

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Stacey Koosel
(the “Appellant”)

- 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: James F. Maxwell

FILE No.: 2020/099

DATE OF DECISION: October 5, 2020

DECISION

OVERVIEW

1. Stacey May Koosel (the “Appellant”) filed a complaint with the Employment Standards Branch (the “Complaint”) against her former employer, Kelowna Art Gallery Association (the “KAGA”). The Appellant initially advanced a number of allegations of impropriety against KAGA, including the allegations that KAGA had misrepresented the terms of her employment at the time of hiring, and had failed to comply with the agreed terms of employment. Later, the Appellant alleged that KAGA had intimidated and coerced her because she filed her Complaint. The Appellant also alleged that KAGA had failed to pay her wages to which she was entitled.
2. A delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) pursuant to the *Employment Standards Act* (the “ESA”) in which the Director held that KAGA had not committed the alleged infractions. The Director dismissed the Appellant’s Complaint.
3. The Appellant has appealed the Determination.
4. Having reviewed the Determination, the Appellant’s submissions, and the Record provided by the Director, I dismiss the Appellant’s appeal. My reasons follow.

ISSUES

5. The within Appeal raises the following issues:
 - (a) Did the Director err in law in the making of the Determination?
 - (b) Did the Director fail to observe the principles of natural justice in making the Determination?
 - (c) Has evidence become available that was not available at the time the Determination was made?

FACTS

6. KAGA is a registered non-profit society and operates an art gallery in the city of Kelowna.
7. In 2019, the Appellant applied for a position with KAGA. The Appellant was interviewed by KAGA and had a number of discussions with KAGA personnel. On March 18, 2019, the Appellant commenced work for KAGA in the position of Curator.
8. At the time that the Appellant commenced work with KAGA, she signed an Employment Agreement (the “1st Employment Agreement”). This Agreement incorporated, by reference, a position description (the “Job Description”) and KAGA’s Human Resources Policies and Procedures (the “HR Manual”).
9. Pursuant to the terms of the 1st Employment Agreement and the Job Description, the Appellant commenced work in a six-month probationary period, intended to afford KAGA the opportunity to assess the Appellant’s suitability for ongoing employment in the position. The Appellant was to receive an annual

salary of \$50,000.00, and was to work 35 hours per week, though the timing of these hours was to be flexible in order to accommodate the contingencies of the work. The Appellant was to be entitled to paid vacation time, and to six paid sick days per year, subject to KAGA's sickness policy and practices.

10. At the six-month anniversary of commencement of her employment on September 17, 2019, the Appellant requested a performance assessment and salary increase. The Appellant's supervisor advised the Appellant at that time that the probationary period would be extended by a further six months, and that any salary increase would have to wait until the end of the year and would be subject to KAGA's normal salary review procedures.
11. On September 23, 2019, the Appellant wrote to her immediate supervisor, and advised that the Appellant was of the view that KAGA had violated the provisions of the *ESA* and had exhibited a disregard for the rule of law. The Appellant advised her supervisor that she would "approach BC Employment Standards for a review of the violations" and would request a WorkSafeBC Investigation into workplace harassment.
12. On September 27, 2019, the Appellant filed the Complaint with the Employment Standards Branch. In her Complaint, the Appellant alleged the following:
 - (a) that KAGA had induced, influenced and persuaded the Appellant to accept the position as curator by misrepresenting the terms of her employment;
 - (b) that KAGA had breached its verbal commitment to give the Appellant a salary increase at the end of the six-month probationary period;
 - (c) that KAGA arbitrarily extended the probationary period to one year;
 - (d) that KAGA failed to provide the Appellant with a formal performance appraisal prior to the expiry of the probationary period;
 - (e) that KAGA had instructed the Appellant to work seven hours per day, contrary to the provisions of KAGA's own HR Manual; and
 - (f) that KAGA had required the Appellant to work, at times, without compensation.
13. After filing her Complaint, the Appellant continued to work for KAGA.
14. On October 9, 2019, KAGA advised the Appellant that:
 - (a) it would undertake an investigation into her allegations that she had been harassed;
 - (b) her probationary period was considered to have been satisfactorily completed three months after she commenced employment, and a new Employment Agreement would be presented to reflect that fact;
 - (c) KAGA had not promised the Appellant a wage increase upon the completion of the probationary period, and the Appellant's salary would be reviewed in concert with the wage reviews of all employees;
 - (d) the Appellant's performance appraisal would occur within the ensuing two weeks;

- (e) the Appellant was expected to work five days per week, seven hours per day, but that adjustment would be made for instances when the Appellant was required to work excess hours; and
- (f) as a result of the fact that the Appellant had indicated during her initial interview that she had limited supervisory experience, KAGA had decided that the Appellant's supervisor would retain responsibility for supervision of all staff, including performance reviews and disciplinary actions. KAGA had been dilatory in failing to amend the Job Description and HR Manual to reflect these decisions.

15. On or about October 21, 2019, KAGA presented the Appellant with a revised version of her Employment Agreement (the "Amended Employment Agreement"). The Appellant advised KAGA that she was not prepared to sign the Amended Employment Agreement, alleging that it was "functionally defective". The Appellant alleged that KAGA had acted in bad faith.
16. On October 24, 2019, KAGA instructed the Appellant to take one week off work, with pay, while KAGA considered the concerns that the Appellant had raised.
17. On October 30, 2019, the Appellant amended her Complaint to allege that KAGA had violated section 83 of the *ESA* by intimidating or coercing the Appellant because she had filed her Complaint, by suspending her from work, by rude and humiliating behaviour, and by seeking to compel the Appellant to sign a revised employment agreement.
18. On November 3, 2019, the Appellant advised KAGA that she intended to continue on sick leave. The Appellant did not return to work for KAGA.
19. In early November 2019, the Employment Standards Branch advised KAGA of the existence of the Complaint. An initial attempt was made to mediate the dispute between the Appellant and KAGA, but that did not result in a resolution. The Director then requested and received from KAGA all records related to the Appellant's employment.
20. The Appellant's employment with KAGA officially ended on January 19, 2020, when the Appellant advised KAGA that, due to what she perceived as substantial changes to the terms of her employment, she considered herself to have been constructively dismissed.

The Determination

21. The Director undertook an investigation into the Appellant's complaint and examined, under affirmation, both the Appellant and representatives for KAGA, and reviewed the records supplied by the parties.
22. The Director presented both parties with a detailed summary of the testimony of all parties, and afforded the parties the opportunity to respond to the testimony and documents provided by the other party. Both the Appellant and KAGA presented further submissions to the Director.
23. The Director considered the further submissions of the parties, and issued a Determination, dated May 22, 2020.

24. In the Determination, the Director concluded that KAGA had not breached the provisions of the *ESA*, and found that no wages were owing to the Appellant.
25. The Director considered the Appellant's allegation that KAGA had breached section 8 of the *ESA* by misrepresenting the terms of the Appellant's employment, including the amount that she was entitled to be paid, the length of her probationary period, and that she would be entitled to a performance appraisal at the end of that period. The Appellant had also alleged that KAGA had instructed her to work hours contrary to the terms of the HR Manual.
26. With respect to the Appellant's salary, the Director found that the parties were in agreement that at the time of the initial interview KAGA told the Appellant that the salary range for the position of curator was \$50,000.00 to \$60,000.00 per year. The Appellant believed that she had been told that she would qualify for the top end of that range upon completion of her probation period, while KAGA recalled only that the Appellant had been told that her salary was open for review upon completion of the probation period. The Director considered the testimony of the parties, and the contents of the KAGA HR Manual, and held, on a balance of probabilities, that the Appellant had not been promised an increase to \$60,000.00 after the six-month probation period. The Director concluded that KAGA had not misrepresented the amount of the Appellant's salary.
27. The Director considered the fact that KAGA had, for a time, purported to extend the probationary period. The Director rejected the contention that this constituted a misrepresentation, at the time of hiring, as to the terms of employment. The Director noted that while the Appellant's supervisor asserted at one point that the probationary period would be extended to one year, the KAGA Board ultimately advised the Appellant that she had passed her probationary period after three months' work. The Director noted that KAGA had committed to undertake a performance appraisal in October 2019. The Director found that KAGA undertakes salary reviews for all staff at year-end, and concluded that any delay in a review of the Appellant's performance did not affect the Appellant's salary. The Director concluded that KAGA had not misrepresented the terms of the Appellant's employment regarding the probationary period or the performance appraisal. The Director rejected the Appellant's assertion that she was owed wages as a result of a delay in her performance appraisal.
28. The Director considered the evidence regarding the hours of work that the Appellant had been required to perform. The Director noted that the Appellant understood that she was to work seven hours per day, five days per week, and was not eligible to receive overtime wages, but rather time off in lieu of overtime work. The Director rejected the Appellant's assertion that she had complete liberty to set her own hours within the requirement that she work 35 hours per week. The Director observed that KAGA had reminded the Appellant of a need to discuss any modifications to her working hours with her supervisor. The Director found that the fact that KAGA had directed the Appellant as to the hours that she was to work did not amount to a misrepresentation as to the conditions of her employment.
29. The Director also considered the Appellant's allegation that KAGA had breached section 83 of the *ESA* by intimidating or coercing the Appellant because she had filed the Complaint, by insisting that she execute the Amended Employment Agreement, by subjecting her to rude behaviour, and by suspending her from work. The Director examined the events that led to KAGA requesting that the Appellant execute an amendment to the 1st Employment Agreement. The Director noted that KAGA purported to change the 1st Employment Agreement solely by removing language related to the probationary period. The Director

also observed that KAGA proposed to amend the Job Description to remove several references that appeared to give the Appellant supervisory responsibility over two other KAGA employees. The Director was satisfied by the evidence of the KAGA representatives that the removal of the language regarding supervisory responsibilities was consistent with decisions made, and discussions with the Appellant, at the time of her hiring. The Director did not find that KAGA's insistence upon the execution of an Amended Employment Agreement constituted intimidation or coercion. The Director found no evidence that the Amended Employment Agreement was a response to the Appellant's filing of the Complaint; rather, the Director found that the Amended Employment Agreement arose in response to concerns raised by the Appellant, and was an effort on the part of KAGA to address any misunderstanding. The Director did not find that KAGA had subjected the Appellant to rude behaviour; rather, the Director found that KAGA had treated the Appellant professionally and with courtesy, despite the Appellant's own behaviour. In any event, the Director did not find that KAGA had engaged in any behaviour that amounted to intimidation or coercion in response to the filing of the Complaint. Finally, the Director found that KAGA's placement of the Appellant on paid leave was intended to afford KAGA time to consider how to proceed, and to defuse a tense relationship. The Director found no evidence that this action was a retaliation for the Appellant's filing of the Complaint.

30. The Director examined the Appellant's post-Complaint allegation that she was owed wages, in part for work performed but unpaid, in part for unpaid sick leave, and in part as compensation for length of service. The Director considered the testamentary and documentary evidence of the parties as to the hours worked by the Appellant. The Director held that the Appellant's evidence that she had worked substantially more hours than she had been compensated for was not credible, and stated that the Director preferred the evidence of the KAGA representative over that of the Appellant. The Director examined the hours allegedly worked by the Appellant, the hours that the Appellant was required to work, and the hours that the Appellant was away from work, and concluded that the Appellant had been compensated in excess of the hours that she worked. The Director also considered the Appellant's claim that she should have been paid for six sick days that she accrued during the course of her employment. The Director noted that any entitlement to paid sick time was governed by the Employment Agreement and by KAGA's policies and procedures. The Director was satisfied that KAGA was under no obligation to compensate the Appellant for sick days, and was entitled not to do so.
31. As to the Appellant's claim for compensation for length of service, the Director referred to section 63 of the *ESA*, which provides that compensation for length of service may be payable in appropriate circumstances. The Director noted that compensation for length of service is not payable when an employee terminates the employment relationship. The Director also considered section 66 of the *ESA*, which provides that if the Director accepts that an employer has made substantial alterations to the terms of employment, the Director may conclude that the employer has terminated the employment. In this case, the Director found that the changes proposed to the 1st Employment Agreement and the Job Description did not amount to substantial alterations to the terms of the Appellant's employment, and did not constitute a termination of the employment relationship. For this reason, the Director held that the Appellant was not entitled to compensation for length of service.

The Appeal

32. On June 29, 2020, the Appellant filed the within appeal.

33. Much of the submission tendered by the Appellant with her appeal is given over to a renewed argument of the case that was before the Director. An appeal under the *ESA* is not an opportunity for an appellant to re-argue the evidence in the hope that this Tribunal will come to a different finding. An appeal is strictly limited to the enumerated grounds, namely error of law, failure to observe the principles of natural justice, or new evidence that was not available at the time that the Director made the Determination. I will limit my examination herein to those of the Appellant's submissions that fall, arguably, within those enumerated grounds.
34. In the arguments tendered with her appeal, the Appellant presented the following assertions as to errors committed by the Director:
- (a) “[a]necdotal narratives were given more weight than documentary evidence”;
 - (b) the Director “accepted hearsay evidence of the employer”;
 - (c) the Director erroneously accepted the oral evidence of KAGA witnesses that the Appellant did not supervise two other employees;
 - (d) the Director erroneously preferred the evidence of KAGA witnesses to that of the Appellant;
 - (e) the Director misinterpreted the language of KAGA's HR Manual, and erroneously rejected the Appellant's claim for payment for sick days;
 - (f) the Director “ignored the evidence” and erroneously concluded that KAGA's attempts to amend the 1st Employment Agreement and the Job Description were not substantial alterations to the Appellant's terms of employment.
35. The Appellant refers to “errors in the presentation of evidence”. This appears to be an allegation that the Director erred in interpreting the evidence arising during the course of the investigation. Virtually all of the Appellant's argument in this regard is that the Director should have preferred the Appellant's interpretation of this evidence.
36. The Appellant also alleges that the Director exhibited bias against the Appellant. In support of this allegation, the Appellant refers to the Director's use of the words “unreasonable”, “uncooperative”, “high-handed”, “exaggerating”, and “inexperienced”, in describing the behaviour of the Appellant.
37. The Appellant challenges the Director's conclusions that where the evidence of the Appellant and the evidence of KAGA conflicted, the KAGA evidence was preferred. Assessments of credibility are questions of fact, which are entitled to deference. I have no jurisdiction to interfere with the Delegate's findings as to the credibility of the witnesses. As this Tribunal stated in *Re: Garrick Automotive Ltd.*, 2020 B EST 85:
- The assessment of the reliability of evidence as well as the credibility of the witnesses is within the authority of the delegate. The issue of what weight to be given to certain evidence and the credibility of any witnesses are questions of fact, not law.
38. In addition, the Appellant contends that new evidence is available that was not available at the time the Determination was made. This new evidence consists of an email, dated June 29, 2020, from Julie Martin “[t]o whom it may concern”. In this email, Ms. Martin asserts that the Appellant “was in charge of the Curatorial team, of which I was a part”.

ANALYSIS

39. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.

40. The burden is on an appellant to persuade this Tribunal that there is justification to interfere with a determination on any one of these statutory grounds.

41. In the present case, the Appellant cites all three of these statutory grounds. The Appellant contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant also asserts that there is new evidence available that was not available at the time that the Determination was made.

Did the Director err in law in making the Determination?

42. The Appellant, in her appeal submissions, alleges that the Director committed an error of law in making the Determination.

43. This 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.

44. Much of the Appellant’s Complaint was based upon her assertion that KAGA had violated section 8 of the *ESA*, by misrepresenting to her the terms of her employment. Section 8 of the *ESA* states:

- 8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
- (a) the availability of a position;
 - (b) the type of work;
 - (c) the wages;
 - (d) the conditions of employment.

45. The Director correctly considered the applicability of section 8, noting that this Tribunal has said that this provision is “focussed on the conduct and intention of the employer leading up to the initial hiring” (*Re: John Shaddick*, BC EST # D029/09). The Director thoroughly examined the evidence of all of the witnesses as to the events that occurred during and after the interview process. The Director undertook a thorough review of the evidence regarding what KAGA had told the Appellant regarding hours of work, and the references to hours of work found within the 1st Employment Agreement, the Job Description and the HR Manual. The Director concluded that KAGA had not misrepresented to the Appellant her expected hours of work.
46. The Director also carefully examined and weighed the evidence of the witnesses regarding KAGA’s representations, at the time of hiring, regarding wages and performance appraisals. The Director noted that the parties agreed that KAGA had told the Appellant the range of starting salary for the position. The Director accepted the evidence of the KAGA witnesses that KAGA had not told the Appellant that she would automatically qualify for a salary increase at the end of her probationary period. The Director noted that the HR Manual specified that salary alterations would be subject to KAGA’s customary procedures and timing. The Director found, on a balance of probabilities, that KAGA had not misrepresented the Appellant’s wages. As to the Appellant’s assertion that KAGA had misrepresented that a performance appraisal would be undertaken at the end of the probationary period, the Director found that since KAGA had not represented that a performance appraisal would result in an increase in the Appellant’s salary, KAGA had not violated section 8 in this regard.
47. I am satisfied that the Director correctly interpreted and applied section 8 of the *ESA*.
48. The Appellant alleged that KAGA had violated section 83 of the *ESA* by mistreating her because she had filed a Complaint. The Appellant asserted that KAGA had intimidated or coerced her by suspending her with pay, by subjecting her to rude behaviour, and by attempting to compel her to execute the Amended Employment Agreement.
49. Section 83 of the *ESA* provides as follows:
- 83 (1) An employer must not
- (a) refuse to employ or refuse to continue to employ a person,
 - (b) threaten to dismiss or otherwise threaten a person,
 - (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
 - (d) intimidate or coerce or impose a monetary or other penalty on a person,
- because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.
50. The Director thoroughly canvassed the testimonial and documentary evidence as to the events occurring during the Appellant’s employment, leading to her suspension from her duties. The Director found that the Appellant became, over time, increasingly concerned with KAGA’s attempts to dictate the hours that she worked, and with KAGA’s assertions that the Appellant’s supervisor retained ultimate

authority regarding the supervision of staff. The Director noted that as time passed, the Appellant's behaviour and language toward KAGA became increasingly inflammatory and provocative. The Director held that KAGA's decision to place the Appellant on paid leave was a reasonable action to defuse a tense situation and afford KAGA time to consider its position. The Director held that this action did not amount to intimidation or coercion. The Director found no evidence to suggest that KAGA's decision was motivated by the Appellant's Complaint.

51. As to the Appellant's allegation that she had been subjected to rude behaviour, the Director weighed the evidence and found that KAGA had acted in a manner that was generally professional and courteous. The Director did not find evidence of rude behaviour on the part of KAGA and, in any event, held that rude behaviour alone would not have constituted a violation of section 83 of the *ESA*.
52. The Director weighed the evidence of the parties, and found that the introduction of the Amended Employment Agreement was an attempt by KAGA to correct a misperception that the Appellant retained ultimate supervisory authority over two KAGA employees. The Director found no evidence that the Amended Employment Agreement was a retaliatory response to the Appellant's Complaint.
53. I am satisfied that the Director correctly interpreted and applied section 83 of the *ESA*.
54. The Appellant asserted that she was owed wages by KAGA. She contended that she had not been fully compensated for hours worked, that she should have been paid for sick days accrued, and that she should have received compensation for length of service.
55. With respect to the Appellant's allegation that she had worked hours for which she had not been compensated, the Director carefully examined the evidence of the parties. The Director noted the absence of documentary evidence related to this issue, and considered the testamentary evidence of the parties. The Director fully explained that the evidence of the KAGA witnesses, where it conflicted with that of the Appellant, was more credible on this issue. The Director concluded that the Appellant had been more than compensated for the hours that she worked.
56. The Director noted that the *ESA* did not govern the question of sick days in this case, as this was a matter that fell within the scope of the 1st Employment Agreement and the HR Manual. The Director noted that KAGA retained the discretion to award paid sick days. The Director correctly concluded that the Appellant had no claim, under the *ESA*, to be paid for sick days.
57. As to the Appellant's assertion that she was entitled to be paid compensation for length of service, the Director considered and applied the provisions of sections 63 and 66 of the *ESA*. The Director noted that section 63 provides that an employer is liable to pay compensation for length of service except where an employee terminates the employment. Section 66 of the *ESA* provides that the Director can accept that an employer has terminated employment when the employer attempts to substantially alter terms of employment. The Director carefully examined the evidence regarding the introduction of the Amended Employment Agreement, and concluded that the proposed changes did not amount to a substantial alteration to the employee's duties. I am satisfied that the Director correctly applied section 66 of the *ESA*, and came to a reasonable conclusion as to the significance of the proposed changes to the 1st Employment Agreement.

58. I am satisfied that the Director correctly interpreted and applied the provisions of the *ESA* that dealt with the Appellant's allegations of unpaid wages.
59. I do not find that the Director misapplied any principle of general law.
60. I do not find that the Director acted without any evidence. On the contrary, the Director was fulsome in presenting and assessing the evidence, both testamentary and documentary. The Director very thoroughly examined the events leading to the termination of the Appellant's employment. The Director noted that there were instances where the testimony of the Appellant conflicted with that of the KAGA witnesses, but the Director fully explained why KAGA's evidence was preferred to that of the Appellant.
61. I am satisfied that the Director's conclusions, based on the evidence, were reasonable. I find that the Determination was well-supported by evidence, with fulsome discussion of the conclusions reached.
62. I find that the Director did not err in law in making the Determination, and I dismiss this ground of appeal.

Did the Director fail to observe the principles of natural justice in making the Determination?

63. In her appeal, the Appellant alleged that the Director failed to observe the principles of natural justice in making the Determination.
64. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies, as follows:
- 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).
65. Thus, natural justice requires the Director to provide certain procedural protections to both parties, and to conduct investigations in an unbiased and neutral manner.
66. I am satisfied that the Director afforded the Appellant the required procedural protections. The Director provided sufficient opportunities to the Appellant to know the case against her. The Director conducted an investigation and afforded both the Appellant and KAGA an opportunity to provide evidence. It is clear from the record in this case that the Director afforded both parties full opportunity to see the other party's documentary evidence, and to comment upon the testamentary and documentary evidence each presented. I am satisfied that the Director carefully weighed all of the evidence supplied by both parties and applied the relevant legislative provisions.
67. The Appellant alleges that "[a]necdotal narratives were given more weight than documentary evidence". The Appellant then goes on to state that the Director "accepted hearsay evidence of the employer and their team of lawyers over documentary evidence presented by myself". The Appellant has not cited

instances where the Director “accepted hearsay evidence”. The Director thoroughly examined all of the evidence, both testamentary and documentary, and provided a comprehensive analysis of that evidence. As was appropriate, the Director gave appropriate weight to the evidence that was the most compelling.

68. The Appellant advances serious allegations that the Director was biased against her, stating that the Director “exhibited bias against me in their interpretation of evidence and statements.” The Appellant then goes on, in her submissions to cite numerous instances which the Appellant describes as “[e]rrors in the presentation of evidence”. For the most part, the examples referenced by the Appellant as alleged “[e]rrors in the presentation of evidence” are instances in which the Appellant proposes a different interpretation of the evidence than the conclusions reached by the Director. As mentioned above, it is not the purpose of this appeal to simply re-examine the arguments presented to the Director, and I will not do so.

69. The Appellant takes issue with the Director’s description of the Appellant as “unreasonable, uncooperative, high-handed, exaggerating and inexperienced.” I recognize that the Director used strong adjectives in the Determination to characterize the behaviour of the Appellant. I will now consider whether the use of this language demonstrates bias on the part of the Director.

70. The Director is required to conduct an investigation in a manner that is unbiased and neutral. The Supreme Court of Canada stated, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992], 1 S.C.R. 623 at 636-37, that the test to assess whether an adjudicator has been unbiased is that of the ‘reasonably informed bystander’:

The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. ... As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

71. In the Determination the Director provided a detailed review of the course of events during the Appellant’s employment, including an examination of the correspondence between the parties. The Director noted a pattern of increasing tension between the parties with the passage of time. The Director considered the behaviours of the parties, and gave the following descriptions of these behaviours:

- Referring to an email from the Appellant to her supervisor, the Director stated that “the language in this email is disrespectful and inflammatory” and “needlessly provocative”;
- Referring to an email from KAGA to the Appellant, summarizing a prior meeting, the Director described the language as “professional and thorough”, demonstrating “an honest, good-faith effort to understand Ms. Koosel’s position and respond to her concerns”;
- Describing the Appellant’s response to the foregoing summary, the Director described the Appellant’s language as “curt at best and rude at worst”. The Director held that “a reasonable employer might have had doubts about Ms. Koosel’s willingness to cooperate”;

- Referring to a later email from the Appellant to her employer, the Director described the Appellant's language as "disrespectful and inflammatory" and stated that "[t]he tone of this email is accusatory and high-handed" and "does not evidence any intention to cooperate".

72. I am satisfied that the language chosen by the Director was used for the purpose of assessing the Appellant's claim that she was mistreated by KAGA for having filed a Complaint. The Director thoroughly examined the timing of this correspondence, and contrasted the language used by the Appellant and KAGA, in order to evaluate whether the Appellant had, in fact, been mistreated by KAGA for filing the Complaint.
73. I do not find that the language chosen by the Director in the Determination evidences prejudice on the part of the Director, or gives rise to a reasonable apprehension of bias. While the language used by the Director is strong, I do not find that it rises to the level of "intemperate language – language that could give rise to a reasonable concern as to his neutrality", as described by this Tribunal in *Re: Director of Employment Standards (Re: Milan Holdings Inc.)* BC EST #D313/98. On the contrary, I find that the Director's language is used for the purpose of providing contrast in examining the respective behaviours of the employer and employee over the course of time.
74. I do not believe that a reasonable person would perceive bias on the part of the Director. Rather, I find that the Director conducted the investigation in a manner that was even-handed and impartial, and afforded the Appellant all of the protections required by natural justice.
75. The Appellant has presented no convincing evidence in support of her allegations that the Director failed to apply the principles of natural justice. On the contrary, I am satisfied that the Director observed the principles of natural justice in conducting the investigation, and in evaluating the evidence provided therein. For this reason, I dismiss this ground of appeal.

Has evidence become available that was not available at the time the Determination was being made?

76. In her appeal, the Appellant alleges new evidence has become available that should be considered in this appeal. The Appellant includes an email, dated June 29, 2020, from Julie Martin, entitled "Letter of Support" addressed "[t]o whom it may concern". In this email, Ms. Martin states that "[t]here was no doubt in my mind that as Curator at the Kelowna Art Gallery, she [the Appellant] was in charge of the Curatorial team, of which I was a part ...".
77. This Tribunal, in *Re: Bruce Davies*, BC EST # D171/03, set out the test to be applied to allegedly new evidence that is sought to be admitted on appeal, as follows:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

78. The purported new evidence presented by the Appellant does not satisfy this test. There is nothing before me that suggests that Ms. Martin's information was not available during the investigation of the Complaint and prior to the Determination being made. I dismiss this ground of appeal.

SUMMARY

79. In summary, I do not find that the Director erred in law in making the within Determination, or failed to observe the principles of natural justice. I do not find that there is new evidence available that was not available at the time the Determination was being made.

ORDER

80. I dismiss this appeal, and pursuant to section 115 of the *ESA*, I confirm the Determination.

James F. Maxwell
Member
Employment Standards Tribunal