Employment Standards **TRIBUNAL**

Citation: Angela Zavediuk (Re)
2024 BCEST 79

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

\- by -

Angela Zavediuk
(“Applicant”)

\- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Robert E. Groves (Panel Chair)
Carol L. Roberts
Shafik Bhalloo, K.C.

SUBMISSIONS: Gregory Zavediuk, on behalf of Angela Zavediuk
Katy E. Allen and Lauren Dresselhuis, legal counsel for Bioriginal Food & Science Corp.
Michael Thompson, delegate of the Director of Employment Standards

FILE NUMBER: 2024/009

DATE OF DECISION: September 4, 2024

DECISION

OVERVIEW

1. Angela Zavediuk ("Applicant") has applied for a reconsideration ("Application") of a decision made by a Member ("Member") of the Employment Standards Tribunal ("Tribunal") dated December 27, 2023, referenced as 2023 BCEST 116 ("Appeal Decision"). The Application is brought under section 116 of the *Employment Standards Act* (*ESA*). The matter arises out of six complaints ("Complaints") made by the Applicant to the Director of Employment Standards ("Director") alleging violations of the *ESA* by her employer, Bioriginal Food & Science Corp. ("Employer").

2. After an investigation by several delegates of the Director, an adjudicating delegate ("Adjudicating Delegate") issued a determination ("Determination") on August 31, 2023. The Determination concluded that the Employer had breached the *ESA* and ordered the Employer to pay wages, annual vacation pay, compensation for retaliatory dismissal, and interest in the amount of $95,115.26. Additionally, the Adjudicating Delegate imposed administrative penalties of $2,500.00, bringing the total amount owed to $97,615.26.

3. The Applicant appealed the Determination under section 112 of the *ESA*. The Appeal Decision dismissed the appeal pursuant to sections 114(1)(c), 114(1)(f), and 115(1)(a) of the *ESA*.

4. The Reconsideration Panel has reviewed the Appeal Form and the Application delivered on behalf of the Applicant, her submissions in support of both, the Determination, and the Adjudicating Delegate's accompanying reasons for it ("Reasons"), the Appeal Decision, the record delivered by the Director to the Tribunal pursuant to section 112(5) of the *ESA*, and the Reconsideration submissions of the Applicant, the Employer, and the Director.

BACKGROUND

5. The Employer operates a business that sources and markets ingredients for health supplements to manufacturers and distributors throughout North America. The Applicant was employed as a salesperson for the Employer from January 5, 2015, until she terminated her employment on November 16, 2020. During her tenure, she was paid a base salary annually, and other additional remuneration through various incentive plans issued by the Employer from time to time.

6. Issues regarding the calculation and payment of the Applicant's wages arose over time. The Applicant filed four formal complaints with the Director alleging contraventions of the *ESA*. Those complaints are summarized below:

- **April 22, 2018:** Applicant alleged unauthorized deductions from her wages and owed commissions.
- **November 4, 2020:** Applicant sought compensation for "mistreatment" under section 83 of the ESA.
- **November 6, 2020:** Applicant claimed entitlement to compensation due to wrongful dismissal under section 66 of the *ESA*.
- **November 16, 2020:** Applicant alleged violations of sections 17 and 18 of the *ESA*.

7. In addition, the Applicant sent two emails to the Director which were accepted as further complaints under the *ESA*:

- **June 24, 2019:** Applicant alleged issues with her 2019 earnings.
- **April 9, 2020:** Applicant addressed her 2020 earnings.

8. The Director's process included a hearing, at least two mediations, investigations and reports, all of which culminated in the Determination.

9. Delegates of the Director issued eight reports summarizing the evidence collected during the investigation and occasionally providing findings of fact and legal conclusions.

10. The Determination addressed several issues arising from the Complaints, with the Adjudicating Delegate concluding as follows:

- **Wage Recovery Period:** The Determination fixed a recovery period from April 18, 2017, to the end of the Applicant's employment in November 2020.
- **Termination Date**: The Applicant was not deemed terminated as of May 10, 2017, under section 66 of the *ESA*.
- **Owed Wages:** The Applicant was owed incentive plan wages based on the 2017 and 2020 plans.
- **Unlawful Deductions:** The Employer had not made unlawful deductions from the Applicant's wages, under section 21 of the *ESA*.
- **Vacation Pay:** The Applicant was owed vacation pay for 2017, 2019, and 2020.
- **Retaliatory Dismissal**: The termination of the Applicant's employment was deemed a retaliatory dismissal, under section 83 of the *ESA*, warranting a "make whole" remedy of three months' wages, under section 79(2)(c) of the *ESA*.

11. The Applicant appealed the Determination on all three statutory grounds under section 112(1) of the *ESA*.

12. The Member dismissed the appeal summarily, confirming the Determination, on the ground that there was no reasonable prospect it would succeed.

ISSUES

13. Should the Appeal Decision be reconsidered?

14. If so, should the Appeal Decision be confirmed, varied, or cancelled, or should the matter be referred back to the original panel of the Tribunal or to another panel?

ARGUMENT

15. The Applicant challenges the Member's conclusions in the Appeal Decision. She contends that some of her arguments were not properly addressed:

- **Natural Justice:** The Applicant claims that the Adjudicating Delegate did not provide a final summary of findings before issuing the Determination, violating the requirements of section 78.1 of the *ESA*.
- **Calculation Errors:** The Applicant argues that the calculations of wage and vacation pay amounts ordered in the Determination are inaccurate due to arithmetical errors and incomplete consideration of relevant evidence by the Adjudicating Delegate.
- **Inadequate Remedy:** The Applicant contends that the three months wage award for retaliatory dismissal under section 79 of the *ESA* is insufficient.

16. Apart from its length, the investigation's complexity is compounded by the fact that three different delegates of the Director investigated the Complaints. The first delegate ("Delegate S") issued a document dated October 21, 2020, ("S Report") which referred to "Final Findings" regarding several of the issues arising from the Complaints that had been delivered to that point. The S Report stated that the Employer had contravened various sections of the *ESA*, and the *Employment Standards Regulation*. In particular, Delegate S found that the Employer had contravened section 66 of the *ESA* in early 2017 when it unilaterally altered the terms of the Applicant's contract of employment, retroactively, for the purpose of reducing her wages. In an earlier communication to the parties, dated June 8, 2020, Delegate S observed that the unilateral change imposed by the Employer reduced the Applicant's income by "approximately one-third," making the change "substantial" within the meaning of section 66. The S Report also stated that no monetary penalties would be imposed if the Employer paid $183,502.82, less statutory deductions, to the Director by November 3, 2020. If the funds were not paid, the Director would issue a determination.

17. On October 22, 2020, Delegate S sent an email to the parties clarifying the amount to be paid was actually $201,061.97. The $201,061.97 figure had appeared in the S Report, but it was cited incorrectly by Delegate S when he stated what his calculation had shown was the sum for wages the Employer owed. The $201,061.97 figure cited was based on the evidence the parties had produced to that point in the investigation.

18. The Employer did not make any payment, and Delegate S did not issue a determination for reasons that are unclear.

19. In March 2022, a second delegate ("Delegate VV") assumed conduct of the investigation, gathered additional evidence, and issued an "Interim Investigation Report" ("VV Report") on August 26, 2022, summarizing issues for adjudication but making no findings on disputed issues.

20. A third delegate (the Adjudicating Delegate) assumed conduct of the investigation in September 2022, sought further submissions from the parties, and issued his own "Interim Investigation Report" ("D Report") on November 17, 2022. After receiving responses from the parties, the Adjudicating Delegate issued the Determination on August 31, 2023.

21. Section 78.1 of the *ESA* requires the Director to summarize findings in a written report and serve it on relevant parties, allowing them to respond:

> 78.1 (1) After completing the investigation of a complaint, the director must

(a) summarize the director's findings of the investigation in a written report, and

(b) serve a copy of the written report on the following:

(i) the person who made the complaint;

(ii) the person against whom the complaint was made;

(iii) any person the director considers should have the opportunity to respond to the report.

(2) A person referred to in subsection (1) (b) may, within a period set by the director, provide to the director a written response to the report.

22. Section 78.2 of the *ESA* provides that the Director must consider the written report and all responses before making a determination:

> 78.2 In making a determination of a complaint...the director must consider the written report referred to in section 78.1(1)(a) and all responses provided to the director under subsection 78.1(2).

23. The Applicant refers to an email from Delegate S dated April 5, 2019, explaining the process of reviewing evidence, issuing preliminary findings for responses, and making final findings of fact.

24. The Applicant asserts that this process ensures both parties will have the opportunity to comment on the factual findings before a final determination is made, even if the final findings are not agreed upon by both parties.

25. The Applicant says that the S Report constituted "Final Findings" summarizing the Employer's *ESA* contraventions and amounts to be paid, which differed from the subsequent "Interim" reports of Delegate VV and the Adjudicating Delegate, which merely summarized issues, evidence, and submissions. The Applicant submits that a simple uncritical summary of the parties' respective positions does not constitute an adequate investigation in which requisite factual findings must be made, especially in cases like the one now before us where much of the evidence is in conflict.

26. The Applicant's principal submission is that the Adjudicating Delegate failed to comply with the stipulations in section 78.1. The Applicant argues that the D Report did no more than summarize issues arising from the Complaints, describe the evidence and submissions the parties had delivered, and request further submissions. The Applicant says the D Report did not include findings to which the parties might respond before the Determination was issued.

27. The Applicant argues that this failure constitutes a breach of natural justice, making the Determination fatally flawed. The Applicant says that since neither Delegate VV nor the Adjudicating Delegate made any final findings which departed from the findings in the S Report, nor permit her to respond to any different factual findings, she expected the Determination to incorporate the findings Delegate S had made. Instead, the Determination incorporated different findings, leading to significantly lower payment orders than the S Report contemplated.

28. In the Appeal Decision, the Member concluded the Director had complied with the requirements of section 78.1, citing that several written reports had been provided to the parties for review and reply, including the findings from various investigative reports:

> The appellant says that the delegate failed to issue a section 78.1 report prior to issuing the Determination. This allegation ignores the fact that, as summarized in the delegate's reasons (at page R2), several written reports were prepared and provided to the parties for their review and reply, including a report from the delegate, prior to the Determination being issued, which summarized the findings of the various investigative reports. I am satisfied that the Director of Employment Standards, through her delegates, complied with section 78.1 of the *ESA*. (Appeal Decision, paragraph 35)

29. The Applicant argues that the Member erred in concluding that the Adjudicating Delegate summarized findings in a written report prior to the Determination, as no such report exists, and the first findings of fact made by the Adjudicating Delegate were contained in the Determination itself. The Applicant submits this procedure was fundamentally wrong, because it failed to permit her to respond to key findings made by the Adjudicating Delegate before he incorporated those findings into the Determination. Key findings made by the Adjudicating Delegate in the Determination which contradicted "Final Findings" in the S Report included a finding that the Employer's unilateral, retroactive, alteration in the Applicant's remuneration in 2017 was not a "substantial" change warranting a conclusion that the Applicant's employment had been terminated pursuant to section 66. In addition, the Adjudicating Delegate calculated the amount owed to the Applicant at $95,115.26, a significantly lower sum than the $201,061.97 figure established as a "Final Finding" in the S Report.

30. Upon receiving the Application, the Tribunal requested submissions from the Employer and the Director regarding the Applicant's natural justice challenges and the application of section 78.1, focusing on:

- The argument that the S Report's "Final Findings" contained the only findings of fact by a delegate the Applicant was able to respond to prior to the issuance of the Determination.
- The argument that the Adjudicating Delegate made no findings in the D Report, or any affirmative determination of the matters in dispute to which the parties could respond prior to issuing the Determination in this matter.
- The argument that the Member, in the Appeal Decision, erred in deciding that the Adjudicating Delegate produced a written summary of findings prior to the issuance of the Determination, as no such report exists.
- The argument that the Member, in the Appeal Decision, erred in deciding the Director had complied with section 78.1.

31. The Tribunal also requested that the parties deliver submissions in response to the following questions:

- To what extent, if any, was the Adjudicating Delegate entitled to make different factual findings than those appearing in the written reports prepared in this matter pursuant to section 78.1?

- What is the effect, in this case, of the fact that section 40 of the 2019 *Employment Standards Amendment Act,* SBC 2019 c.27 ("*2019 Act*") provides that complaints received and not resolved before the coming into force of section 78.1 on August 15, 2021, are not subject to it?

32. The Employer, the Director, and the Applicant have all delivered submissions to the Tribunal in response.

33. We have considered the last question first.

34. Sections 78.1 and 78.2 of the *ESA* were added by section 28 of the *2019 Act*. Section 40 contains the transition provisions, stating that the new sections do not apply to complaints not finally adjudicated before their enactment:

> 40 (1) In this section, **"finally adjudicated"** means, with respect to a complaint, a complaint to which one of the following applies:
>
> (a) a settlement agreement is made under the *Employment Standards Act*;
>
> (b) a determination is made under the *Employment Standards Act* and, in relation to the determination, all reconsiderations and appeals under that Act, and reviews and appeals under any other enactment, have been heard and decided or the time limit for making the reconsiderations, appeals and reviews has expired.
>
> (2) Subject to subsection (3), the following transition rules apply with respect to a complaint that, on the date a provision of this Act comes into force, has been delivered under section 74 (2) of the *Employment Standards Act* but has not yet been finally adjudicated:
>
> (a) if the provision of this Act amends a provision of the *Employment Standards Ac*t, the provision of the *Employment Standards Act*, as it read immediately before the provision of this Act came into force, applies with respect to the complaint;
>
> (b) if the provision of this Act adds a new section to the *Employment Standards Act*, the new section does not apply with respect to the complaint.
>
> (3) If, on the date this Act receives Royal Assent, a determination under section 76 (3) or 79 of the *Employment Standards Act* has not been made with respect to a complaint that has been delivered under section 74 (2) of the *Employment Standards Act*, section 80 of the *Employment Standards Act* as amended by section 29 of this Act applies to the complaint.

35. The Employer and the Director argue that section 78.1 does not apply to the Complaints since the Determination was issued after the enactment date.

36. The Employer observes that the inclusion of section 40(3) of the *2019 Act*, which permits the amended section 80 of the *ESA* to apply retroactively, is proof the legislature did not intend for other provisions of the *2019 Act*, including the new section 78.1, to apply retroactively to complaints which

had not been finally adjudicated, because the latter provision was not so expressly referred to in that section.

37. The Applicant acknowledges that section 78.1 is inapplicable to the Complaints, but she argues that the failure of the Adjudicating Delegate to allow her to respond to findings in the Determination that differed in substance from findings previously made is a breach of natural justice. The Applicant repeats a statement of position she offered in her submission in the appeal, as follows:

> The [Applicant] submits that [the Adjudicating Delegate]'s failure to issue findings prior to the Determination was a breach of the principles of natural justice and procedural fairness. This breach of the principles of natural justice negates the entire Determination as once procedural unfairness occurs to this degree, or at all, the results and consequences from the unfairness are never known.
>
> This breach has not allowed the [Applicant] the opportunity to respond to errors of fact and misunderstanding in the investigation and has also made the production of a proper appeal on findings procedurally unfair.

38. Regarding the other questions posed by the Tribunal, the Employer submits that:

- The S Report was no more than a preliminary assessment. It did not conclude the issues arising from the Complaints, and it was not a determination.
- Since section 78.1 does not apply to the Complaints, the Applicant had no legal entitlement to respond to findings of fact prior to the issuance of the Determination.
- In any event, the Applicant was provided with the appropriate opportunities to respond to the matters raised in the investigation. This included an opportunity to respond to the contents of the D Report. The Applicant did, in fact, respond.
- It is incorrect for the Applicant to state the Member erred in deciding that the Adjudicating Delegate produced a "written summary of findings" prior to the issuance of the Determination, because the Appeal Decision nowhere utilizes this language to describe the reports issued during the investigation. Alternatively, the D Report was a written summary of facts produced prior to the Determination.
- The Tribunal did not commit a reviewable error in stating that section 78.1 was complied with, because section 78.1 was inapplicable. Alternatively, the parties had numerous opportunities to respond to the factual and legal issues arising from the Complaints.
- The Adjudicating Delegate was entitled to make different findings of fact from those appearing in previous reports because he was the delegate who was responsible for completing the investigation and issuing the Determination. This is especially so where an initial assessment is incorrect.
- An investigation under the *ESA* may continue until a determination is issued. Owing to the length of the investigation, and the multiple occasions on which the parties were able to deliver evidence and submissions, the quantum of material before the Adjudicating Delegate when the Determination was being made was extensive.

- In complicated cases, like this one, delegates are permitted to make different factual findings as needed, where the material in the record accumulates and issues change over time.

39. The Director's submission in response to the Tribunal requests may be summarized as follows:

- Notwithstanding the inapplicability of section 78.1, the Applicant was entitled to know and respond to the Employer's evidence pursuant to section 77 of the *ESA*, and the requirements of natural justice more generally. The lengthy history of the investigation in this case reveals that the Applicant received numerous summaries of evidence and she was given multiple opportunities to provide evidence of her own. The Director concurs with the Member's comment in the Appeal Decision (paragraph 41) that the Applicant was given a fair and reasonable opportunity to present her evidence and argument, and to respond to the evidence and argument submitted by the Employer.
- Section 78.1 did not require the Director's delegates to provide findings to which the Applicant might respond, because the section is inapplicable.
- While a delegate who is conducting an investigation may provide preliminary findings to the parties to a complaint, there was no statutory requirement, or any natural justice obligation, that any of the Director's delegates do so in this instance.
- The D Report contained no explicit findings, preliminary or otherwise. Other reports did include preliminary findings. In none of the reports were findings legally required.
- The Member made no error in determining, in the Appeal Decision, that the requirements of section 78.1 had been met, even if it was perhaps an error for the Member to have accepted the Applicant's premise that section 78.1 applied to the Complaints. Regardless, the Member's comments regarding section 78.1 had no impact on the ultimate disposition of the Applicant's appeal, which involved conclusions regarding a number of the other substantive claims made by the Applicant in her Complaints.
- A delegate is entitled to make findings which differ from preliminary findings made earlier in an investigation, although it may constitute a failure of natural justice if parties are not afforded an opportunity to respond to the new findings. Here, however, the Adjudicating Delegate was entitled to make findings which differed from those contained in the S Report, because none of the parties understood the findings in the S Report to be "final or applicable."

40. Regarding the other Tribunal requests, the Applicant repeats many of the statements made by her in the Application. The Applicant submits:

- Delegate S was the only delegate who made findings or determinations of matters in dispute to which the Applicant was able to respond before the Adjudicating Delegate issued the Determination.
- The Adjudicating Delegate made no findings to which the parties might respond prior to issuing the Determination.

- The Member issuing the Appeal Decision erred in deciding that the Adjudicating Delegate produced a written summary of findings prior to issuing the Determination. No such report exists.
- The Member erred, too, when he stated that the Director had complied with section 78.1.
- The Adjudicating Delegate was entitled to make different findings from those shared previously, but only "[t]o the extent that the parties know the case being made against them and have the right to respond." Here, the Applicant had no reasonable opportunity, before the Determination was issued, to respond to the Adjudicating Delegate's conclusion that he should make different findings on critical matters at issue in the Complaints.

41. The Applicant also says this, at paragraph 163 of her submission in response to the Tribunal's requests:

> Applicant now has every right to have a procedurally fair process going forward and is prepared to educate a fourth delegate of the Branch to the nuances of this case.

42. Given our decision to address the natural justice issue in this Application, reviewing other grounds for varying the Appeal Decision is unnecessary.

ANALYSIS

43. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

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

44. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

45. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

46. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Re Milan Holdings*, BC EST # D313/98). In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A "yes"

answer means that the applicant has raised questions of fact, law, principle, or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

47. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).

48. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

49. In our view, the Application meets the threshold for reconsideration at the first stage, because it succeeds in establishing an important issue relating to natural justice that arises from a reading of the Appeal Decision. The issue to be addressed is whether the conclusion, expressed implicitly in the Appeal Decision, that the Applicant had adequate opportunity, during the lengthy investigation of the Complaints, to respond to findings on matters of substance that would form the basis for the Determination, is correct.

50. As we have noted, the Applicant has argued throughout that the Determination is fatally flawed because the Director failed to comply with section 78.1. We find, however, that section 78.1 is inapplicable in this case, because all the Complaints were delivered, but they were not yet finally adjudicated, when section 78.1 came into effect on August 15, 2021.

51. Even before the specific provision requiring the preparation of a written summary of findings was established in section 78.1, however, the Director was, and remains, obligated to observe several of the principles of natural justice in the broader sense when conducting investigations and preparing determinations. This is so despite the Tribunal having acknowledged, given its restricted appellate powers set out in section 112, that an investigation by the Director does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context (see, for example, *Inshalla Contracting Ltd.*, BC EST # RD054/06).

52. Section 77 of the *ESA* codifies an aspect of the natural justice protections afforded by the statute. It reads:

> 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

53. Section 77 establishes a minimum standard of procedural protection for persons subject to investigations under the *ESA*, but it is not intended to establish a complete and exclusive code. Complainants, too, are accorded procedural protections during investigations (see *Inshalla*, *supra*).

54. One of the criteria the Tribunal has relied upon to determine if an investigation has been conducted fairly is to determine whether the procedures followed had the effect of facilitating, or frustrating, the opportunity for an informed and effective presentation of a party's case (see *Great Canadian Bingo Corp.*, BC EST # D046/06 at paragraph 42).

55. An appeal decision of the Tribunal which provides persuasive guidance regarding the application of these precepts in circumstances akin to those presented in the Application, that is, in a situation where section 78.1 is not engaged, is *Alexander McCormack Client Support Group Society, Anilyn Baylon and Caroline Gallego (Re)*, 2021 BCEST 97 ("*McCormack*"). There, an adjudicating delegate issued a determination that departed from preliminary findings delivered previously to the parties by a different delegate who had investigated the parties' complaints. The parties challenged the determination on natural justice grounds, claiming that it was unfair for the adjudicating delegate to have acted in this manner without providing the parties with any notice of the new findings, or an opportunity to provide submissions in response.

56. The Tribunal determined the different conclusions reached by the adjudicating delegate had significant consequences for the parties and that they should have been provided a further opportunity to respond before the determination was issued. The panel said this, at paragraphs 94 and 97, respectively:

> 94. ...if significant information has been submitted to the Director on complex issues, as it occurred in this case, parties have a reasonable expectation that a second delegate will not alter factual findings without affording the parties a reasonable opportunity to respond.
>
> ...
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> 97. ...fairness required the Adjudicative Delegate to inform the parties that he was not in agreement with the preliminary findings letter and had arrived at a different conclusion on that point, and offered the parties a further opportunity to respond before issuing a final Determination. Absent that information, parties will understand that findings of fact as expressed in the preliminary findings letter will be confirmed by the adjudicative decision maker, or at least form the basis for the adjudication.

57. We agree with the submissions of the Employer and the Director that before the enactment of section 78.1 there was no statutory or, indeed, any procedural requirement that an investigating delegate produce findings, preliminary or otherwise, prior to issuing a determination. We agree, too, that even where findings were issued in advance of a determination, delegates were free to experience a change of mind and reach different findings should the evidence and submissions produced by the parties so dictate.

58. That said, as *McCormack* illustrates, if new findings are made in a determination which contradict other findings shared with the parties during the investigation of a complaint, so that the opportunity for an informed and effective presentation of a party's case to the Tribunal is for that reason frustrated, a natural justice concern may arise.

59. In our opinion, this is what occurred in the case now before us. The S Report, and the clarifying email a day later, established, as "Final Findings," that the Employer had dismissed the Applicant pursuant to section 66 of the *ESA* in May 2017. They also established that the Applicant was owed $201,061.97 due to the Employer's contraventions of the statute.

60. While the communications of Delegate VV and the Adjudicating Delegate suggested that new findings might be made based on further evidence and submissions delivered by the parties, including issues that were the subject of the "Final Findings" in the S Report, neither Delegate VV nor

the Adjudicating Delegate shared new findings that altered the substance of the S Report until the Determination was issued. Furthermore, as we have noted earlier, the Adjudicating Delegate decided, contrary to the conclusions in the S Report, that no section 66 dismissal had occurred, and that the Applicant was owed less than half the sum set out in the S Report.

61. In these circumstances, we have concluded that the process followed in the investigation of the Complaints had the effect of frustrating the Applicant's ability to present her case. This is not to say that the Applicant was denied the opportunity to deliver evidence and submissions in support of her position regarding the Complaints, or to respond to the evidence and submissions delivered by the Employer. The Applicant did provide lengthy and comprehensive submissions to the Director on multiple occasions. The point, however, is not the number of submissions the Applicant delivered, or their length, but what the nature and substance of the issues were that those submissions were intended to address.

62. In none of the reports prepared by Delegate VV and the Adjudicating Delegate before the Determination was issued was the Applicant apprised expressly that findings different from the "Final Findings" in the S Report had, or would, be made. Their reports did, it is true, note issues raised in the Complaints which it would be necessary to determine, including the issues we have previously noted that had been the focus of "Final Findings" in the S Report. We have concluded, however, that it was reasonable for the Applicant to continue to believe, and for her to legitimately expect, that Delegate S's "Final Findings" remained final, and would form the basis for the Determination, unless she was informed of specific new findings to which she would have an opportunity to respond directly. If the Applicant had been informed about the Adjudicating Delegate's rationale for arriving at different findings from the "Final Findings" it would have been open to her to address it. Since this did not occur, the opportunity was denied to her. Natural justice demands that an individual like the Applicant, who is a lay person, and who is not legally trained, must not be misled by the process chosen for the investigation and determination of a complaint.

63. In our view, the failure to alert the Applicant that the Determination would incorporate new findings means that the process followed in the investigation was unfair. It follows we have decided the Member erred when he stated, in the Appeal Decision at paragraph 40, that he was "unable to conclude that the investigation was inadequate to the point that there was a failure to abide by the principles of natural justice."

64. However, this is not the end of the matter. We have decided that the investigation was unfair, but a question arises concerning a remedy. We have relied on the statements of the Tribunal in *McCormack*. In that decision, the panel concluded that a denial of natural justice had occurred, but it also determined that no remedy was warranted because the denial was cured on appeal. The panel said this, at paragraph 100 of the decision:

> While I appreciate that the process adopted by the Director in these appeals was confusing, I find that the parties had many opportunities to present their arguments and any evidence in support of those arguments. I also find that any failure to observe the principles of natural justice has been cured on appeal as the parties have had full opportunity to present their arguments.

65. It has been held that the Tribunal does have the ability to cure breaches of the rules of natural justice by the Director, where it can be said the proceedings before the Director and the Tribunal, viewed in

their entirety, satisfy the requirements of fairness (see *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 (“*Taiga*”)). In *Taiga*, at paragraph 40, the court observed that “[t]he question of whether the proceedings were rendered fair depends on, among other factors, the nature of the breaches of the principles of natural justice (or procedural fairness) and the powers on appeal of the Tribunal.”

66. The appellate powers of the Tribunal are set out in section 112(1) of the *ESA*, and none of them permit the Tribunal to re-weigh, or to “correct,” a finding of fact made by a delegate in a determination, except in the limited circumstances where the delegate’s error regarding the facts constitutes an error of law. As has often been stated by the Tribunal, an error of fact does not amount to an error of law except in rare circumstances where it reveals what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that a factual conclusion of a delegate, or an inference drawn from that factual conclusion, is so unsupported by the evidentiary record that there is no rational basis for the finding that was made, and so it is perverse or inexplicable. Put another way, a party will only succeed in challenging a delegate’s finding of fact if they establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusion set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

67. The Tribunal applies a similar approach where the matter at issue involves a question of mixed law and fact. In such cases, the Tribunal is bound to defer to the factual conclusions of a delegate, unless it is established that an error has been made that engages an extricable error of law (see, for example, *Britco Structures Ltd.*, BC EST # D260/03).

68. As we have noted, the principal elements of the “Final Findings” in the S Report the Adjudicating Delegate elected to change in the Determination were the findings by Delegate S that the Applicant had been dismissed pursuant to section 66, and the Adjudicating Delegate’s calculations regarding the total amount of wages owed to the Applicant.

69. Section 66 of the *ESA* reads as follows:

> 66 If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

70. Whether an employee has been constructively dismissed within the meaning of section 66 is a question of mixed law and fact. If a delegate applies the correct legal test when considering section 66 in the context of a case, the standard of review by the Tribunal is palpable and overriding error (see *Re Short*, BC EST # D061/04).

71. The Adjudicating Delegate’s rationale for deciding that no section 66 dismissal had occurred in the case of the Applicant appears at R10 of the Reasons. The Adjudicating Delegate said this:

> I agree with [Delegate S] that there was a unilateral change to a condition of the [Applicant’s] employment (i.e., her incentive compensation), but I do not agree that this change was substantial, such that would make it proper for me to exercise my discretion to find the [Applicant] had been terminated.

> The nature of the [Applicant's] employment with the Employer was that of a sales representative with a commission structure that was changed from time to time. I can only find that the parties' legitimate expectations were that the conditions of the incentive arrangement would change at the Employer's discretion from time to time. The Employer, in seeking to apply this change retroactively, did, in my view (as explored further below), contravene the Act. A contravention of the Act, however, does not necessarily, or even typically, automatically lead to a deemed dismissal of an employee.
>
> A change to the [Applicant's] incentive payment structure, even if it has a prospective negative impact on her earnings, does not, in my view, constitute a substantial change such as would be inconsistent with the employment relationship continuing. The nature of the [Applicant's] compensation was that it would change from time to time. I decline to exercise my discretion to find the [Applicant] was terminated by the Employer's attempt to change the [Applicant's] incentive compensation unilaterally and retroactively.

72. It is apparent from this discussion that the Adjudicating Delegate's decision to reach a conclusion on the section 66 question that was the opposite of one of the important "Final Findings" of Delegate S was based in large measure on the Adjudicating Delegate's analysis of the parties expectations regarding the terms of the Applicant's employment agreement, and his determination that it was a term of her agreement that her compensation would change from time to time. These findings of fact were within the Adjudicating Delegate's sole purview to decide, and they are not amenable to review by the Tribunal on appeal, or in the Application.

73. Regarding the significant difference in the amounts of wages determined to be owed to the Applicant by the Adjudicating Delegate, as compared to the amounts set out in the "Final Findings" of Delegate S, one might rightly have assumed that with the passage of time, the new complaints raising new financial matters filed by the Applicant after the S Report was issued, and the multiple submissions delivered by the parties thereon, that the Determination might have included different wage calculations. However, that is not the point of the natural justice concern the Applicant has identified. What the Applicant has said is that the Adjudicating Delegate's calculations might have been markedly more favourable to her if she had been made aware, before the Determination was issued, what the Adjudicating Delegate's new findings were that so markedly reduced the amount of her financial award expressed as one of the "Final Findings" in the S Report, and the reasons why he was of the view they better reflected the proper resolution of the Complaints. The Applicant would, then, have had an opportunity to try to change the Adjudicating Delegate's mind before he prepared the Determination and the matter was concluded.

74. We agree.

75. The analysis of the proper interpretation to be applied to the various aspects of the Applicant's compensation during her employment, and the arithmetical adjustments consequent thereon, are matters of fact that also fall within the exclusive jurisdiction of the Director. They should, therefore, be determined by the Director, and we are of the view it would be inappropriate, at least in this case, for the Tribunal to attempt to do so utilizing its limited power to "cure" failures to observe the principles of natural justice arising during the investigation of these Complaints.

76. Notwithstanding the fact that the proceedings surrounding these Complaints have been extended beyond a duration anyone could have reasonably expected, we have decided that the proper

resolution of the Application is to order that the Appeal Decision be varied to provide that the Determination is cancelled, and the Complaints be referred back to the Director for consideration afresh on an expedited basis.

ORDER

77. Pursuant to section 116 of the *ESA*, it is ordered that the Appeal Decision, referenced as 2023 BCEST 116, be varied to order that the Determination dated August 31, 2023, is cancelled and the Complaints are referred back to the Director for investigation and determination afresh in accord with the statements we have made in this decision.

Robert E. Groves
Panel Chair
Employment Standards Tribunal

Carol L. Roberts
Panel Member
Employment Standards Tribunal

Shafik Bhalloo, K.C.
Panel Member
Employment Standards Tribunal