Employment Standards **TRIBUNAL**

Citation: PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd., and 0922182 B.C. Ltd. (Re)
2024 BCEST 65

EMPLOYMENT STANDARDS TRIBUNAL

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

- and -

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

- by -

PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd.,
and 0922182 B.C. Ltd.

("Appellants")

– of a Determination issued by –

The Director of Employment Standards

PANEL:	David B. Stevenson
SUBMISSIONS:	Kerem Tirmandi, on behalf of PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd., and 0922182 B.C. Ltd.
FILE NUMBER:	2024/010
DATE OF DECISION:	July 25, 2024

DECISION

OVERVIEW

1. PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd., and 0922182 B.C. Ltd. (collectively, "Appellants") have filed an appeal under section 112 of the *Employment Standards Act* (*"ESA"*) of a determination issued by Kirsten Dzavashvili, a delegate of the Director of Employment Standards ("deciding Delegate"), on December 29, 2023 ("Determination").

2. The Determination found the Appellants had contravened Part 7, section 58 and Part 8, section 63 of the *ESA* in respect of the employment and termination of Jennie Deneka ("Ms. Deneka"). The Determination ordered the Appellants to pay Ms. Deneka wages in the total amount of $26,000.01, interest under section 88 of the *ESA* in the amount of $3,660.52, and to pay administrative penalties in the amount of $1,000.00. The total amount of the Determination is $30,660.53.

3. The Appellants challenge the Determination, alleging the deciding Delegate committed errors of law and failed to observe principles of natural justice in making the Determination. The appeal also raises the ground of appeal set out in section 112(1)(c): new evidence becoming available that was not available at the time the Determination was made.

4. The appeal seeks to have the Tribunal allow the appeal, cancel the Determination, order Ms. Deneka to pay the Appellants the amount of $25,383.81 – which is alleged to be the amount Ms. Deneka was overpaid for annual vacation pay – or, alternatively, to refer the matter back to the Director of Employment Standards.

5. The Appellants have also requested the Tribunal to exercise its discretion under section 113 of the *ESA* to suspend the effect of the Determination pending the appeal.

6. In correspondence dated March 1, 2024, the Tribunal acknowledged having received the appeal and, among other things, requested the section 112(5) record ("record") from the Director, advised the parties of their right to make a submission on document disclosure, and notified the parties that no submissions were being sought from any other party on the merits pending a review of the appeal by the Tribunal.

7. The record has been provided to the Tribunal by the Director. A copy has been delivered to Ms. Deneka and the Appellants. An opportunity has been provided to both to object to its completeness.

8. Ms. Deneka, through her counsel, has indicated the record does not include a document which she says was provided to the delegate of the Director who was investigating her complaint ("investigating Delegate").

9. The Appellants confirm all of the documents submitted by them during the complaint investigation are included in the record, noting the absence of the "supporting documents" attached to the appeal, which were not provided during the complaint process and are the subject of the 'new evidence' ground of appeal, and identifies what it perceives to be discrepancies in the record.

10. The deciding Delegate has submitted a response, identifying the location in the record of three accreditation letters and asserting there is no indication in the file that the document referred to by Ms. Deneka was ever submitted during the complaint process.

11. The Appellants and Ms. Deneka were invited to make a final reply to the deciding Delegate's submission but have not.

12. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed by the Appellants with the appeal, any additional evidence accepted and considered by this panel in the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:
>
> (a) the appeal is not within the jurisdiction of the tribunal;
>
> (b) the appeal was not filed within the applicable time limit;
>
> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the appeal was made in bad faith or filed for an improper purpose or motive;
>
> (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
>
> (f) there is no reasonable prospect that the appeal will succeed;
>
> (g) the substance of the appeal has been appropriately dealt with in another proceeding;
>
> (h) one or more of the requirements of section 112 (2) have not been met.

13. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Ms. Deneka will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

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

THE BACKGROUND FACTS

15. The Appellants are part of a limited partnership, West Coast Seniors Housing Management LP ("WCSHM"), which operates several seniors living facilities in the province.

16. Ms. Deneka was originally hired as the Vice President, Operations by Retirement Concepts and Well Being Seniors Services Ltd. That company was sold to WCSHM in February 2017 and WCSHM took over her employment contract. Ms. Deneka was promoted to Chief Operating Officer (COO) on June 7, 2017. As COO, she oversaw 23 facilities in B.C. and Alberta.

17. Under her employment contract, Ms. Deneka was entitled to 20 annual vacation days a year. These vacation days were available to use at the beginning of the calendar year. When the full year was not worked, vacation days were prorated. Ms. Deneka was allowed to carry over any unused vacation days to the next year.

18. Ms. Deneka was terminated on June 9, 2020, and filed a complaint alleging WCSHM had contravened the *ESA* by failing to pay all vacation pay owing and failing to pay compensation for length of service.

19. The Employer contended Ms. Deneka had been paid all vacation pay owing and was terminated for just cause.

20. The investigating Delegate investigated the complaint and issued an Investigation Report ("IR") which was delivered to each party, who were provided the opportunity to respond to it. Each party provided a response.

THE DETERMINATION

21. The deciding Delegate identified three issues: what was Ms. Deneka's rate of pay; whether Ms. Deneka was owed annual vacation pay; and whether Ms. Deneka was entitled to compensation for length of service.

22. The deciding Delegate summarized the information provided by each party during the investigation that was set out the IR. A summary of the positions of Ms. Deneka and of the Appellants is set out at pages R3 to R10 of the Reasons for Determination ("reasons").

23. On the first issue, the deciding Delegate found Ms. Deneka's rate of pay was an annual salary of $200,000.16.

24. On the second issue, the deciding Delegate found Ms. Deneka was owed 13 days annual vacation pay. In making this finding, the deciding Delegate found Ms. Deneka had a total entitlement at termination of 39.04 days, basing that finding on information contained in the Appellant's ADP Workforce Software (the "ADP System") as of May 31, 2020, which showed Ms. Deneka had 30 days of annual vacation carryover, and uncontested evidence that Ms. Deneka was entitled to 9.04 days of annual vacation entitlement for the year 2020. Ms. Deneka was paid for 26.04 days of accrued annual vacation on termination and this payment was credited to the Appellants in the deciding Delegate's calculation.

25. On the third issue, the deciding Delegate set out the principles which applied to this issue; analyzed the position of the parties in the context of those principles and the evidence provided; and reached a conclusion on that analysis, finding the Appellants had not established there was just cause for terminating Ms. Deneka and she was entitled to compensation for length of service in the amount set out in the Determination.

26. The deciding Delegate found the Appellants had contravened sections 58 and 63 of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENT

27. The Appellants have raised all of the grounds of appeal: error of law; failure to observe principles of natural justice in making the Determination; and evidence becoming available that was not available at the time the Determination was being made.

Error of Law

28. The error of law ground of appeal is raised in respect of the decisions on section 58 and section 63.

a. Section 58

29. The Appellants submit the deciding Delegate erred in law by: misinterpreting and/or misapplying the *ESA*; acting without any evidence; and adopting a method of assessment which was wrong in principle.

30. The Appellants advance the following assertions:

i. the Appellants fulfilled their obligation to maintain vacation records in accordance with section 28 of the *ESA*, and produced the vacation records for Ms. Deneka in the proceedings;

ii. the ADP System accurately accounted for all the vacation days Ms. Deneka personally recorded into the ADP System;

iii. the Appellants cannot be held responsible for the failure of Ms. Deneka to properly record her vacation time when she was required to do so;

iv. an interpretation of Section 28 that would require the Appellants to ensure Ms. Deneka accurately and honestly reported her vacation time, the results "would be patently unfair and undermine the principle of mutual responsibility in the employment relationship";

v. the deciding Delegate erred by finding the screenshot of the ADP System was evidence that Ms. Deneka had accrued 30 days annual vacation days as of May 31, 2020; and

vi. the deciding Delegate erred in law by accepting the ADP System screenshot as evidence that Ms. Deneka had accrued 30 days annual vacation entitlement over the evidence submitted by the Appellants, that she had failed to record 46 vacation days into the ADP System.

b. Section 63

31. The Appellants argue the deciding Delegate made errors of law by: ignoring the "principle that . . . when an employee's performance or incompetence poses a serious risk to health and safety, immediate dismissal may be justified without the need for prior warning"; or alternatively, by finding the Appellants were required to clearly communicate to Ms. Deneka their concerns, to advise her that her employment was in jeopardy, and to provide a meaningful opportunity to respond to the concerns raised in the letter of June 2, 2020.

Natural Justice

32. Under this ground of appeal, the Appellants submit the deciding Delegate "violated the principle of natural justice by disregarding the assessment of [the investigating Delegate], regarding the sufficiency of [their] evidence" on the vacation pay issue. The argument made here addresses the decision of the deciding Delegate to prefer the evidence in the ADP System, that Ms. Deneka had 30 days of accrued annual vacation, over the allegations of the Appellants that she had taken 46 vacation days that were not recorded in the ADP System.

33. The Appellants submit the deciding Delegate's decision contradicts a conclusion reached by the investigating Delegate that the evidence they had provided was sufficient to establish that Ms. Deneka had failed to record 46 days in the ADP System.

New Evidence

34. The Appellants have attached several documents to their appeal that were not provided during the complaint process. They are:

i. ADP time off balance sheets, comprising 2 pages;

ii. A Time Off Balance Detail sheet of one page;

iii. ADP calendar entries, comprising 52 pages; and

iv. Three pages listing 'Transactions' that are not specifically identified.

35. The above documents are being considered in the context of whether or not they will be accepted as new evidence and considered in the appeal. To clarify a point raised by counsel for the Appellants in a communication to the Tribunal dated May 1, 2024, these documents will not be considered on the merits of the appeal unless they are accepted as new evidence under section 112(1)(c).

36. The appeal submission also attaches 95 pages of material that are contained in the record. The appeal submission does not contend this material should be considered new evidence and it does not need to be addressed under this ground of appeal.

37. While not specifically acknowledging the material sought to be admitted as 'new evidence' was available at the time the Determination was being made, the Appellants submit the material was "effectively unavailable" because the Appellants say its absence was a violation of principles of natural justice.

38. The Appellants say the material sought to be introduced with the appeal should be admitted because, they allege, the investigating Delegate 'assured' them that "no further evidence was necessary, beyond wage statements, to substantiate its position that [Ms. Deneka] was overpaid vacation pay" (para 48, appeal submission).

39. The Appellants submit the evidence is relevant, credible, and highly probative.

ANALYSIS

40. 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.

41. 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.

42. 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.

43. The facts upon which this appeal must be based are those found by the deciding Delegate in the reasons for Determination, and supported by the record, unless such findings constitute an error of law.

New Evidence

44. I shall first address the new evidence ground of appeal.

45. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations: whether such evidence was reasonably available and could have been provided during the complaint process; whether the evidence is relevant to a material issue arising from the complaint; whether it is credible, in the sense that it be reasonably capable of belief; and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.

46. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the

determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.

47. I will note here that prior to 2002, the grounds of review did not include the current section 112(1)(c). Decisions of the Tribunal discussing admissibility of new evidence before the amendments to section 112 in 2002, or which do not consider this ground of appeal against the considerations set out in *Davies*, *supra.*, are not helpful.

48. For the reasons stated below, I find the material submitted with the appeal, but not provided in the complaint process, does not satisfy the conditions for allowing it as 'new evidence' and I exercise my discretion not to accept it.

49. To reiterate what is said above, the material has been submitted in an attempt to alter the decision of the deciding Delegate to accept the ADP System screenshot as the best evidence that as of May 31, 2020, Ms. Deneka had 30 vacation days carried over from previous years.

50. There are several elements of the record and the Determination, including the reasons, that lead me to exercise my discretion against accepting the material presented as 'new evidence':

- Primarily, none of the material is 'new.' If the submissions of the Appellants about this 'evidence' is accepted, the documents must have existed at the time the complaint of Ms. Deneka was investigated and decided. The Appellants do not argue otherwise, but have advanced an argument that avers this evidence was 'effectively unavailable.' Even if I accepted the proposition that there can be evidence which is 'effectively unavailable,' I do not accept the information contained in the material submitted as 'new evidence' was ever 'effectively unavailable.'
- If the material existed during the investigation, I find there is no reasonable explanation for failing to provide it to the investigating Delegate.
- The only explanation for the failure to submit this material during the complaint process is that the investigating Delegate "informed the Appellant, that its evidence *was sufficient* to establish that Employee failed to record 46 vacation days in the ADP system." I reject this contention, and point to the following elements of the record:
    1. At page 103 of the record (page 9 of the IR), the investigating Delegate notes the Respondent stating that the March 9, 2020, email from Ms. McFarlane, the contents of which are referred to below, was "*based off of the summary of vacation days documented in the payroll system"* (emphasis added);
    2. At page 176 of the record, there is an email dated September 14, 2022, from Irfan Ali, who was at the time legal counsel for the Appellants, to Henry Lu, at that time the Chief Financial Officer of the Appellants, Julia Horn, at that time the Director of Human Resources for the Appellants, and Joon Oh, at that time the Manager – Payroll & Benefits for the Appellants, which includes the following statements: "I still require proof of the vacation days Jennie took before her termination" and, "we need to account for 31 unpaid vacation days." See also the email at page 183 of record, where, as of July 21, 2020, legal counsel was continuing to seek all supporting documents relating to Ms. Deneka's vacation claim;

3. At page 177 of the record there is an email dated September 13, 2022, from legal counsel for the Appellants to Julia Horn asking, "Do we have any confirmation of the vacation taken versus paid out? We need to respond to the Employment Standards Tribunal [sic] by this Thursday";

4. At page 170 of the record, the following is included in a submission from legal counsel for the Appellants to the investigating Delegate, identified as, "Ms. Deneka vacation Response to the Employment Standards Branch – September 15, 2022":

> The email from Thao McFarlane dated March 9, 2020 in Ms. Deneka's evidence package states that Ms. Deneka had 31 days in total for vacation days which were carried over from previous years and 20 days on the current (2020) year. McFarlane responded to Ms. Deneka's request on March 9, 2020 after a quick review of the time on the ADP Workforce software.
>
> After sending the email on March 9, 2020 to Ms. Deneka, Ms. McFarlane conducted a further review of the information on ADP Workforce software and discovered that Ms. Deneka had 30 days carry over instead of the previously stated 31 days.
>
> To confirm the information on the ADP Workforce site, "*Ms. McFarlane reviewed Ms. Deneka's online calendar and had discussions with team members to verify her actual vacation days*." As a result of this exercise Ms. McFarlane discovered that Ms. Deneka had taken off numerous days which were not recorded on the ADP Workforce software by Ms. Deneka or her assistant. I've attached a spreadsheet which shows that between February 29, 2016 to June 9, 2020, Ms. Deneka was entitled to 86 vacation days. (emphasis added)

51. The September 15, 2022, submission from legal counsel for the Appellants, which occupies 49 pages in the appendix to the IR, appears to be nothing less than their complete response to Ms. Deneka's vacation claim. The material submitted as 'new evidence' was never provided. It defies logic this material, which the Appellants assert in this appeal is relevant, credible, and highly probative, was not included. A reasonable inference is that either it did not exist in any form the Appellants felt was 'relevant to a material issue' or it would not be helpful to their position.

52. I do not find the information submitted under this ground of appeal to be particularly credible. Of particular concern is that both the ADP balance sheet and the ADP calendar appear to be of recent origin. The dates on the documents indicate the time off balances in them are as of '27/11/23', which is counterintuitive to these records providing information as of May 31, 2020. There would be no reason to 'update' them as Ms. Deneka was terminated June 9, 2020.

53. There is no reference to the ADP balance sheet and the ADP calendar in any of the record or IR.

54. If these documents existed during the investigation, there is no rational explanation for them not being provided to legal counsel for the Appellants in response to his September 14, 2022, email to Henry Lu, Julia Horn, and Joon Oh, or even referred to, at least indicating they existed.

55. In my view, the so-called 'new evidence' does little more than attempt to prop up assertions made during the investigation without apparent regard to the finding of the deciding Delegate that the

Appellants had not provided records showing there were 46 vacation days taken by Ms. Deneka that were not recorded as such by her.

56. Also, the ADP balance sheet and the ADP calendar which indicates 43 'vacation days' were recorded for Ms. Deneka between August 2016 and September 2019, is inconsistent with the position taken by the Appellants, and supported by evidence they provided, that Ms. Deneka had carried over, and accrued, 30 vacation days as of May 31, 2020. Based on the ADP balance sheet, the ADP calendar, and the undisputed information provided during the investigation – that Ms. Deneka was entitled to at least 75 vacation days up to the end of 2019 and 9.04 days for 2020 – these records, if provided, would have shown Ms. Deneka had accrued vacation entitlement as of May 31, 2020, of *42 days*, not 30, and shown, when the prorated days are added, an entitlement at termination of 51.04 days (75 - 43 = 42 + 9.04). This is 25 days more than what she was paid out by the Appellants on termination and 12 days more than what the deciding Delegate found she was entitled to.

57. If the Appellants are suggesting, as noted at para. 48 of their appeal submission, the ADP balance sheet and the ADP calendar were "previously available," their representation that their records showed Ms. Deneka had accrued 30 vacations days as of May 31, 2020, was knowingly wrong.

58. The point is that in all of this, there is nothing that persuades me that the material submitted is sufficiently credible to satisfy that condition.

59. Nor am I persuaded the 'new evidence' is probative in the sense required when considering this ground of appeal. The Appellants contend Ms. Deneka took 46 vacation days without a proper recording. The support provided for that assertion are emails and Ms. Deneka's calendar. The deciding Delegate found, and I accept this finding, rejecting the Appellants contention to the contrary, that the Appellants failed in their statutory responsibility to maintain the records required by section 28 (1) (i): the dates of the annual vacation taken by an employee, the amounts paid by the employer, and the days and amounts of vacation pay owing. In my view, the 'new evidence' submitted does nothing to change that finding. In other words, nothing in the material advanced establishes there were 46 days which Ms. Deneka took as vacation and did not record. The material might in fact change the result in Ms. Deneka's favour, but she has not appealed the Determination and such speculation does not affect my view of its probative value relative to this appeal.

60. In sum, this ground of appeal is not established and the material advanced as 'new evidence' is not accepted.

61. This appeal will be decided on the facts as found by the deciding Delegate unless those findings are shown to be an error of law.

Error of Law

62. 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] 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.

a. Section 58

63. On the arguments raised on section 58, I find the Appellants have failed to show an error of law in any aspect of the decision of the deciding Delegate.

64. The Appellants argue the deciding Delegate, in considering Ms. Deneka's vacation entitlement claim, misinterpreted or misapplied section 28 of the *ESA* by finding the Appellants had contravened the statutory requirement in that provision to keep a record of the dates of the annual vacation taken by Ms. Deneka, the amounts paid by the employer, and the days and amounts of vacation pay owing to her.

65. Within that argument, the Appellants assert they fulfilled their obligation to maintain vacation records in accordance with section 28. This contention directly challenges an explicit finding of fact made by the deciding Delegate, that the Appellants did not comply with requirements of section 28, which is not shown, or even argued, to be an error of law; it is based on a view of the requirements of section 28(1)(i) that, on the clear words of the provision, cannot rationally be supported, and I categorically reject it.

66. The Appellants say the deciding Delegate erred in law on the facts by making the Determination without evidence and/or adopting a method of assessment that is wrong in principle.

67. On the first point, the Appellants say the deciding Delegate accepted Ms. Deneka's account of vacation time without corroborating evidence. That is simply wrong. What the deciding Delegate found was that, as of May 31, 2020, Ms. Deneka had 30 vacation days carried over from previous years. This finding was *based on evidence provided by the Appellants* – evidence they have since spent considerable effort attempting to resile from. This argument is completely meritless and is rejected.

68. On the second point, the Appellants assert the deciding Delegate erred by accepting the screenshot as evidencing the number of vacation days carried over from previous years, while "wholly discounting evidence that clearly demonstrated that the Employee was not properly recording her vacation time into the ADP System." That argument is an incorrect reading of the deciding Delegate's finding, which was that the Appellants had failed to show Ms. Deneka was not recording her vacation days, and I reject it. I also reject the notion that the deciding Delegate accepted the screen shot as "categorical proof" of Ms. Deneka's vacation taken. The Appellants presented the screenshot as showing the number of vacation days Ms. Deneka had accrued to May 31, 2020, and the deciding Delegate accepted it on that basis.

69. I find no merit in this argument.

70. To the extent the decision to accept the ADP screenshot at face value was a 'weighing of evidence,' it is well established that assessing the weight of the evidence is within the purview of the deciding Delegate and this Tribunal should not intervene lightly. The deciding delegate may prefer some evidence over other evidence.

71. I am satisfied, based on the reasons provided, and in the context of all the evidence, that the deciding Delegate's decision to accept the ADP screenshot as the best evidence was sound; more specifically, it has not been shown to be an error of law.

b. Section 63

72. Relating to the finding in the Determination on section 63, I will note at the outset that the question of whether an employee has been dismissed for cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco Structures Ltd.*, BC EST # D260/03, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests." A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

73. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, *supra*. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

74. At its root, the Appellants' dispute with the Determination is simply a disagreement with the conclusion of the deciding Delegate that the circumstances did not show just cause to terminate Ms. Deneka's employment.

75. The principles for examining cases raising the question of whether there is cause for dismissal that have been developed under the *ESA* are well established, have been consistently applied, and are expressed as follows (see *Kruger*, BC EST # D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
    1. A reasonable standard of performance was established and communicated to the employee;
    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

76. The applicable principles were correctly identified by the deciding Delegate, were set out in the reasons for Determination, and were applied to the facts as found. The deciding Delegate did not misinterpret or misapply any part of section 63 of the *ESA*.

77. Provided the established principles have been applied, and I find they were, a conclusion on cause is essentially a fact-finding exercise. The correct application of the principles relating to just cause to the facts as found by the deciding Delegate does not convert the issue into an error of law. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is a question over which the Tribunal has no jurisdiction. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

78. The Appellants have identified and argued three elements of the decision on section 63 as errors of law:

1. that the Appellants were required to warn Ms. Deneka that her performance was placing her job in jeopardy;
2. that the Appellants, in addition to clearly communicating their concerns about her job performance, were required to provide Ms. Deneka with a meaningful opportunity to improve her performance; and
3. because Ms. Deneka's performance, or incompetence, posed a serious risk to health and safety, there was grounds for immediate dismissal without the need for a warning.

79. The first argument does not challenge the factual finding that prior to June 2, 2020, Ms. Deneka was not warned her job was in jeopardy by a continuing failure to meet the standards set for her or that the relevant legal principles were not applied.

80. Rather, the Appellants say that a warning was not necessary in this case, that Ms. Deneka should have known, in her capacity as COO and from everything that transpired, that her job was in jeopardy. While that assertion quite obviously represents the opinion of the Appellants, it does not demonstrate an error of law. In my view, the deciding Delegate correctly adhered the principles which applied to the facts as found. The following comment in the reasons expresses a key element of the rationale for a warning in this case:

> The [Appellants] had not advised [Ms. Deneka] that her employment was in jeopardy until June 2020. The [Appellants'] failure to warn [Ms. Deneka] is particularly conspicuous in light of the fact that she was told there would be a four-month review in April and precisely during that time, multiple facilities were taken over by public administration. [Ms. Deneka] continued to operate in her role without repercussion, thereby condoning what the [Appellants] viewed as poor performance. (at page R14).

81. The second argument is similar to the first, in the sense that it challenges the application of just cause principles, but does challenge the factual findings to which that principle is applied, which was that the Appellants did not provide Ms. Deneka with sufficient time or resources, between the June 2, 2020, letter containing the warning and her termination a week later, to meet the standard and, in any event, had not shown Ms. Deneka had still not met the standard imposed.

82. The last argument set out above infers the Appellants had grounds for summary dismissal relating to health and safety concerns. This appears to be a new argument. I have reviewed the record and the reasons and, while there are references to matters of health and safety, I cannot find any submission that contends there was justification for the summary dismissal of Ms. Deneka for reasons relating to health and safety. The Appellants did argue there were grounds for summary dismissal, which the deciding Delegate rejected, but it was not grounded in health and safety concerns.

83. The deciding Delegate was aware of the concerns the Appellants had with Ms. Deneka's job performance, which are set out in detail in the termination letter dated June 9, 2020, found at pages 124-127 of the record, which identified her termination was grounded in her "failure to reasonably improve the performance of your employment responsibilities despite numerous attempts since April 9, 2019 by the employer" and that her inability to manage the business operations "has adversely affected our business and employees [and] adversely affected our relationships with partners, industry professionals, and stakeholders" (pages 124 and 127, record).

84. The absence of any reference in that letter to the health and safety of patients being a basis for termination renders this argument somewhat ingenuous.

85. I find the Appellants have not shown there was an error of law in the decision relating to the termination of Ms. Deneka.

Natural Justice

86. The Appellants have raised the natural justice ground of appeal.

87. A party alleging a failure by the Director 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.

88. The foundation for the argument made under this ground of appeal is the allegation that the investigating Delegate "informed the Appellant, that its evidence *was sufficient* to establish that the Employee failed to record 46 vacation days in the ADP System" (emphasis included). The specific

comment made by the investigating Delegate is found on page 92 of the record in an email sent to counsel for the Appellants on October 13, 2022, which included the following:

> I don't believe the Decision Maker will find any vacation pay is outstanding.

89. However ill advised it was for the investigating Delegate to include such a comment in communications with a party, I reject the contention made by counsel for the Appellants that the above comment is either an "assessment [by] . . . the Investigating Officer . . . regarding the sufficiency of the Appellant's evidence," a "conclusion that no additional vacation pay was due to the Employee" (paras. 34 and 38 of the appeal submission), or that the Determination "contradicted the Investigating Officer's earlier conclusion" on the sufficiency of the Appellants' evidence on the vacation pay claim (point 4 of the Summary in the appeal submission). I also reject the contention that the investigating Delegate 'assured' the Appellants that "no further evidence was necessary."

90. In my view, and I find, the comment made by the investigating Delegate speaks for itself – it is an expression of opinion made a month after the Appellants had submitted their complete response to Ms. Deneka's vacation pay claim: see para. 50, above.

91. The natural justice principles that typically operate in the complaint process, including this complaint, in expressed 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).

92. Nothing in the October 13, 2022, email from the investigating Delegate affected the procedural rights of the Appellants described above.

93. There is no factual or legal basis for this ground of appeal and no reasonable prospect it will succeed.

94. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

95. In light of this decision, it is unnecessary to consider the request under section 113 of the *ESA* to suspend the effect of the Determination.

ORDER

96. Pursuant to section 115(1) of the *ESA*, I order the Determination dated December 29, 2023, be confirmed in the amount of $30,660.53, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal