Citation: Patrick Jobe (Re)
2024 BCEST 1

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Patrick Jobe
("Mr. Jobe")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2023/111

DATE OF DECISION: January 3, 2024

DECISION

SUBMISSIONS

Patrick Jobe	on his own behalf
Nikala de Balinhard	delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*"ESA"*) by Patrick Jobe ("Mr. Jobe") of a determination issued by Jennifer Redekop, a delegate ("deciding Delegate") of the Director of Employment Standards ("Director"), on July 4, 2023 ("Determination").

2. The Determination found the *ESA* had not been contravened, that no wages were owing to Mr. Jobe, and that no further action would be taken on his complaint.

3. Mr. Jobe has appealed the Determination on all of the grounds available under section 112(1) of the *ESA*: error of law; failure to observe principles of natural justice in making the Determination; and new evidence becoming available that was not available at the time the Determination was made.

4. In correspondence dated August 23, 2023, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record ("record") from the Director, requested submissions from the parties on document disclosure, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Jobe and to the respondent employer, Community Living British Columbia ("CLBC"), care of their legal counsel. Both have been provided with the opportunity to object to its completeness.

6. In correspondence dated October 6, 2023, Mr. Jobe raised some concerns with the completeness of the record, identifying information he says was submitted to the 'Director's Delegate,' but is not reflected in the record. A delegate of the Director, who was also the delegate who investigated the complaint ("investigating Delegate") and the author of the Investigation Report, has submitted a response identifying the location within the record of each of the pieces of information identified by Mr. Jobe. In a further submission, dated November 9, 2023, Mr. Jobe indicated he still had issues with one of the items identified in his earlier correspondence, but does not identify what those concerns are or in what respect the record is incomplete. He also refers to another item from his initial response to the record, indicating he continues to have concerns about whether the Investigation Report accurately reflected his formal response to the investigating Delegate. This latter point does not address the completeness of the record, but whether the information set out in the Investigation Report accurately reflects information Mr. Jobe provided during the investigation.

7. On analysis, I find nothing in Mr. Jobe's concerns that demonstrate the record is incomplete. The submission of the investigating Delegate indicates it is complete.

8. There has been no objection by CLBC to the completeness of the record.

9. For the purposes of this appeal, I accept the record is complete.

10. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:
>
> (a) the appeal is not within the jurisdiction of the tribunal;
>
> (b) the appeal was not filed within the applicable time limit;
>
> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the appeal was made in bad faith or filed for an improper purpose or motive;
>
> (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
>
> (f) there is no reasonable prospect that the appeal will succeed;
>
> (g) the substance of the appeal has been appropriately dealt with in another proceeding;
>
> (h) one or more of the requirements of section 112 (2) have not been met

11. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and CLBC will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

12. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

13. CLBC is a provincial crown corporation that provides support to persons with mental disabilities. Mr. Jobe was employed by CLBC from September 22, 2014, to July 16, 2021. His final position with CLBC was as Integrated Services Manager ("ISM"), which he held from April 1, 2020, to July 16, 2021.

14. The parties agreed Mr. Jobe was a manager for the purposes of the *ESA*.

15. Mr. Jobe filed a complaint with the Employment Standards Branch on January 14, 2022, in which he alleged CLBC had contravened the *ESA* by failing to pay all regular wages owed and by requiring him to work excessive hours. The specific claim was that Mr. Jobe had worked extra hours for which he should have received additional pay but had not.

16. The deciding Delegate found Mr. Jobe was not entitled to any additional wages. This finding is addressed in the Determination under three headings: whether Mr. Jobe was entitled to wages for hours worked over 35 hours in a week; whether Mr. Jobe was entitled to wages for unused Earned Time Off ("ETO"); and whether Mr. Jobe was entitled to wages for December 24-28, 2020, and possibly for December 29, 2020.

17. The analysis of the Director under each of these headings is comprehensive and this decision does not require they be set out in any more detail than what is required to respond to the arguments raised by Mr. Jobe in his appeal submissions.

18. It suffices, at this point, to provide a summary of the basis for the decision of the deciding Delegate on each of those questions.

19. On the first question, the deciding Delegate found the terms of Mr. Jobe's employment, expressed through documents and other evidence, all of which is discussed at pages R3-R8 of the reasons for Determination, was essentially that he would be paid an annual salary for working the number of hours required to perform the work he was expected to carry out based on the requirements of the job. It was not limited to 35 hours a week as Mr. Jobe claimed.

20. On the second question, the deciding Delegate found the ETO was not 'wages' under the *ESA*, but even if it were, Mr. Jobe had received all the ETO to which he was, on the evidence, entitled.

21. On the third question, the deciding Delegate found Mr. Jobe had received his regular salary for the December 24-28 period, had not established an agreement by the employer to provide additional compensation for those days, and that the evidence did not sufficiently support Mr. Jobe's claim that work was performed on a day, December 29, that he was on vacation.

ARGUMENTS

22. As indicated above, Mr. Jobe has raised each of the allowable grounds of appeal under section 112(1) of the *ESA*. He commences his appeal, however, with some general comments about the complaint investigation process, an assertion that his ability to support his claim was hampered (my term) by "incomplete records, or inability to access and provide corroborating evidence" that normally would be available for reference through the employer, and an allegation that there are factual inaccuracies in the Investigation Report and in the reasons for Determination – a list of which he says can be provided "on request."

23. Mr. Jobe's general comments include several questions which he asks the Tribunal to consider when addressing his appeal. At this point I will only state that as any of those questions are required to be answered in considering the relative merits of this appeal, they will be addressed. An appeal, however, is

not an academic exercise for pronouncing on questions that are not relevant to the appeal, but is an error correction process.

24. I shall summarize the arguments made by Mr. Jobe under each of the grounds of appeal.

Error of Law

25. Mr. Jobe submits the statutory requirements, expressed in section 27, to provide accurate payroll records is "an essential expression of the employment contract." From this position he makes the point that the requirement to accurately record hours of work is not simply "a tool offering administrative expediency to the employer's benefit," but an obligation which, if properly administered, would allow a problematic work situation to be better known, understood and potentially mitigated by the employer, and the failure to recognize that statutory obligation led the deciding Delegate to allow the employer to describe his compensation in multiple ways – annually, daily, and hourly – depending on what was expedient for the employer – which operated to his detriment.

26. Mr. Jobe submits the deciding Delegate erred in finding his terms of employment did not include an entitlement to "extra pay" for "extra work," or in other words, additional compensation for work beyond 35 hours a week.

27. Mr. Jobe submits the deciding Delegate erred in finding the ETO was not wages under the *ESA*. He says the deciding Delegate erred in her conclusion the ETO was not "money that is paid or payable as an incentive."

28. Mr. Jobe says the deciding Delegate erred as it related to employer and employee requirements for vacation under the *ESA*. Under this argument, he says the deciding Delegate was wrong in stating, "if the Complainant is indeed claiming any vacation pay or wages owed in relation to December 29, 2020, I find the evidence before me does not sufficiently support that work was completed on a day the Complainant was on vacation and paid vacation pay."

29. The initial submission with the Appeal Form identified two other areas under the rubric "error of law." The first was an assertion that Mr. Jobe's direct supervisor was inconsistent in his application of policy. In respect of this assertion, Mr. Jobe says supporting documentation will be forthcoming. The second is simply an assertion that Mr. Jobe, had he known he would not be compensated, would not have worked extra hours in early 2021.

Natural Justice

30. Under this ground, Mr. Jobe says CLBC acted in bad faith, that the deciding Delegate was biased, that CLBC has supressed his access to records, limiting his range of action and, potentially, the range of outcomes, and that CLBC has taken punitive action against him by demanding the return of a supposed 'overpayment' of wages.

New Evidence

31. Under this ground Mr. Jobe refers to information in CLBC's payroll records relating to the administration of his vacation bank, letters relating to what he has submitted is punitive action for a supposed overpayment of wages, and what is described as an incomplete CLBC "Orientation Checklist For New Employees."

ANALYSIS

32. 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.

33. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

34. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. As stated above, 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.

35. I shall respond to each of the grounds of appeal, addressing the merits of the arguments raised by Mr. Jobe.

Error of Law

36. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

37. The arguments raised by Mr. Jobe under this ground engage the points, set out at 1 and 2, of whether the deciding Delegate misinterpreted a provision of the *ESA* and/or misapplied an applicable principle of general law.

38. I do not disagree with Mr. Jobe that there is a statutory obligation on an employer to comply with the requirements of section 27 of the *ESA*, but like the deciding Delegate, I part ways with Mr. Jobe on his argument that the information required to be included on a wage statement represents "an essential expression of the employment contract." This argument was addressed by the deciding Delegate in the following passage in the reasons for Determination:

> [Mr. Jobe] argues the hourly wage rate shown on the Wage Statements form part of his employment contract; however, I do not accept that argument as consistent with the evidence. I find the hours shown on the Wage Statements are not compelling evidence of an agreement that [Mr. Jobe] was to receive additional compensation for any hours he worked beyond 35 in a week. Given the other evidence in this case, including the Employment Letter, the Job Description, and the ETO Guidelines, I find the hours listed on the wage statement are simply a result of apportioning [Mr. Jobe's] annual salary to individual pay periods for administrative purposes in a large government organization, rather than an indication of the actual hours worked or compensated: (at page R8).

39. As indicated in that passage, the finding made by the deciding Delegate is based on assessment of the evidence before her. I agree with the reasons provided by the deciding Delegate.

40. The argument made by Mr. Jobe has not identified any decision of the Tribunal that has endorsed the proposition advanced here, which is that the statutory requirements found in section 27 of the *ESA* define the terms of employment. There is no doubt such information will assist in determining an individual's terms of employment, but as the deciding Delegate indicates, such information is not determinative where other evidence points to and supports a different conclusion.

41. The deciding Delegate did not misinterpret section 27 of the *ESA*.

42. I also find, for the reasons expressed below, that the deciding Delegate did not misapply an applicable principle of general law.

43. In my view, the second argument made by Mr. Jobe on the error of law ground is the central element of his appeal – he disagrees with the decision by the deciding Delegate that the terms of his employment did not include an agreement to compensate for hours worked beyond 35 in a week.

44. In making the decision on this aspect of Mr. Jobe's claim, the deciding Delegate identified that the task to be performed was to determine whether the terms of Mr. Jobe's employment included providing extra pay for extra work and correctly characterized that task as a matter of contract interpretation. At page R7, the deciding Delegate set out the following:

> The general law of contract interpretation provides that words of an agreement must be given their plain, ordinary meaning and that an objective test should be applied to the interpretation of words used in the agreement. The words of the contract are the primary source. If the words are not clear, reference may be had to other external evidence.

45. I agree the above statement incorporates the essential elements of the approach which should be taken in cases involving contract interpretation.

46. The interpretation of employment contracts is a question of mixed fact and law, in which the principles of contractual interpretation are directed by a common-sense approach applied to the employment agreement as a whole, giving the words used by the parties when they set out the agreement their ordinary and grammatical meaning, consistent with the underlying factual matrix, statutory principles, and the surrounding circumstances known to the parties at the time of formation of the employment agreement.

47. The proper test for reviewing a question of mixed fact and law is whether the decision-maker made a "palpable and overriding error," unless the decision maker made a discrete and extricable legal error, in which case the "correctness" standard applies.

48. I find the deciding Delegate has applied the established legal principles and the analysis undertaken conforms to the approach required to be taken on the contract interpretation issue. There is no "extricable legal error." Mr. Jobe does not argue otherwise; at its core, he simply argues the deciding Delegate got it wrong.

49. I agree with the deciding Delegate that, on the evidence, the terms of Mr. Jobe's employment agreement did not indicate the number of hours that was to be covered by the salary paid to Mr. Jobe or include an agreement to compensate for hours worked beyond 35 in a week. At the very least, I am satisfied that the deciding Delegate did not make a "palpable and overriding error" in reaching the conclusion that Mr. Jobe was not entitled to extra pay for extra work.

50. All of the points raised in the appeal submission on this point were before the deciding Delegate, were addressed in the reasons for Determination, and were not accepted as defining the terms of the employment agreement. As stated by the deciding Delegate at the top of page R8 of the Determination:

> While [Mr. Jobe] may have ended up working more hours than he thought he would, given the particular events that happened, this does not change there was no agreement between him and the Employer to receive extra compensation for any hours above 35 in a week.

51. Simply disagreeing with the conclusion of the deciding Delegate, which was made by applying general legal principles respecting the interpretation of employment agreements to the relevant facts as found, and asking the Tribunal to reassess that conclusion based on assertions and arguments that have been addressed by the deciding Delegate in the reasons for Determination, is entirely inconsistent with the error-based approach required for setting aside a determination under section 112 of the *ESA*.

52. The argument made by Mr. Jobe alleging his employer did not follow its policies for an orientation does not alter terms of the employment agreement or the result. It is irrelevant to the issue raised and, more directly, does not show an error of law in the Determination.

53. I do not entirely understand the point sought to be made by Mr. Jobe in the argument relating to the ETO. Whether I agree or not with the deciding Delegate on whether the ETO falls within the definition of "wages" in the *ESA*, that question is inconsequential, as the deciding Delegate also found, based on Mr. Jobe's own evidence, that he had received all the ETO to which he was entitled. Nothing in the submission on this matter establishes an error of law affecting the Determination.

54. I take a similar view of the argument relating to what Mr. Jobe refers to as an error concerning vacation administration. This argument centers on December 29, 2020, and unspecified dates in June/July 2021.

55. The submission relating to December 29 fails on the facts, as the deciding Delegate found insufficient evidence to conclude any work was performed by Mr. Jobe on that day. Mr. Jobe's assertion to the contrary in his appeal submissions that the deciding Delegate found otherwise is incorrect.

56. The June/July matter was never part of the claim made by Mr. Jobe. Not only does this claim have no factual foundation, neither the Director nor CLBC has ever been advised it was an aspect of his complaint nor has Mr. Jobe ever particularized how this matter fits within his claim for regular wages. CLBC has had no opportunity to respond to the assertions made in the appeal submissions. It is inappropriate, as well as being raised too late in the day, for this matter to be considered here. In any event, nothing in the submission demonstrates an error of law in the Determination.

57. I find there is no merit in this ground of appeal.

Natural Justice

58. A party alleging a failure to comply with principles of natural justice, as Mr. Jobe has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

59. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, are given the opportunity to reply, and have the right to have their case heard by an impartial decision maker.

60. The Tribunal has confirmed on many occasions that the content and scope of procedural fairness is highly contextual. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this matter, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

61. The above statement succinctly incorporates and expresses both the common law duty of fairness and the statutory duty of fairness that operate in the context of the natural justice ground of appeal in this case.

62. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Mr. Jobe was provided with the

opportunity required by principles of natural justice. I am satisfied Mr. Jobe was accorded the procedural rights required under the *ESA*. He participated fully in the complaint process.

63. Mr. Jobe alleges the response of the deciding Delegate to the question of whether he was owed vacation pay was "incomplete" and a failure to comply with principles of natural justice. His argument contends the vacation pay question warranted consideration as an issue separate from his other claims. The record indicates Mr. Jobe provided his position on vacation pay. His position was addressed by the deciding Delegate in the Determination.

64. I am not certain what Mr. Jobe means by "incomplete." There is nothing "incomplete" about the deciding Delegate's answer on his vacation pay argument relating to December 29 and, as I have already indicated, Mr. Jobe did not identify to the Director he had any issue with whatever might have occurred in the June/July 2021 period respecting vacation pay.

65. The process followed by the investigating and deciding Delegates met the requirements of the principles of natural justice. No breach is shown.

66. Mr. Jobe alleges bias on the part of the deciding Delegate. In support of this allegation, he refers to the following:

i. The language used in the reasons for Determination which Mr. Jobe says indicates "both an implicit and explicit subjectivity in the treatment and consideration of" his evidence;

ii. The deciding Delegate developed and expressed her assumptions in a way that effectively fully credited the Employer and fully discredited the employee; and

iii. The deciding Delegate included information in the Determination that favoured the employer but had no real relationship to the decision that had to be made.

67. Examples of the above concerns are provided by Mr. Jobe.

68. There are several principles that have been developed to apply to cases where an allegation of bias is raised.

69. First, the test is an objective one. In that context, because allegations of bias are serious allegations, they should not be found except on the clearest of evidence. The evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias. The rationale for this requirement is anchored in the principle that a party against whom an allegation of bias is made is not permitted to explain away the circumstances in which the allegation arises, or to deny the presence of a biased mind: see *Dusty Investments Inc. dba Honda North*, *supra.*: at page 8.

70. In my view, Mr. Jobe has not provided any evidence from which a reasonably informed bystander could reasonably perceive bias on the part of the deciding Delegate. The allegations of bias flow from a superficial view of words used, the structure developed by, and the reasons set out by, the deciding Delegate in the reasons for Determination. The allegations are grounded in, and consist mainly of, a subjective impression formed by Mr. Jobe. In this case, as in any case involving allegations of bias against a decision maker, there is an initial presumption that the deciding Delegate acted impartially. That presumption is not overcome by presenting subjective impressions, as Mr. Jobe has done here.

71. I reject the allegation of bias.

72. Mr. Jobe advances a breach of natural justice argument on allegations CLBC supressed evidence and subjected him to punitive action for bringing his complaint. This part of his natural justice arguments fails on an application of the clear scope of the natural justice ground of appeal, which provides an appeal on natural justice if the *director* fails to observe the principles of natural justice in making the Determination. This ground of appeal does not contemplate, or allow, an appeal based on what is perceived to be a failure to comply with principles of natural justice by an employer.

73. In sum, Mr. Jobe has not shown there is merit in the natural justice ground of appeal.

New Evidence

74. The material which Mr. Jobe seeks to submit as new evidence relates to his allegation of CLBC supressing evidence and his position on his claim of extra pay compensation for extra work. There is also a reference in the initial appeal submission to vacation scheduling records showing how his vacation bank was administered during his medical leave in June-July 2021.

75. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach; testing 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 et al. (Merilus Technologies Inc.)*, BC EST # D171/03.

76. 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*.

77. The submission on the appeal does not address any of the considerations applied by the Tribunal when considering whether to accept and consider material that is submitted under the new evidence ground of appeal. The appeal submissions do not indicate the 'new evidence' advanced was not reasonably available during the complaint process; how it is relevant to any issue arising from the complaint; that it is credible; or that it is probative.

78. In my assessment, the 'new evidence' delivered to the Tribunal does not meet any of the criteria under which the Tribunal might accept it. These documents are not 'new'; if Mr. Jobe felt they were relevant to any part of his claim, they could have, and should have, been provided during the complaint process.

79. In any event, as I have indicated above, the document going to allegation of punitive conduct toward Mr. Jobe by CLBC is not probative, as it does do not address any issue that is relevant to his complaint, nor is it credible, as it does not establish the allegation for which it is submitted.

80. I have also addressed the contention of Mr. Jobe relating to the incomplete employee orientation checklist and do not find the document relating to it to be either credible or probative.

81. This ground of appeal is also not likely to succeed and is dismissed.

82. I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

83. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated July 4, 2023, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal