

An appeal

- by -

Right Choice Products Inc.
carrying on business as Satya Asha Veggie Food World
("RCP")

- 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)

PANEL: David B. Stevenson

FILE NO.: 2018A/15

DATE OF DECISION: May 23, 2018

DECISION

SUBMISSIONS

Harry Virk

counsel for Right Choice Products Inc. carrying on
business as Satya Asha Veggie Food World

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”) Right Choice Products Inc. carrying on business as Satya Asha Veggie Food World (“RCP”) has filed an appeal of a Determination issued by Kara L. Crawford, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on December 28, 2017.
2. The Determination found RCP had contravened Part 2, section 8, Part 3, sections 17 and 18, Part 4, section 40 and Part 5, sections 45 and 46 of the *ESA* in respect of the employment of Brijesh Mohan (“Mr. Mohan”) and ordered RCP to pay Mr. Mohan wages, including interest, in the total amount of \$32,702.43 and to pay administrative penalties in the amount of \$3,000.00. The total amount of the Determination is \$35,702.43.
3. This appeal is grounded in error of law, failure by the Director to observe principles of natural justice in making the Determination, and evidence becoming available that was not available when the Determination was being made. RCP seeks to have the Determination cancelled, varied, or referred back to the Director.
4. In correspondence dated February 8, 2018, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, that following such review, all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director; a copy has been delivered to counsel for RCP and Mr. Mohan and an opportunity has been provided to object to its completeness. Counsel for RCP filed a submission contending there were documents missing from the record; he attached a copy of correspondence from the Director to a person who is not a party to this matter with the submission (“the June 8, 2017 correspondence”). The Director has responded, indicating the June 8, 2017 correspondence, and any response to the correspondence, was part of a separate investigation and was neither included nor considered by the Director in making the Determination under appeal here. In a final reply, counsel for RCP contends the information contained in a response to the June 8, 2017 correspondence was potentially material and the Director erred in law and breached principles of natural justice by not considering it when making the Determination and, if it was considered, by not providing RCP with a copy of the response for comment.
6. With the greatest respect, the submission advanced here makes no sense; it is premised on speculation upon speculation. If, as suggested by RCP, there was any response to the Director’s June 8, 2017 correspondence – and there is no indication there was – the burden of proving that assertion belongs to

RCP, who also bears the burden of showing the June 8, 2017 correspondence and any response was considered by the Director in the context of Mr. Mohan's complaint against RCP, that the contents of the June 8, 2017 correspondence and the purported response were relevant to some part of that complaint, that the relevant aspects of the June 8, 2017 correspondence and any response required the Director to provide RCP and Mr. Mohan with a copy of them and allow each to comment on its contents. RCP has not gotten over the first hurdle and it is unnecessary to advance the speculation further than to say RCP has not met the burden of showing the June 8, 2017 correspondence was considered by the Director or that it should have been included in the record.

7. As there is no other issue raised with the completeness of the record, I am satisfied it is complete.
8. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:

- (a) the appeal is not within the jurisdiction of the tribunal;*
- (b) the appeal was not filed within the applicable time period;*
- (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.*

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

ISSUE

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

THE FACTS

11. RCP operates an Indian restaurant named Satya Asha Veggie Food World. Mr. Mohan was brought to Canada by RCP as a Temporary Foreign Worker to work as a tandoori cook. Mr. Mohan was employed by RCP for a period from November 9, 2016, to February 16, 2017, when he resigned his employment.
12. Mr. Mohan filed a complaint under the *ESA* alleging RCP had contravened the *ESA* by failing to pay regular and overtime wages, statutory holiday pay and annual vacation pay.
13. Mr. Mohan amended his complaint to add a claim for length of service compensation and the Director amended the complaint to add a possible contravention of section 8 of the *ESA*, notifying the parties of an intention to conduct an investigation on that question and providing both parties with an opportunity to file evidence and make submissions on it.
14. The Director conducted the complaint process through a combination of investigation and a complaint hearing. RCP attended the complaint hearing and was represented by legal counsel; Mr. Mohan attended the complaint hearing and was represented by Mr. Ashish Manral.
15. RCP sought to introduce an affidavit from Bhawani Singh Shekhawat, who was identified as the restaurant manager for RCP. The Director allowed the affidavit to be introduced, but for the reasons expressed in the Determination at page R4, did not rely on it in making the Determination.
16. Shailendra Bitton (“Mr. Bitton”), one of the directors and officers of RCP, gave evidence on behalf of RCP at the complaint hearing. Mr. Mohan gave evidence on his own behalf.
17. The Director made several findings of fact: that Mr. Mohan worked 12 hours a day, 6 days a week, commencing November 9, 2016, and ending, but not including, February 16, 2017; that Mr. Mohan was not paid for all regular hours worked; that Mr. Mohan worked four hours of overtime every Tuesday through Saturday for which he received no overtime pay; that Mr. Mohan qualified for and worked three statutory holidays for which he was not paid in the manner required under the *ESA*; that Mr. Mohan was owed 4% annual vacation pay on wages found owing to him; that Mr. Mohan voluntarily resigned employment on February 16, 2017, and was not owed compensation for length of service; and that RCP contravened section 8 of the *ESA*, misrepresenting wages and hours of work in order to induce Mr. Mohan to accept employment with them resulting in compensable losses to Mr. Mohan.
18. In making the findings of fact, the Director substantially rejected the evidence presented by Mr. Bitton, finding it to be, variously, internally discrepant and contradictory, not contextually reasonable, uncertain and vague. The Director accepted much of Mr. Mohan’s evidence, including his evidence of the days and hours he worked and his evidence of the pre-hiring representations made by RCP that induced him to accept the job offered.

ARGUMENT

19. RCP has raised all of the allowable grounds of appeal. I shall outline the arguments relating to each ground as it appears in the appeal submission.

20. By way of general comment, the appeal submission states it relies on “facts” contained in the affidavit of Mr. Bitton that is attached to the appeal. I will point out, however, that the facts upon which this appeal will be decided are those findings of fact made by the Director unless RCP shows such findings raise an error of law and for that reason should be disregarded.

Failure to Observe Principles of Natural Justice

21. There are two main submissions in the argument on this ground of appeal. The first is that the Director collected evidence and information from a third-party source and failed to disclose that evidence to the parties for comment and response. This submission focuses on the June 8, 2017 correspondence. The other is that the Director was biased toward Mr. Bitton and, by extension, RCP.
22. The argument on this ground is liberally sprinkled with assertions of fact not found in the Determination or the record and disagreements with findings of fact made in the Determination.
23. Central to the first submission is that the June 8, 2017 correspondence, which has been referred to above in the context of the contents of the record – and a possible response to that correspondence – was not provided to RCP.
24. The June 8, 2017 correspondence related to a potential contravention by a third-party of sections 10, 11 and 12 of the *ESA*. The factual basis for the inquiry into a possible contravention of these provisions was generated from information provided by RCP, Mr. Bitton, and Mr. Mohan during the complaint process and in the complaint hearing on Mr. Mohan’s complaint. The June 8, 2017 correspondence sought no information relating to Mr. Mohan’s complaint against RCP but sought the particulars of the relationship between the third-party and Mr. Mohan.
25. The Director says the June 8, 2017 correspondence, and any response to it, was not considered when making the Determination. There is nothing in the record indicating this assertion by the Director is questionable; all of the findings of fact made by the Director in the analysis of whether there was a contravention of section 8 of the *ESA* is supported by material found in the record.
26. Counsel for RCP says this person told him that “she had submitted a detailed reply and various documents relating to the employment and hiring” of Mr. Mohan to the Director. Counsel for RCP contends the Director “relied” on the information provided by this person.
27. Counsel for RCP also contends the Director breached principles of natural justice by allowing Mr. Manral to act as both representative and interpreter for Mr. Mohan, stopping Mr. Bitton from giving evidence, making personal remarks to Mr. Bitton and yelling at him, not allowing RCP to call Mr. Bitton’s wife as a witness, denying counsel for RCP to fully cross-examine Mr. Mohan, interrupting counsel’s cross-examination of Mr. Mohan, giving evidence for Mr. Mohan and refusing, upon request from counsel for RCP, to warn Mr. Mohan about discussing his evidence. Counsel for RCP submits all of these matters also demonstrate a bias by the Director toward Mr. Mohan and against Mr. Bitton and RCP.

Error of Law

28. Counsel for RCP says the Director erred in law by failing to consider relevant evidence and making erroneous findings of fact.
29. As with the argument on the first ground of appeal, the argument under this ground includes a liberal sprinkling of assertions of fact that are either not found or do not accord with findings made in the Determination.
30. Counsel for RCP submits the Director committed an error of law by not considering and adopting the contents of the affidavit of Bhawani Singh Shekhawat. Counsel submits his affidavit is reliable because he was employed along with Mr. Mohan and had direct knowledge of the incident that led to Mr. Mohan resigning.
31. The submission provides a litany of assertions which counsel for RCP says were not set out in the Determination or properly weighed by the Director in reaching conclusions of fact.
32. Counsel for RCP says the Director's finding on section 8 of the *ESA* was made without any evidence of misrepresentation and was based on "assumption", on "speculation" that Mr. Mohan worked 12 hours a day, 6 days a week and, in other respects, relied on incorrect evidence. Counsel for RCP also submits the findings of the Director were made without reference to the evidence given by Mr. Bitton and without "balancing" the evidence that was provided, simply ignoring, or rejecting, the evidence given by Mr. Bitton without providing reasons for doing so.
33. He says the Director's conclusion on this issue is not justified when all of the correct evidence and circumstances are considered.
34. Counsel for RCP also says the Director was not justified in accepting the evidence of Mr. Mohan over that of Mr. Bitton. He submits the Director's position on the relative merits of the evidence of the respective parties was the product of the bias toward Mr. Bitton and legal counsel for RCP.

New Evidence

35. Counsel for RCP submits the June 8, 2017 correspondence, and any response to that correspondence, which the Tribunal apparently should order to be produced by the Director, be accepted as new evidence and considered in the appeal.

ANALYSIS

36. 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.*

37. 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.
38. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
39. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.
40. The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias must be demonstrated on clear and cogent evidence.
41. As already indicated above, 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. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
42. I shall deal with the grounds of appeal in reverse order.

New Evidence

43. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

44. I am not persuaded to accept the June 8, 2017 correspondence sought to be introduced into this appeal nor to require the Director to produce any response or communication relating to it. It is clear on the face of this correspondence that it was produced and delivered to a third-party in respect of a matter that was unrelated to Mr. Mohan's complaint against RCP. RCP has not established this correspondence, and any response, has relevance to any issue arising from the complaint. All of the facts summarized in the June 8, 2017 correspondence are based on material and testimony received in the complaint process involving RCP and Mr. Mohan. It is found in the Determination and the record. In that sense, there is no evidence in that correspondence that is "new".

45. It may already be apparent in my comments addressing the substance of the June 8, 2017 correspondence, but I do not find it to be probative of any material issue in dispute in this appeal.

46. This ground of appeal is not accepted.

Error of Law

47. At its core, the arguments relating to the error of law ground of appeal challenge the findings of fact made by the Director from the evidence presented by the parties and the conclusions drawn from those findings. RCP alleges the Director acted without evidence, but rather on "assumption" and "speculation", failed to consider relevant evidence, and made erroneous findings of fact from the evidence presented.

48. In order to establish the Director committed an error of law in respect of factual findings and conclusions drawn from them, RCP is required to show the factual findings reached by the Director, and the conclusions or inferences drawn from those findings, are inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the findings or conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant, supra*, at paras. 26 – 29. RCP has not succeeded in meeting this burden.

49. RCP is doing nothing more than seeking to have the Tribunal re-visit the conclusions reached by the Director, using assertions of fact that are either not found in the Determination or the record, are inconsistent with findings made in the Determination, without showing those findings raise an error of law, or have specifically been rejected by the Director in the Determination. I categorically reject the suggestion the Director erred in any respect relating to the findings drawn from the evidence that was presented by the parties.

50. The decisions made by the Director on the evidence provided by the parties were not unreasonable; they were based on what appears to be a thorough consideration of the competing evidence, and the findings are not perverse and inexplicable, in the sense that is required when seeking to challenge findings of fact as errors of law. The Director has provided a rational foundation for each of the key and relevant findings made.

51. RCP argues the Director ignored the evidence provided through the affidavit of Bhawani Singh Shekhawat. Having read the affidavit and that part of the Determination relating to it, I find the Director's view of it to be perfectly reasonable and logical. Not only is it vague and somewhat

misleading, it speaks to matters about which the deponent could have no personal knowledge without indicating either that he has been informed of that information or disclosing its source.

52. RCP also argues the Director ignored the evidence given by Mr. Bitton. There is nothing that would support that argument. The summary of the evidence of both parties shows the Director was alive to the position of RCP and Mr. Bitton on Mr. Mohan's complaint. The Determination does not show the evidence of Mr. Bitton was not considered or was ignored, but quite clearly indicates the Director was more persuaded by the evidence of Mr. Mohan than that of Mr. Bitton. The reasons are expressed in the Determination. There is nothing in the appeal that shows the Director's conclusions on the evidence were an error of law.
53. To a large extent, the arguments made against the Determination have ignored the "functional context-specific approach" adopted and applied by the Tribunal in such cases as *Kirk Edward Shaw*, BC EST # D089/10, *Worldspan Marine Inc.*, BC EST # D005/12, and *Robin Bourne carrying on business as Agent 99 Express Services*, BC EST # D044/16. These decisions direct that the Determination should be read as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they are delivered: see *R. v. R.E.M.*, 2008 SCC 51, from paragraph 15. Every finding and conclusion need not be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned. In this case, the delegate has reached a result that is grounded in the evidence and the material provided by the parties. Taken as a whole, the Determination is reasonable and logical. The onus on RCP is not satisfied by attacking irrelevant and insignificant elements of the Determination; their appeal must address the "whole" and demonstrate a reviewable error.
54. This failure is exemplified in the argument by RCP that the Director erred by not allowing Mr. Bitton to testify about the BC Provincial Nominee Program ("BC PNP"). This argument is made in the context of both error of law and breach of natural justice. The Director's decision to foreclose some of Mr. Bitton's testimony is discussed at page R4 of the Determination. The reason for the intervention of the Director was in response to a question from counsel for RCP about whether BC PNP had "found [RCP] to be in compliance with the law, including the Act", which the Director, correctly in my view, indicated was irrelevant since it was the Director's responsibility to decide whether RCP was in compliance with the *ESA* and, in any event, Mr. Bitton was not qualified to give evidence on how the BC PNP made nomination decisions or the significance of a nomination decision. When viewed in context there is nothing in this appeal which shows the decision of the Director not to hear Mr. Bitton on that matter was in any respect an error. To advance a general attack on the Director, one which mis-states the circumstances of the Director's ruling, on this totally irrelevant matter is misguided and inappropriate.
55. RCP is doing nothing more in this appeal than seeking to have the Tribunal ignore evidence that was provided to the Director and alter findings made in the Determination that were based, at least in part, on that evidence. There is no legal basis shown in the appeal for the Tribunal to do this.
56. This ground of appeal is without merit.

Breach of Principles of Natural Justice

57. The appeal asserts a failure to observe principles of natural justice as one of its grounds. As indicated above, there are two parts to this ground of appeal: procedural fairness and bias.
58. The main element of the first part of this ground of appeal is the contention, which I do not accept, that the non-disclosure of the June 8, 2017 correspondence denied RCP the procedural protections reflected in both section 77 of the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. My view of this correspondence has been fully expressed above. To summarize: RCP has not shown this correspondence was in any way relevant to the issues in dispute between RCP and Mr. Mohan or that RCP's ability to answer the claims made by Mr. Mohan in his complaint was compromised by not being provided this correspondence, and any response to it, and not being able to comment upon it.
59. The natural justice concerns 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.
60. RCP was provided with the procedural rights described in the above excerpt. There is no foundation for contending there was a denial of natural justice. The burden on RCP to show a breach of the principles of natural justice has not been met. RCP has provided no objectively acceptable evidence showing it was denied those procedural protections.
61. Another aspect of the natural justice argument lies in the challenge by RCP to procedural matters and the decisions made by the Director in respect of them. This submission is also framed under the allegation of bias, which I shall deal with below.
62. The decisions of the Director on those matters about which RCP complains is predominantly one of discretion. In *Jody L. Goudreau and Barbara E. Desmarais*, BC EST # D066/98, the Tribunal stated it will not interfere with the exercise of discretion by a delegate unless it can be shown the exercise was an abuse of power, the delegate made a mistake in construing the limits of his/her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
- . . . a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly

be said, and often is said, to be acting "unreasonably". *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229

Absent any of these considerations, the Director even has the right to be wrong.

63. In *Goudreau and Desmarais, supra*, the Tribunal stated the unreasonableness test as whether “the Director has considered immaterial factors or failed to consider material factors.”
64. Although RCP may strongly disagree with the Director’s decisions on the procedural matters it would not, in my view, be correct to interfere with that exercise of discretion in this matter. Nothing in the materials, including RCP’s submissions, indicates that the Director’s decisions in this respect were an abuse of process, a mistake in construing the limits of authority, or involved procedural irregularity. There is no indication that the Director considered irrelevant factors or failed to consider relevant factors. It appears from the Determination and the record that the decision of the Director on Mr. Manral’s participation and the relevance of the BC PNP evidence which Mr. Bitton sought to give were within the authority of the Director to make and were made on relevant considerations. RCP has not shown a basis for a review of the discretion exercised on these matters.
65. In any event, the arguments on these matters rely substantially on assertions that have no apparent factual foundation in the Determination or the record. If there is such foundation, either in the Determination – as findings made by the Director – or in the record, it is RCP’s obligation to identify where those facts might be found and that they objectively support their argument but they have not done so. In the absence of such a foundation being in the Determination or on the record, these assertions invoke the ground of new or additional evidence, section 112(1)(c) of the *ESA*, and RCP has not established a basis for the Tribunal accepting such assertions on this appeal as new or additional evidence.
66. In answer to the allegation of bias, the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact. Furthermore,
- ...because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: (*A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.)
67. Allegations of bias against a delegate must be considered in light of the fundamental nature of the statutory process within which a delegate functions: (see *Milan Holdings Inc.*, BC EST # D559/97; *Reconsideration Refused*, BC EST # RD313/98)
68. In *Cyberbc.Com AD & Host Services Inc. operating as 108 Tempo and La Pizzeria*, BC EST # RD344/02 (*Reconsideration of BC EST # D693/01*), the Tribunal has stated:
- One of the fundamental principles of natural justice is that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case” (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685).

Impartiality was discussed by the Supreme Court of Canada in *R. v. R.D.S.*, [1997] 3 S.C.R. 484 as follows:

[Impartiality] can also be described ...as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

The Supreme Court articulated the test for finding a reasonable apprehension of bias as follows:

When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias.... It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.... The manner in which the test for bias should be applied was set out with great clarity by de Grandpre J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. 394:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is “what would an informed person, viewing the matter realistically and practically- and having thought the matter through-conclude...”

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including “the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold”.

An allegation of bias against a decision maker is serious and should not be made speculatively:

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))

To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A.) September 28, 1999)

As the Supreme Court in *S. v. R.D.S.*, *supra* stated:

Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice

The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

The appellant provided only his perception of what occurred. He provided no evidence from any other party appearing at the hearing.

As the Tribunal has noted in *Re: Dusty Investments Inc. d.b.a. Honda North*, BCEST #D043/99, the evidence presented should allow for objective findings of fact that demonstrate a reasonable apprehension of bias. The rationale for this requirement is anchored in the principle that a party against whom an allegation of bias is made does not have the opportunity to explain the circumstances in which the allegations arise or to deny the presence of a biased mind.

In *R. v. R.D.S. (supra)* the court held that there was a presumption that judges would carry out their oath of office requiring them to render justice impartially. This presumption is one of the reasons why the threshold for perceived judicial bias is high, and can only be displaced with ‘cogent evidence’.

As with judges, there is a presumption that the adjudicator acted impartially. Employment Standards Tribunal adjudicators, like judges, take an oath of office, in which they swear they will discharge their duties as an adjudicator with independence and common law principles of natural justice.

That presumption is not overcome by presenting subjective and impressionistic evidence.

69. In the context of this appeal, the above principles can be summarized as follows:

There is an onus on RCP to prove an allegation of bias on the evidence. The evidence must show a “real likelihood” or probability of bias. Mere suspicions, or impressions, are not enough. The evidence presented should allow for objective findings of fact that demonstrate a reasonable apprehension of bias. There is a presumption of impartiality. Employment Standards Tribunal delegates take an oath of office, in which they swear they will discharge their duties with independence and within common law principles of natural justice. This presumption is one of the reasons why the threshold for perceived judicial bias is high, and can only be displaced with “cogent evidence”.

70. Considering the applicable principles in light of the onus on RCP and the evidence provided, I reject completely and without reservation the allegations of bias. There is not one scintilla of evidence showing the Director was predisposed to a particular result adverse to RCP and Mr. Bitton. The only basis for the allegations represent nothing more than challenges against the Director acting judicially in making findings or reaching conclusions that do not accord with RCP’s view of their case and with which it disagrees. Such is not a basis for finding bias.

71. This ground of appeal is without merit.

72. In sum, and based on 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

73. Pursuant to section 115 of the *ESA*, I order the Determination dated December 28, 2017, be confirmed in the amount of \$35,702.43, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal