Citation: Gaspar, Najera, Phan, Simon, and Villahermosa (Re)
2018 BCEST 48

An appeal

- by -

Leonila Gaspar, Daria Najera, Erlinda Phan, Jane Simon, and Nida Villahermosa
(the "Appellants")

- of a Determination issued by -

The Director of Employment Standards

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

TRIBUNAL MEMBER: David B. Stevenson

FILE NOS.: 2017A/123, 2017A/124, 2017A/125, 2017A/126 and 2017A/127

DATE OF DECISION: May 1, 2018

DECISION

SUBMISSIONS

Kenneth Soe, LSLAP — on behalf of Leonila Gaspar, Daria Najera, Erlinda Phan, Jane Simon and Nida Villahermosa

OVERVIEW

1. Leonila Gaspar ("Ms. Gaspar"), Daria Najera ("Ms. Najera"), Erlinda Phan ("Ms. Phan"), Jane Simon ("Ms. Simon") and Nida Villahermosa ("Ms. Villahermosa"), (collectively "the Appellants"), have each filed an appeal under section 112 of the *Employment Standards Act* (the *"ESA"*) of a Determination issued by Arun Mohan, a delegate of the Director of Employment Standards (the "Director"), on September 22, 2017.

2. The Appellants had filed complaints alleging their former employer, Ron Saito Enterprises Ltd. carrying on business as Canadian Tire ("Canadian Tire"), had contravened the *ESA* by failing to pay length of service compensation.

3. The Appellants were represented during the complaint process by Kenneth Soe through the Law Students' Legal Advice Program ("LSLAP") who has also advanced these appeals on behalf of the Appellants. Although filed separately, four of the appeals are substantially identical, advancing the same arguments for each of the four appellants and relying on the same record. The appeal for Ms. Phan differs slightly in that it does not contain the argument that the Director erred in law in applying the test for credibility.

4. The Determination found the *ESA* had not been contravened, that no wages were outstanding to the Appellants and that no further action would be taken on their complaints.

5. The appeals are all grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. The Appellants seek to have the Determination varied to find each Appellant was not terminated for cause and was, therefore, entitled to compensation for length of service, or, alternatively, referred back to the Director for a new hearing on the issues raised by the Appellants' complaints.

6. In correspondence dated November 8, 2017, the Tribunal acknowledged having received all of the appeals, requested the section 112(5) record (the "record") from the Director on each of the Appellants, notified the parties that no submissions were being sought from any other party pending a review of the appeals by the Tribunal and, following such review, all or part of the appeals might be dismissed.

7. The record has been provided to the Tribunal by the Director for each of the appeals. A copy of each has been delivered to the representative for the Appellants and an opportunity has been provided to object to their completeness. There has been an objection to the completeness of the record which has generated several submissions.

8. The representative for the Appellants has identified an e-mail chain that was not included in the record. The Director has acknowledged the e-mail chain was inadvertently omitted and should be included in the record.

9. The representative for the Appellants also requests that certain categories of documents be added to the record; these categories include notes of phone conversations, memorandums and miscellaneous information. The Director says that apart from the e-mail chain, the record is complete; there were no additional notes, memorandums or documents created during the complaint investigation.

10. I am satisfied that with the inclusion of the e-mail chain the record for each appeal is complete. I am not persuaded by the submissions of the representative for the Appellants that there are any other documents that should have been included in the record. The new evidence ground of appeal has not been advanced in the appeals.

11. I have decided these appeals are appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeals based solely on the Determination, the reasons for Determination, the appeals, the written submissions filed with the appeals 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 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.*

12. If satisfied the appeals or parts of them should not be dismissed under section 114(1), the Director and Canadian Tire will be invited to file submissions. On the other hand, if it is found any or all of the appeals satisfy any of the criteria set out in section 114(1), they are liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect any or all of the appeals will succeed.

ISSUE

13. The issue here is whether any these appeals, or any parts of them, should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

14. Four of the Appellants were employed by Canadian Tire as cashiers (the "Appellant cashiers"). Ms. Phan was employed by Canadian Tire, at the time of her dismissal, as a sales associate. The length of employment with Canadian Tire for the Appellants ranged from approximately 8 years for Ms. Phan to over eleven years for each of the four Appellant cashiers.

15. The Appellants were part of a group of persons terminated from Canadian Tire in July 2016 following an investigation by the employer into allegations that the Appellants and other persons, including three janitors, had engaged in an improper parking ticket reimbursement scheme, fraudulently taking money, or participating in the fraudulent taking of money, from Canadian Tire.

16. The Director conducted an investigation of the Appellants' complaints, conducting interviews of the Appellants, Glen Gilles ("Mr. Gilles"), Canadian Tire's General Manager and Albert Moreno (Mr. Moreno"), a former janitorial employee of Canadian Tire who had been terminated in May 2016 for his involvement in the same scheme for which the Appellants were terminated.

17. The representative for the Appellants and counsel for Canadian Tire requested an oral hearing on the complaints. The Director considered and addressed the requests, denying them and opting for an investigative process.

18. The Director considered the information and evidence presented, weighed that information and evidence and, for the reasons set out in the Determination, preferred the evidence provided by Mr. Gilles and Mr. Moreno.

19. In the investigation, the Appellants acknowledged they had reimbursed janitors for parking receipts but said they had done so only "once to twice" and in accordance with Canadian Tire's parking reimbursement policy. Mr. Moreno gave evidence that for a period of approximately one year he picked up parking receipts from the Canadian Tire customer lot, obtained reimbursement from certain cashiers, including the Appellants, without a merchandise receipt and in some circumstances shared the money he received with those cashiers. Ms. Phan confessed she had improperly sought reimbursement for a parking receipt on one occasion.

20. Based on the evidence, and applying principles of just cause under the *ESA*, the Director found Canadian Tire had met the burden of showing the Appellants had been terminated for cause.

ARGUMENT

21. The Appellants submit the Director erred in law in two respects – in finding the Appellants were terminated for cause and in applying the law on credibility – and breached principles of natural justice by refusing to conduct an oral hearing and by failing to provide their representative with the interview notes of another complainant who was not represented by LSLAP.

ANALYSIS

22. 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.*

23. 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.

24. 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 an appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

25. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

26. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

27. 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] BCJ No. 2275 (BCCA):

> 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.

28. The question of whether an employee has been dismissed for just cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of just cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact counsels deference. As succinctly expressed in *Britco*, *supra*, 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.

29. The principles of just cause that have been developed under the *ESA* are well-established, have been consistently applied and are expressed as follows:

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:
   i. A reasonable standard of performance was established and communicated to the employee;
   ii. 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;
   iii. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
   iv. 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.

30. While the Tribunal has been guided by the common law on the question of just cause, the principles of just cause used by the Director and the Tribunal have been developed and applied to reflect the purposes and objectives of the *ESA* and to provide effective and efficient administration of the provisions of the *ESA* relating to termination of employment.

31. The Tribunal has also been consistent in stating that the objective of any analysis of just cause is to determine, from all the facts provided, whether the misconduct of the employee has undermined the employment relationship, effectively depriving the employer of its end of the bargain. In *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST # D643/01 (Reconsideration denied in BC EST # RD092/02), the Tribunal made the following comment:

> While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment

contract" (see *McKinley v. B.C. Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a "repudiatory" breach.

32. I am entirely satisfied the Director applied the correct principles to the question of just cause.

33. The Director considered whether the evidence established dishonest conduct by each of the Appellants, and found it did, stating, ". . . the Cashiers, [which included four of the Appellants,] did knowingly process and facilitate fraudulent parking reimbursement transactions" and that Ms. Phan ". . . knowingly sought and received reimbursement of a parking receipt that she knew she had wrongly received".

34. The appeal submissions of the Appellants submit there is an inconsistency in findings made by the Director that undermines the conclusion that the Appellants committed a dishonest act. The representative for the Appellants points to comments in the Determination referring to circumstances where Director says the Appellants cashiers, "knew or ought to have known" or "were aware or ought reasonably to have been aware", as misapplying the standard for finding just cause, which, it is submitted, does not justify finding the Appellant cashiers committed a "serious" employment offence.

35. I do not find anything of consequence arises from the comment by the Director that the Appellant cashiers "knew or ought to have known" the janitors were picking up parking receipts from the customer lot for reimbursement or "were aware or ought reasonably to have been aware" Mr. Moreno was seeking reimbursement from parking tickets that were not his own. These comments relate to the likely state of the knowledge of the Appellant cashiers about how the janitors were acquiring the tickets, not whether they participated in the scheme knowing it was dishonest. The totality of the evidence strongly suggests each of the Appellant cashiers voluntarily participated in the scheme knowing it was dishonest. That finding is made by the Director at page R15 of the Determination on the evidence presented and accepted and I find nothing in the appeal that detracts from this finding or shows it to be unsupportable.

36. The representative for the Appellants also argues the Director did not find the misconduct of the Appellants to be "serious, wilful and deliberate", which he submits is a prerequisite to summary dismissal. While those words are not specifically used in reference to the dishonest conduct of the Appellants, the finding made by the Director, viewed in context, clearly describes conduct that is in every relevant way "serious, wilful and deliberate".

37. Consistent with the endorsement of a contextual approach to assessing just cause for dismissal, the Director considered whether the nature of the dishonesty of the Appellants was sufficiently serious to warrant dismissal and found that it was. Based on the evidence provided, and accepted, by the Director, it is difficult to find fault with the conclusion of the Director that dismissal was an appropriate response to the dishonest conduct of the Appellants; that each of the Appellants had violated an essential condition of their employment which was impossible to reconcile with a continuation of that employment.

38. In finding the Director did not err in law on just cause, I reject the argument that, in making findings of fact in the Determination, the Director applied an incorrect burden of proof to the detriment of the Appellants. The argument relies on comments made in *Carol F. Anderson*, BC EST # D172/01, and contends those

comments establish that a "higher standard of proof" is required rather than a balance of probabilities when alleging an employee has committed serious offence.

39. With respect, that decision does not establish there is a different, or higher, standard of proof when considering whether an employee has committed a "serious" employment offence. There is only one standard of proof under the *ESA*: the civil standard – a balance of probabilities. That said, a delegate deciding a complaint under the *ESA* alleging a serious act of misconduct is entitled to scrutinize the evidence with greater care. I am not persuaded the Director failed in any way in his scrutiny of the evidence.

40. The argument made on behalf of each of the Appellants submits the Director erred in failing to take into account the Appellants were long-serving employees. It is apparent the Director was aware of the length of employment of each of the Appellants; the Determination sets out the basic details of each of their employment. The Director does not need to address every piece of evidence and it is incorrect to presume evidence of which the Director is aware, but is not addressed in the Determination, would have generated a different result. There is no overriding principle that a long-term employee may not be terminated for dishonesty that strikes at the heart of the employment relationship. The "proportionality" submission founders on the finding that the conduct of the Appellants went to the heart of their responsibilities as employees of Canadian Tire. This argument was addressed by the Director in the Determination, where it was specifically stated, in respect of Ms. Phan, that she "was in a trusted position in which she had control over the Employer's revenue and merchandise and knowingly obtained money from them that she was not entitled to" and in the evidence respecting the Appellant cashiers that they were persons whose responsibility was to handle money and "did knowingly process fraudulent reimbursement transactions".

41. While the onus is on the employer to establish just cause for dismissal, the onus in an appeal to this Tribunal is on the appellant to show that the Determination is wrong. I am not persuaded that the Director misapplied the standard of proof or made any substantial error in applying that standard to the facts of the case as found.

42. The Appellants' appeals submit the Director erred in law in assessing the credibility of competing evidence. I agree that credibility was an issue in the investigation and impacted the result; I disagree the factors and evidence the Director considered in assessing the credibility of the Appellant cashiers *vis.* Mr. Gilles and Mr. Moreno amount to an error of law. I find the Director applied the correct test for determining credibility.

43. What is actually challenged in this aspect of the appeals is not whether the Director applied the correct legal test, but whether in applying the legal test to the facts, the Director reached the correct result. The appeal submissions contend the Director erred in "his application of the test for credibility". As indicated above, this kind of argument may only give rise to an error of law if a discreet question of law can be extricated that has resulted in an error.

44. In my view, the argument made on this point does no more than express disagreement with the Director's decision on credibility based on an analysis of the evidence presented. This does not amount to an error of law unless such error arises from the findings of fact. The Director did exactly what is required when called upon to assess the credibility of competing evidence. The reasons provided by the Director for accepting Mr.

Moreno's evidence over that provided by the cashiers is clear and forceful. The credibility of Mr. Gilles evidence was never challenged.

45. The appeals assert a failure to observe principles of natural justice. There are two specific elements to this ground of appeal in the appeal submissions: that the statement and notes of the evidence provided by another complainant, who was also a cashier terminated for her involvement in the reimbursement scheme but was not represented by LSLAP, were not disclosed; and that the Director declined to hold an oral hearing.

46. On the first element, factually there is no issue that a summary of the statement made and the position taken by the other complainant were disclosed during the complaint process, with the Director indicating her statement aligned with those of the Appellant cashiers. The representative for the Appellants says that was not enough to satisfy principles of natural justice that operate in the *ESA*. I disagree. This other complainant's position is summarized in the Determination and it is indeed consistent with the statements of the Appellant cashiers. The argument made in the appeal submission ties the statements made by this individual to the question of the credibility of Mr. Moreno. This circumstance adds nothing to the credibility issue and, I note, was never referred to in any submission on credibility made to the Director on behalf of the Appellants during the complaint process.

47. With regard to the second element to this ground, I find there was no failure by the Director to observe principles of natural justice by investigating the complaints, rather than holding an oral hearing.

48. There are two considerations to address here. The first is whether the process adopted by the Director was, generally, procedurally fair. The second is whether the process adopted amounted to breached principles of natural justice by denying the opportunity to challenge the credibility of the evidence provided by Mr. Moreno in an oral hearing.

49. I will first deal with the second consideration, as it may affect my assessment of whether the procedure adopted was procedurally fair.

50. The Director has discretion over how a complaint will be addressed. There is no entitlement for any party to an oral hearing before the Director. Whether one, or both, parties would prefer to have an oral hearing is not particularly relevant. The question is whether the refusal to conduct an oral hearing, in the circumstances of the particular case, amounted to a breach of the principles of natural justice.

51. Issues of credibility seem to create particular problems when considering if a party was denied fair process by the decision of a delegate to deny an oral hearing. It is fair to say that many, if not most, of Determinations are decided on an assessment of the credibility of the evidence presented by the parties to a complaint. As acknowledged by the Director this was one of those many cases. The Director is the decision-maker in the first instance and is the first to hear what people – witnesses – have to say. It is not for the Tribunal to second guess a finding of credibility that is otherwise grounded in the evidence before the Director and adequately reasoned but the Tribunal will, where called upon, decide whether it was or was not reasonable for the Director to reach conclusions on credibility using the complaint process adopted. In this case, I am satisfied that it was.

52. The Tribunal will only compel an oral hearing where the case involves a serious question of credibility on one or more key issues, or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly. The concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the of the evidence and issues.

53. The sole factual issue around which this argument revolves is whether the evidence of Mr. Moreno, that the Appellant cashiers reimbursed him for parking receipts without his having a merchandise purchase receipt and sometimes received a share of the reimbursement, could be believed over the denials the Appellant cashiers made to the Director in the complaint process.

54. The evidence gathering process adopted by the Director included conducting interviews, either in person, as in the case of Mr. Gilles and Mr. Moreno, or by telephone, as in the case of the Appellants.

55. The Appellant cashiers never denied reimbursing Mr. Moreno or the other janitors for parking receipts. Their position to the Director during their interviews was that they had only reimbursed the janitors "a few times, once to twice" and had never reimbursed a parking receipt unless the janitor showed a valid merchandise receipt.

56. Mr. Gilles was interviewed twice. Mr. Gilles was the person who interviewed the janitors who were said to be involved and each the Appellants. His evidence relating to statements of the former was that they all admitted to presenting parking tickets to the Appellant cashiers for reimbursement over a period of at least one year. With respect to his first interview with each of the Appellant cashiers, he said all of them admitted to having reimbursed parking receipts to the janitors without there being a purchase. Nothing in the appeal submissions made on behalf of the Appellants suggests Mr. Gilles' evidence should not be considered credible or the Director made an error of law in accepting it. Mr. Gilles said all the Appellant cashiers were apologetic. The representative of the Appellants says an apology may not be taken as an admission of guilt. Even if that were so in the context of the interviews Mr. Gilles had with the Appellant cashiers, it is not logical that the Appellant cashiers would apologize for something company policy allowed them to do.

57. Mr. Moreno was interviewed by the Director under oath on three occasions. The Director found that throughout the interviews he provided "clear and consistent detail of the scheme and who was involved."

58. The evidence of Mr. Moreno was provided to the representative for the Appellants, who was invited by the Director to provide questions which the Director could put to Mr. Moreno that had not otherwise been addressed in the three interviews conducted by him. The invitation was declined, on the basis "it is not sufficient for me to send you a list of questions as I would not be able to ask follow up questions to test Mr. Moreno's credibility thoroughly or sufficiently."

59. The Director provided the opportunity to each of the Appellant cashiers to be interviewed with respect to Mr. Moreno's evidence that parking receipts were reimbursed to the janitors without a merchandise receipt showing a purchase, but none of the Appellant cashiers accommodated this request.

60. On July 6, 2017, the representative for the Appellants made his submission to the Director for an oral hearing, relying on allegations that Mr. Moreno had been "pressured" by a manager of Canadian Tire to testify against the complainants and had been aided by the same manager in obtaining a job at a business in which Ross Saito was involved in return for his testimony – allegations denied by Mr. Moreno when he was interviewed by the Director. The Director asked the representative for the Appellants that contact information be provided for this individual but it never was.

61. The Director found as fact, based on the evidence of Mr. Gilles and Mr. Moreno, that janitors were fraudulently remitting parking receipts for reimbursement and that the cashiers were required in order to complete the transactions, leading to the conclusion the cashiers had participated in the parking receipt reimbursement scheme as alleged by Canadian Tire.

62. The Director provided reasons accepting Mr. Moreno's evidence concerning the scheme and those involved. In doing so, the Director considered factors that are typically weighed in assessing credibility: ability to recall details, consistency in what is said, the context in which it is said, the reasonableness of the story, the presence or absence of bias, interest or other motive and the capacity to know. There is no inconsistency in the Director's analysis with the legal test for determining credibility.

63. All of the reasons submitted by the representative for the complainants arguing an oral hearing should be conducted were addressed by the Director. In those reasons, the Director refers to the unanswered requests to the complainants to be interviewed, the failure to provide further detail on the allegations that Mr. Moreno had been "pressured" to testify against the complainants and the failure to provide contact information for the individual said to have "pressured" Mr. Moreno. The Director notes the allegations upon which an oral hearing was sought were "unsubstantiated".

64. I find there was no "serious" question of credibility that would compel an oral hearing. An issue of credibility must arise from the evidence that is provided to the Director or which is accepted by the Tribunal and added to an appeal. Serious issues of credibility do not arise from speculation about the potential effect of allegations unsubstantiated and unsupported by evidence.

65. Returning to the first consideration, the Appellants have provided no objectively acceptable evidence showing the process adopted by the Director denied them the procedural protections reflected in section 77 of the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. These protections have been briefly summarized by the Tribunal in an oft-quoted excerpt from *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.

66. It is clear from the file that the Appellants were afforded the procedural rights captured within the above statement. As stated in the Determination, at pages R3 – R4:

> Throughout the investigation, the parties were granted an opportunity to fully present their cases and to participate in the process through interview and written submissions. Both the Employer's witnesses and the complainants were contacted and interviewed on multiple occasions, either individually or through their counsel and all evidence was cross disclosed. Parties received repeated opportunity to all evidence and submission including the testimony and statements provided the Complainants and the various witnesses. They were allowed to submit questions for me to ask during both initial and subsequent interviews of the parties and witnesses on all issues including that of credibility.

67. I am satisfied the process adopted by the Director allowed the Appellants to fairly state their case. It was their decision to not accept the invitation of the Director to be interviewed with respect to Mr. Moreno's evidence or add anything further to the statement each made in the telephone interview with the Director.

68. The Director scrutinized the evidence that was presented, made findings based on that evidence and gave reasons for accepting the evidence for Canadian Tire over that of the Appellants.

69. I view the credibility argument is nothing more than a last attempt by the Appellants to have the Tribunal reassess findings made by the Director without providing a legal basis for doing so.

70. When viewed in the context of all the evidence provided to the Director, the Director made no reviewable error in the Determination.

71. 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*.

ORDER

72. Pursuant to section 115 of the *ESA*, I order the Determination dated September 22, 2017, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal