he resigned. His claim for length of service compensation was denied by the Director. He appealed.

92. The Tribunal found the Director had "erred in equating substantial alteration of wages to substantial alteration of conditions of employment" (at page 4-5), stating:

> A condition of employment is a much wider concept than the payment of a wage. The failure to consider the effect of the change on "all matters and circumstances that in any way affect the employment relationship", and focus on an effect on wages is an error in the interpretation and application of section 1 and section 66 of the *Act*.
>
> In my view, the status of the employee - regular or on call-, and the timing of shifts - weekends or weekdays, are also conditions of employment. The first question in the analysis is whether the Employer has altered a condition of employment. Here the answer clearly is yes, as the Employer has changed a shift schedule which has been in effect for some 15 years. It has also changed the status of the Employee from regular scheduled to "on call for events".

93. The purpose of juxtaposing this decision against the *Abinoja* case is to point out that whether an employee's shift is a condition of employment and whether there has been an alteration of that condition of employment are questions of fact that must be addressed on the evidence in the particular case and might lead to different results when those facts are applied to the section 66 analysis.

94. The *Abinoja* case does not demonstrate any inconsistency in the Determination with any previous cases of the Tribunal; it is perfectly consistent with the approach the Tribunal has identified as being necessary in its many decisions on section 66.

95. Nechako argues the deciding Delegate erred by failing to consider that Mr. Pearce was moving into a new role with Nechako, a role with different terms of employment that was, in effect, "entering into a new employment agreement with different terms regarding duties, wages and title" (para. 20).

96. Once again, I do not see how that argument advances this appeal, since if it were the case that Mr. Pearce was "entering into a *new* employment agreement" [*emphasis* added], that would mean the *old* employment agreement was being brought to an end and that result would either trigger section 63 of the *ESA* directly or require the same examination of section 66 as the deciding Delegate undertook in this case.

97. In sum, I find the decision of the deciding Delegate considered factors that were relevant to the question being considered and was made within the legal framework of the *ESA*. No basis for interfering with the deciding Delegate's discretion in this matter has been shown in this case. As stated above, short of showing the deciding Delegate acted arbitrarily, without authority or not in good faith, the Tribunal will not interfere with the exercise of such discretion: *Takarabe and others*, BCEST D160/98.

98. I find there is no merit to this appeal and it is, accordingly, dismissed.

## ORDER

99. Pursuant to section 115 of the *ESA*, I order the Determination dated August 31, 2022, be confirmed in the amount of $12,156.14, together with any interest that has accrued under section 88 of the *ESA*.

**David B. Stevenson**
**Member**
**Employment Standards Tribunal**