Employment Standards TRIBUNAL

An appeal

- by -

Viewpoint Developments Ltd.
("VDL")

- 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.: 2015A/129

DATE OF DECISION: November 19, 2015

DECISION

SUBMISSIONS

Attilio Fabbro — on behalf of Viewpoint Developments Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Viewpoint Developments Ltd. ("VDL") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on August 26, 2015 (the "Determination").

2. The Determination found that VDL had contravened Part 3, section 17 (paydays); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Wendy J. Fox ("Ms. Fox"), and ordered VDL to pay Ms. Fox wages in the amount of $884.79, inclusive of accrued interest under section 88 of the *Act*, and levied four (4) administrative penalties of $500.00 each under section 29 of the *Employment Standards Regulation* (the "*Regulation*") for contraventions of section 17 (minimum wage for resident caretakers) of the *Regulation* and section 17 (paydays), section 18 (payment of wages on employment termination) and section 63 (liability resulting from length of service) of the *Act*. The total amount of the Determination is $2,884.79.

3. VDL appeals the Determination, alleging the Director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made. VDL seeks to have the Determination cancelled.

4. In correspondence, dated October 6, 2015, the Employment Standards Tribunal (the "Tribunal") informed the parties, among other things, that no submissions were being sought from the parties pending review of the appeal by the Tribunal and that, following such review, all, or part of, the appeal might be dismissed.

5. On October 20, 2015, the Tribunal received the section 112(5) "record" (the "Record") from the Director, and a copy was delivered to VDL on October 21, 2015. There was no objection to the Record taken by VDL and, accordingly, the Tribunal accepts the Record as complete.

6. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Reasons for the Determination (the "Reasons"), the Appeal Form and written submissions made on behalf of VDL by its director, Attilio Fabbro ("Mr. Fabbro"), and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), Ms. Fox will, and the Director may, be invited to file further submissions.

ISSUE

7. The issue at this stage is whether VDL's appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

8. VDL operates a residential building in Kimberley, British Columbia. Pursuant to a BC Online: Registrar of Companies – Corporation Search conducted by the delegate on January 13, 2015, VDL was incorporated on November 13, 1964, with Mr. Fabbro listed as its sole director and officer.

9. On January 13, 2015, Ms. Fox filed a complaint under section 74 of the *Act*, alleging that she was employed by VDL as a resident caretaker, commencing on July 9, 2014, and ending on November 17, 2014, and that VDL contravened the *Act* by failing to pay her minimum wage, statutory holiday pay, compensation for length of service and vacation pay (the "Complaint").

10. On April 8, 2015, the delegate of the Director conducted a hearing into the Complaint (the "Hearing"). At the Hearing, the delegate considered three (3) issues as follows: (i) Was Ms. Fox an independent contractor or an employee under the *Act*?; (ii) Was Ms. Fox a "resident caretaker" as defined in the *Regulation*?; (iii) Is VDL liable to pay Ms. Fox minimum wage, statutory holiday pay, compensation for length of service and vacation pay?; and, if so, in what amounts?

11. In the Reasons, the delegate sets out the evidence of the parties which was presented by Ms. Fox on her own behalf and Mr. Fabbro on behalf of VDL. I have carefully reviewed the parties' evidence in the Reasons and in the Record, and do not find it necessary to reiterate all the evidence here except that which is relevant to the issues raised by VDL in the appeal.

12. With respect to the issue of whether Ms. Fox was an independent contractor as alleged by VDL, the delegate noted that for the *Act* to apply to the Complaint, the relationship between Ms. Fox and VDL must be shown to be an employment relationship. In deciding whether Ms. Fox was in such a relationship with VDL, the delegate was guided by definitions of "employee" and "employer" in the *Act*, as well as common law tests employed by courts in determining employment or independent contractor relationships. In concluding that Ms. Fox was an "employee" under the *Act*, the delegate reasoned as follows:

> The level of control exercised by Viewpoint over Ms. Fox is typical of an employment relationship. Ms. Fox did not bid on a contract for labour and services; she submitted a written application to Mr. Fabbro for the position of building manager. Mr. Fabbro interviewed and selected Ms. Fox for a vacant job and set the nature and rate of Ms. Fox's remuneration. Additionally, Mr. Fabbro provided instruction and direction to Ms. Fox on all matters related to the building and property. He controlled the method of work by requiring Ms. Fox to seek his approval regarding the hiring of a contractor and work to be performed. As well, Ms. Fox had to obtain approval before receiving an extra $15.00 per hour for any work performed above and beyond the itemized duties and responsibilities. Lastly, Mr. Fabbro handled all third party contracts and financial matters.
>
> A person who is self-employed will generally provide all the necessary tools, supplies and equipment to carry out services. In this case, Viewpoint provided all of the tools and supplies to maintain the building and property.
>
> Ms. Fox could not realize a profit or suffer a loss, which implies an employment relationship. There is no evidence that shows that Ms. Fox made any financial investments or carried financial risk in an effort to manage Viewpoint's building and property.
>
> Therefore, Ms. Fox had no ability to control costs and efficiencies in an effort to gain a profit or suffer an entrepreneurial loss.
>
> There is no evidence to establish Ms. Fox was performing similar services for other parties or was actively involved in searching out similar work while she was working for Viewpoint. The work arrangement

> between Ms. Fox and Viewpoint was ongoing rather than the fulfillment of a specific project. These factors support a conclusion that Ms. Fox was not a person in business for herself.

13. Having concluded that the evidence adduced by the parties on the status of Ms. Fox was more consistent with an employment relationship, the delegate noted that any agreement stipulating Ms. Fox was an independent contractor had no effect, pursuant to section 4 of the *Act*, and that Ms. Fox was entitled to receive the minimum standards of compensation under the *Act* for work performed for VDL.

14. With respect to the issue of whether Ms. Fox was a "resident caretaker", the delegate considered the definition of "resident caretaker" in section 1 of the *Regulation*. Section 1 of the *Regulation* exclusively defines "resident caretaker" to mean a person who lives in an apartment building that has more than eight (8) residential suites, and is employed as a caretaker, custodian, janitor or manager of that building.

15. The delegate notes in the Reasons that VDL did not dispute Ms. Fox was a person living in VDL's building which had more than eight (8) residential suites. The delegate also notes that VDL agreed that Ms. Fox was a manager of the building, but disputed that she was a "resident caretaker" because she did not live in or manage an "apartment building". In rejecting VDL's submission, the delegate reasoned as follows:

> The Director of Employment Standards considers an apartment building to be any building that has the appearance and characteristics of an apartment building, including a predominantly vertical structure, multiple residential accommodation units, common entrances and hallways and common facilities. It makes no difference whether entrances and hallways have doors or are located on the interior or exterior of the building.
>
> The building floor plan and pictures of the building submitted by the parties demonstrate that the building has three floors (including the basement) and sixteen suites, resulting in a vertical structure with multiple residential units. The exterior stairwells and corridors are common passageways for tenants to access their respective suites. The building provides common facilities for tenants, including laundry and storage rooms. I find the building has the appearance and characteristics of an apartment building….

16. Having concluded that the building Ms. Fox was living in was indeed an "apartment building" and that she was employed by VDL to manage it, the delegate determined that she was therefore a "resident caretaker" as defined in the *Regulation*.

17. With respect to the question of whether Ms. Fox was entitled to minimum wage, the delegate notes, in the Reasons, that the wage agreement between the parties was that Ms. Fox was to be compensated $550 per month, and that it would be applied towards her rent obligation of $700 per month for the year that Ms. Fox occupied a suite in VDL's apartment building. Therefore, Ms. Fox would not receive any wages each month but, instead, she would owe VDL $150.00 each month.

18. The delegate notes that, under section 17 of the *Regulation*, the minimum wage for a resident caretaker is, for a building with nine (9) to sixty (60) residential suites, $615.00 per month plus $24.65 for each suite. Since VDL's building had sixteen (16) suites, Ms. Fox should have been paid at least $1,009.40 per month, consisting of $615.00 base pay, plus $24.65 for each of the sixteen (16) suites. Therefore, the delegate reasoned that Ms. Fox was entitled to the amount of $1,009.40 for each month she worked as a resident caretaker except for the months of July and November when she did not work full months. For these two (2) months, the minimum wage rate was pro-rated by the delegate based on the number of days she worked. Accordingly, the delegate calculated Ms. Fox's total wage entitlement was $4,349.10 for all the months she worked, including the two months she partially worked.

19. The delegate further notes that Ms. Fox provided VDL with a written assignment of wages dated December 2, 2014, authorizing VDL to deduct outstanding rental fees she owed VDL for July to December 2014 in the amount of $3,900.00 from her wages. Based on this agreement and section 22(4) of the *Act* which allows an employer to honour an employee's written assignment of wages to meet a credit obligation, the delegate found that VDL is liable to pay Ms. Fox regular wages of $449.10 after offsetting her rental obligation of $3,900.00 from VDL's wage obligation to Ms. Fox of $4,349.10. In these circumstances, the delegate concluded that VDL, by failing to pay Ms. Fox at least the minimum wage to which she was entitled as a resident caretaker, contravened section 17 of the *Regulation* and issued VDL an administrative penalty of $500.00 for the said breach.

20. The delegate also determined that VDL contravened section 17 of the *Act*. This section requires that at least semi-monthly and within eight (8) days after the pay period, an employer must pay to an employee all wages earned by the employee in a pay period. Therefore, the delegate issued a further administrative penalty of $500.00 against VDL.

21. The delegate also issued a third administrative penalty of $500.00 against VDL for contravention of section 18 of the *Act*, which required VDL to pay all wages owing to Ms. Fox within 48 hours after terminating her employment relationship on November 17, 2014, which VDL failed to do.

22. With respect to Ms. Fox's claim for statutory holiday pay, the delegate notes that section 36 of the *Regulation* excludes a "manager" from statutory holiday pay requirements under Part 5 of the *Act*. Based on the evidence of Ms. Fox's responsibilities and duties in her position as a resident caretaker, the delegate concluded that the overall evidence showed that she spent a considerable amount of time supervising and directing human and other resources on behalf of VDL, and that she was a "manager" within the meaning of section 1 of the *Regulation* and, therefore, not entitled to statutory holiday pay pursuant to section 36 of the *Regulation*.

23. Finally, with respect to whether Ms. Fox was entitled to compensation for length of service under section 63 of the *Act*, Mr. Fabbro, on behalf of VDL, contended that VDL had just cause to terminate Ms. Fox's employment because she refused to follow his instructions to rent suite no. 7 in the apartment building (because she had some concern with poor air quality and traces of asbestos in the suite as a result of some renovation work done to it).

24. The delegate also notes that Mr. Fabbro specified some additional reasons supporting Ms. Fox's termination for cause such as contractor and tenant complaints against her, as well as incomplete work assignments and breaches of the Occupancy Agreement.

25. In preferring the evidence of Ms. Fox and concluding that VDL did not have just cause to terminate her employment, the delegate considered section 63 of the *Act*. The delegate notes that the employer's liability, under section 63 of the *Act* to pay compensation for length of service to an employee upon termination of employment, is discharged if an employee is terminated for just cause. The delegate then went on to define "just cause" to include fundamental breaches of an employment relationship, noting that in exceptional circumstances, a single act of misconduct can establish just cause provided the act is wilful and deliberate and is inconsistent with the continuation of the contract of employment. In these cases, the delegate notes that no warning or repeated offence is required to prove just cause. However, the delegate also notes that minor workplace infractions related to unsatisfactory conduct or poor performance required an employer to satisfy the following elements of the test to prove that an employee was dismissed for just cause: (i) reasonable standards of performance were set and communicated to the employee; (ii) the employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met; (iii) a reasonable period

of time was given to the employee to meet such standards; and (iv) the employee did not meet those standards.

26. If the foregoing process is employed by an employer, then the employer may dismiss an employee for just cause immediately or within a reasonable period of time after considering its position.

27. In this case, the delegate notes that VDL terminated Ms. Fox's employment immediately on November 17, 2014, because Ms. Fox refused to follow Mr. Fabbro's direction relating to the renovation and rental of suite no. 7 in VDL's apartment building. The delegate notes that, according to VDL, just cause for termination existed by virtue of the appointment letter VDL provided to Ms. Fox which stipulates that Mr. Fabbro could terminate the relationship at any time by reason of "I don't like you". According to the delegate, the fact that Mr. Fabbro is merely unhappy with Ms. Fox does not amount to a fundamental breach of the employment relationship. VDL must show that Ms. Fox's behaviour on November 17, 2014, amounted to an act of misconduct that was wilful and deliberate and inconsistent with the continuation of employment and VDL failed to discharge this burden, states the delegate.

28. In the result, the delegate concluded that he was unconvinced that Ms. Fox's behaviour on November 17, 2014, was a single act of misconduct that was wilful and deliberate and inconsistent with a continuation of her employment contract. Therefore, the delegate rejected VDL's submission that it had just cause for dismissing Ms. Fox based on the latter's actions on November 17, 2014.

29. The delegate also notes that while Mr. Fabbro argued that there were a number of secondary reasons for terminating Ms. Fox's employment, including contractor and tenant complaints, incomplete work assignments and breaches of the Occupancy Agreement, VDL did not address these issues with Ms. Fox during her employment, nor did VDL set and communicate reasonable standards of performance and provide a clear warning to her that her employment would be terminated if the alleged offences were repeated. Instead, VDL condoned her purported misconduct, and only raised them after Ms. Fox filed the Complaint. Therefore, the delegate rejected that VDL has just cause to dismiss Ms. Fox on these alternate bases.

30. In the result, the delegate concluded that Ms. Fox was entitled to one (1) week's compensation for length of service, pursuant to section 63 of the *Act*, and assessed an administrative penalty of $500.00 against VDL for breach of section 63 of the *Act*.

31. With respect to Ms. Fox's claim for vacation pay, the delegate concluded that VDL was liable to pay Ms. Fox vacation pay in the amount of $183.28, which is 4% of the total wages earned by Ms. Fox.

SUBMISSIONS OF VDL

32. In the Appeal Form, VDL has checked off all available grounds of appeal in section 112(1) of the *Act*; namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was made.

33. In support of VDL's appeal, Mr. Fabbro has provided three (3) sets of written submissions. The first is with the Appeal Form and received by the Tribunal on October 1, 2015 (the "First Submissions"). The second submissions of Mr. Fabbro were received by the Tribunal on October 16, 2015 (the "Second Submissions"), and the third submissions on November 2, 2015 (the "Third Submissions").

34. In the First Submissions, while Mr. Fabbro does not dispute the delegate's conclusion that Ms. Fox was an employee and not an independent contractor, he argues that the Director erred in law in concluding that Ms. Fox was a residential caretaker. In support of this contention, Mr. Fabbro refers to the definition of "rent" and a tenant's obligation to pay rent set out in sections 5 and 26 of the *Residential Tenancy Act* respectively, as well as the definition of "resident caretaker" in section 17 of the *Regulation*. He argues that because Ms. Fox did not pay rent for a period of six (6) months, she was not lawfully in possession of her rental unit and "cannot also be considered to be 'living in an apartment building' in accordance with the definition [of 'resident caretaker' in section 17 of the *Regulation*]". He states that the delegate's failure to "consider the stated fact that [Ms. Fox] did not pay any rent as a tenant" led the delegate to wrongly conclude that Ms. Fox was a resident caretaker and therefore the delegate erred in law. In these circumstances, he argues that the wage award made to Ms. Fox as well as the administrative penalty of $500.00 levied against VDL for breach of section 17 of the *Regulation* should be cancelled.

35. Mr. Fabbro also submits that the Director erred in law in concluding that VDL did not establish just cause for the dismissal of Ms. Fox. He relies on the decision of the Supreme Court of Canada in *McKinley v. BC Tel* (2001) 2 S.C.R. 161 wherein the Court stated that just cause will exist where the employee violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or whose conduct is fundamentally inconsistent with the employee's obligations to his or her employer. He submits that Ms. Fox's failure to inform him that she hired a contractor who was also her son constituted an act of dishonesty on her part and a conflict of interest resulting in a breakdown in the employment relationship between Ms. Fox and VDL. He argues that delegate failed to consider this information when deciding that there was no just cause for VDL to terminate Ms. Fox's employment.

36. Mr. Fabbro also submits that the Director erred in law in applying the wrong legal test for determining whether just cause existed for VDL to terminate Ms. Fox's employment when the latter refused to rent out suite no. 7 in VDL's apartment building. He states:

> The refusal by the Complainant to rent out suite #7 contrary to the instructions from her Employer fundamentally and adversely affected the ability of the Employer to conduct his business. Clearly this was not a 'minor workplace infraction'.
>
> When the presence of asbestos was discovered, it was for the Employer to decide what course of action should be taken. It should be noted that the refusal by the Complainant to allow a contractor in to work on suite # 7 apparently hinged upon the asbestos issue having been addressed. However, the Employer had discussed 'directly' with the contractor to complete work in suite # 7 which was his right. It was not for the Complainant to determine rules on health and safety. Determining how the asbestos situation should be treated was for the Employer to determine and not the Complainant. In these circumstances the Complainant should have followed the instructions of her Employer and allowed the new contractor access to the suite.

37. Mr. Fabbro also submits that the delegate's decision that VDL failed to establish just cause for Ms. Fox's termination was influenced by his "concern [for] health and safety issues not contained in the Act and Regulations" and, therefore, he exceeded his jurisdiction under the *Act* and *Regulation*. He argues that Ms. Fox was indeed dismissed for just cause as submitted above and therefore, both the termination pay ordered by the delegate to be paid to Ms. Fox as well as the administrative penalty of $500.00 levied against VDL for breach of section 63 should be cancelled.

38. Also included in the First Submissions are separate handwritten submissions and documents in support of those submissions. In the first of the two (2) handwritten pages contained in the First Submissions, Mr. Fabbro disputes the evidence of Ms. Fox set out at page R3 of the Reasons that he terminated "the existing contractor and hired a new contractor to replace the flooring without addressing the asbestos

concern". He states that he never terminated the contractor, and produces renovation bills, as well as a statement from the contractor, Neal Ross ("Mr. Ross"). I note Mr. Ross was not called at the Hearing by Mr. Fabbro or VDL to give evidence. Mr. Ross states in his witness statement that he had a strained relationship with Ms. Fox and due to time constraints and ongoing difficulty with her, he "backed out of the remaining installation" work in unit no. 7 and, with Mr. Fabbro's advice, contacted another contractor to finish the job in the unit.

39. Mr. Fabbro also submits statements from a plumbing contractor and some tenants which were previously submitted to the delegate before the Hearing and form part of the Record. Mr. Fabbro argues that Ms. Fox treated these individuals "unprofessionally" and failed to resolve tenants' disputes, and, instead, created disputes with both tenants and contractors. I have read these statements and I do not find it necessary to set them out in more detail here.

40. Mr. Fabbro also includes a statement signed by Dan Metza ("Mr. Metza") who claims to have taken over "the caretaker position" from Ms. Fox as of December 2014. He sets out his conversations with Ms. Fox wherein he claims she told him she was "out to get Al Fabbro" and asked him to "make a complaint against Al Fabbro".

41. Mr. Fabbro also adds a single handwritten page as part of the First Submissions setting out a handwritten summary of calls he made to Ms. Fox between June 25, 2014, and November 17, 2014, suggesting that she was not reachable on many occasions and when she responded to his calls it was many days later. He also attaches Telus telephone bills in support of his latter submission. All this evidence was not previously produced at the hearing but is now produced to dispute Ms. Fox's claim at the Hearing that she worked every day for VDL.

42. In the Second Submissions, Mr. Fabbro submits that a security deposit of $350.00 paid by Ms. Fox for her unit was deducted by VDL as a result of the Order VDL obtained against her at the Residential Tenancy Branch for rental arrears. He also attaches a further written statement from Mr. Metza. In his statement, Mr. Metza states that Ms. Fox moved out of her unit and told him to "clean up the rest of her stuff". He states that "she did not want to clean up her own mess". Her unit was "full of garbage and furniture" which he disposed of, and there was "smoke damage to the bathroom from marijuana smoke". He further states that Ms. Fox told him to deduct the cost of cleanup "from the damage deposit".

43. In the Third Submissions, Mr. Fabbro submits that he has reread the Determination, and he is "so mad!" because the delegate has "accepted the evidence provided by [Ms. Fox]" and given "little or no credibility to the evidence" he provided. He further submits that Ms. Fox's evidence is full of "untruths", and the delegate has failed to give "equal consideration" to his evidence. He states that Ms. Fox "wants to ruin [his] reputation" and have him "fined".

44. Mr. Fabbro also attaches to the Third Submissions a copy of his comments in response to Ms. Fox's January 13, 2015, submissions contained in the Complaint. These submissions dispute Ms. Fox's contention that she was hired as a residential caretaker. He states that she was hired as a manager on a contract basis. He further submits that it was Ms. Fox who hired the contractors for remodelling unit no. 7, and it was she who hired her son to assist the flooring contractor, and, perhaps, he was the one who used the skill-saw on the floor and damaged the floor. He reiterates his previous submissions that Ms. Fox did not get along with the flooring contractor and he dealt directly with him "for the rest of his contract". He states that the flooring contractor, [Mr. Ross], was experienced with asbestos and advised him that all proper procedures had been taken to clean the site, and that he had phoned WorkSafeBC and was told that only the area where the asbestos was removed had to be cleaned. He states the contractor cleaned the apartment as required and the apartment

was "held for a tenant" and he asked Ms. Fox "to explain to the tenant what happened". He states he never told Ms. Fox "to rent any apartment that was not properly cleaned", and queries whether Ms. Fox is an expert on asbestos.

ANALYSIS

45. The grounds of appeal are statutorily limited to those found in section 112(1) of the *Act*, which provides:

> **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.

46. An appeal under the *Act* is intended to be an error-correction process, with the burden being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds identified in section 112 of the *Act*. The onus lies on the appellant to establish a cogent evidentiary basis for the appeal.

47. As indicated previously, VDL relies on all three (3) available grounds of appeal under section 112(1) of the *Act*. I will, therefore, review these grounds of appeal under separate headings below.

(i) Error of Law

48. 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.

49. In this case, the first challenge VDL advances under the error of law ground of appeal is that the delegate erred in law in concluding that Ms. Fox was a "resident caretaker" as defined in section 1 of the *Regulation*. Section 1 of the *Regulation* provides:

> **'resident caretaker'** means a person who
>
> (a) lives in an apartment building that has more than 8 residential suites, and
>
> (b) is employed as a caretaker, custodian, janitor or manager of that building;

50. According to Mr. Fabbro, because Ms. Fox was in arrears of rent for a period of six (6) months, she did not have a lawful right to possess her rental unit and, therefore, she was not lawfully living in VDL's apartment

building. Therefore, she cannot be a resident caretaker, he argues. I do not share Mr. Fabbro's interpretation of the meaning of "resident caretaker" in section 1 of the *Regulation*. There is nothing in the definition of "resident caretaker" that limits Ms. Fox from qualifying as such if she was in arrears of rent. It has been well established in both court and tribunal decisions that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* and *Regulation* is the protection of employees through minimum standards of employment and, accordingly, an interpretation which extends that protection is to be preferred over one which does not (see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). To inject the precondition that one must not be in arrears of rent at any time to qualify as a "resident caretaker" within the meaning of section 1 of the *Regulation* is inconsistent with the purposes of the *Act* and *Regulation*, and runs counter to judicial and Tribunal authorities that have confirmed the remedial nature of the *Act* and *Regulation*. Therefore, I do not find Mr. Fabbro's submission persuasive. I find the delegate's interpretation of "resident caretaker" is correct. I also find the delegate's related conclusion that Ms. Fox was a resident caretaker is based on a view of facts which could reasonably be entertained and persuasive.

51. Having said this, I note that Mr. Fabbro also contends that the Director erred in concluding that VDL failed to establish just cause for Ms. Fox's dismissal. He argues that there were two bases on which just cause for Ms. Fox's dismissal exists. First, he contends that there was dishonesty and conflict of interest on the part of Ms. Fox because she hired her son as a contractor without informing him. He argues that the dishonesty was of such a magnitude as to give rise to a breakdown in the employment relationship, and provide VDL cause to terminate Ms. Fox's employment.

52. Mr. Fabbro also argues that the delegate erred in law in failing to rely upon the decision in *McKinley, supra.* In *McKinley,* Iacobucci J. advocated a contextual analysis which requires an assessment of the context of the alleged misconduct, when determining whether alleged dishonesty constitutes just cause. He stated at paragraph 48:

> …[T]he test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent in the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

53. In order to comply with this test, the Court endorsed a two-fold analysis at paragraph 49:

> In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced.

54. Having said this, I note that VDL and Mr. Fabbro did not raise the matter of Ms. Fox hiring a contractor who was her son to perform work for VDL without Mr. Fabbro's consent or permission at the Hearing, and it is, therefore, inappropriate for VDL to advance, for the first time on appeal, this argument or issue. An appeal is not a forum for raising arguments for the first time that could have been advanced during the investigation stage or at the hearing.

55. Having said this, in the event that I am mistaken and Mr. Fabbro did raise at the Hearing the matter of Ms. Fox hiring her son as a contractor without Mr. Fabbro's permission, I do not find that VDL would have successfully established dishonesty under the two-fold approach set out in *McKinley*. More particularly, I do

not find that VDL would have been able to prove, on a balance of probabilities, that Ms. Fox's conduct in hiring her son as a contractor was deceitful. In the further alternative, even if VDL were able to successfully establish that Ms. Fox's conduct was deceitful, I do not think VDL would succeed on the second prong, namely, that the nature and degree of the dishonesty warranted dismissal.

56. The second part of Mr. Fabbro's argument that VDL had just cause for terminating Ms. Fox pertains to the incident on November 17 concerning the renovation of suite no. 7 and the related asbestos concern. Mr. Fabbro submits that the refusal by Ms. Fox to rent out suite no. 7 contrary to his instructions "fundamentally and adversely affected the ability of the Employer to conduct his business" and gave just cause to VDL to terminate Ms. Fox's employment, and the Director erred in law in concluding otherwise. I am unable to agree with Mr. Fabbro that the Director erred in law. I find the delegate's following reasons at page R11, supporting his conclusion that VDL failed to show Ms. Fox's behaviour on November 17, 2014, amounted to an act of misconduct that was wilful, deliberate and inconsistent with the continuation of her employment with VDL, persuasive:

> The parties agree that a contractor identified an asbestos hazard in suite #7. However, they provided divergent evidence about whether Viewpoint addressed the asbestos hazard prior to Mr. Fabbro directing Ms. Fox to continue the renovation and find a prospective tenant. I have concerns about Mr. Fabbro's evidence pertaining to removal of asbestos from suite #7 prior to directing Ms. Fox. Mr. Fabbro's evidence is not logical considering Ms. Fox's course of action during their meeting on November 17, 2014, nor is the evidence in harmony with Ms. Fox's job responsibilities that include arranging, directing and supervising contractors. If a contractor had returned to remove asbestos prior to Mr. Fabbro's conversation with Ms. Fox on November 17, 2014, such arrangement would have been made with Ms. Fox. The contractor's return and access for removing asbestos was dependent on Ms. Fox providing access to suite #7. For these reasons, I am not convinced the asbestos hazard had been addressed by Viewpoint prior to the termination of Ms. Fox's employment.
>
> I prefer the evidence of Ms. Fox that the asbestos hazard was not addressed by Viewpoint as of November 17, 2014, and she was directed to give a contractor access to the suite to finish the installation of new flooring despite the asbestos hazard. Under this circumstance, Ms. Fox's refusal to follow instructions was not unreasonable considering the asbestos was a health hazard identified by a previous contractor.
>
> Even if the asbestos had been handled by a third party or the current contractor was directed by Mr. Fabbro to remove it, there was no evidence that Mr. Fabbro made any attempt to explain the clean-up efforts to Ms. Fox. Mr. Fabbro's failure to clarify any misunderstandings regarding the condition of suite #7 provides a reasonable explanation for Ms. Fox's action. It does not support a conclusion that Ms. Fox's actions were wilful and deliberate with an intention of prejudicing the employer's interests.
>
> I am not persuaded that Ms. Fox's behaviour on November 17, 2014, was a single act of misconduct that was wilful and deliberate and inconsistent with the continuation of the employment contract. Accordingly, I find Viewpoint has not established just cause for dismissal on this basis.
>
> Mr. Fabbro also argued that there were a number of secondary reasons for terminating Ms. Fox's employment, including contactor [*sic*] and tenant complaints, incomplete work assignments and breaches of the Occupancy Agreement. While this may have been the case, Viewpoint did not address these issues with Ms. Fox during her employment, set and communicate reasonable standards of performance and provide a clear warning that employment would be terminated if such offences were repeated. Instead, Viewpoint condoned any purported misconduct and has only raised these issues as a result of the complaint filed by Ms. Fox. I find Viewpoint has failed to establish just cause on these bases.

57. In my view, the delegate correctly set out the burden on VDL to prove "just cause", and he also set out the applicable law governing the discharge of employees for just cause, and it was open to the delegate to prefer

the evidence of Ms. Fox to that of Mr. Fabbro and to arrive at the decision he did, namely, that VDL failed to establish just cause for dismissal. I find no reason to interfere with that decision.

(ii) Natural Justice

58. VDL, as indicated, also invokes the natural justice ground of appeal in section 112(1)(b) of the *Act*. A party asserting a failure to observe the principles of natural justice bears the burden of establishing such a breach. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal summarized the natural justice concerns that typically operate in context of this ground of appeal 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 *B.W.I. Business World Incorporated*, BC EST #D050/06)

59. Having reviewed the Record, I find that VDL was afforded the rights described above.

60. Furthermore, while Mr. Fabbro argues that the delegate ignored or failed to consider the evidence of VDL, I am not so persuaded. Based on my full and fair reading of the Reasons, I find the delegate considered the evidence of both VDL and Ms. Fox, including the differences in their evidence. Where there were differences in the parties' evidence, the delegate, in preferring the evidence of Ms. Fox, made reasoned decisions with which I am unable to interfere. I also find, based on my review of the three (3) sets of written appeal submissions of Mr. Fabbro, VDL is primarily disagreeing with the findings of fact made by the delegate on the material issues. The *Act* does not allow and the Tribunal has no authority to consider appeals based on alleged errors of fact unless such findings raise an error of law. In this case, the findings of fact made by the delegate do not constitute an error of law.

61. I find VDL has not met the burden of showing a failure on the part of the delegate to observe the principles of natural justice in making the Determination. Therefore, I dismiss VDL's natural justice ground of appeal.

(iii) New Evidence

62. VDL also relies on the "new evidence" ground of appeal in section 112(1)(c) of the *Act*. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* (BC EST #D171/03), the Tribunal set out four (4) conjunctive requirements that must be met before new evidence will be considered. The appellant must establish that:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value in the sense that, if believed, it could, on its own or when considered with the other evidence, have led the Director to a different conclusion on the material issue.

63. In this case, all of the evidence and materials presented by Mr. Fabbro in the First Submissions, the Second Submissions and the Third Submissions do not meet three (3) of the four (4) conditions set out above. The witness statements from the tenants and the plumber forming part of the First Submissions were adduced before the Hearing and form part of the record and the delegate did consider them. Mr. Ross's statement and Mr. Metza's two statements could have been produced with the exercise of due diligence during the investigation stage and before the Hearing or the Determination was made but were not. The same can be said of the telephone records and evidence of Mr. Fabbro.

64. While the witness statements from Mr. Ross and Mr. Metza, including evidence from Mr. Fabbro not previously presented at the Hearing (such as Mr. Fabbro's allegation that Ms. Fox hired her son and Ms. Fox did not respond or did not respond in a timely fashion to telephone calls of Mr. Fabbro) may have some relevance to the issue of Ms. Fox's termination, I am not persuaded they would have led the delegate to a different conclusion on the issue of whether VDL had just cause to terminate Ms. Fox's employment.

65. Therefore, I find there is no basis to interfere with the Determination on the new evidence ground of appeal.

66. In the result, I find that there is no possibility this appeal can succeed and, therefore, I dismiss it under section 114(1)(f) of the *Act*.

ORDER

67. Pursuant to section 115 of the *Act*, I order the Determination, dated August 26, 2015, be confirmed in the amount of $2,884.79, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal