

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Ashton College Ltd.
("Ashton College")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.
SUBMISSIONS: Colin Fortes, on behalf of Ashton College Ltd.
FILE NUMBER: 2024/083
DATE OF DECISION: October 23, 2024

DECISION

OVERVIEW

1. This is an appeal by Ashton College Ltd. (“Ashton College”) of a decision of a delegate of the Director of Employment Standards (“Director”) issued on May 27, 2024 (“Determination”).
2. On February 25, 2023, John S. Kurian filed a complaint under section 74 of the *Employment Standards Act (ESA)* with the Director alleging that his former employer, Ashton College Ltd. (“Ashton College”) had contravened the *ESA* by failing to pay him statutory holiday pay, vacation pay, and compensation for length of service (“Complaint”).
3. In investigating the Complaint and making the Determination, the Director followed a two-step process. One delegate of the Director (“investigative delegate”) corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report dated April 3, 2024 (“Investigation Report”). The Investigation Report included questions to be answered by the investigation including whether Ashton College and Ashton Education Ltd. (“Ashton Education”) are associated employers as defined by section 95 of the Act and summarized the submissions made by the parties, witnesses, and included a list of relevant records and documents which were attached to the Investigation Report. The Investigation Report was sent to the parties for review and comment within a deadline. None of Mr. Kurian, Ashton College, or Ashton Education, provided further information in response to the Investigation Report. The matter was then sent to a second delegate (“adjudicative delegate”) who assumed responsibility for reviewing the responses and any replies and issuing the Determination pursuant to section 81 of the *ESA*.
4. For purposes of the *ESA*, the Determination found Ashton College and Ashton Education are associated employers (collectively, “Employer”).
5. The Determination found that the Employer violated Part 7, section 58 (vacation pay) and Part 8, section 63 (compensation for length of service) of the *ESA* in respect of the employment of Mr. Kurian.
6. The Determination ordered the Employer to pay wages to Mr. Kurian in the total amount of \$5,789.57 including accrued interest.
7. The Determination also levied two administrative penalties of \$500 each against the Employer for contravention of sections 58 and 63 of the *ESA*.
8. The Employer has filed two separate appeals of the Determination, one by Ashton College and another by Ashton Education and made separate written submissions. Therefore, I have decided each appeal separately.
9. In its Appeal Form, Ashton College has checked off two of the three available grounds of appeal under section 112(1) of the *ESA*, namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination.

10. Section 114(1) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions of Ashton College, I find it is unnecessary to seek submissions on the merits from Mr. Kurian or the Director.

11. My decision is based on the section 112(5) record (“record”) that was before the Director at the time the Determination was made, the appeal submissions of Colin Fortes, on behalf of Ashton College, the Determination, and the Reasons for the Determination (“Reasons”).

ISSUE

12. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or dismissed under section 114(1) of the *ESA*.

THE DETERMINATION AND THE REASONS

Background

13. According to a BC Registry Services Searches conducted online on March 13, 2023, with a currency date of September 20, 2022, Ashton College was Incorporated in British Columbia on September 14, 1998. Mr. Fortes is listed as the sole director. A search on the same platform of Ashton Education conducted online on March 11, 2024, with the currency date of December 13, 2023, indicates that Ashton Education was incorporated in British Columbia on September 20, 2018, and Mr. Fortes is listed as its sole director.

14. Ashton College operates an online vocational training business in Vancouver, which falls within the jurisdiction of the *ESA*. Ashton Education operates a business that provides administrative and human resource services to Ashton College. It also operates the “Ashton Education Network” consisting of other corporate entities that provide other complementary services like testing facilities, and preparing individuals for licensing certification exams, and IT certification exams.

15. Mr. Kurian worked as an instructor for the Employer from March 14, 2013, to January 18, 2023. At the time of termination of his employment, his rate of pay was \$45 per hour.

16. Mr. Kurian filed the Complaint against the Employer within the period allowed under the *ESA*.

17. As indicated by the adjudicative delegate in the Reasons, the key issues for the Determination were the following: whether Mr. Kurian was as an employee under the *ESA*; whether he was entitled to statutory holiday pay and vacation pay; whether he was entitled to compensation for length of service; and whether Ashton College and Ashton Education were associated employers as defined by section 95 of the *ESA*.

18. The adjudicative delegate reviewed the Investigation Report, which detailed the evidence presented by both Mr. Kurian and the Employer, ultimately accepting it as an accurate reflection of the parties’ positions.

19. In addressing the first issue, the adjudicative delegate emphasized the *ESA*’s definition of “employee,” which includes “a person an employer allows directly or indirectly to perform work

normally performed by an employee.” The Employer argued that Mr. Kurian was merely a faculty member on short-term teaching contracts, while Mr. Kurian contended that these contracts were scheduling documents that did not reflect his employment status. Evidence, such as T-4 tax forms and contracts that outlined his pay rate, work hours, and responsibilities, demonstrated that Mr. Kurian was under the Employer's control and direction, leading the adjudicative delegate to conclude that he indeed satisfied the definition of an employee under the *ESA*.

20. Regarding vacation and statutory holiday pay, the Employer argued that vacation pay was included in Mr. Kurian's hourly rate, citing various appointment letters, such as one dated March 14, 2013, which stated that his pay would be \$40 per hour, and another dated January 12, 2021, indicating that his \$45 per hour rate included 4% vacation pay. However, Mr. Kurian disputed this, providing wage statements that did not reflect any vacation pay being paid or accrued. The employee detail record provided by the Employer also failed to show any amounts paid for vacation. Additionally, Mr. Kurian argued that having been employed for over five years, he was entitled to 6% vacation pay, not the 4% the Employer claimed.
21. The adjudicative delegate concluded that blending vacation pay into an hourly rate was impermissible under the *ESA*, as it reduces the regular rate of pay and the overall wages owed to the employee. Moreover, there was no evidence supporting the claim that Mr. Kurian had ever been paid vacation pay. Based on his continuous employment since 2013, the adjudicative delegate determined that Mr. Kurian was entitled to 6% vacation pay, which should have been paid on his gross wages. This entitlement covered the recovery period from January 18, 2021, to January 18, 2022, per section 80 of the *ESA*. Using Mr. Kurian's T-4 statements for 2020 and 2021 as the only evidence of his earnings, the adjudicative delegate prorated his income and calculated that he was owed \$2,900.38 in vacation pay.
22. Regarding statutory holiday pay, the adjudicative delegate found no evidence that Mr. Kurian had been paid for any statutory holidays. Section 44 of the *ESA* states that an employee is eligible for statutory holiday pay if they have been employed for at least 30 consecutive days and worked or earned wages for 15 of the 30 days preceding the holiday. Although Mr. Kurian had been continuously employed since 2013, the adjudicative delegate examined the payroll summaries provided by the Employer and determined that he had not worked the required 15 days prior to any of the statutory holidays during the recovery period from January 18, 2022, to January 18, 2023. While Mr. Kurian also had short-term contracts during certain periods for which no payroll records were submitted, the adjudicative delegate concluded that those courses were likely canceled. Even if Mr. Kurian had worked those courses, the adjudicative delegate stated that it would not have affected his eligibility for statutory holiday pay, as he still would not have met the required threshold of working 15 days in the 30-day period preceding any of the statutory holidays.
23. In the result, the adjudicative delegate found that while Mr. Kurian was entitled to vacation pay, he was not eligible for statutory holiday.
24. With respect to whether Mr. Kurian was entitled to compensation for length of service, the adjudicative delegate began by citing section 63 of the *ESA*, which provides that, after three months of employment, an employer is liable to pay compensation for length of service or provide written notice of termination, unless the employee quits, retires, or is dismissed for just cause. Section 65(1)

of the *ESA* excludes employees hired for a definite term from the protections or entitlements under section 63.

25. The Employer argued that Mr. Kurian was employed under definite-term contracts, which would exclude him from entitlement to length-of-service compensation. These contracts, referred to as Short-Term Teaching Contracts, were cited as the basis for this claim. However, Mr. Kurian disputed this characterization, stating that these were merely scheduling documents and did not define the nature of his employment as term-based. He claimed he was offered continuous employment, teaching one class per week, “like a regular job.”
26. The adjudicative delegate referred to the Tribunal’s decision in *Delphi International Academy et al.* (BC EST # D166/02), where it was determined that recurring employment agreements did not create a definite-term employment relationship if the overall relationship was ongoing and continuous. In the *Delphi* case, the Tribunal Member noted that the terms of the employees’ contracts were inconsistent with a definite-term arrangement, as the salaries were “subject to review on an annual basis,” vacation time was “not cumulative from year to year,” health benefits increased with each year of employment, and pension contributions were subject to a three-year vesting rule. Additionally, the agreements included a termination clause requiring notice based on years of service, which is inconsistent with fixed-term employment.
27. In Mr. Kurian’s case, the adjudicative delegate relied on similar facts to conclude that his employment was indefinite rather than for a fixed term. The March 14, 2013, letter issued to Mr. Kurian at the time of his hire specified that his rate of pay was “subject to annual review,” indicating a long-term employment relationship. Additionally, the June 10, 2015, Offer of Appointment to the Faculty Pool stated that “4% vacation pay would be added to each pay cheque,” and explicitly noted that Mr. Kurian would “not bank any vacation pay,” which is typical of ongoing, indefinite employment. Given the similarity of these facts to those in *Delphi* and the absence of any evidence suggesting Mr. Kurian’s employment would end at a prescribed time, the adjudicative delegate found that Mr. Kurian was employed under an indefinite employment arrangement.
28. The Employer alternatively argued that Mr. Kurian was terminated for just cause, citing alleged performance issues. The adjudicating delegate outlined the test for just cause based on progressive discipline, which requires that:
1. The employer must establish a reasonable performance standard and communicate it to the employee;
 2. The employee must be given sufficient time and opportunity to meet that standard;
 3. The employer must warn the employee that failure to meet the standard could result in termination; and
 4. The employee must fail to meet the standard after these steps.
29. In the present case, the Employer provided evidence of performance concerns raised in two letters from Suzanne Adams, the Program Director. The first letter, issued in December 2022, outlined five performance issues, including tardiness, unprofessional attire, and inadequate feedback. It also identified action items to address these concerns. Despite this, in January 2023, Ms. Adams sent a

termination letter citing eight additional complaints, including irrelevant discussions, inadequate teaching, and student dissatisfaction with exams.

30. The adjudicative delegate found that many of the concerns raised in the January termination letter were new and had not been previously communicated to Mr. Kurian. Importantly, there was no evidence that Mr. Kurian was given an opportunity to address these issues before his termination. Moreover, the Employer did not provide documentation of an internal investigation or any feedback from the entire class, despite being requested to do so by the investigative delegate. Therefore, the adjudicative delegate concluded that the Employer failed to establish just cause for termination based on progressive discipline.
31. Regarding the continuity of employment, the Employer asserted that Mr. Kurian's employment was not continuous since March 14, 2013, due to a lack of available contracts. Mr. Kurian countered this by providing evidence of consistent scheduling throughout his recovery period in 2022, though there was a break between June 29 and September 12, 2022. The adjudicative delegate accepted that Mr. Kurian's employment was continuous despite this break and noted the absence of evidence from the Employer to prove otherwise.
32. In conclusion, the adjudicative delegate found that Mr. Kurian was entitled to compensation for length of service, calculated based on eight years of employment. His average weekly wage was determined to be \$283.50, and he was awarded eight weeks' compensation, amounting to \$2,268, plus 6% vacation pay of \$136.08, for a total of \$2,404.08.
33. Regarding the association of Ashton College and Ashton Education as defined by section 95 of the *ESA*, the adjudicative delegate noted that if the Director considers that businesses are carried on by or through more than one corporation under common direction or control, they may be treated as one employer for the purposes of the *ESA*. During the investigation, the Employer asserted that Mr. Kurian was employed solely by Ashton College and not Ashton Education. The Employer was invited to provide evidence regarding the association but failed to do so, nor did they dispute the evidence suggesting that both entities were part of the same business network under the management of Mr. Fortes. This included evidence that both corporations shared resources, personnel, and operational control, further substantiated by payroll information and administrative communications linking both entities.
34. Based on this undisputed evidence, the adjudicative delegate found that Ashton College and Ashton Education should be treated as one employer for the purposes of the *ESA*, as they were jointly and separately liable for the payment of Mr. Kurian's wages.
35. The adjudicative delegate also held that Mr. Kurian was entitled to interest in the amount of \$485.11 pursuant to section 88 of the *ESA*.
36. Furthermore, the adjudicative delegate determined that the Employer contravened sections 58 and 63 of the *ESA*, and levied penalties of \$500 each against the Employer for these violations.

EMPLOYER'S SUBMISSIONS

37. Ashton College appeals some key findings of the Determination issued by the adjudicative delegate, though it does not contest the finding that Mr. Kurian was an employee during the periods covered by the short-term contracts. Ashton College's primary concerns are the determinations regarding Mr. Kurian's entitlement to vacation pay and compensation for length of service, arguing that these conclusions were based on "errors of law" and involved violations of "natural justice" due to procedural unfairness and bias in the investigation.
38. Regarding vacation pay, Ashton College disputes the determination arguing that the adjudicative delegate made an error of law by finding that vacation pay was owed. Ashton College points to the specific language in the signed appointment letters dated June 10, 2015, February 26, 2020, and January 12, 2021, which stated that the hourly rate of \$45.00 included 4% vacation pay. It argues that section 58(2)(b)(i) of the *ESA* permits vacation pay to be included in regular wages when agreed to in writing, and therefore, no further vacation pay should have been required. It contends that section 27, which outlines wage statement requirements, does not mandate a separate line item for vacation pay when it is integrated into wages, which, according to Ashton College, made the finding legally erroneous.
39. Further, Ashton College asserts that the adjudicative delegate erred by mentioning "blended hourly rate" in the Determination and claiming that it is not allowed under the *ESA*. It is concerned whether this concept affected the decision on vacation pay non-payment. If it did, Ashton College argues that it is irrelevant to the case and should not have been included or considered in the decision-making. It maintains that the terms of Mr. Kurian's employment contracts were unambiguous, and the hourly wage, which included vacation pay, was agreed to in writing. They argue that the decision misinterpreted the wage statements and the employment contracts, constituting an error of law.
40. Ashton College also challenges the determination that Mr. Kurian was continuously employed from 2013 and therefore entitled to 6% vacation pay under section 58(2)(b)(ii) of the *ESA*. Ashton College argues that the evidence does not support a conclusion of more than five years of continuous employment. It emphasizes that the documentary evidence, including short-term contracts with defined start and end dates, demonstrates that Mr. Kurian's employment was not continuous. They assert that the adjudicative delegate erred in relying on "hearsay evidence" provided by the investigative delegate, which they argue was insufficient to establish continuous employment.
41. As for the finding that Mr. Kurian is entitled to eight weeks of compensation for length of service under section 63(2), Ashton College again argues that this is an error of law. It maintains that section 63(2) applies only where employment is consecutive, and there is no evidence of consecutive employment in this case. Ashton College points to an inconsistency in the adjudicative delegate's reasoning, noting that while the adjudicative delegate dismissed Mr. Kurian's statutory holiday pay claim on the grounds that there was no consecutive employment, she simultaneously found that compensation for length of service was owed—an internally contradictory conclusion, in Ashton College's view.
42. In support of its position, Ashton College argues that the adjudicative delegate misapplied the *Delphi* case, *supra*, which was used to justify the finding that Mr. Kurian's employment was indefinite rather than based on fixed-term contracts. Ashton College asserts that the facts of *Delphi* are

distinguishable, as that case involved a significantly different employment relationship characterized by annual salary reviews, cumulative vacation time, and increasing health benefits—none of which were present in Mr. Kurian’s contracts, which specified wages for short-term periods only.

43. Ashton College also raises concerns regarding procedural fairness, alleging violations of natural justice. It asserts that it was denied a fair opportunity to be heard, claiming that the investigative delegate failed to contact key staff members, such as the president and the director of Ashton College, to obtain their testimony. Ashton College argues that the investigative delegate’s report, relied upon by the adjudicative delegate, was based on unsworn hearsay evidence, rather than on direct testimony or documentary evidence. Ashton College further alleges “bias” on the part of the investigative delegate, who, they claim, pressured the college to settle the matter early in the investigation by suggesting that wages were owed before thoroughly examining the evidence.
44. In conclusion, Ashton College seeks to have the Determination set aside, arguing that the adjudicative delegate made errors of law in interpreting key sections of the *ESA*, including particularly sections 27, 28, 58, and 63, and that the adjudicative process was procedurally unfair.

ANALYSIS

45. Having reviewed the Determination, the record, and Mr. Fortes’ submissions on behalf of Ashton College, I find the appeal should not be allowed to proceed; it should be dismissed under section 114(1) of the *ESA*. My reasons follow.
46. 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.
47. The Tribunal has consistently held that 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, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).
48. 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: see *Britco Structures Ltd.*, BC EST # D260/03.
49. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

50. Having delineated some of the relevant principles applicable to appeals, as previously noted, Ashton College has checked off the “error of law” and “natural justice” grounds of appeal under section 112(1) in the Appeal Form.
51. I will discuss each ground of appeal under separate headings below starting with the error of law ground.
- a. Error of law
52. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco, supra*, in which the Tribunal adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLii 6466 (BCCA), [1998] BCJ No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *ESA*;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
53. As indicated above, Ashton College disputes the determination that vacation pay was owed to Mr. Kurian, asserting that it complied with the *ESA* by including 4% vacation pay in his \$45.00 hourly rate, as outlined in appointment letters dated June 10, 2015, February 26, 2020, and January 12, 2021. Ashton College relies on section 58(2)(b)(i) of the *ESA*, which allows vacation pay to be paid on scheduled paydays if agreed in writing. Ashton College also argues that section 27 of the *ESA* does not require a separate line item for vacation pay in wage statements if it is incorporated into wages.
54. While section 58(2) of the *ESA* allows vacation pay to be included in regular wages if both parties agree, the *ESA* also requires employers to issue wage statements that clearly itemize wages and vacation pay separately under section 27. The adjudicative delegate found that Ashton College’s practice of including or blending vacation pay into the hourly rate without separately itemizing it in the wage statements did not comply with the *ESA*’s requirements for clear documentation of vacation pay. I agree with this conclusion.
55. The burden of proving that vacation pay was properly paid to Mr. Kurian rests with the Employer. The wage statements Mr. Kurian provided for the pay periods ending March 31, 2016, and January 15, 2023, showed no payment or accrual of vacation pay. Similarly, the employee detail record provided by the Employer listed only Mr. Kurian’s gross wages and statutory deductions, without any indication that vacation pay was paid or accrued. Furthermore, Ms. Chang, the College’s Chief Operating Officer, did not supply a breakdown of the hourly rate or documentation of vacation pay when requested by the investigative delegate. Under these circumstances, I find that it was reasonable for the adjudicative delegate to conclude that Ashton College failed to prove vacation pay was properly paid to Mr. Kurian, and to order the Employer to pay the outstanding vacation pay for the period of his employment.

56. Although Ashton College’s violation of section 27 could have justified a monetary penalty under section 98 of the *ESA*, the Director chose not to impose one. The core issue remains whether vacation pay was paid in accordance with the *ESA*. Based on the evidence and a thorough review of the record, I find that Ashton College has not provided sufficient evidence to meet its burden of proof regarding vacation pay. I find the adjudicative delegate did not err in her analysis of this issue. Specifically, there is no indication that the adjudicative delegate acted on an unreasonable view of the facts or misinterpreted any provision of the *ESA*. On the contrary, her decision aligns with sections 58(2) and 27 of the *ESA*, and I find no grounds to interfere with it.
57. Ashton College also argues that the adjudicative delegate erred in law by concluding, without sufficient evidence or based on hearsay, that Mr. Kurian had been continuously employed since 2013, thus entitling him to 6% vacation pay under section 58(2)(b)(ii) of the *ESA*. I find this argument unpersuasive.
58. Ashton College’s assertion that Mr. Kurian’s employment was not continuous due to the short-term nature of his contracts contradicts the principles set out in *Delphi, supra*. In that case, the Tribunal found that a series of fixed-term contracts should not be viewed as creating a “definite term” relationship when the actual nature of the employment points to continuity. The Tribunal stressed that the essence of the employment relationship, not the formalities of the contracts, should be the focus when determining whether service was continuous, particularly when there is an expectation of ongoing employment. This principle applies to Mr. Kurian’s situation, where successive short-term contracts over several years clearly demonstrated an expectation of continuity by both parties. Ashton College’s attempt to distinguish the contracts in this case from those in *Delphi* does not change the underlying analysis. The substance of the relationship remains one of continuous service, and Ashton College’s reliance on the formality of fixed-term contracts does not negate that reality.
59. Furthermore, in *Delphi*, the Tribunal also relied on the reasoning in *Ceccol v. Ontario Gymnastic Federation*, 2001 CanLII 8589 (ON CA). The Court of Appeal in *Ceccol* emphasized the importance of looking beyond the formal terms of fixed-term contracts and examining the overall context of the employment relationship. The court cautioned against allowing employers to evade minimum employment protections by labeling contracts as “fixed-term.”
60. Applying the reasoning from both *Delphi* and *Ceccol* to Mr. Kurian’s case, the same logic must therefore govern. The series of short-term contracts in Mr. Kurian’s employment history cannot be used to deny him the benefits associated with continuous service. The adjudicative delegate correctly recognized the ongoing nature of the employment relationship between Mr. Kurian and Ashton College, as evidenced by the consistent pattern of his work and the absence of any clear intention from either party to terminate the employment at the conclusion of each contract. I do not find that the adjudicative delegate erred in law or acted without evidence in concluding that Mr. Kurian had been continuously employed since 2013. Accordingly, I concur with the adjudicative delegate that as an employee with more than five years of service Mr. Kurian was entitled to vacation pay at the rate of 6%, rather than 4%.
61. In response to Ashton College’s argument that Mr. Kurian is not entitled to compensation for length of service under section 63(2) of the *ESA* because his employment was not continuous, I find this argument also unconvincing. As discussed above, the nature of Mr. Kurian’s short-term contracts

does not negate the reality of continuous employment. The adjudicative delegate correctly focused on the substance of the employment relationship, rather than the form of the contracts, in determining continuity. I therefore agree with the adjudicative delegate's conclusion that Mr. Kurian was an employee for over eight years, from March 14, 2013, and is entitled to eight weeks of compensation for length of service under the *ESA*.

62. Having found that Mr. Kurian is entitled to compensation for length of service under section 63(2) of the *ESA*, I turn to Ashton College's assertion that the adjudicative delegate's findings are internally inconsistent. This claim is without merit. Ashton College argues that the adjudicative delegate's dismissal of Mr. Kurian's statutory holiday pay claim contradicts the decision to award compensation for length of service, but this misinterprets the adjudicative delegate's reasoning. The statutory holiday pay claim was not dismissed due to a lack of service; rather, it was dismissed based on the specific requirements governing statutory holiday entitlement, which differ from the provisions related to length of service under section 63.

63. I find the adjudicative delegate correctly applied the statutory framework to both issues. The decision to dismiss the holiday pay claim was rooted in the distinct rules that apply to statutory holiday eligibility, whereas the award for length of service reflects Mr. Kurian's continuous employment over an extended period. These are separate legal determinations, and there is no inconsistency between them. The adjudicative delegate properly applied section 63 based on the facts of continuous employment, while recognizing the different standards that govern holiday pay.

b. Natural Justice

64. The Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explains that 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.

65. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party (see *B.W.I. Business World Incorporated* BC EST # D050/96).

66. The burden of proving a failure to comply with the principles of natural justice rests on the party making the allegation.

67. Ashton College contends that the Director breached the principles of natural justice by failing to allow Ashton College to be heard by an independent and impartial decision-maker and by not conducting an oral hearing. Specifically, Ashton College asserts that the investigative delegate was

biased in favor of Mr. Kurian and that the adjudicative delegate relied solely on hearsay evidence presented in the Investigation Report, without conducting her own independent inquiry or contacting key staff members at Ashton College. Furthermore, Ashton College alleges that the investigative delegate “made it very clear right at the start of this matter” that Ashton College or the Employer should settle early by suggesting that wages were owed to Mr. Kurian without examining the evidence.

68. However, Ashton College’s argument fundamentally misapprehends the principles of natural justice and the procedural structure under the *ESA*. The assertion that the bifurcated process—where the investigative delegate conducts the investigation, and the adjudicative delegate makes a determination based on the Investigation Report and any submissions—violates natural justice is unfounded. This procedural structure effectively separates the fact-finding function from the decision-making function. This division of roles does not, in and of itself, detract from the fairness and impartiality of the process, as there is no objective evidence to suggest a violation of natural justice principles.

69. The record indicates that Ashton College was provided with several opportunities to be heard and to respond to the allegations against it. The Chief Operating Officer of Ashton Education, Ms. Chang, represented both Ashton Education and Ashton College—entities found to be associated employers under section 95—and maintained regular communication with the investigative delegate throughout the investigation of the Complaint. Moreover, the investigative delegate sent the Investigation Report to Ms. Chang via email, and Ashton College does not argue that Ms. Chang did not receive it on behalf of the Employer. This ongoing communication demonstrates that both Ashton College and Ashton Education were actively engaged in the investigation process. Notably, the Investigation Report, sent to Ms. Chang on April 3, 2024, included a specific deadline for Ashton College (and Ashton Education) to respond or provide additional evidence by April 17, 2024. Despite this opportunity, Ashton College (and Ashton Education) failed to provide any response, undermining its claim that it was denied the chance to present its case.

70. Furthermore, the principles of natural justice do not require that the adjudicative delegate personally hears all the evidence. The role of the adjudicative delegate is to assess the evidence gathered during the investigation and the submissions made by the parties. The key requirement is that the parties are given an opportunity to be heard. In this instance, during the investigation of the Complaint, Ashton College had that opportunity, as both Ashton College and Ashton Education were provided with the Investigation Report and given the chance to submit additional evidence or respond. The fact that they chose not to engage after receiving the Investigation Report does not undermine the fairness of the process.

71. Section 77 of the *ESA* gives the Director the authority to conduct investigations and gather relevant evidence, while section 77.1 clarifies that these investigations can happen without an oral hearing, as natural justice does not require one in every situation. The Director and her delegates must make reasonable efforts to collect relevant information and provide parties with a chance to respond. In this case, the investigative delegate thoroughly investigated, communicated with Ashton College’s representative, Ms. Chang, and submitted the Investigation Report, clearly allowing for a response. The adjudicative delegate then reviewed this report along with relevant documents, enabling her to make a fair determination. I find that Ashton College’s concerns about not having an oral hearing are unfounded since the Director is not required to hold one, and allowing parties to submit written

evidence is consistent with procedural fairness, especially since they were given enough time to respond.

72. Additionally, the claim that the investigative delegate demonstrated bias by allegedly pressuring the Employer to settle early in the process is unsupported by any cogent evidence. Bias in administrative proceedings requires a reasonable apprehension of bias grounded in specific facts. Here, there is no indication that the investigative delegate's conduct deviated from standard practices under the *ESA*. The mere suggestion to consider a settlement does not constitute bias or a lack of impartiality.
73. In the result, I find Ashton College's arguments regarding procedural unfairness and bias are without merit. I find there is no basis for this Tribunal to interfere with Determination, and Ashton College's appeal is dismissed.

ORDER

74. Pursuant to subsection 114(1)(f) of the *ESA*, there is no reasonable prospect that this appeal will succeed and therefore, it is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination dated May 27, 2024, is confirmed as issued.

/S/ Shafik Bhalloo

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal