

CANADA / JUDGMENT

BCEST 2023 79 (Re)

2025 BCSC 2304

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 2304 BCEST 2023 79 (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

BCEST 2023 79 (Re),

2025 BCSC 2304

Date: 20251124

Docket: S237134

Registry: Vancouver

In the Matter of BCEST 2023 79

Before: The Honourable Justice Tucker

On judicial review from: An order of the Employment Standards Tribunal, dated October 3, 2023
(Blue-O Technology Inc.(Re), 2023 BCEST 79)

Reasons for Judgment

Representative for the Petitioner, Blue-O Technology Inc., appearing in person:

H.X. Ruan

Counsel for the Respondent Director of Employment Standards:

L. Courtenay

Counsel for the Respondent Employment Standards Tribunal:

A. Vulimiri

Place and Date of Hearing:

Vancouver, B.C.

March 14, 2025

Place and Date of Judgment:

Vancouver, B.C.

November 24, 2025

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I. Introduction

- [1] Blue-O Technology Inc. (the "Company") petitions for judicial review of an October 23, 2023, decision of the Employment Standards Tribunal ("Tribunal"). The subject of the review is a reconsideration decision under s. 116 of the Employment Standards Act, R.S.B.C. 1996, c. 113 [ESA], by Member Kenneth W. Thornicroft ("Member Thornicroft"): Blue-O Technology Inc. (Re), 2023 BCEST 79 ("Reconsideration Decision").
- [2] The Tribunal and the Director of Employment Standards ("Director") each filed a response to petition. For the reasons set out below, the petition is dismissed.

II. Procedural History

- [3] The Company is a scientific research company operating in Vancouver. Mr. Hai Xiong (Hanson) Ruan is the Company's chief executive officer and sole director. Mr. Ruan is also responsible for the Company's human resources and payroll administration.
- [4] The Company employed Emad Shahnam as a research scientist. Mr. Shahnam's employment began on September 29, 2020, and was terminated on February 9, 2021.
- [5] On June 23, 2021, Mr. Shahnam filed a complaint against the Company under s. 74 of the ESA. The Director appointed an investigative delegate to investigate the complaint.
- [6] As an aside, at some point in time, Mr. Shahnam appears to have also filed a small claims action against the Company in relation to the termination of his employment by the Company. If reasons for judgment or an order were ever made in that action, there is no evidence whatsoever of such before me.
- [7] After the investigation was completed, the Director appointed Michael Thomson as an adjudicative delegate ("Delegate") to determine Mr. Shahnam's complaint.
- [8] On February 10, 2023, the Delegate issued a decision ("Determination"). The Delegate found that the Company had contravened the ESA by:
 - a) failing to pay wages within eight days of the end of pay period in which the wages were earned (s. 17);
 - b) failing to pay wages for hours worked in excess of Mr. Shahnam's standard work week (ss. 35 and 40); and
 - c) terminating Mr. Shahnam's employment without just cause and without notice or compensation for length of service (s. 63).
- [9] The Delegate accepted Mr. Shahnam's testimony about when he had been paid his wages. He also observed that the investigator had asked the Company to provide wage statements during the investigation, but the Company had not.
- [10] The Delegate found on the evidence that the Company was aware that Mr. Shahnam had worked the hours in excess of his standard hours and had benefitted from his having worked them. The Company's assertion that the additional hours had not been authorized by the Company was specifically rejected as inconsistent with the other evidence.
- [11] With respect to the alleged just cause for termination, the Delegate found that the Company had failed to document or effectively communicate concerns about Mr. Shahnam's work performance to him prior to his termination, and that Mr. Shahnam had not been given notice of the performance standard he was to meet or time (let alone a reasonable amount of time) to improve his performance. Accordingly, the Delegate found that the Company had failed to establish just cause, and thus ought to have paid Mr. Shahnam s. 63 compensation for length of service at the time of his termination.

- [12] The Delegate ordered the Company to pay \$1,437.90 (wages and interest) to Mr. Shahnam, and to pay \$1,000 (2 x \$500) in administrative penalties in respect of its contraventions of the requirements of ss. 17 and 63.
- [13] The ESA has an internal appeal process. Under s. 112(1) of the ESA, a determination may be appealed to the Tribunal on one or more of the following grounds:
- a) error in law;
 - b) failure to observe the principles of natural justice in making the determination;
 - c) based on evidence that was not available when the determination was being made.
- [14] The statutory deadline for appealing the Determination was March 20, 2023.
- [15] The Tribunal has the authority to grant an extension of the statutory deadline for appeal under s. 109(1)(b) of the ESA.
- [16] On March 22, 2023, the Company filed an appeal of the Determination. The Company asserted a basis for appeal under all three s. 112(1) grounds. As the appeal period was expired, the Company also sought a two day extension of the deadline for filing an appeal.
- [17] The Company, the Director, and Mr. Shahnam made submissions regarding the extension request. The Company provided various reasons in explanation of its delay, including Mr. Ruan's health issues, Mr. Ruan's work schedule, Mr. Ruan's lack of legal training, and the assertion that the appeal process is a "time-consuming" endeavour.
- [18] The Director and Mr. Shahnam opposed the extension. Both emphasized the fact that the Company was expressly advised of the deadline well before the deadline passed. The Director also pointed to emails in evidence where Mr. Ruan had written that he had "forgot" about the deadline.
- [19] On July 27, 2023, Tribunal Member Jonathan Chapnick ("Member Chapnick") issued a decision dismissing the appeal: *Blue-O Technology Inc. (Re)*, 2023 BCEST 58 ("Appeal Decision"). His reasons set out the Tribunal's established framework for assessing extension requests:

The Tribunal does not grant extension requests as a matter of course; there must be "compelling reasons" for the extension request, and it is up to the appellant to establish that the extension is warranted: *Patara Holdings Ltd. carrying on business as Best Western Canadian Lodge and/or Canadian Lodge*, BC EST #RD053/08 [Patara]. In considering whether to grant an extension request, the Tribunal considers the following non-exhaustive list of factors:

- a. Is there a reasonable and credible explanation for the appellant's failure to meet the appeal period deadline?
- b. Has there been an ongoing, genuine intention, on the part of the appellant, to appeal to the Determination?

- c. Were the respondent (in this case, the Employee) and the Director made aware of the appellant's intention to appeal?
 - d. Will the respondent be unduly prejudiced if the Tribunal grants the extension request?
 - e. Does the appellant have a strong case that might succeed? (This factor is traditionally expressed as an inquiry into whether there is a "strong prima facie case" in favour of the appellant; however, I prefer to use the simpler language of "a strong case that might succeed"): John Curry, 2021 BCEST 92 at para. 74 (aff'd 2022 BCEST 2). See Niemisto, BC EST #0099/96; Patara; C.G. Motorsports Inc., BC EST # RD110/12.
- [20] Member Chapnick found the Company had not provided a reasonable and credible explanation for failing to meet the deadline. He held a reasonable and diligent party in the Company's circumstances could have filed in time. He also found that a reasonable and diligent party in the Company's circumstances would have, at the least, sought an extension before the appeal period expired. Finally, Member Chapnick agreed that the emails in evidence suggested that the late filing was due to inattention and cast doubt on the credibility of the explanations now advanced in the Company's submissions.
- [21] Grouping genuine intention to appeal, communication of intention, and undue prejudice factors together for consideration, Member Chapnick accepted that the Company had a genuine intention to appeal and that no undue prejudice would result in the particular circumstances.
- [22] With regard to the final factor, Member Chapnick found that the Company did not have a strong case on the merits for its appeal.
- [23] Member Chapnick observed that the Delegate had applied the law regarding just cause correctly, including his putting the onus of proof of just cause on the Company. He observed that the Delegate had not taken an unreasonable view of the facts in finding that the Company had not discharged its onus of proof to establish just case. Accordingly, the appeal did not advance a strong case with respect to any error of law regarding just cause.
- [24] With respect to natural justice, Member Chapnick found that, as opposed to identifying evidence or argument as having been disregarded by the Delegate, the Company was re-arguing its case on appeal.
- [25] With respect to the Delegate's having considered the fact that there were no wage statements refuting Mr. Shahnam's testimony that he was paid wages late, Member Chapnick reviewed the record and confirmed that the Company had been asked to provide wage statements during the investigation, but had not. Member Chapnick also noted that given the allegation of late payment of wages, the Company was on notice that it should provide the investigator with any evidence it had that would disprove Mr. Shahnam's claim and testimony.

- [26] Member Chapnick found there was no basis whatsoever for the Company's allegations that the Delegate was biased against the Company or had fabricated facts to support the complaint.
- [27] Finally, the "new" evidence the Company proposed to put before the Tribunal on appeal consisted of electronic wage statements relating to Mr. Shahnam's period of employment. Member Chapnick set out the established test for adducing further evidence on appeal, and found that the wage statements had been available to the Company at the time of the investigation. Member Chapnick also ruled that the wage statements were not evidence of high probative value as required by the test, as the proffered statements confirmed that the Company had paid wages late in contravention of s. 17 (as found by the Delegate).
- [28] Member Chapnick then dismissed the Company's appeal under ESA, s. 114(1)(b), which permits dismissal on the basis that "the appeal was not filed within the applicable time limit".

[29] A person may apply to have a Tribunal decision reconsidered by another panel:

Reconsideration of orders and decisions

116 (1) On application under subsection (2) or on its own motion, the tribunal may

- (a) reconsider any order or decision of the tribunal, and
 - (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
- (2) The director or a person served with an order or a decision of the tribunal may make an application under this section.

[30] The Company applied under s. 116 of the ESA.

[31] In its reconsideration application, the Company asked the Tribunal to assign a three member panel to the reconsideration and for a public oral hearing to be held. Member Thornicroft addressed that request at the outset of the Reconsideration Decision:

3. The applicant asks that "at least three members of EST to conduct a reconsideration of my appeal request", and also seeks "a public hearing session for this reconsideration." This application, on its face, is entirely without merit, and must be dismissed since it does not pass the first stage of the two-stage Milan Holdings test (see Director of Employment Standards, BC EST # D313/98). That being the case, there is no need for either a three-person panel or a public hearing. I note that the Tribunal is not obliged to hold hearings open to the public (ESA, section 103(d)(ix)), and is entitled to hear matters by way of one-person panels (section 106(4)).

[32] Turning to the merits, Member Thornicroft summarized the grounds on which reconsideration of the Appeal Decision was sought as follows:

- a) Member Chapnick unfairly put the Company in a "fault position";
- b) Member Chapnick "covered up" the Delegate's "deceit or ambush" by accusing Mr. Ruan and the Company of not providing "the needed timesheet";
- c) Member Chapnick favoured the Delegate by "accusing [Mr. Ruan's] accusations was false without any solid proof";
- d) Member Chapnick was "biased and bitter hearted" in imposing an administrative penalty under s. 17 for "one single justified missing pay date"; and
- e) Member Chapnick "ignored the legal medical ground for the cause of the delay", which was contrary to nature justice.

[33] Member Thornicroft these assertions in turn:

- 9. The applicant's first assertion appears to concern the monetary penalty that was issued for the applicant's section 17 contravention. However, this penalty was issued based on the uncontroverted evidence set out in the applicant's own documents (see Appeal Decision, paras. 46-48). The first assertion also relates to the delegate's finding that the former employee was dismissed without just cause. The delegate's findings in this regard are set out at page R4 of his "Reasons for the Determination" (the "delegate's reasons"). I fully agree with and endorse the delegate's findings on the just cause issue. The applicant's appeal on this matter was wholly devoid of merit.
- 10. The applicant's second assertion relates to its failure to provide payroll records, which the applicant says it was never asked to provide. However, this latter assertion is plainly untenable. As the Appeal Decision (and the section 112(5) record) makes clear, at para. 32:

the [applicant] argues it was never asked to submit "records of ... wage statement[s] with dates," and the Director erred in law (and failed to observe the principles of natural justice) "by ignoring the availability of such records." I reject this argument because it is not accurate. The Record shows that the Investigative Delegate made several requests for wage statements, but the [applicant] did not provide them. The Record also shows that the [applicant] was made aware that the Employee alleged it paid him and others late on several occasions. If the Company had evidence to refute this claim, it should have proffered that evidence during the investigation process.

- 11. The applicant's third assertion appears to be grounded in a belief that Member Chapnick was biased against the applicant and in favour of the delegate. The applicant asserts that the Appeal Decision contains "lies", and that the Member should be "disciplined." However, having reviewed the complete record in this matter, I am fully satisfied that all of the delegate's findings were supported by a proper evidentiary foundation. Member Chapnick did not err in law in rejecting the applicant's challenges to the delegate's findings of fact.

12. The applicant's fourth allegation reiterates the wholly groundless allegation of bias and misconduct on the part of Member Chapnick, and further claims that it was "punitive" to impose a monetary penalty for the proven section 17 contravention. The short answer to this argument is that monetary penalties are mandatory in the face of proven contraventions (see Appeal Decision, para. 48).
13. The applicant's fifth and final assertion concerns the applicant's reason for failing to file a timely appeal and, in particular, the applicant's principal's medical condition. Member Chapnick did not "ignore" the medical evidence in question. Rather, he found that this evidence was undermined by the applicant's admission that it was well aware of the appeal deadline, but simply failed to file a timely appeal (see Appeal Decision, paras. 23 and 27). Further, even if there had been a reasonable explanation for failing to file a timely appeal, the application to extend the appeal period fell short of the mark in terms of other relevant considerations.
14. Although the applicant's appeal was dismissed under section 114(1)(b) of the ESA, it seems clear from Member Chapnick's findings that the appeal could have equally been dismissed under section 114(1)(f) as having no reasonable prospect of succeeding. Either way, I fully endorse Member Chapnick's reasons for dismissing the appeal.

III. THE PETITION

[34] The petition asks the Court to:

- a) to set aside "the BCEST decision",
- b) transfer the Company's appeal of the Determination to the Court;
- c) order the Tribunal to publish a formal apology to the Company, and
- d) order the Tribunal to reimburse the Company for its costs.

[35] Summarily, the grounds of appeal set out in the Legal Basis of the petition are as follows:

- a) The denial of a three-person reconsideration panel and a public oral hearing was contrary to natural justice and procedural fairness;
- b) Member Chapnick "copied arbitrarily some writings of the ES director's decision without checking the submitted documents, which was non-existing to sustain his decision", demonstrating bias against the Company;
- c) The Tribunal misapplied the ESA by "denying" that the Company had "made all 19 pay checks on time while one was due to the delay of submission of his timesheet by Mr. Shahnam".
- d) The Tribunal denied Mr. Ruan's "sustained and severe medical history" as a basis for late filing, "which lacked any basic human moral and humanity";

- e) The Tribunal put the Company "at a default guilty position" contrary to procedural fairness and natural justice.

IV. ROLE OF THE COURT IN JUDICIAL REVIEW

- [36] The proper role of the Court on judicial review is supervisory in nature and focused on ensuring that decision-makers act within the scope of the authority granted to them under statute and provide a fair process to those affected by their decisions: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28. The general presumption is that decision-makers are entitled to deference in the discharge of their responsibilities. The focus of judicial review is on the decision actually made by the decision-maker (both the reasoning process and its outcomes): *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 30 and 83.

V. The Decision under Review

- [37] The petition refers to the "Tribunal" rather than an individual decision-maker and decision. Further, the relief sought includes a transfer of the Company's appeal of the Determination to the Court. On its face, the petition is unclear as to exactly what decision(s) the Court is being asked to review.
- [38] Generally speaking, where a party has invoked internal appeal or reconsideration processes, judicial review must be of the decision made by the final administrative decision-maker: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at para. 40. Under s. 116 of the ESA, the Tribunal has broad powers of reconsideration that encompassed all of the grounds in the Company's reconsideration application. Thus, it is the Reconsideration Decision from which judicial review is properly sought here: *Alfier v. Sunnyside Villas Society*, 2021 BCSC 212 at para. 25; *Canwood International Inc. v. Bork*, 2012 BCSC 578 at paras. 17-18; *Ma v. British Columbia (Employment Standards Tribunal)*, 2016 BCSC 2097 at para. 36; *Gornshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 16; *Pereira v. British Columbia (Labour Relations Board)*, 2023 BCCA 165 at para. 44-45.
- [39] The Determination and Appeal Decision may be considered for context.

VI. Standard of Review

- [40] The ESA contains the following privative clause:

Exclusive jurisdiction of tribunal

110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.

- (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.
- [41] By virtue of the combination of ss. 110 and 103 of the ESA, s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA] applies to the Tribunal. Pursuant to s. 58(2)(a) of the ATA, the standard of review on findings of fact or law and exercises of discretion in respect of matters within the Tribunal's exclusive jurisdiction under is patent unreasonableness.
- [42] The patent unreasonableness standard is highly deferential. A decision is not patently unreasonable unless it is "clearly irrational", "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand": *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)* 2019 BCCA 131 [Cariboo] at para. 24, citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52.
- [43] Pursuant to s. 58(2)(b) of the ATA, questions of natural justice and procedural fairness are to be decided with regard to whether the Tribunal acted fairly. No deference is owed on matters of procedural fairness and natural justice: *Champ's Fresh Farms Inc. v British Columbia (Employment Standards Tribunal)*, 2023 BCSC 1075, at para. 26; *Malagoli v. North Vancouver (City)*, 2021 BCSC 520 at para. 37; *Sebastian v. Vancouver Coastal Health Authority*, 2019 BCCA 241 at paras. 29-30; *Technical Safety BC v. Simply Green Home Services (BC) Inc.*, 2020 BCSC 2157 at paras. 43-44.

VII. analysis

A. Natural Justice & Procedural Fairness

Requested Panel and Form of Hearing

- [44] Under s. 103(3)(ix) of the ESA, s. 41 of the ATA applies to the Tribunal. Section 41(2) of the ATA enables the Tribunal to conduct hearings that are not open to the public where a public hearing is undesirable (within the meaning of that provision) or impractical. Section 106 of the ESA gives the Tribunal the power to establish one or three or five member panels at the chair's discretion.
- [45] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (SCC), the Court outlined the framework for determining the extent of procedural fairness that applies to any given type of hearing. The non-exhaustive list of factors to be considered in assessing the duty of procedural fairness includes: i) the nature of the decision being made and the process followed in making it; ii) the nature of the statutory scheme; iii) the importance of the decision to the affected parties; iv) legitimate expectations created by administrative decision-makers; and v) the procedure chosen by the decision-maker.
- [46] The ESA is regulatory in nature, makes efficiency one of its stated goals, and affords substantial discretion to the Tribunal to determine its own processes: *Read v. Rimex Supply Ltd.*, 2021 BCSC 2157 at para. 55; *British Columbia Securities Commission v. Burke*, 2008

BCSC 1244 at paras. 61, 74; *D. Hall & Associates Ltd. v. Director of Employment Standards*, 2001 BCSC 575 [D. Hall] at para. 29. The Court of Appeal has recently confirmed that the question of whether to hold an oral hearing is a matter of discretion: *Cariboo* at para. 32. Even where the issues are complex or credibility is an issue, an oral hearing need not always be held: *Cariboo* at para. 31; *D. Hall* at para. 26.

- [47] As set out in the Reconsideration Decision, the Tribunal reviews reconsideration applications under the two-stage test established in *Director of Employment Standards and Milan Holdings Inc. et al.*, BCEST # D313/98 [Milan Holdings]. Under that test, the Tribunal first reviews the application to determine whether it, on its face, raises a sufficiently important matter (such as a question of statutory interpretation) or a compelling argument that the appeal decision was wrongly decided or otherwise tainted by a breach of the rules of natural justice, so as to justify a full inquiry into the merits. If the application does not pass this first threshold, the application for reconsideration is summarily dismissed. If the application does pass that threshold, then the Tribunal undertakes a full review on the merits.
- [48] In the Reconsideration Decision, Member Thornicroft held that, at least in this case, he should determine whether the application passed the Milan Holdings first-stage threshold prior to any consideration of what form a full hearing might take. The Company has not provided any argument to support a finding that that was a patently unreasonable approach. Nor has the Company provided any argument as to how or why the principles of natural justice would require a three-person panel and a public oral hearing in order to fairly address the Company's reconsideration application.
- [49] The Company has established no basis in law for this Court to interfere with the Reconsideration Decision in relation to the size of panel or form of hearing.

Bias Allegation Against Member Thornicroft

- [50] The Company submits that Member Thornicroft showed partiality towards the Determination made by the Delegate and that he used "very personal related manner language towards the ES Director", that shifted him into a position of bias.
- [51] In *Yukon Francophone School Board, Education Area No. #23 v. Yukon (Attorney General)*, 2015 SCC 25 [Yukon] at para. 20, the Supreme Court of Canada affirmed the well-established test for a reasonable apprehension of bias:

what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

- [52] The Company has not identified specific issues. Rather, the Company's allegations of bias centre on its disagreement with Member Thornicroft's decision. The Company has not identified anything capable of demonstrating a predisposition to one side or to a particular

outcome. A party alleging bias bears the onus of adducing evidence to demonstrate such an apprehension of bias. Mere suspicion or speculation is insufficient: Yukon at paras. 20-37. Nothing before me on this review gives rise to any credible or reasonable apprehension of bias with respect to Member Thornicroft and the Reconsideration Decision.

B. Whether Reconsideration Decision Patently Unreasonable

[53] I do not find Member Thornicroft's reasons regarding either the denial of the extension of the time or the assessment of the merits of the Company's reconsideration application to be patently unreasonable.

Dismissal of Bias Allegation against Member Chapnick

[54] Member Thornicroft addressed the allegation that Member Chapnick was biased against the Company. Member Thornicroft reviewed the record. He concluded that Member Chapnick's findings involved a correct application of the law and had a proper basis in the evidence.

[55] While the Company asserted that Member Chapnick was "punitive" toward the Company with respect to the administrative penalties imposed, Member Thornicroft addressed this when he observed that the penalties imposed were mandatory under the ESA, not imposed under an exercise of discretion.

[56] The Company also asserted that Member Chapnick's refusal to accept the electronic wage statements as new evidence on appeal is indicative of bias. Member Thornicroft addressed that argument. He observed that the test for admitting new evidence on appeal is both stringent and well-established, and that Member Chapnick applied the correct test and gave multiple reasons for finding that the wage statements did not pass that test. Member Thornicroft also confirmed, by review of the record, that the Company had been asked to provide wage statements during the investigation.

[57] Member Thornicroft's conclusion that the Company had failed to adduce any evidence of bias on the part of Member Chapnick was not patently unreasonable.

Patently Unreasonable Reading of Section 17

[58] Member Thornicroft addressed the Company's argument that no "proper" application of s. 17 of the ESA could have sustained the imposition of a penalty against the Company given that the Company generally paid on time.

[59] Reviewing the record, Member Thornicroft found the monetary penalty for the s. 17 contravention rested on uncontroverted evidence in the Company's own documents that there had been at least one instances of late payment of wages. As already noted, Member Thornicroft also explained in his reasons that the administrative penalty imposed under s. 98(1) of the ESA was mandatory following any finding that s. 17 had been contravened.

[60] Member Thornicroft's reasons on these points were rational and logical.

Medical Condition as an Explanation for Delay

- [61] Member Thornicroft's assessment of Member Chapnick's dismissal of the application for an extension of the deadline was not patently unreasonable.
- [62] Contrary to the Company's assertion that its medical evidence was disregarded, Member Chapnick referred to the "ill health" explanation offered twice in the Appeal Decision, first at para. 22 (in summarizing the Company's position) and again at para. 25 (as part of his analysis of whether the explanations offered were insufficient).
- [63] In the Reconsideration Decision, Member Thornicroft accurately observed that the medical excuse had, in fact, been addressed by Member Chapnick, but that Member Chapnick had not found it compelling. Member Thornicroft further observed that, having already concluded the Company's offered explanations were insufficient, Member Chapnick nonetheless went on to observe that the Company's explanation also lacked credibility (Reconsideration Decision at para. 13).
- [64] Finally, and in any event, Member Thornicroft held that even if the appeal had been timely, Member Chapnick's assessment of the merits of the appeal as set out in the Appeal Decision would have sustained a dismissal under ESA, s. 114(1)(f) (no reasonable prospect of success). Member Thornicroft's conclusions regarding the alternative basis for the dismissal under s. 114(1)(f) were rational and reasoned.

The Asserted "Default Guilt" Approach

- [65] There is no basis for interfering with Member Thornicroft's reasoning in dismissing this assertion.
- [66] In the Determination, after noting Mr. Shahnam's detailed oral evidence and the Company's obligation to retain payroll records under s. 28 of the ESA, the Delegate stated:

Under section 28 of the Act BOTI was required to keep records demonstrating when wages were paid, partially in order to resolve issues such as these. BOTI failed to provide these records when asked. Given this failure, and given Mr. Shahnam's detailed evidence on the issue, I find that BOTI failed to pay wages in accordance with s. 17 of the Act.

- [67] That finding is not a presumption of guilt. It is a weighing of evidence.
- [68] In any event, as noted by Member Thornicroft, the Company's wage statements confirmed that the requirements of s. 17 had, in fact, been contravened.
- [69] Member Thornicroft stated in the Reconsideration Decision that he fully agreed with and endorsed the Delegate's just cause findings. The comments necessarily implies the Member Thornicroft was in agreement with the Delegate's allocation of the burden of proof for just cause.

[70] It is well-established that an employer bears the burden of establishing just cause for summary dismissal of an employee. At bottom, the Company is not taking issue with the Tribunal's statement or application of the law in this regard, but rather disagreeing with the substantive law itself. Accordingly, the Company has not established any error in Member Thornicroft reasoning with respect to just cause.

VIII. Disposition

[71] The Company has not established that the Member Thornicroft committed any reviewable error in the Reconsideration Decision, whether of law, mixed fact and law, discretion or with respect to the principles of natural justice.

[72] There is, in particular, no merit whatsoever to the Company's assertions of bias against Member Thornicroft (or, for that matter, against Member Chapnick).

[73] The petition is dismissed.

"Tucker J."

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