

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Savitri Thejoisworo
(the “Complainant”)

- 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

FILE No.: 2021/046

DATE OF DECISION: July 2, 2021

DECISION

SUBMISSIONS

Savitri Thejoisworo on her own behalf

OVERVIEW

1. Savitri Thejoisworo (the "Complainant") seeks reconsideration of a decision of an appeal panel of the Tribunal (the "Appeal Panel") dated April 23, 2021 and referenced as 2021 BCEST 35 (the "Appeal Decision"). The application for reconsideration is brought pursuant to section 116 of the *Employment Standards Act* (the "ESA").
2. This matter arose when the Complainant brought a complaint (the "Complaint") alleging that she was entitled to wages because her former employer, Northern Gold Foods Ltd. ("Northern Gold"), had failed to adhere to the requirements of section 54 of the *ESA* after the Complainant took a parental leave. The relevant portions of section 54 read:
 - (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
 - (a) terminate the employment, or
 - (b) change a condition of employment without the employee's written consent.
 - (3) As soon as the leave ends, the employer must place the employee
 - (a) in the position the employee held before taking leave under this Part, or
 - (b) in a comparable position.
3. A delegate (the "Delegate") of the Director of Employment Standards (the "Director") conducted a hearing of the Complaint and concluded that Northern Gold had contravened sections 54(2)(b) and 54(3)(b) of the *ESA*, entitling the Complainant to a "make whole" financial compensation remedy pursuant to section 79(2)(c) of the *ESA*.
4. The Delegate issued a determination of the Complaint on October 16, 2020 (the "Determination"). It required Northern Gold to pay \$23,630.48 in wages, vacation pay, and accrued interest. It also imposed a \$500.00 administrative penalty. The total found to be owed was \$24,130.48.
5. Northern Gold appealed the Determination pursuant to section 112 of the *ESA*, claiming that the Delegate had erred in law.
6. The Appeal Decision ordered that the Determination be cancelled pursuant to section 115 of the *ESA*.
7. I have before me the Complainant's application for reconsideration and her submission delivered in support. I also have the documents generated in the Northern Gold appeal proceedings, including Northern Gold's appeal form, its submissions in the appeal, the Delegate's submission in the appeal, the Determination and its accompanying Reasons, the Appeal Decision, and the record the Director was

required to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. I have not requested responding submissions from Northern Gold or the Director on this application for reconsideration.

FACTS

8. Northern Gold operates a food manufacturing business. It employed the Complainant as a Research and Development Technologist from March 1, 2015, until August 8, 2019.
9. The Complainant took parental leave in March 2018. She was scheduled to return to work early in September 2019.
10. Northern Gold concluded that the Complainant's duties could be performed by other employees during her absence, and that it was unnecessary for a temporary replacement to be hired. During the leave period Northern Gold also decided that changes in the scope of the work performed within the company meant that the Complainant's position as a Research and Development Technologist should be eliminated.
11. In August 2019, some weeks before the end of her leave, the Complainant met with Northern Gold managers, who informed her that her position no longer existed, and that a job as a Quality Control Technician was available to her.
12. The Complainant viewed the Quality Control Technician position as a demotion. She declined to accept it. She believed that Northern Gold had eliminated the Research and Development Technologist position because management was perturbed she had taken the parental leave, the second such leave she had taken during the period she had been employed by the company.
13. The Complainant did not return to work for Northern Gold. She obtained another employment position at a higher rate of pay approximately six months later.
14. Northern Gold disputed that the Quality Control Technician position was a demotion. It asserted that the job was comparable to the position the Complainant had previously occupied. Northern Gold also argued that the Research and Development Technologist position was eliminated for genuine business reasons, and not because the Complainant had taken a second parental leave.
15. The Delegate found that the elimination of the Complainant's Research and Development Technologist position contravened section 54(2)(b) of the *ESA* because it constituted a change in a condition of the Complainant's employment without her consent, and for reasons that "related to" her taking parental leave. The Delegate stipulated (Reasons, p. R 13) that "the notion...a parental leave might prompt a re-evaluation of the value of that employee's role to the business [is] contrary to the spirit and intent of the Act."
16. Regarding section 54(3)(b) of the *ESA*, the Delegate determined that, although Northern Foods offered to maintain in her new job the higher salary the Complainant had earned in her Research and Development Technologist position, as well as her work schedule for a period of months following her return, the Quality Control Technician position was not comparable to the position the Complainant had occupied before taking leave. The Delegate found the Quality Control Technician position to be inferior, not only in terms

of pay, but also because the qualifications for the position, and the levels of responsibility inherent in the tasks to be performed within it were less onerous than similar requirements associated with the Complainant's position as a Research and Development Technologist.

17. Finally, the Delegate determined that the Complainant had made reasonable efforts to mitigate her financial loss in the job search she conducted following her departure from Northern Gold. In addition, the Delegate rejected Northern Gold's submission that the Complainant could have mitigated her loss further if she had accepted the Quality Control Technician position until she found other work.
18. The Appeal Panel decided that the Determination should be cancelled for error of law because the Delegate misinterpreted and misapplied the requirements of section 54. The Appeal Panel also concluded that the Delegate committed a further error of law when he failed to decide that the Complainant had not properly mitigated her financial loss. However, due to its decision regarding section 54, the Appeal Panel considered its conclusion on the mitigation issue to be moot.
19. The Appeal Panel took pains to identify as critical to the appeal several instances where the Delegate failed to make important findings of fact. In particular, the Appeal Panel referred to the following:
 - The Delegate did not find that Northern Gold's elimination of the Complainant's Research and Development Technologist position was in retaliation for her taking a second parental leave.
 - The Northern Gold witnesses who gave testimony at the hearing of the Complaint were consistent in maintaining that the Complainant's position was eliminated for reasons wholly separate and apart from the fact the Complainant had taken a leave. The Delegate did not reject the testimony of the Northern Gold witnesses or find that it was unreliable.
 - The Delegate did not reject the critical aspects of the Northern Gold evidence supporting the company's position that the elimination of the Complainant's position occurred for legitimate business reasons. The Northern Gold evidence was that the company had experienced a decline in the research and development work performed by the Complainant prior to her taking leave, for reasons relating to the changing needs of its customers over which the company had no control, and that the trend had accelerated during the time she was absent. The Delegate appeared to accept the substance of the Northern Gold assessment when he said (Reasons, p. R 13):

I accept that [Northern Gold's] research and development work had decreased and note that it was able to sustain this aspect of its operations without the necessity of assigning anyone else to this role on a full-time basis. I also find however that this was not sudden and that it had occurred over a period of years.
 - The Delegate did not reject the evidence of the Complainant's former direct supervisor that when the Complainant was first hired all her work pertained to research and development, but as this work declined so too did the Complainant's associated duties.
 - The Complainant was the only Research and Development Technologist on staff at Northern Gold, but no one was hired to replace her when she took her parental leave. Instead, her work was allocated to other employees. Further, the Delegate did not reject, and there was no other evidence to refute, the Northern Gold testimony that the particular Quality Control

Technician position offered to the Complainant was entirely new and was created to permit the Complainant to return to work, as her Research and Development Technologist position no longer existed.

- Northern Gold witnesses testified that the total value of tax credits for research and development work applied for by the company was a reliable measure of this type of activity, and that the tax credits earned by the company steadily declined over a period of years. None of this evidence was contradicted in substance, and while the Complainant contended before the Delegate that there had been no decline in research and development work, she was not well placed, during her period of leave, to assess how much of this work had been lost, because she was absent from the workplace.
- While the Delegate did find that some research and development work did not qualify for tax credits, he did not reject the uncontroverted Northern Gold evidence that at one time 75% of the firm's research and development work was submitted for tax credits, but by 2020 the firm had no research and development credits to apply for.
- There was no convincing evidence supporting the Complainant's contention before the Delegate that the Quality Control Technician position offered to her involved a demotion in status because she would be reporting to a supervisor who had been inferior in the management hierarchy to the individual to whom the Complainant had reported in her position as Research and Development Technologist. Rather, the uncontested testimony from the Complainant's former supervisor was that she had been transferred to another Northern Gold facility, and her replacement, to whom the Complainant would have reported in her new position as Quality Control Technician, had been promoted from her old inferior position. In the result, there would have been no change in the managerial status of the person to whom the Complainant would have reported had she accepted the Quality Control Technician job.
- The Delegate never expressly determined that the Complainant's employment conditions were changed, as section 54(2) requires, "because of" a leave, and further, there was no cogent evidence supporting such a finding. The Delegate did not make an express finding that Northern Gold contravened section 54(2)(b). Instead, the Delegate stated that Northern Gold acted contrary to the spirit and intent of the *ESA* when it eliminated the Complainant's position during her leave.

20. The Appeal Panel acknowledged that section 126(4) of the *ESA* stipulates that the burden is on an employer to prove that a leave permitted by the statute is not the reason for changing a condition of employment without the employee's consent. Here, however, the Appeal Panel held that the Delegate should have determined that Northern Gold had met this burden.

21. Regarding section 54(2)(b), the Appeal Panel stated, correctly, that while the provision requires employers to maintain an employee's position while the employee is on leave, the circumstances of the employer's business may change while the employee is absent, and so it is lawful for an employer to make changes to the conditions of employment of an employee on leave, without the employee's consent, so long as the changes are not made "because of" the employee's leave.

22. A reading of the Reasons for the Determination convinced the Appeal Panel that the Delegate never specifically decided that Northern Gold changed the Complainant's conditions of employment "because of" her leave, in the sense that the reason for the changes was the leave. Instead, the Delegate misdirected himself, and erred in law, when he stated that if Northern Gold were to establish that it had not contravened section 54(2)(b) it needed to show that the elimination of the Complainant's Research and Development Technologist position was "not related" to her taking leave.
23. The Appeal Panel's conclusions regarding this point are revealed in the following passages excerpted from the Appeal Decision. At paragraph 45 the Appeal Panel said this:
- ...The delegate determined that the changes made to the complainant's former position were made without her written consent "and that its reasons for doing so were *related to* her parental leave (page R13; my *italics*). So far as I can determine, this "relatedness" appears to flow largely, if not exclusively, from the fact that the changes were instituted after the complainant went on leave. However, the recognition of this temporal ordering falls well short of constituting proof that the changes were made "because of" the complainant's leave.
24. Later, at paragraph 81, these statements appear:
- In my view, the delegate erred in law by applying the wrong legal test to the evidence before him. Further, even if one characterized the delegate's failure to apply the specific statutory standard as merely a matter of "semantics" (as the delegate argued in his submission), the uncontroverted evidence before the delegate was that the change in employment conditions was not necessitated by the complainant's leave but, rather, due to the changing nature of Northern Gold's customers' requirements.
25. Later still, at paragraph 87 of the Appeal Decision, the Appeal Panel said this:
- In my view, the evidence before the delegate overwhelmingly demonstrated that the change in the complainant's working conditions was not instituted "because of" her leave but, rather, was caused by the fundamentally changed nature of its business operations attributable to its customers' shifting requirements. In my view, the delegate's determination that the change in the complainant's conditions of employment "were related to her parental leave" (page R13), and thus constituted a contravention of section 54(2), cannot stand, as this finding was not supported by a legally sufficient evidentiary foundation.
26. And finally, at paragraph 100, the Appeal Panel stated:
- In my view, the delegate erred in law in determining that Northern Gold changed the complainant's conditions of employment contrary to section 54(2)(b) of the *ESA* (which requires that the changes be "because of" the employee's leave). In the language of *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BCCA), the delegate "acted without any evidence" or, at the very least, "acted on a view of the facts which could not reasonably be entertained". The complainant took her leave during a period that was coincident with the almost total evaporation of Northern Gold's R & D work. Significantly changed business conditions, and not the complainant's parental leave, underlaid the decision to change the duties associated with the complainant's job. I am satisfied that Northern Gold discharged its evidentiary burden under section 126(4)(c) of the *ESA* (see *Flint*, BC EST # D477/00).

27. The Appeal Panel concluded, too, that even if it could be said that Northern Gold had contravened section 54(2)(b), the company offered the Complainant a "comparable position" for the purposes of section 54(3)(b) of the *ESA*. When considering this element of the Complaint, the Appeal Panel observed that it was unnecessary for the purposes of the statutory requirement that a "comparable position" be identical to the employee's former position. If that were the case, there would be no need for section 54(3)(b) to be included in the statute, as section 54(3)(a) would be sufficient to establish the requirement.
28. The Appeal Panel concluded that since the similarities between the position the Complainant occupied when she went on leave, and the position offered to her shortly before her scheduled return, were more consequential than the differences, the Delegate had erred in law when he concluded that the two positions were not "comparable" for the purposes of section 54(3)(b).
29. More specifically, while the Appeal Panel acknowledged that the evidence before the Delegate supported his conclusions that a person occupying the Research and Development Technologist position might enjoy a higher degree of prestige or status, and might need to possess more work experience and accept a higher level of responsibility than a Quality Control Technician, the Delegate appeared to have ignored the evidence of the Northern Gold managers who testified at the hearing that the latter position also required the incumbent to accept a significant burden of responsibility to ensure that food products were fit for consumption, the position was not an entry level job, and it was highly regarded.
30. In addition, the Appeal Panel emphasized that while the salary paid to a Quality Control Technician was lower than the remuneration for a Research and Development Technologist (\$45,000 annually for a Technologist, and \$34,000 for a Technician), Northern Gold elected to pay the Complainant the same amount she had received in her former role. It also undertook to maintain her benefits and vacation entitlement, her work location and work station, her work schedule, and the chain of command structure that had existed previously.
31. As for the Complainant's salary, in particular, the Appeal Panel was critical of the significant weight the Delegate had attributed to the difference in pay for the two positions when determining their value for the purposes of determining whether they were "comparable". This is reflected in the following comments of the Appeal Panel in paragraph 40 of the Appeal Decision:
- ...However, the position that was actually offered to the complainant (which, on the uncontested evidence, was crafted to fit her unique circumstances) did not entail any reduction in salary. Regarding the continuance of the complainant's salary, I do not appreciate how this factor would not be relevant when determining if the technician position offered to the complainant was "comparable" to her former technologist position, particularly since the delegate himself identified the "pay package" as a relevant factor to consider when determining if the technician position was "comparable" to the technologist position (see page R11).
32. In the further alternative, if the Delegate was correct in deciding that Northern Gold had contravened both sections 54(2)(b) and 54(3)(b), the Appeal Panel concluded that the Delegate should not have issued a monetary award in favour of the Complainant pursuant to the "make whole" compensation remedy provision in section 79(2)(c) of the *ESA* because the Complainant did not take all the steps reasonably necessary in order to mitigate her financial loss.

33. The Appeal Panel observed, correctly in my view, that section 79(2)(c) compensation is akin to an award of damages at common law, and so a mitigation issue arises whenever a person makes a claim pursuant to the section.
34. The Delegate acknowledged that the Complainant owed a duty to mitigate, but the primary focus of his inquiry regarding this issue was the Complainant's very real and substantial efforts to secure new employment after her employment with Northern Gold came to an end. The Delegate declined to decide that the Complainant had failed to mitigate her loss when she declined to accept the Quality Control Technician position Northern Gold offered to her, even on a temporary basis while she sought out other employment opportunities.
35. The Appeal Panel determined that the evidence supported a conclusion the Complainant should have accepted the Quality Control Technician position to mitigate her loss, and the Complainant's failure to do so meant that she relinquished the opportunity to reduce the loss substantially, if not entirely. The Appeal Panel pointed out that there was no evidence the relationship between the parties was acrimonious. The Quality Control Technician position on offer provided the same salary and benefits, vacation entitlement, work location, workspace, and reporting structure as the Complainant's Research and Development Technologist position. It was difficult, therefore, for the Appeal Panel to be persuaded that the Complainant's accepting the new position would have caused her humiliation or embarrassment, particularly as it was being offered in good faith due to changed business circumstances.
36. The Appeal Panel noted the Delegate's finding that Northern Gold assured the Complainant her former work schedule would remain unchanged for a period of at least three months and perhaps longer, as the parties "were still in the process of negotiation" when the Complainant declined the offer and departed. This finding led the Appeal Panel to decide that it was at best speculative for the Delegate to have stated (Reasons, p. R 15) that Northern Gold's "inability to guarantee a regular shift beyond three months made [the Complainant's] eventual departure inevitable."
37. The Appeal Panel also identified as speculative the Complainant's posture, absent labour market evidence, that her accepting the Quality Control Technician position would compromise her search for new employment. For the Appeal Panel, one might just as easily attempt to speculate in the opposite way that the Complainant's failure to accept the Northern Gold offer might have resulted in a lengthening of her period of unemployment thereafter, because it might have appeared to prospective employers that she had resigned from her employment without justification.

ISSUES

38. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
- a. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 - b. If so, should the decision be confirmed, cancelled, varied, or referred back to the original panel or another panel of the Tribunal?

ARGUMENTS

39. The Complainant's application asserts that the Appeal Decision reveals errors of law. It submits that the Appeal Panel should not have cancelled the Determination.
40. The Complainant argues that there was evidence important to the resolution of the issues on appeal that the Appeal Panel did not consider. The Complainant says that in 2018, the year she took leave, the tax credits Northern Gold sought for its research and development work were still high and only declined significantly in 2019 because the Complainant was absent and Northern Gold had decided not to replace her with a temporary employee while she was on leave. The Complainant queries why Northern Gold decided not to replace her in 2018 given that the tax credits for that year were still high, and research and development work was ongoing.
41. The Complainant submits further that Northern Gold failed to produce any compelling evidence, particularly from third parties who owe no fiduciary duty to the company, which Northern Gold managers do, that the reduction in tax credits during her leave period and a reduction in research and development work generally was due to business circumstances rather than the company's decision not to replace her while she was absent.
42. The Complainant argues the Appeal Panel's assertion that the total value of tax credits was a reliable measure of research and development activity at Northern Gold, and that the Northern Gold evidence tendered to this effect was uncontradicted, is incorrect. She states that one of the Northern Gold managers testifying at the hearing acknowledged that the tax credit amounts the company had claimed was not directly correlated to the amount of research and development work the company performed. The reason for this was that some research and development projects did not qualify for a credit. She adds that she submitted evidence to the Delegate that the amount of tax credits was not a reliable gauge of the research and development activity at the company. She says she knew this because she performed the research and development work for Northern Gold, and she was the person who provided the pertinent data which supported the applications for credits that the company made.
43. The Complainant states that when Northern Gold managers met with her in August 2019 to discuss her accepting the Quality Control Technician position they told her that no other company plants were doing research and development work, and that the company was not hiring research and development staff elsewhere. The Complainant says this was in direct conflict with earlier statements made to her by Northern Gold managers and other colleagues to the effect that research and development work was continuing at her place of work. In addition, the Complainant observed that there was, at the time, a posting on the Northern Gold website for "an R&D Technician Position" at its facility in the state of Oregon.
44. The Complainant acknowledges that at a later point "the narrative shifted" and she was told that remaining research and development work was being shared by others or relocated to other Northern Gold facilities, but she states that all the contradictory messages she had received caused her to lose trust in her employer. It was for this reason, the Complainant says, that the Appeal Panel should have understood why she was reluctant to trust Northern Gold when they told her she would work at her old schedule during a "3 months adjustment period" if she accepted the Quality Control Technician position, and why she subsequently decided she could not return to work for the company.

45. The Complainant also offers what she submits is new evidence contradicting the Northern Gold position that research and development work at the facility where the Complainant was employed ceased in 2019. She refers to information she received in a telephone chat exchange she had with a client of Northern Gold in the spring of 2021 suggesting that research and development activity continues at the Complainant's former place of work with Northern Gold. The Complainant requests that Northern Gold produce affidavits from its key customers for whom it performed research and development services in the past confirming the evidence of the Northern Gold managers before the Delegate that the company did no such work for them after 2019.
46. The Complainant submits that the Appeal Panel misinterpreted the reason for a transfer of the Complainant's former supervisor to another Northern Gold facility. The Appeal Panel linked the transfer to the decision to eliminate the Research and Development Technologist position. The Complainant says the record establishes the supervisor sought the transfer for personal reasons.
47. The Complainant challenges the statements in the Appeal Decision asserting that the Northern Gold managers were in a better position than her to assess the quantity of research and development work at the company's facilities, especially during the period when she was absent due to her leave. The Complainant argues that she continued to be informed about the business circumstances of Northern Gold during her leave because she lived close to her place of work, and she was in regular communication with her workplace colleagues.
48. The Complainant questions why it was necessary for her Research and Development Technologist position to be eliminated entirely. She wonders why no consideration was given to maintaining her in the position to continue to perform the research and development work that remained, and to assigning her some other duties. Instead, Northern Gold declined to consider any accommodation of this sort. It merely told her that she had to accept the Quality Control Technician position, or she would have no job at all.
49. The inference to be drawn from all these circumstances, the Complainant contends, is that Northern Gold decided to eliminate her job because of her parental leave, and not because the company's business circumstances had fundamentally changed.
50. The Complainant also challenges the Appeal Panel's conclusion that the Quality Control Technician job Northern Gold offered to her was "comparable" to the Research and Development Technologist position she had occupied prior to her taking leave. The Complainant argues that the Northern Gold job postings for the two jobs reveal that the Quality Control Technician position was an "entry-level position", and incorporated shift work. The Research and Development Technologist position, by contrast, involved the performance of different duties, it was a more senior position, it required more work experience, and it reported to a different manager at a higher level in the chain of command.
51. The Complainant denies there was any indication from the Northern Gold managers with whom she met near the end of her leave that there would be ongoing "negotiations" regarding an extension of the three months adjustment period incorporating her previous work schedule should she elect to accept the Quality Control Technician position.
52. The Complainant says that if she had accepted the Quality Control Technician position she would have been accepting a demotion, which would have had a detrimental impact on her desired career

progression. She also makes the point that working full-time in the position, and caring for her young family, would have seriously diminished the number of hours she would have been able to devote to securing another research and development position with another employer.

ANALYSIS

53. The power of the Tribunal to reconsider one of its 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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

54. 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.

55. 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 mandated in section 112.

56. 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 the Tribunal's appeal decision overturned.

57. 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.

58. 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). It has also been said that evidence that was available at the time of the original hearing of an appeal, but not presented, cannot found a basis for a reconsideration (see *Steelhead Business Products*, BC EST # D237/97).

59. 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 Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

60. I am of the view that the Complainant's application does not establish any errors rooted in the analysis of the Appeal Panel which are so important that they warrant a reconsideration of the Appeal Decision. Accordingly, the application must be dismissed.
61. When distilled to its core, the Complainant's application simply disagrees with the legal conclusions relied upon when the Appeal Panel decided to cancel the Determination. Rather than demonstrating how those conclusions were legally incorrect, however, the Complainant offers a different interpretation of the facts which she asserts should lead the Tribunal to a different result. Such an approach is precisely the type of case where an applicant seeks a "second opinion" regarding the issues raised in an appeal which the Tribunal has said is an inappropriate use of the reconsideration power set out in section 116 of the *ESA*.
62. It is important to recall that the Tribunal does not establish the facts that are relevant to the resolution of the issues arising in a complaint. It is the Director, and authorized delegates, who bear that responsibility in proceedings engaging the provisions of the *ESA*.
63. Here, the Delegate determined the relevant factual matrix. The Appeal Panel found no facts.
64. That said, it was entirely within the purview of the Appeal Panel to decide that the legal conclusions drawn by the Delegate, based on the findings of fact he made, were incorrect. This is so because section 112(1)(a) of the *ESA* establishes that an appeal of a determination may be successful if it is shown that the Director has erred in law.
65. In this case, the key legal issues for the Appeal Panel involved the proper application, given the facts as found by the Delegate, of sections 54(2)(b) and 54(3)(b), and the law relating to mitigation of financial loss that must form a part of the consideration of the compensation remedy found in section 79(2)(c) of the *ESA*.
66. The Appeal Panel decided, properly in my view, that the Delegate did not conclude Northern Gold eliminated the Research and Development Technologist position, thereby changing a condition of her employment without the Complainant's consent, and contravening section 54(2)(b), "because of" the Complainant's parental leave. Instead, the Delegate determined that Northern Gold's decision to make the change "related to" the Complainant's leave, and so it contravened section 54(2)(b) because the company decided to make the change following the Complainant's ceasing to perform her work as a Research and Development Technologist due to her taking the leave. Like the Appeal Panel, I am of the view that the Delegate applied the wrong legal test, and so he erred in law, when he interpreted section 54(2)(b) to mean that an employer acts in contravention of the provision if it decides to eliminate an employee's position when she takes a leave, but not because the employee has taken the leave. If that were the test, it would mean an employer could never take such a step when an employee is on leave, even if business circumstances affecting the employer might justify the decision.
67. The Complainant argues that the Appeal Panel should have concluded that the elimination of her Research and Development Technologist position was because she had taken leave, and not because the business circumstances of Northern Gold had changed. As the Appeal Panel noted, however, the Delegate made no such factual determination. To the contrary, the Delegate accepted that the research and development work at Northern Gold had declined over time, and that the remaining work of this nature was performed by other employees, in addition to their other regular work, while the Complainant was

on leave, without the need for the company to hire a temporary replacement. Further, the Delegate did not reject the Northern Gold evidence that the decision to eliminate the Complainant's position was due to the decline in research and development work, and not because she had taken a leave.

68. In her application, the Complainant argues strenuously, and repeatedly, that Northern Gold's decision to eliminate her position had to be due to her taking leave because there was considerable research and development work being done by her when she commenced the leave, as shown by the value of tax credits the company applied for in 2018, and the precipitous declines in tax credits experienced thereafter were caused by the fact that Northern Gold hired no one to perform her work during her absence. She asserts that by the time she was ready to return to work in 2019, Northern Gold had decided to eliminate her position citing the loss of research and development work, a state of affairs that Northern Gold had itself created.
69. The difficulty with this argument is that the Delegate did not accept it. At the same time, the Delegate did not reject the Northern Gold evidence that contradicted the Complainant's theory. In particular, as noted by the Appeal Panel, the Delegate did not reject the evidence of Northern Gold that no factors apart from the decline in research and development work were considered when the company decided to eliminate the Complainant's Research and Development Technologist position.
70. The Complainant argues, by implication, that the evidence provided to the Delegate by Northern Gold managers should have been rejected as unreliable because they owed a fiduciary duty to the company, which suggests a possible bias, and so their evidence should have been supported by evidence from neutral third parties. That is not the law. The nature of proceedings conducted by delegates investigating complaints entitles them to deference regarding the evidence to be accepted. There was no obligation on the Delegate to require that the evidence of the Northern Gold managers the Delegate received be corroborated by evidence from neutral third parties before it could be accepted as reliable.
71. The Complainant's concern that some research and development work continued at Northern Gold, notwithstanding some of the comments made by Northern Gold managers to the contrary, is of limited, if any, importance to the result in this case. The Delegate found, and the Appeal Panel did not dispute, that research and development work at Northern Gold had not ceased entirely during the Complainant's leave. However, the crux of the matter related to a different issue – whether, the Complainant having taken a parental leave or not, the research and development work at Northern Gold had declined to the point where it made legitimate business sense to eliminate the Complainant's position as the company's Research and Development Technologist.
72. Regarding the application of section 53(3)(b) of the *ESA*, I do not discern that the Complainant has shown it was wrong for the Appeal Panel to have decided the Research and Development Technologist position and the Quality Control Technician position that was offered were "comparable" within the meaning to be ascribed to that word in the statutory provision, and that the Delegate committed a legal error when he determined that they were not. The Appeal Panel noted, and the Complainant agreed, that a "comparable" position for the purposes of the section need not be identical to a position that is no longer available.
73. The Complainant submits that the Quality Control Technician position was a demotion. One of the factors the Complainant identified in support of this contention was her assertion that if she had accepted the

new position she would have reported to a person lower in the managerial hierarchy than had been the case before she took her leave. The Appeal Panel stated, and I agree, that the evidence did not support this assertion.

74. While it is correct to say that the Complainant would have reported to a different individual had she accepted the new position offered to her, the Northern Gold evidence the Delegate heard was that the Complainant's manager when she had worked as a Research and Development Technologist had transferred to another Northern Gold facility in Ontario during the Complainant's leave, and the individual to whom the Complainant would have reported in the new position had been promoted. That individual reported directly to the Northern Gold president, just as the Complainant's previous manager had done. There was no substantive change, therefore, in the managerial status of the person to whom the Complainant would have reported if she had accepted the new position. But as the Appeal Panel pointed out, even if there was a different reporting relationship, the Delegate concluded that it was a factor that was "not...particularly helpful" when evaluating whether the Complainant had been offered a "comparable" position (Reasons, p. R 11).
75. The Delegate did identify that there were differences in the level of responsibility between the two positions, and that a person performing Research and Development Technologist duties needed to possess superior qualifications and more impressive work experience credentials. However, these factors were not nearly as important to the Delegate, when determining whether the Quality Control Technician position that was offered was "comparable", as the significant difference in the salaries ordinarily payable in the two positions that the Delegate fixed upon in his analysis.
76. In my view, the Appeal Panel acted correctly when it decided the Delegate erred in law when he determined (Reasons, p. R 12) that "[f]or the purpose of ascertaining the existence of an actual disparity between the value assigned to these two positions, I am especially persuaded by differences in compensation." In this case, a reliance on differences in compensation to determine whether the position offered to the Complainant was "comparable" was inappropriate because there were no such differences present in the Complainant's case. Northern Gold did not offer an ordinary Quality Control Technician position to the Complainant. Instead, they offered her a special position that was similar, but one which paid her a salary commensurate to, and therefore "comparable" to, the salary she had earned as a Research and Development Technologist. The value assigned to a position as a Quality Control Technician could not, therefore, be analyzed in terms of what that meant in circumstances where other employees were performing work in that role. It had, rather, to be considered in light of what Northern Gold was prepared to contemplate with regard to the role when the Complainant was working in the position.
77. The Delegate did recognize the special nature of the position Northern Gold offered when the company agreed that the Complainant's work schedule would be the same as she had experienced while working in her former position, which meant that she would have avoided the shift work requirements a Quality Control Technician position normally entailed, for at least three months, and perhaps longer. For that reason, at least, the Delegate found that the new position was "comparable" for the purposes of section 54(3)(b). However, the Delegate did not apply the same recognition to the question of salary, which was the factor most prominent in persuading the Delegate that the two positions were not "comparable". For these reasons, I am of the view that the Delegate erred in law, because he reached a legal conclusion based on view of the facts which could not reasonably be entertained, namely, that there were differences

in the compensation paid for the two positions at issue in the Complaint, when in fact the compensation for the two positions was the same.

78. As I have decided the Complainant has shown no error by the Appeal Panel which warrants a reconsideration of the conclusions in the Appeal Decision regarding the application of section 54 to the relevant facts it is, as the Appeal Panel observed, unnecessary to decide whether the Complainant took all the steps that were reasonably necessary to mitigate her financial loss.
79. Like the Appeal Panel, however, I think it appropriate to provide some comments regarding this issue, in the event it is found that my treatment of the issues arising from the application of section 54 is determined to be incorrect.
80. I am not persuaded that the Appeal Panel erred when it decided the Complainant had failed to mitigate her damages when she declined to accept the Quality Control Technician position that was offered to her, at least until she secured other employment more consistent with her expectations.
81. The Delegate based his conclusion that the Complainant should not have been obliged to accept the new position by way of mitigation relying largely on the subjective perceptions of the Complainant. I have alluded earlier to the Complainant's submission that she lost trust in Northern Gold as the discussions regarding her employment proceeded at the end of her parental leave. The Delegate also said this of the Complainant (Reasons, p. R 15):
- ...her evidence with respect to her career path discloses a clear trajectory and I accept that maintaining this trajectory was important to her. I accept that Ms. Thejoisworo had legitimate concerns as to how the acceptance of the Quality Control Technician position might be perceived by potential employers, and that this might negatively impact her career prospects and future earnings.
82. What the Delegate did not do, however, is analyze whether the Complainant's views on the subject were objectively reasonable, given the Complainant's job prospects generally, and the other circumstances relating to the special conditions of employment Northern Gold was prepared to offer to her in the new position. As the Delegate did not perform this analysis, his conclusions regarding the issue of mitigation reveal error.
83. I am also of the opinion the Delegate's error regarding mitigation was compounded by his statement (Reasons, p. R 15) that the Complainant's concern regarding the perceptions of potential employers if she had accepted the Quality Control Technician position "was especially important given that Northern Gold's inability to guarantee a regular shift beyond three months made her eventual departure inevitable." I agree with the Appeal Panel's conclusion that this statement was highly speculative based on the totality of the evidence before the Delegate. There was, in fact, no evidence supporting a conclusion it was a certainty that if the Complainant accepted the new position she would have left her employment at Northern Gold no more than three months later.

ORDER

84. The Complainant's application is dismissed. Pursuant to section 116 of the *ESA*, the Tribunal's Appeal Decision, referenced as 2021 BCEST 35, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal