

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Conor Pacific Canada Inc.

- and by -

Robert E. Nowack

- of Determinations issued by -

The Director of Employment Standards

**PANEL:** Brandon Mewhort

**FILE NOS.:** 2023/153 and 2023/159

**DATE OF DECISION:** March 14, 2024

## DECISION

### SUBMISSIONS

Robert E. Nowack	on his own behalf and on behalf of Conor Pacific Canada Inc.
Quintin Hill	on his own behalf
Grace Gimenez	delegate of the Director of Employment Standards

### OVERVIEW

1. This decision addresses two appeals. Conor Pacific Canada Inc. (“Employer”) appeals a determination issued by Mitch Dermer (“Adjudicative Delegate”), a delegate of the Director of Employment Standards (“Director”), dated November 29, 2022 (“Corporate Determination”). Robert E. Nowack (“Mr. Nowack” and, together with the Employer, “Appellants”), who is a director of the Employer, appeals another determination issued by the Adjudicative Delegate on the same day (“Director Determination” and, together with the Corporate Determination, “Determinations”). The Determinations followed an investigation conducted by another delegate of the Director (“Investigative Delegate” and, together with the Adjudicative Delegate, “Delegates”), which resulted in an Investigation Report issued on August 4, 2022. These appeals are filed pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
2. In the Corporate Determination, the Adjudicative Delegate determined that a former employee, Quintin Hill (“Employee”), was required to pay the Employer’s business costs, in contravention of section 21(2) of the *ESA*, and he was owed \$774.79 for those costs. The Adjudicative Delegate also determined the Employee was owed \$2,600.00 in outstanding vacation pay. With the addition of interest and administrative penalties for contraventions of the *ESA*, the Adjudicative Delegate determined that the Employer owed the Employee \$5,014.71.
3. In the Director Determination, the Adjudicative Delegate found Mr. Nowack was personally liable for up to two months’ unpaid wages of the Employee pursuant to section 96 of the *ESA*. With the addition of interest, the Adjudicative Delegate determined that Mr. Nowack was personally liable to the Employee in the amount of \$3,514.71.
4. For the reasons discussed below, I order that both the Corporate Determination and the Director Determination be confirmed pursuant to section 115(1) of the *ESA*.

### ISSUES

5. The issues in the appeal of the Corporate Determination are whether the Director erred in law or failed to observe the principles of natural justice.
6. As discussed below, the parties did not specifically address any grounds of appeal regarding the Director Determination. Mr. Nowack essentially submits that, because the Corporate Determination should be

overturned, the Director Determination should also be overturned because it flows from the Corporate Determination.

## THE DETERMINATIONS

### *Corporate Determination*

7. The Employer operates a financial planning business in British Columbia. The Employer owns a boat, and the Employee was employed as a deckhand on that boat from June 1, 2020, to July 30, 2021. At the time of his termination, the Employee earned a monthly salary of \$5,000. The Corporate Determination states that the Employee delivered his complaint against the Employer on October 5, 2021 (however, the complaint itself appears to be dated October 25, 2021 – see page 32 of the section 112(5) record (“Record”)).
8. During the investigation, the Employee provided either receipts or banking records, along with descriptions, for expenses he claimed to be owed by the Employer, totalling \$774.79. The expenses related to such things as administering the Employer’s website, incurring the cost of car sharing, and purchasing boat supplies, including teak cleaner, rubber stoppers, non-skid tape, and vinyl boat decals.
9. The Employer argued during the investigation that it should not have to reimburse the Employee for those costs because it made other overpayments to the Employee and the expenses should be set off against those overpayments.
10. The Adjudicative Delegate determined that these expenses were business costs, as contemplated in section 21(2) of the *ESA*, and that he did not have the jurisdiction to offset the business costs claimed by the Employee against the alleged overpayments. The Adjudicative Delegate determined that the Employee was owed \$774.79 for the costs he incurred in the course of his employment.
11. The Adjudicative Delegate also determined the Employee was owed \$2,600.00 in vacation pay. It was not disputed that the Employee had been paid \$65,000.00 in wages during his employment, which all fell within the recovery period, and that he had not been paid any vacation pay. The Employer argued that because the Employee was a salaried employee he was not owed vacation pay, but that argument was dismissed by the Adjudicative Delegate as being incorrect. The Employer also again argued that it made other overpayments to the Employee which should be set off against any vacation pay owing, but the Adjudicative Delegate again dismissed that argument relying on section 21 of the *ESA*.

### *Director Determination*

12. A BC Registry Services search conducted on November 22, 2022, with a currency date of August 19, 2022, indicated that the Employer is a federal company that was registered in British Columbia on July 24, 2020. Federal records showed Mr. Nowack as the sole director of the Employer.
13. The Adjudicative Delegate determined that Mr. Nowack was a director of the Employer from at least June 1, 2020, which is when the Employee began his employment with the Employer, until the date of the Director Determination. Accordingly, pursuant to section 96 of the *ESA*, the Adjudicative Delegate found

that Mr. Nowack was personally liable for two months' unpaid wages of the Employee in the amount of \$3,374.79, plus interest in the amount of \$139.92.

14. The Adjudicative Delegate determined that Mr. Nowack was not personally liable for the administrative penalties because there was insufficient evidence to demonstrate that he authorized, permitted or acquiesced in the Employer's contraventions of the *ESA*.

## ARGUMENTS

### *Corporate Determination*

15. When asked in the appeal form to select its grounds of appeal, the Employer indicated that the Director erred in law and that the Director failed to observe the principles of natural justice in making the Corporate Determination.
16. In its submissions, the Employer alleges that the Director made the following errors of law:
- a. The complaint should not have been allowed to proceed because it was not filed within the time limit provided for under the *ESA*.
  - b. The Director miscalculated the vacation pay owed to the Employee.
  - c. The Employee was overpaid, and those amounts should be set off against any amounts owed to the Employee.
  - d. Administrative penalties are discretionary and should not have been imposed by the Adjudicative Delegate.
17. The Employer alleges the following failures to observe the principles of natural justice:
- a. The Investigative Delegate predetermined their findings and failed to engage with the Employer to find an amicable settlement between the parties.
  - b. The Employer was not provided adequate opportunity to respond to the complaint.
18. The Director submits that:
- a. The complaint was delivered within the six-month time limit set out in the *ESA*, because the Employee's last day of employment was July 30, 2021, and the complaint was delivered on October 25, 2021.
  - b. Vacation pay was not miscalculated. The Employee's gross wages of \$65,000 were not disputed and the amount owing of \$2,600 for vacation pay was based on the calculation of  $\$65,000 \times 0.04$ .
  - c. Section 21 of the *ESA* states that an employer cannot withhold wages for any purpose, including to offset owed wages with respect to prior overpayments, as held in *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343 ("*Health Employers*") at paras 65 to 67.

- d. Administrative penalties are mandatory when an employer is found to have contravened the *ESA* or *Employment Standards Regulation* and the Adjudicative Delegate was required to impose them in this case.
- e. All information and evidence provided by the parties was taken into consideration by the Adjudicative Delegate.
- f. The Investigative Delegate attempted to facilitate a voluntary resolution between the parties, but they were unable to agree on final terms, with the Employer insisting on a full release of liability. The failure of the parties to agree on terms of a settlement does not represent a breach of natural justice.
- g. The Investigative Delegate did not fail to disclose issues to the Employer, and it was given an adequate opportunity to respond to the Employee's complaint. The Employer was emailed a copy of the Investigation Report on August 4, 2022, and it provided a response on August 8, 2022, in which further documentation was provided. The Corporate Determination addressed the same substantive issues as the Investigation Report, even though the issues were not phrased the exact same way.

19. The Employee submits that:

- a. The complaint was filed within the time limit provided under the *ESA*.
- b. The Employer's submissions regarding overpayment should be dismissed because an employer cannot withhold wages for any reason.
- c. The *ESA* requires that vacation pay be paid and there was no dispute regarding the total wages paid to the Employee or the fact vacation pay was never paid.
- d. The Employer was required to pay the administrative penalties.

20. In its final reply, the Employer essentially reiterates its position that the Employee was overpaid, and those amounts should be set off against any amounts owed to the Employee.

*Director Determination*

21. In his original submission regarding his appeal of the Director Determination, Mr. Nowack essentially submits that, because the Corporate Determination should be overturned, the Director Determination should also be overturned because it flows from the Corporate Determination.

22. In the appeal form submitted subsequently, the grounds of appeal selected by Mr. Nowack were that the Director erred in law and that the Director failed to observe the principles of natural justice in making the Director Determination. However, in his submissions, Mr. Nowack did not raise any alleged errors of law or failures to observe the principles of natural justice specifically regarding the Director Determination. Rather, all of Mr. Nowack's submissions reiterated alleged grounds of appeal regarding the Corporate Determination.

## ANALYSIS

### *Corporate Determination*

23. 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.
24. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with a determination: see *Tejinder Dhaliwal (Re)*, 2021 BCEST 34 at para 13.

### Alleged errors of law

25. This Tribunal has adopted the following factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA), as reviewable errors of law:
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.
26. Regarding the Employer's allegations about the complaint not being filed within the six-month time period provided for under the *ESA* and the calculation of vacation pay owed to the Employee, those are both questions of mixed fact and law, which are given deference by this Tribunal: see *3 Sees Holdings Ltd.*, BC EST # D041/13 at paras 26 to 28 ("*3 Sees*"); see also *Michael L. Hook (Re)*, 2019 BCEST 120 at para 31. As this Tribunal stated in *3 Sees* at para 28:
- The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, *supra*).
27. As this Tribunal has recently stated, a decision-maker's finding on a question of mixed fact and law should not be set aside on appeal unless it is tainted by a "palpable and overriding error": *Cultus Lake Waterpark Ltd. (Re)*, 2023 BCEST 54 at para 21, citing *Housen v Nikolaisen*, 2002 SCC 33.
28. In this case, there is no dispute that the Employee's last day of his employment was July 30, 2021. The Corporate Determination states that the complaint was delivered on October 5, 2021; however, as discussed above, the complaint itself appears to be dated October 25, 2021 – see page 32 of the Record.

In any event, the complaint was clearly delivered within the six-month time period provided in section 74 of the *ESA*. The Employer has not pointed to any evidence to the contrary.

29. The Employer has also not pointed to any evidence about how the Employee's vacation pay was calculated improperly. Section 58 of the *ESA* provides that an employer must pay an employee at least 4% of an employee's total wages during the year of employment entitling the employee to the vacation pay. In this case, the Employee's gross wages of \$65,000 were not disputed and the amount owing of \$2,600 for vacation pay was based on the calculation of  $\$65,000 \times 0.04$ . I see no reason to interfere with that aspect of the Corporate Determination.

30. Whether an Employer can set off overpayments made to employee against wages is a question of law, which is addressed in section 21 of the *ESA*. That section states:

- 21**
- (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
  - (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
  - (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

31. As submitted by the Director, section 21 of the *ESA* was addressed by the Court of Appeal in *Health Employers, supra*, at paras 65 and 67 as follows [emphasis in original]:

...Whatever the reasons a past overpayment may have been made to an employee, and no matter whether that overpayment was "wages," s. 21 says that "an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose". "For any purpose" includes the purpose of reimbursing the employer for the overpayment, regardless of the reason for the overpayment. In *Prins, supra* (at para. 1), McEachern C.J.S.C. (as he then was) characterized the provision as an absolute requirement with certain permissible exceptions. He said unilateral deduction of an overpayment of wages was not a permissible exception...

...

The arbitrator's ruling does not prohibit the employer from ever recovering an overpayment from an employee. The arbitrator interpreted s. 21 as prohibiting the unilateral recovery by the employer in all but certain excepted circumstances. The employer is still able to recover overpayments from employees where that employee agrees to the deductions, or where a statute or collective agreement expressly authorizes the employer's unilateral action. Where no such agreement or statutory authorization exists, the employer has the option of recovering overpayments in other ways such as pursuing a grievance, or bringing a claim against the employee.

32. None of the exceptions discussed in section 21 of the *ESA* and *Health Employers* apply in this case. Accordingly, in my view, the Adjudicative Delegate was correct in that the alleged overpayments paid by the Employer could not be set off against the wages owing to the Employee.

33. Lastly, I turn to the Employer's submissions on administrative penalties. The imposition of penalties for contraventions of the *ESA* are mandatory and, as explained by this Tribunal in *537370 B.C. Ltd.*, BC EST #D011/06 at para 15: "...absent circumstances amounting to bad faith or abuse of process, the Tribunal may only cancel a penalty provided for in the *Act* and *Regulation* if it decides that the contravention which underlies it cannot be supported and must be set aside pursuant to one of the grounds of appeal referred to in Section 112 of the *Act*." In this case, the Appellant does not allege bad faith or an abuse of process, and I have not set aside any of the contraventions underlying the administrative penalties pursuant to one of the grounds of appeal under section 112 of the *ESA*.
34. For the reasons discussed above, I dismiss this ground of appeal.
- Alleged failures to observe the principles of natural justice
35. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, this Tribunal discussed the principles of natural justice as follows:
- 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).
36. In my review of the Record, I have found nothing to suggest that the Investigative Delegate predetermined their findings, nor have I found anything to suggest the Employer was not provided an adequate opportunity to respond to the complaint.
37. As explained by the Director, the Employer was emailed a copy of the Investigation Report on August 4, 2022, and the Employer provided a response on August 8, 2022, in which it provided further documentation. The Corporate Determination addressed the same substantive issues as the Investigation Report, even though not phrased the exact same way.
38. Regarding the Employer's allegation that the Investigative Delegate failed to engage with the Employer to find an amicable settlement between the parties, I agree with the Director that a failure of the parties to agree on terms of a settlement is not, by itself, a breach of natural justice. In my review of the Record, nothing occurred or failed to occur during settlement negotiations that impacted the Employer's right to procedural fairness. I also note that section 78 of the *ESA* is discretionary in that it states the Director "may" assist in settling a complaint, but it is not obligated to.
39. For the reasons discussed above, I dismiss this ground of appeal.



*Director Determination*

40. Section 96 of the *ESA* is clear that a person who is a director at the time wages of an employee of a corporation were earned or should have been paid is personally liable for up to two months' unpaid wages for each employee.
41. In *Notel-Steeves*, BC EST # D007/16 at para 48, this Tribunal held:
- Absent extraordinary circumstances, in an appeal of a director/officer determination issued under subsection 96(1) of the *Act*, the only issues that may be properly raised concern the appellant's status as a director or officer of the employer firm, whether any particular subsection 96(2) defence applies, or whether the individual's personal liability "for up to 2 months' unpaid wages for each employee" has been correctly calculated...
42. Mr. Nowack has not raised any of those issues in his appeal of the Director Determination and he has failed to demonstrate a basis for the Tribunal to interfere with it. Accordingly, given that I have already dismissed the appeal of the Corporate Determination, I also dismiss the appeal of the Director Determination.

**ORDER**

43. I order that both the Corporate Determination and the Director Determination be confirmed pursuant to section 115(1) of the *ESA*.

---

**Brandon Mewhort**  
**Member**  
**Employment Standards Tribunal**