Employment Standards TRIBUNAL

Citation: Northern Gold Foods Ltd. (Re)
2021 BCEST 35

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Northern Gold Foods Ltd.
("Northern Gold")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2020/158

DATE OF DECISION: April 23, 2021

DECISION

SUBMISSIONS

David M. Smart — legal counsel for Northern Gold Foods Ltd.

Dan Armstrong — delegate for the Director of Employment Standards

INTRODUCTION

1. Northern Gold Foods Ltd. ("Northern Gold") appeals a determination issued by Dan Armstrong, a delegate of the Director of Employment Standards (the "delegate"), on October 16, 2020 (the "Determination"). The Determination was issued following a complaint hearing held on June 16, 2020. The delegate also issued, concurrently with the Determination, his "Reasons for the Determination" (the "delegate's reasons") in which he set out the parties' evidence and argument, his analysis, and ultimate findings.

2. Northern Gold says that the delegate erred in law in issuing the Determination – see section 112(1)(a) of the *Employment Standards Act* (the "*ESA*"). This appeal principally concerns the interpretation and application of section 54(2) of the *ESA*. This provision, together with section 54(3), concerns an employer's obligations regarding employees who are returning to work following a leave permitted under the statute (in this instance, parental leave under section 51). Section 54(2) states: "An employer must not, because of an employee's pregnancy or a leave allowed by this Part, (a) terminate employment, or (b) change a condition of employment without the employee's written consent." Section 54(3) states: "As soon as the leave ends, the employer must place the employee (a) in the position the employee held before taking leave under this Part, or (b) in a comparable position."

3. Briefly, the delegate determined that Northern Gold did meet its section 54(3)(b) obligation to return Savitri Thejoisworo (the "complainant") to a "comparable position" (delegate's reasons, page R12). The delegate also determined that Northern Gold contravened section 54(2)(b) of the *ESA* inasmuch as it changed the complainant's conditions of employment because of her parental leave, and did not have her written consent to do so (page R13). The delegate, by way of a "make whole remedy" under section 79(2)(c), awarded the complainant $23,630.48 including vacation pay and section 88 interest. The delegate also levied a $500 monetary penalty against Northern Gold based on its section 54 contravention. Thus, the total amount payable under the Determination is $24,130.48.

4. As noted above, Northern Gold says that the delegate erred in law in finding a contravention of section 54(2)(b) and, on that basis, seeks an order cancelling the Determination. More particularly, Northern Gold says that it did not change any of the complainant's conditions of employment "because of" her parental leave. Further, it maintains that since the complainant quit her employment before her leave ended, section 54(3) was never triggered. Alternatively, Northern Gold says that due to changed business circumstances unrelated to the complainant's leave, it was unable to return the complainant to the position she held when her leave commenced.

5. The complainant, although invited to do so, did not participate in this appeal. The delegate's position is that the Determination should be confirmed.

6. As will be seen, I am of the view that this appeal is meritorious, and that the Determination must be cancelled.

FACTUAL BACKGROUND

7. The parties appeared at a teleconference complaint hearing held on June 16, 2020. Four witnesses testified on behalf of Northern Gold, and the complainant was the sole witness on her own behalf. The various witnesses provided the following evidence, as summarized in the delegate's reasons.

8. Northern Gold manufactures a variety of food products such as breakfast cereals. The complainant was employed as a "Research and Development Technologist" from March 1, 2015 to August 8, 2019. In this role, she oversaw the development of new product recipes and products from initial proposal to full scale production (delegate's reasons, page R2). Her duties included communicating with clients, updating recipes and mechanical processes, production troubleshooting, and preparing paperwork related to research and development tax credits. When her employment ended, her annual salary was $45,000.

9. The complainant, who had earlier in her employment taken a section 51 parental leave, commenced another section 51 parental leave on March 7, 2018. She was scheduled to return to work on September 3, 2019 (i.e., a leave of about 18 months). While the complainant was on leave, Northern Gold allocated her work duties to various other employees. On August 9, 2019, Northern Gold's president decided that the complainant's position would be eliminated – according to the evidence presented by Northern Gold, this decision was purely a business decision since "there had been a significant decrease in the amount of research and development work conducted at its facility" (delegate's reasons, page R3). The delegate's reasons, at page R3, set out what next transpired:

> On August 13, 2019, approximately three weeks before her anticipated return, [the complainant] met with [Northern Gold's operations manager] and [Northern Gold's controller] to discuss her return. She was informed that her position as Research and Development Technologist had been eliminated because Northern Gold was no longer conducting research and development. Management further informed her that no other plants owned by Northern Gold were conducting research and development, and that it was not hiring research and development staff anywhere else. [The complainant] was told that the only position available to her was that of a Quality Control Technician.
>
> The duties of a Quality Control Technician, a role that [the complainant] had held a decade prior, primarily consist of monitoring production and routine testing of samples.
>
> [The complainant] considered the position of Quality Control Technician to be a demotion and refused to accept her assignment to it. Furthermore, she believed that Northern Gold eliminated of the Research and Development Technologist position as a result of its displeasure with her decision to take parental leave for a second time during her employment with Northern Gold.
>
> Northern Gold disputed that the Quality Control Technician position was a demotion, asserting that it was comparable to that which she had previously occupied. Northern Gold also asserted that the elimination of the Research and Development Technologist position was necessary for business reasons. Specifically, it argued that there had been a significant decrease in the amount of research and development work conducted at its facility.

10. Northern Gold's witnesses testified as follows. The complainant's former direct supervisor (who was the manager of the Quality and Research Development department) testified that as of June 2018 (three to four months after the complainant's leave commenced), the amount of research and development work being undertaken was declining – "customers had started to have a lot of this work done themselves, including testing batches and piloting equipment [and] [a]s a result, there was less research and development work and projects were completed in shorter timeframes" (delegate's reasons, page R4). The complainant's supervisor agreed that the Quality Control Technician position, relative to the Research and Development Technologist position was somewhat "more routine", but nonetheless was a very responsible position because the technician "must ensure products are safe for consumption"; the technician position was also comparably less well paid ($34,000 versus $45,000). The complainant's former supervisor was not involved in the decision to eliminate the Research and Development Technologist position (there was only one such position in the plant).

11. Three Northern Gold witnesses testified specifically about the decision to eliminate the Research and Development Technologist position. The company president testified that although the decision to eliminate the technologist position followed the complainant's taking leave, her leave was not a factor in the decision to eliminate the position, and that "no other factors were considered other than a decline in research and development work" (delegate's reasons, page R5). The company's business had changed from a research and development facility to a production facility and a "transition from a development function to a quality function" (page R5). This, in turn, resulted in other staffing changes – the complainant's former supervisor (head of Research and Development and Quality Assurance) transferred to the company's Ontario facility and now works in a quality control capacity; when the complainant went on leave, the company's operations manager assumed all of the project management duties formerly undertaken by the complainant, but by 2019 this aspect of his position had disappeared.

12. Northern Gold's controller testified that there had been a significant change in the firm's operations after the complainant went on leave "and as a result the research and development work [the complainant] was doing prior to her leave no longer existed" (delegate's reasons, page R6). By way of example, the controller noted that annual research and development spending fell from $100,000 per annum (for 2017-2018) to $60,000 in 2019, and in 2020 the company "experienced another decrease in this work and had no research and development [tax] credits to apply for" (page R6). The controller further testified that this decline was not a sudden trend, and that the firm's "customers were moving away from research and development as they tended to do it more themselves" (page R6). The complainant had been the only technologist, and there was no need to (and the company did not) hire a replacement technologist while the complainant was on leave. The controller's evidence, as set out in the delegate's reasons (at page R7) continued:

> …They [i.e., the controller, the operations manager, and the president] concluded that the duties associated with the Research and Development Technologist role were no longer required. On August 9, 2019 [the president] directed [the controller] to eliminate the Research and Development Technologist position. [The president's] decision was also communicated to [the operations manager] who was responsible for conveying this to [the complainant]. [The complainant's] parental leave was not a factor in their decision to eliminate the Research and Development Technologist position in their Port Coquitlam facility.
>
> [The controller] offered [the complainant] the position of Quality Control Technician. This was the only option in which they could bring her back. In Northern Gold management's opinion, it was a

> comparable position. It is not an entry level role and the work is highly regarded. He added that other employees in this role have bachelor's degrees. They created an additional position for her. They did not need it, especially not at her wage [Note: the complainant would have continued in this new position without any reduction in salary or benefits]. In this new role [the complainant] would have reported to [her former supervisor's replacement – her former supervisor had been reassigned to Ontario]. All Quality Control Technicians report to her.
>
> [The complainant] declined the Quality Control Technician position offered to her. [The controller] argued that in doing so, [the complainant] was responsible for her ensuing financial loss. She ought to have remained in that position while searching for additional work if indeed that was her intention.

13. Northern Gold's operations manager testified as follows in relation to the elimination of the complainant's former position (delegate's reasons, pages R7 – R8):

> [The complainant's] duties were wide-ranging and he interacted with her in research and development performing trials and interacting with customers and employees. When [the complainant] left on leave, the research and development of Northern Gold shifted away from developing concepts brought to them by customers, to manufacturing and packaging recipes already developed by customers. By that time, [the complainant] was primarily ensuring raw materials arrived which she would then inventory. She also ensured the transfer of leftovers so that Quality Control could collect data and samples.
>
> [The operations manager] became involved in discussions about eliminating the Research and Development Technologist position sometime prior to [the president's] decision on August 9, 2019. [The operations manager] said there had been a reduction in terms of research and development, adding that whereas in 2015 he spent 15-20% of his time in this area, he spent no time on it in 2019. From Northern Gold's perspective, a Research and Development Technologist is given concepts of projects and asked to develop recipes around that. Now, their trials already have formulas. The need for a full time Research and Development Technologist no longer existed…
>
> They recognized that they needed to accommodate [the complainant] as best they could, and the Quality Control Technician position was the only one in that field/department.
>
> Quality Control workers are under an agreement that they are available to work all/any shifts, though management does try and accommodate to ensure they are on a regular schedule. He added that there are employees who have other jobs and some who require childcare. Following their August 13, 2019 meeting with [the complainant], she was offered three months accommodation which would have allowed her to work previous shift [*sic*] on a regular basis in the interim. He could not say that [the complainant] would not have had to subsequently work different shifts as they were still in the process of negotiation at that time.

14. The complainant testified that, in her view, there were substantial differences from the technologist position she held prior to taking parental leave and the technician position offered to her prior to her scheduled return. Among other things, the complainant noted that the technician position, relative to the technologist position:

- involves rotating "graveyard" shifts;

- although also requiring a 4-year food science degree, generally will not require significant experience since most such positions are filled by recent graduates and typically pays a lower salary (e.g., at Northern Gold, $34,000 versus $45,000); and
- would have a "diminished status" due to its reporting requirements.

15. The complainant maintained that her former position was not eliminated for legitimate business reasons. Rather, she claimed that it was a retaliatory action taken against her because Northern Gold was "displeas[ed] with her decision to take parental leave for a second time in the course of her employment with Northern Gold" (delegate's reasons, page R9). The complainant also maintained that Northern Gold's business had not shifted away from research and development and that it continued into 2020; however, it is not clear how the complainant would know this, since she was on leave as of March 7, 2018.

16. The complainant conceded that the technician's position offered to her was at the same salary, and with the same schedule (at least for an initial three months), as the technologist's position. Nevertheless, she refused the position because, in her mind, Northern Gold's offer was not "consistent with her career progression", and she did not want to indicate on her resume that she had moved from a technologist's to a technician's position as "this might have limited her ability to subsequently progress" (delegate's reasons, page R10).

17. On August 14, 2019, the complainant filed a section 74 complaint.

18. The complainant was supposed to return to work following her parental leave on September 3, 2019. On September 4, 2019, at about 11 AM, the complainant sent an e-mail separately addressed to both Northern Gold's controller and its operations manager. The subject line read "Constructive Dismissal". In the body of the e-mail, the complainant set out her position that she was not prepared to accept the "unilateral" and "significant" changes proposed and that they constituted a "constructive dismissal". She continued: "I, therefore, tender my resignation, effective immediately."

19. By way of reply to the complainant's resignation e-mail, Northern Gold sent a letter to the complainant on September 26, 2019 which set out its position – largely the same as it advanced before the delegate at the complaint hearing – as follows:

- The position of QC Tech offered to you in no way constitutes a demotion; it has the same working conditions (same lab/desk/co-workers/pay/benefits) as your previous role.
- The QC Tech position is a comparable position to your former role within our organization.
- We disagree with your characterization of the QC Tech position as entry level, others in that position carry a wide range of previous experience and education.
- The QC Tech position offered to you was in no way the result of you taking maternity leave, the business has changed; our primary customer built their own R&D center and do not use us for product development anymore. You would have been moved to the QC Tech position regardless.
- The R&D Tech position you formerly held simply does not exist anymore, it is not filled by anyone else, we are not recruiting for it, and what's more the R&D manager who you reported to has left the province.

- By not returning to work at least temporarily to assess your options, under full pay and benefits, you failed to mitigate your situation.

20. Finally, and with respect to the matter of her income loss, the complainant applied for, but was refused, employment insurance benefits (apparently because she did not meet a 400 working hours eligibility requirement). About six months after submitting her resignation letter, the complainant found new employment (delegate's reasons, page R10):

> [The complainant] did not receive any other income following the end of her employment until February 24, 2020, when she became employed in a Senior Research and Development Position. She is being paid a higher salary than that which she received with Northern Gold. This current position was the first one that she was offered. She added that the role she was seeking is a very niche role. She that added [*sic*] that in the months following her dismissal she applied for 69 jobs. She provided a detailed application log in support this claim.

THE DELEGATE'S FINDINGS

21. At the outset, I believe it important to note what the delegate did *not* find since, in my view, the absence of certain findings is critical to this appeal. So far as I can determine, there are at least eight problematic omissions in the delegate's reasons.

Matters not addressed by the delegate

22. First, although the complainant maintained that Northern Gold's elimination of her former position was in retaliation for her having taken a second parental leave during her tenure (delegate's reasons, page R9), the delegate did not find that to be the case. The delegate's reasons simply do not address the issue. Further, and in any event, there was no cogent evidence before the delegate that the elimination of the technologist position was a retaliatory measure uniquely directed toward the complainant, and with no rational and legitimate business justification.

23. This leads me to a second concern. Northern Gold's evidence consisted of the oral testimony of four senior executives who, unlike the complainant, were well-positioned to testify about the business reasons underlying the decision to eliminate the technologist position. I note that the complainant was not at the workplace for nearly 1½ years prior to her scheduled return date, and was therefore not in a position to knowledgeably comment about the changing nature of the firm's business activities during the period of her leave (from March 7, 2018; she never returned to the workplace). Further, and most importantly, all four of Northern Gold's witnesses testified about the changing nature of the firm's business (several also providing corroborating business data), and all four testified that this was the precipitating factor leading to the decision to eliminate the technologist position (and there was only one such position in the firm when it was eliminated). These witnesses maintained that the position was eliminated based on considerations wholly separate and apart from the complainant having taken a leave. The delegate did not reject the testimony of any Northern Gold's witnesses, nor did he find that their evidence was not credible. Further, these witnesses' evidence appears to have been wholly unchallenged in any meaningful and justifiable fashion – the complainant merely refused to accept (without legitimately being in a position to do so, and without providing supporting cogent evidence) Northern Gold's evidence about the changing nature of its business.

24. Third, the delegate did not reject the particularly critical aspects of Northern Gold's evidence supporting its position that the elimination of the technologist position was made for legitimate business reasons. Indeed, the delegate did not reject any of Northern Gold's evidence. In particular, however, the delegate did not reject Northern Gold's evidence that it experienced a steady decline in its research and development work dating from prior to the complainant's leave, but accelerating during her leave. In fact, to the contrary, the delegate held (at page R13):

> I accept that [Northern Gold's] research and development work had decreased and note that it was able to sustain this aspect of its operations without the necessity of assigning anyone else to this role on a full-time basis. I also find however that this was not sudden and that it had occurred over a period of years.

25. Fourth, the delegate did not reject the complainant's former direct supervisor's evidence that when the complainant was first hired "100% of her work pertained to research and development [but] [a]s research and development decreased, her associated duties decreased accordingly" (delegate's reasons, page R4).

26. Fifth, the complainant's position was never the subject of a labour market search to find an interim replacement, and no person was ever hired to replace her. The complainant had been the only Research and Development Technologist on staff. While the complainant was on leave, her former duties were allocated to other Northern Gold employees. The controller testified that the technician position offered to the complainant was a "new position" that was created uniquely to allow the complainant to return to work. Northern Gold's operations manager testified that "the need for a full time Research and Development Technologist no longer existed" (delegate's reasons, page R7). The delegate did not reject any of this evidence, and there was no credible contrary evidence before the delegate.

27. Sixth, Northern Gold's president testified that the total value of tax credits was a reliable measure of research and development activity, and that tax credits steadily declined over the past several years. Northern Gold's controller (i.e., its chief financial officer) provided uncontested evidence regarding the significant absolute decline in R & D tax credit eligible work from 2018 to 2020. The operations manager testified that from 2015 to 2019, the time he spent on research and development activities declined from about 15-20% of his time in 2015 to no time at all in 2019. None of this evidence was contradicted. The complainant, having been on leave and without access to internal company records, was simply not in a position to contradict this evidence although she nonetheless maintained – contrary to the delegate's ultimate findings, noted above – that research and development work had not declined during the past few years of her employment, and during the 1½ years that she was on leave.

28. Although the delegate held, at page R13 of his reasons, that "not all research and development work is eligible for tax credits" he did not reject Northern Gold's president's uncontroverted evidence (at page R5) that at one time 75% of the company's research and development work was submitted for tax credits, or the controller's uncontroverted evidence that in 2020 the firm "had no research and development credits to apply for" (delegate's reasons, page R6). The only reasonable and credible inference to be drawn from this – and other – evidence regarding Northern Gold's research and development activity was that this work had declined precipitously prior to the elimination of the technologist position (an inference the delegate appeared to accept at page R13 of his reasons).

29. Seventh, the complainant testified that she "would have had a different reporting structure in her new role" and that this fact, in turn, would have left her with a "diminished status as perceived by other staff" (delegate's reasons, page R9). The delegate noted, at page R11 of his reasons, that the technician position would have involved a "different reporting relationship". This finding stands in marked contrast to the uncontested testimony from the complainant's former supervisor – who transferred to the firm's Ontario facility due to a lack or R & D work at the Port Coquitlam facility – and Northern Gold's president that the complainant would be reporting to the complainant's former supervisor's successor (this individual had been promoted during the complainant's leave). This latter individual reported – as had the complainant's former supervisor – directly to Northern Gold's president. In short, there simply is no evidence whatsoever to support the complainant's assertion, and the delegate's finding, that the complainant would have had a different reporting relationship. Although the individual to whom the complainant would have reported was a different person, that person had the same *role* within the organization as was held by the complainant's former supervisor.

30. Finally, if an employee takes a leave permitted under the *ESA* and is subsequently terminated, or has their terms and conditions of employment changed without their written consent, there is no section 54(2) contravention unless the employer terminates the employee, or unilaterally changes their terms and conditions of employment, "*because of* [the] employee's pregnancy or a leave allowed under [Part 6]". In other words, the leave must be the event that precipitates the termination or changed employment conditions. The delegate never expressly determined that the complainant's employment conditions were changed "because of" her leave and, further, there was no cogent evidence before the delegate that would have supported such a finding.

31. As noted above, Northern Gold's essentially uncontroverted evidence was that the technologist position was eliminated due to the changing nature of its business and, in particular, the precipitous decline in research and development work. It is also important to emphasize that the delegate "accept[ed] that [Northern Gold's] research and development work had decreased and note[d] that it was able to sustain this aspect of its operations without the necessity of assigning anyone else to this role on a full-time basis" (delegate's reasons, page R13). Nevertheless, the delegate determined that since "the decision to eliminate [the technologist] position was triggered by conversations stemming from [the complainant's] parental leave which culminated in a reassessment of her role" (delegate's reasons, page R13), Northern Gold had not discharged its evidentiary burden under section 126(4)(c) of the *ESA* requiring it to demonstrate that the complainant's leave was not the reason for the changes in her conditions of employment.

32. The delegate continued his analysis by referring to the Tribunal's decision in *Capable Enterprises Ltd.*, BC EST # D336/98 (a reconsideration decision confirming BC EST # D033/98), where the reconsideration panel observed that a section 54(2) contravention could "be founded on the employer's response to either the pregnancy or the leave allowed under Part 8" (at page 7). However, in *Capable*, unlike the present case, the employer permanently replaced the employee on maternity leave with a lower-wage employee, and was only prepared to offer the employee on leave another less responsible position with a significant salary decrease (about 25%). The appeal panel concluded that the employee on leave had been "effectively" constructively dismissed.

33. After referring to *Capable*, the delegate held: "I similarly find the notion that a parental leave might prompt a re-evaluation of the value of that employee's role to the business to be contrary to the spirit

and intent of the Act" (page R13). As previously noted, the delegate did not make an *express* finding that Northern Gold contravened section 54(2) as distinct from a finding that it acted contrary to the "spirit and intent" of the *ESA* and, on that basis, contravened this provision.

34. Although the delegate stated that Northern Gold changed the complainant's conditions of employment and that "its reasons for doing so were related to her parental leave" (page R13), he did not address the essentially uncontroverted evidence before him that the complainant's leave was *not* the reason why the technologist position was eliminated. In particular, the delegate did not address Northern Gold's president's uncontested evidence that "although [the complainant's] absence initiated the process that led to the elimination of her role, no other factors were considered other than a decline in research and development work" (delegate's reasons, page R5). Similarly, the delegate did not address the following uncontested testimony from Northern Gold's controller (at page R7): "[The complainant's] parental leave was not a factor in their decision to eliminate the Research and Development Technologist position in their Port Coquitlam facility." The delegate simply did not turn his mind to this evidence. Certainly, he never rejected the controller's testimony as being untruthful or otherwise unreliable.

35. I now turn to the delegate's actual findings.

The delegate's findings

36. First, as discussed above, the delegate held that Northern Gold contravened "the spirit and intent" of section 54(2) of the *ESA*, since the elimination of the technologist position was prompted by the complainant's parental leave. The technologist's position was effectively eliminated immediately after the complainant went on leave, as no replacement was ever hired (even after the complainant submitted her resignation 1½ years later), and the duties of this position were disbursed to other employees.

37. Second, the delegate determined, consistent with section 54(3)(b) of the *ESA*, that since Northern Gold eliminated the technologist position – and thus the complainant could not return to that position – it "had a responsibility to place [the complainant] in a comparable position" (page R11). While noting that the complainant "would have received a different job title with a different reporting relationship" (this latter finding regarding the reporting relationship was contrary to the evidence before him), the delegate nonetheless determined that neither of these two factors was "particularly helpful in the context of evaluating whether [the complainant] was placed in a comparable position" (page R11).

38. It should be noted that while the complainant was offered a different position (technician versus technologist), as discussed above, her reporting relationship would not have changed. Although the complainant would have reported to a different individual – due to the fact that her former supervisor had transferred to Ontario – her reporting relationship continued unchanged, as she would have reported to her former supervisor's successor, and within the same chain of command.

39. The delegate also determined that the work "schedule [the complainant] was offered upon return was the same as the schedule she had at the time of her departure, and that Northern Gold satisfied its obligations under section 54(3) of the Act" (page R11). In addition to there being no proposed change in the complainant's work schedule, her annual salary, benefits and vacation entitlement would continue unchanged when she returned to work. However, the delegate appears to have ignored this latter consideration in his "comparability" analysis, focusing instead on the fact that the technician position,

relative to the technologist position, had a lower *posted* salary ($34,000 versus $45,000). The only comment in the delegate's "Findings and Analysis" regarding the continuation of the complainant's salary was as follows: "I recognize that [the complainant] was to continue to receive her previous salary despite her transition to the Quality Control role and have assessed this evidence solely in the context of its relevance to the value attributed to the work performed" (page R12).

40. The delegate stated that "[f]or the purpose of ascertaining the existence of an actual disparity between the value assigned to these two positions, I am especially persuaded by differences in compensation" (page R12). However, the position that was actually offered to the complainant (which, on the uncontested evidence, was crafted to fit her unique circumstances) did not entail any reduction in salary. Regarding the continuance of the complainant's salary, I do not appreciate how this factor would not be relevant when determining if the technician position offered to the complainant was "comparable" to her former technologist position, particularly since the delegate himself identified the "pay package" as a relevant factor to consider when determining if the technician position was "comparable" to the technologist position (see page R11).

41. The delegate held that although both the technologist and technician positions typically require a 4-year food science or equivalent degree, the technologist position had "higher expectations in terms of credentials" compared to the technician position. I note that the complainant's former supervisor testified, while agreeing that there were "differences in terms of the skill sets required of the two positions" – since the technician's position is "more routine" – there still was "a significant amount of responsibility in this position as [technicians] must ensure products are safe for consumption" (delegate's reasons, page R4). The delegate in his "comparability" analysis did not reject this latter evidence regarding the significant responsibilities associated with the technician position that was offered to the complainant; indeed, he did not even refer to this evidence. Further, Northern Gold's controller testified that the technician's position was "comparable", particularly since it was not an entry level position, was highly regarded, and that other technicians have a bachelor's degree (delegate's reasons, page R7). The delegate did not substantively address this evidence in his analysis.

42. The delegate ultimately determined that the complainant "was not offered a comparable position" (page R12). This conclusion appears to be based solely on the following considerations:

- the different "level of responsibility associated with these two positions" (page R11);
- the technologist position, compared to the technician position, has "higher expectations in terms of credentials" (page R12); and
- the difference in the "posted" salaries for the two positions (page R12).

43. The delegate held that any differences between the two positions in terms of job title, shift schedule (which would be unchanged for at least three months), and reporting relationships (note, as discussed above, in fact the reporting relationship did *not* change) were *not* relevant in terms of his "comparability" analysis (page R11).

44. The delegate also identified other factors (at page R11) that could properly be taken into account in a "comparability" analysis, but he did not make any findings regarding these other factors which include: "status as perceived by other staff and the public"; "benefit plans"; "location of work"; "location of office,

workstation or desk"; and "provision of equipment and tools". Although the complainant maintained that if she had accepted the technician position, she "would have had a diminished status as perceived by other staff", the delegate did not make any such finding, nor was there any evidence before the delegate that would have supported the complainant's supposition in this regard. There was no evidence before the delegate that the complainant would have had any of her benefits taken away or reduced, or that her workspace or the office resources available to her, would have been changed in any way (this was confirmed by Northern Gold in its September 26, 2019 letter to the complainant, reproduced above: "The position of QC Tech offered to you in no way constitutes a demotion; it has the same working conditions (same lab/desk/co-workers/pay/benefits) as your previous role"). Had the complainant accepted the technician position, there would not have been any change in her geographic work location.

45. Section 54(2)(b) of the *ESA* states that employers cannot "because of an employee's pregnancy or a leave allowed by this Part…(b) change a condition of employment without the employee's written consent". The delegate determined that the changes made to the complainant's former position were made without her written consent "and that its reasons for doing so were *related to* her parental leave" (page R13; my *italics*). So far as I can determine, this "relatedness" appears to flow largely, if not exclusively, from the fact that the changes were instituted after the complainant went on leave. However, the recognition of this temporal ordering falls well short of constituting proof that the changes were made "because of" the complainant's leave.

The Make Whole Remedy

46. Having determined that Northern Gold contravened sections 54(2)(b) and 54(3)(b) of the *ESA*, the delegate then fashioned a remedy under section 79(2), the so-called "make whole" provision (see *W.G. McMahon Ltd.*, BC EST # D386/99, *Roy v. Metasoft Systems Inc.*, 2013 BCSC 1190, and *Hellmich*, BC EST # D046/15). Section 79(2) provides as follows:

> 79 (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:
>
> (a) hire a person and pay the person any wages lost because of the contravention;
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> (c) pay a person compensation instead of reinstating the person in employment;
>
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

47. The complainant refused Northern Gold's return to work offer, submitting her resignation by e-mail on September 4, 2019. Although she applied for employment insurance, her application was refused, apparently because she did not meet the qualifying working hours threshold. The complainant testified that following her resignation, she applied for 69 separate positions, but did not find new employment until February 24, 2020 when she secured a "Senior Research and Development" position at a higher salary than she was earning at Northern Gold (delegate's reasons, page R10). This was the first and only position offered to her during her search.

48. The delegate awarded the complainant $21,575.34 representing 175 lost working days (September 3, 2019 to February 24, 2020), together with $1,229.79 for concomitant vacation pay and $825.35 for section 88 interest.

49. Although Northern Gold submitted, as an alternative position, that the complainant should have accepted the technician's position in order to mitigate her potential income loss, the delegate did not make any deduction on account of a failure to mitigate. The delegate's findings on this issue are as follows (at pages R15 – R16):

> I am satisfied that [the complainant] made reasonable and adequate efforts to mitigate her loss. In reaching this conclusion I have considered her undisputed evidence that she applied for employment insurance benefits but was ineligible as she had just returned from an extended leave.
>
> Northern Gold argued that [the complainant] ought to have returned to work while pursuing other options. While this would have eliminated her financial losses for three months, I note that her evidence with respect to her career path discloses a clear trajectory and I accept that maintaining this trajectory was important to her. I accept that [the complainant] had legitimate concerns as to how acceptance of the Quality Control Technician position might be perceived by potential employers, and that this might negatively impact her career prospects and future earnings. This was especially important given that Northern Gold's inability to guarantee a regular shift beyond three months made her eventual departure inevitable. In the circumstances, I find [the complainant's] decision to decline the Quality Control Technician position to have been a reasonable and pragmatic course of action.
>
> I find that following her departure from Northern Gold, [the complainant] took reasonable steps to obtain suitable alternative employment. She claimed, and I accept, that her current position was the first one that she was offered and the role she was seeking is a very niche role…
>
> I find that [the complainant] took reasonable steps to mitigate her loss and that she is entitled to the full amount to her wage loss, $21,575.34.

50. I believe it important to note that the uncontroverted evidence before the delegate was that Northern Gold would not have reduced her salary to the "posted" technician rate. Her salary would have continued at the higher amount she earned in the technologist position. Indeed, if Northern Gold had later unilaterally decided to reduce the complainant's salary, that action would likely have constituted a breach of contract and, possibly, a section 66 deemed dismissal and/or a section 8 contravention.

51. The complainant was clearly concerned that her former work schedule was apparently only guaranteed for a 3-month period. The delegate placed a great weight on this consideration, finding that "Northern Gold's inability to guarantee a regular shift beyond three months made her eventual departure inevitable". The delegate's finding in this regard ignored Northern Gold's operations manager's uncontroverted testimony (at page R8) that the complainant being given a changed shift schedule after three months was not pre-ordained, and that "they were still in the process of negotiation" when the complainant submitted her resignation. As discussed, above, if Northern Gold had unilaterally changed the complainant's shift schedule after she returned to work, that would have been a breach of contract, possibly a section 66 deemed dismissal, and possibly conduct constituting family status discrimination

under the B.C. *Human Rights Code*. In my view, the delegate's finding that the complainant's departure was "inevitable" was purely speculative, as it was not supported by the evidentiary record.

52. I now turn to the parties' positions in this appeal.

THE PARTIES' POSITIONS

53. Northern Gold places particular emphasis on the essentially uncontested evidence before the delegate to the effect that before, and especially during, the complainant's leave its "customers changed their R&D processes such that most of their R&D work was then changed to 'in-house' work." Northern Gold also notes that it did not hire a replacement for the complainant while she was on leave, or after she resigned at the end of her leave. Finally, it maintains that it "offered [the complainant] the most comparable position available, at her original salary, but [the complainant] declined".

54. Northern Gold's fundamental position is that, as a matter of statutory construction (section 54(2) of the *ESA*), and considering the largely uncontroverted evidence before the delegate, it did not terminate or change the complainant's conditions of employment *because of* her leave. Northern Gold also observes that section 126(4)(c) states that the burden lies on the employer to show that an employee's leave was "not the reason for" the employee's termination or for changing the employee's conditions of employment. Northern Gold submits that the delegate applied a lower evidentiary threshold, determining that the complainant's leave was merely "related" to her changed conditions of employment. Northern Gold's submission continues:

> …the [delegate] erred by conflating the trigger for the discussion with the cause for the decision to eliminate the role…[and] that, regardless of [the complainant's] leave, such a discussion would necessarily have occurred anyway, because its R&D work had been significantly decreasing, to the point that there was no longer a need for the R&D Technologist position" [underlining in original text]

55. Northern Gold relies on the Tribunal's decision in *Flint*, BC EST # D477/00, where the Tribunal reconsideration panel held, at page 6, as follows:

> …it is unreasonable to impose a duty on an employer to place an employee, at the end of several months pregnancy leave, in the same position, or a comparable position, if the business of the employer has undergone significant changes for reasons unrelated to the employee's pregnancy. It would otherwise place an employee who has taken pregnancy or parental leave in a better position than another employee who may have continued to work through that period, and had been offered other work, or laid off, because of that significant change.

56. Northern Gold says the instant case falls precisely within the parameters of the *Flint* decision, maintaining that "it made an effort to preserve [the complainant's] employment by offering a new position to her, with no reduction in salary, but [it was] not obligated to place [the complainant] in her previously held position or a comparable position because the business underwent significant changes".

57. Although specifically invited to make submissions with respect to the matters of remedy (and, particularly, mitigation), Northern Gold declined to do so.

58. The complainant did not file a submission with the Tribunal.

59. The delegate says that Northern Gold's position regarding the use of the term "related to" in his reasons, rather than "the reason for" or "because of" is a "semantic distinction, not a meaningful one", and that read in context, he did not apply a lower evidentiary threshold. The delegate says that his decision is consistent with the Tribunal's jurisprudence, and specifically referred to *Tricom Services Inc.*, BC EST # D485/98, *Miller*, BC EST # D062/07, and *Quigg Development Corporation*, BC EST # D014/08 (reconsideration refused: BC EST # RD047/08).

60. The delegate also says, as was the situation in *Britco Structures Ltd.*, BC EST # D260/03, that the evidence clearly showed that the proposed changes to the complainant's conditions of employment "were instigated by her decision to take a leave…which prompted Northern Gold to turn its mind to the viability of her job" and that "Northern Gold was then able to assess the necessity of her position by redistributing her duties to other employees rather than hiring a replacement."

61. Finally, and with respect to the matter of remedy, the delegate first noted that reinstatement would have been inappropriate since the complainant found new employment at a "substantially" higher wage and, in any event, had no interest in returning to Northern Gold. Relying on the criteria set out in *Afaga Beauty Service Ltd.*, BC EST # D318/97, the delegate issued an in lieu of reinstatement "make whole" award based on the complainant's unemployment period from September 3, 2019 (the complainant's scheduled return to work date; she resigned on September 4, 2019) to February 24, 2020 (when she obtained new employment) – a period of approximately six months.

62. As noted above, the delegate calculated the complainant's income loss based on prorating her former $45,000 salary for the 175 working days lost ($21,575.34), plus vacation pay and section 88 interest, for a total award of $23,630.48. Regarding mitigation, the delegate advanced two propositions. First, the complainant was not obliged to accept the technician position offered to her "because it was not a comparable position as required by section 54(3)" and she was not required to "accept employment on terms that amount to a contravention of the [*ESA*]" (citing *660 Management Services Ltd.*, BC EST D147/05). Second, and in any event, the complainant's rejection of the technician position "was a reasonable and pragmatic course of action" especially because she required day shifts so that her young children's daycare needs could be met, and Northern Gold "would not guarantee a regular shift beyond three months which made her eventual departure inevitable".

63. The delegate also says that the complainant's refusal of the technician position was appropriate given that it constituted a "demotion", and acceptance could have impaired her re-employment prospects. Insofar as her 6-month period of employment is concerned, the delegate says that the complainant undertook an extensive "genuine and sustained effort to obtain suitable alternative employment" and accepted the first position offered to her. The complainant's job search was complicated by the fact that she was seeking a "very niche" position.

FINDINGS AND ANALYSIS

64. At this outset, I should note that although the complainant asserted Northern Gold eliminated her technologist position because it was displeased "with her decision to take parental leave for a second time during her employment with Northern Gold" (delegate's reasons, page R9), the delegate did *not* conclude

that the elimination of the position constituted a contravention of the section 83 "no retaliation" provision. The delegate grounded his award solely on section 54 of the *ESA*.

The employer's section 54 obligations

65. Sections 54(2) and (3) of the *ESA* state:

> (2) An employer must not, *because of* an employee's pregnancy or a leave allowed by this Part,
>
> (a) terminate employment, or
>
> (b) change a condition of employment without the employee's written consent.
>
> (3) As soon as the leave ends, the employer *must place* the employee
>
> (a) in the position the employee held before taking leave under this Part, or
>
> (b) in a *comparable position*.
>
> [my *italics*]

66. Subsections 54(2) and (3) set out complementary, but nonetheless separate and distinct, requirements regarding an employer's obligations to an employee who has taken a leave permitted by the *ESA*.

67. Section 54(2) speaks to the employer's fundamental obligation to maintain the position the employee held when their leave commenced. However, events may occur during the employee's leave that fundamentally undermine the employer's ability to satisfy that obligation – a key client may enter bankruptcy, or the viability of the employer's business may dramatically change (e.g., the business is ordered to be closed due to a pandemic), and the employer may need to take steps, including steps that may impact employees on leave, for legitimate business reasons. An employer *can* make changes to the employee's conditions of employment provided those changes are not made "because of" the employee's leave. Alternatively, the employee may provide written consent to the proposed changes.

68. At page R13 of his reasons, the delegate stated: "An employer may not change a condition of employment of an employee who is pregnant or on leave without the employee's written consent. *Changes are only acceptable if they are unrelated to the employee's pregnancy or leave*" (my *italics*). I am of the view this latter observation constitutes a misinterpretation of the relevant provision. Section 54(2) clearly contemplates a change in a condition of employment "because of an employee's pregnancy or a leave allowed by this Part". But such a change can only be lawfully implemented with the affected employee's written consent. I would caution, however, that this consent must be freely given, and predicated on complete and accurate information (see sections 2(b), (c) and (f) of the *ESA* – these provisions identify the following purposes of the statute: "fair treatment"; "open communication"; and allowing employees to meet work and family responsibilities).

69. Section 54(3) speaks to the employer's obligations once the employee's leave ends. The employee is entitled to be placed in the position they held when the leave commenced, or in a "comparable position". A "comparable position" is one that is broadly similar, in all material respects, to the position the employee held prior to commencing their leave.

70. In this case, the complainant was not terminated – she resigned by way of an e-mail sent to Northern Gold on September 4, 2019. Although the complainant maintained in her September 4th letter that she had been "constructively dismissed", the delegate did *not* determine that there had been a "deemed dismissal" under section 66 of the *ESA*. Accordingly, section 54(2)(a) does not apply here.

Permitted leaves, actual dismissals, and deemed dismissals

71. At this juncture, I wish to briefly comment on section 66 given my view that the interpretation and application of this provision should be broadly consistent with the notion of "changes to conditions of employment" under section 54(2)(b) of the *ESA*.

72. Section 66 states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." This provision is akin to the common law notion of "constructive dismissal". In *Potter v. New Brunswick Legal Aid Services Commission*, [2015] 1 S.C.R. 500, the Supreme Court of Canada held that a constructive (or deemed) dismissal may occur in one of two ways. First, the employer unilaterally changes the terms of an employment contract (and thus effects a breach of contract); this change must constitute a "substantial alteration" (see para. 34) of an essential contract term. Second, the employer may engage in "conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract" (para. 42). In this form of constructive dismissal, there need not be "an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach [but rather] the focus is on whether a course of conduct pursued by the employer 'evince[s] an intention no longer to be bound by the contract'" (para. 42).

73. Accordingly, not all employer-initiated unilateral changes to an employment contract can be lawfully characterized as a constructive dismissal. The changes must be serious, consequential and detrimental (*Potter*, para. 37) or, alternatively, clearly demonstrate that the employer no longer wishes to maintain the employment relationship.

74. In my view, the legal principles that delimit whether a constructive dismissal has occurred should apply with equal force when determining if an employer has unilaterally "substantially altered" a condition of employment and thereby contravened section 66 of the *ESA*. Further, even if there is a section 66 "deemed dismissal", section 63 compensation for length of service (which would otherwise be payable) is *not* payable if the employee "has been offered and has refused reasonable alternative employment by the employer" (see section 65(1)(f) of the *ESA*). A position that constitutes "reasonable alternative employment" within section 65(1)(f) may not be a "comparable" position for purposes of section 54(3)(b), but a truly "comparable" position would, in my view, certainly constitute an offer of "reasonable alternative employment".

75. In light of the foregoing comments regarding sections 66 and 65(1)(f) of the *ESA*, I am of the view that section 54(2)(b) should not be interpreted such that minor, inconsequential changes fall within its ambit. While I recognize that *ESA* leave provisions should be interpreted in a broad and generous manner (see *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), I do not accept that *any* change – no matter how minor – constitutes a section 54(2)(b) contravention. As *Rizzo* also instructs, the *ESA* should be interpreted contextually and in a manner that is in harmony with the entire scheme of the statute.

Were the complainant's employment conditions changed "because of" her pregnancy leave?

76. Returning to the facts of this case, there is no dispute that the complaint's "conditions of employment" were changed without her written consent. Although the complainant's wage rate and benefits would have continued unaffected by the proposed change from the "Research and Development Technologist" to the "Quality Control Technician" position, some (but not all) of the duties and responsibilities she formerly undertook would not be undertaken in her new role. The technician position had a lower posted salary (by $11,000) relative to the technologist position. However, the technician position also requires a 4-year food science degree, and the uncontested evidence before the delegate was that the complainant's reporting relationship would not have changed; she would have continued to work at the same work station and on the same work schedule as was the case before her leave commenced.

77. Despite the latter comments, it must be recognized that "conditions of employment" are broadly defined in section 1(1) of the *ESA* as meaning "all matters and circumstances that in any way affect the employment relationship of employers and employees". I am satisfied that the delegate did not err in finding that a "condition of employment" was changed without the complainant's written consent. Although many of the complainant's employment conditions would have continued unchanged had she accepted the technician position (e.g., her pay and benefits, vacation entitlement, work location and reporting relationship), the evidence shows that the essential nature of the complainant's duties and responsibilities, and her job title would have changed.

78. The key question here is whether this change was "because of" the complainant's leave. In this regard, section 126(4)(c) of the *ESA* places the burden on the employer to demonstrate (consistent with the ordinary civil burden of proof – balance of probabilities) that the employee's leave was "not the reason for…changing a condition of employment without the employee's consent".

79. I think it important to stress that this is not a case where the employer changed an employee's employment conditions in an effort to force that employee to quit so that the employer could hire someone else, or continue on with the employee's replacement. Northern Gold did not hire a replacement employee while the complainant was on leave, and it did not hire a replacement after she quit.

80. As I read the delegate's reasons, he never specifically determined that the complainant's conditions of employment were changed "because of" the complainant's leave, or that the "reason" for this change was the complainant taking leave. Rather, at page R12 of his reasons, the delegate misdirected himself by stating that section 126(4) placed the burden on Northern Gold to show that the change was not "related" to the complainant's leave:

> Under section 126(4)(c) of the Act, the burden is on the employer to show that a change in a condition of employment of an employee who is on a leave **is not related** to the employee's leave. It is therefore incumbent upon Northern Gold to demonstrate that the elimination of the Research and Development Technologist **was not related** to [the complainant's] leave.
>
> [underlining in original text; my **boldface**]

81. In my view, the delegate erred in law by applying the wrong legal test to the evidence before him. Further, even if one characterized the delegate's failure to apply the specific statutory standard as merely a matter

of "semantics" (as the delegate argued in his submission), the uncontroverted evidence before the delegate was that the change in employment conditions was not necessitated by the complainant's leave but, rather, due to the changing nature of Northern Gold's customers' requirements.

82. I have already set out this unchallenged evidence, above, but for greater clarity will summarize it a second time. The complainant's supervisor (the manager of the Quality and of the Research and Development department) testified that prior to June 2018, Northern Gold's clients had taken on much of the research and development work, rather than have Northern Gold undertake this work. As this trend continued, the complainant's duties shifted such that, formerly, about 100% of her duties "pertained to research and development", but that as R & D work declined, Northern Gold increasingly focussed on sampling, testing and quality control (delegate's reasons, page R4).

83. Northern Gold's president testified (delegate's reasons, page R5) that the company faced a significant decline in R & D work and transitioned "from a development function to a quality function". Northern Gold's clients apparently preferred to do their own R & D work as it was less costly and they – not Northern Gold – would then own the associated intellectual property. As a result, "early stage [R & D] has been removed from Northern Gold's scope". The complainant was not the only person affected by this need to change the firm's business model – aside from the elimination of the Research and Development Technologist position, the complainant's former manager was transferred to Ontario.

84. Northern Gold's controller testified that $200,000 worth of federal tax credit applications filed for 2017 and 2018 fell to $60,000 in 2019, and to $0 in 2020 (delegate's reasons, page R6). This pattern is reflected in the fact that when the complainant took her first leave the company hired a replacement for her, but there was no need to do so when, a few years later, she took her second leave.

85. Northern Gold's operations manager testified (at page R7) that when the complainant's leave commenced "the research and development [work had] shifted away from developing concepts brought to them by customers, to manufacturing and packaging recipes already developed by customers" and that "the need for a full time Research and Development Technologist no longer existed".

86. Northern Gold's evidence regarding the fundamentally changed nature of its business, and the ongoing need for a Research and Development Technologist, was wholly uncontradicted by any cogent evidence. Indeed, the delegate held, at page R13 of this reasons: "I accept that [Northern Gold's] research and development work had decreased and note that it was able to sustain this aspect of its operations without the necessity of assigning anyone else to this role on a full-time basis." The delegate also found that this change was not something precipitated by, or otherwise connected to, the complainant's leave since "this [change] was not sudden and that it had occurred over a period of years".

87. In my view, the evidence before the delegate overwhelmingly demonstrated that the change in the complainant's working conditions was not instituted "because of" her leave but, rather, was caused by the fundamentally changed nature of its business operations attributable to its customers' shifting requirements. In my view, the delegate's determination that the change in the complainant's conditions of employment "were related to her parental leave" (page R13), and thus constituted a contravention of section 54(2), cannot stand, as this finding was not supported by a legally sufficient evidentiary foundation.

88. In many respects, this situation mirrors that in *Creative Surfaces Inc.*, BC EST # D195/00, where the employee was advised, prior to her return from leave, that her former position (an "outside" sales position) had been abolished, but that she could continue as an "inside" salesperson at the same salary. The employee's outside sales position was eliminated due to the company's changed business needs due to an acknowledged contraction in the construction industry; another employee was dismissed outright for lack of work. The employee refused the employer's offer and quit. The Tribunal cancelled the determination awarding the employee compensation in lieu of reinstatement holding (at pages 5 – 6):

> It appears to me that the essence of Ms. Flint's assertion is that her employer, while she was on leave, changed a condition of her employment (namely, the fundamental nature of her duties) without her written consent and thereby contravened section 54(2)(b) of the *Act*. It may well be that while Ms. Flint was on pregnancy/paternity leave, Creative Surfaces changed a condition of her employment without her consent. Nevertheless, Creative Surfaces contravened section 54(2)(b) *only if* a condition of Ms. Flint's employment was changed *because of her pregnancy/paternity leave* [see *e.g., Koren v. White Spot Ltd.* (1988), 29 B.C.L.R. (2d) 121 (B.C.S.C.); *John Ladd's Imported Motor Car Co.*, BC EST #D313/96; *Bosun's Locker Ltd.*, BC EST #D292/97; *Capable Enterprises Ltd.*, BC EST #D033/98; *Bottos*, BC EST #D517/98].
>
> …
>
> There is no evidence before me that Creative Surfaces hired some other individual to replace Ms. Flint after she quit, or indeed, to temporarily replace her while she was on leave. It is conceded by Ms. Flint that the residential construction industry was experiencing a downturn even before she went on pregnancy leave. There is nothing in the evidence before me which would call into question the employer's assertion that this downturn continued (and, indeed, worsened) during the early part of 1998. When Ms. Flint stated that she intended to quit rather than accept the new position, she agrees that Mr. Napoleone asked her to "reconsider"; hardly the words of an employer fixed and determined to oust her from the workforce. Finally, if it was the employer's intention to shed Ms. Flint from its workforce why would it guarantee her the same salary for a job that she considered to be a lower-level position?
>
> The employer's appeal is allowed.

89. The employee applied to have the *Creative Surfaces* appeal decision reconsidered. The reconsideration panel (see *Flint*, BC EST # D477/00) held, at pages 5 – 6, as follows:

> …subsections 54(2) and (3) cannot be considered in isolation of one another…
>
> It is my view, as it appeared to be the adjudicator's, that it is unreasonable to impose a duty on an employer to place an employee, at the end of several months pregnancy leave, in the same position, or a comparable position, if the business of the employer has undergone significant changes for reasons unrelated to the employee's pregnancy. It would otherwise place an employee who has taken pregnancy or parental leave in a better position than another employee who may have continued to work through that period, and had been offered other work, or laid off, because of that significant change.

90. In this case, the complainant never actually returned to work following her leave. There is some doubt about whether the technician position that was offered to her would have been substantially different, leaving aside the job title, from the position she would have ended up in had she never taken leave (see also *Gurney*, BC EST # D221/02). Further, as in *Creative Surfaces*, the overriding factor that led to the

complainant's proposed changed working conditions was an external economic climate, and a set of circumstances over which Northern Gold had no control.

91. As noted above, the delegate relied on several Tribunal decisions to support his position that Northern Gold changed the complainant's conditions of employment "because of" her leave – *Tricom Services*, *Miller*, *Quigg Development Corporation*, and *Britco Structures*. None of these decisions was referenced in the delegate's reasons and, at least to a degree, the delegate's submission on appeal represents an attempt to buttress his original reasons. However, Northern Gold's legal counsel did not object to the delegate's submission and, that being the case, I will now simply proceed to address each of decisions set out in the delegate's submission, and their relevance to this appeal.

92. *Tricom Services* concerned an employee's termination, which she alleged was due to her pregnancy. The employer advanced shifting reasons for the termination – including just cause – but denied that the employee's pregnancy played any role in her dismissal. The employee was nearly full-term and was continuing to work when she was dismissed. The *viva voce* evidence before the Tribunal showed that the "just cause" allegation was a pretext; the evidence clearly demonstrated that the employer's president became increasingly antagonistic toward the employee after she became pregnant – e.g., "[the president] made disparaging comments about [the employee's] ability to cope with work once she had the baby" (page 14). The Tribunal found that the employer manifestly failed to discharge its burden of proof – the just cause allegation was not credible, and evidence showed that the employer's attitude toward the employee changed markedly for the worse after she announced her pregnancy. In my view, *Tricom Services* was correctly decided on its facts, but it is a wholly different case from the one presented in this appeal where there is no suggestion that Northern Gold's declining R & D work was some sort of myth, or otherwise served as a pretext to dispense with the complainant's services.

93. Similarly, in *Miller*, the employer maintained that the employee's termination was solely related to poor performance. The employee, on the other hand, was several months' pregnant when dismissed, and maintained her pregnancy was the underlying reason for her dismissal. The delegate held that the employee's alleged performance deficiencies were either not proven, or were otherwise quite inconsequential. Further, the alleged performance deficiencies had never been brought to the employee's attention prior to her dismissal. The delegate held that the employer had not discharged her section 126(4)(c) burden of proof. As noted in the appeal decision (at page 10): "[The employer's] assertion that [the employee's] performance and attitude were the sole reasons for discharge was so weak that [the delegate] was entitled to infer that the pregnancy must have constituted a factor." In other words, *Miller* simply turned on the reverse onus provision found in section 126(4)(c) of the *ESA*. But in this case, and in my view, Northern Gold amply discharged its burden of proof, relying on a substantial body of cogent and essentially uncontradicted evidence that demonstrated the complainant was not offered a different position because of her parental leave.

94. In *Quigg Development Corporation*, the employee was dismissed about two months after she notified her employer that she was pregnant, and about three weeks before the end of her three-month probationary period. The employer took the position that the dismissal was due to the employee's poor performance and general unsuitability for the job, and in no way stemmed from her pregnancy. The delegate determined that the employer's allegations regarding the employee's poor performance had not been proven and, that being the case, it failed to discharge its section 126(4)(c) burden. On appeal, the Tribunal Member held (at page 8):

> Quigg seems to have misunderstood what the Director decided, which was that the reasons relied on by Quigg as the sole reasons for terminating [the employee's] employment – her constant mistakes and substandard performance – were not borne out by the evidence. In this regard, the Director found no indication in the evidence that Quigg had communicated its alleged dissatisfaction with her performance in any meaningful way; no evidence that [the employee] was ever made aware that her behavior was as serious as alleged or that her performance was as inadequate; no evidence that she was ever made aware that her performance needed to improve significantly or she would not be kept; and that her termination on January 25, 2007 was sudden and unpredicted. In the absence of evidence supporting the reasons given for her termination, the Delegate was, in my view entitled to infer that [the employee's] pregnancy played at least some role in the termination.

95. The employer's reconsideration application was refused, the reconsideration panel member noting that the employer wholly failed to demonstrate that it had cause for dismissal (at page 5): "The record discloses that, when asked to demonstrate that Ms. Young's pregnancy was not a basis for her termination, Quigg said that it did not have a formal system established to document performance reviews and could not establish just cause."

96. In my view, *Quigg Development Corporation* presents an entirely different situation from the case at hand. The employee was dismissed not very long after informing her employer that she was pregnant. The employer alleged that the termination was based on her poor performance, but was wholly unable to substantiate that allegation. With no lawful basis for the dismissal (and no other reason being advanced), coupled with the very close temporal relationship between the employee's announced pregnancy and her dismissal, it seems eminently obvious that the employer had not discharged its section 126(4)(c) burden of proof. In the present case, by contrast, the complainant took her leave without protest (her second), but during her leave Northern Gold's R & D business continued to deteriorate to the point that in 2020 it did not have a single dollar of R & D tax credits. This is not a case where the employer was unable to demonstrate a *bona fide* justification for failing to return the complainant to her former position (indeed, Northern Gold could not have returned the complainant to her former position even if it wished to do so, since the R & D work the complainant was formerly undertaking had largely dissipated). When her leave ended, rather than dismissing the complainant (as it may have done, given the absence of sufficient R & D work), Northern Gold created a broadly similar position for her while maintaining her prior salary, benefits, vacation, work location and reporting relationship.

97. In *Britco Structures* the employee, who held a secretarial/clerical position, went on maternity leave and arrangements were made for a part-time employee to move to a full-time position in order to undertake the ordinary duties of the employee going on leave (who was working 4 days per week prior to her leave). This part-time employee was expected to return to her former part-time position after the pregnancy leave ended. However, shortly before the employee was scheduled to return to work, her employer advised that it did not have a position for her. The delegate held that the employer contravened section 54(2) and (3) by terminating her employment. The employer's position that there simply was no work for the terminated employee was belied by the evidence – the former part-time employee continued to work full-time after the employee was terminated, and other employees took on some of her other duties. On appeal, the Tribunal Member observed (at page 19): "The evidence persuades me that much, if not all, of the work she formerly did continued to be done, albeit by other people within Britco Structures and Britco Leasing." Thus, unlike the present case, the work of the employee on leave did not largely dissipate;

rather, the employer simply decided to retain the formerly part-time employee as a full-time employee, and distributed some duties to other employees.

98. As noted above, the delegate determined that Northern Gold contravened section 54(2)(b) of the *ESA* by offering the complainant a technician position, rather than returning her to her former technologist position. It is clear that the complainant did not give her written consent to this change in her employment status. Nevertheless, Northern Gold cannot be found to have contravened section 54(2)(b) unless this change occurred "because of" the complainant's parental leave. The delegate accepted that Northern Gold's R & D work had declined, and that it did not replace the complainant when she went on leave, but noted that this trend preceded the complainant's leave. The delegate stated that R & D work "had not ceased entirely", and also held that the amount of R & D tax credits was not a reliable measure of R & D intensity. In regard to this latter finding, I am unable to determine how the delegate arrived at this finding. It appears to be a declaration without any underlying evidentiary support. The uncontested evidence before the delegate was that Northern Gold's tax credit eligible R & D work declined precipitously from about $200,000 in 2017/18 to $60,000 in 2019 to $0 in 2020, and that the volume of tax credit eligible R & D *was* a reliable measure of R & D intensity (see delegate's reasons, pages R5 – R7). The delegate's conclusion that tax credit eligible R & D work was not a reliable measure of actual R & D work was entirely contrary to the evidence before him. Since the complainant was not at the workplace for a period of 1½ years (her leave extended from the beginning of March 2018 to early September 2019, and, in fact, she never returned to work), she was not in a position to reliably comment on the volume of R & D work Northern Gold undertook during this latter period. Northern Gold's evidence regarding the reduction in R & D work *could* have been challenged – say, through a review of its billing or work product records – but Northern Gold's evidence regarding the reduction in R & D activity was not challenged by any cogent and credible evidence.

99. In my view, the delegate erred in determining that the change in position offered to the complainant was triggered by her parental leave. The overwhelming weight of the evidence is that the position the complainant formerly held no longer existed. This, in turn, was due to significant changes in Northern Gold's customers' preferences, and was not in any way *caused* by the complainant's parental leave. This is not a case, such as *Tricom Services*, *Miller*, or *Quigg Development Corporation*, where the employer advanced a wholly unfounded "just cause" allegation in order to justify its decision to refuse to return the employee to her former position. There was nothing pretextual about the employer's conduct in this case. Northern Gold never replaced the complainant when she went on leave (nor did it do so after she quit), and it made, in my view, a *bona fide* effort to accommodate the complainant by offering her a substantially similar position, based on its legitimate business requirements, when she was scheduled to return from her leave.

100. In my view, the delegate erred in law in determining that Northern Gold changed the complainant's conditions of employment contrary to section 54(2)(b) of the *ESA* (which requires that the changes be "because of" the employee's leave). In the language of *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BCCA), the delegate "acted without any evidence" or, at the very least, "acted on a view of the facts which could not reasonably be entertained". The complainant took her leave during a period that was coincident with the almost total evaporation of Northern Gold's R & D work. Significantly changed business conditions, and not the complainant's parental leave, underlaid the decision to change the duties associated with the complainant's job. I am satisfied that

Northern Gold discharged its evidentiary burden under section 126(4)(c) of the *ESA* (see *Flint*, BC EST # D477/00).

Was the complainant offered a "comparable position"?

101. Apart from section 54(2)(b), the delegate also held that Northern Gold contravened section 54(3)(b) of the *ESA* because it failed to offer the complainant a "comparable position" when her leave ended. In my view, even if it could be said that Northern Gold contravened section 54(2)(b), I am of the view that it nonetheless offered the complainant a "comparable position" and, as such, the complainant could have avoided any financial loss if she had not summarily rejected the technician position.

102. Northern Gold, as the delegate noted at page R11 of his reasons, was not able to return the complainant to her former position, since its associated duties could no longer be performed due to changing business circumstances outside its control. Accordingly, Northern Gold was obliged to place the complainant in a "comparable position". A "comparable position" is not required to be "identical" to the employee's former position – otherwise, section 54(3)(b) would be superfluous in light of section 54(3)(a) – and I accept that the various criteria listed at page R11 of the delegate's reasons may be used to determined comparability (along with other criteria that are not listed – for example, educational requirements, experience requirements, form of compensation, number of direct subordinates, relationships with external stakeholders, accountabilities, job autonomy, etc.).

103. The delegate determined that the technician position offered to the complainant was not comparable to her former technologist position. In coming to this conclusion, the delegate focused on three principal factors – first, the technologist position had a higher level of responsibility; second, the technologist position demanded greater "credentials" and perhaps had greater "status" or "prestige"; and third, the technologist position was significantly higher paid position. The evidence before the delegate generally supported the delegate's findings in regard to these factors, but I also note that the delegate appears to have ignored the complainant's former supervisor's evidence that the technician position had "a significant amount of responsibility…as they must ensure products are safe for consumption" (page R4), and the controller's evidence that it was "not an entry level role and the work is highly regarded" (page R7). As for the second factor, both positions require the same educational attainment, although the technologist position may require greater work experience.

104. On the other side of the ledger, the uncontested evidence before the delegate was that the complainant would be paid the same salary as when she was a technologist; her benefits and vacation entitlement would continue unchanged; her work location and actual workstation would be unchanged; and her reporting relationship would continue unchanged (although she would report to a new individual since her former supervisor had been transferred to Ontario – the delegate misstated the evidence when he concluded, at page R11, that there would have been "a different reporting relationship"). The delegate also held that the complainant's work schedule would continue unchanged "and that Northern Gold satisfied its obligations under section 54(3)" in this regard (page R11). Aside from a changed job title (that better reflected the core duties of the new position), the key difference between the two positions was that there would be a very limited R & D component. However, due to the changing nature of Northern Gold's business operations, it simply could not offer her a job that involved a significant degree of R & D work, since it no longer carried out that work to any appreciable degree. In my view, and taking into account that the similarities between the two positions were much more consequential than the

differences, I am of the view that the delegate erred in law in concluding that the two positions were not "comparable" within section 54(3)(b) of the *ESA*. The complainant refused to report to work in the new position, and thus the extent to which the two positions would have actually been so very different (as the complainant asserted they would be), could not be reliably determined.

The complainant's duty to mitigate

105. Finally, even if it could be said that the complainant was offered a non-comparable position when scheduled to return to work, and that her changed employment conditions were "because of" her parental leave, I am still of the view that the delegate should not have issued a monetary award to the complainant because she failed to mitigate her economic loss.

106. The complainant's monetary award took the form of a "make whole" remedy under section 79(2)(c) of the *ESA*: "In addition to subsection (1), if satisfied that an employer has contravened a requirement of…Part 6 [the leave provisions], the director may require the employer to do one or more of the following:…(c) pay a person compensation instead of reinstating the person in employment". The complainant did not seek reinstatement (hardly surprising since she found a new job at a higher salary) and she did not claim any section 79(2)(d) expenses.

107. In *Afaga Beauty Service Ltd.*, BC EST # D318/97, the Tribunal set out (at page 5) the criteria that should govern a "make whole" award:

> This Section of the Act [section 54] is unique in that it anticipates that a former employee may be reinstated after an unjust dismissal or that a person improperly dismissed can receive compensation instead of reinstatement. In the latter case, appropriate compensation for loss of employment normally is based on the circumstances of the employee, e.g., length of service with the employer, the time needed to find alternative employment, *mitigation*, other earnings during the period of unemployment, projected earnings from previous employment and the like. [my *italics*]

108. This approach to "make whole awards", including a consideration of the duty to mitigate, was endorsed by the B.C. Supreme Court in *Roy v. Metasoft Systems Inc.*, 2013 BCSC 1190, and has been repeatedly followed by the Tribunal (see, e.g., *Oster*, BC EST # D104/09; *Hellmich*, BC EST # D046/15; and *Hamilton*, 2020 BCEST 4). In *660 Management Services Ltd.*, BC EST # D147/05, reconsideration refused: BC EST # RD044/06, the appeal panel, at para. 39, arguably suggested that mitigation should not be considered in a make whole award, since "wage loss flowing from a contravention of the *Act* is a statutory consequence of the failure to comply with a requirement of the *Act*; it is not a form of damages for breach of contract but rather a form of remedy for having one's statutory rights ignored or violated." I accept that the mitigation principle has no application where there is a claim for unpaid wages otherwise payable under the *ESA* (for example, a claim for unpaid regular wages, overtime pay, vacation pay, statutory holiday pay, or compensation for length of service). However, section 79(2)(c) compensation is akin to a common law damages award, and the Tribunal has consistently held that a failure to mitigate can be taken into account when fashioning a section 79(2)(c) make whole award. To the extent that the appeal decision in *660 Management Services* suggests otherwise (and I am not entirely satisfied that it actually does), I believe it is in error, and I prefer the view espoused in the overwhelming majority of other Tribunal decisions addressing this issue.

109. When the complainant refused to accept the technician position and resigned, she had about 4½ years' active service (excluding her most recent 1½ year leave), and was earning a $45,000 annual salary. When she resigned, the complainant was not eligible for employment insurance benefits since she had not returned to work for at least 400 hours (delegate's reasons, page R10). She understood that any replacement position would be hard to secure – she described her former position with Northern Gold as "a very niche role" (page R10) and, no doubt, the unique nature of her former position in the labour market is reflected by the fact that she applied for 69 positions before securing a replacement position (the first offered to her) in late February 2020, some six months after her resignation from Northern Gold.

110. Nevertheless, and despite the seemingly obvious difficulties she would face in her search for new employment, the complainant refused to accept the technician position – even on a temporary basis – while she looked for what she considered to be a more suitable position. The delegate held that the complainant "took reasonable steps to mitigate her loss" (page R16).

111. In *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661, the Supreme Court of Canada held, at paras. 28 and 30, as follows:

> …in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself…
>
> I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant…In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 1989 CanLII 260 (ON CA), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, 1980 CanLII 23 (SCC), [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation.

112. There was no evidence before the delegate that the relationship between the parties was acrimonious. The complainant was offered a position that guaranteed her former salary, benefits, vacation entitlement, geographic work location, workspace, and prior reporting relationship. It is hard for me to see how accepting the technician's position would have been "embarrassing" or "humiliating", or that she would

have suffered a significant loss of dignity by no longer doing much R & D work, especially when that work was no longer available. Northern Gold's offer was made in an effort to provide the complainant with the best employment option in light of radically changed business circumstances. I also note that this offer was not some sort of post-termination subterfuge – it was a *bona fide* offer made while the complainant was on leave and still considered to be an employee (see the section 1(1) definition of "employee").

113. In my view, considered objectively (as *Evans* dictates), the complainant should have accepted the technician position, if only on a temporary basis in order to mitigate her losses. The complainant testified that she refused Northern Gold's return to work "due to the schedule" and because "she believed that her job had fundamentally changed [and] she should have the option to make a choice consistent with her career progression [and] to accept the Quality Control position would have required her to indicate that on her resume, and this might have limited her ability to subsequently progress."

114. With respect to the work schedule offered to her, the delegate specifically found, consistent with the evidence, that the complainant was guaranteed the same work schedule for at least three months, and thus Northern Gold satisfied its section 54(3) obligation insofar as her work schedule was concerned. Northern Gold's uncontested evidence was that, in fact, her prior work schedule may have continued for an even longer period because that the parties "were still in the process of negotiation" on that point when the complainant resigned. The delegate stated, at page R15, that Northern Gold's "inability to guarantee a regular shift beyond three months made [the complainant's] eventual departure inevitable". In my view, this latter statement was highly speculative, and was not supported by the actual evidence before him.

115. In my view, the complainant could have accepted the position based on her prior work schedule and if, after three months or some longer period, Northern Gold attempted to assign her "graveyard" shifts, that might well have constituted a section 66 contravention. The complainant's position that accepting the technician's position would have compromised her job search was pure speculation, unsupported by any empirical labour market evidence. One might have equally speculated that her initial job search was actually lengthened and compromised by the fact that she quit her prior position without an objectively justifiable reason, and was seeking new employment while unemployed. Either way, speculation is not a proper foundation for making a determination with respect to the mitigation issue.

116. For a period of not less than three months – and perhaps for a longer period – the complainant would have fully avoided any income loss had she accepted the technician position. In my view, at the very least, her income loss claim should have been reduced by half given her failure to mitigate.

117. The delegate determined, and I agree, that the complainant appears to have taken all reasonable steps to secure *new* employment. However, this observation begs the fact that had the complainant accepted the proffered technician position, her income loss would have been substantially diminished, and perhaps wholly averted. In his written submission in response to Northern Gold's appeal, but not in his original reasons, the delegate relied on the Tribunal's decision in *660 Management Services Ltd.*, *supra*, to buttress his finding that the complainant had not failed to mitigate her economic loss. In my view, the delegate's reliance on *660 Management Services* is misplaced.

118. In *660 Management Services*, the employee while pregnant, but still working, had her full-time 40-hour per week position reduced to three days per week and, while on leave, was further advised that when she

returned to work her workweek would be reduced yet again, from three days to two days per week. This proposed change was made without the employee's written consent. The delegate determined that the employer failed to prove its assertion that this reduction was made for legitimate "business reasons". On appeal, among other grounds, the employer alleged that the employee should have accepted the proposed 2-day/week work schedule in order to mitigate her loss. The Tribunal held that it was not reasonable to expect the employee to accept a 2-day work week – when her pre-pregnancy workweek was based on a 40-hour workweek. The employer's application for reconsideration was dismissed.

119. In my view, *660 Management Services* while correctly decided on its facts, is distinguishable from the case at hand. First, unlike the situation here, the employer failed to show that there was any legitimate business justification for the reduction in the employee's work hours. Second, and again unlike this case, the employer offered the employee a position that was not, in any reasonable sense, "comparable" to her pre-pregnancy position, particularly in light of the 60% wage reduction inherent in the employer's offer.

Summary

120. In my view, the delegate erred in law in his interpretation and application of sections 54(2)(b) and 54(3)(b) of the *ESA*. Northern Gold did not contravene either provision. That being the case, it follows that the Determination must be cancelled.

121. Although Northern Gold does not seek to have the section 79(2)(c) award varied on account of the complainant's failure to mitigate, in my view, the delegate nonetheless erred in failing to take the complainant's failure to mitigate into account. However, since the Determination must be cancelled, this latter issue is moot.

ORDER

122. Pursuant to section 115(1)(a) of the *ESA*, the Determination is cancelled.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal