Citation: Dolphin Timber Trading Ltd. (Re)
2024 BCEST 104

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Dolphin Timber Trading Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	M. Diane Irvine
SUBMISSIONS:	Catherine Repel, on behalf of Dolphin Timber Trading Ltd.
FILE NUMBER:	2024/061
DATE OF DECISION:	October 29, 2024

DECISION

OVERVIEW

1. This is an appeal by Dolphin Timber Trading Inc. ("Employer") of a determination dated May 8, 2024, ("Determination"), issued by a delegate ("Delegate") of the Director of Employment Standards ("Director").

2. The Determination held that the Employer contravened section 58 (annual vacation pay) and section 63 (compensation for length of service) of the *Employment Standards Act* (*ESA*) regarding a former employee ("Complainant").

3. The Determination ordered the Employer to pay the Complainant compensation for length of service, annual vacation pay, and accrued interest totalling $11,961.46. In addition, the Determination levied two mandatory administrative penalties, totalling $1,000.00, for a total amount payable of $12,961.56.

4. The Employer appeals on the basis that the Director erred in law and failed to observe the principles of natural justice, and has provided a written submission in support of its appeal.

5. In correspondence dated June 28, 2024, the Tribunal, among other things, acknowledged having received an appeal, requested the section 112(5) record ("record") from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.

6. The Director has provided a copy of the record to the Tribunal and the parties. The parties have been provided with the opportunity to object to the completeness of the record.

7. None of the parties have raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.

8. 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, I find it is unnecessary to seek submissions on the merits from the Complainant or the Director.

9. My decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the Employer's appeal submissions, the Determination, and the Reasons for the Determination ("Reasons").

ISSUE

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

BACKGROUND FACTS

11. The Employer operates a lumber production company in Prince George, B.C., which falls within the jurisdiction of the *ESA*. Brian Jenkins is its sole director and officer.

12. The Complainant was employed by the Employer as a Sawmill Supervisor. The Complainant and Respondent disagree on the start date of the Complainant's employment. The parties do agree that the Complainant was temporarily laid off on November 11, 2022, and was subsequently terminated via text sent by Mr. Jenkins on December 6, 2022. However, they disagree on whether this termination was for just cause.

13. The Complainant filed a complaint under section 74 of the *ESA* alleging that the Employer contravened the *ESA* by terminating his employment without paying compensation for length of service, and by incorrectly calculating the vacation pay owing to him upon his termination based on an incorrect start date. The Complainant and the Employer agree that the Complainant was paid 4% vacation pay for all hours worked during the course of his employment. However, under section 58 of the *ESA*, an employee is entitled to be paid 6% vacation pay after five years of continuous service. The Complainant's position was that his employment exceeded five years, and so he was owed additional vacation pay.

14. Another delegate of the Director ("Investigating Delegate") investigated the complaint. As part of the investigation, the Investigating Delegate communicated with the Complainant and with Brian Jenkins, as the Employer's representative. In addition, the Investigating Delegate also received evidence from several witnesses.

15. The record shows the Investigating Delegate provided both the Complainant and the Employer's representative with the opportunity to provide information and documents on relevant issues, and to respond to evidence presented by the other party and by the witnesses.

16. The Investigating Delegate provided the parties with an investigation report dated December 13, 2023 ("Investigation Report"), which set out the positions and evidence received to date. The Investigating Delegate's cover letter asked the Complainant and the Employer to review the Investigation Report carefully, and to respond if they wanted to provide clarifications or additional relevant information as the Investigation Report and any responses would be considered in making a final determination regarding the Complaint. Both parties provided responses. Subsequently, on January 17, 2024, the Investigating Delegate provided the Employer with cross-disclosure of new information provided by the Complainant as well as the opportunity for a further response.

Evidence re Length of Service

17. As noted, the parties disagree on the start date of the Complainant's employment. The Employer's position is that the Complainant's length of service began on May 4, 2021, when he began working for the Employer. The Complainant's position is that his service was, under section 97 (Sale of business) of the *ESA,* continuous and uninterrupted from a predecessor employer, Longwood Productions Ltd ("Longwood"), and so began on October 11, 2016.

18. In May 2021, the Employer entered into an agreement with Longwood for, among other things, the purchase of equipment related to a sawmill business. The parties disagree on what the impact was to Longwood's employees at that sawmill.

19. The Complainant's position is that his employment was continuous before and after the sale. He told the Investigating Delegate that there was no paperwork involved, and that everything stayed the same.

20. The Employer's position is it purchased assets only, that Longwood retained liability for its employees, and any employment with the Employer subsequent to the transaction was new employment. Mr. Jenkins gave oral evidence that the Employer only purchased equipment from Longwood; it did not purchase Longwood's business as a going concern, nor was the employment of any employee transferred. He did agree that some of Longwood's employees began working for the Employer. He does not recall speaking to the employees specifically, but said they all knew what was happening and that they should continue on. He told the Investigating Delegate that the employees continued working the same shifts and the same hours, with no break in pay or work schedule. They were not offered a new contract.

21. During the investigation, the Employer was provided the opportunity to provide documentary evidence to support its position, such as a copy of its agreement with Longwood, but did not do so.

22. The Investigating Delegate contacted Longwood's former owner, Witness A. Witness A told the Investigating Delegate that he didn't terminate any of Longwood's employees as a result of the agreement he entered into with the Employer, or serve any of them with notice of termination. He said that there was language in the sales agreement that the employees would not be terminated. Further, he said that the employees understood there was a sale happening and chose to continue working.

23. In a follow up email, Witness A provided the Investigating Delegate with an unsigned copy of a sales agreement between the Employer and Longwood ("Draft Agreement"). His email stated in part:

> Attached please find the main contents of the Sale of Business Agreement from Longwood Productions Ltd. To Dolphin Timber Trading Ltd. I have marked relative [sic] clauses in yellow for your reference.
>
> Essentially, Dolphin wished to take over the Equipment and operation as a going concern, with the benefit of a trained crew. There was no gap between May 3 and May 4 – operations continued seamlessly.

24. The Draft Agreement expressly included a condition that the Employer would assume operations of the sawmill as a going concern and continue the employment of the employees currently employed. The agreement also provided that the purchaser would provide written offers of employment to every employee employed by Longwood (who were referred to as "Transferred Employees"), subject to the successful closing of the transaction. The only exception was for employees who were in receipt of disability benefits, who would not be considered Transferred Employee and would remain the full responsibility of Longwood.

25. The Investigating Delegate followed up with Mr. Jenkins regarding the Draft Agreement and Witness A's statements about the continuing status of the affected employees. Mr. Jenkins did not agree that the Complainant's employment was continuous, stating that Longwood's employees had quit and so were not entitled to compensation for length of service in respect of their employment at Longwood. Mr. Jenkins declined the Investigating Delegate's offer to send him a copy of the Draft Agreement, stating that he had one.

26. In response to being provided with the Investigation Report, Mr. Jenkins said that the Draft Agreement was fraudulently dated, and that there were revisions prior to the final copy. However, Mr. Jenkins did not provide any documents to support these allegations, citing an ongoing legal dispute with Witness A. Mr. Jenkins also asserted that the Complainant and Witness A were best friends.

Evidence re termination

27. Mr. Jenkins initially told the Investigating Delegate that he tried to recall the Complainant, who failed to respond to the texts recalling him and then quit.

28. The Complainant provided the Investigating Delegate with a copy of texts between himself and Mr. Jenkins between November 19, 2022, and December 6, 2022. In November, Mr. Jenkins said "Work Tuesday I think". The following text was on the morning of December 6, 2022, when he indicated "We're back to work. Are you coming back?" However, that afternoon at 5:48 pm he wrote again that he had heard the Complainant was "bad mouthing us," and said "so can you just give the key to Ryan please and we will send you a quit [*sic*]." The Complainant responded that he hadn't heard from Mr. Jenkins in weeks, since November 20th, and had not been kept in the loop as promised. He had been expecting termination pay as Mr. Jenkins had not tried to reach him and "the guys have communicated with you several times."

29. The Investigating Delegate asked Mr. Jenkins about the text in which he asked the Complainant to return his keys. In response, Mr. Jenkins said that he had just cause to terminate, due to defamation. The Investigating Delegate asked him to provide any evidence he had of defamation.

30. As evidence of defamation, the Employer provided a series of text messages between Mr. Jenkins and from another of its employees ("Witness B") who is the Complainant's brother and was also employed by the Employer as a sawyer. Only three of these text exchanges appear to precede the Complainant's termination.

a. The first exchange occurs on November 30, 2023, and December 1, 2023. Mr. Jenkins sent a recall notice via text, and Witness B indicates he had Covid and would send a message when he felt better.

b. The second exchange is a text from Mr. Jenkins dated November 30, 2023, in which Mr. Jenkins asks Witness B to contact him regarding a return to work. Witness B did not reply.

c. The third is dated December 6, 2023. At 5:34 pm, Witness B sent a text indicating that he will not be returning to work until "you pay your bills and get the equipment fixed," and alleging that Mr. Jenkins had lied to him about communicating with the Complainant as he had not texted or emailed or tried to phone the Complainant. He indicated he would not return until "you fix everything with [the Complainant] and the equipment" and

expressed a hope that these issues could be resolved. In the meantime, he would not return. Mr. Jenkins sent a series of texts in response.

31. The Investigating Delegate spoke to Witness B about his recollection of events during this time and what he remembered about the texts between himself and Mr. Jenkins. Witness B indicated he had a different phone and no longer had access to those texts, but the contents as described to him by the Investigating Delegate sounded reasonable. He didn't know what happened between the Complainant and Mr. Jenkins, only that the Complainant said he was fired and Mr. Jenkins said the Complainant had quit.

32. The Employer also provided a text between himself and an independent contractor ("Witness C").

33. Witness C told the Investigating Delegate that he met the Complainant only once, sometime in November 2022. The Complainant had the only key to the mill and had instructed Witness C to get it from him. Witness C told the Investigating Delegate that they had a short conversation during which he asked if the Complainant was returning and the Complainant replied that, "No, I'm done, I'm out of here."

34. The Complainant denies telling Witness C that he had no intention to return, indicating that he would have no reason to say anything to Witness C and met Witness C only to let him into the sawmill.

35. The Complainant denied defaming the Employer. He stated that he didn't tell anyone that there were problems. He and a few other employees did speak to each other about the situation but they were all saying the same things.

The Determination

36. In her Reasons, the Delegate states that she reviewed all the information in the complaint file, including the Investigation Report and the responses of both of the parties to the Investigation Report.

37. The Delegate determined that that the Complainant's service was continuous from October 11, 2016, to December 6, 2022, pursuant to section 97 of the *ESA*. Section 97 provides as follows:

> **Sale of business or assets**
>
> 97. If all or part of a business is disposed of, or the business continues to operate under a receiver or receiver manager, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition or receivership, as applicable.

38. The Reasons stated that the Delegate considered all of the evidence, including the information provided by Witness A and that provided by the Employer, concerning the agreement between Longwood and the Employer, but that she found the information provided by Witness A to be more credible. She concluded that Longwood's sawmill business had been sold as a going concern, and that this included the employment of Longwood's employees, including the Complainant.

39. Consequently, the Delegate determined that the Complainant had completed five years of service as of October 11, 2021, and under section 58 of the *ESA* was entitled to receive 6% vacation pay as

of October 12, 2021, until the end of his Employment, rather than the 4% vacation pay that he had received.

40. The Delegate further determined that the Employer had not met its burden of establishing just cause for termination. In her Reasons, the Delegate set out that an Employer who seeks to rely on just cause has the burden of proving that just cause exists. The Reasons briefly set out the test for just cause, and then state that the first step in establishing whether just cause existed was to identify whether an employee has committed an act of misconduct. In this case, the alleged misconduct was defamation, which the Reasons defined as the act of communicating to a third-party false statements about a person that result in damage to that person's reputation. However, having reviewed the text messages provided by the Employer, the Delegate did not find support for the Employer's allegations that the Complainant had defamed or badmouthed the Employer. The Delegate concluded that the Employer did not meet its burden of establishing that it had just cause, and so the Complainant was entitled to compensation for length of service.

THE EMPLOYER'S APPEAL

41. As noted above, the Employer appeals the Determination based on both the "error of law" (section 112(1)(a)) and "natural justice" (section 112(1)(b)) statutory grounds of appeal.

42. The Employer says the Delegate disregarded Mr. Jenkins' direct oral evidence regarding the Complainant's length of service and whether there was just cause in its entirety without proper explanation, leading to conclusions made based on inappropriate evidence which resulted in an unfounded and/or unsupported conclusion.

43. The Employer also says the Delegate failed to consider whether the Complainant had acted in a manner which is inconsistent with their continued employment, and by failing to set out the test it was applying to find that the Complainant did not defame the Employer.

44. Finally, the Employer says given the procedure used by the Director in which an Investigating Delegate conducts an investigation and submits their findings to a second Delegate to make a determination, that process did not provide the Employer with an adequate measure of procedural fairness. Specifically, the Employer is concerned that the Delegate did not hear Mr. Jenkin's oral evidence directly from him in order to assess its credibility and/or reliability.

FINDINGS AND ANALYSIS

45. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the ESA, which says:

> 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.

46. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

47. The Employer argues error of law and failure to observe principles of natural justice.

48. The Tribunal has 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 (BC CA), [1998] B.C.J. No. 2275 (B.C.C.A.):

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.

49. A disagreement with a finding of fact does not amount to an error in law unless the finding was not grounded in the evidence. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

50. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate.

51. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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

52. In other words, this ground of appeal is about whether the process in coming to the Determination was fair. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker: *CCON Recon Inc. and CCON Metals Inc.*, 2022 BCEST 26 at para. 62.

53. The burden of proving an error of law or a failure to comply with the principles of natural justice rests on the party making the allegation.

54. I have carefully reviewed the Record and the Employer's appeal submission, and I find no basis to interfere with the Determination on any ground of appeal.

55. The Employer argues that the Delegate did not fully apply the test for just cause, providing no analysis or consideration to one of the two branches of the test. The Employer further argues that the Delegate did not set out what test was being used to determine that the Complainant had not defamed the Employer before finding that Employer had not established that defamation occurs. I cannot agree.

56. Though it does so briefly, the Reasons sets out that just cause can be made out either when an employee has either performed minor misconduct over a period of time or when the employee has acted in a manner which is inconsistent with their continued employment. The Reasons then state that the first step in establishing whether just cause existed was to identify whether an employee has committed an act of misconduct. The Delegate provided a definition of defamation, namely the act of communicating to a third-party a false statement about a person that resulted in damage to that person's reputation. The Delegate then considered whether there was support for the allegation that the Complainant had indeed committed misconduct in the form of defamation.

57. It appears that the Employer believes that the "first step" referred to by the Delegate applies only to the first branch of the test for just cause, when the employee has performed minor misconduct over a period of time, and so failed to consider the second branch of the test, which is acting in a manner which is inconsistent with continued employment. However, that second branch is also misconduct. The first step in either branch of the test is to determine whether or not an employee has indeed committed an act which can be said to be misconduct, whether it is minor or more serious and thus inconsistent with continued employment.

58. In reviewing the Reasons, the Delegate clearly applied the standard for defamation which she set out in the Reasons. The Delegate reviewed the text messages provided by the Employer in support of its position that it had just cause for termination because the Complainant had defamed the Employer to "everyone." The Delegate concluded that the information provided by the Employer did not set out what was said by the Complainant that was defamatory, to whom it was spoken, how that information was inaccurate, and/or somehow defamed the Employer.

59. The Employer also argues that the Delegate disregarded Mr. Jenkins's direct oral evidence with respect to the existence of just cause in its entirety without proper explanation. The Tribunal has said that it should be cautious in attempting to determine whether a delegate considered "all of the evidence," as this can come very close to a reassessment of the delegate's findings of fact, which is not an assessment that the Tribunal is typically permitted to undertake: see *Regent Christian Academy Society, c.o.b. Regent Christian Online Academy, BC* EST # D011/14 at para. 36 [RCOA], quoting Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2009, loose-leaf). Here, I am not persuaded that the Delegate disregarded evidence. The burden of proving just cause is on the Employer: *McCall Bros. Funeral Directors Ltd. v. Employment Standards et al*, 2000 BCSC 1507. The Reasons establish that the Delegate did consider the Employer's allegations of just cause, but found that the Employer did not provide sufficient evidence to meet this burden.

60. Similarly, I do not accept that the Delegate disregarded Mr. Jenkins's direct oral evidence with respect to the Complainant's length of service in its entirety without proper explanation. The Delegate clearly stated that she preferred the information provided by Witness A to that of Mr. Jenkins as she found it to be more credible. This information included both oral evidence, as well as supporting documents. While the Employer alleged that the Draft Agreement was not the final agreement, Mr. Jenkins declined to provide supporting documents in support of this assertion. In my view, it is appropriate to draw an adverse inference (in this case, against the Employer) where particular information could have been rebutted, but was not.

61. Finally, I address the Employer's argument that the investigation and determination process used by the Director does not provide adequate procedural fairness because the Delegate did not hear Mr. Jenkins' oral evidence directly, but rather reviewed it by way of reviewing the Investigating Delegate's Investigation Report and the rest of the information in the complaint file.

62. It is unclear from the Employer's submission whether the Employer believes an oral hearing should have been offered, or if it would have been adequate to have the Investigating Delegate also be the delegate who made the Determination. In any event, the Employer did not apply for an oral hearing.

63. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.

64. Several factors inform the content of the duty of fairness. These include the nature of the decision being made, the nature of the statutory scheme and the terms of the statute under which the administrative decision was made, the impact of the decision on the individual, any legitimate expectations occasioned by agency promises or procedural practices and the agency's own choice of procedures made in light of its institutional constraints*: Baker v. Canada (Minister of Citizenship and Immigration) (1999),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817

65. Here, the *ESA* does not require that the delegate who investigates a complaint also be the one to make the determination. Sections 78.1 and 78.2 of the *ESA* arguably contemplate a bifurcated process. It was open for the Director to make that choice of procedure.

66. Further, the decision to provide an oral hearing is discretionary, pursuant to section 77.1 of the *ESA*. The Branch and the Director's delegates do not have unlimited resources to adjudicate, investigate and determine each complaint. Section 2 of the *ESA* provides for the "fair treatment" of both employees and employers, and "fair and efficient procedures for resolving disputes over the application and interpretation" of the *ESA*.

67. However, it is clear from the Record that the Employer was given adequate opportunity to know the case against it, and to respond to it. The Investigating Delegate contacted the Employer on multiple occasions, provided the Employer with the chance to provide information and documents, and to respond to information and documents provided by the Complainant and witnesses. The Employer was provided the opportunity to review the Investigating Delegate's Investigation Report, and to provide any clarifications or additional information relevant to the Complaint. The Employer was

given a meaningful opportunity to be heard. A fair hearing, in this context, did not require providing oral evidence directly to the Delegate who made the Determination.

68. In conclusion, I am satisfied that the Employer did not meet its burden to persuade the Tribunal that the Delegate erred in law, or failed to observe the principles of natural justice in making the determination.

ORDER

69. Pursuant to sections 114(1(f) and 115(1)(a) of the *ESA*, this appeal is dismissed, and the Determination is confirmed as issued in the total amount of $12,961.46, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

/S/ M. Diane Irvine

M. Diane Irvine
Member
Employment Standards Tribunal