Citation: Stallion Contracting Limited (Re)
2024 BCEST 53

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Stallion Contracting Limited
("Stallion")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Shafik Bhalloo, K.C.

**FILE NO.:** 2023/191

**DATE OF DECISION:** June 4, 2024

# DECISION

## SUBMISSIONS

Christopher Anderson — on behalf of Stallion Contracting Limited

## OVERVIEW AND BACKGROUND

1. This is an appeal by Stallion Contracting Limited ("Stallion") of a decision of the Director of Employment Standards ("Director") issued on June 21, 2023 ("Determination").

2. The Determination found Stallion, 664114 NB Ltd., formerly known as NBG eotech & Contracting Services Inc. ("NBG eotech") and 1059551 Alberta Ltd. are associated employers (collectively "Associated Employers") within the meaning of section 95 of the *Employment Standards Act* ("*ESA*"). The Determination also found the Associated Employers contravened Part 4, section 40 (overtime wages); Part 5, sections 45 and 46 (statutory holiday pay); and Part 7, section 58 (annual vacation pay) of the *ESA* in respect of the employment of Patrick Winterhalt ("Mr. Winterhalt"). The Determination ordered the Associated Employers to pay Mr. Winterhalt the amount of $10,289.84, an amount that included interest under section 88 of the *ESA.* The Determination also levied 6 administrative penalties totaling $3,000 against the Associated Employers pursuant to section 98 of the *Employment Standards Regulation* ("*Regulation*").

3. The Determination was sent to Stallion (and the other Associated Employers) by regular mail and email on June 21, 2023.

4. The appeal period is 30 days after the date of service, whether service was by registered mail, regular mail, electronic mail, fax machine, or by personal service.

5. Only one of the Associated Employers, Stallion, filed an Appeal Form with the Tribunal that was received on December 27, 2023, about five months after the expiry of the appeal deadline.

6. The appeal is grounded in allegations the Director failed to observe 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 being made. Stallion submitted a single document with its appeal submissions, namely, Mr. Winterhalt's written contract of employment with Stallion, dated April 1, 2021.

7. The Appeal Form contained an application requesting an extension of the appeal deadline and Stallion's reasons for the extension request, which I will set out under a separate subheading below.

8. In correspondence dated February 8, 2024, the Tribunal acknowledged receipt of Stallion's appeal, requested the section 112(5) record ("record") from the Director, and notified the other parties that submissions on the request for an extension of the appeal period and on the merits of the appeal were not being sought at that time.

9. The record has been provided to the Tribunal by the Director and a copy delivered to each of the parties by the Director.

10. Both Stallion and Mr. Winterhalt were provided with an opportunity to object to the completeness of the record but neither raised any objections. The Tribunal accepts the record as being complete.

11. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for Determination ("Reasons"), the appeal, the written submissions filed by Stallion on the appeal, my review of the material that was before the Director when the Determination was being made, and any additional material allowed to be added to and considered in the appeal. Under section 114(1) of *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection including if there is no reasonable prospect that the appeal will succeed.

12. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Winterhalt will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the appeal should be dismissed for the failure to file the appeal in the time allowed in section 112 of the *ESA* and whether, in any event, there is any reasonable prospect the appeal will succeed.

## ISSUE

13. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA.*

## THE DETERMINATION AND THE REASONS

14. I have closely read the Determination and the Reasons, but I will only refer to the evidence in the Reasons relevant to Stallion's appeal. As Stallion is not disputing the finding of "Associated Employers" made in the Determination in the Appeal, I will not review that finding nor any evidence related to that finding.

15. Stallion was incorporated in British Columbia on July 13, 2016, and operated an equipment rental and temporary personnel services business for mining operations in North Vancouver, British Columbia.

16. At all material times, Christopher Anderson ("Mr. Anderson") also known as Chris Anderson, Christopher Abderson, and Ross C Anderson, was Stallion's director.

17. Mr. Winterhalt was hired by Mr. Anderson through a mutual friend, Moe Debler (Mr. Debler"), a onetime director of NBG eotech. Mr. Winterhalt worked as a laborer for Stallion and NBG eotech from September 30, 2020, to June 4, 2021.

18. On June 22, 2021, Mr. Winterhalt filed a complaint under section 74 of the *ESA* with the Director alleging, among other things, that Stallion, NBG eotech and another company contravened the *ESA* by failing to pay him regular and overtime wages, statutory holiday pay, and vacation pay ("Complaint").

19. The Director followed a two-step process in investigating the Complaint and making the Determination. One delegate of the Director ("investigating delegate") corresponded with the parties and gathered information and evidence. Once the investigation completed, the investigating delegate prepared a report dated January 17, 2023 ("Investigation Report"), summarizing the results of the investigation and sent it to the parties for review and comment. A second delegate of the Director ("adjudicating delegate")

reviewed the Investigation Report and the parties' responses to the same before issuing the Determination.

20. As indicated above, the parties were afforded an opportunity to respond to the Investigation Report and to provide any clarification necessary. Stallion and another company responded to the Investigation Report.

21. Subsequently, on September 9, 2022, the investigating delegate sent Stallion and the other companies a Demand for Employer Records requesting all payroll records relating to Mr. Winterhalt including particularly wages paid, hours worked, conditions of employment, and Record of Employment.

22. On October 14, 2022, the investigating delegate sent Stallion and the other companies a letter notifying them that they may be associated employers under section 95 of the *ESA* and afforded Stallion and the other companies an opportunity to respond, failing which a determination would be issued based on the evidence in the file. The correspondence was also emailed to Mr. Anderson and included a disclosure of Mr. Winterhalt's evidence. The delegate did not receive a response from Stallion (and the other companies).

23. On November 4, 2022, the investigating delegate received an unsigned email submission, purportedly from Stallion, stating:

> We took on Patrick and it was our understanding he was making $20/hr at his previous position, we offered him an increase of 20% if he came to work with us and stayed for a year. We gave him a 20% increase so $24/hr and inclusive of holiday pay, which he was well aware of and wanted; this worked out to $25/hr all in.
>
> …
>
> We do not feel we owe anything.... I am sure your efforts and resources, and the cost to ourselves, would be better suited for other matters.

24. On January 17, 2023, the investigating delegate sent the Investigation Report to Stallion and two others, including NBG eotech who was later determined to be Associated Employers with Stallion.

25. On February 7, 2023, the investigating delegate received a letter dated January 30, 2023, from Mr. Anderson, on behalf of Stallion, stating:

> 1. Mr. Debler reached out to me to ask if I had or could find some work for a Patrick Winterhalt.
>
> …
>
> 3. [after meeting with Mr. Winterhalt] I mentioned to Mr. Debler that he should take him on and I would help find some work to keep him busy.
>
> 4. Unfortunately, that employment relationship ended.
>
> 5. Hearing that Patrick was doing well and me wanting to continue supporting him, Patrick and I had a discussion about making Garbage containers and Trailers for the local area … therefore, we agreed to move forward with this as our primary focus while keeping an open mind for any other work we could generate, since some could arise from my involvement in my other business activities …. This was discussed and reviewed, and we

> signed a contract outlining this with a promise from Patrick that if I made and[sic] investment in raw steel for these projects he would give me a year's commitment.
>
> 6. ... I was not aware that a complaint was filed, and, when Patrick quit suddenly, I was disappointed but held no ill will ....
>
> …
>
> 8. Patrick, as far as I am aware, never mentioned there was an issue with pay or anything else … If after reviewing Patrick's Stallion work logs and the contract that Patrick signed with Stallion, neither of which I have seen included in these materials, you still believe there was an error, please advise and provide me with supporting documentation to review and I will cover any shortfalls immediately.

26. Mr. Anderson's letter did not specifically address the issues raised by Mr. Winterhalt in the Complaint – overtime, vacation, and statutory holiday pay – nor provide any Employer Records pertaining to Mr. Winterhalt.

27. On February 16, 2023, the investigating delegate sent Mr. Anderson a letter at the address provided in the latter's letter of January 30, 2023, reminding him that Stallion was served with a Demand for Employer Records on September 9, and on October 14, 2022. The letter also said that the investigation phase of the Complaint had been completed and the time for responding to the Investigation Report had expired. It also informed Mr. Anderson that his letter of January 30, 2023, the Investigation Report, and the evidence gathered to date would be considered in the determination of the Complaint.

28. After the investigation of the Complaint was completed and responses were collected from the parties who responded, the adjudicating delegate reviewed the same, and issued the Determination.

29. The Reasons show that the adjudicating delegate considered two issues, namely, whether Stallion and other named companies were associated employers under section 95 of the *ESA* and whether Mr. Winterhalt owed any wages. As indicated previously, Stallion was found to be part of a group of Associated Employers, but Stallion does not appeal that finding in the appeal of the Determination and therefore, I need not review the evidence and reasons of the adjudicating delegate pertaining to that finding. As for the second question, the adjudicating delegate found Mr. Winterhalt was owed wages and went on to determine the amount owed. I will discuss this below.

30. The adjudicating delegate sought to first determine the rate of pay of Mr. Winterhalt. She noted, according to Mr. Winterhalt, Mr. Anderson informed him that his wage rate would be $20.00 per hour plus room and board at the start of his employment. However, once he moved out on his own, his rate would be increased to $25.00 per hour. Accordingly, for approximately the first 6 months of his employment, Mr. Winterhalt believed he was being paid $20.00 per hour. At the end of February 2021, he said that Mr. Anderson informed him that his rate of pay would increase to $25.00 per hour as he was moving to Grand Forks effective March 1, 2021, and no longer required room and board. However, when he received copies of his wage statements in May 2021, he noticed he was paid a wage rate of $24.04 per hour in the pay period ending April 15, 2021.

31. In preferring the evidence of Mr. Winterhalt and concluding that the latter's regular rate of pay was $20.00 per hour from the start of his employment until the end of February 2021, and $25.00 per hour thereafter, the investigative delegate reasoned as follows:

> Mr. Anderson said the Complainant signed an employment agreement however he did not provide one although served with a Demand for Employer Records. In the absence of an employment agreement that an employer is required to keep pursuant to section 28 of the Act, I cannot conclude that the Complainant agreed to a rate of pay of less than $20.00 per hour until the end of February 2021 and of less than $25.00 per hour thereafter. In making this finding, I note that the Complainant's undisputed evidence is that he did not receive any wage statements until almost the end of his employment. The Complainant's wage statements up to the pay period ending March 15, 2020 either imply or show a rate of pay of $20.00 per hour without the accrual or payment of vacation pay and then approximately 6 months later, they show a rate of pay to $19.23 per hour and $24.04 per hour, respectively plus vacation pay. I conclude from this payroll evidence that the Employer initially paid the Complainant a blended rate of pay that included vacation pay and then later unilaterally reduced the Complainant's hourly rate of pay without any notice to him to make it equivalent to a blended rate of pay of $20.00 and $25.00 per hour, respectively.
>
> A blended rate of pay is not permissible under the Act for the obvious reason that it reduces an employee's regular rate of pay and total wages accordingly. As a result, I find the Complainant's regular rate of pay was $20.00 per hour from the start of his employment until the end of February 2021 and $25.00 per hour thereafter.

32. The adjudicating delegate next determined the hours Mr. Winterhalt worked. She noted that when Mr. Winterhalt reviewed his wage statements in late May 2021, he found the hours on the wage statements did not match the recorded hours on his time sheets. She further observed that Mr. Winterhalt's undisputed evidence, corroborated by his time sheets, showed that he sometimes worked 7 days per week. He provided copies of his time sheets from January 1 to February 12, 2021, in the investigation of his Complaint and did not have times sheets after the latter date as he was required to bring his time sheets to Stallion's office thereafter. The times sheets he provided from January 1 to February 12, 2021, showed that Mr. Winterhalt regularly worked 5 days per week and an average of 47.5 hours per week. Based on these time sheets, the adjudicating delegate deduced that Mr. Winterhalt worked 9.5 hours per day, 5 days per week in the period from February 13 to June 4, 2021, excepting the last two days before the end of his employment which he admitted to taking off to look for a job. The adjudicating delegate also found, based on Mr. Winterhalt's undisputed evidence, it was a term of his employment that he was paid a meal break of 30 minutes, which was included in his total daily hours on the timesheets he submitted.

33. The adjudicating delegate next considered payments made by Stallion to Mr. Winterhalt. She noted Mr. Winterhalt did not dispute that he was paid the amounts shown on his wage statements. However, he did not provide to the investigating delegate wage statements for the pay periods ending May 15, May 31, and June 15, 2021, and neither did the employer. Since the amount of the wages shown on the wage statements for each pay period corresponded with the amounts listed on Mr. Winterhalt's Record(s) of Employment ("ROE"), the adjudicating delegate concluded that the amounts shown in the ROE represented the payment amounts in the missing wage statements.

34. The adjudicating delegate next considered Mr. Winterhalt's evidence that he was informed by the employer's payroll person that the employer only paid up to 100 hours each pay period and any excess time he worked was banked. When he enquired how much time was in his overtime bank, the employer told him 'Zero.' Mr. Winterhalt then informed Mr. Anderson he was not paid for approximately 80 hour and the latter informed him that since the employer is no longer operating, the banked time was gone.

According to Mr. Winterhalt, in lieu of the banked time, Mr. Anderson gave him a cheque for $1,500 which he cashed.

35. The investigating delegate next went on to determine the wages Mr. Winterhalt was owed by Stallion and the other Associated Employers. Preferring the undisputed evidence of Mr. Winterhalt, the investigating delegate determined the amount of overtime wages, statutory holiday pay, and vacation pay owing to Mr. Winterhalt totaled $10,289.84 (consisting of $9,527.70 plus interest of $762.14) and so awarded him the sum in the Determination.

36. Finally, the adjudicating delegate also levied six mandatory administrative penalties totaling $3,000 against Stallion and the other Associated Employers for violations of sections, 18, 27, 40, 45, and 46 of the *ESA* and section 46 of the *Regulation*.

## SUBMISSIONS OF STALLION

37. Mr. Anderson presented written submissions in support of Stallion's application for an extension of the appeal period and on the merits of the appeal. I have carefully reviewed these submissions and I will summarize them under separate headings below.

### (i) *Submissions in support of the extension of the appeal period*

38. Mr. Anderson states that Stallion ceased operations in 2022. Thereafter, all files or records of Stallion have been placed in storage. Stallion does not have any staff to respond to the requests from the Employment Standards Branch.

39. Mr. Anderson adds that he has been out of the country for "most of the latter half of 2022 and for most of 2023" and he was "unaware [of] all the mail being received" by Stallion. When he returned to Canada for very brief periods, he immediately responded to the investigating delegate with "registered letters" explaining "that no amounts were owed [or] due to Patrick Winterhalt" but the investigating delegate "ignored" this information in making the Determination. He also states that the Determination did not consider Mr. Winterhalt's contract of employment with Stallion. For all these reasons, he requests, on behalf of Stallion, an extension of time "to provide evidence that was missing and not available for consideration in the [D]etermination."

### (ii) *Submissions on the merits of the appeal*

40. As previously indicated, Stallion has grounded its appeal in allegations that the Director failed to observe 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 being made.

41. With respect to the new evidence ground of appeal, Mr. Anderson submits as follows:

- Mr. Winterhalt signed an employment contract with Stallion on April 1, 2021, for a one-year term but did not produce it to the Director or the investigating delegate during the investigation of the Complaint because the contract "would be unfavourable to [him] because it would verify [Stallion's position] that no amounts were due to him."

- Stallion "agreed to make a significant investment in acquiring materials for the construction of welding projects" Mr. Winterhalt had proposed, which projects were crucial for the latter's employment with Stallion and "the main reason the one-year contract was offered to him."
- Mr. Winterhalt "reverted to his previous behaviour, failing to fulfill his work commitments and breaching the agreed-upon contract" and "provided misleading information to employment standards."
- He (Mr. Anderson) was away and "unaware of the mail/emails from Employment Standards."
- Mr. Winterhalt failed to provide his contract of employment with Stallion to the Director when he filed the Complaint.

42. Mr. Anderson attaches to his written submissions a copy of the employment contract of April 1, 2021, between Mr. Winterhalt and Stallion which Stallion wants the Tribunal to consider as "new evidence."

43. With respect to the natural justice ground of appeal, Mr. Anderson submits the following:

- "Despite our best efforts, considering Stallion had no administrative staff and I was out of the country, to highlight the facts, respond to inquiries, and request a review regarding any funds allegedly owed to [Mr. Winterhalt], [the investigating delegate] altered the narrative."
- Stallion "directed" the investigating delegate "to request the employment contract from [Mr. Winterhalt] which would confirm [Stallion's] claim of no pay owing" to him, but the investigating delegate "refused to acknowledge" the request.
- Stallion "issued a final request and demanded an end to any further requests for materials already supplied."
- Stallion incurred costs to hire "an individual to assist with retrieving from storage and reviewing [Mr. Winterhalt's] hours and pay history and [to respond] to Employment Standards."
- Stallion submitted "an invoice for its time, effort, and associated costs" to retrieve and review documents pertaining to Mr. Winterhalt from storage to the investigating delegate who "resigned from the matter" but made a ruling against Stallion before "resign[ing] from the matter" and "passing the matter to a new party … displaying what we perceive as clear malfeasance."
- Mr. Winterhalt has "family connections within Employment Standards" and he is acutely aware of the system, and "detailed-oriented, organized and diligent in his work logs and record keeping." Therefore, his failure to produce his contract of employment with Stallion in the investigation of the Complaint and his claim that "he was unaware of how his pay was structured is absolutely false."
- If the Director had "carefully reviewed" Mr. Winterhalt's work logs and contract of employment with Stallion, and "calculated his pay per the contract, it would [have] arrive[d] at the conclusion that no funds were owed to [Mr. Winterhalt]."

- Stallion is "seeking damages for the materials purchased for the welding project, totaling $13,647.99, plus shipping and handling, legal fees, and professional services invoiced at $6,314.99."
- Stallion is also seeking "restitution for the unjust confiscation of $13,289.84 from a director's personal account related to this file … plus interest."

**ANALYSIS**

44. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

45. Section 114(1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112 (2) have not been met.

46. An appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to demonstrate, on a balance of probabilities, that the Director made a reviewable error under one of the statutory grounds. As previously indicated, Stallion has grounded its appeal in the "natural justice" and "new evidence" grounds of appeal. However, there is a preliminary issue in this appeal, namely, Stallion's failure to file its appeal within the statutory appeal period. I will address this question first as this failure is dispositive of this appeal pursuant to section 114(1)(b) of the *ESA*.

***Failure to file the appeal within the statutory appeal period***

47. The *ESA* imposes a deadline on appeals to ensure they are dealt with promptly: see section 2(d).

48. Section 112(2) and (3) of the *ESA* provides:

(2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, *within the appeal period established under subsection (3)* (emphasis added),

(a) deliver to the office of the tribunal

(i) a written request specifying the grounds on which the appeal is based under subsection (1),

(i.1) a copy of the director's written reasons for the determination, and,

(ii) payment of the appeal fee, if any, prescribed by regulation, and

(b) deliver a copy of the request under paragraph (a) (i) to the director.

(3) The appeal period referred to in subsection (2) is the *period that starts on the date the determination was served under section 122 and ends 30 days after that date* (emphasis added).

49. The appeal period is 30 days after the date of service, whether the person was served by registered mail, regular mail, electronic mail, fax machine, or by personal service.

50. Section 122 of the *ESA* provides:

**122** (1) A determination… that is required under this Act to be served on a person is deemed to have been served if it is

(a) sent by ordinary mail or registered mail to the person's last known address according to the records of the director,

(b) transmitted by email to the person's last known email address according to the records of the director,

…

(2) If service is by *ordinary mail* or registered mail, then the determination … *is deemed to have been served 8 days after it is mailed* (emphasis added).

(3) *If service is by email* or fax, then the determination … *is deemed to have been served 3 days after it is transmitted* (emphasis added).

51. In the present case, Stallion participated in the investigation of the Complaint sending a response to the investigating delegate on November 4, 2022, which is set out in paragraph 23 above.

52. Further, the investigating delegate sent the Investigation Report dated January 17, 2023, on the same date to Stallion, Mr. Anderson, the other Associated Employers, and the latter's other directors. They were all afforded an opportunity to respond. In the case of Stallion, the Investigation Report was sent to its registered and records office address indicated in the BC Registry search conducted by the investigating delegate on October 26, 2022. The address in question was a post box in North Vancouver ("North Vancouver Post Box"). The same North Vancouver Post Box address showed for Mr. Anderson's in the search under Director Information. The investigating delegate also sent the Investigation Report by email to the business office email of Stallion posted online at Stallion's business website ("business email of Stallion"). In the Investigation Report, the investigating delegate afforded Stallion, Mr. Anderson, and others an opportunity to respond to the findings in the Investigation Report by no later than January 31, 2023.

53. On January 30, 2023, on behalf of Stallion, Mr. Anderson sent the investigating delegate Stallion's response to the Investigation Report.

54. On June 21, 2023, the adjudicating delegate made the Determination and sent the same, together with the Reasons, to Stallion and Mr. Anderson at the North Vancouver Post Box address and the business email of Stallion (and to the other Associated Employers at their available contact addresses).

55. The Determination expressly indicated that if served *by email*, the appeal period expiry date is July 17, 2023, and if served *by ordinary or registered mail* the appeal period expiry date is July 31, 2023. The Director of Employment Standards has no authority under the *ESA* to extend (or shorten) an appeal period (see *1050417 B.C. Ltd. and Jared Dale Penner (Re),* 2024 BCEST 13). The authority rests solely with the Tribunal under section 109(1)(b). As soon as Stallion was lawfully served – whether by email to its office email address or by ordinary mail to their Registered and Records office address – sections 122(2) and (3) were triggered.

56. In the case at hand, Stallion's appeal was received by the Tribunal on December 27, 2023, almost 5 months after the expiry of the appeal deadline.

57. The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal delineated the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

> Section 109 (1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

58. In *Re Wright*, BC EST # D132/97, the Tribunal reinforced the principle that there must be "compelling reasons" for granting of an extension of time.

59. In *Re Niemisto*, BC EST #D099/96, the Tribunal delineated a principled approach to the exercise of its discretion. The Tribunal required the following criteria must be satisfied to grant an extension:

i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e*., the employer or employee) as well as the Director, must have been made aware of this intention;

iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

v) there is a strong *prima facie* case in favour of the appellant.

60. The above criteria are not exhaustive, but they have been considered and applied by the Tribunal, time and again. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time.

61. Based on my review of all the evidence and having regard to the criteria delineated in *Re Niemisto,* I find there is no compelling reason in this case to grant an extension of the appeal period. My reasons follow.

62. First, I am not persuaded that there is a reasonable and credible explanation for Stallion's failure to request an appeal within the statutory time limit. The deadline for filing the appeal of the Determination was, at the latest, July 31, 2023, as indicated in the Determination. Mr. Anderson says that Stallion "ceased operations in 2022" and "no administration has been on staff to respond to the requests from the Employment Standards [B]ranch." He also says he was out of the country for "most of the latter half of 2022 and most of 2023 and was unaware … of [all the] mail being received [by Stallion]". I do not find either of these reasons reasonable or credible for extending the appeal deadline. I find it is Stallion's duty to monitor and respond to communications from the Director in a timely manner and this includes ensuring important deadlines are met, even if the sole director, Mr. Anderson, is traveling. If Mr. Anderson was unavailable to check mail coming at his and Stallion's North Vancouver Post Box address or at the business email address for Stallion, then Stallion or Mr. Anderson should have made alternate arrangements for someone else to check mail or email addressed to them or set up forwarding of mail/email.

63. Second, there is no evidence of a genuine and *on-going* bona fide intention by Stallion or Mr. Anderson to appeal the Determination.

64. Third, Stallion has not adduced any evidence to show that the Director was aware of its intention to appeal.

65. Fourth, with respect to the question of whether granting an extension of the appeal period to Stallion will unduly prejudice Mr. Winterhalt, there is always prejudice to the beneficiary of a determination where the Tribunal grants an extension. Further, a delay of about five months to appeal in this case, in my view, is not a short delay by any standard and surely prejudicial to the respondent, Mr. Winterhalt.

66. While the first four factors above are important in the consideration whether an extension of the appeal period should be granted in this case, I find the determinative factor is the last one, namely, whether there is a strong *prima facie* case in favour of Stallion. I find there is not. I find there is no reasonable prospect that the appeal will succeed, even if I were to grant an extension of the appeal period. I will set out my reasons below.

***Grounds of Appeal***

67. As previously indicated, Stallion appeals the Determination on dual grounds: the director failed to observe the principles of natural justice in making the determination in section 112(1)(b); and evidence has become available that was not available at the time the determination was being made in section 112(1)(c). I will discuss each under separate headings below, starting with the new evidence ground first.

***(i) New evidence***

68. The Tribunal has discretion to accept or refuse new evidence on appeal. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations. More particularly, in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

69. The requirements above are conjunctive and the Tribunal will rarely accept evidence on appeal that does not satisfy all the requirements.

70. It is also noteworthy that the new evidence ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.

71. In the present case, Stallion seeks the Tribunal to admit as "new evidence" the contract of employment between Mr. Winterhalt and Stallion dated April 1, 2021. The contract was likely prepared by or on behalf of Stallion in or about April 2021, and presented to Mr. Winterhalt by Stallion before or at the start of the latter's employment with Stallion. It existed before the investigation of the Complaint and before the Determination was made. The onus is on the appellant, Stallion, to adduce the document in a timely fashion during the investigation of the Complaint, particularly if it wanted to rely upon it. Stallion cannot simply relinquish this obligation by turning to the investigating delegate during the investigation of the Complaint and directing the latter to get it from Mr. Winterhalt. I do not find compelling Mr. Anderson's submission that he was out of the country for "most of the latter half of 2022 and for most of 2023" to justify Stallion's very late production of the employment contract into evidence in the appeal. He does not explain why he could not have provided the document to the investigating delegate when Stallion sent an email to the investigating delegate during the investigation of the Complaint on November 4, 2022, or when he sent his letter of January 30, 2023, in response to the Investigation Report. In the result, I find the employment contract does not satisfy the first requirement in *Davies, supra*, because it is evidence that was available during the investigation of the Complaint and before the Determination was made and could have, with the exercise of due diligence, been presented to the investigating delegate during the investigation or to the adjudicating delegate before the Determination.

72. While my determination on the first criteria in *Davies, supra,* is dispositive of Stallion's new evidence ground of appeal, I also find that the contract of employment *lacks* high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue. Throughout the Reasons, the adjudicative delegate prefers the uncontroverted evidence of Mr. Winterhalt. The contract of employment does not, in my view, effectively raise any material doubt with respect to Mr. Winterhalt's uncontradicted evidence and the adjudicating delegate's findings of facts and determinations pertaining to Mr. Winterhalt's rate of pay, hours worked, payments made, and wages owed.

73. In the result, I find there is no basis for the Tribunal to interfere with the Determination on the "new evidence" ground of appeal and I dismiss this ground of appeal.

### *(ii) Natural justice*

74. Stallion also appeals the Determination on the "natural justice" ground of appeal.

75. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal explained the principles of natural justice comprehensively 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 #D050/96).

76. The onus is on the party alleging a failure to comply with the principles of natural justice to adduce some evidence in support of the allegation. In the present case, Stallion has failed to discharge its burden. I have reviewed the section 112(5) record of the Director and I find there is nothing in the record that would remotely give rise to the natural justice ground of appeal.

77. There is ample evidence of the investigating delegate making numerous attempts to contact Stallion and Mr. Anderson (not to mention the other Associated Employers) before and after the Investigation Report was prepared and before the Determination was made. Stallion was afforded ample opportunity to fully participate in the investigation of the Complaint. While Mr. Anderson says that "I was out of the country" and "Stallion had no administrative staff" and he "was unaware of the mail/emails from Employment Standards," I reiterate that it is Stallion's duty to monitor and respond to communications from the Director in a timely manner and this includes ensuring important deadlines are met, even if Mr. Anderson was traveling. As indicated previously, if Mr. Anderson was unavailable to check mail coming at his and Stallion's North Vancouver Post Box address or at the business email address for Stallion then Stallion or Mr. Anderson should have made alternate arrangements for someone else to check mail or email addressed to them or set up forwarding of mail/email.

78. I also reiterate that Stallion was aware of and did participate in the investigation of the Complaint by sending an unsigned email to the investigating delegate on November 4, 2022 (as delineated in paragraphs 23 above), and making submissions in response to the Investigation Report on January 30, 2023. Stallion's failure to participate more in the investigation or respond to requests for payroll records from the Director in a timely fashion is on Stallion and does not a breach of natural justice make.

79. Stallion also cannot deflect its obligation to provide payroll records including its contract of employment with Mr. Winterhalt to the investigating delegate by directing the latter to obtain it from Mr. Winterhalt during the investigation. The investigating delegate, on two separate occasions during the investigation of the Complaint, served Stallion with Demand for Employer Records but to no avail as Stallion did not respond. Stallion cannot now point to the investigating delegate and suggest that there was a breach of

natural justice on the part of the Director because the investigating delegate should have obtained the documents (including particularly the contract of employment) from Mr. Winterhalt.

80. I also find the allegation by Mr. Anderson that the investigating delegate "altered the narrative" somewhat troubling. If Stallion and Mr. Anderson are suggesting that the investigating delegate was somehow biased, the Tribunal has clearly and repeatedly stated that an allegation of bias must be proven on the evidence. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact. Also:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

81. An allegation of bias cannot be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias always lies with the person who is alleging its existence, in this case Stallion or its representative, Mr. Anderson. I find Stallion and Mr. Anderson have not provided any evidence that would demonstrate to an objective observer that the investigating delegate or the adjudicating delegate in this case were biased in the above sense.

82. I also find the submissions of Mr. Anderson that had the Director "carefully reviewed" Mr. Winterhalt's work logs and contract of employment with Stallion, and "calculated his pay per the contract, it would [have] arrive[d] at the conclusion that no funds were owed to [Mr. Winterhalt]," unpersuasive. Stallion and Mr. Anderson have not adduced any cogent evidence, either during the investigation of the Complaint or in the appeal, to show that the investigating or the adjudicating delegates failed to do their jobs. I also add that the adjudicating delegate preferred the uncontradicted evidence of Mr. Winterhalt (which it was open for her to do). While Stallion and Mr. Anderson disagree with the adjudicative delegate's finding and conclusions in the Determination, this does not a breach of natural justice make.

83. In the result, I find there is no basis for me to interfere with the Determination under the natural justice ground of appeal either.

84. Before concluding, I should point out in response to Stallion's appeal for damages "for the materials purchased for the welding project" and "restitution for the [the alleged] unjust confiscation" of monies by the Director from the personal account of Stallion's director, these claims are beyond the scope of this Tribunal's authority, and I respectfully decline to consider them.

85. In all the circumstances, I dismiss Stallion's appeal under section 114(1)(b) as it was not filed within the applicable time limit. Having said this, had I not dismissed the appeal for untimeliness, I would have dismissed the appeal pursuant to section 114(1)(f) of the *ESA* as I also find the appeal has no reasonable prospect of succeeding.

**ORDER**

86. Pursuant to subsection 114(1)(b) and (f) of the *ESA*, this appeal is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination dated June 21, 2023, is confirmed as issued.

**Shafik Bhalloo, K.C.**
**Member**
**Employment Standards Tribunal**