Employment Standards TRIBUNAL

Citation: R.S. Gem Connection Ltd. (Re)
2021 BCEST 36

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

R.S. Gem Connection Ltd.

(the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal

(the "Tribunal")

pursuant to section 116 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Jacquie de Aguayo (Panel Chair)
Robert E. Groves
Shafik Bhalloo

FILE No.: 2020/023

DATE OF DECISION: April 26, 2021

DECISION

SUBMISSIONS

Julianne Yeager	counsel for R.S. Gem Connection Ltd.
Steve Hamilton	on behalf of Larysa Hamilton
Laurel Courtenay	counsel for the Director of Employment Standards

OVERVIEW

1. The Employer applies for reconsideration pursuant to section 116 of the *Employment Standards Act* (the "*ESA*") in respect of a decision of a three-member appeal panel (the "Appeal Panel") in 2020 BCEST 4 (the "Appeal Decision"), dated January 7, 2020. The Appeal Decision allows an appeal filed by Larysa Hamilton (the "Employee") in respect of a Determination issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on August 15, 2019.

2. The Delegate found the Employee was offered and accepted an Office Manager position but, eight weeks into her employment with the Employer, she had not assumed the role. The Delegate further found that the Employer's decision to terminate the Employee's employment was due to "her refusal to accept that she would not be employed as the Office Manager, an issue which had become an irritant to the Employer" (Determination, p. R16). For the reasons set out in the Determination, the Delegate found the Employer contravened section 8 of the *ESA* by misrepresenting a position offered to, and accepted by, the Employee.

3. Section 8 provides as follows:

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

4. The Delegate issued a remedial order under section 79(2)(c) of the *ESA.* That section gives the Director the authority to make additional remedial orders on finding a contravention of specific sections of the *ESA*, including section 8.

5. 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.

6. The Delegate noted that section 79(2)(c) is a "make whole" remedial provision and made a remedial order for approximately 4 weeks' lost wages, less any earnings (the "Recovery Period"), calculated from the time the Employee was dismissed by the Employer until the end of her second week of employment under a contract, part-time position (the "Contract Position") (Determination, R18 – R19).

7. The Employee appealed the Determination alleging the Delegate erred with respect to the appropriate Recovery Period. For the reasons set out in the Appeal Decision, the Appeal Panel found the Delegate erred by failing to "fully consider the purposes of the *ESA*, especially sections 2 and 8, in making the section 79(2) "make whole" award in this case" (para. 58). Accordingly, the Appeal Panel allowed the Employee's appeal and remitted the issue of appropriate compensation under subsection 79(2) to the Delegate to be decided in accordance with the compensation principles set out in the Appeal Decision.

8. On reconsideration, the Employer alleges that the Appeal Panel breached its right to a fair hearing and made reviewable errors of law.

BACKGROUND

9. To set the context for the grounds for reconsideration, we will briefly summarize what we find to be the relevant background from the Determination and the Appeal Decision.

The Determination

10. As noted above, the Delegate found the Employer misrepresented a condition of the Employee's employment in breach of section 8 of the *ESA*. The Delegate noted that the Employee sought compensation for the period commencing from the termination of her employment with the Employer until she secured permanent, part-time employment on July 30, 2018 (the "Six Month Recovery Period"). She did not claim other financial losses.

11. The Delegate ordered financial compensation in lieu of reinstatement under subsection 79(2)(c), noting it is a "make whole" remedy, i.e., the objective is to put an employee back in the same position as if the contravention had not occurred.

12. The Delegate accepted that the Employee suffered financial loss because of the Employer's misrepresentation, noting the Office Manager position wage at 37 hours per week. In determining the Recovery Period, the Delegate noted it was appropriate to consider several other factors, including the time the Employee needed to find alternative employment, her mitigation efforts, as well as any other

earnings (Determination, p. R17). Finally, the Delegate noted that the reasonableness of an employee's mitigation efforts will be unique to a person's circumstances (Determination, p. R18).

13. The Determination summarizes the Employee's uncontested evidence with respect to the Contract Position, her personal circumstances, and her mitigation efforts. Among other things, the Contract Position was initially for only 2 days a week and was less pay than the Office Manager position. The Employee stated she was promised that, after 4 weeks, the hours in the Contract Position would increase to 3 days a week with an increase in pay (Determination, p. R6). With respect to mitigation efforts, it is not in dispute that, while in the Contract Position, the Employee did not look for other work as she hoped to be successful and remain with the new employer. However, after 4 weeks, she was told that the "business could not sustain her employment as an appraiser" and the position ended on March 22, 2018 (Determination, p. R6). The Determination further summarizes the Employee's subsequent search for employment, listing approximately 22 businesses contacted between April and July 2018 (Determination, p. R7).

14. Finally, the Determination sets out that the Employee believed she had difficulty finding other employment, including because she was 50 years of age, she 'had a black mark' on her employment record as she left a position to work for the Employer but was dismissed after several weeks and only worked briefly under the Contract Position, was seen as 'overqualified' for minimum wage positions, and had a medical condition that precluded her from sitting or standing for long periods of time which limited her employment options (Determination, p. R6).

15. In coming to a decision on remedy, the Delegate noted that the Employee had ceased looking for work to focus on succeeding in the Contract Position and would have stayed in the position had it been possible. The Delegate found that 2 weeks after securing the Contract Position gave the Employee "sufficient free time during which she could have made an informed decision about her employment ambitions". The Delegate accepted that the Contract Position "was not on par in terms of hours or compensation with that she had lost". However, the Delegate found that the requirement to mitigate financial loss does not end with acceptance of a part-time position and the responsibility to pursue additional work. The Delegate found that while the Contract Position ended after four weeks, this was "an unfortunate outcome for which [the Employer] is not responsible". Accordingly, the Delegate found that after two weeks in the Contract Position, the Employer's "liability for [the Employee's] wage loss" was "extinguished" (Determination, pp. R18 – R19).

The Appeal Decision

16. The Employee appealed the Determination pursuant to section 112 of the *ESA*, alleging that the Delegate erred with respect to the Recovery Period by "stopping the clock" two weeks into the Contract Position. The parties' positions before the Appeal Panel are summarized at paragraphs 26 to 29 and 34 to 35 of the Appeal Decision. A summary of the relevant statutory provisions and jurisprudence is set out at paragraphs 39 to 47.

17. With respect to the applicable approach to remedies under subsection 79(2), the Appeal Panel had regard to a number of decisions of the Tribunal and the Courts, including *Tricom Services Inc.* (BC EST # D485/98) ("*Tricom*"), *Roy v. Metasoft Systems Inc.* (2013 B.C.S.C. 1190) ("*Metasoft*"]), *Afaga Beauty Service Ltd.* (BC EST # D318/97) ("*Afaga*"), *Re Krausz,* BC EST # RD112/17 ("*Krausz*"), *Reference Re Public Service Employee*

Relations Act (Alta.), [1987] 1 S.C.R. 313 ("*PSERA")*, *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986 ("*Machtinger*"), and *Rizzo & Rizzo Shoes,* [1998] 1 S.C.R. 27 ("*Rizzo*").

18. At paragraphs 41 to 47 of the Appeal Decision, the Appeal Panel sets out the principle that that the *ESA* is benefits-conferring, remedial legislation and should be given a broad and liberal interpretation: *Machtinger*, *Rizzo*. Accordingly, the Appeal Panel found that the *ESA* should not be narrowly construed and that a remedy under subsection 79(2) should be fair, compensatory and promote compliance with the *ESA*, as well as reflect the extent of the injury suffered because of the breach.

19. The Appeal Panel then noted that subsection 79(2) is a "make whole" remedial provision for specific contraventions of the *ESA*. It provides a statutory remedy not available at common law (reinstatement) or compensation in lieu of reinstatement that is not limited by what may be awarded in an action for wrongful dismissal: *Tricom*, *Metasoft*, *Krausz*.

20. In interpreting the term "compensation" in subsection 79(2)(c), the Appeal Panel noted that it is the "most restorative remedial provision in the *Act*" and gives the Director "broad jurisdiction to place the terminated employee in the same position he or she would have been in but for the wrongful action of the Employer", citing *Tricom* (para. 41)

21. Finally, the Appeal Panel had regard to the jurisprudence of the Supreme Court of Canada which it noted has "repeatedly underscored the importance of employment and the fair treatment of employees" (paras. 46-48). The Appeal Panel quoted from *PSERA* for the principle that work is one of the most fundamental aspects in a person's life, providing financial support and, as importantly, a contributory role in society. Thus, employment is an essential component of a person's sense of identity, self-worth and emotional well-being (para. 46). The Appeal Panel also noted that, in *Machtinger* and *Rizzo*, the Supreme Court of Canada recognized that the manner in which employment can be terminated is equally important to an individual's sense of identity (para. 47).

22. Accordingly, the Appeal Panel found that subsection 79(2) compensatory awards must be given a large and liberal interpretation, reflecting the effect of the misrepresentation, and "as in this case, the loss of employment, on a person's sense of identity, self-worth and emotional well-being, particularly in circumstances where the Employer has engaged in what might be characterized as 'bad faith' conduct" (para. 48).

23. The Appeal Panel then identified three specific areas the Director must consider in fashioning a compensatory "make whole" remedy under subsection 79(2)(c) in the face of a contravention of Section 8 of the *ESA*: 1) the length of the wage recovery period; 2) compensation for the employer's misrepresentation; and 3) reasonable expenses incurred.

24. With respect to the length of the wage recovery period, the Appeal Panel noted that the proper approach is to return an employee, as far as reasonably possible, in an economic sense, to the position the employee would have been in had the contravention not occurred: *Krausz*, *Metasoft*. In doing so, the Director should consider factors such as the labour market, the nature and characteristics of the position, the employee's age, education and qualifications, and the employee's mitigation efforts. Then, the Director should deduct the amounts actually earned by the employee in mitigation to determine the employee's wage loss over the recovery period: *Afaga*, *McMahon*.

25. Applying these principles, the Appeal Panel found that the Delegate erred in concluding that the Contract Position "was equivalent to the one she had at Gem Connection and limiting her compensation to a period ending two weeks after she began working there", the Contract Position "cannot be considered suitable alternative employment", the Employee did not find suitable alternative employment until July 30, 2018, and that "a recovery period of six months is both fair and reasonable" (Appeal Decision, paras. 53 – 54).

26. With respect to the second issue, compensation for the Employer's misrepresentation, the Appeal Panel noted that the fundamental principle underlying section 8 of the *ESA* is that both employers and prospective employees must be dealt with honestly and in good faith. The Appeal Panel observed that the obligation of good faith is also implicit in section 2 of the *ESA* and was further recognized as a matter of general contract law by the Supreme Court in *Bhasin v. Hrynew,* [2014] 3 S.C.R. 494 ("*Bhasin*"). The Appeal Panel found that, in being deprived of the statutory obligation of fair treatment, an employee may suffer more than a pure economic loss.

27. Accordingly, the Appeal Panel finds that, although the Employee only claimed lost wages, "in our view, an individual who was not treated honestly and in good faith in accordance with section 8 obligations can be entitled to compensation beyond the recovery of provable lost wages". The Appeal Panel stated that the Delegate should consider whether additional compensation for the Employer's "bad faith" treatment of the Employee should be awarded, stating that "[a] remedy under section 79(2) need not only reflect an employee's actual wage loss, but should also promote compliance with the *ESA* and compensate an employee for any provable losses that reasonably flow from the section 8 contravention (Appeal Decision, paras. 55 – 56).

28. With respect to the third issue, the Appeal Panel stated as follows (para. 57):

> Finally, in the Panel's view, any remedy awarded under section 79(2)(c) is not limited to lost wages, as it specifically refers to "compensation" rather than "wages." Compensation can include the loss of such things as vacation pay, benefits (such as insurance and pension), bonuses, commissions and gratuities. In our view, it may also include legal fees and disbursements since a complainant who has engaged counsel to make representations on their behalf cannot be considered "whole" if they are obligated to pay any legal costs out of any award (we note that section 79(2)(d) specifically provides for recovery of "reasonable and actual out of pocket expenses incurred…because of the contravention").

29. In light of these reasons, the Appeal Panel found that the Delegate "failed to fully consider the purposes of the *ESA*, especially sections 2 and 8, in making the section 79(2) "make whole" award in this case" (para. 58). Accordingly, the Employee's appeal was allowed, and the matter was referred back to the Delegate to be decided "in accordance with the compensation principles identified in [the Appeal Decision]" (para. 59).

THE APPLICATION FOR RECONSIDERATION

30. The Employer seeks reconsideration of the Appeal Decision on the following grounds:

a. The Tribunal had no jurisdiction to include a complainant's legal fees or moral damages in a Section 79(2) award and its decision was *ultra vires* on this point;

b. The Tribunal made a reviewable error by giving direction about legal fees and moral damages without being requested to do so by [the Employee] or giving the parties an opportunity to make submissions;

c. The Tribunal made a reviewable error of law and natural justice by disregarding Gem Connection's submissions concerning procedural fairness in the investigation process, namely, the Delegate's failure to give the employer an opportunity to make submissions;

d. The Tribunal made a reviewable error in law by importing common law principles of expansive compensation in lieu of reasonable notice, but excluding common law principles concerning an employee's duty to mitigate;

e. The Delegate's Determination is based upon logic not supported by the facts in evidence, and the result is a reviewable error that ought to be accepted for appeal or reconsideration;

f. The Tribunal erred in law by adopting facts not supported by the findings of fact in the Determination and basing its Decision on those incorrect facts.

31. We do not intend to separately summarize the positions of the parties. Having considered the submissions, we intend to address in our analysis, below, those arguments we find to be material to our findings in response to the Employer's grounds for reconsideration.

ANALYSIS

General Approach on Reconsideration

32. The power of the Tribunal to reconsider one of its decisions is set out in section 116 of the *ESA*. The Tribunal's reconsideration power is discretionary and is exercised in limited circumstances: *Milan Holdings Inc. (Re)*, BC EST # D313/98 ("*Milan*").

33. *Milan* is the Tribunal's leading decision on the exercise of its reconsideration powers. The Tribunal applies a two-stage approach. The primary factors weighing in favour of reconsideration are whether the applicant has raised questions of law, fact, principle, or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases (p. 7). Thus, at the first stage of the Tribunal's analysis, we must consider whether the Employer has made out an arguable case of sufficient merit to warrant reconsideration.

34. Reconsideration is not an automatic right of review of an appeal decision, nor is it an opportunity for re-argument in the hope of a more favourable "second opinion" by a party that disagrees with the result in an original decision (see *Re Middleton,* BC EST # RD126/06). It is only where an applicant satisfies the requirements in the first stage of the *Milan* approach that the Tribunal proceeds to the second stage of the inquiry and addresses whether, in its view, there is an error on an established ground for reconsideration: section 116.

35. We now turn to the Employer's grounds for reconsideration, identifying them by the paragraph letters set out in the application.

(c) Failure to give the Employer an opportunity to make submissions

36. The Employer submits the Appeal Panel erred when it dismissed its ground of appeal alleging the Delegate breached its right to a fair hearing. As it did before the Appeal Panel (Appeal Decision, para. 29), the Employer maintains that the Delegate failed to consider a submission it filed on February 21, 2019 in response to the Delegate's preliminary assessment of the Employee's complaint.

37. The Appeal Decision notes, and it is not in dispute before us, that the Employer did not file its own appeal, or a formal request for an extension of time to appeal, as required under the *ESA*. Instead, the Employer raised its own ground of appeal, and requested an extension, in its written submission filed in response to Employee's appeal (para. 31).

38. The Appeal Panel nevertheless considered whether the Employer had established a basis for an extension of time for filing an appeal. In doing so, we find the Appeal Panel correctly identified the relevant approach and factors as set out in *Niemisto*, BC EST # D099/96 (para. 30).

39. The Appeal Panel found the Employer had not satisfied any of the factors in *Niemisto* (para. 31) and denied the request for an extension of time to file an appeal. The Appeal Panel found the Employer had shown no independent, ongoing intention to appeal the Determination; was motivated by the Employee's decision to appeal; the Director and the Employee were not made aware of its intention to appeal; and it failed to explain its failure to file a proper appeal within the statutory time limit (para. 32).

40. The Employer submits that it was not aware of "the problems with the Delegate's process" until it reviewed the appeal record as part of the Employee's appeal. It says that, by then, the statutory period for filing an appeal had expired, noting the Employee filed her appeal on the last day.

41. The Employer further submits it did communicate an intention to appeal, contrary to the finding made by the Appeal Panel. It notes emails in the Record where it asked whether it could make payments to the Director or the Employee on consent without prejudice to its right of appeal or cross-appeal, including on the issue of misrepresentation. The Employer indicated to the Delegate that, if the Employee appealed, the Employer's representative "may" receive instructions to appeal (Record, pp. 82, 89, 99).

42. We find that this ground for reconsideration constitutes a disagreement with the Appeal Panel's exercise of discretion in applying the *Niemisto* factors but does not establish a reviewable error in the Appeal Panel's application of those factors in this case.

43. Even if we accept the Employer was not aware of what it now alleges are "problems" with the Delegate's process until it received the record as part of the Employee's appeal, we agree with the Appeal Panel that this does not explain why a proper appeal, accompanied by a request for an extension of time, was not filed in accordance with the *ESA*.

44. In addition, even if the Employer told the Delegate that it reserved its right to file an appeal or cross-appeal "without prejudice" in the event it agreed to make a voluntary payment, or "may" file an appeal, we find no error in the Appeal Panel's finding that neither the Employee nor the Director were made aware of the Employer's intention to appeal. We are not persuaded that a 'without prejudice' statement

that an appeal 'may' be filed establishes a basis for concluding that the Employer had a "genuine bona fide intention to appeal" as contemplated by *Niemisto*.

45. We find this ground for reconsideration is based on the Employer's assertion that the Delegate failed to consider its February 21, 2019 submission because the findings in a preliminary assessment, including with respect to misrepresentation, did not change in the Determination. However, declining to adopt the Employer's version of events, or not specifically mentioning particular evidence or arguments in the Determination, does not establish that the Delegate failed to consider the Employer's position such that we can conclude it was denied a fair hearing (*Re Gutierrez,* BC EST # D108/05). After giving the Employer several opportunities to file submissions and information, opportunities it exercised, the Delegate found the Employer breached section 8 of the *ESA*.

46. In our view, this ground for reconsideration reflects the Employer's strong disagreement with the Delegate's finding that it contravened section 8. However, the Appeal Panel considered whether the Employer had established a strong arguable case that it was denied a fair hearing before the Delegate as contemplated in *Niemisto* (para. 33). The Appeal Panel found it was well-supported by the evidence that the Employer had the opportunity to provide its submissions at several stages of the process, including in response to two preliminary assessments, prior to the Determination being issued in August 2019.

47. Our review of the record supports the Appeal Panel's finding in this regard. There were multiple occasions on which the Employer was invited to, and did, file submissions and information in response to two preliminary assessments disclosed to it over the course of the investigation, including on the question of misrepresentation, prior to issuing the Determination (Record, pp. 37, 41, 47, 63, 70, 72, 74). Accordingly, we agree with the Appeal Panel's finding that the Employer failed to establish a strong, arguable case that its right to a fair hearing was breached.

48. We find the Employer's bases for reconsideration under this ground constitute re-argument in the hope that this panel will come to a more favourable conclusion with respect to the application of the factors in *Niemisto*. For the reasons set out, we find the Employer has failed to establish an arguable case of sufficient merit that the Appeal Panel erred in exercising its discretion not to grant an extension of time to file an appeal of the Determination.

49. Finally, we note the Employer, in its final reply, raises an allegation that it was prejudiced by the Delegate's decision to cut short a fact-finding conference during the investigation. It asserts that this demonstrates that the Delegate's investigation process "suggests procedural unfairness" that supplements the allegations outlined above. The Employer submits that "[h]aving cut [its] witnesses short, it was incumbent upon the Delegate to receive and consider the rest of their evidence and submissions before making any finding of misrepresentation".

50. We find this is a new appeal allegation raised improperly in final reply on reconsideration. In any event, it is not in dispute that, subsequent to the fact-finding conference, the investigation continued for many months. During that time, the Employer had several opportunities to provide additional information and to respond to the complaint, which it did. In the circumstances, we find that the Employer has not shown that the investigation process resulted in a failure to observe the principles of natural justice, as alleged (*Re Dr. Marko Nenadic Inc.,* BC EST # D503/98).

51. For the reasons given, this ground for reconsideration is dismissed.

(e) The Determination is based upon logic not supported by the facts in evidence

52. The Employer alleges the Delegate made a reviewable error that this panel should now accept as a basis for appeal or reconsideration. The Employer challenges findings of fact made by the Delegate in concluding that the Employer contravened section 8 of the *ESA*. The Employer sets out a range of arguments in support of its contention that a proper analysis of the evidence leads to a different legal conclusion. For example, the Employer submits that its evidence before the Delegate was that the Employee was "not succeeding" in her employment and had "no future" with the Employer. It asserts that she would have been dismissed regardless and, accordingly, is not entitled to any compensation at all. The Employer's submissions also repeat some of the allegations raised in respect of ground (c), above, relating to its February 21st submission, allegations we have rejected for the reasons set out.

53. We find this ground for reconsideration is a further, and improper, attempt to raise a ground of appeal in respect of the Determination at this late stage in the proceedings, in the absence of a particularized application for an extension of time. In any event, having regard to the factors in *Niemisto*, and for the reasons given in response to ground (c), above, we deny the Employer's request for an extension of time to raise further grounds of appeal.

54. We further find the Employer has failed to raise an arguable case that the Delegate erred as alleged. As noted above, the Delegate considered the evidence and found the Employer contravened section 8 of the *ESA*, including that its decision to terminate the Employee's employment was due to "her refusal to accept that she would not be employed as the Office Manager, an issue which had become an irritant to the Employer" (Determination, p. R16). We find the Delegate's conclusion that the Employer contravened section 8 of the *ESA* was supported by the evidence and his findings of fact.

55. For the reasons given, this ground is dismissed.

(f) The Tribunal erred in law by adopting facts not supported by the findings of fact in the Determination, and basing its Decision on those incorrect facts

56. Under this ground for reconsideration, the Employer alleges the Appeal Panel erred by basing its own decision on findings of fact that were not supported by the evidence or the Delegate's findings. The Employer identifies the following (with relevant paragraph numbers in the Appeal Decision identified):

a. During her first interview, the Employee was told she was qualified for the Office Manager position (para. 8)

b. During her second interview, the Employee was told she was the top candidate (para. 8)

c. The Employee was told she would be running the entire office (para. 9)

d. The Employee was told that the previous Administrative Assistant was leaving her employment (para. 9)

e. The employee in the Office Manager position began introducing herself to customers as the Office Manager (para. 11)

f. The Employee asked the Employer whether it had given the Office Manager position to the other employee and it acknowledged that it had (para. 12)

g. The Employee had difficulty finding employment after she lost the Contract Position (para. 15)

h. When the Employee complained to the Employer her employment was terminated (para. 17)

i. The Employee was terminated from the Contract Position for reasons unrelated to her performance (para. 28)

57. The Employer alleges that the evidence identified by the Appeal Panel was not "adopted" as fact by the Delegate, some of the evidence was disputed by the Employer, and there was no basis for the Appeal Panel's finding that the Employer's decision to terminate the Employee's employment was motivated by her complaints about not performing the duties of Office Manager.

58. We note that each of the areas, noted above, form part of the Appeal Panel's summary of the background to the appeal, except i. which appears in the summary of the Employee's argument.

59. With respect to a. and b., the information is taken from the summary of the Employee's evidence as set out in the Determination (pp. R2 – R3). The Delegate's finding was that the Employee was hired as an Office Manager.

60. With respect to c. and d., the information is taken from the summary of the Employee's evidence as set out in the Determination (pp. R2, R9 – R10, R13). Again, the Delegate's finding was that the Employee was hired as an Office Manager, and no findings are made with respect to the running of the office or that another employee was leaving.

61. With respect to e. and f., the Delegate's finding was that Ms. Chan assumed the role of Office manager on December 1, 2017 (p. R14), and based on evidence she received a significant wage increase, training duties, and assuming the previous Office Manager's office (p. R16).

62. With respect g., this is taken from the summary of the Employee's evidence in the Determination (p. R6).

63. With respect to h., the Delegate found that the Employer failed to commence the Employee's training as Office Manager in a timely way and that the Employer's decision to dismiss her was due to her refusal to accept she would not be employed as an Officer Manager, an issue which had become an irritant for the Employer (p. R16).

64. In each of these examples, we accept that the background set out in the Appeal Decision includes evidence recorded in the Determination, some of which was in dispute before the Delegate. However, the question on reconsideration is whether the Employer has shown that the Appeal Decision erred in referencing the evidence such that it rises to a reviewable error.

65. The Employer does not identify how, in its view, the Appeal Decision turned on these aspects of the evidence such that we can be satisfied they were material to the outcome. In any event, we find they were not. The areas identified relate to the Employee's employment by the Employer and to the Delegate's finding there was a contravention of section 8 of the *ESA*. However, the issue raised by the

appeal, and addressed in the Appeal Decision, was whether the Delegate erred in not awarding the Employee the Six-Month Recovery Period requested in her complaint. That issue involved the period of time after the Employee was dismissed by the Employer.

66. Even if we accept the Appeal Panel erred in citing evidence the Employer says was in dispute, or were not findings of fact made by the Delegate, and we make no findings in that regard, the Appeal Decision does not turn on them. We find this ground for reconsideration is a further attempt to appeal the Delegate's finding the Employer contravened section 8 of the *ESA*, a request that was rejected by the Appeal Panel and this panel for the reasons set out.

67. With respect to i., the summary of the Employee's evidence in the Determination states that, after four weeks in the Contract Position, she was informed that the business could not sustain her employment as an appraiser (p. R6) and, in the Findings and Analysis, the Determination states "[u]nfortunately, she was dismissed…." (p. R17). We note there was no evidence to contradict the Employee's evidence on this point and we find no error in the Appeal Panel's characterization of that evidence in paragraph 28 of the Appeal Decision.

68. Accordingly, for the reasons set out, we find the Employer has not shown that the Appeal Decision turned on material facts that were in dispute or on factual findings not made by the Delegate.

69. For the reasons given, this ground is dismissed.

(d) The Recovery Period and the Duty to Mitigate

70. As noted above, the Employee appealed the Determination alleging that the Delegate erred by "stopping the clock" for the recovery period two weeks into the Contract Position. The Appeal Panel allowed the appeal on this ground and found that the Six-Month Recovery Period requested in the complaint was fair and reasonable.

71. The Employer submits the Appeal Panel erred by failing to consider the Employee's mitigation efforts. We note that the Director, on reconsideration, agrees with the Appeal Panel's finding that a Six-Month Recovery Period was both fair and reasonable in the circumstances. The Employee's submissions on reconsideration are very brief and, with respect to this ground for reconsideration, maintain that the Appeal Decision should be upheld.

72. For the reasons set out below, we find this ground for reconsideration raises an arguable case and, accordingly, we have considered it on the merits: *Milan*.

73. After summarizing the relevant statutory context and jurisprudence (paras. 40 – 49), as well as the approach to determining an appropriate recovery period under section 79(2)(c) (paras. 50 – 52), the Appeal Panel found as follows:

> 53. In our view, the delegate erred in concluding that Ms. Hamilton's employment at Van Yperen was equivalent to the one she had at Gem Connection and limiting her compensation to a period ending two weeks after she began working there. Given that Ms. Hamilton's employment at Van Yperen was a part-time, contract position at which she was paid less than at Gem Connection and did not receive any benefits, it cannot be considered suitable alternative employment.

> 54. The evidence before the delegate was that Ms. Hamilton did not find suitable alternative employment until July 30, 2018, a period of almost six months. In the Panel's view, a recovery period of six months is both fair and reasonable, and while we are not governed by what might be found to be a reasonable notice period at common law, a six-month period is in line with common law awards.

74. However, the Delegate did not find that the Contract Position "was equivalent" to the Office Manager position as the basis for limiting compensation to a period ending two weeks after the Contract Position started. On the contrary, the Delegate expressly finds that the Contract Position was not "on par" with the Office Manager position. The Delegate's finding was that the Employer's liability was "extinguished" because 2 weeks was sufficient time for the Employee to decide whether to resume her search for other employment.

75. The Employer submits the Appeal Decision errs by failing to address the issue of mitigation, an issue on which we find the Determination turned. We find the Appeal Panel's reasons do not explain whether or how the Delegate erred with respect to that issue. Given the length of time the issue has been outstanding, we exercise our discretion to address that issue, below.

76. On reconsideration, the Employer submits the Delegate was correct in limiting the Recovery Period to four weeks on the basis that the Employee did not make sufficient efforts to mitigate. The Employer submits the duty to mitigate exists for the policy reason of discouraging litigants from increasing their damages in hopes of obtaining a windfall. The Employer submits that, at common law, a wrongfully dismissed employee must employ a "constant and assiduous effort to obtain alternative employment, an exploration of what is available through all means", citing *Forshaw v. Aluminex Extrusions Ltd.*, (1989), 39 B.C.L.R. (2d) 140 (BCCA), 1989 CanLII 234 (BC CA) ("*Forshaw*"), *Smith v. Aker Kvaerner Canada Inc.*, 2005 BCSC 117, *Besse v. Dr. A. S. Machner Inc.*, 2009 BCSC 1316.

77. The Employer also relies on cases from the British Columbia Human Rights Tribunal (the "HRT") setting out its approach to awards for lost wages: *Toivanen v. Electronic Arts (Canada) Inc.,* 2006 BCHRT 396 ("*Toivanen*") and *Paguette v. Amaruk Wilderness and another (No. 2),* 2015 BCHRT 147 ("*Paquette*"). The Employer submits these cases show that where a loss of wages is not because of, or connected with, a contravention of the *Human Rights Code*, or would have occurred regardless of the contravention, the HRT will reduce the award, or decline to award lost wages.

78. In deciding whether the Delegate erred with respect to the principle of mitigation, we note the Appeal Panel correctly identified that a remedial order under section 79(2) is "perhaps the most restorative remedial provision in the *Act*": *Tricom*, *Metasoft*, *Krausz*. Accordingly, section 79(2) requires a broad and liberal interpretation that includes not only a compensatory approach, but one that is fair and promotes compliance with the *ESA* (para. 51). As explained more fully in one of the Tribunal's leading decisions under section 79(2), *Tricom*, the panel stated:

> In our view, the remedies under the *Act* must be fair, compensatory and promote compliance. These principles are reflected in the purposes of the *Act* set out in Section 2 and the *Act* itself. With respect to compensation, the general principle of damages must be to put the individual in the same position the individual would have been in but for the breach of the statutory obligation. Section 79(4) [now section 79(2)] permits a remedy not available at common law. We are not in any way limited to, for example, such damages as might have been awarded in an action for

> wrongful dismissal. In our view, the statutory remedy should not be narrowly constructed and we have the power to fashion a remedy that is fair, compensatory and promotes compliance with the *Act*. In short, the remedy depends on the extent of the injury suffered because of the breach. Some of the factors we have considered are those relied on by the Tribunal in a recent decision *Afaga Beauty Service Ltd.* (BCEST # D318/97): length of employment with the employer; the time needed to find alternative employment; mitigation efforts undertaken; other earnings during the period of unemployment; projected earnings from previous employment; etc. The Tribunal is not limited to considering only those factors as which factors are appropriate will depend on the specific circumstances of each appeal (para. 73) (emphasis added).

79. We further agree with the Appeal Panel that, in determining the wage recovery period, the governing principle is to return an employee, as far as reasonably possible, in an economic sense, to the position the employee would have been in had the contravention not occurred: *Tricom*, *Krausz*, *Metasoft*. In doing so, the Director should take into consideration factors such as the labour market, the nature and characteristics of the position, the employee's age, education and qualifications, and the employee's mitigation efforts: *Afaga*, *McMahon*.

80. The question of an employee's mitigation efforts is but one factor to consider in crafting a remedy that is restorative, fair, and promotes compliance with the *ESA*: *Afaga*, *McMahon*. This is a contextual analysis that considers the particular circumstances of the employee.

81. As set out in *Creative Surfaces Inc.*, BC EST # D195/00, an employee's reasonable mitigation efforts, or lack thereof, are to be considered when fashioning a "make whole" remedy (para. 8). This includes a number of elements, such as the employee's efforts to find new employment, actual earnings arising from successful efforts to mitigate, and the nature of the employee's previous employment: *Photogenis Digital Imaging Ltd*., BC EST # D534/02 ("*Photogenis*"). In *Photogenis*, the Tribunal acknowledged that awards under section 79(2)(c) have no clear "formula", unlike other provisions of the *ESA* (such as compensation for length of service under section 63 or group termination pay under section 64). As such, the Tribunal is generally reluctant to interfere in a remedial award, unless it is "based on a clearly erroneous footing or where the award does not take into account relevant factors" (para. 40).

82. In this case, the Delegate noted a number of factors, including the time the Employee needed to find alternative employment, her mitigation efforts, as well as her other earnings during the recovery period (Determination, p. R17). Finally, the Delegate noted that the reasonableness of an employee's mitigation efforts will be unique to a person's circumstances (Determination, p. R18).

83. The Delegate found that 2 weeks into the Contract Position (i.e. 4 working days) was sufficient time for the Employee to decide whether to resume her search for employment and, as a result, the Delegate found the Employer's liability was "extinguished". The Delegate, based on that analysis, concluded that the fact that the position ended two weeks after that date was an "unfortunate outcome" for which the Employer was "not responsible" (Determination, p. R19).

84. We find the remedial approach in the Determination does not show the relevant contextual factors were considered or addressed in determining the Recovery Period and, instead, focussed only on the Contract Position in assessing the reasonableness of the Employee's mitigation efforts: *Photogenis*.

85. The Delegate accepted that the Contract Position was not "on par" with the Employee's Office Manager position with the Employer. The Employee worked 2 days a week, instead of 37 hours a week, and for less pay. The Employee's evidence was that she was told that this would increase to 3 days with more pay after 4 weeks, and she hoped to stay in the position. Even in the common law context, as noted in the *Forshaw* case relied on by the Employer, a "former employer cannot have any right to expect that the former employee will accept lower paying alternate employment with doubtful prospects" (p. 144). This is particularly true in the context of the *ESA* and, in particular, the application of its "most restorative remedial provision": *Machtinger*, *Rizzo*, *Tricom*.

86. The Employer submits the Delegate found that the Employee failed to mitigate, however, for the reasons set out we find this resulted from a failure to apply a contextual approach as required under the *ESA*. In the result, the Delegate found that 2 weeks was "sufficient time" such that the recovery period under the *ESA* was "extinguished". The reasons in the Determination do not consider or address the totality of the uncontested evidence relevant to considering the Employee's mitigation efforts, including that the Employee was promised that the position would result in more hours and pay after 4 weeks, and, after the position ended, failed to take into account that the Employee was 50 years old, the nature of her skills and qualifications, her medical condition, her subsequent mitigation efforts, and the fact she did not find alternate, albeit part-time, employment until the end of July 2018.

87. In the circumstances, we find the Delegate erred by taking a narrow approach to deciding on the recovery period and is, therefore, inconsistent with the purposes of the *ESA*. In the result, the Delegate erred by "stopping the clock" and finding that subsequent events were not relevant to assessing the appropriate recovery period under the contextual and multi-factor approach required by Section 79(2)(c) of the *ESA*. Accordingly, we find the Delegate failed to award a "make whole" remedy that put the Employee back in the position she would have been but for the Employer's misrepresentation, was fair, and that promoted compliance with the *ESA*.

88. We conclude that the Appeal Panel's finding in favour of a Six-Month Recovery Period is appropriate having regard to all the circumstances. In light of the totality of the Employee's uncontested evidence before the Delegate, we are not persuaded that the Contract Position shows that the Employee failed to engage in reasonable mitigation efforts sufficient to extinguish an entitlement to compensation under section 79(2)(c) of the *ESA* as found by the Delegate. We find, considering the totality of the evidence, the Employee did not stand idly by or fail to take reasonable steps to avoid the losses claimed in the complaint, including her acknowledgement that she would have been satisfied with the Contract Position, employment that ended after 4 weeks. Accordingly, we uphold the finding in the Appeal Decision in favour of a Six-Month Recovery Period as it fairly and reasonably put the Employee in the same position she would have been but for the contravention of section 8 by the Employer: *Tricom*.

89. For the reasons given, we find the Delegate's findings constitute a misapplication of the principles of mitigation as understood in the context of the broad and purposive approach to remedying a contravention of section 8, as contemplated by section 79(2)(c) of the *ESA*. We further find it is appropriate to uphold the Six-Month Recovery Period in the Appeal Decision and we vary the Determination accordingly.

(b) The Tribunal made a reviewable error by giving direction about legal fees and moral damages without being requested to do so by [the Employee] or giving the parties an opportunity to make submissions

90. The Appeal Panel found that, under section 79(2) of the *ESA,* the Director has the authority to award legal costs and compensation for "provable losses that reasonably flow from the section 8 contravention" (Appeal Decision, paras 55 – 58). Accordingly, the Appeal Panel referred the issue of compensation back to the Delegate to be decided "in accordance with the compensation principles we have identified in this decision" (para. 59).

91. There is no dispute, and in any event the Determination expressly confirms, that the Employee sought only compensation for lost wages and made no claim for out of pocket expenses (Determination, p. R17). It is also not in dispute that, on appeal, the Employee did not allege that the Delegate erred by failing to make an award in respect of legal costs or for compensation for misrepresentation. It is also not in dispute that the parties were not given notice of the Appeal Panel's intention to address the Director's authority to issue an award for legal costs or compensation for misrepresentation, nor were they given an opportunity to make submissions with respect to that authority.

92. In the circumstances, the Employer submits the Appeal Panel acted contrary to the principles of procedural fairness and asks that the Appeal Panel's direction to the Delegate be cancelled as a result. The Employer also filed submissions setting out its position that the Appeal Panel erred in law in finding the Director had that authority in any event.

93. The Employee filed a brief submission agreeing with the reasons set out in the Appeal Decision. Those submissions do not address the bases for reconsideration in any detail. The Director did not file submissions with respect to the fair hearing ground for reconsideration but filed extensive submissions on its position that the Appeal Panel erred in finding the Director has the statutory authority to award legal costs or compensation for misrepresentation under the *ESA*.

94. In the present case, the Appeal Panel, of its own motion and without notice to, or seeking submissions from, the parties found the Director has the authority to award legal costs and compensation for misrepresentation. It is open to the Tribunal to provide policy guidance with respect to the interpretation or application of the *ESA*. However, the findings in the Appeal Decision with respect to the applicable compensation principles go beyond policy guidance on remittal and constitute a substantive change to existing Tribunal authority that awards for legal costs or non-economic loss are not available under the *ESA*: *Tricom*, *Hytek Air-Conditioning*, (BC EST # D201/98), *Afaga Beauty Service Ltd., Krauz, Angie MacKenzie*, BC EST # D033/00 *Photogenis Digital Imaging Ltd.*, BC EST # D534/02, *Jennifer Oster*, BC EST # D104/09. In the circumstances, we find the Appeal Panel breached the parties' right to a fair hearing.

95. Moreover, having found the Director has the authority to award legal costs and compensation for non-economic loss, we further find the Appeal Panel's fair hearing breach is not "cured" by its direction to the Delegate to seek the parties' submissions and issue a new determination in light of the Appeal Panel's findings (para. 59). The parties' opportunity to dispute whether or not such statutory authority exists was before the Appeal Panel, an opportunity it denied them in the present case.

96. Accordingly, these aspects of the Appeal Decision are cancelled.

97. We have considered the entirety of the proceedings in this matter, as well as the Employer and Director's submissions on the issue of statutory interpretation, with a view to assessing whether we should exercise our discretion to decide the matter and cure the fair hearing breach on reconsideration (see *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards),* 2010 BCCA 97). We have also considered whether it is appropriate to remit the matter back to the Appeal Panel for decision after giving the parties an opportunity to be heard.

98. We find that neither of these options is appropriate in the present case.

99. When investigating or issuing a determination, the Director is not limited to the grounds set out in a complaint. Instead, the *ESA* provides a broad latitude enabling the Director to uncover all possible contraventions of the law, and available remedies, to ensure compliance with the statute (see, for example, *Re Sunco Construction Services Ltd.*, BC EST #D202/97, reconsideration dismissed in BC EST #D475/97; *Re Meadow Creek Cedar Ltd.*, BC EST # D061/12), and *Khowutzun Heritage Centre Ltd.*, BC EST # D408/02. At the time the Delegate issued the Determination, the "available remedies" under section 79(2) would not have included an award for legal costs and non-economic loss, for the reasons set out.

100. The Appeal Panel does not identify what evidence the Delegate ought to have, but failed, to consider as provable non-economic loss arising from the Employer's misrepresentation. With respect to legal costs, the Employee was represented by counsel before the Delegate. However, as the Delegate notes in the Determination, the Employee claimed only lost wages for the Six-Month Recovery Period.

101. While it is open to the Tribunal to change its approach under section 79(2) of the *ESA*, it must be persuaded that change in approach is consistent with the legislative intent. We note that neither the Tribunal's existing jurisprudence or the Appeal Decision contain a full analysis of the *ESA* as contemplated by the modern approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (SCC) ("*Rizzo*") at para. 21, quoting from Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. The submissions before us, particularly those of the Director, invite us to apply that analysis in the present case.

102. However, we decline to do so in the absence of a claim and appropriate evidentiary framework, both of which we find are lacking in the present case. For the reasons given, we find the Appeal Panel denied the parties a fair hearing on the question of legal costs and non-economic loss and its findings in that regard are cancelled. We further find no basis in the evidentiary record of the grounds of appeal such that we would exercise our discretion to decide the issues or remit them back to the Appeal Panel.

CONCLUSION

103. For the reasons set out, the Appeal Decision's findings with respect to legal costs and compensation for misrepresentation are cancelled.

104. We confirm the Appeal Decision's finding that a Six-Month Recovery Period is appropriate in the present case for the reasons given in this decision.

105. We order that the Determination be varied to award the Employee compensation for lost wages, minus any actual earnings, starting the day after the Employee was dismissed from her employment with the Employer and ending on the last day before the Employee commenced employment on July 30, 2018.

106. The Appeal Decision is varied to provide that the calculation of any wages and interest owing to the Employee, together with an order for payment, be referred back to the Delegate.

Jacquie de Aguayo **Chair** **Employment Standards Tribunal**	**Robert E. Groves** **Member** **Employment Standards Tribunal**	**Shafik Bhalloo** **Member** **Employment Standards Tribunal**