Citation: Ping Kang (Re)
2021 BCEST 40

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Ping Kang

(the "Applicant")

- 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: Robert E. Groves (Panel Chair)
Kenneth Wm. Thornicroft
David B. Stevenson

FILE No.: 2021/009

DATE OF DECISION: May 07, 2021

DECISION

SUBMISSIONS

Ping Kang	on her own behalf
Victoria Merritt	counsel for Mary Jo Fetterly
Laurel Courtenay	counsel for the Director of Employment Standards

OVERVIEW

1. Ping Kang (the "Applicant") seeks reconsideration of a decision of the Tribunal (the "Appeal Panel") dated January 8, 2021, and referenced as 2021 BCEST 4 (the "Appeal Decision"). The application is brought pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. This matter arose from a complaint delivered by the Applicant to the Director of Employment Standards (the "Director") alleging that a former employer, Mary Jo Fetterly (the "Employer"), had failed to pay compensation for length of service. The Applicant later amended the complaint to include claims for overtime wages, and wages for meal breaks.

3. A delegate (the "3rd Delegate") of the Director issued a determination dated July 8, 2020 (the "Determination"). In it, the 3rd Delegate found that the Employer had contravened sections 40, 45, 46, 58, and 63 of the *ESA*, and that the Employer was liable to pay $13,308.19 for wages and interest, together with four administrative penalties of $500.00, for a total of $15,308.19.

4. The Employer appealed pursuant to section 112 of the *ESA*. The Appeal Panel cancelled the Determination.

5. We have before us the Determination and its accompanying Reasons for the Determination (the "Reasons"), the record the Director was required to deliver to the Tribunal in the appeal pursuant to subsection 112(5) of the *ESA*, the Employer's appeal form, the submissions of the parties in the appeal, the Appeal Decision, the Applicant's application for reconsideration, and the submissions of the parties delivered for the purposes of the application.

ISSUES

6. There are two issues which arise on this application for reconsideration:

- Does the request meet the threshold established by the Tribunal for reconsidering the Appeal Decision?
- If so, should the Appeal Decision be confirmed, cancelled, varied, or referred back to the Appeal Panel, or to another panel of the Tribunal?

FACTS

7. The Employer is a quadriplegic. She employed the Applicant as a caregiver from 2011 until August 2017, when she terminated the relationship summarily, based on an allegation of cause.

8. The Applicant filed the complaint noted above on September 23, 2017, almost three years before the Determination was issued. A hearing of the complaint was scheduled for January 5, 2018. On that date, the Applicant and the Employer attended at the venue for the hearing. The Employer's counsel was also present, as was a witness for the Employer.

9. An individual the Reasons refer to as "a delegate of the Director" (the "1st Delegate") had been a mediator on the file previously. He too was present on January 5, 2018.

10. The Reasons refer to a statement of the 1st Delegate explaining that on January 5, 2018, he spoke to the Applicant as she awaited the commencement of the hearing. The statement indicates that another delegate was to adjudicate the complaint in a separate hearing room.

11. The evidence before the 3rd Delegate regarding the discussions that occurred on January 5, 2018 was conflicting. There was no dispute, however, that the Applicant left the hearing venue of her own accord before any hearing could occur.

12. The 1st Delegate stated, and the 3rd Delegate accepted, that he informed the Applicant, before she left the hearing venue on January 5, 2018, that if she did not attend the hearing she would be deemed to have withdrawn her complaint.

13. The 3rd Delegate also accepted that the 1st Delegate emailed the Applicant later on January 5, 2018 confirming that, since she had left the hearing venue before the hearing had commenced, she had withdrawn her complaint, her file would be closed, and no further work on it would be conducted by the Employment Standards Branch (the "Branch"). The Applicant admitted that she received the 1st Delegate's email. As more fully discussed below, in our view, this communication from the 1st Delegate constituted a “determination” as defined in section 1(1) of the *ESA*.

14. Some weeks later, the 1st Delegate contacted the Employer by letter confirming that the Applicant had abandoned her complaint on January 5, 2018, her file had been closed, and that the Branch would not conduct any further work regarding it.

15. Some months later, on June 7, 2018, the Applicant emailed the 1st Delegate stating that she had left the venue for the January 5, 2018 hearing on that day because she was sick, the 1st Delegate had told her "the Employment Standards doesn't have authority to my case *[sic]*" and that a hearing was "not necessary". She also asserted that she "did not voluntarily without my case *[sic]*". It does not appear that anyone at the Branch responded to this correspondence.

16. The Applicant did not contact the Branch again until November 2018, at which time she spoke to one of its regional managers. The 3rd Delegate's Reasons state that the Applicant told the manager she did not wish to withdraw her complaint, and that she had been unable to proceed with it because she had been ill. She also stated that she was now well, and that she wished to "re-open" her complaint.

17. The Director assigned the Applicant's complaint to another delegate (the "2nd Delegate"). Over the following months the 2nd Delegate conducted several fact-finding meetings with the parties. The 2nd Delegate also considered voluminous documentary material submitted by the parties.

18. The 2nd Delegate left the Branch in December 2019 without issuing a determination.

19. The file was assigned to the 3rd Delegate, who investigated the file anew. As noted above, her Determination was issued on July 8, 2020.

20. The Determination addressed the following issues:

- Did the Applicant withdraw her complaint?
- Did the Applicant's duties make her a "sitter" for the purposes of the *ESA*? If so, her claims arising from her work in that capacity were excluded by the legislation.
- If the Applicant was not a "sitter", was she entitled to compensation for length of service, and to wages for overtime, or for working during meal breaks?

21. Notwithstanding the evidence to which we have referred earlier relating to the Applicant's unilateral departure from the hearing venue on January 5, 2018, and the communication from the 1st Delegate which followed immediately thereafter stating that the Applicant had withdrawn her complaint, her file would be closed, and no further work would be conducted regarding the complaint, the 3rd Delegate determined that the Applicant had not withdrawn her complaint.

22. The 3rd Delegate's Reasons acknowledge that while the Applicant may not have been well in January and February 2018, "she provided no compelling reason why she waited until June 2018 and then November 2018 to contact the Branch to say that she wanted to 're-open' her complaint", and she was certainly "well enough" to commence and prosecute proceedings against the Employer before the British Columbia Human Rights Tribunal during the hiatus period.

23. Nevertheless, the 3rd Delegate determined that the Applicant never withdrew her complaint, and so the proceedings before the Director relating to it had never been concluded. The 3rd Delegate's rationale for this conclusion is captured in the following comments from her Reasons at R22:

> Despite Mrs. Kang's failure to provide a plausible explanation for not pursuing her complaint between January and November 2018, the fact remains that Mrs. Kang never signed a Withdrawal of Complaint form and never expressly told the Branch that she wanted to withdraw her complaint. It is for this reason, that I conclude Mrs. Kang *did not* withdraw her complaint.

24. Regarding the substantive merits of the complaint, the 3rd Delegate determined that the Applicant was not a "sitter", and so she was entitled to the monetary sums noted earlier.

25. The Employer appealed the Determination, alleging that the 3rd Delegate committed errors of law, and failed to observe the principles of natural justice.

26. There were two principal issues addressed by the Appeal Panel:

- Was a decision made in January 2018 to stop investigating the Applicant's complaint, thus depriving the Director of jurisdiction to continue to investigate the complaint once the Applicant gave notice in November 2018 that she wished to "re-open" it?
- Did the Director fail to observe the principles of natural justice when the decision was made to re-open the Applicant's complaint and continue the investigation?

27. The Appeal Panel determined that the answer to both questions was "yes".

28. The Appeal Panel decided that the facts supported a conclusion the Applicant abandoned her complaint when she declined to participate in the investigation process on January 5, 2018, and in the months that followed. The Appeal Panel also determined that the Director decided to stop investigating the complaint pursuant to the jurisdiction found in section 76(3)(d) of the *ESA*, which reads:

> **76 (3)** The director…may stop…investigating…a complaint if…
>
> (d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint

29. The substance of the Appeal Panel's rationale for this conclusion is summarized at paragraphs 44 and 47 of the Appeal Decision, as follows:

> Given that the Director had made a decision to stop investigating the complaint, I find that the Director erred in law in later concluding that the Employee had not withdrawn the complaint because she had not signed a withdrawal form. There is nothing in the *ESA* that requires a complainant to formally withdraw a complaint. The Director has the authority to make decisions about the conduct of a complaint based on the circumstances before them. In this case, the 1st delegate confirmed with the Employee their discussions that day, in which the Employee had withdrawn her complaint. The Employee did not challenge either the 1st delegate's understanding of what had occurred, nor did she challenge his decision not to continue investigating her complaint.
>
> …
>
> As the 1st delegate concluded that the Employee had withdrawn the complaint and made a decision to not continue investigating it, there was no statutory basis for a different delegate to conclude, 30 months later, that the Employee had not withdrawn her complaint and to continue with an investigation. I find that the Director erred by acting on a view of the facts that cannot be entertained.

30. The Appeal Panel also decided that the 3rd Delegate's "reviving" of the complaint constituted a denial of natural justice and a further error of law.

31. The Appeal Panel decided that the 3rd Delegate erred when she decided to accept the "revival" of the complaint, because she did not exercise her discretion to do so judicially. The Appeal Panel concluded that the 3rd Delegate had relied on an irrelevant consideration, and she had failed to weigh several other relevant factors. The Appeal Panel said this at paragraph 51 of the Appeal Decision:

> The 3rd delegate did not consider the length of time that had passed since the end of the employment or the abandonment of the complaint or the purposes of the *ESA*. Nor did the 3rd delegate consider the potential hardship and prejudice to the Employer, which appeared to be significant. The sole basis for the reason for allowing the Employee to revive the complaint was that she did not expressly withdraw it. The exercise of discretion must not be based on irrelevant considerations (see *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2). In my view, a failure to consider relevant factors constitutes an error of law.

32. The Appeal Panel also observed that the *ESA* is designed to achieve a speedy resolution of complaints, at the lowest possible cost to the parties. At paragraph 53 of the Appeal Decision the Appeal Panel then said:

> These principles are embedded in the *ESA*, specifically in section 2(d), in which the purposes of the legislation include the provision of "fair and efficient procedures for resolving disputes over the application and interpretation of this Act." The record indicates that the process was anything but fair and efficient.

ARGUMENT

33. A significant portion of the Applicant's submission in support of her application for reconsideration takes issue with many of the facts as found by the 3rd Delegate in her Reasons, which the Appeal Panel relied upon for the purposes of the Appeal Decision.

34. The Applicant's submission also challenges the Appeal Panel's conclusion regarding the main matters of substance addressed in the Appeal Decision.

35. The Applicant argues that no decision to stop investigating her complaint was made on behalf of the Director on January 5, 2018. She asserts that the 1st Delegate had no authority to issue such a determination, as he was not the adjudicating delegate on that date and, indeed, no such determination was ever issued.

36. The Applicant contends further that there is no provision in the *ESA* that contemplates an authority on the part of a delegate of the Director to decide to stop investigating a complaint without a determination being issued to that effect. She refers to section 81(1) of the *ESA* which requires that when a determination is made, the Director must serve any person named in it with a copy. The inference we draw from this reference is that since the 1st Delegate's communications to the parties relating to the Applicant's withdrawal of her complaint and the closure of her file did not comply with this requirement, they are not a determination.

37. The Applicant also submits that no decision to stop investigating her complaint could have been made lawfully pursuant to section 76(3)(d) because the adjudicating delegate on January 5, 2018 never ordered her to do anything to facilitate the resolution or investigation of the complaint.

38. Regarding the issue whether the Director erred in allowing the Applicant to reinstate or revive her complaint, the Applicant submits, in substance, that she filed her complaint in a timely way, she never withdrew her complaint, and no effective decision to stop the investigation of her complaint was ever made. On this view of the facts, the resolution of her complaint was merely delayed, and the use of the

word "revival" to describe the subsequent proceedings that commenced in November 2018 merely refers to the end of the months long hiatus period that followed the abortive hearing on January 5, 2018.

39. In the alternative, if the actions of the 1st Delegate early in 2018 did stop the investigation of her complaint, the Applicant argues that the 2nd Delegate's decision to revive the complaint later in the year was the result of a proper exercise of discretion pursuant to section 76(3)(a) of the *ESA*, which permits the Director to investigate complaints filed out of time.

40. The Director has delivered a submission. The Director contends that reconsideration is appropriate because the Appeal Decision raises questions that provide an opportunity for the Tribunal to analyze what constitutes the withdrawal of a complaint, and the procedural fairness requirements that arise when the Director exercises discretion and decides that the investigation of a complaint should be stopped on the grounds set out in section 76(3)(d) of the *ESA*.

41. The Director observes that the *ESA* contains no guidance regarding the withdrawal of complaints. Section 76(3) permits the Director to stop investigating a complaint. However, the circumstances under which this authority may be exercised are specified in the subsection, and withdrawal of a complaint by a complainant is not one of them.

42. The Director argues that if a complainant properly withdraws a complaint, the Director's jurisdiction to act further is exhausted, and section 76(3) has no application because there is no longer a complaint for the Director to exercise the discretion to stop investigating.

43. The Director contends that the 3rd Delegate was correct to conclude that the Applicant never withdrew her complaint. The reasons the Director gives are that the Applicant did not sign a withdrawal form, and never communicated to the Director or the Employer that she wished for her complaint to be withdrawn.

44. The Director accepts that if the Applicant did not withdraw her complaint, section 76(3) is engaged, and the Director may exercise the discretion to stop investigating the complaint where, as per section 76(3)(d), a complainant refuses or fails to participate in any of the procedural steps the Director specifies. That said, the Director argues that when a decision emerges from the exercise of the discretion it must be made in a manner that is procedurally fair.

45. Like the Applicant, the Director submits that the 1st Delegate was in no position to make a decision to stop investigating the Applicant's complaint because he was not the delegate assigned to adjudicate it on January 5, 2018. Instead, the 1st Delegate was acting in the role of mediator on that day. The Director asserts that the only person who had the authority to stop investigating the Applicant's complaint was the person who was delegated to hear and decide it.

46. The Director contends further that the Director cannot simply decide that a complainant has abandoned a complaint, and that a file should be closed. The discretionary nature of such a decision, importing requirements of procedural fairness, means that a person affected must be given notice and an opportunity to respond before the decision is made.

47. Here, the Director asserts that the Applicant was a vulnerable person, and so the content of any requirement of procedural fairness needed to insure that the Applicant understood why the investigation

of her complaint was being stopped, that she was being provided with a reasonable opportunity to explain why it should not be stopped and, instead, the investigation of her complaint should proceed. The Director contends that the 1st Delegate's presenting a withdrawal form for the Applicant to sign, telling her to sign it, and advising her that if she left the hearing venue she would be withdrawing her complaint did not constitute a meaningful opportunity to respond.

48. The Director also submits that a decision engaging section 76(3) is a determination for the purposes of the *ESA*. The word "determination" is a defined term in section 1(1) of the statute, and includes decisions made under section 76(3). Section 81(1) of the *ESA* requires that any person named in a determination must be served with a copy of it. It also mandates that a determination must include the time limit and process for an appeal to the Tribunal. The Director notes that the 1st Delegate's January 5, 2018 email to the Applicant did not say that a "determination" of the Applicant's complaint had been made, nor did it include the other mandatory information specified in section 81. For these reasons, the Director asserts that no determination in respect of the Applicant's complaint was made pursuant to section 76(3).

49. For the Director, it follows that there was no reinstatement, or revival, of the Applicant's complaint. What the 2nd Delegate did in November 2018 was merely to continue the original investigation of the Applicant's complaint, and add to it an investigation to decide whether the Applicant had withdrawn her complaint. In the end, the 3rd Delegate decided that the complaint had not been withdrawn, and so there was nothing to reinstate or revive.

50. The Director's response to the Appeal Panel's decision that the Director's "reviving" the investigation of the Applicant's complaint in November 2018 was unfair is that it was for the Director, and not the Tribunal, to weigh the evidence, and draw the appropriate inferences of fact, to determine whether the investigation should continue. The Director submits that if the 2nd Delegate failed to weigh all the relevant considerations when she decided to continue the investigation in November 2018, the Appeal Panel should not have cancelled the Determination for that reason. Instead, the Appeal Panel should have remitted the matter back to the 3rd Delegate for a re-assessment based on all the relevant factors.

51. The Employer has also delivered a submission. She argues that there is nothing in the application that justifies a reconsideration of the Appeal Decision, but if a reconsideration occurs the application should be dismissed because the Appeal Decision is correct.

52. The Employer submits that the application is wrongly conceived because it reveals no legal error in the Appeal Decision. Instead, it does nothing more than challenge findings of fact set out in the Determination, disagree with the conclusions the Appeal Panel reached in the Appeal Decision, and ask the Tribunal on reconsideration to draw different conclusions.

53. The Employer asserts that it was appropriate for the Appeal Panel to decide that the 1st Delegate exercised the discretion to stop investigating the Applicant's complaint provided in section 76(3)(d) because the Applicant refused to participate in the hearing on January 5, 2018, and so she failed to take the requisite steps to facilitate a resolution or investigation of her complaint.

54. The Employer states that the 1st Delegate was a delegate of the Director, and had the authority to decide, as he did, that the investigation of the Applicant's complaint should be stopped.

55. In reply submissions, the Applicant repeats, and expands upon arguments made in the application, and adopts arguments made in the submission delivered by the Director.

ANALYSIS

56. The power of the Tribunal to reconsider one of its appeal decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> **116 (1)** On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

57. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

58. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process established in section 112.

59. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have an appeal decision overturned.

60. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A “yes” answer means that the applicant has raised questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

61. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal (see *Re Middleton* BC EST # RD126/06).

62. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the appeal decision. When considering that decision at this second stage, the standard applied is one of correctness.

63. We are of the view that the portions of the Applicant's application which challenge the findings of fact in the Reasons were ill-conceived, and the Applicant's arguments based on those challenges do not warrant a reconsideration of the Appeal Decision.

64. The *ESA* provides no opportunity for the Tribunal to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law. Errors of fact do not amount to errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable.

65. The investigation conducted on behalf of the Director in this case was detailed, comprehensive, and lengthy. As regards the factual matters set out in the Reasons, the Applicant has not shown that the findings the 3rd Delegate made relating to what occurred during the course of the investigation affecting the matters now before us were incorrect. The Applicant disagrees with some of the 3rd Delegate's findings, to be sure, but that is insufficient to warrant a decision that the Determination reveals errors of fact that constitute errors of law. There is no indication the 3rd Delegate's findings lacked the support of at least some evidence, and the weight to be attributed to the various types of evidence she received was a matter within her purview to assess. There is, therefore, no basis to find that the 3rd Delegate's findings of fact set out in her Reasons were perverse or inexplicable.

66. We are of the opinion, however, that the application does raise questions of law, principle, and procedure that warrant a reconsideration of the Appeal Decision, because they are matters of general importance which may have implications for future cases. The matters raised in the application we believe warrant reconsideration are as follows:

- Did the 1st Delegate have the authority to decide that the investigation should be stopped pursuant to section 76(3)(d) of the *ESA*?
- If the answer to the first question is "yes", was the 1st Delegate's exercise of discretion to stop investigating the complaint procedurally fair?
- If the answer to the first question is "yes", was the decision to stop investigating the complaint a "determination" under the *ESA*?
- If the decision to stop investigating was a determination, and accepting the requirements of section 81(1) of the *ESA* were not met, what effect might that have in the circumstances?
- If no lawful decision to stop the investigation was made, was the November 2018 decision to "re-open" the Applicant's complaint procedurally fair?

Did the 1st Delegate have the authority to decide that the investigation should be stopped pursuant to section 76(3)(d) of the ESA?

67. The Applicant, supported by the Director, contends that the 1st Delegate had no authority to decide that the investigation should be stopped pursuant to section 76(3)(d) because he was not the delegate assigned to adjudicate the complaint on January 5, 2018.

68. While it is accurate to say that the 1st Delegate was not the adjudicating delegate on January 5, 2018, it does not follow that the latter individual was the only delegate who could decide whether the investigation should be stopped, based on what transpired that day.

69. A delegate's authority to act on behalf of the Director is contained in section 117 of the *ESA*, the relevant portions of which read:

> **117 (1)** …the director may delegate to any person any of the director's functions, duties or powers under this Act, except the power to delegate under this section.

70. The Applicant may have assumed that the 1st Delegate had no authority to stop investigating her complaint, but such an assumption was misconceived.

71. The Reasons at R2 expressly refer to the 1st Delegate as "a delegate of the Director" when he communicated to the Applicant via email, on January 5, 2018, that she had withdrawn her complaint and her file would be closed, as she had left the Branch office before the scheduled hearing that day.

72. Absent convincing proof to the contrary, a delegate's authority is presumed (see *Thunder Mountain Drilling*, BC EST # D314/96, and *Super Save Disposal*, BC EST # D128/05).

73. One might expect that it would have been the adjudicating delegate who would have made a decision concerning the investigation if the hearing had occurred on January 5, 2018, but it did not. As the 1st Delegate was the person directly involved in the events leading to the Applicant's departure from the hearing venue before the hearing began, it is entirely plausible that he would be a person well placed on behalf of the Director to decide that the investigation should be stopped.

74. The fact that the 1st Delegate may have acted as a mediator on the file at one time is of no moment. No reasonable person reading the 1st Delegate's January 5, 2018 email to the Applicant could have construed that communication to be a without prejudice message designed to assist the parties with the settlement of the complaint.

75. In her Reasons, at R21, the 3rd Delegate found that the 1st Delegate told the Applicant on January 5, 2018 that if she left the hearing venue without attending the hearing, she would be deemed to have withdrawn her complaint. It follows that since the Applicant did leave, it was open to the 1st Delegate to decide that the investigation of the complaint should be stopped pursuant to section 76(3)(d) because the Applicant had not taken a requisite step specified in order to facilitate the resolution or investigation of her complaint, namely, attend at the hearing. While the absence of a complainant at a scheduled hearing might not offer a basis for stopping an investigation in every case, in this instance the Applicant's presence was important because of the many disputed matters of fact that a hearing would have been expected to canvass.

76. In our view, and as is explained below, the decision of the 1st Delegate was a "determination" as defined in section 1(1) since it was a decision made under section 76(3). The Applicant never appealed this determination to the Tribunal, and thus it stood as a final order with respect to the Applicant's complaint. Perhaps the Director could have varied or cancelled this determination, but the Director never did so and, in any event, the 30-day time limit governing the Director's section 86 reconsideration power has long since expired.

77. The 3rd Delegate determined, in her Reasons at R22, that the Applicant had not, subjectively, withdrawn her complaint, because she never signed a document withdrawing it, and she never expressly told any representative of the Branch that she wished to withdraw her complaint. What the Determination did

not address is the question whether the Applicant must be deemed, objectively, to have withdrawn or abandoned her complaint because she declined to attend the scheduled hearing, with the result that it was appropriate for the 1st Delegate to decide that the investigation should be stopped and the file closed.

78. As described above, the Appeal Panel addressed this issue, and decided that the actions of the Applicant constituted an abandonment of her complaint. We see no error in the analysis of the Appeal Panel on this point.

79. The answer to the question posed is "yes".

If the answer to the first question is "yes", was the 1st Delegate's exercise of discretion to stop investigating the complaint procedurally fair?

80. We accept that a decision to stop investigating a complaint pursuant to section 76(3)(d) of the *ESA* involves an exercise of discretion, and that the discretion should be exercised in a manner that is procedurally fair (see *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553).

81. In the context of resolving the question whether the 1st Delegate's decision to stop the investigation was made in a way that was procedurally fair, it is sufficient, in our view, that the Applicant had enough information to make an informed decision regarding the action to be taken before she elected to leave the hearing venue prior to the commencement of the hearing on January 5, 2018.

82. The 3rd Delegate found, in her Reasons at R21, that the 1st Delegate told the Applicant on that day that if she left the hearing venue without attending the hearing she would be deemed to have withdrawn her complaint. Despite her receiving this information, the Applicant left the hearing venue. It is important to reiterate that the Applicant was very clearly informed about the consequences that would flow from her decision to refuse to appear at the hearing. We also refer to the 3rd Delegate's Reasons, at R8, summarizing the substance of the evidence provided by the 1st Delegate:

> At no point did [the 1st Delegate] tell [the Applicant] that the Hearing was not necessary. At no point did [the Applicant] say that she was sick or not able to participate in the Hearing. At no point did [the Applicant] request that the Hearing be adjourned.

83. We are of the view that a reasonable person in the Applicant's position, hearing what the 1st Delegate said to her on that day, would have understood that the investigation of her complaint would not continue thereafter. The email the 1st Delegate sent to the Applicant later on January 5, 2018 confirmed that fact.

84. The Applicant made no effort to challenge the decision of the 1st Delegate for months following January 5, 2018. The Applicant's explanation for this failure, referred to at R22 of the Reasons, was that she was unwell and "wanted a break" from her dispute with the Employer. The Reasons, also at R22, observe that the Applicant was well enough to commence and participate in proceedings against the Employer before the British Columbia Human Rights Tribunal during this hiatus period. The 3rd Delegate concluded that the Applicant "provided no compelling reason why she waited until June 2018 and then November 2018 to contact the Branch to say that she wanted to 're-open' her complaint."

85. We concur. It follows that the Applicant has failed to establish that the Appeal Decision should be disturbed because the 1st Delegate's decision to stop the investigation was made in a way that was procedurally unfair.

86. The answer to the question posed is "yes".

If the answer to the first question is "yes", was the decision to stop investigating the complaint a "determination" under the ESA?

87. The 1st Delegate's decision to stop investigating the Applicant's complaint was a decision made pursuant to section 76(3)(d) of the *ESA*. Section 1(1) of the statute defines a "determination" to mean, among other things, "any decision" made by the Director, and therefore by a delegate, under section 76(3). Since the Appeal Panel concluded, and we have agreed, that the 1st Delegate's decision to stop the investigation was made pursuant to section 76(3)(d), it follows that the decision was a determination for the purposes of the statute.

88. There is no requirement in the *ESA* that a determination state, explicitly, that it is a "determination".

89. The answer to the question posed is "yes".

If the decision to stop investigating was a determination, and accepting the requirements of section 81(1) were not met, what effect might that have in the circumstances?

90. The Applicant, and the Director, submit that since section 81 of the *ESA* requires service of a copy of a determination on any person named in it that includes the time limit and process for an appeal, the January 5, 2018 email cannot be a determination because it did not include this information.

91. We disagree. The Applicant and the Director confuse form with substance. The substance of the 1st Delegate's decision to stop investigating the complaint was communicated to the Applicant in his January 5, 2018 email. Whether the Applicant was provided with proper service of the 1st Delegate's determination or the information regarding an appeal that is stipulated in section 81 are different issues that do not impugn the substantive validity of the 1st Delegate's decision to stop the investigation of the Applicant's complaint.

92. What the requirements of section 81 the Applicant and the Director have identified might inform is a resolution of the question whether the Applicant was ever out of time to file an appeal of the 1st Delegate's decision to stop the investigation of her complaint. That question is, however, not directly relevant to the issues raised on this application, because the Applicant has never appealed that decision. Indeed, the Applicant declined to address the substance of the 1st Delegate's January 5, 2018 decision at all for several months after she received notice of it. In our view, a reasonably attentive person ought not to have presumed, as the Applicant appears to have done, that the 1st Delegate's communication had no effect, or that his decision was something she could simply ignore.

93. As noted above, the Director's initial decision to stop investigating the complaint was a "determination", and since it was never appealed, it stood as a final order. In our view, the Director was *functus officio* (that is, without any further statutory authority to hear and decide the complaint) once this determination

was issued. The Director never varied or cancelled this determination under section 86. That being the case, it is arguable that the Determination eventually issued was, as a matter of law, a nullity.

94. The answer to the question posed is "yes".

If no lawful decision to stop the investigation was made, was the November 2018 decision to "re-open" the Applicant's complaint procedurally fair?

95. The Appeal Panel determined that the 2nd Delegate's decision in November 2018, later confirmed in the Determination, that the Applicant's complaint should be re-opened, "was anything but fair and efficient", and so it was a decision that contravened the statement of principle in section 2(d) of the statute that the procedures for resolving disputes over the application and interpretation of the *ESA* should reflect these attributes.

96. We agree entirely with the reasoning of the Appeal Panel regarding this issue.

97. It has been stated that mere delay in the conduct of an investigation and the issuance of a determination, without more, is normally insufficient to warrant a finding that there has been an abuse of process that renders proceedings in respect of a complaint procedurally unfair. That said, where the delay is inordinate, and there is prejudice to a party as a result, it is open to the Tribunal to find that the integrity of a decision meant to resolve a dispute will be fatally undermined if the proceedings leading to it are permitted to continue (see *Atkinson*, BC EST # D113/09, and *Gulf Coast Materials Ltd.*, BC EST # D003/15).

98. Given what transpired on January 5, 2018, and the 1st Delegate's communication to the Employer approximately two weeks later to confirm that the Applicant had abandoned her complaint, the file had been closed, and no further work regarding the complaint would be performed, it was correct for the Appeal Panel to conclude that a reasonable person, and by inference, therefore, the Employer, would understand that the complaint proceedings were at an end.

99. In the circumstances, any "re-opening" of the complaint process thereafter should have raised immediate concerns regarding possible prejudice to the Employer, especially as the delay that occurred – a period of ten months – was, in our view, inordinate. Therefore, the Appeal Panel was correct in deciding that the decision to re-open the investigation was procedurally unfair because it failed to incorporate an analysis of these relevant considerations.

100. The Director argues that even if the Appeal Panel was correct in finding that the decision to re-open was procedurally unfair, the appropriate remedy was to refer the matter back for re-assessment based on all the relevant factors rather than to cancel the Determination.

101. Again, we disagree. It is trite that one of the grounds of appeal of a determination set out in section 112(1) of the *ESA* is that the Director has failed to observe the principles of natural justice. Section 115 permits the Tribunal to cancel a determination for that reason. The Tribunal is not restricted to the remedy of referral back if such a failure occurs (see *Old Dutch Foods Ltd.*, BC EST # RD115/09, and *Writers Guild of Canada*, BC EST # RD021/11).

102. Here, the Appeal Panel found that the decision to re-open the investigation of the Applicant's complaint was such an affront to the fairness and efficiency goals the scheme of the legislation is designed to achieve, it was necessary for the Determination to be cancelled, rather than referred back.

103. In our view, the Appeal Panel fashioned a remedy that was an appropriate exercise of the discretion conferred in section 115, and we see no reason to depart from it.

104. The answer to the question posed is "no".

ORDER

105. The Applicant's application for reconsideration is dismissed. The Appeal Decision is confirmed.

Robert E. Groves **Member** **Employment Standards Tribunal**	**Kenneth Wm. Thornicroft** **Member** **Employment Standards Tribunal**	**David B. Stevenson** **Member** **Employment Standards Tribunal**