An appeal

- by -

Elise Butterfield carrying on business as Island Executive Cleaning
("Ms. Butterfield" or "IEC")

- 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/122

DATE OF DECISION: December 18, 2017

DECISION

SUBMISSIONS

Elise Butterfield	on her own behalf carrying on business as Island Executive Cleaning

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Elise Butterfield carrying on business as Island Executive Cleaning ("Ms. Butterfield" or "IEC") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 21, 2017 (the "Determination").

2. The Determination found that IEC contravened Part 3, sections 17 and 18 (wages) and 25 (special clothing); and Part 4, section 32 (meal breaks) of the *ESA* in respect of the employment of Marie Pepin ("Ms. Pepin"). The Determination ordered IEC to pay Ms. Pepin wages in the total amount of $717.02 inclusive of accrued interest. The Determination also levied three administrative penalties against IEC totaling $1,500 for breaches of sections 17, 25, and 32 of the *ESA*. The total amount of the Determination is $2,217.02.

3. IEC appeals the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination.

4. On November 2, 2017, the Tribunal corresponded with the parties advising them that it had received IEC's appeal which it was enclosing. 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 Ms. Pepin and the Director to file their submissions on the merits of the appeal.

5. The Record was provided by the Director to the Tribunal on November 15, 2017. A copy of the same was sent by the Tribunal to IEC and Ms. Pepin and both parties were provided an opportunity to object to its completeness. Neither IEC nor Ms. Pepin objected to the completeness of the Record and the Tribunal accepts it as complete.

6. On November 15, 2017, the delegate of the Director sent the Tribunal the Determination with two addendums, containing calculations of wages awarded, which were missing from the original Determination. The Tribunal forwarded the same to both parties. In the case of IEC, the latter was afforded an opportunity to respond to the now complete Determination. In the case of Ms. Pepin, she was provided the complete Determination for informational purposes only.

7. On November 29, 2017, IEC made further appeal submissions in response to the complete Determination.

8. On December 4, 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 Tribunal's above notice to the parties, 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 complete Determination, the Appeal Form, written submissions of IEC 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 Ms. Pepin and the Director to file their submissions on the merits of the appeal. IEC will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

9. 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

10. The factual background is delineated in the reasons for the Determination (the "Reasons") and can be summarized as follows.

11. Ms. Butterfield is a sole proprietor operating IEC, a home-based cleaning business.

12. IEC employed Ms. Pepin as a Cleaning Specialist from November 2, 2016, to March 2, 2017, at the rate of pay of $18.00 per hour. On January 1, 2017, Ms. Pepin received a wage rate increase to $18.50 per hour.

13. On April 7, 2017, Ms. Pepin filed a complaint against IEC under section 74 of the *ESA* alleging that Ms. Butterfield, carrying on business as IEC, contravened the *ESA* by failing to pay her regular wages, overtime and compensation for length of service (the "Complaint").

14. The parties participated in mediation which evidently failed to resolve the Complaint.

15. Subsequently, on July 24, 2017, a delegate of the Director conducted a hearing of the Complaint (the "Hearing"). The Hearing was attended by Ms. Pepin on her own behalf and by Ms. Butterfield on behalf of herself or IEC.

16. The delegate considered two issues at the Hearing, namely: (i) Is Ms. Pepin owed wages? (ii) Is Ms. Pepin owed compensation for length of service?

17. In the summary of the evidence of both parties, in the Reasons, the delegate notes that Ms. Butterfield initially contented that Ms. Pepin was sent a written employment agreement (the "Agreement") which was to be signed and returned by her, but Ms. Pepin testified that that she first saw the Agreement at the Complaint mediation session. The Agreement was not signed by Ms. Pepin. Later Ms. Butterfield acknowledged that it

was possible that Ms. Pepin did not receive the Agreement as around the same time "some things slipped through the cracks" as her (Ms. Butterfield's) mother had passed away.

18. With respect to her claim for unpaid regular wages, Ms. Pepin submitted that she is owed wages for travel time to and from her residence, as well as time spent travelling between work locations. The travel times claimed are estimates which included a consideration of traffic conditions pertaining to the time of day during which the travel occurred.

19. The mode of transportation Ms. Pepin employed to travel was her own vehicle. She did not transport other employees to job sites. She only transported her cleaning equipment which included a vacuum, cleaning supplies, a mop and rags.

20. Ms. Butterfield provided Ms. Pepin a flat $5 travel time credit, if Ms. Pepin worked at two or more locations in a single day regardless of the distance Ms. Pepin had to travel.

21. Ms. Pepin also claimed wages for the time she spent at home washing and drying her special clothing/uniform and rags used in the performance of her cleaning services for IEC. More specifically, at the start of her employment with IEC, Ms. Pepin was given a single shirt with IEC's logo which she was required to wear to every job. About four to six weeks later, IEC provided her two more shirts. Ms. Pepin said every work day she washed and dried at home shirts, rags and mop pad she used at jobs she attended. Sometimes she would have to soak the item if there was grease on it. She also paid for a stain remover she used.

22. Ms. Pepin estimated that she spent about two hours each work day to do the washing. The two-hour estimate of Ms. Pepin was based on a "wash cycle" of one hour and twenty-six minutes, a forty-five minute dryer cycle and twenty minutes of manual labour. However, she was unable to provide an estimate of the cost that a laundry service might charge for this service or the cost to her personally with respect to the use of laundry detergent and electricity.

23. Ms. Butterfield responded that although section 12 of the Agreement indicates that the employee "shall wear a t-shirt with the company logo while working in the homes of client" and "clean and maintain the t-shirts in good state of repair" for which the "Employer shall provide the Employee with an allowance of $2.00 per pay period", the Agreement also gave the employee a choice to "drop off the soiled t-shirts for the Employer to clean and repair". Ms. Butterfield also asserted that employees are instructed not to buy cleaning supplies as IEC will provide them.

24. Ms. Pepin also claimed that she was not provided with meal breaks, and therefore owed wages on this basis. Ms. Butterfield contended that Ms. Pepin's travel time between jobs, for which she was paid $5.00 flat, was considered part of her meal break.

25. Ms. Pepin also claimed she was owed minimum daily pay with respect to shifts that were cancelled without adequate notice. In particular, she claimed that she was owed minimum daily pay for a five-hour shift scheduled for Monday, November 14, 2016, which was cancelled by IEC without notice until the day prior. She also claimed minimum daily pay with respect to February 6 and 7, 2017, when she was unable to walk or

drive to her scheduled job sites because of weather conditions – "winter storm" and "ice". She also claimed minimum daily pay for transferring some keys to Ms. Butterfield on December 23, 2016.

26. Ms. Pepin also claimed she was owed wages as a result of failure by payroll to account for a raise she received, effective January 1, 2017, from $18.00 to $18.50 per hour but which only took effect on January 7, 2017. IEC acknowledged this error in an email to Ms. Pepin and informed her that she should expect the amount she was owed to be added to her February 15, 2017, paycheque.

27. Ms. Pepin also claimed she was owed overtime wages and that her claim for overtime should be expanded to include the hours she is claiming for travel, washing clothes, and meal breaks. Ms. Butterfield responded that IEC does not authorize employees to "do overtime" but paid Ms. Pepin for the one time she worked overtime.

28. Ms. Pepin also claimed additional statutory wages from IEC. She contended that as a result of underpayment of wages by IEC, the average day's pay she received for statutory holidays ought to have been greater.

29. Ms. Pepin's final claim was for compensation for length of service. She indicated that while she sent Ms. Butterfield an email on March 9, 2017, indicating that she was resigning, it was because IEC began to take away shifts from her in the weeks prior to her resignation, after she called in sick on the previous Friday and Monday. She also interpreted Ms. Butterfield's request to return keys and codes for various clients to mean that she no longer had a job. She then began self-employment the next day, providing cleaning, home-staging and gardening services.

30. Ms. Butterfield responded that IEC did not terminate Ms. Pepin's employment. She said it was necessary to transfer clients to other employees on a temporary basis as a result of Ms. Pepin's absences since Ms. Pepin had not indicated when she would return and IEC "can't stop doing business just because she is sick." Ms. Butterfield also submitted that one of Ms. Pepin's clients had asked for a new cleaner and another had cancelled her cleaning services. She also added that IEC instructed all its employees to return keys and codes as it was not otherwise possible to transfer services to another employee during an absence of an employee. She also suspected that Ms. Pepin's resignation was related to her displeasure with having received a warning letter from IEC in February.

31. After reviewing the evidence of the parties, the delegate decided each claim of Ms. Pepin starting with travel time. He stated that in the normal circumstances, and in the "absence of evidence to show that a commute to work is something more, the employer is not responsible for the time an employee takes to travel to work." However, any time spent by an employee traveling during the working day, going from one work place to another, is work for which the employee should be paid wages. In the case of Ms. Pepin, the delegate determined that the time she spent travelling to and from her residence was not work. The delegate noted that she did not transport in her vehicle other employees to job sites. She merely transported a vacuum, cleaning supplies, a mop and rags, which the delegate found "to be minimal and do not constitute 'providing a service to the employer'".

32. Having said this, the delegate also found, based on records Ms. Pepin submitted of the days she worked at more than one job for IEC and travelled between jobs, she spent a total of 19.98 hours travelling during her

period of employment with IEC. As this constituted work, the delegate determined that Ms. Pepin was owed her hourly rate for the travel time and calculated the amount of $364.60. The delegate also reviewed wage statements issued to Ms. Pepin by IEC and noted that she received travel credits from IEC totalling $155.00 which he subtracted from $364.50. In the result, the delegate concluded Ms. Pepin was owed $209.60 by IEC for her travel time.

33. With respect to Ms. Pepin's claim for cleaning her uniform or special clothing, the delegate noted that section 25 of the *ESA* provides that an employer who requires an employee to wear special clothing must provide the clothing without charge. The cost of cleaning and maintaining that clothing must also be paid by the employer. Based on the definition of "special clothing" in section 1 of the *ESA*, the delegate determined that Ms. Pepin wore special clothing to work. The delegate also noted the Agreement in Section 12 required Ms. Pepin to wear the company t-shirt and "clean and maintain the t-shirt in good state of repair". While Ms. Pepin did not have the Agreement and was unaware of its contents until after her employment ended, IEC did provide her company t-shirts that bore the company logo which she regularly wore while working in the homes of clients. The delegate found this evidence to be especially compelling in determining that the t-shirts constituted special clothing.

34. The delegate next considered Ms. Pepin's claim for two hours' of wages for washing her shirts which consisted of 20 minutes of manual labour and the balance of the time for the operation of her washing machine and dryer. The delegate noted that the Agreement afforded Ms. Pepin a choice to drop off soiled t-shirts with the employer for cleaning or alternatively to clean the t-shirts herself and receive an allowance of $2.00 per pay period. The delegate found neither of these options reasonable or practical because Ms. Pepin received one shirt initially and then two more shirts four to six weeks later. She preferred to wear a clean shirt daily, which required that she wash her shirt daily at first, and then subsequently at least every other day. Therefore, according to the delegate, dropping off her shirt with the employer was not a practical option. As for the allowance of $2.00 per pay period for washing the shirts herself, the delegate found this option in the Agreement not "sufficient", even if Ms. Pepin had been aware of it.

35. As the delegate found that Ms. Pepin was not aware of the written contract of employment and IEC did not reimburse her for cleaning costs, he concluded that there was no agreement between the parties for reimbursement for cleaning of the "special clothing" pursuant to section 25 of the *ESA*. In the circumstances, the delegate decided to determine a reasonable amount equivalent to the costs incurred by Ms. Pepin in cleaning and maintaining the clothing. He noted that Ms. Pepin did not provide an estimate of the cost of detergent, electricity and hot water associated with each load of laundry she did. However, since Ms. Pepin said she spent 20 minutes of labour associated with cleaning her clothing each time, the delegate determined that the approximate true cost to Ms. Pepin was the equivalent of .33 or 1/3 of an hour at the rate of $18.00 per hour for each load of cleaning before January 1, 2017, and $18.50 per hour for each load after January 1, 2017. He calculated the total amount owing to Ms. Pepin for cleaning the special clothing to be $409.37 and so ordered IEC to pay Ms. Pepin.

36. The delegate also levied an administrative penalty of $500 against IEC for contravening section 25 of the *ESA* for failing to reimburse Ms. Pepin for the costs associated with cleaning and maintaining the special clothing.

37. Ms. Pepin also claimed that she incurred expenses as a result of having to purchase stain remover which was used to clean her shirts, rags and mop pads. Ms. Butterfield, however, submitted that employees are instructed not to buy cleaning supplies as IEC will supply them. The delegate found that Ms. Pepin was not required to pay this business costs and dismissed Ms. Pepin's claim for reimbursement for stain remover.

38. With respect to Ms. Pepin's claim that she was not provided with meal breaks, and owed wages on this basis, the delegate noted that Ms. Pepin testified that she was expected to eat meals while travelling between jobs. The delegate also noted that Ms. Butterfield agreed that Ms. Pepin's travel time between jobs was considered part of her break. He noted that under section 32 of the *ESA* employers are required to give a 30-minute, unpaid, meal break to employees who work more than five consecutive hours. If an employer requires or allows an employee to work or be available for work during a meal break, the employer must compensate the employee for it. He also noted that travel time between work locations is considered work. In concluding that IEC contravened section 32 of the *ESA* in the case of Ms. Pepin, the delegate reasoned as follows:

> I find that Ms. Butterfield failed to ensure that Ms. Pepin did not work more than five consecutive hours without a break. Although Ms. Butterfield claimed Ms. Pepin's travel time was to be considered her break and she was compensated for this by way of travel credits worth $5.00 each, the evidence indicates there are multiple instances in which she worked more than five hours at a single location without travelling or a break. While the Complainant's record of her hours do not indicate start and end times of each entry and whether they were truly consecutive, the Employer did not allege that unrecorded unpaid breaks were taken.
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> In her testimony Ms. Pepin clarified that the meal breaks indicated in the record of hours which she prepared after her employment ended do not represent meal breaks taken. Rather, her practice was to add a paid break to her hours in those instances where she had recorded five or more hours of work in a day. As the time indicated in her record does not represent unpaid meal breaks taken or additional time worked, I find that she is not entitled to wages for these entries.

39. Although the delegate did not find Ms. Pepin was entitled to any wages related to meal breaks not taken, he did find that IEC or Mr. Butterfield contravened section 32 of the *ESA* for failing to ensure that Ms. Pepin did not work more than five hours without a meal break and levied a mandatory administrative penalty of $500 for this contravention.

40. With respect to Ms. Pepin's claims for minimum daily pay for several shifts that were allegedly cancelled without adequate notice and an entry dated December 23, 2016, recorded in her hours of work document, the delegate dismissed these claims. As these claims are not the subject of IEC's appeal, I do not find it necessary to review them here.

41. With respect to Ms. Pepin's claim that she is owed wages as a result of a payroll which failed to account for a raise she received effective January 1, 2017, from $18.00 to $18.50 per hour, but which did not take effect until January 7, 2017, the delegate noted that IEC acknowledged this error by email, and informed Ms. Pepin that she could expect the amount she was owed to be added to her February 15, 2017, paycheque. However, upon review of the relevant wage statements and emails exchanged between the parties, the delegate noted it was not apparent that the additional wages totaling $25.38 that should have been paid to Mr. Pepin were paid. Therefore, the delegate found that Ms. Pepin did not receive this amount and ordered IEC, in the

Determination, to pay her the said amount. I note that this aspect of the Determination is also not the subject of IEC's appeal.

42. With respect to Ms. Pepin's claim that she is owed wages with respect to overtime hours worked, the delegate considered both the record of her hours prepared post-employment, and the hours submitted in her emails to IEC and preferred the evidence contained in her emails which was contemporaneously prepared. Based on this evidence, the delegate determined that Ms. Pepin was owed overtime wages and explains his overtime calculation as follows (including in his calculation in an addenda to the Determination):

> In reaching this conclusion I have first considered Ms. Pepin's hours spent cleaning, and then added to these hours any time that I have credited her for hours pertaining to travel time between job locations. If the combined total exceeded eight hours, I would then multiply those hours in excess of eight at an overtime rate. As I have already credited travel time under a different heading, I have only credited Ms. Pepin the difference between her regular rate and the overtime rate.
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> I find that she is owed overtime wages in the amount of $64.81, calculated as follows:
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> $13.88 (wage rate differential overtime) + $50.93 (all other overtime) = $64.81

43. With respect to Ms. Pepin's claim for additional statutory pay, it suffices to say that the delegate dismissed this claim and I do not find it necessary to review it here in any detail as it is not the subject of IEC's appeal.

44. With respect to wages found owing to Ms. Pepin for travel time and wage rate discrepancy, the delegate found that IEC's failure to pay Ms. Pepin these wages in multiple pay periods throughout her employment contravened section 17 of the *ESA* which requires employers to pay employees all wages earned in a pay period at least semi-monthly and within eight days after the completion of the pay period. In the result, the delegate levied an administrative penalty of $500 against IEC for this contravention.

45. With respect to Ms. Pepin's claim for compensation for length of service pursuant to section 63 of the *ESA*, the delegate found that Ms. Pepin quit her employment. Accordingly, the delegate dismissed her claim. As this claim is also not the subject of IRC's appeal, I do not find it necessary to review it here in any detail.

46. With respect to all wages ordered to be paid to Ms. Pepin, the delegate also ordered IEC to pay vacation pay and interest thereon.

SUBMISSIONS OF IEC

47. As previously indicated, Ms. Butterfield made two written submissions in her appeal of the Determination. The second set of submissions were made by Ms. Butterfield in response to a completed version of the Determination that included two appendices containing calculation of wages owing to Ms. Pepin that the delegate inadvertently failed to include in the original Determination he sent to the parties. I will summarize both submissions together below, as the second set of submissions, in part, reiterate and buttress the first.

48. The written submissions are delineated under the following descriptive headings: "Laundry Allowance", "Travel Time", Meal Break" and "Wages Owing".

49. With respect to "Laundry Allowance", Ms. Butterfield submits that the allowance in the Agreement was set with the assistance of a Human Resources expert. It is based on "a known Union contract of .10 cents worked." She states that while IEC is not a union, the rate in the union contract is an appropriate guideline. She further adds that the *ESA* does not provide the rate but only states that the parties can come to an agreement. She states IEC's rate is contained in the Agreement which Ms. Pepin was provided. She questions the basis on which the delegate found IEC's rate of $2.00 per pay period for laundry allowance inappropriate. She asks: "[w]here is the formula?". She also argues that she did not intentionally fail to pay Ms. Pepin the laundry allowance and says that Ms. Pepin did not request or "submit allowance for payment". As payroll for IEC is done by her Bookkeeper, Ms. Butterfield states she could not have known that Ms. Pepin did not request payment for allowance.

50. With respect to "Travel Time", Ms. Butterfield submits that it cannot be left to Ms. Pepin's discretion to determine travel time as "she has been less than truthful throughout this process". She states that Ms. Pepin "was actually overpaid for travel, at $5.00 per day". She further adds that IEC is able to calculate Ms. Pepin's travel time based on where she was scheduled to work using Google Maps. Ms. Butterfield says that she has done this for with her other employees "for 7 years". In the case of Ms. Pepin, Ms. Butterfield states that the "farthest she ever had to drive was 25 minutes and this only happened 1or 2 times." She questions the basis on which the delegate determined that Ms. Pepin is owed 19.98 hours of travel time.

51. With respect to "Meal Breaks", Ms. Butterfield argues that IEC does not schedule any employee to work more than 5 consecutive hours at one cleaning job. Cleaning jobs were scheduled between 2 to 2.5 hours per job "with an hour between" allowing for a meal break "plus enough time to travel to the next clean". She states that Ms. Pepin was rarely scheduled for 2 cleaning jobs per day.

52. In her second submission, on the subject of meal breaks, Ms. Butterfield submits that the delegate suggested in the Determination that he found multiple occasions where Ms. Pepin worked 5 consecutive hours without a meal break and after she challenged this in her first submissions, the delegate changed his finding to one instance on February 16, 2017. She states that on the latter occasion Ms. Pepin did not work more than 5 hours without a break. She states that Ms. Pepin was scheduled on one job from 12 to 3:30 p.m. and another job, five minutes away, from 4:30 to 6:00 p.m. and, therefore, had 55 minutes for a meal break. If Ms. Pepin, on her own, changed her schedule then that is not allowed, Ms. Butterfield states. She attaches to her submissions a computer printout schedule consisting of two pages for February 16, 2017. She purports the schedule is Ms. Pepin's for that day. The starting time on the schedule is 9:00 a.m. and the end time is 4:00 p.m. There is one job showing on the schedule starting at 12 and ending at 3:30 and the second job is showing a start time of 4:00 p.m. but it is cut-off as she states that the schedule does not go past 4:30 p.m. She does not explain why this schedule was not produced previously at the Hearing or before the Determination was made. It is not something that would pass the first of the fourfold test for accepting new evidence on appeal set out in *Bruce Davies and others*, *Directors or Officers of Merilus Technologies Inc.*, (BC EST # D171/03). In particular it is not evidence that 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.

53. Under the heading "Wages Owed", Ms. Butterfield submits Ms. Pepin often submitted wrong hours but IEC corrected these errors and "made it right immediately". She also submits that occasional discrepancies in

wages owed to Ms. Pepin were always resolved in her favour. She does not understand how the delegate concluded that IEC contravened the *ESA* on March 9 when Ms. Pepin emailed her resignation.

54. Ms. Butterfield also submits that Ms. Pepin "refused to sign her Employment Contract, which was emailed to her, along with all relevant employment documents … when she was hired". She also adds that Ms. Pepin "continually went against our rules and simply cannot be trusted" and is making "invalid monetary demands".

55. She concludes stating that the delegate's Determination containing the Addendums is "solely based on [Ms. Pepin's] records, which are not accurate". She states she works very hard and never has had any complaints filed against her in 7 years and wants the Determination cancelled.

ANALYSIS

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

> **Appeal of director's determination**
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> 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.

57. The Tribunal has consistently stated that an appeal is an error correction process, with the burden on the appellant to persuade the Tribunal that there is an error in the determination on one of the statutory grounds listed in section 112(1) above.

58. Having said this, the grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law. The test for establishing an error of law is rather strict, requiring the appellant to show, on a balance of probabilities, that the Director's findings of facts are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation (see *Britco Structures Ltd.*, BC EST # D260/03). Short of the appellant discharging this burden to show an error of law, the Tribunal must respect or defer to the findings of fact made by the Director.

59. In this case, Ms. Butterfield has grounded her appeal 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).

60. 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.

61. Having carefully reviewed the Determination including the Record and both written submissions of Ms. Butterfield, I am unconvinced with the merits of the natural justice grounds of appeal advanced by Ms. Butterfield or IEC in this case. More particularly, I do not find there is evidence of any natural justice concerns that typically operate in context of the complaint process. Instead, there is ample evidence in the Record and the Reasons that the delegate afforded Ms. Butterfield 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*. In the circumstances, I find Ms. Butterfield has failed to discharge the burden on her to persuade the Tribunal that there is an error in the Determination on the natural justice ground of appeal and I dismiss her appeal on this basis.

62. Having said this, it is abundantly clear to me that Ms. Butterfield's objections in her appeal submissions are primarily in the nature of a disagreement with the delegate's findings or conclusions of fact in the Determination. As previously indicated, the *ESA* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law. In this case, without exception, I find the delegate's findings of fact do not raise an error of law. I also propose to briefly review the objections of Ms. Butterfield below starting with her submissions on the "Laundry Allowance" or cleaning of the special clothing.

63. As indicated previously, the delegate found that Ms. Pepin was unaware of the Agreement until after her employment ended, however, in her appeal submissions, Ms. Butterfield submits that Ms. Pepin was provided the Agreement "when she was hired" and she "refused to sign [it]". Regardless of whether Ms. Pepin was aware of the Agreement and the options delineated in it pertaining to the special clothing, the delegate found both options in the Agreement –for the employee to drop off the soiled shirts with the employer for cleaning or clean the shirts herself for an allowance of $2.00 per pay period- not reasonable or sufficient. Ms. Butterfield, of course, thinks otherwise. She says that the allowance amount in the Agreement was based on "a known union contract" that is a sufficient guideline in this case. She also questions what formula the delegate used to determine the amount owed to Ms. Pepin for cleaning the special clothing. Since the delegate did not have any estimate from Ms. Pepin of the cost of detergent, electricity and hot water associated with each load she washed during her period of employment, he relied upon the best evidence

available to him, namely, Ms. Pepin's evidence of labour she expended in relation to cleaning the laundry. She testified that she spent 20 minutes for each load of laundry. The delegate, therefore, estimated that the true cost to Ms. Pepin for cleaning her special clothing should be determined based on .33 or 1/3 of an hour multiplied by the days she performed laundry multiplied by her then hourly rate of pay with Ms. Butterfield. I find it was both open and reasonable for the delegate, on the evidence, to make the calculation he did to determine the wages owed to Ms. Pepin, particularly in the absence of any agreement between the parties under section 25 of the *ESA*. I also do not find any basis to interfere with the delegate's finding that Ms. Butterfield or IEC contravened section 25 of the *ESA*.

64. With respect to both travel time and meal breaks, Ms. Butterfield disputes the delegate's conclusions of fact. I find it was open for the delegate to prefer the records and testimony of Ms. Pepin at the Hearing and to conclude as he did. I do not propose to reiterate the delegate's conclusions of fact and his reasons here (which I have set out in the previous section entitled "THE FACTS AND REASONS FOR THE DETERMINATION"). However, I do wish to state that Ms. Butterfield has not established that the delegate relied on no evidence or irrelevant facts or on a view of facts that cannot be reasonably be entertained to conclude as he did in both claims. Therefore, I do not find there is any basis for the Tribunal to interfere with the delegate's decisions here.

65. With respect to Ms. Butterfield's submissions under "Wages Owed" referred to in paragraph 53 above, as with her other submissions, I find them to be in the nature of a disagreement with the delegate's conclusions of fact. I find the delegate correctly determined, at page R13 of the Determination, the total wages owing to Ms. Pepin for "travel time" and "wage rate" and relatedly make a finding that Ms. Butterfield contravened section 17 of the *ESA* for failing to pay these wages to Ms. Pepin in multiple pay periods throughout Ms. Pepin's employment. The delegate also correctly determined that the last full pay period in which regular wages were owed to Ms. Pepin ended on February 28, 2017, and therefore, the *ESA* was contravened on March 9, 2017 (eight days after the completion of the pay period), when Ms. Butterfield failed to pay these wages in accordance with section 17 of the *ESA*. I also find the delegate correctly levied mandatory administrative penalty of $500.00 against Ms. Butterfield for contravention of section 17 and therefore, I do not find any basis to interfere with the delegate's decision.

66. I also do not find anything turns on the balance of the submissions of Ms. Butterfield. More particularly, contrary to the delegate's finding that Ms. Pepin only became aware of the Agreement after her employment ended, Ms. Butterfield contends otherwise stating that Ms. Pepin was sent the Agreement at the time of hire and she refused to sign the Agreement. She also disputes as "not accurate" the records of Ms. Pepin which the delegate relied upon in making his findings of fact relating to wages owing to Ms. Pepin.

67. In the result, pursuant to section 114(1)(f) of the *ESA,* I dismiss Ms. Butterfield's appeal of the Determination.

ORDER

68. Pursuant to section 115 of the *ESA,* I confirm the Determination made on September 21, 2017, together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal