Citation: Remedi Wellness and Spa Ltd. (Re)
2024 BCEST 92

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Remedi Wellness and Spa Ltd.

("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Ryan Goldvine
SUBMISSIONS:	Walaa Zeidan and Jas Kalsi, on behalf of Remedi Wellness and Spa Ltd. Felisa Friesen, delegate of the Director of Employment Standards Jasslyn McCroy, on her own behalf
FILE NUMBER:	2024/040
DATE OF DECISION:	October 17, 2024

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*ESA*) by Jas Kalsi on behalf of Remedi Wellness and Spa Ltd. ("Appellant") of a determination made by Felisa Friesen, a delegate ("Delegate") of the Director of Employment Standards ("Director"), on February 29, 2024 ("Determination").

2. The Determination awarded Jasslyn McCroy ("Complainant") $5,656.21 in wages and imposed $2,000.00 in administrative penalties against the Appellant. The Appellant has grounded their appeal on all three available grounds; namely, that the Director erred in law in making the Determination, that the Director failed to observe the principles of natural justice in making the Determination; and on the basis that evidence has become available that was not available at the time the Determination was being made.

3. Unable to dispose of the matter on the materials initially filed, I sought submissions from the parties on the merits of the appeal.

4. The Tribunal received submissions on behalf of each of the Director and the Complainant, as well as a reply submission from the Appellant.

5. Although I have reviewed all of the materials provided by the parties, I address only those portions necessary to reach my decision.

6. For the reasons that follow, I deny the appeal.

ISSUES

7. The Appellant raises several issues to be determined as follows.

8. Should the Determination be cancelled, or remitted to the Director, in whole or in part, on the basis of new evidence that has become available that was not available at the time the Determination was made?

9. Did the Director err in law in reaching any or all of the following conclusions:

    a. That the Complainant was entitled to commission on the full amount of sales when the threshold of $5,000 was met, and not only on that amount by which the threshold was exceeded;

    b. That the Complainant was entitled to commission for all sales attributed to her, regardless of whether she performed the service to which the commission was tied;

    c. That the Complainant was entitled to compensation for length of service ("CLOS") on the basis that she did not resign her employment, nor did the Employer have just cause to terminate her employment.

THE DETERMINATION

10. The Appellant employed the Complainant as a laser technician and skin health specialist from June 1, 2020, until September 16, 2022. In this role, the Complainant's compensation would include an hourly wage, as well as commissions and gratuities.

11. Following an investigation into the Complaint, another delegate ("Investigating Delegate") issued an investigation report to the parties on October 26, 2023 ("Investigation Report"). While the Complainant responded confirming the accuracy of the Investigation Report, the Appellant did not provide any further information prior to the present appeal.

12. The Delegate reviewed a number of issues as part of the Determination and reached the following conclusions.

1. Was the Complainant owed wages for hours worked from September 4 to 17, 2022?

13. The Delegate reviewed the evidence provided by both parties and accepted most of the evidence of the Complainant with respect to her hours worked, with the exception of a day the Employer confirmed she had booked off sick. After reviewing the wages paid for the Complainant's final pay period, the Delegate concluded that the Complainant was owed $52 in regular wages.

2. Was the Complainant owed wages for commissions earned in August and September 2022?

14. There was a great deal of disparity between the evidence of the Complainant and the Appellant with respect to when commission is earned and when it is payable. This was further confounded by the fact that the parties submitted three different employment agreements.

15. The Delegate found several of the Appellant's arguments internally inconsistent. She rejected the Appellant's contention that commissions were only payable to the employee rendering the services, rather than the employee who sold the treatment package, and rejected the Appellant's contention that the Complainant had been overpaid for commissions in earlier months, nor paid in advance for commissions for August and September 2022.

16. The Delegate concluded based on the Appellant's reconciliation documents, and the Complainant's contemporaneous sales records, that the Complainant was owed commissions for the month of August 2022 in the amounts of $823.25 for services, and $522.61 for product sales. In the absence of any supporting evidence, the Delegate rejected the Complainant's claim for commissions for September 2022.

3. Was the Complainant owed an amount for gratuities collected and withheld?

17. Although the Delegate accepted that the Complainant may have earned gratuities that were not paid to her, in the absence of supporting evidence, the Delegate did not award any amount as gratuities.

4. Did the Employer take unauthorized deductions from the Complainant's wages?

18. Based on the evidence, and with reference to sections 21(2) and 22 of the *ESA*, the Delegate concluded that the Appellant had improperly withheld $295 for a pair of safety glasses broken by the

Complainant, $661.88 deducted as an alleged overpayment of commissions, and $125 deducted for a treatment received by the Complainant.

5. Was the Complainant entitled to compensation for length of service ("CLOS")?

19. The Appellant argued, first, that the Complainant had resigned her employment, and in the alternative, that it had just cause to terminate the Complainant for breaches of four provisions of her employment agreement, three of which related to accepting employment at another employer offering similar services in August 2022, and the fourth for engaging in gossip in the workplace. This latter breach was described by the Appellant as constituting bullying and harassment.

20. The Delegate rejected the Appellant's contentions with respect to the Complainant's alternate employment, finding that the Appellant had condoned her acceptance of that employment. Further, the Delegate concluded there was no evidence that the Complainant was soliciting the Appellant's clients for her new job, nor that she had copied client files as alleged.

21. The Delegate accepted that the Complainant had been warned regarding her workplace behaviour (gossiping) but found that this was minor misconduct, and the Complainant was not given a sufficient opportunity to address the Appellant's concerns, having received a third warning on the same day she was escorted off the premises.

22. Accordingly, although the Appellant asserted that the decision to terminate the Complainant was not made until September 26, 2022, she was effectively terminated September 16, 2022, when she was escorted from the building and asked to return her keys. Based on this, the Delegate concluded the Complainant was entitled to two weeks' average wages, or $2,492.16, as CLOS, pursuant to section 63(2) of the *ESA*.

6. Was the Complainant owed vacation pay?

23. The Delegate concluded the Complainant was paid vacation pay on wages earned up to and including September 3, 2022; however, based on the Delegate's assessments above with respect to wages owing as a result of the Determination, a further $197.77 in vacation pay was owing pursuant to section 58 of the *ESA*.

24. In addition to the above the Delegate imposed mandatory administrative penalties in the amount of $2,000 for contraventions of sections 18, 21, 27, and 63 of the *ESA*, and accrued interest in the amount of $486.54.

ARGUMENTS

25. The Appellant says that the Director erred in law both in the calculation of commissions owing to the Complainant, and in determining which sales should have attracted commission for the Complainant.

26. The Appellant submits that the employment agreement for the Complainant clearly indicates that commission was payable only on the amount of product and service sales in excess of $5,000 per month, and not on the entire amount if the amount exceeds $5,000.

27. In addition, the Appellant says the Director misinterpreted how the business operates by failing to accept that commission is only payable on services where the employee both sells and performs the service. The Appellant says that for many of the services on which the Director determined commissions were owing, the Complainant either did not complete the sale, or did not perform the service.

28. Further to this, the Appellant also seeks to introduce new evidence in the form of witness statements indicating that, for many of the services claimed to have been sold by the Complainant, it was in fact the owner of the business who sold the services, and/or that individuals other than the Complainant performed the services.

29. In addition, the Appellant says that although commissions were in some cases paid in advance of the services being provided, the fact that a customer may ask for a refund of the service fee at any time before the service is rendered, means the commission is not in fact payable until after the service is rendered.

30. The Appellant also submits that the Director erred in law in determining that the Complainant had not resigned from her employment. The Appellant points to an email from the Investigating Delegate which purportedly acknowledged the Complainant's admission that she had resigned. While the Determination concluded that the parties had agreed to continue the Complainant's employment on a part-time basis, the Appellant says this was never agreed to.

31. This notwithstanding, the Appellant also rejects the Delegate's contention that the Complainant was not given sufficient opportunity to correct her behaviour before being terminated for just cause. In making this finding, the Appellant says the Director misapplied the law in the circumstances.

32. The Appellant also submits that the Director erred in law in concluding the Complainant's workplace behavioural issues amounted to minor misconduct. The Appellant says, instead, that they reflect bullying and harassment, which is unacceptable in any circumstance. The Appellant provides further documents in the form of emails from the accounting manager, and from a fellow technician, to underscore the seriousness of the allegations.

33. For these reasons, the Appellant says even if the finding that the Complainant did not resign is allowed to stand, there was nevertheless sufficient misconduct to justify termination with cause, and no CLOS should be owing.

34. With respect to the new evidence provided, as outlined above, the Appellant says this evidence was not available at the time the Determination was made because the owner of the business was off work due to injuries sustained in a car accident. The Appellant says the owner was only able to come back to work recently, when she could then search and verify the information contained in the new evidence.

35. In response, the Director rejects the Appellant's attempts to rely on what is advanced as "new evidence" and says all of that information was either available or could have been discovered at the time the investigation was underway. In addition, the Director says the documents that were before the Director when the Determination was made ("Record") clearly indicate the owner was heavily involved in the investigation into the Complaint and provided substantial evidence at that time.

36. With respect to the witness statements provided as new evidence, the Director rejects these as hearsay, but says that in any event, the evidence described could have been provided by the Appellant at the time the Determination was made with the exercise of due diligence on the part of the Appellant.

37. This notwithstanding, the Director also says the evidence disclosed in the witness statements would not have led to a different conclusion on the merits of the Complaint.

38. With respect to the email exchange relied on by the Appellant as new evidence, the Director points to the Record, which indicates that evidence was, in fact, before the Delegate at the time the Determination was made.

39. In response to the Appellant's assertions with respect to the commission calculations, the Director notes, first, that the employment agreement did not specify whether commissions were to be paid only on the amount that exceeded $5,000 in a month, or on the total amount if the $5,000 threshold was exceeded. Following this, the Director identified the Appellant's own commissions calculation document included in the Record which calculated commissions on the total value, and not only the portion that exceeded the threshold.

40. In addition, the Director says that in the absence of clear direction in the employment agreement as to how a sale is initiated or closed, the Delegate's preference for the evidence of the Complainant based on all of the evidence available did not constitute an error of law.

41. Similarly, the Director says that what the Appellant is disputing with respect to whether the Complainant resigned, and whether there was just cause to terminate the Complainant's employment, constitute findings of fact, rather than conclusions of law, and therefore are not liable to be overturned in an appeal such as this.

42. For these reasons, the Director submits that the appeal is without merit and should be dismissed.

43. The Complainant also provided a response submission, attaching several new documents. The Complainant's submissions, however, largely dispute the factual assertions made by the Appellant, and found in the witness statements the Appellant seeks to rely on. The documents provided with her submissions reflect witness statements in support of the Complainant, which, on their face, seek to dispute many of the allegations of the Appellant, and reinforce the Complainant's good character.

44. In reply the Appellant says the employment agreement is clear that commissions are only to be paid on the amount over $5,000 per month, and reiterates, in addition, that the Director erred in not relying on the evidence that the Complainant "neither initiated, closed or provided" certain of the services claimed.

45. The Appellant also rejects the Director's contention that moving from a full-time to a part-time position does not constitute a resignation, and says if this had, in fact, been what occurred, a new employment agreement would have been prepared.

46. In addition, the Appellant disputes the Director's contention that the new evidence provided could have been provided earlier given the owner's medical condition(s) which they say the Delegate and Investigating Delegate were aware of.

47. The Appellant reiterates that the owner had been in a serious car accident and was participating in the appeal as best she could. The Appellant also describes the owner's circumstances as a single mom on maternity leave, and experiencing post-partum depression, as also impacting her ability to provide any further information in response to the Complaint.

48. The Appellant also rejects the Director's description of the new evidence provided as being hearsay, as it is direct evidence that can be substantiated, and further rejects the response evidence provided by the Complainant as being factually incorrect. The Appellant does not, however, provide any further direct responses to the assertions contained therein.

49. Finally, the Appellant's reply submissions suggest the Director and Delegate were biased in their decision-making and overlooked evidence supporting the Appellant's positions in relation to the Complaint.

ANALYSIS

50. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

51. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

52. 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 persuade the Tribunal that there is an error in the determination under one of the statutory grounds.

53. As noted above, the Appellant is appealing on the grounds that the Director erred in law and is seeking to advance new evidence they say was not available at the time the Determination was made. The Appellant also alleges that the decision-making was conducted in a biased fashion, which, if proven, would engage the principles of natural justice.

54. With respect to allegations of bias, the Tribunal has clearly and repeatedly affirmed that an allegation of bias must be proven on the evidence. The test for determining bias, either actual or a reasonable apprehension thereof, is an objective one, and the evidence presented should allow for objective findings of fact: *Dusty Investments Inc. dba Honda North,* BC EST # D043/99. I am not persuaded

that, to the extent the Appellant is alleging bias, or the perception of bias, any evidence has been provided which could support such an allegation.

55. I deal next with the new evidence the Appellant is seeking to rely on, followed by the alleged errors of law.

New Evidence

56. The appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al.,* BC EST #D171/03. The test requires that:

(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.

57. As noted above, the Investigating Delegate conducted the investigation into the Complaint and issued the Investigation Report on October 26, 2023.

58. Although the Complainant confirmed her view of the completeness and accuracy of the Investigation Report, the Record does not indicate the Appellant provided any response to the Investigation Report prior to the Determination being issued.

59. As alluded to above, the new evidence advanced by the Appellant includes the following:

a. Correspondence between the Appellant and the Investigating Delegate;

b. Sales records from the Appellant's computer systems; and

c. Recent correspondence between the Appellant and three individuals, including one client and two employees of the Appellant, in support of the Appellant's factual assertions.

60. The Complainant also seeks to rely on new evidence submitted in response to the evidence and submissions of the Appellant.

61. With respect to the correspondence between the Appellant and the Investigating Delegate, I note this correspondence does form part of the Record. The Appellant relies on this correspondence to support their contention that they did not agree to the Complainant's shift from full-time to part-time work.

62. I accept the Director's assertion that the correspondence was part of the Record, and the Determination indicates, on its face, that the Delegate conducted a review of all of the information on the file. However, even if this correspondence was not reviewed by the Delegate at the time the

Determination was being made, I am not persuaded, in any event, that the Appellant's position in this respect was not accurately reflected in the Investigation Report.

63. Specifically, while the Appellant says the correspondence confirms that the Complainant agreed (and the Investigating Delegate confirmed) she had resigned and given two-weeks' notice, the correspondence from the Investigating Delegate notes the Complainant "advised that she would like to continue working at Remedi for two days a week…and provided two weeks notice of the proposed change." In response, the owner indicated the following:

> The main point here is that [Complainant] resigned from her full time position. We did not have a part time position for her at Remedi and I hired a technician to replace her.
>
> I accepted her full resignation and she was trying to manipulate her length of stay to collect her commissions past mid-September.

64. I am satisfied that these conflicting positions are accurately reflected in the Investigation Report, and the addition of the correspondence relied on by the Appellant neither adds to, nor detracts from, the substance of the Investigation Report.

65. With respect to the other documents advanced as new evidence by the Appellant, I am not persuaded they could not have been discovered (or prepared) and presented to the Director during the investigation, or prior to the Determination being issued.

66. While the Record does disclose that the owner took medical leave as a result of a car accident, there is nothing on the face of the Record that would suggest this significantly impaired her ability to respond to the Complaint or participate in the investigation.

67. In fact, the Record includes emails from the owner to the Investigating Delegate dated August 1, 8, 16, and 20, September 23, 25, 26, and October 11, 2023. The emails also reference multiple phone conversations between the owner and the Investigating Delegate.

68. The Appellant makes the vague assertion that "[t]he new evidence was not available previously as [the owner] was off work due to injuries suffered in a car accident. [The owner] was only able to come back to work recently and able to search and verify the details of the submissions made previously."

69. This notwithstanding, one of the owner's first emails to the Investigating Delegate on August 8th indicated that the week previous was her first week back from her injuries. While she indicated on August 20th that she was "still on Part Time Medical leave" she nevertheless continued to respond to the Investigating Delegate's inquiries.

70. The Record also discloses that the Investigating Delegate corresponded numerous times with the Appellant's accountant, as well as with the Appellant's operations manager. At no time did the Appellant advise that they were not able to respond because of or in relation to the owner's injuries or absence from the workplace. Further to this, neither has the Appellant provided evidence to support their contention that the owner was unable, due to medical restrictions or limitations, to fully respond to the Complaint.

71. I note as well the Appellant's submissions refer to the owner's post-partum depression. If this was disclosed during the investigation, there is no record of it, nor is there any evidence to support that such a condition impaired the Appellant's ability to participate in the investigation.

72. The Appellant's reply submission indicates the owner "did her best to respond to the requests of the adjudicating delegate on a timely basis and with the evidence, that she believed, supported her position."

73. The parties to an investigation, however, are obligated to provide any and all available information and evidence during the investigation, and not simply what is believed to be sufficient. An appeal of a determination such as this one is not an opportunity to provide more evidence in response to the adverse findings made in that determination.

74. For these reasons, I am not prepared to accept the documents advanced by the Appellant as new evidence, and they will not be considered further as part of this appeal.

Error of Law

75. The Tribunal has recognized the following ways in which an "error of law" may be found to have occurred, as set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, 1998 CanLII 6466 (BC CA), [1998] B.C.J. No. 2275 (BC CA) (*Gemex*):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

76. Specifically, the Appellant identifies the following as reflecting alleged errors in law:

a. Concluding that commission is payable on the full amount of sales rather than only the amount exceeding $5,000 in a month;

b. Concluding that commission is payable on the full amount of sales of service packages, regardless of who performs the service or when the service is performed;

c. Concluding that the Complainant did not resign her employment;

d. Concluding that the Appellant did not have just cause to terminate the Complainant's employment.

77. I deal with each of these in turn in light of the arguments submitted by the parties.

Commission Threshold

78. The employment agreement provides entitlement to "a monthly commission calculated as 10% of the total product and service sales over $5,000, initiated and closed by the Employee."

79. While I agree on the face of the language in the employment agreement the more likely interpretation would suggest commission entitlement is in relation only to the amount by which the $5,000 threshold is exceeded, this is not without the potential for ambiguity.

80. As noted above, the Delegate concluded, instead, that the commission entitlement was in relation to all sales, where the total value of those sales exceeded $5,000. In doing so, the Delegate reviewed and compared sales records with the Appellant's own calculations of what the Complainant had been paid in commissions to date.

81. As indicated above, the Director brings my attention to the Record, which includes the Appellant's commissions reconciliation calculations. Although this reconciliation was provided to demonstrate that the Complainant had been overpaid as a result of commissions being paid on services not rendered, it indicates the Appellant applied the 10% commission rate to all sales, rather than only the amount by which the $5,000 threshold was exceeded. Further to this, the same document indicates the Complainant was, in fact, paid commission in June on the full amount of sales recorded for her, even though she had not exceeded the $5,000 threshold.

82. Based on this, I am not persuaded that the Delegate's finding that commission was payable on the full amount of sales, and not simply those that exceeded the $5,000 threshold, reflects a finding made without evidence, nor based on a view of the facts that could not be reasonably entertained. Accordingly, I am not prepared to interfere with this finding.

Commission Calculations

83. The Delegate points out in the Determination that while the Complainant said commissions were paid to the person who sold a service, the Appellant took the position that commissions were only fully earned after the service was finally rendered and rendered by the person selling the package. The Delegate noted that the *ESA* does not define when commissions are earned or payable, and while the employment agreement indicated that commissions were for sales "initiated and closed by the Employee" the agreement went no further in how "initiated and closed" is defined.

84. The Delegate reviewed the evidence and confirmed that, while unwritten, there was an agreement that commissions for treatment packages were paid after they were sold, even though some or all of the services may be rendered at a later date.

85. At the heart of this aspect of the dispute is whether "initiated and closed by the Employee" encompasses only the sale of services, or the sale and subsequent performance of those same services.

86. The Delegate rejected the Appellant's assertion that if another employee performed the service, the commission would be clawed back from the employee who sold the service and given to the one

who performed it. The Delegate also rejected the Appellant's contention that the owner, in fact, sold most or all of the service packages for which commissions were paid.

87. While the Delegate accepted that reconciliation could occur, she rejected the Appellant's evidence on this point as inconsistent. Specifically, the Delegate rejected the Appellant's suggestion that sales from as early as March required reconciliation after the Complainant's employment was terminated in September given the Appellant's own assertions that this reconciliation occurred on a monthly basis. The Delegate further pointed to the absence of any evidence of a written agreement regarding when or how overpayments may arise, or how they are dealt with.

88. The Delegate reviewed the evidence available, which also included the documents advanced by the Appellant as "reconciliation documents" and noted those reflect the total value of packages sold by the Complainant, and only addressed service sales. Based on all of this, the Delegate accepted the Complainant's assertion that "initiated and closed" referred only to sales, and did not inherently require the person selling the treatment to also perform it in order to earn commission.

89. While the Appellant says this finding fails to recognize the practicalities of operating a business, I am not persuaded the Delegate's conclusions in this regard were made without evidence, or on a view of the facts that could not be reasonably entertained. Accordingly, I am also not prepared to interfere with these findings.

Resignation

90. The Appellant says it is clear on the evidence that the Complainant "resigned from her full-time employment," and that this should be sufficient to dispense with the obligation to pay CLOS. They say this resignation was accepted with a two-week notice period. Though the Complainant continued working "on an as needed basis," they say this did not reflect any kind of agreement to continued employment on a part-time basis beyond this notice period.

91. As noted above, the Delegate accepted the evidence of the Complainant on this point, which was that the notice she gave was notice of a reduction in her hours from full-time. The Delegate correctly points out that there is an onus on the Appellant to establish that the Complainant resigned from her employment and concluded that the Appellant had not met that onus.

92. The Delegate did not accept the Appellant's assertions that the Complainant had fully resigned, in the absence of a letter of resignation or a specific date such notice would extend to. The Delegate noted the Complainant continued to work into September, and her status in the Appellant's Payworks software was changed from full-time to part-time.

93. Given the Complainant's continued employment after her expressed desire to work part-time, with no clear end date established on the evidence, I am not persuaded the Delegate erred in law in concluding the Complainant had not resigned her employment in August as maintained by the Appellant.

94. I find this is further reinforced by the fact that the Appellant subsequently issued a letter purporting to terminate the Complainant's employment with cause, something that would have been unnecessary for an employee who had resigned with a clear end-date for her employment. The

termination letter dated September 26, 2022, in fact, indicates "we accepted your resignation as a full-time employee and changed your status to part-time effective September 12th, 2022."

95. Although the word resignation is used, the evidence demonstrates the Appellant continued to employ the Complainant, albeit on a part-time basis, and there was no evidence before the Director that a clear end-date to that employment had been established prior to September 16th, when the Complainant was escorted from the premises.

Termination for Cause

96. The question of whether an employee has been dismissed for cause is one of mixed law and fact. The delegate adjudicating the claim must apply the facts to the relevant legal principles relating to just cause developed under the *ESA*.

97. In the Determination, the Delegate correctly notes, first, that the onus to demonstrate just cause is on an employer. Further, the Delegate acknowledges that a single act of misconduct may constitute just cause.

98. The Delegate reviewed the misconduct alleged and was not persuaded any of these constituted major misconduct capable of supporting just cause in themselves. The Delegate concluded that the Appellant condoned or permitted the Complainant to work simultaneously at another clinic, and was not persuaded there was sufficient, or any, evidence to support the contention that the Complainant had either solicited clients to her new place of employment, or had copied patient files.

99. The Delegate set out the test for just cause where repeated misconduct or poor performance is alleged, noting that it requires demonstration of the following:

1. A reasonable standard of performance was communicated to the employee;
2. The employee was given a reasonable opportunity to meet the standard;
3. The employer warned the employee that failure to meet the standard was serious and would result in termination; and
4. That the employee still did not meet the standard.

100. This is consistent with the vast Tribunal jurisprudence regarding just cause under the *ESA*. (See, for example, *Hall Pontiac Buick Ltd.,* BC EST # D073/96; *Cook,* BC EST # D322/96; *Justason*, BC EST # D109/97; *Chamberlin*, BC EST # D374/97.

101. In *Chamberlin, supra,* the Tribunal noted that:

> the concept of just cause requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that his or her work performance is acceptable to the employer.

102. The Delegate accepted that, through warnings dated August 20, 2022, and September 6 and 16, 2022, the Appellant communicated the expected standards of performance to the Complainant. This notwithstanding, the Delegate was not persuaded that the Appellant had taken the further steps

necessary, which would have included warning the Complainant that failure to meet the standards expected of her could lead to termination, nor was there a sufficient opportunity provided to meet those standards prior to terminating her employment.

103. While the Appellant highlights what they say are serious incidents of misconduct including theft and verbal harassment, I am not persuaded the Delegate failed to give due consideration to all the evidence before her.

104. The Appellant says the Complainant engaged in theft by reallocating sales from others to herself in order to gain commission. While theft, however characterized, may in most or all circumstances be considered a serious workplace offence, the only evidence provided to the Director in support of this allegation is an email dated August 19, 2022, that indicates misallocated sales were being reallocated after an audit. While the email appears to set expectations going forward, it was not indicated be disciplinary in nature, nor does it appear the Appellant characterized it as such during the investigation. Further to this, I note that there is no reference to the actions alleged as theft in any of the warnings dated August 20, or September 6 or 16, 2022.

105. As with theft, there can be no doubt that bullying and harassment may amount to serious workplace misconduct capable of establishing just cause for termination. Although the Appellant says bullying and harassment is unacceptable in any circumstances, the Delegate was not persuaded the evidence before her rose to the level necessary to establish just cause.

106. Though the termination letter dated September 26, 2022, describes the Complainant's conduct as "continued harassment," I note the warnings, instead, refer to "gossip," and "spreading untrue rumors." While these may equate to harassment or bullying, the Delegate concluded instead that they amounted to a series of minor misconduct, even accepting the Appellant's supporting evidence at face value.

107. As noted above, the Delegate concluded that the warnings issued did not sufficiently warn the Complainant of the seriousness of the alleged misconduct, nor was the Complainant given a sufficient opportunity to meet the standards expected of her. While the warnings clearly indicate that what is described as gossip, and spreading untrue rumors, is unacceptable, I am not persuaded the Delegate's findings that they did not convey the seriousness of the misconduct, nor warn that termination may result from continued such misconduct, was made without evidence, or on a view of the facts that could not be reasonably entertained.

108. Further, while the Appellant relies on the September 16th warning in support of a finding of just cause, I note, as did the Delegate, that the date on which this third warning was issued was the date on which the Complainant was escorted from the building and her access to company systems revoked. Although the Delegate acknowledged the Appellant's assertion that the decision to terminate had not yet been made, it was clear the Complainant was not welcome back to the Appellant's premises after the September 16th warning was issued.

109. Given this last fact, and the fact that a formal termination letter followed ten days later, it is difficult to see how the Delegate could have reached any other conclusion than that this third warning did not leave room for any further opportunity to improve, or for the Complainant to meet the standards

expected of her by the Appellant. Accordingly, I am not persuaded that the Delegate's findings were made without evidence, or on a view of the facts that could not reasonably be entertained.

110. For these reasons, I am not persuaded the Delegate erred in law in concluding that the Appellant did not meet its onus of demonstrating that it had just cause to terminate the Complainant, either on the basis that the misconduct alleged was sufficiently serious in itself, or on the basis of repeated misconduct the Complainant failed or refused to correct.

111. Based on all of the foregoing, I deny the appeal.

ORDER

112. Pursuant to section 115(1) of the *ESA*, I confirm the Determination issued February 29, 2024, together with any additional interest that has accrued under section 88 of the *ESA*.

/S/ Ryan Goldvine

Ryan Goldvine
Member
Employment Standards Tribunal