Citation: Marivic Bariquit (Re)
2022 BCEST 14

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Marivic Bariquit
(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

FILE No.: 2021/083

DATE OF DECISION: February 17, 2022

DECISION

SUBMISSIONS

Jonathon Braun	counsel for Marivic Bariquit
Sapinder Mund Gosal and Manjit Gosal	on their own behalf

OVERVIEW

1. Marivic Bariquit (the "Applicant") applies for a reconsideration of a decision of a member (the "Appeal Panel") of the Employment Standards Tribunal (the "Tribunal") dated September 1, 2021 (the "Appeal Decision").

2. The application is brought pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

3. This proceeding was commenced when the Applicant filed a complaint (the "Complaint") with the Employment Standards Branch (the "Branch") pursuant to section 74 of the *ESA* alleging that her former employers, Sapinder Mund Gosal ("Mrs. Gosal") and Manjit Gosal ("Mr. Gosal") (collectively, the "Employer"), contravened the statute when they misrepresented the Applicant's conditions of employment, failed to pay her all the wages, including overtime wages, that she asserted were owed to her, failed to pay her vacation pay, made unauthorized deductions from her wages, and failed to pay her compensation for length of service.

4. A delegate (the "Delegate") of the Director of Employment Standards (the "Director") investigated the Complaint and issued a determination dated March 18, 2021 (the "Determination").

5. The Determination found that the Complaint had been resolved and no further wages were owed to the Applicant.

6. The Applicant appealed the Determination pursuant to section 112 of the *ESA*. The Appeal Decision confirmed the Determination.

7. I have before me the Applicant's appeal form and application for reconsideration, her submissions in support of both, submissions from the Director and the Employer in the appeal proceedings and on this application, the Determination and its accompanying Reasons (the "Reasons"), the Appeal Decision, and the record the Director was obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*.

FACTS

8. Unless stated otherwise, I accept the facts as set out in the Delegate's Reasons, and in the Appeal Decision. What follows is a necessary summary.

9. The Applicant was employed by the Employer as an in-home caregiver from May 9, 2019, until August 29, 2019. She was employed under the Temporary Foreign Worker Program (the "TFWP"), after the Employer had obtained a positive Labour Market Impact Assessment ("LMIA") earlier in the year. The Applicant's

employment contract, dated May 3, 2019 (the "Contract"), stipulated that she would work full-time from 12:00 pm until 8:00 pm, Monday to Friday. Her duties were stated to include "childcare, meal preparation, general housekeeping and pet care."

10. The Applicant claimed, and the Employer acknowledged, that another work agreement called the "Live-in Caregiver Worker Agreement" (the "Agreement") was entered into by the parties when she commenced her employment on May 9, 2019. The Applicant contended that the Agreement required her to perform different duties, listed as "afterschool snacks, meal preparation, housekeeping and pet care." The Agreement was also accompanied by a detailed housekeeping description sheet. Every week, according to the Applicant, the Employer would assign her a lengthy, and burdensome, list of cleaning tasks she was expected to complete.

11. The Applicant asserted that the Employer had misrepresented the conditions under which she would be employed, in violation of the LMIA, section 8 of the *ESA*, and section 20(c) of the *Temporary Foreign Worker Protection Act* (the "*TFWPA*"), because the alterations to the Contract contained in the Agreement established that her primary duties were changed from "primarily childcare with some additional housekeeping duties" to "primarily a house cleaner".

12. A contravention of section 8 of the *ESA* occurs when an employer induces, influences, or persuades a person to become an employee by misrepresenting any of: the availability of a position, the type of work, the wages, or the conditions of employment. Section 20(c) of the *TFWPA* prohibits employers from misrepresenting employment opportunities, including respecting a position, duties, length of employment, wages and benefits, or other terms of employment.

13. In support of her argument, the Applicant referred to the National Occupational Classification ("NOC") code 4411 for the position of "nanny" noted on her LMIA, which identified, as some of its more relevant main duties, the supervision and care of children in the employer's own residence, the planning, preparing, and serving of the children's meals, other housekeeping duties, and the maintenance of a safe and healthy environment in the home. This, the Applicant submitted, was to be contrasted with the job responsibilities for NOC positions that did not appear in the LMIA. One of these was NOC code 4412, which referred to the position of "housekeeper", and included, as job responsibilities, housekeeping and other home management duties, the planning and preparing of meals, the possibility of serving meals and, possibly, the caring of children. Another was NOC code 6731, the code for "light duty cleaners", whose primary duties consisted of common housekeeping and cleaning chores, ensuring that beds were changed and made, and that towels and toiletries were made available. The Applicant argued that the duties imposed upon her in the Agreement were more akin to those identified in NOC codes 4412 and 6731 than the nanny duties stipulated in NOC code 4411 that were mandated in the LMIA.

14. She also contended that the changes incorporated in the Agreement made it impossible for her to endure continued employment with the Employer, as the housekeeping focus it created for her work was inconsistent with the childcare duties she believed she had been hired to discharge. Since the Applicant possessed an employer-specific work permit when her employment with the Employer ended, she could not work for any other employer in Canada until she obtained a new work permit. That did not occur until May 1, 2020. The make whole remedy the Applicant claimed for the misrepresentation pursuant to the *ESA* was an order that the Employer pay her all the wages she would have earned from August 30, 2019,

the last day she was employed by the Employer, until April 30, 2020, which was the last day she was unemployed before obtaining her new work permit.

15. The Applicant alleged, too, that while her Contract stated she was to work 40 hours a week, she worked 2.5 hours longer each day, for a total, weekly, of 52.5 hours. She also claimed that she had been obliged to work several days on weekends, which were her days off. The Applicant asserted that she was not paid for these extra hours of work, nor was she provided any wage statements. She also stated that any timesheets produced by the Employer showing hours of work to the contrary were signed by her under duress.

16. The Applicant alleged that the Employer insisted she pay $100.00 bi-weekly for room and board, in contravention of the Contract, which stated that the Employer would provide accommodation and meals "at no cost". The Applicant informed the Delegate she had paid $600.00 to the Employer for room and board while employed, and she argued that these payments constituted unauthorized deductions from her wages.

17. The Applicant claimed, in addition, that the Employer failed to pay her all the vacation pay she was owed.

18. Initially, the Applicant's Complaint included a claim for compensation for length of service. That claim was later withdrawn.

19. The Employer submitted that the Agreement was made because it had become obvious shortly after the Applicant commenced to work that she lacked the experience to perform the childcare, housekeeping, and cooking duties set out in the Contract. The Employer asserted that the parties created the list of duties in the Agreement together, and that it was made clear to the Applicant that her duties were limited to cleaning the kitchen after dinner, preparing snacks for the Employer's teenage children, and ensuring that their uniforms, clothing, and bedrooms were in order. For the Employer, the Agreement did not alter the overall job description and conditions of employment the parties had accepted originally, and that the duties expressed in the Agreement constituted further aspects of "childcare". Further, since the Applicant knew, before she commenced to work for the Employer, that the Employer's children were teenagers, she must have known that her childcare duties would not be the same as would have been required if the children had been younger.

20. The Employer denied that the Applicant was made to work overtime hours, or that she was required to pay for room and board. The Employer argued that the notes produced by the Applicant to the contrary were fabricated. The Employer stated that on the two specific occasions the Applicant was asked to work on a weekend the Employer paid her for those hours. The Employer also rejected the Applicant's claim that amounts of vacation pay remained unpaid.

21. The Delegate determined that the Employer did not misrepresent the Applicant's employment duties, and so no contravention of section 8 of the *ESA* had occurred. The Delegate concluded that while the Applicant was not performing all the duties associated with an NOC code 4411 nanny position, and her work included some of the duties of an NOC code 4412 housekeeper and an NOC code 6731 light duty cleaner, her primary duties remained those more closely associated with a nanny position responsible for childcare.

22. The Delegate dismissed the Applicant's claim based on section 20(c) of the *TFWPA* because this provision of the legislation did not come into effect until after the Applicant's employment with the Employer came to an end, and the provision was not made to apply retroactively.

23. The Delegate decided that neither the Employer's timesheets nor the Applicant's personal records could be solely relied upon for the purpose of determining the Applicant's hours of work. That said, the Delegate concluded that the Employer's evidence on this point was more reliable as their timesheets had been produced and signed by both parties prior to the end of the Applicant's employment. The Delegate decided that the Applicant's hours of work were as stated in the Contract. In effect, the Delegate concluded that the Applicant's claim for overtime wages had not been established, with one exception. That exception related to work on two weekend days the Applicant performed, which the Employer acknowledged, and for which the Delegate determined the Applicant had not been paid. However, as the Employer had made a voluntary payment to the Branch in the amount found to have been unpaid, the Delegate decided that no overtime wages were owed.

24. The Delegate also found that the Applicant was owed vacation pay. However, the voluntary payment made by the Employer was sufficient to satisfy this aspect of the Applicant's claim as well.

25. Finally, the Delegate determined that the Applicant's evidence did not establish that she had made payments to the Employer for room and board, and so no unauthorized deductions had been made from the Applicant's wages on this basis. The Delegate decided that the proofs the Applicant provided of cash withdrawals she made from her bank account to pay for room and board were inconclusive, as the withdrawals could just as easily have been sums earmarked to pay for other expenses including, for example, the costs associated with the Applicant's frequent absences from the Employer's residence on weekends. In addition, the Delegate found it telling that the total of the amounts the Applicant said she had paid to the Employer for room and board was insufficient to fully pay what the Applicant asserted the Employer had demanded for room and board during the period of her employment, thus begging the question why the Employer would neglect to try to collect the remaining amounts that were unpaid. Finally, the Delegate dismissed as insufficiently probative the Applicant's evidence that the Employer had charged a previous employee for room and board. On this point, the Delegate noted that the employment agreement involving the previous employee specifically provided that the employee would be required to pay for room and board.

26. The Applicant's appeal sought multiple remedial orders based on assertions that the Delegate erred in law and failed to observe the principles of natural justice in making the Determination. The Appeal Panel declined to find that the Applicant had established her case on either ground. The Determination was confirmed.

ISSUES

27. 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

28. The Applicant acknowledges that the reconsideration power in the *ESA* is discretionary. She submits, however, that reconsideration is appropriate in this case because the Appeal Panel mischaracterized several aspects of the Determination. This, in turn, led the Appeal Panel to commit legal errors, resulting in an outcome that was unjust.

29. The Applicant challenges the Appeal Panel's conclusion that the Delegate found the Applicant had failed to establish important aspects of her claims on a balance of probabilities. The Applicant alleges this was an error because there is no evidence the Delegate assessed the evidence having regard to this standard. Instead, the Applicant asserts that there are multiple instances in the Reasons where the Delegate required "unequivocal proof" of the Applicant's claims – a much higher burden. The Applicant submits the Appeal Panel construed the Delegate's findings having regard to a standard of proof the Delegate did not apply.

30. The Applicant asserts further that the Reasons reveal the Delegate relied on only a part of the NOC code 4412 for "housekeeper" to base a conclusion that the Applicant was not asked to work in that role, when a complete reading of that code should have established that the Applicant did, indeed, fall within its definition. The Applicant argued, in the appeal, that the Delegate's narrow interpretation was false and misleading. The Applicant submits that the Appeal Panel did not address this point, and its failure to consider the Delegate's error was "fatal" to the Appeal Panel's "overall assessment of the Determination."

31. The Applicant asserts that the factual conclusions drawn by the Delegate regarding the substantive nature of the duties the Applicant was required to perform cannot be reasonably entertained because the Delegate did not conduct an adequate analysis of the government policies supporting the TFWP, which resulted in a failure on the part of the Delegate to give sufficient attention to the context in which the Complaint arose. The Applicant says that the Appeal Panel erred in neglecting to address how the policy concerns in the TFWP designed to prevent the exploitation of persons like the Applicant due to misrepresentations regarding the nature of their work should have informed the conclusions the Delegate needed to reach in the Determination.

32. The Applicant submits that the Appeal Panel erred in finding that the Applicant was accorded an opportunity to respond to all the Employer's positions during the investigation of the Complaint. The Applicant points to the Delegate's reliance on submissions offered by the Employer contradicting the veracity of evidence of notes supplied by the Applicant for the purpose of showing that the Employer had failed to pay her for overtime work she had performed. The Applicant says the Delegate never shared the Employer's submission with her prior to the issuance of the Determination, and so she had no opportunity to refute it.

33. The Applicant argues the Appeal Panel erred in failing to decide that the Delegate misapplied a principle of general law when the Delegate preferred the evidence of the Employer and determined that the Applicant was not entitled to all the overtime wages the Applicant claimed she was owed. The Applicant asserts that the Delegate's conclusions were flawed because the Delegate did not conduct a proper assessment of the credibility of the parties and their evidence when considering this issue. The Applicant states in addition that the Appeal Panel fell into error when it added comments of its own relating to the

evidence tendered by the Applicant regarding overtime, and utilized this supplementary reasoning as a further justification for the Delegate's decision to deny a part of the Applicant's claim.

34. Regarding the Applicant's claim that the Employer made unauthorized deductions from her wages when the Employer required the Applicant to pay for room and board, the Applicant contends that the Appeal Panel erred when it did not address with sufficient particularity the specific arguments made by the Applicant in the appeal. The Applicant argues that the Appeal Panel should have found that the Delegate's conclusions relating to the evidence on this point were perverse, that the Delegate failed to conduct an adequate credibility assessment, and that the Delegate engaged in speculative reasoning in support of her conclusion.

35. The Applicant contends that, in the appeal proceedings, the Director failed to address several of the arguments she submitted to the Tribunal. The Applicant referenced this failure in its reply submission in the appeal, and argued that the Appeal Panel should have drawn an adverse inference. The Applicant says, however, that there is no indication the Appeal Panel considered its submission on this point.

36. The Applicant asserts that the Appeal Panel erred when it declined to find that mandatory interest was payable by the Employer on the sums for overtime wages and vacation pay the Delegate found the Employer had not paid in a timely way, and which the Employer only paid to the Branch later, albeit on a voluntary basis, prior to the issuance of the Determination. The Applicant claims not only that the Delegate's failure to assess, and impose, mandatory interest "raises serious questions on the accuracy, reliability, and neutrality" of the rest of the Determination, but that the Appeal Panel's error "casts doubt" on the Appeal Decision.

37. The Applicant submits that the Appeal Panel erred when it decided the Applicant had no right to challenge the absence in the Determination of an order requiring the Employer to pay mandatory administrative penalties, once the Delegate had concluded the Employer had failed to pay the Applicant sums owed in respect of vacation pay and overtime wages, and had failed to provide vacation leave to the Applicant. The Applicant argues that a conclusion the Tribunal cannot correct a Delegate's failure to enforce the mandatory penalty provisions in the *ESA* means that the imposition of penalties becomes a matter of the exercise of the Director's discretion, and any Tribunal oversight of the Director's decisions regarding the imposition of penalties is rendered nugatory.

38. On this point, the Applicant asserts, again, that the Delegate's failure to impose mandatory administrative penalties raises "serious questions" as to the validity of the Determination as a whole. Moreover, the Applicant contends that the discussions between the Delegate and the Employer that resulted in a voluntary payment by the Employer to the Branch of amounts the Delegate suggested were owed to the Applicant – which discussions the Applicant says were held in "secret" because they were not disclosed to the Applicant prior to the issuance of the Determination – and the fact that the payment was "seemingly" for the purpose of avoiding mandatory penalties, raises a reasonable apprehension of bias on the part of the Delegate. The inference to be drawn from this submission is that the Appeal Panel should have recognized these flaws in the proceedings before the Delegate, and addressed them in the Appeal Decision.

39. The Applicant challenges the Appeal Panel's dismissal of her argument that the investigation was procedurally unfair because the Delegate "demonstrated inadequate knowledge of the legislation over which she holds jurisdiction." The Applicant submits that the presumption of regularity of the decisions of delegates of the Director is not absolute, and may be rebutted in a proper case. The Applicant alleges that the multiplicity of the Delegate's errors must lead to the conclusion that the proceedings resulting in the Determination were in no way regular, constituted a contravention of a purpose of the *ESA* set out in section 2(d) that its provisions should be applied to ensure a fair and efficient procedure for resolving disputes, and raise a reasonable apprehension of bias.

40. The Applicant posits that errors she has noted in the Determination "raise concerns about the fundamental fairness of the Employment Standards Branch complaint process." She submits, too, that the Appeal Decision is significant because its confirmation of the Determination will prejudice migrant workers like the Applicant, whose working circumstances often render them vulnerable to being exploited by their employers. In particular, the Applicant argues that the Appeal Decision removes all meaning from section 8 of the *ESA*, the misrepresentation provision, given the facts of the Applicant's case. Instead, the Applicant says the Appeal Decision supports the right of an employer to bring an employee to Canada based on the promise of their performing certain job duties, and then provide them with new job duties on their first day of work in this country.

41. The Applicant argues that the Appeal Decision should be cancelled, and that the Tribunal make the remedial orders it sought in the appeal, namely:

- An order that funds owed to the Applicant as compensation for misrepresentation pursuant to sections 8(b) and (d) of the *ESA* be calculated;
- An order that funds owed to the Applicant for unpaid overtime wages be re-calculated;
- An order that funds owed to the Applicant as compensation for unauthorized deductions be calculated;
- An order that a mandatory penalty be imposed for each of the Employer's contraventions of the *ESA* or the *Employment Standards Regulation* (the "*Regulation*");
- An order that mandatory interest be applied to wages owed.

42. The Director has delivered a submission on this application.

43. Regarding the Applicant's claim that interest should have been calculated on the voluntary payment for wages and vacation pay made by the Employer, the Director acknowledges that section 88 of the *ESA* contemplates such an award. However, the Director points out that purposes of the legislation include providing a fair and efficient process for resolving disputes and promoting the fair treatment of employees and employers. The Director says that, to that end, the Delegate "facilitated" a voluntary payment by the Employer to the Applicant of wages the Applicant claimed she was owed "as a non-punitive measure that encouraged open communication and led to the efficient payment of wages." The Director says further that the Applicant never indicated she was pursuing a section 88 award during the investigation of the Complaint.

44. The Director adds that the "long-standing practice is to only award interest when a Determination is issued ordering wages to be paid." The Director says that no interest was assessed because the Employer paid the wages voluntarily, and if the Tribunal were to refer the matter back for a calculation of interest it "would not only undo the fair and efficient resolution process provided by the Delegate, but it would also be directly contrary to the purposes of the [*ESA*] and the Director's long-standing practice."

45. As for the other grounds raised by the Applicant in her application, the Director says that reconsideration should be denied because the Applicant has merely re-argued matters that it raised, unsuccessfully, in the appeal.

46. The Employer has also delivered a submission. As with the Employer's submission in the appeal, it re-states the Employer's version of the facts in support of the conclusions drawn by the Delegate, and in response to what the Employer argues are the mis-characterizations asserted by the Applicant.

47. The Applicant has delivered a submission by way of final reply. In it, the Applicant observes that the Director has provided no reason for the fact that interest was not assessed on the wages the Employer voluntary paid during the Delegate's investigation. The Applicant says further that the voluntary payment was significantly less than the amount the Applicant claimed was owed, and that the Delegate's arranging the payment occurred without the knowledge of the Applicant, in contravention of a purpose of the *ESA* identified in section 2(c) that the statute should encourage "open communication" between employers and employees.

48. The Applicant also disputes the validity of the Director's practice not to order an interest payment where no wages are found to be payable in a determination. The Applicant says that if wages were owed, as she says it is clear they were in this instance, section 88 makes interest payable whether wages are ordered to be paid in a determination or not. The Applicant says further that any "practice" to the contrary is unlawful and unfair.

49. The Applicant challenges the Director's submission that since the Applicant did not request a payment of interest during the Delegate's investigation, it was not an issue that was thought to be in dispute. The Applicant argues that her entitlement to section 88 interest was not something she was obliged to identify explicitly in the Complaint before pursuing it as a remedy. Rather, the right to be paid interest was an automatic consequence of the Employer's failure to pay the Applicant all her wages. The Applicant says that the Director's position on this point is "shocking", it again raises questions regarding the "lack of qualifications" of the Delegate and why it would be "fundamentally unfair" to apply a "presumption of regularity" in this case.

50. The Applicant's reply submission objects to the rhetoric in the Employer's submission, and argues that the Employer mischaracterizes many of her positions set out in the application. The Applicant re-argues several points made in the application, in response to specific challenges raised in the Employer's submission. The Applicant also requests that if the application results in an order that the Complaint be referred back to the Director, that it be considered by a different Delegate.

ANALYSIS

51. 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, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

52. 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.

53. 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.

54. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Re Milan Holdings*, BC EST #D313/98). 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.

55. 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).

56. 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.

57. I am persuaded that a reconsideration of the Appeal Decision is warranted because the Applicant has raised important matters of law and procedure relating not only to the Complaint, but also regarding the application of provisions of the *ESA* in proceedings involving the Director more generally.

58. I turn, therefore, to an analysis of the issues raised in the application on their merits.

Did the Appeal Panel err when it failed to conclude that the Delegate had applied an incorrect burden of proof?

59. The Applicant argues that "multiple references" in the Reasons to the Applicant's failure to provide "unequivocal proof" of certain facts means that the Delegate misapplied the relevant evidentiary standard to the consideration of the issues raised in the Complaint – a balance of probabilities – and that it was an error for the Appeal Panel to decline to provide a remedy.

60. I decline to accept the Applicant's submission.

61. There are, to be sure, instances in the Reasons where the Delegate states that evidence tendered by the Applicant does not constitute "unequivocal proof". One such instance occurs at R15 of the Reasons, in reference to information provided by the Applicant that she withdrew cash from her bank account to pay for room and board.

62. While the Delegate's description of the probative value of the Applicant's evidence on this point may have been inapt, a reading of the remainder of the Delegate's Reasons nowhere supports the conclusion asserted by the Applicant that the Delegate held the Applicant to an evidentiary burden even more onerous than the standard of proof beyond a reasonable doubt that is required in criminal cases.

63. Another instance where the Delegate referred to "unequivocal proof" occurred at R6 of the Reasons, in the context of the Delegate's finding that the Applicant had provided evidence the Employer could not refute that the Employer had failed to pay the Applicant overtime wages. The Delegate's use of the phrase on this occasion had nothing to do with the burden of proof. The Delegate's comment merely described the overwhelming quality of the evidence the Applicant had tendered on the point.

64. In my view, a fair reading of the Delegate's Reasons reveals the care with which the Delegate weighed in the balance the information provided by both parties regarding the relevant issues. But one example of the method of analysis employed by the Delegate that is pertinent to a consideration of the burden of proof applied by the Delegate appears at R13 of the Reasons, when the Delegate discussed whether the Applicant was owed overtime wages. The Delegate said this:

> Given the Employer's time sheets and Ms. Bariquit's personal records are each disputed by the another [*sic*], it is my finding neither can be solely relied upon as an accurate record of the hours worked by Ms. Bariquit. If I am to disregard the record of hours provided by the Employer on the basis the Complainant claimed they were false, then I am equally obliged to disregard the records provided by the Complainant, on the basis the Employer claimed they are fabricated. With that said, I think it is notable how the Employer demonstrated the Complainant's records could have been easily altered and fabricated after the fact where, alternatively, the Employer's records had clearly been produced and signed by both parties prior to Ms. Bariquit's employment even ending. Accordingly, should I be required to accept one version of the records based on the credibility of the parties, I prefer the evidence submitted by the Employer. In addition to Ms. Bariquit's employment contract which provided Ms. Bariquit's hours of work to be 12:00 PM to 8:00 PM, Monday through Friday, it is my finding Ms. Bariquit worked 8 hours a day, 40 hours a week.

65. Apart from the disposition of the substantive issue the Delegate was discussing – whether the Applicant typically worked an average of 52.5 hours per week, and not the 40 hours contemplated in her Contract – this excerpt demonstrates that the Delegate was alive to the principle, critical to the necessity for an application of a burden of proof based on a balance of probabilities, that in circumstances where the probative value of the evidence tendered by both sides in a dispute is equal, the claim of the proponent in the case, in this instance the Applicant, must fail. Here, the Delegate made it plain that it was only if she were *required* to accept one party's version over the other would she have accepted the Employer's version. The inference to be drawn from the Delegate's formulation is that such a finding was unnecessary because the evidence of the Applicant was insufficient to tip the balance in her favour. Such a mode of analysis is consistent with an appreciation that the appropriate burden of proof was proof on a balance of probabilities, and not a different, even more onerous, burden.

Did the Appeal Panel err when it confirmed the Delegate's conclusions the Employer had not contravened section 8 of the ESA?

66. I decline to accept the Applicant's submission that the Delegate misread the NOC code 4412 for "housekeeper" and misapplied its language in a way that tainted her conclusion the Employer had not misrepresented the type of work the Applicant was meant to perform and the conditions of her employment. Instead, a close reading of the Reasons establishes that the Delegate was acutely aware of the subtle distinctions in the types of work set out in the various NOC code descriptions relevant to the Complaint.

67. The Delegate, at R5 of the Reasons, made specific reference to the Applicant's argument that the duties she was asked to perform when she arrived at the Employer's residence more closely resembled the duties set out in NOC code 4412 for a "housekeeper", as they included "performing housekeeping and other home management duties under general direction of employer; planning and preparing meals independently or with employer, and possibly serving meals; and possibly caring for children." The Reasons further reveal, at R12, that the Delegate accepted the Applicant did not perform all the duties noted on her LMIA relating to the NOC code 4411 position of "nanny" and, conversely, she did perform some of the duties appearing in NOC code 4412 relating to the position of "housekeeper" and NOC code 6731 describing the position of "light duty cleaner".

68. That the Delegate was cognizant of the wording of NOC code 4412 is also established by the fact the Delegate took pains to explain, again at R12, how another facet of that code's job description, that of "home support worker", was also inapplicable. In the same way, the Delegate concluded, on balance, that the Applicant's work was not sufficiently akin to that of a "light duty cleaner" as described in NOC code 6731, because the position referred to a person employed to “clean the lobbies, hallways, offices and rooms of hotels, motels, resorts, hospitals, schools, office and other buildings, and private residence." The Delegate acknowledged that the duties for which the Applicant was hired by the Employer could be construed to include the cleaning of their private residence, thereby engaging a part of the wording of NOC code 6731, but they also could be characterized as the "household duties" noted to be an aspect of the "nanny" position described in NOC code 4411.

69. Since there was a degree of overlap in the duties described in the various NOC codes for positions the parties deemed were relevant for the purposes of determining the Complaint, it was necessary that the Delegate decide which NOC code best described the substantive character of the work the Employer hired

the Applicant to perform and whether that work was aligned with the duties set out in the LMIA. Weighing the evidence tendered regarding the work the Applicant actually performed, the Delegate concluded that while the Applicant did complete tasks that fell withing the job descriptions noted in NOC code 4412 for a "housekeeper", and NOC code 6731 for a "light duty cleaner", her primary responsibility was to provide the "childcare" that was the focus of the "nanny" role set out in NOC code 4411, to which these other tasks must be deemed to be supportive, but also subordinate. As stated by the Delegate, again at R12 of the Reasons, "[c]hildcare can take many different forms". Later, on the same page, the Delegate said this:

> Despite Ms. Bariquit not believing cleaning and meal preparation to be components of caring for a child, it is my finding the Employer did not misrepresent the type of work she would be performing and the conditions of her employment. While Ms. Bariquit may not have been directly tending to and supervising children during her Employment for Mr. and Ms. Gosal, she was helping to maintain a safe and healthy environment in the home; planning preparing and serving meals; and performing other housekeeping duties – these of which are duties associated directly with the NOC code "4411 – nanny"….

70. In reaching this conclusion, the Delegate accepted the Employer's interpretation regarding the substance of the working reality experienced by the Applicant while she remained in their employ. The Delegate described that reality in this way, at R11 of the Reasons:

> …while the Employer acknowledged the Contract stated her duties were to "assist with childcare, meal preparation, general housekeeping and pet care," whereas the Agreement provided her responsibilities to include "afterschool snacks, meal prep, housekeeping and pet care," it was the Employer's position this did not mean "childcare" was removed from Ms. Bariquit's job description. Rather, according to the Employer, preparing afterschool snacks, meal preparation and housekeeping were all part of childcare duties. As Ms. Bariquit was aware, prior to accepting the employment position, the Employer's children were teenagers and, therefore, not in need of the same care a baby or toddler would require. As such, claimed the Employer, Ms. Bariquit was cognizant of the fact her "childcare" duties would consist of things like preparing them food and cleaning their rooms or school uniforms. While the space on the LMIA only provided room for a brief description of what Ms. Bariquit's responsibilities would include, the Employer claimed the Agreement simply allowed for a more detailed breakdown of what her duties (including childcare) would include; this being afterschool snack preparation, meal preparation, and housekeeping.

71. In my view, the Delegate's conclusions on the issue of misrepresentation were consistent with a view of the evidence, and a reading of the applicable NOC codes, that was reasonable in the circumstances, and so it was right for the Appeal Panel to decline to interfere with them.

72. I have decided I must also reject the Applicant's submission that the Determination, and therefore the Appeal Decision, are flawed because they failed to pay sufficient deference to the policy of the TFWP that seeks to protect persons like the Applicant from exploitation by people like the Employer in the form of misrepresentations as to the nature of the work that will be performed by vulnerable foreign workers. The Delegate's Reasons make it clear the Delegate was aware it is a principal policy goal of the TFWP, and also of section 8 of the *ESA* for that matter, that employers refrain from this sort of prohibited activity. What the Applicant's submission asserts, in substance, is that because the Delegate declined to find that the Employer had contravened section 8 of the *ESA*, it must follow, of necessity, that the Delegate failed to take adequate note of the policy considerations underlying the provisions of the TFWP applicable to

the Complaint when it came time for the Delegate to make her findings of fact in support of the Determination. In my view, the dismissal of the Complaint, standing alone, is no basis for a conclusion that the Delegate ignored the policy considerations incorporated in the TFWP. Nor am I persuaded that it was necessary for the Delegate to make specific reference to those policy considerations to validate her factual conclusions and the order contained in the Determination.

Did the Appeal Panel err when it decided the Applicant was afforded an opportunity to respond to the Employer's submissions?

73. The Applicant submits it was an error for the Appeal Panel to find that the Delegate provided the Applicant with an adequate opportunity to respond to the Employer's relevant positions expressed during the investigation. In particular, the Applicant argues the Appeal Panel should have decided that it was a fatal error of natural justice on the part of the Delegate not to advise the Applicant that the Employer had provided a submission arguing that the Applicant's evidence of her overtime hours of work, consisting of notes on her phone, could be fabricated. For this reason, indeed, the Applicant says that the statement of the Appeal Panel (at paragraph 50 of the Appeal Decision) that the Applicant "had many opportunities … to respond to the Employer's position" is blatantly false.

74. I decline to accept the Applicant's submission.

75. As noted in the passage from R13 of the Delegate's Reasons quoted earlier regarding the burden of proof to be applied to resolve the Complaint, the Delegate stated that only if she were "required to accept one version of the records based on the credibility of the parties" concerning the issue of overtime would the Employer's showing how the Applicant's notes of her overtime hours of work on her phone could have been falsified have persuaded her to prefer the evidence of the Employer. Earlier in the passage, however, the Delegate made it clear that neither the Employer's timesheets nor the Applicants personal records could be solely relied upon as accurate. Accordingly, the Delegate decided that the probative value of each party's proof was the same, and since the burden of proof fell upon the Applicant, this aspect of the Applicant's claim failed. The reference to the Employer's providing information about a way the Applicant's records might have been falsified was, therefore, unnecessary having regard to the decision the Delegate made regarding the issue.

76. I am also of the view that the statement from the Appeal Decision at paragraph 73 noted above is, in substance, an accurate observation. From the outset of the Delegate's investigation, it was made clear to the Applicant the Employer was alleging that several of the Applicant's assertions in support of her claims were fabricated. It was also clear that the evidence tendered by the parties regarding many important aspects of the Complaint was in conflict. The record reveals that the Applicant had multiple opportunities before the Determination was issued to demonstrate that her proofs were more reliable than those offered by the Employer.

Did the Appeal Panel err when it declined to find the Delegate failed to conduct an adequate credibility assessment?

77. The Applicant submits the evidence the parties tendered during the investigation was often in conflict, yet the Delegate did not refer to any of the usual factors applied to assess the reliability of the evidence,

which the Applicant contends was a failure to provide adequate reasons. The Applicant says further that the Appeal Panel failed to consider the Applicant's argument on this point in the appeal.

78. Regarding the issue of overtime work, the Applicant argues that the Delegate weighed the conflicting time records against each other and disregarded them. I disagree. The Delegate said that the records of neither party could be solely relied upon, by which I infer the Delegate meant the probative value of the evidence was evenly balanced because each party was saying the other party's records were fraudulent.

79. The Applicant then says the Delegate should have conducted, and set out in her Reasons, an examination of the "inconsistencies, internal contradictions, and inaccuracies" in the evidence provided by the Employer.

80. In fact, the Delegate did allude to other factors contributing to her conclusion that the Applicant had failed to establish this aspect of her claim. For example, the Delegate noted, at R13 of her Reasons, the evidence that, prior to her employment coming to an end, the Applicant signed the timesheets verifying her hours of work the Employer later relied upon during the investigation. An inference it was reasonable for the Delegate to draw from this evidence is that the Applicant agreed with the statements of hours worked contained in the timesheets she signed.

81. Later, on the same page of her Reasons, the Delegate observed that the only evidence offered by the Applicant to support her claim to disputed overtime was her personal record of her hours worked, which the Delegate had found to be no more persuasive than the conflicting timesheets provided by the Employer. In re-stating this conclusion here, the Delegate did refer to the Employer's suggesting how such records could be altered, or concocted, which one must assume to be axiomatic for many types of such records. However, the Delegate also provided an additional reason why the Applicant's evidence was insufficient: the parties were in frequent text-message communication with each other throughout the employment relationship, yet no messages relating to disputed overtime were ever produced by the Applicant during the investigation, which one would have expected the Applicant to have delivered if there had been a dispute about her hours worked.

82. The Applicant argues that the Appeal Panel should have found that the Determination was fatally flawed because the Delegate's Reasons focused on those aspects of the evidence that supported the Delegate's conclusions, and failed to account properly for different inferences the Applicant argues the Delegate should have drawn from other evidence that was before her. In essence, the Applicant is asserting that the absence in the Delegate's Reasons of a discussion of all the "inconsistencies, internal contradictions, and inaccuracies" in the Employer's submissions offered up by the Applicant means that inadequate reasons were provided, and the Delegate's factual findings prejudicial to the Applicant cannot be reasonably entertained, and so they are perverse or inexplicable.

83. Again, I disagree.

84. It is not of necessity an error if a delegate does not allude to, or analyze, all the evidence the parties tender in an investigation, nor must one conclude that a delegate has ignored, or failed to properly assess, evidence if it is not specifically referred to in the delegate's reasons (see, for example, *Re Gutierrez*, BC EST # D108/05).

85. The following comments, made in the Tribunal's decision in *Re Renshaw Travel Ltd.,* BC EST # D050/08, at paragraph 34, albeit in the context of an allegation that a delegate was biased, are also, I believe, apposite in the circumstances now presented:

> Under the *Act*, if an investigation is conducted, findings of fact must be made and, as a practical reality, those findings will be adverse to the interests of one of the parties. In making findings of fact, the Director may accept some evidence as cogent and disregard other evidence, even if that evidence comes from the same source. Accepting some of the information provided by Renshaw does not require the Director to accept all of it. The converse is also true. The reality is that a fair and reasonable consideration of the information provided by any party may result in some of that information being accepted and some rejected. That reality is part of the complaint process, but it does not make the delegate involved in the process bias against any party because of it.

86. It is also trite to say that 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. Put another way, an appellant will only succeed in challenging a delegate's findings of fact if they establish that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* (1998) 62 BCLR (3d) 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area #11 – Richmond/Delta)* [2000] BCJ No. 331 (QL)).

87. In this case, as I have set out earlier, there was evidence the Delegate alluded to in her Reasons on which the Delegate could conclude, reasonably, that the Applicant had not established the facts necessary to prove her entire claim for overtime wages. The fact that the Applicant alleges the Delegate should have weighed the evidence before her differently, or drawn different conclusions, is of no moment. As there was some evidence that supported the Delegate's conclusions, those conclusions were not perverse or inexplicable. It follows that the Appeal Panel did not err when it declined to give effect to this aspect of the Applicant's appeal.

88. I also decline to accept the Applicant's argument that the Appeal Panel acted improperly in making note of an aspect of the evidentiary record relating to the Applicant's claim for overtime that the Delegate referred to in her Reasons, but not in her analysis, as further support for the Delegate's finding that the Applicant's personal record of hours worked were less reliable and therefore insufficient to establish her claim. The Applicant refers to paragraph 43 of the Appeal Decision, where the Appeal Panel says this:

> While it is not referred to in her analysis, I note that at page R. 6 of the Determination, the delegate considered what the Employee asserted was a contemporaneous record of the hours she worked for the Employer as “new evidence,” stating that it had not been previously submitted due to an error by her previous representative. The Employee submitted screenshots of the edit history of those notes, showing that they had last been edited on October 10, 2019 (i.e. about six weeks after the end of her employment). In light of the editing, it was open to the delegate to

> find the Employee's notes less reliable and reject her contention that they were made contemporaneously.

89. In my view, it was not improper for the Appeal Panel to note this reference to this part of the evidence by the Delegate herself, and to infer that the Delegate must therefore have considered it when determining the degree to which the Applicant's evidence was probative enough to establish her claim for overtime, even if the Delegate did not refer to this aspect of the evidence expressly in her analysis of the question. In any event, as I have indicated, the Delegate did allude to other evidence in her analysis sufficient to ground her conclusion the Applicant had not established all aspects of her claim for overtime.

Did the Appeal Panel err when it declined to decide the Delegate failed to find that the Employer had made unauthorized deductions?

90. The Applicant submits that the Appeal Panel did not address her argument that her non-payment of room and board for four weeks during her employment was not conclusive evidence that no such payments were made at all.

91. While this evidence may not have been conclusive on the point, the fact the Applicant alleged she paid for room and board for some weeks, but not for others, without providing any explanation for the failure to pay for all the weeks during her employment was, in my view, a reason the Delegate could decide that the weight of the Applicant's bare assertion that she did pay some room and board, and made withdrawals from her bank account to do so, was insufficient to meet the burden of proof resting on her to establish that unauthorized deductions from her wages had been made.

92. The Applicant argues further that the Delegate erred by not conducting an adequate credibility assessment of the evidence relating to the issue of unauthorized deductions. I disagree. It is clear from the Delegate's discussion of the issue at R15 and R16 of the Reasons that the Delegate weighed the evidence the parties tendered. The evidence on the point was limited. The Applicant asserted she paid the Employer in cash for room and board, and she provided proof that she made cash withdrawals from her bank account. She also referred to the fact that the Employer had charged a previous employee for room and board, and to the fact that she had told third parties she was required to pay for room and board.

93. The Employer denied that the Applicant was required to pay for room and board, or that any such payments had been received. The Employer acknowledged that its previous employee had been charged room and board because her employment contract specifically called for it. Since the Applicant's contract did not contain such a requirement, and the TFWP forbade it, the Employer says no room and board was charged.

94. In the end, the Applicant provided no direct evidence that she made payments for room and board, apart from her bald verbal assertion that she had done so, which was met with the bald verbal assertion of the Employer that no such payments had been made. Again, given that the burden of proof rested on the Applicant, the Delegate concluded that the evidence was simply insufficient to establish the Applicant's claim on the point. In the circumstances, I am not persuaded that the Delegate's finding was perverse or inexplicable.

95. The Applicant states here, and elsewhere in her submissions, that the Delegate should have resolved the evidentiary stand-off in favour of the Applicant because the Employer's statements were less credible. The Applicant points to the Employers having "lied" about the Applicant not working overtime on at least two occasions, and their providing the Applicant with wage statements that were incorrect regarding the missing overtime.

96. The Delegate made no finding that the Employer had lied. Instead, the Delegate found that the Employer had been mistaken regarding some of the contested overtime hours, and they had been forthright in acknowledging that the Applicant had worked some overtime hours, once they reviewed their relevant text messages. The Employer asserted it had paid for those overtime hours in cash, but the Delegate declined to find that this was established, for the same reason the Delegate declined to accept that the Applicant had paid for room and board: there was no direct evidence, apart from the verbal assertions of the parties, that the cash payments had been made.

97. The Applicant also argues that the Delegate engaged in speculation when she stated that the cash withdrawals the Applicant made, allegedly to pay for room and board charged by the Employer, were utilized to pay for accommodations elsewhere during her days off on weekends. In my view, the Delegate's comments are to be construed differently. The Delegate did not find that the cash withdrawals were for accommodations elsewhere on weekends. Instead, the Delegate stated, at R15 of the Reasons, that the withdrawals "could have been for just about anything." This statement was accurate, as the Applicant had provided no evidence that the cash withdrawn was actually paid to the Employer, either for room and board specifically, or at all. The Delegate's comment that the withdrawals could have been employed to pay for the Applicant's accommodations elsewhere during her days off on weekends was simply an example of one type of alternative expenditure that was plausible, given the known facts.

Should the Appeal Panel have drawn an adverse inference against the Director?

98. I am not persuaded by the Applicant's argument that since the Director did not engage with several of the submissions of the Applicant in the appeal, the Appeal Panel should have drawn an adverse inference.

99. The mere fact the Director did not respond to every argument contained in the Applicant's submission does not compel a finding that the Director must be deemed to have conceded on the points the Director did not confront head-on. Arguments relating to the drawing of adverse inferences normally arise in trials, where a party fails to cross-examine a witness on a vital point, and later seeks to adduce testimony that contradicts what the witness has said (see, for example, *R. v. O.G.K.,* 1994 CanLII 8742 (BC CA)). In the circumstances in which the Applicant has alluded to the practice here, I do not accept that her position articulates a binding rule of law, and the Applicant has provided no authority in support of it.

Did the Appeal Panel err when it declined to find that mandatory interest was payable by the Employer on the sums for overtime wages and vacation pay found to be owed by the Delegate?

100. The Delegate determined that the Employer owed the Applicant $461.68 for wages, consisting of $87.00 in overtime wages, and $374.68 for vacation pay (R14 and R15 of the Reasons). Since the Employer made a voluntary payment of $461.68 to the Director to discharge these obligations before the Determination was issued, the Delegate determined that the Complaint had been resolved, and that no further wages were owing.

101. On appeal, the Applicant argued that section 88 of the *ESA* required the Employer to pay interest on wages the Delegate had found the Employer had not paid. Section 88 reads as follows:

> 88 (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of
>
> (a) the date the employment terminates, and
>
> (b) the date a complaint about the wages or other amount is delivered to the director
>
> to the date of payment.

102. The Appeal Panel, at paragraph 56 of the Appeal Decision, stated that the Delegate's conclusion was consistent with the purposes of the *ESA* and section 88 as there was "no purpose to be served by assessing interest on payments which were in excess of what the [D]elegate found owing."

103. On this application, the Applicant submits, correctly in my view, that the Appeal Panel erred in stating that the voluntary payment made by the Employer exceeded the sums the Delegate found owing for overtime wages and vacation pay. In fact, the $461.68 sum the Delegate found owing consisted of $87.00 for overtime wages and $374.68 for vacation pay, no less and no more.

104. While I do not accept the Applicant's assertion that the voluntary payment was meant to be a "secret", and therefore it was somehow nefarious, it was not made pursuant to a settlement agreement under section 78 of the *ESA*. I note, too, that while the Applicant may not have asserted, formally, a claim for interest, neither did she waive her entitlement to it in the event the Director determined that wages remained owing to her. Accordingly, having found that wages owed to the Applicant had not been paid in a timely manner, section 88 required that the Employer pay interest in accordance with the statutory provision, notwithstanding the Employer made a voluntary payment of the principal amounts at some point thereafter. This is so because the wording of section 88 is mandatory, and there is no discretion for the Director to alter or waive the requirement (see *Re Regency Motor Cars Inc. operating as Regency GM*, BC EST # D091/06). It is for this reason that I do not accept the statement in the Director's submission that a determination requiring the Employer to pay interest on wages that were owed would be inconsistent with the "fair and efficient resolution process" contemplated as one of the purposes of the *ESA* set out in section 2. The wording of section 88 also compels me to reject the Director's argument that an order for interest would contravene a long-standing practice at the Branch. A practice cannot supersede the plain language of the statute.

105. It follows that since the voluntary payment did not include a payment of interest, the Delegate should have made an order in the Determination that the Employer pay the interest that was owed to the date the payment was made, and the Appeal Panel should have so found.

Did the Appeal Panel err when it decided the Applicant had no right to challenge the absence in the Determination of an order requiring the Employer to pay mandatory administrative penalties?

106. Section 98 of the *ESA* mandates the imposition of administrative penalties for contraventions of the statute. Section 29 of the *Regulation* establishes the sums that must be paid if administrative penalties are imposed. The relevant parts of section 98 read as follows:

> 98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
>
> (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.
>
> (1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.

107. In this instance, the Delegate issued the Determination pursuant to section 79. I infer that the Delegate did not include the mandatory statement referred to in section 98(1.2) because the Delegate found no further wages outstanding, due to the Employer's having made the voluntary payment.

108. However, as I have found, the Delegate should have made an order, pursuant to the mandatory requirements of section 88 of the *ESA*, that the Employer pay interest on the wages in the form of overtime wages and vacation pay the Delegate determined the Employer had not paid to the Applicant in a timely way.

109. Section 88(3) of the *ESA* deems interest to be wages for the purpose of the statute.

110. In my view, since the Delegate issued the Determination and, as I have noted, it should have contained an order that the Employer pay interest, the Determination should also have contained a statement regarding an administrative penalty, as required by section 98(1.2).

111. Decisions of the Tribunal have made it clear that the imposition of penalties is not a matter of discretion, even in circumstances where an employer has contravened the statute while intending to act in good faith. Questions of fairness are irrelevant when the penalty scheme is engaged (see *Actton Super-Save Gas Stations Ltd.*, BC EST # D067/04).

112. In rejecting the Applicant's assertion that the Delegate should have made an order for penalties, the Appeal Panel relied on the statement of the Tribunal in *Raed Eid*, 2020 BCEST 58, that a complainant possesses no right to demand that the Director impose administrative penalties for contraventions of the *ESA*, as the responsibility for administrating the penalty scheme rests solely with the Director.

113. The decision in *Raed Eid* is perhaps distinguishable, as the Applicant submits, because no requirement under section 79 was issued in the case, and so it may be argued that section 98 was not engaged. That said, and while I do not disagree that the Director is responsible for administering penalties, I am unable to accept that the Tribunal has no power to supervise whether a failure to impose a penalty is lawful. The Tribunal certainly has the power, albeit limited, to determine if penalties are lawful when they are imposed. Why should the Tribunal decline to examine the Director's actions when a party alleges that the

Director has acted unlawfully because the payment of a penalty established to be mandatory by section 98 has not been ordered in a determination?

114. Section 81 of the *ESA* requires that the Director must serve any person "named" in a determination with a copy. A person "named" in a determination includes persons such as the Applicant, because her rights and entitlements under the statute were addressed in the Determination (see *Re Francesco Aquilini, et al.*, 2020 BCEST 90). Section 112(1)(a) of the *ESA* provides that a person served with a determination may appeal the determination on the ground that the Director erred in law. Whether a penalty is payable under section 98 is a question of law. It follows that the Applicant must have standing to challenge what she argues was the failure of the Delegate to impose an administrative penalty in the Determination.

115. I agree with the submission of the Applicant that if the section 112(1)(a) right to appeal on the basis that the Director erred in law is restricted, in the case of administrative penalties, to circumstances where an employer challenges penalties that have been imposed, it renders a failure on the part of the Director to order the payment of a penalty unreviewable, for practical purposes, as no employer who has contravened the statute is likely to appeal the absence of a such a requirement. I agree, too, that if such an interpretation is contemplated by the statute, it means that a mandatory decision to impose a penalty becomes, in effect, a matter in which the Director can exercise a discretion.

Should the Appeal Panel have decided that the proceedings conducted by the Delegate were procedurally unfair because the Delegate demonstrated inadequate knowledge of the ESA and the Determination constrains the enforcement of section 8?

116. The Applicant submits that since the Delegate made so many errors in the Determination, the Appeal Panel should have decided that the procedures followed by the Delegate were unfair, and they raise a reasonable apprehension of bias.

117. As these reasons show, while I have decided that the Appeal Decision should be varied, I have also concluded that the Delegate, and the Appeal Panel, did not make nearly as many errors as the Applicant suggests.

118. I agree with the comment of the Appeal Panel, at paragraph 28 of the Appeal Decision, regarding this point:

> Section 117 of the *ESA* enables the Director to delegate to any person any of the Director's functions, duties or powers under the *ESA*. The presumption of regularity allows the Tribunal to assume that the delegate properly exercised the Director's statutory powers in making the Determination, and to infer that the Director would not delegate those powers to an unqualified person. The mere fact that the Employee disagrees with the Determination is insufficient to rebut the presumption, even if this was one of the enumerated grounds of appeal, which it is not. I find this argument entirely without foundation.

119. In support of its submission that the Delegate's conduct was irregular, the Applicant submits that the presumption of regularity is rebuttable, in appropriate circumstances, and she cites as authority *Applicants v. College of Physicians and Surgeons of British Columbia (No. 1)*, 2021 BCHPRB 19 (CanLii), a decision of the British Columbia Health Professions Review Board (the “Board”), at paragraph 72.

120. I agree that the presumption of regularity is not absolute. However, in paragraph 72, the Board refers to the comments of the British Columbia Court of Appeal on this point in *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2019 BCCA 60, at paragraphs 49 and 50. The court said this:

> [49] The principle of deliberative secrecy plays an important role in safeguarding the independence of administrative tribunals and adjudicators. It grants protections to internal consultative processes that involve interactions between adjudicators who hear cases and other members of a tribunal, within specified parameters. Absent some evidence that a tribunal failed to follow proper parameters, a court may not reverse the presumption of regularity of the administrative process: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 at paras. 52, 53, 55.
>
> [50] Deliberative secrecy does not protect administrative decision-makers to the same extent as judicial tribunals and it may be lifted to allow examination of the process followed. However, it remains the rule unless a litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice: *Tremblay* at 966. Valid reasons must be based on evidence, not speculation.

121. Here, the Applicant submits that the Delegate's findings of fact and her conclusions are so often wrong that she must be incompetent. I cannot accept this assertion. If I were to do so, it would mean that no decision-maker found to have committed a legal error would be free from the taint.

122. For the reasons I have given, it is my opinion that the Delegate addressed the issues before her capably, and that the Applicant's challenge on this ground rests solely on the belief that the Delegate's findings of fact and conclusions the Applicant disagrees with are wrong. That being so, I find that the Applicant's submission the Delegate was incompetent is based on nothing more than speculation, and so it fails.

123. For much the same reasons, I do not accept that the Delegate's actions created a reasonable apprehension of bias. The Applicant says that a finding of bias is warranted because the Delegate made errors. Even if I had been disposed to find that the Delegate made as many errors as the Applicant alleges, they would be insufficient, on their own, to ground a finding of bias in the mind of a reasonable person. Errors alone do not establish that the Delegate failed to bring an impartial mind to the investigation of the Complaint, or to the Determination.

124. As for the application of section 8 of the *ESA*, the Applicant says this, in part, at paragraph 171 of her submission:

> …As it stands, the [Appeal Decision] supports an Employer's right to provide a migrant worker new job duties upon their arrival to Canada. This conclusion removes all meaning from the protections afforded under Section 8.

125. Again, I must disagree with this characterization. The Delegate did not find that the Employer substituted new duties for the Applicant once she arrived in Canada and commenced her employment. Instead, the Delegate found that the elaboration of the Applicant's duties set out in the Agreement continued to fall within the designation "childcare" provided for in the Applicant's original Contract. The Delegate also accepted the Employer's evidence that the reason for the more refined catalogue of the Applicant's duties in the Agreement was because there was insufficient room for an adequate description of all of them in the LMIA (R11 of the Reasons).

126. It is trite to say that each case is determined on its own facts. The Delegate's finding that the facts of this case did not establish a contravention of section 8, a conclusion that was confirmed by the Appeal Panel in the Appeal Decision, in no way eviscerates the application of this provision in the *ESA* in another case, where the facts as found will be different.

ORDER

127. I order that the Appeal Decision, 2021 BCEST 75, be varied to provide that the issue of the calculation of interest owed to the Applicant, and the issue of the imposition of administrative penalties, be referred back to the Director to be determined in accord with the reasons in this decision. I decline to order, as requested by the Applicant, that the matter must be re-examined by a different delegate.

128. In all other aspects, the Appeal Decision is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal