



An appeal

- by -

0933335 B.C. Ltd. carrying on business as Centennial Beach Cafe  
(“CBC”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

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

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2017A/105

**DATE OF DECISION:** November 20, 2017

## DECISION

### SUBMISSIONS

Paul Roberts

on behalf of 0933335 B.C. Ltd. carrying on business as  
Centennial Beach Cafe

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), 0933335 B.C. Ltd. carrying on business as Centennial Beach Cafe (“CBC”) has filed an appeal of a Determination issued by Sarah Orr, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), on July 7, 2017 (the “Determination”).
2. The Determination found that CBC contravened Part 3, sections 17 and 18 (wages); Part 5, section 45 (statutory holiday); Part 7, section 58 (annual vacation pay) and Part 8, section 63 (compensation for length of service) of the *ESA* in respect of the employment of Brandon Mestres (“Mr. Mestres”). The Determination ordered CBC to pay Mr. Mestres wages in the total amount of \$2,862.25 inclusive of accrued interest. The Determination also levied four administrative penalties against CBC totaling \$2,000 for breaches of sections 17, 18 and 63 of the *ESA* and 46 of the *Employment Standards Regulation* (the “*Regulation*”). The total amount of the Determination is \$4,862.25.
3. CBC appeals the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination.
4. The deadline to file the appeal of the Determination was August 14, 2017. On August 18, 2017, after the expiry of the appeal period, the Tribunal received CBC’s incomplete appeal. The appeal did not contain CBC’s written submissions but a letter from Paul Roberts (“Mr. Roberts”), CBC’s sole director and officer, requesting an extension of time to file the appeal to October 14, 2017. Mr. Roberts provided several reasons why it was difficult for him to file CBC’s appeal in a timely fashion including his family obligations, new employment and “the duties of closing business accounts” of CBC. As I am not dealing with the extension application here, I need not go into these reasons in any detail at this stage.
5. On August 22, 2017, the Tribunal corresponded with the parties advising them that it had received CBC’s appeal including CBC’s request for an extension of deadline to file the appeal. The Tribunal requested CBC to provide written reasons and argument for the appeal, grounds of appeal, and any supporting documents no later than 4:00 p.m. October 13, 2017. The Tribunal informed CBC that this deadline was not an extension to the appeal deadline, but simply a deadline to provide the requested documents.
6. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) “record” (the “Record”) and notified the other parties that no submissions were being sought from them pending a review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed. If the appeal is not dismissed then the Tribunal will invite Mr. Mestres and the Director to file a reply to the

question of whether to extend the deadline to file the appeal and may request submissions on the merits of the appeal.

7. The Record was provided by the Director to the Tribunal on August 29, 2017. A copy of the same was sent by the Tribunal to CBC and Mr. Mestres on September 11, 2017, and both parties were provided an opportunity to object to its completeness.
8. On October 17, 2017, Mr. Roberts requested an extension to provide the Tribunal with the requested documents and submissions in order “to consult with Coun[sel]”. The Tribunal granted him an extension to October 22, 2017.
9. Neither CBC nor Mr. Mestres objected to the completeness of the Record and the Tribunal accepts it as complete.
10. On October 20, 2017, Mr. Roberts submitted CBC’s appeal submissions. On the same date, October 20, 2017, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. Consistent with the notice contained in the correspondence from the Tribunal dated August 22, 2017, I have reviewed the appeal, the appeal submissions and the Record. I have decided that this appeal is an appropriate case for consideration under section 114 of the *ESA*. Therefore, at this stage, I will assess the appeal based solely on the Determination, the Appeal Form, written submissions of CBC and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that section 114(1). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite Mr. Mestres and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. CBC will then be given an opportunity to make a final reply to those submissions, if any.

## **ISSUE**

11. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *ESA*.

## **THE FACTS AND REASONS FOR THE DETERMINATION**

12. CBC is a company duly incorporated under the laws of British Columbia and operates two restaurants in Delta, British Columbia. One of the restaurants is located at 541 Centennial Parkway (the "Beach Location") and the other is located at 1127 56 Street (the "Delta Location").
13. According to the BC Online: Registrar of Companies —Corporation Search conducted by the delegate of the Director on March 3, 2017, CBC was incorporated on February 21, 2012, and Mr. Roberts is listed as its sole director and officer.
14. Mr. Mestres was employed by CBC as a line cook from June 12, 2015, to September 6, 2016, at the rate of pay of \$12.50 per hour.

15. On March 3, 2017, Mr. Mestres filed a complaint with the Employment Standards Branch (the "Branch") against CBC alleging that the latter contravened the *ESA* by failing to pay regular wages, overtime wages and annual vacation pay (the "Complaint").
16. The delegate of the Director conducted a hearing of the Complaint on May 30, 2017 (the "Hearing"). The Hearing was attended by Mr. Mestres on his own behalf and Mr. Roberts on CBC's behalf.
17. In the reasons for the Determination (the "Reasons"), the delegate summarizes the preliminary issues that arose before the Hearing; the issues the delegate sought to determine at the Hearing; the evidence in dispute between the parties; the evidence not in dispute between the parties and the findings of fact of the delegate. I will review all relevant details below starting with the preliminary issues the delegate dealt with.
18. With respect to the preliminary issues, the delegate notes that on April 19, 2017, the Branch sent CBC a Demand for Employer Records (the "Demand") by email and registered mail requiring CBC to submit records to the Branch before 4:00 p.m. on May 5, 2017. Canada Post tracking records indicate that the Demand was delivered to CBC's Registered and Records office and to Mr. Roberts' address in the corporate record's search on April 21, 2017.
19. On May 5, 2017, CBC submitted some of its records to the Branch to be relied upon at the Hearing. The Branch provided Mr. Mestres disclosure of these records by sending them to him by email and registered mail on May 8, 2017.
20. On May 26, 2017, CBC submitted additional documents consisting of wage statements, photocopies of cheques, timesheets, and a T4 record (the "Additional Documents") to the Branch to be relied upon at the Hearing. The Branch sent the Additional Documents to Mr. Mestres by email on the same date. Mr. Mestres requested an adjournment of the Hearing for five business days in order to allow him an opportunity to review and prepare a response to the Additional Documents. However, the delegate determined that the Additional Documents did not raise any new issues and three days was sufficient amount of time for Mr. Mestres to review and prepare a response to the Additional Documents in advance of the Hearing, and declined his adjournment request.
21. The delegate also notes in the Reasons that prior to the Hearing Mr. Mestres described the end of his employment with CBC as a resignation but during the Hearing it became apparent that there was a question as to whether CBC terminated his employment. The delegate explained to the parties that since it was her role to apply the entirety of the *ESA*, she would review the evidence from the parties with respect to the circumstances surrounding the end of Mr. Mestres' employment. She notes, CBC did not object.
22. At the Hearing, the delegate notes the evidence showed that Mr. Mestres did not have a written employment contract with CBC. From the start of his employment with CBC in June 2015 until approximately November 2015, he worked exclusively at the Beach Location. Thereafter, from about November 2015 to February 2016, Mr. Mestres worked approximately 40% of the time at the Beach Location and 60% of the time at the Delta Location. From about March 2016 until the end of his employment in September 2016 Mr. Mestres worked approximately 60% of the time at the Beach Location and 40% of the time at the Delta Location.

23. Mr. Mestres did not have a regular work schedule with CBC. At both of CBC's restaurant locations there was a journal in which employees recorded their hours of work at the end of their shifts each day. However, starting in approximately February 2016, the journal at the Beach Location was sometimes unavailable, and at such times the employees wrote their hours on scrap pieces of paper or on the back of receipts which were then taken to the Delta Location and transcribed into the journal at that location. Sometimes Mr. Mestres was the one who transcribed these documents into the journal at the Delta Location. Both CBC and Mr. Mestres submitted various excerpts of the journals, receipts and scrap paper at the Hearing.

24. As part of his reliance document, Mr. Mestres submitted to the Branch a single page document delineating his daily hours of work from April 1 to 9, and from April 29 to September 4, 2016 (the "Work Hours Summary"). The delegate notes that CBC did not dispute Mr. Mestres hours worked in the Work Hours Summary.

25. On its part, CBC submitted wage statements for the 2016 pay periods ending May 26, June 9, June 23, July 7, July 21, August 4, August 18, September 1, and September 15 (the "Wage Statements"). Both parties agreed that CBC paid Mr. Mestres all of the amounts indicated in the Wage Statements with the exception of the wage statement for the pay period ending September 15, 2016. In the latter pay period, Mr. Mestres worked one shift for 4.5 hours for which the parties agree he was not paid.

26. While there are no wage statements for the 2016 pay periods ending March 17, March 31, April 15, April 28, or May 12, the parties agreed that CBC paid Mr. Mestres the following amounts on the following dates:

March 28	\$587.61
April 18	\$633.14
May 17	\$726.25

27. The Wage Statements also indicate that CBC paid Mr. Mestres vacation pay on every pay cheque, and Mr. Mestres took no paid vacation time during his employment.

28. The issues or questions the delegate sought to determine at the Hearing were the following: Does the Employer owe Mr. Mestres wages? Did the Employer terminate Mr. Mestres' employment? And if so, does the Employer owe Mr. Mestres compensation for length of service?

29. On his part, at the Hearing, Mr. Mestres relied on the Work Hours Summary he created on his phone during his employment which he updated every day when he worked. The Work Hours Summary was partially based on some timesheets he had kept, as well as his memory of the hours he worked each day.

30. The delegate specifically notes that in addition to the hours indicated on the Work Hours Summary, Mr. Mestres' time sheets indicate that he also worked seven hours on March 12, 2016, and 8.25 hours on March 18, 2016.

31. Mr. Mestres testified that he rarely took breaks at work as it was too busy to do so during his shifts. On those rare occasions he did take a break, he said it was reflected in his records although he had difficulty pointing out when he took breaks.

32. Mr. Mestres contended that CBC hired him to work generally, and not on a seasonal basis. He said he recalled having a conversation with Mr. Roberts at the start of his employment but did not recall being told that his job was to be seasonal.
33. He said that throughout 2016 he told Mr. Roberts and two other employees of CBC that he wanted to remain employed with CBC for as long as possible. He knew that the Beach Location is typically very busy in the summer but slows down during the rest of the year. However, in early September 2016, he stated the business slowed down at both restaurant locations and he was no longer scheduled for any shifts. He said he received no notice from CBC that he would be taken off the schedule. As a result, he resigned.
34. At the Hearing, Mr. Mestres read out on his phone a text message exchange he had with Kris Beresford ("Mr. Beresford"), CBC's cook, on September 6, 2016. However, he did not introduce copies of the text messages into evidence. Mr. Beresford's text message indicated that there were "no more hours left" for Mr. Mestres to work and wished Mr. Mestres: "good luck with your future endeavors." In response, Mr. Mestres' texted Mr. Beresford: "same to you. Best of luck. If you or Paul would like me to work or fill in any extra hours let me know and I will see what I can do."
35. On the part of CBC, Mr. Roberts testified that in the spring of 2016 he suffered an injury that caused him to be away from the business from that time onward and CBC's record-keeping system became disorganized.
36. CBC submitted many of Mr. Mestres' timesheets into evidence and while Mr. Roberts did not dispute Mr. Mestres' Work Hours Summary, CBC's timesheets indicated that Mr. Mestres worked 6.75 hours on April 23, 2016, which was not included in Mr. Mestres' Work Hours Summary.
37. Mr. Roberts contended that Mr. Mestres employment was on a seasonal basis, from the very start in June 2015 when he commenced working at the Beach Location. Mr. Roberts stated that he remembers sitting down with Mr. Mestres and telling him that he was hired for a seasonal job at the Beach Location.
38. In the fall of 2015, Mr. Mestres' employment became more permanent when CBC opened the Delta Location, and Mr. Mestres started working at both restaurant locations from that time onward.
39. In September 2016, according to Mr. Roberts, Mr. Mestres asked him to guarantee him 32 hours of work per week, but he could not make him that guarantee. Mr. Mestres then asked Mr. Roberts if there would be ongoing work for him, and the latter responded that there would not be work, and it would be better for him to move on.
40. Having summarized the evidence of both parties in the Reasons, the delegate then went on to consider the question of whether CBC owed Mr. Mestres any wages. In answering this question in the affirmative, the delegate noted that there was no dispute that Mr. Mestres worked the hours indicated in the Work Hours Summary except for a single discrepancy between the latter document and Mr. Mestres' handwritten time sheet for June 4, 2016. The Work Hours Summary provided that he worked 1.5 hours on the said date but the handwritten timesheet showed he worked 4.25 hours. As CBC did not dispute the manner in which Mr. Mestres recorded his time, and the fact that the Work Hours Summary was created, in part, from the handwritten timesheets, the delegate concluded that Mr. Mestres worked 4.25 hours on June 4, 2016.

41. The delegate also noted that there was undisputed evidence that Mr. Mestres worked on three additional days not reflected in the Work Hours Summary. His time sheets indicate that he worked seven hours on March 12, 2016, and 8.25 hours on March 18, 2016. In addition, CBC's time sheets indicate that he worked 6.75 hours on April 23, 2016. As this evidence was uncontested the delegate found Mr. Mestres worked these hours.
42. The delegate also noted that there was no dispute between the parties that CBC paid Mr. Mestres the wages indicated in the Wage Statements, with the exception of the wage statement for the pay period ending September 15, 2016, for which the parties agreed Mr. Mestres was not paid.
43. The delegate then went on to meticulously delineate, in a chart, all amounts owing by CBC to Mr. Mestres. While I do not find it necessary, for the purpose of this appeal, to set out in copious detail the delegate's calculations of the amounts owing, it is sufficient to note that she found that Mr. Mestres was owed the following wages by CBC:
- Regular Wages: \$1,938.59  
Statutory Holiday Average Day's Pay: \$77.50  
Annual Vacation Pay: \$12.74  
Total: \$2,028.83
44. After making the above determination, the delegate then went on to levy administrative penalties against CBC of \$500 each for contraventions of sections 17 and 18 of the *ESA* for failing to pay Mr. Mestres all wages earned in a pay period within eight days of the end of that pay period and also for failing to pay Mr. Mestres all wages owed to him within 48 hours of the termination of his employment.
45. The delegate also levied a further administrative penalty of \$500 against CBC for contravention of section 46 of the *Regulation* for failing to deliver all of Mr. Mestres' time sheets or wage statements for the final six months of his employment as specified in the Demand.
46. The delegate next considered the questions of whether CBC terminated Mr. Mestres' employment and if so, did it owe him compensation for length of service. Here the delegate reviewed the requirements of section 63 of the *ESA* and noted that when there is a dispute as to whether an employee quit or was terminated, the employer bears the onus of proving on a balance of probabilities that it is relieved from providing written working notice or paying compensation for length of service under section 63 of the *ESA*. The delegate also explained that for the employer to prove that an employee quit, an employer must show clear and unequivocal evidence that the employee voluntarily quit. This evidence must have both a subjective and an objective element. Subjectively the evidence must show that the employee intended to quit his or her employment. Objectively the evidence must show that the employee carried out an act inconsistent with his or her further employment. In concluding that Mr. Mestres did not voluntarily quit his employment, the delegate reasoned as follows:

Mr. Roberts' uncontested evidence is that at the end of the summer in 2016 there was no more work for Mr. Mestres, and he told Mr. Mestres it would be better for him to move on. Mr. Mestres' uncontested evidence is that Mr. Beresford sent him a text indicating that there was no more work for him and wishing him luck in the future. Aside from Mr. Mestres characterizing the end of his employment as a resignation,

none of the evidence supports either the subjective or objective element of Mr. Mestres voluntarily quitting his employment. As such, I find the Employer terminated Mr. Mestres' employment.

47. The delegate also noted that CBC argued that Mr. Mestres' employment was seasonal and therefore, according to sections 65(1)(b) and (c) and section 65(2) of the *ESA* the requirement to provide notice of termination or pay in lieu of notice in section 63 of the *ESA* did not apply to an employee who is employed for a definite term, or an employee who is employed for specific work to be completed in a period of up to 12 months. In rejecting this argument of CBC, the delegate considered the conflicting evidence of the parties and reasoned as follows:

... Mr. Roberts claimed that Mr. Mestres' employment was to be seasonal, and Mr. Mestres denied that he was hired on a seasonal basis. However Mr. Roberts did not provide evidence of a specific date that Mr. Mestres' seasonal employment was scheduled to end, nor did he allege that Mr. Mestres was hired to perform specific work to be completed within 12 months. As such, there is insufficient evidence to support the Employer's contention that Mr. Mestres was hired for a definite term or for specific work. I also note that regardless of the parties' agreement at the outset of Mr. Mestres' employment, the undisputed evidence is that his employment became permanent in the fall of 2015, and he continued working for the Employer until September 2016.

Given all of the circumstances, I do not find that Mr. Mestres was employed for a definite term or to perform specific work, and therefore the Employer cannot rely on section 65(1)(b) or (c) to discharge its liability under section 63 of the Act. I find the Employer owes Mr. Mestres compensation for length of service.

48. In the result, the delegate determined that Mr. Mestres was entitled to notice of termination or pay in lieu of notice under the *ESA*. As Mr. Mestres was employed with CBC for more than 12 months and less than three years, the delegate determined that under section 63 of the *ESA* he was entitled to two weeks' wages as compensation for length of service and ordered CBC to pay him the amount of \$740.63, plus annual vacation pay of \$42.37.
49. The delegate also levied an administrative penalty of \$500 against CBC for contravention of section 63 of the *ESA*.

## **SUBMISSIONS OF CBC**

50. On behalf of CBC, Mr. Roberts submits that the Determination "is inaccurate and unjust" because CBC "has never denied the monies owed to Mr. Mestres" and offered to pay him "the entire amount that he was asking for". He states that Mr. Mestres has "chosen to withhold" from entering into an agreement with CBC for his claim because he wants to "extend the process in an attempt to abuse valuable time and resources of those involved, while attempting to maximize his return on compensation and penalties."
51. Mr. Roberts submits that in the spring of 2016 when he suffered a brain injury and was unable to effectively operate CBC's daily business, all business matters were directed to the General Manager of CBC or his wife and Mr. Mestres "apparently felt that dealing with [the general manager or his wife] was not adequate and did not follow protocol." He states that with a staff of 35 – 40 people in the previous 4 years, CBC "never had an issue". He states that if Mr. Mestres did not receive payment for any hours he worked for CBC from April to



the end of his employment, he should have addressed this with CBC immediately. Mr. Roberts alleges that Mr. Mestres purposefully withheld information about the hours he claims he was not paid for “until the end of his employment...to draw out the process and inflict the maximum amount compensation and incur penalties on [CBC], a small business.” He states that this is particularly evident because “when [he was] offered full settlement Mr. Mestres denied the offer... [because he was] looking to cause monetary damage to the company and the operators.”

52. Mr. Roberts also submits that CBC has not had any complaints filed against it previously because it has “operated honestly and fairly”. If there was ever a problem with any of the employees, particularly involving a monetary issue, it would be resolved immediately, he states.
53. Mr. Roberts states that the Determination is wrong or “inconsistent” because “[i]t clearly states that he resigned his position knowing that the busy season was ending. He made it clear that he was returning to school as most of the employees were.” He states that Mr. Mestres wanted to be guaranteed “32 hours of work per week to remain an employee” which CBC could not do. It is for this reason he quit his employment with CBC, according to Mr. Roberts.
54. Mr. Roberts also states that the representations of Mr. Beresford in the text exchange with Mr. Mestres the latter read out at the Hearing did not represent the “the opinions and decisions of Mr. Roberts or management”. Mr. Roberts further submits that the reason why “Mr. Mestres was not scheduled for any shifts because he had given his notice” and it was never his or CBC’s practice once they indicate or say that they “no longer work [or] are able to work”.
55. With respect to the finding in the Determination of violation of section 17 of the *ESA*, Mr. Roberts disputes this finding stating that “Mr. Mestres was always paid on time and cheques were made available on paydays.” He states that after Mr. Mestres’ last day at work on September 6, he (Mr. Roberts) was out of the country for the “majority of September” but “[t]he general manager was made aware of the totals for Mr. Mestres final hours” and Mr. Mestres paycheque cheque was “left at the Uptown location” and available to Mr. Mestres. He states that when he returned to town “the cheque for Mr. Mestres was still in the safe where the other pay cheques were kept.” He apparently argues that in the circumstances the finding of violation of section 17 against CBC is wrong.
56. He also argues that the finding of contravention of section 18 of the *ESA* in the Determination is wrong because “Mr. Mestres final pay was made available”.
57. Mr. Mestres also disputes the finding of contravention of section 63 of the *ESA* stating that “Mr. Mestres voluntarily quit” his employment with CBC and admitted this in his testimony. In the circumstances, he states “[i]t is incorrect to say that his employment was terminated”.
58. Mr. Roberts also disputes the finding of statutory holiday pay owing to Mr. Mestres although he refers to the wrong section of the *ESA*, namely section 46 and not section 58, in the heading of his submissions. On closer look at his submissions here, Mr. Roberts does not say that Mr. Mestres was not entitled to vacation pay determined to be owing to him but instead he states that “Mr. Mestres failed to notify management of any error in his pay for each pay period where he felt that there were errors.” He reiterates that CBC offered

Mr. Mestres “a full settlement” at the “onset of arbitration” and he refused. Mr. Roberts asks “[w]hy refuse a full settlement?”

59. Mr. Roberts concludes his written submissions by reiterating that neither he nor CBC denied Mr. Mestres any “owed missing hours” and has “been open and honest, making ever[y] attempt to resolve [Mr. Mestres’ claim] in a fair manner only to be stonewalled by Mr. Mestres”. He states Mr. Mestres has pursued the Complaint “through spite and a desire to abuse the spirit of the employee/employer relationship” with a view to “cause as much financial damage to the company and its director”.

60. He states that Mr. Mestres “documentation of the missing hours [is] confusing and lengthy” and he does not feel CBC should be saddled with any administrative penalties.

61. He reiterates that CBC “has never had a complaint filed against it” before.

## ANALYSIS

62. The grounds of appeal under the *ESA* are statutorily limited to those found in section 112(1):

### Appeal of director's determination

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.

63. The burden is on the appellant, CBC, to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds of review in section 112(1).

64. In this case, CBC’s appeal is grounded in a claim that the Director breached the principles of natural justice in making the Determination. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05)

65. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on 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 respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST # D050/96)

66. Having reviewed the Determination including particularly the Record and the written appeal submissions of Mr. Roberts, I do not find CBC has discharged its burden to persuade the Tribunal that there is an error in the Determination on the natural justice ground of appeal. To the contrary, I find ample evidence in the Record and the Reasons that the delegate of the Director afforded CBC and Mr. Roberts all of the procedural rights within the meaning of the decisions in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, *supra*. Therefore, I dismiss the natural justice ground of appeal.
67. Having said this, I note that Mr. Roberts has not challenged the amounts owing to Mr. Mestres as determined in the Determination but exerts a fair bit of effort in alleging, repeatedly, malevolence on the part of Mr. Mestres against CBC and its “operators” for pursuing his Complaint. More particularly he alleges that Mr. Mestres is motivated by “spite and a desire to abuse the spirit of the employee/employer relationship” in pursuing his complaint while he or CBC has “been open and honest, making ever attempt to resolve this in a fair manner only to be stonewalled by Mr. Mestres”. I do not find any merit in these allegations of Mr. Roberts against Mr. Mestres. At best, I find Mr. Roberts’ allegations are disingenuous as there is ample evidence in the Record in the form of emails (in excess of 12 in the period September 22 to October 24, 2016) from Mr. Mestres to Mr. Roberts pleading with Mr. Roberts to get paid including particularly his last paycheque. There are also two emails dated October 10 and 11 from Mr. Roberts in response to Mr. Mestres’ emails indicating to Mr. Mestres that he would be getting paid shortly. In the first, on October 10, Mr. Roberts says to Mr. Mestres “I’ll look over your hours and send it (cheque) over tomorrow” and in the second, on October 11, he says, *inter alia*, “I will mail you a cheque of my findings (sic) when the examination of all documents is complete”. Mr. Roberts then reneges on his representations and says, in his email of October 23 to Mr. Mestres that he will await to see Mr. Mestres’ claim. In the face of “stonewalling” by Mr. Roberts, Mr. Mestres was well within his rights to pursue his Complaint with the Branch and see it to the end by obtaining the Determination. I think Mr. Robert’s allegation that Mr. Mestres’ “actions seem to be brought about through spite and a desire to abuse the spirit of the employee/employer relationship” is totally misplaced. Mr. Mestres’ desire to pursue his Complaint to a resolution in the form of the Determination appear to be motivated by a desire to obtain a payment of wages he could not get from CBC and Mr. Roberts despite his concerted efforts.
68. I also find it very suspect that Mr. Roberts, in his appeal submissions, says that after Mr. Mestres’ last day of work on September 6, “[t]here was a cheque made available to [Mr. Mestres and] left at the Uptown location” while he (Mr. Roberts) was out of the country for the better part of September. He states that the cheque was still in “the safe where the other pay cheques were kept” when he returned to town. He says that Mr. Mestres’ paycheque was ready because the General Manager of CBC “was made aware of the totals for Mr. Mestres final hours”. If this is true then why, in his email exchange with Mr. Mestres on October 10 he states to Mr. Mestres “I’ll look over your hours and send it (cheque) over tomorrow”? Why does he follow up the latter email with an email on October 11 to Mr. Mestres stating “I will mail you a cheque of my findings (sic) when the examination of all documents is complete”? In short, to borrow Mr. Roberts’ term, the “inconsistencies” between Mr. Roberts’ emails above and his appeal submissions do not reconcile.

69. With respect to Mr. Roberts' dispute with the delegate's finding that Mr. Mestres was entitled to compensation for length of service, Mr. Roberts contends that Mr. Mestres quit or resigned and he was therefore, not entitled to termination pay for length of service under section 63 of the *ESA*.
70. It should be noted that the test used under the *ESA* for deciding whether an employee had quit their employment was set out in *Wilson Place Management Ltd.*, BC EST # D047/96, as follows:
- The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.
71. While Mr. Roberts is rearguing in the appeal that Mr. Mestres resigned or quit voluntarily, I find it was open to the delegate, on the evidence provided, to find as she did that none of the evidence of the parties supported either the subjective or objective elements of Mr. Mestres voluntarily quitting his employment and therefore, his employment was terminated by CBC. I also find it noteworthy the delegate's finding in the Reasons that Mr. Roberts' uncontested evidence was that at the end of the summer in 2016 there was no more work for Mr. Mestres, and he told Mr. Mestres it would be better for him to move on.
72. If Mr. Roberts or CBC is alleging that the delegate erred in her factual conclusion that Mr. Mestres' employment was terminated by CBC then it should be noted that the Tribunal has no authority to consider appeals based on alleged errors of findings of fact unless those findings amount to an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). Having said this, I am not persuaded that the delegate's factual finding that Mr. Mestres employment was terminated by CBC without cause is perverse or unreasonable based on the evidence before her, nor am I persuaded that she applied an incorrect legal test for assessing whether Mr. Mestres resigned his employment voluntarily. In the circumstances, I do not find the delegate erred in law.
73. Lastly, I do not find any legal basis to interfere with the administrative penalties imposed against CBC for contraventions of the *ESA*.
74. In the result, pursuant to section 114(1)(f) of the *ESA*, I dismiss CBC's appeal of the Determination.

## **ORDER**

75. Pursuant to section 115 of the *ESA*, I confirm the Determination made on July 7, 2017, together with any additional interest that has accrued under section 88 of the *ESA*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**