Citation: Familiar Transmissions Ltd. (Re)
2019 BCEST 125

An appeal

- by -

Familiar Transmissions Ltd. carrying on business as Big O Tires

- 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: Maia Tsurumi

FILE NO.: 2019/140

DATE OF DECISION: November 20, 2019

DECISION

SUBMISSIONS

Erin Brandt	counsel for Familiar Transmissions Ltd. carrying on business as Big O Tires
Dan Armstrong	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Familiar Transmissions Ltd. carrying on business as Big O Tires ("Big O Tires" or the "Employer") has filed an appeal of a determination (the "Determination") issued by Dan Armstrong, a delegate (the "Delegate") of the Director of Employment Standards, on June 6, 2019. In the Determination, the Delegate found that Big O Tires contravened sections 58, 63 and 83 of the *ESA*. In the result, he ordered Big O Tires to cease contravening the *ESA* and to pay $9,204.81 (inclusive of interest) to Jimmy Wong (the "Complainant") and to pay $1,000 in administrative penalties.

2. Big O Tires appeals the Determination on the grounds that: (1) the Delegate erred in law; and (2) the Delegate failed to observe the principles of natural justice in making the Determination. Big O Tires seeks to have the Determination cancelled.

3. Pursuant to sub-section 115(1), I dismiss the appeal and confirm the Delegate's Determination.

4. This decision is based on the submissions made by Big O Tires in its Appeal Form, the sub-section 112(5) record (the "Record"), the Determination, the Reasons for the Determination (the "Reasons"), and submissions made by the Director (the "Director's submissions").

ISSUE

5. The issue before the Employment Standards Tribunal is whether all or part of this appeal should be allowed or be dismissed under sub-section 114(1) of the *ESA*.

ARGUMENT

6. Big O Tires submits that the Delegate erred in law and failed to observe principles of natural justice in making his Determination. The Employer raises 17 alleged errors of law and 6 alleged breaches of natural justice as follows:

   a) error of law #1: contents of the Complaint filed on June 27, 2018;

   b) error of law #2: erroneous restatement of Mr. Litke's evidence (reason the Complainant gave for his refusal to work);

   c) error of law #3: erroneous restatement of Mr. Litke's evidence (safety of hoists);

   d) error of law #4: issues in dispute;

e) error of law #5: restatement of the Supervisor's evidence;

f) error of law #6: reason for refusal to perform PVIs;

g) error of law #7: substantiation of Complainant's concerns by WorkSafeBC;

h) error of law #8: finding of credibility;

i) error of law #9: just cause;

j) error of law #10: abandonment of employment;

k) error of law #11: after-acquired cause;

l) error of law #12: Mr. Litke's statement on July 12, 2018 (direction to not return to work);

m) error of law #13: Mr. Litke's statement on July 12, 2018 (the matter referred to was not critical);

n) error of law #14: Mr. Litke's statement on July 12, 2018 (which matter "this" referred to);

o) error of law #15: suspension;

p) error of law #16: termination of employment;

q) error of law #17: "normal" or "average" hours of work;

r) breach of natural justice #1: duty to consider relevant evidence;

s) breach of natural justice #2: duty to consider legal principles;

t) breach of natural justice #3: duty to provide reasons;

u) breach of natural justice #4: reasonable apprehension of bias;

v) breach of natural justice #5: accepting and relying on inaccurate evidence; and

w) breach of natural justice #6: effect of totality of errors of law.

7. Big O Tires wants the Tribunal to cancel the Determination.

THE FACTS

Background

8. Familiar Transmissions Ltd. carrying on business as Big O Tires is a registered British Columbia company. Mr. Robert Litke ("Mr. Litke") is listed in the BC Registry Services database as its sole director. Big O Tires operates a vehicle repair and maintenance business.

9. The Complainant began working as an Automotive Service Technician at Big O Tires on November 25, 2011. When his employment ended, his rate of pay was $35.00 per hour with the potential for a bonus.

10. The Complainant provided the Employer with the Branch's self-help kit seeking compensation for overtime, statutory holiday pay, and vacation pay on June 11, 2018. He filed his Complaint with the Branch on June 27, 2018.

11. On July 16, 2018, the Complainant provided a second self-help kit to Big O Tires, seeking compensation for regular wages, overtime, statutory holiday pay, vacation pay, and compensation for length of service.

12. On August 1, 2018, the Complainant obtained new full-time employment at a higher wage.

13. After mediation in the fall of 2018, on December 5, 2018, Big O Tires and the Complainant entered into a settlement agreement for the claims for regular wages, overtime wages, statutory holiday pay, and annual vacation pay.

14. On the remaining issues of compensation for length of service and whether the Complainant was mistreated because of a complaint or investigation, a hearing was scheduled for December 6, 2018. Prior to the hearing, the parties were notified that the remaining issues would be determined by way of an investigation meeting on December 6, 2018 (the "First Investigation Meeting").

15. After the First Investigation Meeting on December 6, 2018, the Employment Standards Branch (the "Branch") disclosed partial audio recordings made by the Complainant to Big O Tires.

16. On February 13, 2018, the Delegate issued a preliminary assessment in which he relied on the audio recordings (the "Preliminary Assessment").

17. On March 5, 2019, the Employer requested full audio recordings from the Branch as it believed the Complainant had only produced a small portion of his meetings with the Employer. On March 6, 2018, the Delegate informed Big O Tires that the partial audio recordings were the result of a miscommunication between the Branch and the Complainant.

18. On March 28, 2019, the Employer received the full audio recordings.

19. On April 1, 2019, the Employer requested a second investigation meeting to review the contents of the full audio recordings with all parties. A meeting occurred on April 15, 2019 (the "Second Investigation Meeting"). The Second Investigation Meeting was continued on May 7, 2019 (the "Third Investigation Meeting").

20. On May 21, 2019, Big O Tires made written submissions to the Delegate.

21. The Delegate issued his Determination and Reasons on June 6, 2019.

Issues Before the Delegate

22. The issues before the Delegate were whether the Complainant: (1) was owed compensation for length of service; and (2) was mistreated as a result of a complaint made under the *ESA*.

Evidence and Submissions at the Hearing

End of employment

23. On July 12, 2018, the Complainant met with his supervisor (the "Supervisor") and Mr. Litke to discuss resolution of his claim under the *ESA* for regular wages, overtime, statutory holiday pay, annual vacation pay overtime, and vacation pay. The Complainant secretly recorded this meeting and the recording forms part of the Record. The parties were unable to resolve the claims. At the end of the meeting, Mr. Litke told the Complainant that he had yet to review his claim for wages, but if he had, he would be looking to adjust it downwards. He also said that:

> "I think we need to get this resolved one way or the other before we can carry on. I want you to think about what I said and you can call me, set a time during the day and we can come up with something else."

24. The Complainant interpreted this statement as meaning that his wage claims had to be resolved before he could return to work. Mr. Litke said that his statement referred to the need to address the Complainant's refusal to perform provincial vehicle inspections (see below).

25. On July 13, 2018, the Complainant sent a letter to Big O Tires saying that he had been mistreated by them as a result of his Complaint. The alleged mistreatment was a significant reduction in his hours because he was sent home four out of five working days. The reduction in hours meant that he earned less than 50% of his weekly earnings and the Complainant referenced section 62 of the *ESA*, which defines a "week of layoff" as one in which the employee earns less than 50% of their average earnings and said that he considered himself temporarily laid off. He then referenced section 66 of the *ESA* (constructive dismissal) and said that because he had not agreed to a temporary layoff, he considered himself terminated. In this regard, he also referenced a wage rate reduction and his view that he was essentially on-call because he could be sent home at any time. Because of the termination, he sought six weeks of severance from the Employer.

26. Big O Tires said that the Complainant quit his employment via the July 13, 2018 letter. It alleged that the Complainant refused to perform provincial vehicle inspections ("PVIs"), which was an intrinsic part of his job responsibilities. In July 2017, when the Complainant received his license as an Authorized Inspector, the Employer promoted him to Senior Technician and increased his wage rate from $30 to $35/hour to compensate him for his additional duties, including completing PVIs. At this time, it became an implied term of the Complainant's employment contract that he would complete PVIs for Big O Tires.

27. The Complainant said that he was qualified to perform PVIs but did not want to do them because in his opinion, based on his experience and observations, some of the hoists used to perform the work were unsafe. He was sent home on July 6, 2018, after declining to perform a PVI. He was sent home for several days the following week for the same reason. The evidence was that from June 9 to July 5, 2018, he did PVIs on about half of the days that he worked. However, starting on July 6, 2018, he refused to complete any more.

28. According to the Complainant he contacted WorkSafeBC, which audited the facility where the Complainant worked on July 10, 2018, and determined that two out of five hoists were not safe to be

used, ordered repairs, and ticketed Big O Tires. The Complainant said that one of the two hoists found to be unsafe was assigned to the Complainant. He disputed the Employer's statement that the other hoists were available to him to use, both at the location where he worked and at other Employer locations, which had 10 more hoists that were deemed safe.

29. Big O Tires submitted that it had to hire a contractor to do the PVIs because of the Complainant's refusal to do them and there was not sufficient work for both the Complainant and the contractor. It said it told the Complainant that as long as he refused to do PVIs, it would have to replace him with a contractor.

30. On the July 12, 2018 recording, the Complainant said that he "*can't do inspections until this whole thing is over*." When the Delegate asked if this referred to the resolution of his Complaint, the Complainant said it was in part, but that it also referred to the safety issue.

31. The Employer said that it attended the July 12, 2018 meeting to try to resolve the dispute and persuade the Complainant to return to work, but it now believes that the Complainant did not attend the meeting in good faith and that he attended it to try to elicit recordings he could use against the Employer in his Complaint.

Length of employment

32. The Employer submitted that the Complainant was a new employee when he ended his employment on July 13, 2018, because his employment relationship had been severed on April 23, 2018. Big O Tires also said that the Complainant's employment relationship was severed on August 7, 2014. The Complainant denied these allegations.

33. There is an April 23, 2018 Record of Employment (the "2018 ROE"). Big O Tires said that it issued the 2018 ROE because the Complainant went on vacation without authorization. The Complainant was obligated to seek Mr. Litke's permission if he wanted to take vacation and he was aware of this obligation. He failed to do so.

34. The Complainant said that the 2018 ROE arrived at his home when he was on vacation. It indicated that he quit his employment and that he was "*not returning*". The Complainant explained that he immediately contacted his Supervisor to ask why the 2018 ROE was issued. His Supervisor then text messaged him as follows, "*Just spoke with Rob. You're set to return and the two of you can sit and work these things out hopefully. Until then, enjoy your vacation and chill*." The Complainant said that he returned from vacation on June 5, 2018, and resumed work on June 7, 2018, as he had planned.

35. The parties agreed that upon the Complainant's return to work, the Employer told him that he was a new employee, having abandoned his employment on March 31, 2018, because of an unauthorized vacation.

36. Mr. Litke said that the vacation request received by the Supervisor was "*not really a request, more of a notice of intention.*" Mr. Litke said that he did not discuss the vacation request with the Complainant but he expected the Complainant to take the initiative and because the Complainant did not get in touch with Mr. Litke prior to his departure, Mr. Like "*read into it that he thought he could do what he wanted.*" For example, when the request was received, the Complainant had already purchased his airplane tickets. Three weeks after the Complainant's March 31, 2018 departure, the Employer issued the 2018 ROE.

37. The Complainant denied that his leave was not authorized and explained that he had a "Request for Vacation" form signed by his Supervisor. The form indicated that he would be returning to work on June 7, 2018. The Complainant said that he had first raised the possibility of an extended vacation to Asia to visit family with his Supervisor in 2016 or early 2017 and because of his vacation plans for 2018, he did not take vacation in 2017. He says that his Supervisor told him that as long as his request was in writing and did not conflict with other employees, the Supervisor would forward it to Mr. Litke.

38. The Supervisor gave evidence that the Complainant's 2018 vacation was in the works for some time and that the Complainant informed the Supervisor about it, maybe in early 2017. The Supervisor said that he encouraged the Complainant to speak with Mr. Litke about his vacation. The Supervisor also said that communication between the Complainant and Mr. Litke was poor and that the Complainant did not discuss his vacation plans with Mr. Litke even though he had opportunities to do so. According to the Supervisor, he was not the final decision-maker regarding vacation; that decision ought to have involved Mr. Litke. The Supervisor further said that he had discussions with the Complainant about this vacation six to eight weeks before the Complainant's departure for Asia. The Supervisor was fine with it, but the Complainant knew it was not the Supervisor's decision. Having signed the vacation request form, the Supervisor said that it was expected that the Complainant would get Mr. Litke's signature as well. The Supervisor testified that he discussed the Complainant's vacation request with Mr. Litke who said that the Complainant would need to talk to him about it. Although Mr. Litke had not signed the vacation request form, the Supervisor made changes to the work schedule to accommodate the Complainant's absence and the Supervisor said he expected him to return to work after his vacation. He noted that the Complainant's absence was excessive. When asked about his text message to the Complainant that said, "*Just spoke with Rob…you're set to return…until then, enjoy your vacation*", the Supervisor said that he was just saying that the parties would need to address their differences when the Complainant returned. He was merely trying to facilitate a meeting upon the Complainant's return from vacation.

39. Mr. Litke said that the Complainant did not communicate an intention to quit, but that the Complainant did not communicate at all about his vacation and Mr. Litke believed it was necessary to issue the 2018 ROE because the Complainant "*had a cavalier attitude towards taking vacation (irrespective of the effect on the organization).*" Mr. Litke said that vacation cannot be accumulated so as to have a longer vacation and that if there has been no communication with the employee and they are gone longer then they are entitled to be gone, then they are issued a ROE. Mr. Litke said that he had no way to contact the Complainant while he was away, but he acknowledged that he did not try to e-mail or phone him. The Complainant had been with the Employer for years and understood its requirements. Big O Tires also said that in 2013, the Complainant was gone for training for seven weeks and then he went on vacation, which the company did not appreciate as it was stressful.

40. Because there was no code on the ROE form for abandoning a job, the Employer put down that the Complainant quit.

41. The Complainant said that he sought to have Mr. Litke remove the 2018 ROE from his employment record. When he was not able to do so, he completed an Employment Standards Branch self-help kit and provided it to Mr. Litke on June 11, 2018, with overtime wages and vacation pay totalling $14,952.20. He also raised concerns with the legitimacy of the 2018 ROE.

42. According to the Complainant, when he returned to work, he felt that he was being "*singled out*" and made to perform additional tasks such as signing off on his day-to-day duties.

43. The Employer also submitted an August 7, 2014 Record of Employment (the "2014 ROE") into evidence. The 2014 ROE indicated that the Complainant had previously quit Big O Tires. The Employer said that the Complainant was required to seek permission from Mr. Litke for any vacation. Even though the Complainant submitted a vacation request in 2014 to his then supervisor who signed it prior to the Complainant leaving on vacation, the Complainant had to get Mr. Litke's permission and he did not do so.

44. The Complainant disputed that his employment relationship was severed in 2014. He said that from July 24 to August 25, 2014, he went to Hong Kong to get married and then went on his honeymoon. He said that before he left, he submitted a vacation request form to his then supervisor who signed it. The supervisor approved the request and gave a copy to Mr. Litke.

45. It was not contested that the Complainant was rehired on August 26, 2014.

Delegate's Findings and Analysis

Compensation for length of service

46. The first question the Delegate addressed was whether the Complainant was entitled to compensation for length of service. Section 63 of the *ESA* states that after three months of employment, an employee is entitled to either working notice or compensation for length of service if the employer terminates the employment. An employer is not required to pay compensation if an employee quits. The onus for proving an employer is relieved of the need to give written notice or compensation for length of service is on the employer.

47. Whether compensation for length of service was owed, or how much was owed, depended on whether: (1) the Complainant had quit or was terminated; (2) if he was terminated, whether he was terminated with just cause or not; and (3) if he was not terminated with just cause whether his employment had been interrupted before he was terminated.

Was the Complainant terminated or did he quit?

48. The Complainant submitted that his Employer suspended his employment as a result of his wage claim and that he considered this an alteration to his conditions of employment that equated to termination. This is what he said in his July 13, 2018 letter to his Employer.

49. The Delegate concluded that to decide whether the Complainant was terminated, the Delegate had to determine whether Big O Tires suspended him, and if it did, whether this was a substantial alteration of his conditions of employment. The Delegate considered section 66 of the *ESA*. This provision states that if a condition of employment is substantially altered by an employer and as a result of this change the employee makes the decision to quit, the ending of the employment relationship can be the result of the employer's actions and the employee is deemed to have been terminated. To meet the requirements of section 66, the Complainant had to show that the change made by the Employer placed him in a position of having to accept as a condition of continued employment, changes to wages, working conditions, or

benefits that an objective, reasonable person would find to be unfair, unreasonable, and unacceptable. The employer's intent is not relevant.

50. The Delegate noted that the parties disagreed about the meaning of Mr. Like's statement at the July 12, 2018 meeting that:

> "I think we need to get this resolved one way or the other before we can carry on. I want you to think about what I said and you can call me, set a time during the day and we can come up with something else."

The Complainant thought it meant his wage claims had to be resolved before he could return to work and Big O Tires said that it meant that the Complainant's refusal to do the PVIs had to be resolved before he could return to work.

51. First, regardless of what Mr. Litke was referring to that needed to be resolved, the Delegate found that the critical aspect of the statement was that there had to be a resolution "*before we can carry on*" (emphasis added by the Delegate). He found "*carry on*" to be an obvious reference to the continuance of the employment relationship. He therefore found that Mr. Litke's direction was that the employment relationship could not continue without first resolving the matter in question. The Delegate found that the implication of this statement was that the Complainant should not return to work until the matter was resolved. The Delegate concluded that this direction constituted a suspension of the Complainant's employment and constituted a substantial alteration to his conditions of employment, which the Complainant rejected in his July 13, 2018 letter.

52. Next, the Delegate found that the matter that had to be resolved was the wage claim. His determination was based on the evidence in the audio recording of the July 12, 2018 meeting, including Mr. Litke's reference to the Complainant to think about what Mr. Litke had said and "*come up with something else*" (emphasis added by the Delegate), which the Delegate found was a reference to the wage claim. Also, on the recording, the Supervisor suggested that the Complainant provide them with "*a solution*" that would solve the problem for the Complainant and both the Supervisor and Mr. Litke made statements that indicated Big O Tires was asking the Complainant to reduce his wage claim (i.e., the Supervisor told the Complainant that the Employer had given him an explanation of how they would treat overtime; the Supervisor told the Complainant that Big O Tires did not think the wage claim could go beyond six months; the Supervisor said that the vacation pay was according to what the hours were; although it was almost a month since he had received it, Mr. Litke said he had yet to review the wage claim; Mr. Litke said that if he had reviewed the wage claim, he would be looking for a downward adjustment in the hours). The Delegate's finding that Big O Tires told the Complainant to reduce his wage claim and that he could not return to work until this matter was resolved lead the Delegate to conclude that the Employer was trying to force the Complainant to reduce his wage claim as a precondition to his return to employment. The Delegate found that an objective, reasonable person would find the Employer's actions to be unfair, unreasonable and unacceptable and thus he found that the Complainant was terminated by Big O Tires.

53. Finally, the Delegate found that the Complainant's failure to perform the PVIs was not abandonment of his employment. This was based on the Delegate's finding that the Complainant was credible about the safety issues that he identified with the hoists (see below).

Was the Complainant terminated for just cause?

54. The Delegate next addressed whether Big O Tires had just cause in terminating the Complainant because of his refusal to do the PVIs. He noted that to establish just cause, the Employer had to prove on a balance of probabilities that the Complainant behaved in a manner that was inconsistent with the continuation of employment. The Delegate accepted that the Complainant's refusal to perform the PVIs was based on his assessment, which was subsequently substantiated by WorkSafeBC, that the hoists assigned to him were unsafe and required repairs. The Delegate rejected the Employer's evidence that other hoists were available to the Complainant for the PVIs. He preferred the Complainant's evidence that the other hoists were usually occupied by another vehicle and technician. Thus, he found that the Employer had not proven just cause.

55. The Employer also argued that after the Complainant's termination it acquired just cause because of his surreptitious recording of the July 12, 2018 meeting. The Delegate rejected this argument. He accepted that secretly recording one's employer can have a substantially detrimental effect on an employment relationship, but he also found that the circumstances in which the recording occurred added relevant context to the reasonableness of his actions and was not fundamentally incompatible with the employment relationship. The circumstances were as follows:

a) the Complainant had filed a substantial claim for unpaid wages;

b) Mr. Litke admitted that one month after receipt of this claim, he had yet to fully review it; and

c) the recordings related solely to the Complainant's attempts to corroborate his claim for wages and was not intended to embarrass or otherwise bring his employer into disrepute.

Thus, the Delegate found that the Complainant's conduct did not constitute serious misconduct and was not a basis for a finding of just cause.

How much compensation for length of service was owed?

56. The Delegate began by stating that the amount of notice or compensation an employer must provide increases with the employee's length of service, up to a maximum of eight weeks for eight years or more of employment. He stated that the parties disputed the length of the Complainant's employment. The Complainant claimed to have started work on November 25, 2011, and Big O Tires argued that the employment relationship was interrupted in August 2014 and April 2018 and it relied on the 2018 and 2014 ROEs.

57. The Delegate cited the test to determine whether an employee quit or was fired for the purposes of the *ESA* found in *Burnaby Street Taxi*, BC EST # D091/96. That decision held that the right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised. There is a subjective and objective element to quitting. Subjectively, the employee must form the intent to quit and objectively the employee must carry out an act inconsistent with his or her further employment.

58. Regarding the 2018 ROE, the Employer submitted that when the Complainant's employment ended on July 6, 2018, he was a new employee because he had abandoned his employment by virtue of his March

31, 2018 departure on vacation without authorization. He was obliged to seek Mr. Litke's permission if he wanted to take a vacation, the Complainant knew that, and did not do so. The Employer also said that it was especially important that the Complainant seek leave because he intended to be away until June 7, 2018.

59. The Complainant said that he never expressed an intention to quit. He completed a "Request for Vacation" form that was signed by his Supervisor. The form clearly indicated that he would be returning June 7, 2018, and the Supervisor confirmed that he first raised the possibility of a long vacation to Asia in early 2017. He did not take a vacation in 2017 so as to accumulate more vacation entitlement for the proposed trip. The Delegate noted that the Employer's failure to ensure that the Complainant took a vacation in 2017 was a contravention of the *ESA*.

60. The Complainant further said that while he was away on vacation, he found out about the 2018 ROE and that it said he had quit his employment and was not returning. He spoke with his Supervisor and was told, as described above, "*Just spoke to Rob. You're set to return and the two of you can sit and work these things out hopefully. Until then, enjoy your vacation and chill.*" On June 5, 2018, the Complainant returned from vacation and resumed work on June 7, 2018, as he had planned.

61. The Delegate accepted the Complainant and the Supervisor's evidence and found that his decision to inform the Employer verbally a year in advance and in writing prior to his departure were not actions of an individual intending to quit or abandon his employment. While the 2018 ROE indicated that Mr. Litke did not support the lengthy vacation, it was also clear that the Complainant's employment did not end as a result of the 2018 ROE. He resumed his duties on June 7, 2018, as initially planned. In the result, the Delegate found that the Complainant's employment was not interrupted by virtue of the issuance of the 2018 ROE.

62. Regarding the 2014 ROE, Big O Tires said that the Complainant had previously quit on July 23, 2014. The 2018 ROE indicated that the Complainant's employment had begun on August 25, 2014.

63. The Complainant acknowledged receiving the 2014 ROE, but he disagreed that his employment began on that date. He explained about his vacation for his wedding and honeymoon from July 24 to August 25, 2014. As described above, he said that he submitted a Request for Vacation form that his then supervisor signed. The Complainant said that he did not express an intention to quit.

64. In response, the Employer said that the Complainant was obliged to seek Mr. Litke's permission if he wanted to take a vacation and that he did not do so.

65. As with the 2018 ROE, the Delegate found that the Complainant's actions were not those of someone intending to quit or abandon his employment. While the 2014 ROE indicated that Mr. Litke did not support the vacation, it was also clear that the Complainant's employment did not end as a result of the 2014 ROE. He resumed his duties on August 25, 2014, as initially planned. In the result, the Delegate found that the Complainant's employment was not interrupted by virtue of the issuance of the 2014 ROE.

66. The parties agreed, and the Delegate accepted, that the Complainant's first day with the Employer began on November 25, 2011.

67. Based on the Delegate's finding that the Complainant worked from November 25, 2011, continuously through to July 6, 2018, the Delegate concluded that the Complainant was entitled to six weeks of compensation for length of service.

68. The Delegate referenced the *ESA's* requirement that the amount an employer is liable to pay at termination of employment in lieu of notice is calculated by totalling the weekly wages, at the regular wage, during the last eight weeks in which the employee worked normal or average hours of work. Because the evidence indicated that the Complainant's usual hours of work were reduced in his final weeks of employment, the Delegate considered his "normal" or "average" hours.

69. The Employer argued that the reduction in hours during the final weeks of work was caused by the Complainant's refusal to work and so any calculation of his total weekly wages should include these weeks. The Delegate held that the legislation did not permit this interpretation. However, even if it did, the Delegate would have found that the argument lacked merit because the Delegate found that the Complainant's refusal to do the PVIs was because of safety concerns validated by WorkSafeBC.

70. The parties agreed that the Complainant's typical weekly earnings were a 40-hour work week at $35/hour for a total of $1,400. The Delegate determined that the Complainant was entitled to compensation for length of service in the amount of $8,400 ($1,400/week x 6 weeks).

71. The Employer's contravention of section 63 of the *ESA* for failing to pay compensation for length of service was subject to a mandatory $500 administrative penalty.

Annual vacation pay

72. The Delegate noted that annual vacation pay is payable on termination of employment under section 58 of the *ESA*. The Delegate found that the Complainant was owed vacation pay on the outstanding compensation for length of service amount of $8,400. This was calculated at 6% and totalled $504.

Mistreatment as a result of a complaint made under the ESA

73. Based on his findings about the Complainant's termination of employment, the Delegate considered section 83 of the *ESA*. This section prohibits employers from retaliating against a person who has made a complaint or against any other person because of an action taken under the *ESA*. In particular, an employer cannot terminate an employee, or change a condition of employment without the employee's consent because the employee has filed or may file a complaint under the *ESA* or because the employee has supplied, or may supply, information to the Director.

74. The Complainant alleged that he was suspended from his employment as a result of his claim for outstanding wages he believed he was owed under the *ESA*. The Delegate found that the Employer suspended the Complainant and that this action was intended to force the Complainant to reduce his wage claim as a precondition to returning to work. This constituted a change in a condition of his employment that resulted in his termination. It was also retaliation by the Employer as a result of his Complaint.

75. The remedy for mistreatment under section 83 is a "make whole" remedy, which requires an employer to compensate an employee in such a way as to put him or her back in the same position as if the contravention had not occurred: see sub-section 79(2).

76. The Delegate found that the Complainant found suitable alternative employment on August 1, 2018. While he experienced about four weeks of unemployment, and thus financial loss, the remedy had to consider his entitled for compensation length of service, which was six weeks of wages. Because the Complainant's entitled to compensation for length of service was greater than this financial loss, he was not entitled to additional wages under section 83. He did not claim any expenses incurred as a result of the Employer's actions.

77. The Employer's contravention of section 83 of the *ESA* for mistreatment because of a complaint made under the *ESA* was subject to a mandatory $500 administrative penalty.

Accrued interest

78. The Delegated awarded the Complainant $300.81 in interest pursuant to section 88 of the *ESA*.

ANALYSIS

79. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

80. Below, I consider the two grounds raised by Big O Tires in this Appeal: that the Delegate erred in law and that he failed to observe the principles of natural justice in making his Determination.

1. Error of law

81. The Employer submits that the Delegate made 17 errors of law in his Determination.

82. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

a) a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;

b) a misapplication by the decision-maker of an applicable principle of general law;

c) where a decision-maker acts without any evidence;

d) where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or

e) where the decision-maker is wrong in principle.

83. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

84. The *ESA* does not allow appeals based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors of factual findings unless such findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing an error of law because of factual error is stringent, requiring the appellant to show that the findings are perverse and inexplicable in the sense that they were made without any evidence, that they were inconsistent with, and contradictory to, the evidence or they were without any rational foundation: *Britco Structures Ltd.*, BC EST # D260/03 at p. 17.

85. Below, I address each of the Employer's alleged errors in turn. I find that the Delegate did not err in law.

Alleged error of law #1: contents of the Complaint filed on June 27, 2018

86. Big O Tires submits that because the Delegate said that the complaint filed on June 27, 2018, included compensation for length of service he erred in law and the Determination should be cancelled.

87. There was only one Complaint. It was filed on June 27, 2018. The facts for this claim occurred between June 27, 2018 and July 12, 2018. At this time, the claim for compensation for length of service had not yet arisen. On July 13, 2018, the Complainant identified compensation for length of service as an additional claim that formed part of the Complaint. The Employer had notice of this additional claim from July 13, 2018 because of the letter written by the Complainant to Big O Tires and/or July 16, 2018 through delivery of the second self-help kit. I do not take the Delegate's description of the Complaint, which was initially filed on June 27, 2018, to be specifically referencing only the claims made on that date. Rather, his description of the Complaint included all of the claims that he had to determine, which included the compensation for length of service issue. This was not wrong in principle or an unreasonable view of the facts.

88. Once a complaint is made, the Director must accept and review the complaint (subject to the exceptions in sub-section 76(3) that did not apply here): *ESA*, sub-section 76(1). Nothing in the *ESA* limits the Director to only investigating the specific claims set out when a complaint is filed. The powers of the Director to respond to complaints and conduct investigations are broad. In fact, the Director may conduct an investigation whether or not he or she has received a complaint. As correctly noted by the Delegate in correspondence with counsel for the Employer on April 15, 2019, "*I may make decisions concerning other issues as well as they come to my attention during the course of my investigation.*"

89. I find that the Delegate's reference to the claim for compensation for length of service was not an error of law. Regardless of when the issue was first raised, it was before the Delegate after July 12, 2018, he included it in his investigation, and the Employer had notice that this was the case.

90. In any event, if I am wrong, the Delegate's reference to the claim for compensation for length of service in the Complaint filed June 27, 2018, had no impact on his Determination. His investigation determined

that the issue of compensation for length of service had to be decided and nothing in his determination of that issue turned on it being included in the June 27, 2018 Compliant form.

Alleged error of law #2: erroneous restatement of Mr. Litke's evidence (reason the Complainant gave for his refusal to work)

91. The Employer says that the Delegate mistakenly summarized Mr. Litke's evidence about the Complainant's reason for not performing any PVIs. It says that the Delegate found that Mr. Litke said that starting on July 6, 2018, the Complainant "*refused to complete any more PVIs, claiming that the hoists used to perform them were unsafe and that he could not complete an inspection without the use of one.*" Big O Tires submits that what Mr. Litke said was that starting on July 6, 2018, the Complainant refused to complete any more PVIs and that the only reason the Complainant gave to Mr. Litke for refusing to do the PVIs was because the Complaint had not yet been resolved to his satisfaction.

92. In response, the Delegate says in the Director's Submissions that the sentence in the Reasons that the Employer complains about was not intended to convey that Mr. Litke said that it was on July 6, 2018, that the Complainant said he refused to perform the PVIs because of safety concerns.

93. I find that this ground of appeal is not an error of law. In his conclusion that the Complainant was terminated, the Delegate did not act without any evidence or on a view of the facts that could not reasonably be entertained. Neither was his assessment wrong in principle.

94. The Delegate's Determination that the Complainant was terminated did not hinge on whether Mr. Litke knew the reason for the Complainant's refusal to do the PVIs was because the Complainant assessed the hoists as unsafe, or if he knew the reason, when he knew it. The Delegate's conclusion that the Complainant was terminated was based on his finding that the Employer's suspension of the Complainant was a substantial alteration of his conditions of employment. The Delegate correctly noted that an employer's intent is not relevant to this assessment. Thus, whether or not Mr. Litke knew prior to July 13, 2018 that the Complainant refused to do the PVIs because of his safety concerns was irrelevant to the Determination that he was terminated. The question was whether an objective, reasonable person would find the suspension unfair, unreasonable, and unacceptable.

95. The Delegate relied on the following evidence in finding that an objective, reasonable person would find the suspension unfair, unreasonable, and unacceptable:

a) the parties agreed that both sides understood Mr. Litke to be saying on July 12, 2018, that the employment relationship could not continue without first resolving the matter in question, the implication of which was that the Complainant should not return to work until the matter was resolved;

b) the Complainant stated in his July 13, 2018 letter to Big O Tires that his conditions of employment had been altered such that he felt he had been terminated;

c) WorkSafeBC confirmed that the hoist the Complainant used to perform the PVIs was unsafe; and

d) the evidence of the audio recording of the July 12, 2018 meeting indicated that the matter that had to be resolved was the wage claims and that Big O Tires was not going to let the Complainant come back to work until he reduced his wage claim.

96. Similarly, the Delegate's conclusion that there was no just cause was based on his finding that the Complainant refused to perform the PVIs because the Complainant thought they were unsafe. This finding does not depend on whether the Complainant made this clear to Big O Tires or not.

Alleged error of law #3: erroneous restatement of Mr. Litke's evidence (safety of hoists)

97. Next, the Employer submits that the Delegate erred in finding that Mr. Litke provided evidence that he conceded that two of the hoists were deemed unsafe and there were multiple businesses operated by Mr. Litke, with a total of 17 hoists throughout these locations.

98. In response, the Delegate says that during the fact-finding conference on December 6, 2018, the Complainant testified that as a result of his complaint to WorkSafeBC, WorkSafeBC audited the facility on July 10, 2018, and issued a ticket to Big O Tires. Neither Mr. Litke nor the Supervisor denied the accuracy of these statements at the conference. Mr. Litke's reply to the statements was that "*there were 17 hoists*" and the Supervisor's reply was that "*2 hoists had problems, others were free and safe.*"

99. I find that this ground is not an error of law. Whether or not the Employer conceded that two of the hoists were unsafe, the uncontradicted evidence was that WorkSafeBC found that two of the hoists were unsafe and the Delegate rejected the Employer's evidence that other hoists were available to the Complainant for the PVIs. He preferred the Complainant's evidence that the other hoists were usually occupied by another vehicle and technician. The Delegate's finding of no just cause was thus reasonable, and he made no error in principle in his assessment of the evidence.

Alleged error of law #4: issues in dispute

100. Big O Tires submits that the Delegate erred in law because he found that the parties were in dispute as to the length of the Complainant's employment. According to Big O Tires, it abandoned its argument that the Complainant's employment was not continuous at the Second Investigation Meeting on May 7, 2019.

101. I find no error of law. Whether the matter was still disputed or whether it was agreed that the Complainant's employment was continuous made no difference to the Determination that compensation for length of service was owed to the Complainant. And, if the Delegate had determined that the matter was no longer in dispute, this would have had no impact on his Determination that compensation for length of service that was owed to the Complainant.

Alleged error of law #5: restatement of the Supervisor's evidence

102. The Employer submits that the Delegate erroneously found that the Supervisor gave evidence that he made changes to the work schedule in order to accommodate the Complainant's absence during his vacation. Big O Tires says that the Supervisor did not say he "*accommodated*" the Complainant's schedule, but he said that he did what he needed to do to keep the PVI program going for Big O Tires.

103. In response, the Delegate says that the Employer is incorrect. At the First Investigation Meeting on December 6, 2018, prior to Big O Tires retaining counsel, the Supervisor stated that, "*Yes, we made changes to the schedule for* [the Complainant]*'s absence*."

104. I find no error of law. Whether the Supervisor made the disputed statement or not, the Delegate's decision about whether the Complainant's employment was continuous or not from 2011 or 2014 was based on other evidence such as the Supervisor acknowledging the Complainant informed him in early 2017 that he intended to take an extended vacation to Asia, the Request for Vacation form signed by the Supervisor, the Complainant and the Supervisor's actions once the Complainant learned of the 2018 ROE, and the fact that the Complainant returned to work as planned on June 27, 2018.

105. Furthermore, the Employer submits in its Appeal that the length of service was not in dispute before the Delegate. Therefore, even if the Delegate misconstrued the Supervisor's evidence about why he did what he did to account for the Complainant's absence during his vacation, it did not matter to his Determination about the amount of compensation owing for length of service.

Alleged error of law #6: reason for refusal to perform PVIs

106. The Employer submits that the Delegate's finding that the Complainant's refusal to perform PVIs was based on his assessment that the hoists assigned to him were unsafe and required repairs was based on no evidence, was a view of the facts that could not reasonably be entertained, and was a method of assessment that was wrong in principle.

107. The Employer has not expressed what was wrong in principle and I do not find the Delegate made an error in principle. Regarding his assessment of the facts, the Delegate's decision is reviewable on a reasonableness standard. The Delegate provided a reasonable basis for his Determination about the Complainant's refusal to perform PVIs and whether there were other hoists available to him.

Alleged error of law #7: substantiation of Complainant's concerns by WorkSafeBC

108. The Employer submits that the Delegate acted without any evidence, acted on a view of the facts that could not reasonably be entertained, and adopted a method of assessment that was wrong in principle in finding that WorkSafeBC substantiated and validated the Complainant's concern that the hoists assigned to him were unsafe and required repairs. It says that WorkSafeBC did not make any such finding. Rather, a third party (LordCo Auto Parts) audited the five hoists at Big O Tires on September 18, 2018, and recommended repairs for three of the five hoists but did not recommend taking any of the hoists out of use.

109. In response, the Delegate says that during the First Investigation Meeting on December 6, 2018, the Complainant testified that as a result of his complaint to WorkSafeBC, WorkSafeBC audited the facility on July 10, 2018, and issued a ticket to Big O Tires. Neither Mr. Litke nor the Supervisor denied the accuracy of these statements at the Meeting. Mr. Litke's reply to these statements was that "*there were 17 hoists*" and the Supervisor's reply was that "*2 hoists had problems, others were free and safe.*" Further, the Employer's evidence was that Lordco Auto Parts inspected the lifts more than two months after the audit and found that three hoists needed repairs.

110. I find the Delegate did not err in finding that WorkSafeBC substantiated and validated the Complainant's safety concerns. This evidence was not contradicted at the First Investigation Meeting (December 6, 2018). Moreover, the evidence of the Lordco Auto Parts inspection supported the Delegate's conclusion that the Complainant felt there were no hoists that were safe to use for the PVIs. The fact that the hoists were not required to be taken out of use does not mean that the Complainant's safety concerns were not validated or that the Complainant was less credible than Mr. Litke regarding the evidence about the hoists.

Alleged error of law #8: finding of credibility

111. The Employer says that the Delegate's finding that WorkSafeBC had substantiated and validated the Complainant's safety concerns led the Delegate to find that the Complainant was more credible than Mr. Litke or the Supervisor and this was an error of law.

112. As explained above, I found that the Delegate did not err in finding that the WorkSafeBC audit of the Big O Tires hoists substantiated and validated the Complainant's safety concerns and that other evidence also supported the Delegate's conclusion. However, even if the Delegate was wrong in his conclusion that the WorkSafeBC audit substantiated and validated the Complainant's concerns, there was no error of law. The Delegate's finding that the Complainant's evidence was more credible than the Employer's evidence was based on his assessment of the evidence in its entirety and not solely because he found that WorkSafeBC had substantiated and validated the Complainant's safety concerns.

Alleged error of law #9: just cause

113. The Employer submits that the Delegate's reliance on the WorkSafeBC audit to prefer the Complainant's evidence caused him to erroneously conclude that the Complainant's refusal to complete the PVIs was reasonable and therefore Big O Tires had no just cause to dismiss the Complainant.

114. My conclusions about the alleged errors of law #7 and #8 are determinative of this error of law. However, I also note that contrary to the Employer's submission, the credibility finding was not the "*sole basis for rejecting the Employer's argument with respect to just cause.*" The credibility finding was not the sole basis on which the Delegate found there was no just cause. The basis was as follows: (1) the direct evidence from the Complainant about why he refused to perform the PVIs and WorkSafeBC's audit; (2) the Lordco Auto Parts inspection; and (3) the direct evidence from the Complainant about the availability of other hoists. In any event, the Delegate's finding that he preferred the evidence of the Complainant regarding the hoists was a reasonable finding based on his assessment of the entirety of the evidence from both parties.

Alleged error of law #10: abandonment of employment

115. The Employer submits that the Delegate's reliance on the WorkSafeBC audit to prefer the Complainant's evidence caused him to erroneously conclude that the Complainant's refusal to complete the PVIs was reasonable and was not abandonment of his employment.

116. My conclusion about alleged error of law #9 disposes of this alleged error.

Alleged error of law #11: after-acquired cause

117. The Employer submits that the Delegate erred because he found that the Complainant's surreptitious recording of Mr. Litke and the Supervisor did not amount to serious misconduct. Big O Tires relies on *Hart v. Parrish & Heimbecker, Limited,* 2017 MBQB 68, a decision from the Court of Queen's Bench of Manitoba, which found that the employee's surreptitious recording of meetings with his superiors was a factor in the court's conclusion that the employer had just cause.

118. I do not find the *Hart* case helpful. That case dealt with whether an employer had just cause to dismiss an employee against whom there were four reported complaints of intimidation and harassment, all of which the trial judge found were credible. Also, the employee admitted he had behaved inappropriately or in an unprofessional manner. Based on the evidence against the employee, the trial judge found that his conduct justified dismissal. Each of the complaints amounted to a breach of the defendant's policies. The recordings were found to be a breach of the employee's confidentiality obligations to the employer and a breach of the personal code of conduct, but this was just one aspect of why the employee was justifiably dismissed.

119. The Delegate correctly stated that to establish just cause the Employer had to prove on a balance of probabilities that the Complainant behaved in a manner that was inconsistent with the continuation of employment. The Delegate accepted that secretly recording one's employer can have a substantially detrimental effect on an employment relationship, but he ultimately found that the recording was not serious misconduct. This was because the circumstances in which the recording occurred were not inconsistent with the continuation of employment. He found that the purpose of the recording was related solely to the Complainant's attempts to corroborate his claim for wages and the recording was not intended to embarrass or otherwise bring his employer into disrepute.

Alleged error of law #12: Mr. Litke's statement on July 12, 2018 (direction to not return to work)

120. The Employer submits that the Delegate erred in finding that Mr. Litke's statement to the Complainant on July 12, 2018, about needing to get the matter resolved one way or other meant that Mr. Litke was directing the Complainant not to return to work until the matter was resolved. Big O Tires says that: (1) Mr. Litke's evidence was that he did not give a direction to not return to work; and (2) the full audio recording of the July 12, 2018 meeting indicates that both Mr. Litke and the Supervisor wanted the Complainant back at work as soon as possible.

121. The Employer's argument is really that the Delegate should have made different findings than he did. The Tribunal's role is not to review the facts and make different findings of fact if there is a reasonable basis on which the Director or his delegate makes findings. I find that the Delegate made a reasonable finding

that at the July 12, 2018 meeting the Employer directed the Complainant not to return to work until he reduced his wage claims. This finding was available to him to make based on the evidence before him.

Alleged error of law #13: Mr. Litke's statement on July 12, 2018 (the matter referred to was not critical)

122. The Employer submits that the Delegate erred in finding that to determine whether the Complainant was suspended by Big O Tires, it was not critical whether the "matter" referred to on July 12, 2018, that needed resolving referred to the outstanding wage claim or the refusal to perform the PVIs.

123. In response, the Delegate says that he did find it was critical to determine the basis for the suspension. The Delegate assessed the entire conversation between the parties in the context in which it occurred and determined that the language used by the Employer referred to the Complainant's wage claims.

124. I find there was no error of law. The Delegate's comment that the matter referred to by Mr. Litke on July 12, 2018, did not need to be determined, was in the context of his finding that whatever matter was being referred to, the implication was that something had to be resolved before the Complainant could return to work and thus the Complainant had been suspended. After the Delegate determined there was a suspension, he went on to find that the reason for the suspension was because of the Complainant's wage claims (see alleged error of law #14, below).

125. The Delegate's decision about the suspension was reasonable. It was based on the Complainant having been sent home four of five working days between July 6 and July 12, 2018, resulting in his hours of work being reduced to less than 50% of his weekly wages averaged over the previous eight weeks that he worked. The Delegate found that the suspension was a substantial alteration of the Complainant's conditions of employment. Both of these findings were reasonable based on the evidence before him.

126. The Employer says that it is insubordination for an employee to refuse to do his or her assigned duties and an employer is entitled to not pay them for not working. In other words, the Employer is saying that it had just cause to dismiss the Complainant. While this proposition may be true in some situations, in the circumstances in this case, the Delegate reasonably found that there was a suspension resulting in a substantial alteration of the Complainant's employment. The Delegate then went on to determine that the matter that had to be resolved was the wage claims and this meant that the substantial alteration of employment was in fact a termination under section 66 of the *ESA*. Finally, the Delegate found there was no just cause for dismissal.

Alleged error of law #14: Mr. Litke's statement on July 12, 2018 (which matter "this" referred to)

127. Here, the Employer submits that the Delegate erred in finding that the matter referred to by Mr. Litke on July 12, 2018, that had to be resolved before the Complainant could return to work was the wage claims. First, Big O Tires says that the words "*something else*" that the Delegate found was an allusion to the wage claims was not actually on the audio recording. Second, it says that Mr. Litke gave evidence that the matter in issue was the Complainant's refusal to perform PVIs. Third, it says that the Delegate's quote of the Supervisor's comments was incomplete as the Supervisor also referred to the Complainant returning to work and doing all the duties he had done in the past.

128. Essentially, the Employer wants me to come to a different conclusion on the facts based on the evidence that was before the Delegate. It is not open to me to do so unless the Delegate was unreasonable in his finding that Mr. Litke was referring to the wage claims. I do not find that the Delegate was unreasonable. His Determination was based on the audio recording of the July 12, 2018 meeting. This evidence was as follows:

a) the Supervisor suggested that the Complainant provide them with "*a solution*" that would solve the problem for the Complainant;

b) the Supervisor and Mr. Litke made statements that indicated the Employer was asking the Complainant to reduce his wage claim:

c) the Supervisor told the Complainant that the Employer had given him an explanation of how they would treat overtime;

d) the Supervisor told the Complainant that the Employer did not think the wage claim could go beyond six months;

e) the Supervisor said that the vacation pay was according to what the hours were;

f) although it was almost a month since he had received it, Mr. Litke said he had not yet reviewed the wage claim; and

g) Mr. Litke said that if he had reviewed the wage claim, he would be looking for a downward adjustment in the hours.

129. Based on the above, the Delegate's finding that an objective, reasonable person would find the Employer's actions to be unfair, unreasonable, and unacceptable was reasonable even if the Employer is correct that the audio recording does not support a finding that Mr. Litke said the words "*something else*".

Alleged error of law #15: suspension

130. The Employer also alleges the Delegate erred in law by finding that the Complainant rejected his suspension as a condition of his employment in his July 13, 2018 letter. The Employer says that the Complainant rejected a temporary layoff in his letter and because a suspension and a temporary layoff are different things, this error was a misinterpretation or misapplication of the *ESA*, was wrong in principle or was unreasonable.

131. I do not find this to be an error of law. While the Complainant may have told the Employer that he considered the substantial alteration of his employment to be a temporary layoff, this was the Complainant's subjective understanding of what had occurred. It was open to the Delegate to find that the severe reduction in work was a suspension. In fact, the Delegate's Determination that there had been a suspension was consistent with what the Employer argued during the investigation: that the reduction in work was because the Complainant unreasonably refused to perform PVIs. Once it was determined it was a suspension, the Complainant's July 13, 2018 letter clearly rejected this alteration as a condition of his term of work when he referenced section 66 of the *ESA* and said that he considered himself terminated.

Alleged error of law #16: termination of employment

132. The Employer submits that the Delegate's finding that, "*Mr. Litke's failure to address the claim with urgency, failure to properly apprise himself of its details, in combination with his direction that* [the Complainant] *reduce his claim and not return to work until the matter was resolved were actions designed to force* [the Complainant] *to reduce his wage claim as a precondition to his return to employment*" and his finding that these actions amounted to termination were in error.

133. In response, the Delegate says that the Employer's characterization of his analysis is not reflective of his findings regarding the Complainant's termination. The Delegate first found that the Employer's direction to the Complainant to not return to work constituted a suspension of the Complainant's employment and that this suspension was a substantial alteration to his conditions of employment, which the Complainant rejected. The Delegate says that he then made the finding that Mr. Litke's failure to address the claim with urgency, failure to properly apprise himself of the details of the claim, and his direction to the Complainant not to return to work until the matter was resolved were all actions designed to force the Complainant to reduce his wage claim as a precondition to returning to work. Based on this finding, the Employer placed the Complainant in the position of having to accept, as a condition of continued employment, changes to working conditions that an objective, reasonable person would find to be unfair, unreasonable, and unacceptable and that this constituted termination under section 66 of the *ESA*.

134. I find that the Delegate did not err in law by determining that the Employer terminated the Complainant.

135. I already reviewed the basis on which the Delegate made his finding about the Complainant's termination under alleged error of law #14, above. It is clear from the Determination that the Delegate's decision about termination was not based on Mr. Litke's failure to address the claim with urgency and apprise himself of the details *per se*. This was merely part of the context within which the Delegate made his Determination. Similarly, the Delegate did not find that because the Employer asked the Complainant to reduce his claim that there was a termination. He found, based on the evidence as a whole, that Big O Tires did not merely ask for a reduction in the amount claimed for wages but also directed the Complainant not to return to work until he reduced his claims and that this constituted a termination under section 66 of the *ESA*.

136. I have already dealt with the Employer's alleged error of law #12, regarding the direction not to return to work until the matter was resolved, which is reiterated here.

Alleged error of law #17: "normal" or "average" hours of work

137. The last alleged error of law is that the Delegate should have based his calculation of the compensation for length of service on the Complainant's actual last eight weeks of employment and not on the Complainant's last eight weeks of "normal" or "average" hours of work. This was because the reduction in the hours of work just prior to his termination was the Complainant's fault and not caused by the Employer.

138. I cannot accede to this argument.

139. First, the Delegate found that the reduction in the Complainant's hours of work immediately preceding his layoff was a suspension that substantially altered his conditions of work that was rejected by the Complainant and was a termination. Under these circumstances, it cannot be said that the reduction in the hours of work was a direct result of the Complainant's refusal to work.

140. Second, the *ESA* does not support the argument advanced by the Employer. Sub-section 63(4) says that the amount the employer is liable for on termination of employment is calculated by totalling all the employee's weekly wages, at the regular wage, during the last eight weeks "*in which the employee worked normal or average hours of work*" (emphasis added) and dividing this total by eight and them multiplying the result by the number of weeks' wages the employer has to pay. If the Legislature had intended the calculation to be based strictly on the eight weeks immediately prior to termination, it would not have included the words "*normal or average*."

141. As stated in the Tribunal decision *Robert Craig*, BC EST # D052/10, the Tribunal has endorsed an approach that seeks to reasonably reflect the employee's typical, regular, or usual wages and that approach is not necessarily limited to looking at the wages earned only in the eight weeks preceding the termination: *Robert Craig*, at para. 35; see also *Raymond Man Lee Wah and Blaine Howard Rowlett, Directors/Officers of C-O-E Poscann Systems Inc.*, BC EST # D281/00. Based on the Delegate's findings about the reduction in the Complainant's work, which resulted in his termination, the wages he earned when he refused to do any PVIs were not reflective of his typical, regular or usual wages.

2. Breach of natural justice

142. The Employer alleges six breaches of natural justice and procedural fairness.

143. Principles of natural justice (also called procedural fairness) are procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them, and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.

144. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65. The duty of fairness requires different procedural rights in any given set of circumstances: *Baker v. v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paras. 23 – 28.

Alleged breach #1: duty to consider relevant evidence

145. The Employer submits that the Delegate failed to consider material evidence from: the full audio recordings; from the Employer; from the Complainant; and from Lordco Auto Parts. A failure to consider relevant evidence can constitute a breach of the principles of natural justice: *Welch*, BC EST # D161/05 at para. 37. A finding that a delegate has failed to consider relevant evidence involves an assessment of both the reasons given by the delegate for making a determination and an analysis of the issue to which the evidence is relevant: *Welch*, BC EST # D161/05 at para. 44.

146. In response, the Delegate says that he considered all of the evidence and arguments of both parties, including the full audio recordings, before he made his Determination.

147. In my view, the Employer's submissions about this alleged breach are in fact another version of one or more of their alleged errors of law (see for example alleged errors of law #3 and #5 - #8). The Employer presents the evidence that it says should have resulted in the Delegate arriving at findings in its favour. As noted by the Tribunal in *Welch*, any attempt to determine whether an administrative decision-maker has considered all of the evidence as a matter of procedural fairness can come very close to the reassessment of the actual findings of fact: *Welch*, BC EST # D161/05 at para. 40, citing D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) at para. 12:3700.

148. My review of the Record, Determination, Reasons, and Director's Submissions does not indicate that the Delegate failed to consider relevant evidence. He considered evidence from Lordco Auto Parts and from both parties. Where there was a conflict in the evidence, he preferred the evidence of the Complainant as it was open to him to do. Both the Complainant and the Employer provided evidence about whether or not the Complainant could have used a different hoist than the ones that WorkSafeBC found were unsafe or that Lordco Auto Parts found needed repairs. While the Delegate did not set out in detail the Employer's evidence on this point, he expressly rejected its evidence and submissions that other hoists were available to the Complainant for the PVIs and said that he preferred the Complainant's evidence that while there were other hoists, they were usually occupied by another vehicle and technician. As I explain below under alleged breach #3 (duty to provide reasons), a decision-maker does not have to recite all of the evidence in his or her reasons for decision: see below; see also *Welch*, BC EST # D161/05 at para. 41.

149. Furthermore, even if the Delegate failed to consider some relevant evidence, it does not automatically follow that the Delegate failed to observe the principles of natural justice in making his Determination: *Welch*, BC EST # D161/05 at para. 42, citing *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at pp. 491 – 492. Whether a failure to consider relevant evidence amounts to a breach of natural justice is case-specific. Relevant factors include the importance of the case to the issue upon which the evidence was sought to be introduced and the other evidence that was available on that issue: *Welch*, BC EST # D161/05 at para. 43.

150. In the circumstances of this case, even if the Delegate did not consider some of the relevant evidence, there was no breach of natural justice. Unlike in *Welch*, the Delegate in his Determination referred to the evidence that was relevant to his decisions on key issues.

Alleged breach #2: duty to consider legal principles

151. The Employer submits that the Delegate's failure to mention arguments made by it in its submissions regarding section 66 of the *ESA* (termination), just cause, and abandonment compromised the fairness of the investigation and resulted in a breach of natural justice.

152. In essence, the Employer takes issue with the Delegate's Reasons. This alleged breach is dealt with below.

Alleged breach #3: duty to provide reasons

153. The Employer alleges that the Delegate did not provide sufficient reasons for his Determination. It asserts that the Delegate failed to provide any reasons for rejecting the Employer's evidence and submissions as described under alleged breach #1 (duty to consider relevant evidence) and for rejecting the evidence of Mr. Litke regarding the meaning of the "matter" he referred to on July 12, 2018 (alleged errors of law #12 - #14).

154. The Employer submits that section 81 of the *ESA* requires reasons for a determination and that there must be a degree of analysis sufficient to identify the considerations that comprised the conclusion: *Victoria Confederation of Parent Advisory Councils*, BC EST #D436/01 at p. 6.

155. In response, the Delegate says that he considered all of the Employer's evidence and the Complainant's evidence. On balance, he preferred the Complainant's version of events for the reasons given in his Determination.

156. The *ESA* does not require reasons for a determination in every case. Sub-sections 81(1) and (1.1) provide that reasons are not required *per se*. Under sub-section 81(1.1) a person named in a determination may request written reasons for the determination. Also, in certain circumstances procedural fairness will require a written explanation for a decision: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at p. 848.

157. Here the Delegate did provide written reasons for his Determination. I agree with the Employer that if reasons are provided then there must be a degree of analysis sufficient to identify the considerations that comprised the conclusions. Reasons allow persons affected by the decision to know the process by which the decision-maker came to his or her conclusions and allow a reviewing body to examine the reasons for the existence of "*justification, transparency, and intelligibility in the decision-making process*": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47.

158. However, I disagree that the Delegate's Reasons were inadequate. With respect to adequacy of reasons, the fundamental question is whether the decision-maker grappled with the substance of the matter: *Gichuru v. Law Society of British Columbia*, 2010 BCCA 543 at para. 30. A decision-maker's reasons do not have to address every issue raised, but his or her reasons will normally be expected to resolve serious and consequential issues and to provide at least some indication why he or she decided an issue the way he or she did: *R. v. M. (R.E.)*, 2008 SCC 51 at para. 24; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 at para. 3.

159. As outlined above in response to the alleged errors of law, the Delegate provided the basis for his findings and conclusions. He did not have to describe every landmark along the way, including noting every submission of the Employer. I find that when read in light of the evidence before him and the nature of his statutory task, his Reasons adequately explained the basis of his Determination.

160. The Employer also submits that the Delegate found that the Complainant was more credible because WorkSafeBC had substantiated and validated his safety concerns and because this was an error of law (alleged error of law #7), the Delegate's reasons are insufficient. As explained above, I found that there was no error of law as asserted under alleged error of law #7. In any event, the duty to provide reasons

is not the same as a decision-maker's obligation to properly decide the merits. An erroneous reason may be an error of law but not amount to a breach of natural justice.

Alleged breach #4: reasonable apprehension of bias

161. The Employer submits that there is a reasonable apprehension of bias regarding three points: (1) the suspension; (2) the partial audio recordings; and (3) the full audio recordings.

162. The threshold for a finding of real or perceived bias is high: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 113. The test has 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: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 111.

163. Regarding the suspension, the Employer says that because the Delegate found that the Complainant had been suspended even when he did not call his substantial alteration of employment a "suspension" (he called it a temporary layoff: see alleged error of law #15, above) this indicates that the Delegate acted as an advocate or alternatively that he acted in a matter that would lead a reasonable person to believe that he approached his investigation with something less than a fully open mind.

164. In response, the Delegate says that he is not limited to considering only arguments advanced by the parties to a complaint. One of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*. Parties to a complaint often do not have legal representation and it is not reasonable to expect they will have the ability to articulate or advance every legal argument available to them.

165. As I explained above in relation to alleged error of law #15, the Complainant's subjective understanding of what had occurred did not affect the Delegate's fulfillment of his investigative and decision-making function to resolve the Complaint. The *ESA* gives the Director broad powers of investigation: see sections 76 and 84 – 86. A reasonable person would not find that there was a reasonable apprehension of bias.

166. Turning to the partial audio recordings, the Employer says that because the Complainant did not produce the full audio recordings to the Branch before the First Investigation Meeting, the Employer was deprived of the opportunity to provide evidence, make submissions, and/or cross-examine the Complainant at the First Investigation Meeting and prior to the Delegate issuing his Preliminary Assessment and that this "*raises general procedural fairness issues, as well as specific concerns with respect to a reasonable apprehension of bias which ultimately tainted the subsequent proceedings.*"

167. The Delegate says that he explained to the Employer's counsel why the original audio recordings were abbreviated. I note that this communication is in the Record as is evidence that the complete audio files were provided to Big O Tires prior to its opportunity to examine the Complainant.

168. I do not find that there was any breach of procedural fairness regarding the fact that the Employer did not have the full audio recordings prior to the First Investigation Meeting. Principles of natural justice ensure that parties know the case made against them, are given an opportunity to reply to the case against them, and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27. The question is whether, in the circumstances of a given case, the party that contends it was

denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paras. 23 – 28. With respect to a reasonable apprehension of bias, specifically, a reasonable person would not find that there was a reasonable apprehension of bias.

169. After the Employer told the Delegate that it did not have the full audio recordings, the Delegate remedied that deficiency and explained why it occurred (because of a miscommunication between the Branch and the Complainant). As it acknowledges in its appeal submissions, Big O Tires was provided with the full audio recordings prior to the Second and Third Investigation Meetings and had an opportunity to cross-examine the Complainant at these Meetings. The Employer also had the opportunity to make submissions about the full audio recordings and made such submissions.

170. Finally, the Employer says that because the Delegate said at the Third Investigation Meeting that he did not listen to the full audio recordings and instead asked the Complainant to provide his recollection of the meeting on July 12, 2018, there is a reasonable apprehension of bias in favour of the Complainant.

171. The Delegate says that he did listen to the entire audio recordings and he did not state a preference for relying on the Complainant's recollection of events rather than the recordings.

172. I find that a reasonable person would not find this to constitute a reasonable apprehension of bias. Because the Delegate had not yet listened to the full audio recordings by the Third Investigation Meeting and asked for the purposes of that Meeting for the Complainant's version of events does not show that he appeared to be biased or was actually biased. Prior to making his Determination, the Delegate listened to the full audio records. Also, the Delegate had submissions about the full audio recordings from the Employer and the Complainant before the Third Investigation Meeting and from the Employer before making his Determination.

Alleged breach #5: accepting and relying on inaccurate evidence

173. The Employer submits that the Delegate erroneously concluded that the Complainant's safety concerns were substantiated and validated by WorkSafeBC (alleged error of law #7, above) and that there are many other examples where the Delegate based a conclusion on evidence that did not exist (alleged errors of law #2, 3, 5, 8, 9, 10, 15, and 16). Therefore, the Delegate failed in his duty to ensure that the evidence received and relied on was relevant, accurate, reliable, and fair.

174. I have already dealt with the alleged errors of law above and for the reasons given found that they were not errors. Therefore, I find there was no related alleged breach of natural justice as alleged here.

Alleged breach #6: effect of totality of errors of law

175. Finally, the Employer submits that its alleged 17 errors of law suggests that the Delegate reached his Determination in his Preliminary Assessment and did not impartially hear the evidence and arguments presented by the Employer after the Preliminary Assessment was issued. This, it says undermined the fairness of the entire procedure and therefore was a breach of natural justice.

176. I find that this alleged error is not an independent ground of appeal. It is covered by one or more of the five alleged breaches of natural justice, all of which I have dismissed.

ORDER

177. Pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated June 6, 2019, confirmed in the amount of $10,204.81, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal