

Citation: Sunrise Trailer Sales Ltd. (Re)  
2024 BCEST 16

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Sunrise Trailer Sales Ltd.  
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** John Chesko

**FILE NO.:** 2023/148

**DATE OF DECISION:** February 15, 2024

## DECISION

### SUBMISSIONS

Edward R. Lewis

counsel for Sunrise Trailer Sales Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* ("ESA"), Sunrise Trailer Sales Ltd. ("Appellant") has filed an appeal of a determination issued on August 11, 2023 ("Determination").
2. The Determination held the Appellant had contravened Part 8, section 63 (liability resulting from length of service) of the *ESA* and section 58 (annual vacation pay entitlement) in respect of the employment of Jane Hanni ("Complainant").
3. The Determination ordered the Appellant to pay the Complainant compensation for length of service, annual vacation pay and accrued interest totalling \$10,852.51. In addition, the Determination levied two mandatory administrative penalties, totalling \$1,000.00, for a total amount payable of \$11,852.51.
4. The Appellant submits the Director of Employment Standards ("Director") erred in law, failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was being made.

### BACKGROUND

5. The Appellant operates a trailer sales business in Aldergrove, B.C., which falls within the jurisdiction of the *ESA*.
6. The Complainant was employed by the Appellant as the Controller for approximately 19 years from March 3, 2003, to December 29, 2021, when she was terminated by the Appellant for alleged cause.
7. The Complainant filed a complaint under section 74 of the *ESA* alleging that the Appellant contravened the *ESA* by terminating her employment without paying compensation for length of service.

### Investigation of Complaint

8. A delegate of the Director ("Investigating Delegate") conducted an investigation of the complaint. As part of the investigation, the Investigating Delegate communicated with the Complainant and Gordon Firth, the Appellant's representative. In addition, the Investigating Delegate also received evidence from witnesses including persons put forward by the Appellant.
9. The section 112(5) record ("Record") shows the Investigating Delegate spoke with multiple witnesses about the alleged complaint and provided both the Complainant and the Appellant's representative updates and the opportunity to put forward their side of the story, present evidence and respond to evidence presented by the other side.

10. The Investigating Delegate specifically requested both the Complainant and the Appellant provide information and documents relevant to the issues raised in the complaint. Specifically, I note the Record indicates the Appellant's representative was contacted numerous times by the Investigating Delegate during the investigation. The Record indicates the Investigating Delegate explained the process to the Appellant's representative, discussed the issues under investigation and made it clear the Appellant was required to provide information and documents on relevant issues. The Appellant was also provided with a formal Demand for Employer Records on April 3, 2023.
11. The Investigating Delegate provided an investigation report dated June 30, 2023 ("Investigation Report") to the parties, setting out the positions and evidence received to date. The Investigation Report sets out that the Complainant and the Appellant are to review and provide further information. The Investigation Report specifically informed the parties the information set out would be relied on by a delegate of the Director ("Adjudicating Delegate") for making the Determination and that it is important the parties review it carefully and provide any further clarification and evidence.
12. I note the Investigation Report specifically advises the Appellant that there are documents and evidence that have not been provided to the Director by the Appellant. The Investigation Report even highlights specific issues where the Appellant has not provided copies of notes nor evidence supporting aspects of the termination. The Investigation Report also sets out that the Appellant was given repeated requests for "for payroll records and any documents relating to [the Complainant's] termination including documents to establish just cause." The Investigation Report notes that the Appellant has not provided the requested documents to the Director.
13. The Complainant provided further information in response to the Investigation Report. This response was also provided to the Appellant.
14. I note the Appellant did not provide any response to the Investigation Report nor did the Appellant provide any response to the Complainant's response to the Investigation Report.
15. The Investigating Delegate submitted the Investigation Report and the accompanying information to the Adjudicating Delegate to make the Determination.

#### **Determination dated August 11, 2023**

16. On August 11, 2023, the Adjudicating Delegate issued the Determination.
17. The Determination held the Appellant had contravened Part 8, section 63 of the *ESA* in not paying the Complainant compensation for length of service. The Determination held the Appellant was liable to pay the Complainant compensation for length of service (*ESA* section 63), annual vacation pay (*ESA* section 58), and accrued interest (*ESA* section 88) totalling \$10,852.51. In addition, the Determination levied two mandatory administrative penalties, totalling \$1,000.00, for a total amount payable of \$11,852.51.
18. The Determination sets out the issues, the applicable law, the Complainant's and the Appellant's submissions and the evidence provided during the investigation.

19. The Adjudicating Delegate considered the Appellant's submissions that the Complainant's conduct gave just cause for termination. Applying the applicable legal test, the Adjudicating Delegate held there was not just cause in all the circumstances.

### **Appeal filed by Appellant**

20. The Appellant filed an appeal of the Determination on September 18, 2023.
21. Along with the appeal materials filed by the Appellant on September 18, 2023, the Appellant requested additional time to October 18, 2023, so that the Appellant could provide further materials in support.
22. The Employment Standards Tribunal ("Tribunal") granted the Appellant's requested extension to October 18, 2023.
23. On October 18, 2023, the Appellant submitted their further arguments and materials in support of the appeal and requested a further extension of time to submit additional materials and documents in support of the appeal. The Tribunal advised the Appellant that it would proceed with the appeal based on the materials submitted to date and any further extensions, if required, would be granted by the Tribunal Panel assigned to decide the appeal.

### **Appeal Record Completeness Confirmed**

24. On receiving the Appellant's appeal, the Tribunal requested and received the Record from the Director. The Tribunal provided the Record to the parties and sought submissions on the completeness of the Record. As the Tribunal did not receive any objections to the completeness of the Record, the Tribunal accepts the Record as complete.

### **ARGUMENTS**

25. As noted above, the Appellant submits the Director of Employment Standards erred in law, failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was being made. The Appellant seeks to have the Determination cancelled and sent back to the Director for another hearing or investigation.
26. While the Appellant checked the above three grounds of appeal on the Appeal Form, I note the submissions by the Appellant focussed on the following two grounds: that the Director failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was being made.
27. The Appellant submits that the Complainant was terminated for insubordination and time theft.
28. The Appellant submits that "[due] to the overload and burden of the administration" and "understaffing of the senior management," the Appellant "did not have time to investigate ... and compile the supporting evidence" during the investigation of the complaint.
29. The Appellant further submits the Investigating Delegate refused to allow the Appellant's representative extended time to "look into ... [the] complaint and compile the necessary documentation."

30. The Appellant also submits that certain documents “are not producible at this time due to issues with converting them to an accessible format.”
31. The Appellant submits the Director was not impartial in failing to provide the Appellant extended time.
32. The Appellant submits the Investigating Delegate told the Appellant’s representative that the Employment Standards Branch was there to “help the employee” and that the Director did not treat all evidence impartially.
33. The Appellant submits it was a breach of natural justice to not allow the Appellant extended time to respond to the complaint.
34. The Appellant submits that without the extended time to respond to the complaint, the Appellant was denied the right to present their evidence and consequently has not had a fair hearing and the right to be heard by an independent decision-maker.
35. The Appellant submits there is new evidence that was not available at the time the Determination was being made.
36. The Appellant submits there is “evidence that the Appellant requested an extension of the time limit for presenting new evidence in the initial investigation, but the request was never received by the Investigating Delegate.”
37. The Appellant submits the new evidence is material to the issue of the Complainant's termination and should be considered.
38. The Appellant submits the new evidence must be admitted because at the time of the investigation, the Appellant faced a significant administrative burden, lack of resources and lack of time, and was unable to obtain the necessary documents and evidence.
39. The Appellant submits the Determination should be cancelled and the matter sent back to the Director for another hearing or investigation.

## **ANALYSIS**

40. These reasons are based on the written submissions of the Appellant, the Determination, and the Record. I have reviewed the decisions cited by the Appellant.

### **Appeal of the Determination**

41. 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.

42. The Tribunal has consistently maintained that the purpose of an appeal is to correct errors within the parameters of section 112(1). An appeal is not a re-hearing of the case. Nor is it an opportunity to reargue the Appellant's facts or take another 'kick at the can.'

### **New Evidence**

43. The Appellant alleges that new evidence has become available since the time the Determination was being made.
44. As noted by the Appellant, the test that must be met to introduce new evidence on an appeal is clearly established. In *Davies et al. (re Merilus Technologies)*, BC EST # D171/03, the Tribunal set out the following requirements for introducing new evidence:
- (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.
45. Each of the above requirements need to be met by an appellant seeking to submit new evidence. Previous decisions of the Tribunal make it clear that parties are expected to participate in good faith and must present all relevant evidence during the initial investigation and determination stage of complaints. The introduction of new evidence later at the appeal stage that could and should have been introduced at the investigation and determination stage will generally result in the dismissal of the appeal.
46. The Appellant in this case submits evidence that existed at the time of the investigation and the adjudication of the complaint. The Appellant submits understaffing and time constraints prevented the Appellant from presenting evidence during the investigation and adjudication of the complaint.
47. The evidence and arguments submitted by the Appellant do not meet the requirements for new evidence. Although the Appellant submits they were too busy from April to June 2023 to address the complaint and get the documents necessary, the Tribunal's jurisprudence is clear that workplace standards issues are important, and parties are expected to take part and participate in good faith during the investigation. I note the Record indicates multiple occasions where the Appellant communicated with the Investigating Delegate and provided information and it was clearly explained how important it was to take part in the investigation and put together important information necessary for the complaint. I also note the clear warning that failure to take part or disclose information could result in negative consequences for the party not fully taking part as decisions could only be made with the information provided.
48. I note the Record shows the Investigating Delegate repeatedly followed up with and notified the Appellant that they were expected to take part in the investigation. The Record indicates the Investigating Delegate worked within the Appellant representative's schedule as much as possible and provided reminders to assist the Appellant in responding to the issues raised in the complaint. I even note the Record shows the

Investigating Delegate reminded the Appellant's representative that the employer bore the onus of proving just cause and that it was for the Appellant to follow up and respond with information and document production.

49. The law is clear that an appellant must meet the necessary requirements for new evidence and the failure to do so will generally result in dismissal of the appeal (see *Davies et al.*, *supra*; *Can-Pacific Trading Inc.*, BC EST # D082/11; *Anthony MacInnis (Re)*, 2020 BCEST 9). It is important for the fair and efficient resolution of complaints under the *ESA* that parties participate in good faith during the investigation and adjudication of complaints. It is contrary to efficient and fair resolution of complaints under the *ESA* for a party to fail to participate fully at the investigation and adjudication stage and then seek to present information on appeal that could and should have been presented earlier. (See *Kaiser Stables Ltd.*, BC EST #D058/97; *Eric A. Dunning and Yvon Bourque*, BC EST # D550/97 - limited participation)
50. The Appellant generally resubmits arguments made during the initial investigation and adjudication stage but does not submit cogent evidence explaining the Appellant's failure to participate fully during the investigation and adjudication stage. While the Appellant submits there were technical reasons it was unable to produce certain computer information and documents, the Record indicates the Appellant failed to respond to repeated requests for information and clarifications, did not respond to the formal demand for records and even did not provide a response to the investigation report and follow up. I would find the evidence existed and could reasonably have been discovered and presented to the Director during the investigation or adjudication of the complaint. In all the circumstances, I find the Appellant has not shown that the Appellant's proposed new evidence would meet the necessary requirements to sustain an appeal.
51. I find there is no merit in this ground of appeal, and it is dismissed.

#### **Failure to Observe Principles of Natural Justice**

52. As set out above, one of the Appellant's grounds of appeal is that the Director failed to observe the principles of natural justice in making the Determination.
53. Natural justice has been described as the right to a fair procedure. It includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *607730 B.C. Ltd. (English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST #D014/05).
54. A party alleging failure to comply with natural justice must provide evidence in support of the allegation. There needs to be specific evidence about how the determination procedure did not meet the requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).
55. I have reviewed the Record and considered the Appellant's submissions carefully. I find there is no basis for the Appellant's argument on this ground nor is there any basis in the Record for concluding the Director failed to observe the principles of natural justice. The evidence is clear that the Appellant was aware of the evidence and the case being made and had the right to respond and be heard. The Record indicates the Investigating Delegate conducted a thorough investigation of the issues raised in the complaint and the parties had ample opportunity to present and respond to the case. The Record sets out in some detail the Appellant's submissions during the investigation as well as interviews with the Complainant and other

witnesses. The Record indicates discussions with the Appellant's representative and explanations about the issues raised in the complaint including the importance of submitting evidence in support of just cause. Indeed, the Record indicates there were repeated requests and opportunities for the Appellant to submit further information and evidence in support of the Appellant's position, but that it was the Appellant that did not follow up and provide the requested information. In fact, the Record indicates the Appellant's representative indicated that they would provide further information as requested but did not.

56. In response to the Appellant's submission that the Director was not impartial and did not treat all evidence equally, I note it is the nature of the investigation and determination process that findings of fact will need to be made. A fair and reasonable consideration of the information provided by any party may result in some being accepted, and some not, and those reasoned decisions are not alone evidence of bias (see *Renshaw Travel Ltd.*, BC EST # D050/08, confirmed in BC EST # RD085/08). So long as the Director follows the requirements of natural justice—in most cases, listens to both sides of the story and makes a reasoned determination—it is not a failure of natural justice to make reasoned findings of fact or to apply facts within a legal test, such as the test of whether there is 'just cause' under the *ESA*. In the Determination, the Director considered the facts within the appropriate legal tests and concluded the Appellant had failed to demonstrate that there was just cause under the *ESA*.
57. As set out above, the Record also shows the Investigating Delegate repeatedly followed up with the Appellant's representative. The Record shows there were multiple requests and demands made for information and documents to the Appellant. The Record also indicates that the Appellant was repeatedly reminded by the Investigating Delegate to provide further information and documents, that the Employer had the onus to show that there was just cause, and that it was the Appellant that did not do so. The Appellant had every chance to respond to the requests for information, to respond to the repeated demands for information and production, and to provide clarification and information in response to the investigation and investigation report. While the Appellant submits that the Investigating Delegate stated they were 'helping' the Complainant during the investigation of the complaint, the evidence just as clearly shows the Investigating Delegate likewise 'helping' the Appellant's representative through the investigation. I find the Appellant has not provided any evidence of impartiality or bias. Nor do I find anything in the Record that would cause there to be an appearance of impartiality or bias (see *Milan Holdings*, BC EST # D559/97; reconsideration refused in BC EST # D313/98). The Record indicates that the investigation and Determination procedure was compliant with natural justice and that it was the Appellant that did not participate fully and is now trying to re-argue their position on the complaint.
58. I find that the Director did not breach the principles of natural justice in their assessment of the evidence. The Director properly considered the evidence that was before them and made findings that were reasonable and consistent with the law. It is not a breach of natural justice for the Director to make a determination on the evidence that was provided where the parties had reasonable opportunity to respond and provide evidence (see *Black Forest Cedar Products Inc.*, BC EST # D120/05). I find that the Appellant has not shown the Director breached the principles of natural justice in making the Determination.
59. I find there is no merit in this ground of appeal, and it is dismissed.

#### **Error of Law in Determination**



60. The Tribunal has stated that it will take a broad view of an appeal and may consider grounds not raised by an appellant (see *Triple S Transmission Inc.*, BC EST # D141/03). While the Appellant submitted the Director allegedly failed to observe the principles of natural justice and that there was new evidence, the Appellant also appears to allege that the Director erred in concluding the Appellant did not have just cause. In this section I will also consider whether the Appellant's arguments could establish an error of law in the Determination.
61. To show an error of law the Appellant has the burden to show there has been a significant legal error in the decision. An error of law is not just a finding of fact an Appellant disagrees with. Examples of errors of law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion that is inconsistent with established principle. (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466)
62. Findings of fact may in rare cases amount to an error of law where the delegate 'acted without any evidence or on a view of the evidence that could not be reasonably entertained' or arrived at a 'clearly wrong conclusion of fact.' In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view of the same evidence.
63. The Appellant appears to submit that the finding the Complainant was terminated without just cause was not reasonable. I have reviewed the Determination and the evidence in the Record carefully and do not find an error of law in the Determination.
64. Section 63 of the *ESA* creates liability on the employer for length of service on dismissal. To be excused from paying length of service under section 63(3), an employer has an onus to show proper notice was given, equivalent wages, a combination of proper notice and wages, or the employee voluntarily quit, retired or was dismissed for legal cause. The onus is on the employer to show on all the evidence that there was just cause (see *McCall Bros. Funeral Directors Ltd.*, BC EST # D567/98, and *McCall Bros. Funeral Directors Ltd. v. Employment Standards et al*, 2000 BCSC 1507). The determination of whether there is just cause under the legal test required in the *ESA* requires an assessment of the evidence produced and it is clear in the jurisprudence that the employer bears the onus to demonstrate just cause. The finding of whether there is just cause is a mixed question of fact and law and this Tribunal will not second-guess the Determination where the findings of fact have been made and the correct legal test applied.
65. I find there was no error of law in the Determination in the finding that the Appellant did not meet the onus to demonstrate just cause for termination and that compensation for length of service, vacation pay, and interest were owing to the Complainant. The Determination properly considered the legal test and came to a reasoned conclusion on the available evidence. It is clearly established in Tribunal decisions that the Tribunal will not re-evaluate the evidence or substitute its own view of the same evidence.
66. As set out above, the Appellant was required to put forward evidence and documents in support of its position that there was just cause. The Record indicates the Appellant was the author of its own misfortune in repeatedly failing to put forward the evidence and documents in support of its position and it is not correct to submit that the Appellant did not get a fair hearing when it was the Appellant who did not take part sufficiently and respond. I find the facts are somewhat similar to those in *McCall Bros. Funeral Directors Ltd.*, *supra*, and *McCall Bros. Funeral Directors Ltd. v. Employment Standards et al.*,

*supra*, where the Court noted that the employer had ample opportunity to provide information in support of its actions but did not discharge its onus.

67. I have considered the Appellant's submission that there is evidence of after acquired cause that the Appellant now seeks to submit in further support of its position during the investigation. While I have some sympathy for the Appellant's submission on this issue, I am unable to find that there was an error on this issue as there was evidence brought up by the Appellant during the investigation that was canvassed by the Delegate and was cited in the Investigation Report. However, as noted in the Investigation Report and supported by the Record, the Appellant did not present sufficient evidence on this issue to meet the required onus to show just cause. While the Appellant would now like to continue to seek and present new evidence and argument during the appeal, the jurisprudence of the Tribunal is clear that parties are required to participate fully in good faith during the investigation and determination stage of the process and that it would be contrary to the efficient, fair and final resolution of employment standards complaints if parties were able to continue searching for after acquired cause and indefinitely prolong the processes beyond the Determination. I note the Appellant would be in a stronger position if the Record indicated the Appellant had otherwise responded to the repeated requests and demands for information and documents and there was clear evidence the Appellant was following up and responding to the requests and demands for information and documents. Instead, the Record shows the Appellant received repeated requests and indulgences to provide further information and documents, which went unheeded by the Appellant. I also note there is no evidence in the Record nor documented evidence of the Appellant requesting further time during the investigation and determination. In fact, the Record indicates examples where the Delegate rescheduled the investigation communications to later dates when the Appellant's representative requested. While after acquired cause may be raised by an employer in support of just cause, the onus remains with the Employer to demonstrate just cause regardless, and the jurisprudence recognizes the ability to bring after acquired evidence must be carefully considered in the circumstances and will not continue ad infinitum (see *Director of Employment Standards (Black Press Group Ltd. carrying on business as the Nelson Star)*, BC EST # RD074/17). The evidence shows the Appellant did raise the issue of after acquired cause at the investigation but, as noted in the Investigation Report provided to the parties, the Appellant did not follow up.
68. I have also considered the calculation of the amount owing to the Complainant for length of service, vacation pay, interest and administrative penalty. I find there is no error in the calculations. I also note the administrative penalties are mandatory in the circumstances and I would confirm them also (see *537370 B.C. Ltd.*, BC EST # D011/06).
69. Having considered the above issues in the Determination, I find there is no error of law and would dismiss this ground of appeal.

### **Section 114 of the ESA**

70. Section 114(1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the 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.

71. A set out above, I find there is no reasonable prospect the appeal will succeed and that it should be dismissed under section 114(1)(f).

### **ORDER**

72. Pursuant to sections 114(1)(f) of the *ESA*, the appeal is dismissed.

73. Pursuant to section 115(1) of the *ESA*, I confirm the Determination made on August 11, 2023, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

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**John Chesko**  
**Member**  
**Employment Standards Tribunal**