Employment Standards TRIBUNAL

Citation: Village of Anmore (Re)
2024 BCEST 82

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Village of Anmore

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Brandon Mewhort
SUBMISSIONS:	Paul M. Pulver, legal counsel for the Village of Anmore Jason Smith, on his own behalf John Dafoe, delegate of the Director of Employment Standards
FILE NUMBER:	2024/032
DATE OF DECISION:	September 11, 2024

DECISION

OVERVIEW

1. This is an appeal by the Village of Anmore ("Appellant") of a determination issued by a delegate ("Delegate") of the Director of Employment Standards ("Director"), dated January 30, 2024 ("Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* (*ESA*).

2. In the Determination, the Delegate found that Jason Smith, a former employee of the Appellant ("Employee"), was on COVID-19-related leave at the time his employment was terminated on July 21, 2020, and that the Employee's leave directly led to the Appellant's decision to terminate his employment. The Delegate awarded the Employee compensation for lost wages, vacation pay, the reimbursement of certain expenses, and interest. The Delegate also imposed two administrative penalties on the Appellant for contraventions of the *ESA*, each in the amount of $500.

3. The Appellant submits the Delegate erred in law in determining: the Employee was on COVID-19-related leave when he was terminated; the Appellant terminated the Employee because of his COVID-19-related leave; and the Employee was entitled to additional compensation for vacation pay. The Appellant also submitted new evidence on March 27, 2024, after it filed its appeal.

4. For the reasons given below, I dismiss the appeal and order that the Determination be confirmed pursuant to section 115(1)(a) of the *ESA*.

ISSUES

5. The issues to be determined are whether:

   a. the Delegate erred in determining the Employee was on COVID-19-related leave when he was terminated;

   b. the Delegate erred in determining the Appellant terminated the Employee because of his COVID-19-related leave;

   c. the Delegate erred in determining the Employee was entitled to additional compensation for vacation pay; and

   d. the new evidence submitted by the Appellant on March 27, 2024, should be considered.

BACKGROUND FACTS

6. The first issue the Delegate considered in the Determination was whether the Employee was on COVID-19-related leave at the time of his termination. The Delegate found:

   a. the Employee requested COVID-19-related leave to provide care for his children;

   b. the circumstances in which the Employee requested the leave fell squarely within those described in section 52.12 of the *ESA*;

c. the Employee was therefore entitled to the COVID-19-related leave (which is a protected leave under the *ESA*); and

d. the Employee was on his COVID-19-related leave at the time his employment was terminated on July 21, 2020.

7. The Delegate made these findings despite the fact the Employee agreed to make himself available on a limited basis to complete some work related to a rezoning matter, as well as the fact the Employee took some previously scheduled vacation time during the period of his leave.

8. The next issue the Delegate considered in the Determination was whether the Appellant met its burden to show the leave was not the reason for terminating the Employee. The Appellant asserted the decision to terminate the Employee was made due to changing circumstances which eliminated the need for the Appellant to have a full-time employee in the Employee's role – specifically, a large development that had been anticipated was not proceeding, which meant there was insufficient work to justify retaining the Employee in his position. The Appellant explained that, once the Employee began his leave, other employees were able to manage his department and, accordingly, it determined the Employee's full-time role was not needed.

9. However, the Delegate found the Appellant did not meet its burden to show the leave was not the reason for terminating the Employee, because:

a. The Employee's employment contract explicitly stated that his employment would continue indefinitely until terminated by either party and his role involved a diverse list of core duties and responsibilities – i.e., the Employee's employment was not for a fixed term or related to a specific time limited development project;

b. There was nothing on the record to suggest the parties had engaged in discussions before the Employee's leave about a lack of work for his role; and

c. There was an email on the record dated July 8, 2020, expressing concern about work that would accumulate during the Employee's leave – a copy of the July 8, 2020, email is on the section 112(5) record ("Record") at page 165.

10. The Delegate then determined the Appellant owed the Employee compensation pursuant to section 79(2) of the *ESA* for lost wages and outstanding vacation pay on those lost wages. The Appellant has not appealed that aspect of the Determination.

11. The Delegate then considered whether the Appellant owed the Employee vacation pay for the period of January 1 to July 28, 2020, and specifically considered section 6 of the Employee's employment contract, which states (see the Record at page 691):

6. VACATION AND LEAVE

6.1 The Employee shall accrue twenty (20) days of paid vacation each year.

6.2 The Employee may take vacation at such times(s) as may be approved in writing by the Village.

6.3 The Employee agrees to submit to the Village no later than the first day in March in each year his proposed plans for vacation that year.

> 6.4 The Employee may carry over any unused annual vacation entitlement to the following year, to a maximum of 25% of the current year's entitlement. However, any days carried forward must be used by March 31st in the employment year immediately following the employment year in which the vacation days were earned; otherwise it will be paid out in a lump sum cash payment.
>
> 6.5 Subject to annual review, the Employee shall also be entitled to up to two (2) weeks of paid leave per year, prorated for partial years, in respect of additional hours worked.

12. In finding the Employee was owed additional vacation pay for this period, the Delegate stated (bold in original):

> I find, however that the entitlements to annual vacation and IL [In Lieu of OT] are separate and distinct entitlements and Anmore's approach of combining the two into a global leave entitlement of 131 hours is not defensible. Notwithstanding that Anmore may have overpaid the entitlement to IL I find that this does not permit them to offset this overpayment against the vacation entitlement. As a result, I find that Mr. Smith was entitled to 90 hours of paid vacation, that Anmore paid him for 75 hours of vacation and that Anmore owes Mr. Smith 15 hours of additional vacation in the amount of **$1,015.95** (15 hours X $67.73 per hour). I find that, in failing to pay these wages, Anmore has contravened section 58 of the Act. The date of contravention is 14 August 2020 when Anmore failed to pay out all outstanding vacation pay to Mr. Smith.

13. The Delegate further determined the Appellant was liable for two administrative penalties, each in the amount of $500, for breaches of sections 54 and 58 of the *ESA*.

ARGUMENTS

14. The following is a summary of the parties' arguments on each of the issues raised in this appeal, including the submission by the Appellant on March 27, 2024, regarding new evidence.

The Appellant's argument

(1) Whether the Delegate erred in determining the Employee was on COVID-19-related leave when he was terminated

15. The Appellant argues the Delegate failed to consider its position that the Employee was not on COVID-19-related leave because he continued to work and had taken a pre-planned vacation. The Appellant says the Delegate determined the Employee was "on leave" solely on the basis that he had requested the leave in circumstances which fell within those described in section 52.12 of the *ESA*; however, the Appellant says those facts only establish that he was *entitled* to take leave and not that he was actually *on leave*.

16. The Appellant also notes that the section 52.12 of the *ESA* does not expressly permit partial leaves – i.e., an employee must either be on leave or not on leave. The Appellant says: "An employee cannot continue to work, be paid for that work, take vacation and receive vacation pay, yet simultaneously claim to be 'on leave'."

(2) Whether the Delegate erred in determining the Appellant terminated the Employee because of his COVID-19-related leave

17. The Appellant argues the Delegate applied the wrong test and failed to consider whether the Employee's termination was "because of" his leave, as required by section 54(2) of the *ESA*. Instead, the Appellant says the Delegate considered whether the termination was merely "unrelated to the leave," which is a different and lower threshold test. The Appellant relies on *Northern Gold Foods Ltd.*, 2021 BCEST 35 ("*Northern Gold*"), arguing the delegate in that case made a similar error. I discuss *Northern Gold* in the analysis section below.

18. The Appellant argues the evidence before the Delegate indicated that, during the Employee's leave, the Appellant simply concluded there was no requirement for the Employee's full-time role, given that a specific development project did not proceed. The Appellant says there was no evidence to the contrary and, even if the decision to terminate the Employee was made while he was on leave, that does not mean it was made "because of" his leave. The Appellant notes that, in fact, the Employee's role has not been replaced since he was terminated.

19. The Appellant says there were only three pieces of evidence to support the Delegate's determination that the "only logical conclusion" was the Employee's leave "directly led" to the Appellant's decision to terminate him: (1) the Employee was subject to an indefinite term contract, and not a fixed term contract related to a specific project; (2) the parties did not discuss the lack of work; and (3) the July 8, 2020, email expressing concern about work that would accumulate during the Employee's leave. The Appellant addresses each of those three pieces of evidence and explains why, in its view, none of them, whether considered individually or cumulatively, could have led to the conclusion the Employee was terminated because of his leave.

20. For example, the Appellant argues: the Employee's employment contact is irrelevant to this issue and it did not prevent his termination; there was no necessity for the Appellant to discuss the reason for the Employee's termination, because he was not terminated for cause; and the July 8, 2020, email was misunderstood by the Delegate, because it did not suggest that if the Employee was unable to return to work there would be concerns about his accumulated work, rather it expressed concern about accumulating vacation banks.

(3) Whether the Delegate erred in determining the Employee was entitled to additional compensation for vacation pay

21. The Appellant argues the Delegate's award of additional vacation pay was neither fair nor restorative because it resulted in him being paid more than he was entitled to. The Appellant also argues that, under the Employee's employment contract, vacation pay and pay in lieu of overtime were not separate and distinct payments.

(4) New evidence

22. On March 27, 2024, the Appellant submitted new evidence, within the meaning of section 112(1)(c) of the *ESA*. The new evidence was a letter dated February 27, 2024 (received March 13, 2024), from Service Canada – Integrity Services, which advised that an administrative review of the Employee's receipt of the Canada Emergency Response Benefit ("CERB") was initiated. The letter asked for

information from the Appellant regarding the earnings and work schedule for the Employee from the period of June 21, 2020, to September 12, 2020.

23. The Appellant says the letter establishes the Employee claimed CERB during the period of time he was still employed by the Appellant and while he was on vacation. The Appellant also suggests Service Canada questions whether the Employee was "on leave" and entitled to collect CERB during the period he was on vacation or working.

The Employee's argument

(1) Whether the Delegate erred in determining the Employee was on COVID-19-related leave when he was terminated

24. The Employee argues the Delegate made no error in determining he was on COVID-19-related leave and, in making that finding, the Delegate explicitly considered the fact the Employee continued to do a minimal amount of work and took pre-planned vacation during his leave. The Employee says this was a reasonable finding at law based on the evidence available.

(2) Whether the Delegate erred in determining the Appellant terminated the Employee because of his COVID-19-related leave

25. The Employee argues the Delegate did determine the Appellant terminated his employment "because of" his leave, because the Delegate found the Appellant had not shown that the leave was "not the reason" for terminating the Employee. The Employee says this was not an application of a different or inappropriate test.

26. The Employee also takes issue with the Appellant's submission that work for the Employee had declined and there was no evidence to the contrary. The Employer points to evidence showing he presented a report at the Village of Anmore Council meeting on July 6, 2020, regarding the development project and Council gave direction to proceed with it. The Employee also says the Appellant posted a job advertisement for his role in November 2020 and reposted it in January 2021, and that the Appellant spent a significant amount of money on planning consultants after his termination.

(3) Whether the Delegate erred in determining the Employee was entitled to additional compensation for vacation pay

27. The Employee argues the Delegate properly determined the amount of vacation pay owing, and that determination was consistent with the *ESA*. The Employee says, by appealing this aspect of the Determination, the Appellant is attempting to have this Tribunal act as a court and make an order of repayment outside its jurisdiction.

(4) New evidence

28. The Employee argues that whether he was entitled to CERB, or whether he may have to repay some CERB, are not relevant to the issues before this Tribunal. The Employee says the Tribunal's jurisdiction to administer and enforce the *ESA* is not modified by Service Canada's findings, and Service Canada's letter does not change any findings made by the Delegate.

The Director's argument

(1) Whether the Delegate erred in determining the Employee was on COVID-19-related leave when he was terminated

29. The Director notes the Appellant does not dispute the Employee was entitled to COVID-19-related leave, the Employee advised the Appellant he would be taking such leave, and an employer is required to grant an employee leave to which they are entitled. The Appellant also notes that communications between the Appellant and the Employee reflect that the Employee was on unpaid leave, as do the Employee's timecards.

30. Regarding the Appellant's argument that section 52.12 of the *ESA* does not expressly permit partial leaves, the Director argues that section 52.12 also does not expressly prohibit them. The Director says that allowing partial leaves is more consistent with the benefits conferring nature of the *ESA*, and the purpose of the *ESA* to "contribute in assisting employees to meet work and family responsibilities."

31. The Director also notes the leave entitlement under section 52.12 is not described as a number of "consecutive" days or weeks as in sections 50 and 51 of the *ESA*. The Director says that COVID-19-related leave is for employees who require leave to care for their children if schools or daycares are closed, and there is nothing in the legislation as written that would prevent parents from alternating periods of leave and work.

(2) Whether the Delegate erred in determining the Appellant terminated the Employee because of his COVID-19-related leave

32. The Director argues the Determination sets out the test to be applied at the start of the findings and analysis section at page R3, while the phrase "unrelated to" is used later, admittedly unhelpfully. Nevertheless, the Director says the test actually applied was whether the Appellant met its burden under section 126(4)(c) of the *ESA* to prove, on the balance of probabilities, that the leave was not the reason for terminating the Employee. The Director notes that the finding in the Determination was that the leave "directly led" to the termination.

33. The Director argues that whether the leave was the reason for terminating the Employee is a question of fact, and the Determination set out several factors to support the conclusion that the leave was, in fact, the reason for terminating the Employee. Regarding those factors, the Director argues:

a. the indefinite term employment contract was relevant, because is suggests that the discontinuation of a single development project would not result in a sufficiently significant reduction in workload as to justify the Employee's termination;

b. the lack of discussion between the parties regarding the reduction in work for the Employee was relevant, because only approximately one month passed between the Employee requesting leave and his termination and the parties were in contact during that time. If there had been a reduction in work for the Employee, the Director seems to suggest that it would have been mentioned. The Director also notes that a reduction of work was not mentioned in the Employee's termination letter; and

c. the July 8, 2020, email clearly states: "Also, if you are able to be back at work in August and September, there will be work that has accumulated due to your leave which would be worsened by vacation time being taken when you are no longer taking unpaid leave." The Director says this email runs counter to the Appellant's narrative that there was insufficient work to be done.

(3) Whether the Delegate erred in determining the Employee was entitled to additional compensation for vacation pay

34. The Director argues that section 6 of the employment contract (reproduced above) is headed "Vacation **and** Leave" (emphasis added) and that section 6.5 is "in respect of additional hours worked." The Director says that, accordingly, the Employee's pay in lieu of overtime was distinct and separate from his vacation pay.

(4) New evidence

35. The Director has no concerns regarding whether Service Canada's letter is in fact new evidence, but it questions the relevance of the letter to the issues on appeal. The letter appears to confirm the Employee received CERB during at least some of the time he was employed by the Appellant, but it suggests nothing beyond that, so it should be rejected as being irrelevant.

The Appellant's reply argument

(1) Whether the Delegate erred in determining the Employee was on COVID-19-related leave when he was terminated

36. Regarding whether section 52.12 of the *ESA* allows for partial leaves, the Appellant says the Director misses the point. The Appellant says it is not referring to a partial leave where an employee takes a brief leave from work in order to care for a child; rather, it is referring to when an employee continues working and merely engages in "partial" performance of his duties and responsibilities. The Appellant says no such leave exists or is protected by section 52.12 of the *ESA*.

(2) Whether the Delegate erred in determining the Appellant terminated the Employee because of his COVID-19-related leave

37. The Appellant says the Director's suggestion that the phrase "unrelated to" was merely "unhelpful" is overly dismissive of the plain language used by the Delegate, particularly when such language clearly framed and informed the Delegate's decision.

38. Regarding the burden to show that the leave was not the reason for the termination, the Appellant says this would have been easily achieved by the Appellant if the Delegate would not have ignored or minimized critical and uncontradicted facts, such as: the Employee continuing to work and mischaracterizing his vacation as a leave in order to collect CERB; a significant development not proceeding; the Appellant's good faith determination that the Employee's role was no longer required; and the decision to not replace the Employee once he was terminated.

39. Regarding the Director's submission about indefinite term employment contracts, the Appellant argues such contracts are common, and it would be unusual for an employment contract to refer to

a specific development project. The Appellant says, in any event, the Delegate should have relied on certain facts to conclude the Employee was not terminated because of his leave.

(3) Whether the Delegate erred in determining the Employee was entitled to additional compensation for vacation pay

40. The Appellant did not provide any reply submissions on this issue.

(4) New evidence

41. The Appellant reiterates that Service Canada's letter is relevant. The Appellant says the Employee characterised his pre-booked vacation as an unpaid leave solely to make a claim for CERB and that is presumably why Service Canada is engaged in an administrative review of the Employee's claim. The Appellant says, if this was considered by the Delegate, he would have concluded the Employee was not actually on a protected leave.

ANALYSIS

42. The first three issues discussed below concern alleged errors of law. This Tribunal has adopted the following definition of an error of law, which was set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA):

a. a misinterpretation or misapplication of a section of the Act;

b. a misapplication of an applicable principle of general law;

c. acting without any evidence;

d. acting on a view of the facts which could not reasonably be entertained; and

e. adopting a method of assessment which is wrong in principle.

43. Accordingly, I will use this definition of an error of law in my analysis for the first three issues.

(1) Whether the Delegate erred in determining the Employee was on COVID-19-related leave when he was terminated

44. As discussed above, no party disputes the Employee was entitled to COVID-19-related leave, the Employee advised the Appellant he would be taking such leave, and the Appellant was required to grant the Employee leave to which he was entitled. At issue is whether the Employee actually *took* COVID-19-related leave, given he continued to work on occasion and took pre-planned vacation. The Appellant argues the Employee could not have taken COVID-19-related leave, because section 52.12 of the *ESA* does not allow for an Employee to work occasionally and take pre-planned vacation as the Employee did.

45. Section 52.12 of the *ESA* states:

COVID-19-related leave

52.12 (1) In this section, "eligible person", with respect to an employee, means any of the following:

(a) a child who is under the day-to-day care and control of the employee by way of agreement or court order or because the employee is the child's parent or guardian;

(b) a person who

(i) is 19 years of age or older,

(ii) is unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of the person's parent or former guardian, and

(iii) is under the day-to-day care and control of the employee, who is the person's parent or former guardian;

(c) a prescribed person.

(2) An employee who requests leave under this section is entitled to unpaid leave for the period described in subsection (3) if, in relation to COVID-19, any of the following applies:

(a) the employee has been diagnosed with COVID-19 and is acting in accordance with

(i) instructions or an order of a medical health officer, or

(ii) advice of a medical practitioner, nurse practitioner or registered nurse;

(b) the employee is in quarantine or self-isolation in accordance with

(i) an order of the provincial health officer,

(ii) an order made under the Quarantine Act (Canada),

(iii) guidelines of the British Columbia Centre for Disease Control, or

(iv) guidelines of the Public Health Agency of Canada;

(c) the employer, due to the employer's concern about the employee's exposure to others, has directed the employee not to work;

(d) the employee is providing care to an eligible person, including because of the closure of a school or daycare or similar facility;

(e) the employee is outside the province and cannot return to British Columbia because of travel or border restrictions;

(f) a prescribed situation exists relating to the employee.

(3) An employee is entitled to leave under this section for as long as a circumstance described in subsection (2) applies to the employee.

(4) If requested by the employer, the employee must, as soon as practicable, provide to the employer reasonably sufficient proof that a circumstance described in subsection (2) applies to the employee.

(5) An employer must not request, and an employee is not required to provide, a note from a medical practitioner, nurse practitioner or registered nurse for the purposes of subsection (4).

(6) This section may be repealed by order of the Lieutenant Governor in Council.

46. Section 51.12 of the *ESA* does not explicitly address "partial" leaves – i.e., whether an employee can work on occasion or take pre-planned vacation – which means section 52.12 must be interpreted in accordance with the principles of statutory interpretation to resolve this issue. In other words, section 52.12 must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the *ESA*, the purposes of the *ESA*, and the intention of the Legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 at para 21 (SCC) ("*Rizzo*").

47. I also note that employment standards legislation should be interpreted in a manner "which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible": *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC) ("*Machtinger*"), as cited in *Rizzo* at para 24. This approach is consistent with the purpose stated in section 2(a) of the *ESA*, which is to ensure employees in British Columbia receive at least the basic standards of compensation and conditions of employment.

48. Given the dearth of case law regarding section 52.12 of the *ESA* (none of the parties have pointed to any case law interpreting it), I also find it useful to consider the Hansard evidence regarding that section. In *Rizzo*, the Supreme Court of Canada acknowledged the frailties of Hansard evidence, but it recognized that Hansard evidence can play a limited role in the interpretation of legislation, particularly regarding its background and purpose (para 35).

49. The *ESA* was amended to include section 52.12 by *Bill 16, Employment Standards Amendment Act (No. 2), 2020* ("Bill 16"). When Bill 16 was introduced in the Legislature (Fifth Session, 41st Parliament – 2020, Hansard, Issue No. 326), the Honourable Mike Farnworth stated (emphasis added):

> Bill 16 amends the Employment Standards Act to provide unpaid job-protected leave to employees in British Columbia during the COVID-19 crisis. <u>COVID-19 is an unprecedented public health emergency for British Columbians and for people across Canada and around the world.</u>
>
> <u>The most important part of our work is protecting British Columbians. During this crisis, no employee will lose their job or be fired for following an order of the provincial health officer or for needing to care for a child whose school is closed.</u>
>
> Specifically, this leave may be requested by an employee if, in relation to COVID-19, they have been diagnosed with COVID-19 and are acting in accordance with the instructions or an order of a medical health officer or the advice of a medical practitioner, nurse practitioner or registered nurse; they are in quarantine or self-isolation in accordance with an order of the provincial health officer, an order made under the federal Quarantine Act or guidelines of the B.C. Centre for Disease Control or the Public Health Agency of Canada; they have been directed by their employer to stay home because of concerns about their exposure to others; because they are unable to return to British Columbia because of a travel or border restriction; or they are providing care to their minor child or a dependant adult who is their child or former foster child, including when a school, daycare or similar facility has closed.
>
> ...
>
> <u>While this bill will directly impact those who are closest to COVID-19, it will also help keep all British Columbians as safe as possible and mitigate the impacts of the outbreak. We want</u>

> British Columbians to know their government has their backs throughout this crisis, and together we will get through this.

50. While the Hansard evidence also does not address the specific issue at hand, it does, in my view, support the conclusion that section 52.12 of the *ESA* should be interpreted broadly to extend its protections to as many employees as possible.

51. COVID-19-related leave is for employees who require leave to, among other things, care for their children, such as the Employee did in this case. I agree with the Director there is nothing in the legislation that would prevent parents from alternating periods of leave and work, or from working occasionally while on leave, particularly if that is agreed to by the employer, as it was agreed to by the Appellant in this case at the time the Employee notified it of his leave (e.g., see the Record at page 756). Moreover, in my view, allowing employees to occasionally work for their employers while on COVID-19-related leave may, in many cases, benefit employers.

52. Accordingly, I do not interpret section 52.12 as prohibiting an employee on COVID-19-related leave from occasionally working and taking pre-planned vacation, as the Employee did in this case. If the Legislature intended otherwise, it could have included appropriate language in the legislation to that effect – notably, other types of leave in Part 6 of the *ESA* have certain restrictions, such as maternity and parental leave, which are restricted to "consecutive weeks." In my view, this interpretation is consistent with the modern approach to statutory interpretation, the guidance from the Supreme Court of Canada in *Machtinger* regarding the benefits conferring nature of the *ESA*, the purposes of the *ESA* including to "contribute in assisting employees to meet work and family responsibilities," and the Hansard evidence regarding Bill 16.

53. As a result, I find the Delegate did not err in law in determining the Employee was on COVID-19-related leave at the time he was terminated, even though he continued to work on occasion and took pre-planned vacation, and I dismiss this ground of appeal.

(2) Whether the Delegate erred in determining the Appellant terminated the Employee because of his COVID-19-related leave

54. As discussed above, the Appellant relies on *Northern Gold*, in which a key issue was whether a change to an employee's duties and title upon the return from a protected leave was "because of" that leave. This Tribunal held at paras 78 to 81 (emphasis in original deleted):

> The key question here is whether this change was "because of" the complainant's leave. In this regard, section 126(4)(c) of the ESA places the burden on the employer to demonstrate (consistent with the ordinary civil burden of proof – balance of probabilities) that the employee's leave was "not the reason for…changing a condition of employment without the employee's consent".
>
> I think it important to stress that this is not a case where the employer changed an employee's employment conditions in an effort to force that employee to quit so that the employer could hire someone else, or continue on with the employee's replacement. Northern Gold did not hire a replacement employee while the complainant was on leave, and it did not hire a replacement after she quit.

> As I read the delegate's reasons, he never specifically determined that the complainant's conditions of employment were changed "because of" the complainant's leave, or that the "reason" for this change was the complainant taking leave. Rather, at page R12 of his reasons, the delegate misdirected himself by stating that section 126(4) placed the burden on Northern Gold to show that the change was not "related" to the complainant's leave:
>
> > Under section 126(4)(c) of the Act, the burden is on the employer to show that a change in a condition of employment of an employee who is on a leave is not related to the employee's leave. It is therefore incumbent upon Northern Gold to demonstrate that the elimination of the Research and Development Technologist was not related to [the complainant's] leave.
>
> In my view, the delegate erred in law by applying the wrong legal test to the evidence before him. Further, even if one characterized the delegate's failure to apply the specific statutory standard as merely a matter of "semantics" (as the delegate argued in his submission), the uncontroverted evidence before the delegate was that the change in employment conditions was not necessitated by the complainant's leave but, rather, due to the changing nature of Northern Gold's customers' requirements.

55. In my view, *Northern Gold* is distinguishable from the current case. In *Northern Gold*, the delegate never expressly determined that the complainant's employment conditions were changed "because of" her leave (*Northern Gold*, para 30). In this case, while the Delegate unhelpfully used the phrase "unrelated to the leave" at one point in the Determination (page R4), the Delegate also correctly referred to the test earlier in the Determination where it stated: "Section 54 of the Act prohibits an employer from terminating an employee because they have taken a leave protected by Part 6 of the Act" (page R3). Moreover, the Delegate's express finding was that the Employee's "COVID-19 leave directly led to [the Appellant's] decision to terminate his employment" (page R4, emphasis added). In my view, "because of" and "directly led to" are sufficiently synonymous and it is not always necessary for the Director to use the exact language of the *ESA* whenever it makes a finding. Notably, in *Northern Gold*, this Tribunal also described the test under section 54(2) of the *ESA* as follows: "the leave must be the event that precipitates the termination or changed employment conditions" (para 30, emphasis added). I also note the Delegate used the language in section 126(4) of the *ESA* in determining the Appellant failed to meet its burden: "…I find that [the Appellant] has not met the burden of proof to show that the leave was not the reason for terminating [the Employee] and further find that in terminating due to his leave [the Appellant] has contravened section 54 of the Act" (page R4, emphasis added). Accordingly, I find that the Delegate did not err by using the wrong test in determining the Appellant terminated the Employee because of his COVID-19-related leave.

56. Furthermore, in *Northern Gold*, this Tribunal held there was no cogent evidence before the delegate that would have supported a finding that the employee was terminated because of her leave (para 30). As a result, this Tribunal held that the delegate erred in law as follows (para 100):

> In my view, the delegate erred in law in determining that Northern Gold changed the complainant's conditions of employment contrary to section 54(2)(b) of the *ESA* (which requires that the changes be "because of" the employee's leave). In the language of *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BCCA), the delegate "acted without any evidence" or, at the very least, "acted on a view of the facts which could not reasonably be entertained". The complainant took her leave during a period that was coincident with the almost total evaporation of Northern Gold's R & D work.

> Significantly changed business conditions, and not the complainant's parental leave, underlaid the decision to change the duties associated with the complainant's job. I am satisfied that Northern Gold discharged its evidentiary burden under section 126(4)(c) of the *ESA* (see *Flint*, BC EST # D477/00).

57. In this case, in my view, it cannot be said the Delegate "acted without any evidence" or "acted on a view of the facts which could not reasonably be entertained" regarding this issue. The Delegate relied on specific evidence in determining the Employee's COVID-19-related leave led directly to his termination, specifically: (1) the Employee was subject to an indefinite term contract, and not a fixed term contract related to a specific project; (2) the parties did not discuss the lack of work; and (3) the July 8, 2020, email expressing concern about work that would accumulate during the Employee's leave. I am not convinced by the Appellant's argument that such evidence – whether considered individually or cumulatively – could not have led to the conclusion that the Employee was terminated because of his leave.

58. For example, the July 8, 2020, email, on its face, expresses concern about work accumulating while the Employee was on leave and vacation – it stated, in part: "…if you are able to be back at work in August and into September, there will be work that has accumulated due to your leave which would be worsened by vacation time being taken when you are no longer taking unpaid leave."

59. Also, in this case, there was only approximately one month between the Employee requesting leave and his termination, so I find it reasonable that the Delegate considered the lack of discussion between the parties about the reduction in workload when determining the reason for the Employee's termination. This is unlike the facts in *Northern Gold* where the reduction in workload occurred while the employee was on an 18-month parental leave.

60. This case is also distinguishable from *Northern Gold* in that the Appellant argues the reduction of the Employee's work was caused by a single, albeit large, development project not proceeding; whereas, in *Northern Gold*, there was an "almost total evaporation of Northern Gold's R & D work" that the employee was involved in (*Northern Gold*, para 100).

61. In *Northern Gold*, "[t]he overwhelming weight of the evidence [was] that the position the complainant formerly held no longer existed" (para 99), because of the reduction in work. I do not consider that to be the case here. In my view, the Delegate did not err in law with respect to this issue. As discussed above, unlike the circumstances in *Northern Gold*, I do not find the Delegate erred in applying the wrong legal test, in acting without any evidence, or in acting on a view of the facts which could not reasonably be entertained.

62. Accordingly, I dismiss this ground of appeal.

(3) Whether the Delegate erred in determining the Employee was entitled to additional compensation for vacation pay

63. I disagree with the Appellant that, under section 6 of the Employee's employment contract, vacation pay and pay in lieu of overtime were not separate and distinct payments. To the contrary, section 6.1 states that, "[t]he Employee shall accrue twenty (20) days of paid vacation each year", and section 6.5 states that, "…the Employee shall also be entitled to up to two (2) weeks of paid leave per year,

prorated for partial years, in respect of additional hours worked." Those are, on their face, separate and distinct entitlements and section 6 does not contemplate otherwise. If they were a single entitlement, presumably the 20 days of vacation pay would be added to the two weeks of pay in lieu of overtime for a cumulative entitlement of 30 days, but that is not what section 6 of the employment contract says.

64. I sympathize with the Appellant's argument that the Delegate's award of additional vacation pay resulted in the Employee being paid more than he was entitled to; however, the overpayment in lieu of overtime to the Employee was the Appellant's error. Given the Employee's vacation pay and pay in lieu of overtime were separate and distinct entitlements, I find that the Delegate did not err in awarding additional compensation for vacation pay.

65. Accordingly, I dismiss this ground of appeal.

(4) New evidence

66. This Tribunal set out the test for new evidence in *Davies et al.*, BC EST # D171/03, as follows:

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> 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.

67. In this case, the Appellant submitted a letter dated February 27, 2024 (received March 13, 2024), from Service Canada, which advised that an administrative review of the Employee's receipt of CERB was initiated. The letter asked for information from the Appellant regarding the earnings and work schedule for the Employee from the period of June 21, 2020, to September 12, 2020.

68. I accept that the Service Canada letter could not have been presented to the Director prior to the Determination being made, and that the letter is credible in the sense it is reasonably capable of belief. I also accept the letter is at least somewhat relevant to the issue of whether the Employee

was on COVID-19-related leave when he was terminated, but not necessarily for the reasons the Appellant suggests. Arguably, the fact the Employee applied for and received CERB supports the Delegate's finding that he was on COVID-19-related leave.

69. However, in any event, I dismiss this ground of appeal, because I do not consider the letter to have high potential probative value. The letter merely informed the Appellant that an administrative review of CERB received by the Employee was initiated by Service Canada and, as a result, Service Canada requested certain information from the Appellant. In other words, as argued by the Director, the letter only confirms that the Employee received CERB during at least some of the time he was employed by the Appellant and that his CERB was under review by Service Canada. There is no evidence about why Service Canada initiated its review, exactly what was being reviewed, or the results of that review. Any suggestion otherwise by the Appellant is purely conjecture.

CONCLUSION

70. For the reasons discussed above, I find the Delegate did not err in law in making the Determination and the new evidence submitted by the Appellant does not meet the applicable test. I therefore dismiss the appeal.

ORDER

71. I order that the Determination be confirmed pursuant to section 115(1)(a) of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal