Employment Standards TRIBUNAL

Citation: Roman Shalagin (RE)
2022 BCEST 43

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Roman Shalagin
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Brandon Mewhort

FILE NO.: 2022/090

DATE OF DECISION: July 07, 2022

DECISION

SUBMISSIONS

Roman Shalagin	on his own behalf
Nazeer T. Mitha, Q.C. and Erin S. White	counsel for Mercer Celgar Limited Partnership
Kirsten Dzavashvili	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Roman Shalagin (the "Appellant") of a determination issued by Kirsten Dzavashvili, a delegate of the Director of Employment Standards (the "Delegate"), dated February 2, 2022 (the "Determination"). The appeal is filed pursuant to sections 112(1)(a) and (b) of the *Employment Standards Act* ("*ESA*").

2. The Appellant filed a complaint with the Director of Employment Standards on April 22, 2020, alleging that his former employer, Mercer Celgar Limited Partnership (the "Employer"), contravened the *ESA* by failing to pay him annual vacation pay and compensation for length of service.

3. In the Determination, the Delegate found that the *ESA* did not apply to the Appellant, because his occupation was excluded pursuant to section 31(b) of the *Employment Standards Regulation* ("*Regulation*"). Section 31(b) of the *Regulation* provides that the *ESA* does not apply to an employee who is a member of the Organization of Chartered Professional Accountants of British Columbia (the "CPABC") under the *Chartered Professional Accountants Act* ("CPAA"), so long as that person is carrying on the occupation governed by the CPAA. As a result, the Delegate took no further action regarding the Appellant's complaint.

4. The Appellant submits that the Delegate erred in law and that she failed to observe the principles of natural justice in making the Determination.

5. For the reasons given below, I order that the Determination be confirmed pursuant to section 115 of the *ESA.*

ISSUES

6. The issues to be determined are whether, in making the Determination, the Delegate: (1) erred in law in determining that the *ESA* does not apply to the Appellant; and (2) failed to comply with the principles of natural justice.

THE DETERMINATION

7. The Appellant was employed by the Employer from January 6, 2010, to March 25, 2020. His last position with the Employer was as a Senior Financial Analyst – Team Lead. It was uncontested that the Appellant

has a Chartered Professional Accountant ("CPA") designation and is a member of the CPABC. The Delegate noted in the Determination that the parties agreed the Appellant performed, among other duties, shutdown cost reporting, month end tasks, system maintenance and troubleshooting, budgeting and forecasting, data analytics and SQL querying, management and personnel development, cost accountability, correcting vacation and pension calculations in ADP (a payroll system), monthly planning and analysis, and SAP system implementation.

8. In the Determination, the Delegate dealt with two preliminary matters: (1) the Appellant's request that she not use his resume provided by the Employer, because it was obtained during litigation in the British Columbia Supreme Court (BCSC); and (2) the Appellant's argument that the Delegate should not have contacted a professional standards advisor at the CPABC during her investigation, because it violated the principles of natural justice and demonstrated bias against the Appellant.

9. Regarding the first preliminary matter, the Delegate found that, even if the Employer was not at liberty to provide her the Appellant's resume, she had the authority to compel the Appellant to produce the resume in any event. Regarding the second issue, the Delegate found that she had an obligation to seek out the best information available to resolve questions under the *ESA* and that she was not limited to considering information provided by the parties. As discussed below, the Appellant raises both of these of preliminary matters in this appeal.

10. The Delegate noted that there are two components in determining if the *ESA* does not apply to an employee, because their occupation is excluded pursuant to section 31(b) of the *Regulation*. The first is whether the employee is a member of the CPABC under the CPAA. The second is whether the employee is carrying on the occupation governed by the CPAA.

11. In this case, the Delegate found there was no dispute that the Appellant has a CPA designation and is a member of the CPABC. The question the Delegate therefore had to determine was whether the Appellant was carrying on the occupation governed by the CPAA during his employment.

12. The Delegate acknowledged that the *ESA* is benefits-conferring legislation, and it should therefore be interpreted in a broad and generous manner. She also acknowledged that exclusions under the *Regulation*, such as pursuant to section 31(b), should be interpreted in a narrow manner so not to take away benefits.

13. The Delegate addressed an argument by the Appellant that section 47(1) of the CPAA is an exhaustive list of the services performed by CPAs. Section 47(1) of the CPAA states as follows:

> **Professional accounting**
>
> 47 (1) The practice of professional accounting comprises one or more of the following services:
>
> (a) performing an audit engagement and issuing an auditor's report in accordance with the standards of professional practice published by the Chartered Professional Accountants of Canada, as amended from time to time, or an audit engagement or a report purporting to be performed or issued, as the case may be, in accordance with those standards;

(b) performing any other assurance engagement and issuing an assurance report in accordance with the standards of professional practice published by the Chartered Professional Accountants of Canada, as amended from time to time, or an assurance engagement or a report purporting to be performed or issued, as the case may be, in accordance with those standards;

(c) issuing any form of certification, declaration or opinion with respect to information related to a financial statement or any part of a financial statement, on the application of

(i) financial reporting standards published by the Chartered Professional Accountants of Canada, as amended from time to time, or

(ii) specified auditing procedures in accordance with standards published by the Chartered Professional Accountants of Canada, as amended from time to time.

14. The Appellant submitted that, because he did not perform any of those listed services (which was not disputed) and did not hold a public practice license (the requirement to legally perform those listed services), he was not carrying on the occupation governed by the CPAA during his employment.

15. The Delegate, however, preferred the CPABC's interpretation of section 47, which was provided to her by the professional standards advisor. The CPABC's interpretation was that the listed services in that section are a subset of accounting services that require a license to work with the public and it is not an exhaustive list of what accountants do. The Delegate appears to have largely preferred the interpretation provided by the professional standards advisor at the CPABC, because the CPABC is the authority tasked by the government of British Columbia to administer the CPAA.

16. The Delegate also found the evidence of the CPABC and the Employer to be more reliable than the Appellant's generally. That is at least partly because, when the Delegate told the Appellant about the CPABC's position that all CPAs are bound by the CPA Code of Conduct, the Appellant did not volunteer the fact that he believed he was bound by the CPA Code of Conduct. The Appellant did not acknowledge that fact until the Delegate put before him a copy of a decision of the BCSC that made clear he did, in fact, consider himself to be bound by the CPA Code of Conduct: see *Shalagin v Mercer Celgar Limited Partnership*, 2022 BCSC 112 at para 8. The Delegate found the Appellant's initial omission in that regard to be troubling.

17. The Delegate concluded that the Appellant was carrying on the occupation governed by the CPAA during his employment. That conclusion was based, in part, on the Delegate's finding that the Appellant used his financial expertise to, among other things, develop budgets, to perform cost accountability, to perform month end tasks, in his role on the Cost Reduction Task Force, and to assist in SR&ED filings.

ARGUMENTS

Alleged error of law

18. The Appellant acknowledges that he is a member of the CPABC under the CPAA. However, he alleges that the Delegate erred in finding that he was carrying on the occupation governed by the CPAA. As he did before the Delegate, the Appellant argues that section 47(1) of the CPAA is an exhaustive list of the services that are governed by the CPAA and that, because he did not provide any of those services during his employment, he was not carrying on the occupation governed by the CPAA. Accordingly, he says, his occupation was not excluded pursuant to section 31(b) of the *Regulation* and the *ESA* applies to him.

19. The Delegate argues that the Appellant essentially disagrees with the evidence considered and how the evidence was weighed when making a finding of fact. The Delegate argues that the Appellant has failed to identify any of the types of errors of law that are described in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA) (*Gemex*).

20. The Employer argues that the definition of error of law in *Gemex* should not be applied so broadly as to include errors of mixed law and fact if there is no extricable error of law. The Employer argues that, in this case, the determination that the Appellant was carrying on the occupation governed by the CPAA is a finding of mixed law and fact without an extricable error of law and, therefore, it is not reviewable under section 112(1) of the *ESA*.

21. The Employer argues that, in the alternative, if there is an extricable error of law, the Delegate did not err in any event, because the services an accountant provides are not limited to professional accounting as defined in section 47(1) of the CPAA. To support its position, the Employer relies on *Organization of Chartered Professional Accountants of British Columbia v. Nordine*, 2017 BCCA 103, leave to appeal dismissed, 2017 CanLII 53391 (SCC) (*Nordine*), which I will discuss in my analysis below.

Alleged failure to comply with the principles of natural justice

22. The Appellant alleges that the Delegate failed to comply with the principles of natural justice in several ways, particularly regarding: (1) the Appellant's resume; (2) evidence from the CPABC; and (3) the CPA Code of Conduct. I will briefly summarize the arguments regarding each of those issues below.

Appellant's Resume

23. The Appellant submits that a copy of his resume that was provided to the Delegate by the Employer was "litigation privileged", because it was obtained during litigation. The Appellant argues that the Delegate therefore improperly relied on the copy of his resume, and she also did not give him an opportunity to respond to it with evidence of his own.

24. The Delegate argues that the Appellant was given several opportunities to discuss the resume at issue and dispute any of its contents. The Delegate also notes that the Appellant was expressly invited to submit a copy of his resume in his own evidence, but he did not.

25. The Employer similarly argues that the Appellant was given ample opportunity to submit his resume into evidence but chose not to for tactical reasons. The Employer argues that any implied undertaking of confidentiality regarding the Appellant's resume was extinguished when it was tendered in an exhibit in court, and the Employer was therefore entitled to provide it to the Delegate.

Evidence from CPABC

26. The Appellant submits the Delegate should not have contacted CPABC, because doing so demonstrated bias against the Appellant and, he argues, only parties can provide evidence in an investigation. The Appellant also submits that he was not given an opportunity to fully respond to evidence submitted by CPABC. In particular, the Appellant argues that the Delegate failed to disclose the CPABC's position that, "CPAs practicing professional accounting are required to apply for a public practice license and practice through a registered firm unless they fall within one of the exemptions in section 47".

27. Regarding the evidence from the CPABC, the Delegate argues that investigations are inquisitorial processes and delegates have the obligation to seek out the best information available to assist them in resolving the issues of a complaint. The Delegate says that, in this case, the CPABC's evidence regarding the scope of the CPAA was probative and relevant.

28. The Delegate refers to two telephone calls with the Appellant on December 15 and 21, 2021, during which the Delegate disclosed the information provided by the CPABC to the Appellant and it was discussed. The Delegate also argues that the Appellant was provided an opportunity to respond to the CPABC's evidence twice in email submissions on December 16 and 18, 2021.

29. The Employer argues that the Delegate was entitled to contact a third party and that she was not required to share every document with the Appellant. The Employer argues that, instead, the Delegate was only required to share material information with the Appellant. The Employer says that the Delegate met this standard, and the Appellant was given ample opportunity to respond to the evidence of the CPABC.

CPA Code of Conduct

30. The Appellant appears to essentially argue that the Delegate improperly assessed the Appellant's credibility based, at least in part, on the Appellant's initial omission about being bound by the CPA Code of Conduct. The Delegate and Employer did not address the CPA Code of Conduct in their submissions with respect to the issue of the Appellant's credibility.

ANALYSIS

Alleged error of law

31. The Appellant bears the burden of demonstrating that the Delegate made an error of law: see e.g., *Multintel Education Ltd. (Re)*, 2019 BCEST 109 at para 18. The Tribunal has adopted the following definition of an error of law, which was set out in *Gemex*:

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

32. I agree with the Employer that whether the Appellant was carrying on the occupation governed by the CPAA is a question of mixed fact and law. As discussed in *Britco Structures Ltd. (Re)*, BC EST # D260/03 (*Britco*): "…questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests [emphasis added, citations omitted]."

33. Determinations by a delegate on questions of mixed law and fact are given deference by this Tribunal: *Michael L. Hook*, 2019 BCEST 120 at para 31. However, a question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error: see e.g., *Britco* as well as *Gordon Bath (Re)*, 2020 BCEST 55 at para 22.

34. Identifying an extricable error of law was discussed by the British Columbia Court of Appeal (BCCA) in *Ecoasis Resort and Golf LLP v. Bear Mountain Resort & Spa Ltd.*, 2021 BCCA 285. At para 27 of that decision, the BCCA relied on Supreme Court of Canada (SCC) authority where it was held (see *Canada (Director of Investigation & Research) v. Southam*, 1997 CanLII 385 paras 35 to 37 (SCC)) [emphasis added, citations omitted]:

> …On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.
>
> For example, the majority of the British Columbia Court of Appeal in *Pezim*, *supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely — that newly acquired information about the value of assets can constitute a material change — was a matter of law, because it had the potential to apply widely to many cases.
>
> By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

35. I find that, in this case, a question of law can be extricated, specifically whether, for the purposes of section 31(b) of the *Regulation*, the occupation governed by the CPAA is limited to services listed in section 47(1) of the CPAA. That is a question about the interpretation of a statutory provision, which, as discussed by

the SCC, is generally a question of law. It is also a question that may well arise in future cases regarding the interpretation of section 31(b) of the *Regulation*.

36. I therefore must address whether the Delegate erred in law in determining that the occupation governed by the CPAA is not limited to services listed in section 47(1) of the CPAA. In considering that question, the relevant sections of the CPAA must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the CPAA, the object of the CPAA, and the intention of the legislature. This is generally known as the modern approach to statutory interpretation: see *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC).

37. Section 3 of the CPAA states, in part, that one of the CPABC's objects is to: "… regulate all matters … relating to the practice of accounting by members … [emphasis added]." "Member" is defined in section 1 of the CPAA as: "a member of the CPABC." Accordingly, in this case, the CPABC regulates all matters relating to the Appellant's "practice of accounting", given that he is a member of the CPABC.

38. The phrase "practice of accounting" is not defined in the CPAA, but, importantly, section 47(1) does not refer to the "practice of accounting". Instead, section 47(1) refers to the "practice of professional accounting". Those terms should be interpreted to have different meanings in accordance with the presumption of consistent expression. As explained by the BCCA, that presumption is "a rule of statutory construction that applies when different terms are used in a single piece of legislation. Where this occurs, the terms must be understood to have different meanings, otherwise the legislature would have employed one or the other only": *Bowe v. Bowe*, 2022 BCCA 35 at para 37. Accordingly, I find that, in this case, the "practice of professional accounting" is a subset of the "practice of accounting", which is regulated by the CPABC for its members. In other words, there are accounting services that the CPABC regulates for its members that are not listed in section 47(1) of the CPAA.

39. This is consistent with the BCCA's discussion of Part 5 of the CPAA in *Nordine*. In that case, the BCCA allowed the CPABC's appeal and granted an injunction to prohibit two individuals, who were the respondents on the appeal, from using the designations "Professional Business Accountant" and "PBA" to describe themselves. The CPABC argued that the respondents were prohibited from using those designations pursuant to section 45(4) of the CPAA, which states: "Subject to section 44 (1), a person must not use or display the designation 'professional accountant' or the initials 'PA' signifying that designation or, in any manner, imply, suggest or hold out that the person is a professional accountant."

40. The BCSC had found that it was not clear the term "professional accountant" means anything more than a person engaged in the activities described in section 47 of the CPAA. Given what it considered to be an ambiguity, the BCSC went on to consider the additional interpretation principles to resolve the issues in dispute: see *Nordine* at paras 31 and 32.

41. The BCCA held that the BCSC erred in this approach, because it failed to answer the central question of whether the respondents, by using the description "Professional Business Accountant" and the initials "PBA", implied, suggested or held out that they were professional accountants. The BCCA held that: "the precise meaning of the word 'professional' is of limited relevance because the determination of its precise meaning does not answer the central issue before the court": *Nordine* at para 33.

42. The BCCA concluded that a reasonable lay person would undoubtedly consider an accountant described as a professional business accountant to be a professional accountant, and that would be true even if the person had some uncertainty as to the meaning of the term "professional accountant". Accordingly, the BCCA held that the respondents were breaching section 45(4) of the CPAA: *Nordine* at para 36.

43. While the BCCA did not explicitly deal with whether the term "professional accountant" means anything more than a person engaged in the activities described in section 47 of the CPAA, it did discuss Part 5 of the CPAA in general, including the principal object of that part. The BCCA's interpretation of Part 5 is consistent with the view that the services listed in section 47(1) are only a subset of the services that comprise the "practice of accounting".

44. For example, at para 13 of *Nordine*, the BCCA held as follows [emphasis added]:

> Section 46 provides that, subject to s. 47, the *Act* does not affect the right of a person to practise as an accountant or auditor in British Columbia. Section 47(1) lists certain accounting functions (such as issuing audit and assurance reports in accordance with the standards of professional practice published by the Chartered Professional Accountants of Canada) that are included in the practice of professional accounting. Section 47(2) prohibits the provision of these accounting functions by anyone who is not "a chartered professional accountant member in good standing, a professional accounting corporation or a registered firm that is authorized by the CPABC" to provide those services…

45. The BCCA further discussed Part 5 of the CPAA at para 24 of *Nordine* [emphasis added]:

> The principal object of Part 5 of the *Act* is to protect members of the public by helping them recognize whether they are dealing with members of the regulated organization. While s. 46 acknowledges that non-members of CPABC are entitled to practise as accountants or auditors in areas other than those set out in s. 47, only members of CPABC are entitled to use certain specified designations, and there are prohibitions against a non-member implying, suggesting or holding out that he or she is a chartered professional accountant or a professional accountant.

46. In other words, the services listed in section 47(1) of the CPAA are a subset of accounting of services that only members of the CPABC may provide the public. The reason only members of the CPABC may perform those services was discussed by the BCSC in the decision below: see *Organization of Chartered Professional Accountants of British Columbia v. Nordine*, 2016 BCSC 1283. At para 28 of that decision, the BCSC referred to correspondence from the assistant deputy minister in the Ministry of Advanced Education in which it was stated:

> This protection is in place because audit and assurance engagements pose a higher risk to the public. As you know, when accountants perform these activities [the activities listed in section 47(1) of the CPAA], they are giving opinions upon which third parties will rely to make financial and other decisions. Only CPAs are accountable to provincial and national CPA bodies, and are specifically trained and regulated to meet CPA standards. Therefore, only CPAs should be able to guarantee to the public that their work has been performed according to those standards.

47. Accordingly, when section 47(1) of the CPAA is considered using the modern approach to statutory interpretation, I find that the Delegate did not err in determining that the occupation governed by the CPAA is not limited to the services listed in section 47(1) of the CPAA.

48. I also briefly wish to address *Mollenhauer (Re)*, BC EST # D013/09 (*Mollenhauer*), which was discussed in the parties' submissions. While *Mollenhauer* is the leading decision of this Tribunal regarding exclusions under section 31 of the *Regulation*, I find it of little assistance in determining the alleged error of law in this appeal. That is because, in *Mollenhauer*, there was no dispute that the employee was "carrying on the occupation" of a professional engineer during his employment. The employee instead argued, because he was not carrying on that occupation for a substantial portion of his employment (i.e., he did not spend 100% of his employment performing professional engineering), that portion of his employment should be covered by the *ESA*.

49. The Tribunal in *Mollenhauer* dismissed the employee's appeal and held that the exclusion under section 31 of the *Regulation* applied, even at times when the employee was not actually performing professional engineering. While *Mollenhauer* provides a useful discussion about the purpose of the exclusions under section 31 of the *Regulation* (see e.g., para 28), I do not find that it assists in determining whether the occupation governed by the CPAA is limited to the services listed in section 47(1) of the CPAA.

50. Accordingly, I dismiss this ground of appeal.

Alleged failure to observe the principles of natural justice

51. As recently stated by this Tribunal in *CCON Recon Inc. and CCON Metals Inc. (Re)*, 2022 BCEST 26 at para 62:

> This ground of appeal is about whether the Delegate's process in making the Determination was fair. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker.

52. In *Gaspar and others*, 2018 BCEST 48 at para 52 (*Gaspar*), this Tribunal has also held that the "concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the of the evidence and issues."

53. I will now turn to each of the alleged failures of the Delegate to comply with the principles of natural justice.

Appellant's resume

54. In *Whitaker Consulting Ltd. (Re)*, BC EST # D033/06 ("*Whitaker*"), citing *Tri-West Tractor Ltd.*, BC EST #D268/96, this Tribunal held that: "The Director is entitled to expect that parties will participate in investigations. A party may not 'sit in the weeds', refusing to cooperate in an investigation, and then appeal a determination based on evidence that could have been provided to the Director."

55. In my view, the Appellant was given ample opportunity to dispute the resume put into evidence by the Employer and to put his own version into evidence if he wished. In fact, the Appellant was explicitly invited by the Delegate to put his own version of his resume into evidence, but he decided not to. As noted by the Employer, any implied undertaking of confidentiality that may have attached to the resume was

extinguished when it was tendered in an exhibit in court and the Appellant was advised of that by the Employer's counsel.

56. Accordingly, I dismiss this ground of appeal.

Evidence from the CPABC

57. I agree with the Delegate and Employer that investigations are inquisitorial processes and delegates may obtain evidence from third parties, if necessary. As noted by the Employer in its submissions, this Tribunal held in *Whitaker* that: "If … the delegate conducts an investigation, then he or she performs a more inquisitorial function with corresponding powers to gather relevant evidence not only from the parties, but from non-parties if necessary [citations omitted]". Accordingly, in this case, I find that there was nothing inappropriate about the Delegate obtaining evidence from the CPABC to help determine whether the Appellant was carrying on the occupation governed by the CPAA. Doing so certainly did not demonstrate bias against the Appellant.

58. I also agree with the Delegate and Employer that the Appellant was given an adequate opportunity to respond to the evidence provide by the CPABC. As noted by the Delegate in her submissions, the Appellant was given the opportunity to respond to the evidence provided by the CPABC in two phone conversations and in two email submissions.

59. The Appellant argues that he was not given an opportunity to respond to a specific statement of the CPABC that: "CPAs practicing professional accounting are required to apply for a public practice license and practice through a registered firm unless they fall within one of the exemptions in section 47". However, as argued by the Employer, section 77 of the *ESA* does not require delegates to disclose to parties all statements made by other parties in an investigation.

60. In *All Seasons Spa Ltd.*, BC EST #D419/99 ("*All Seasons*"), this Tribunal held [emphasis added]:

> With respect to section 77, the record before me shows that the delegate gave the employer--through both letters and telephone communications--a more than adequate opportunity to respond to the substance of Ms. Shaw's complaint. As I noted in *Urban Native Indian Education Society* (E.S.T. Decision No. D309/99), section 77 does not create, in my view, a general disclosure obligation such as that found in the B.C. Supreme Court Rules. Thus, even if the delegate did not provide to the employer, during the course of her investigation, every single document that was contained in her file, the section 77 obligation was discharged if the general thrust of the complaint--and the supporting evidence--was made known to All Seasons.

61. In *317184 B.C. Ltd. (Elkin Creek Guest Ranch) (Re)*, BC EST # D087/03, this Tribunal relied on *All Seasons* in making a similar finding where, as here, the statements at issue were made by a third party that had no direct interest in the outcome of the complaint.

62. In this case, the general thrust of the CPABC's evidence was provided to the Appellant and he was given an adequate opportunity to respond to it. The thrust of the CPABC's evidence was that the occupation governed by the CPAA is not limited to the services set out in section 47(1) of the CPAA, which was provided to the Appellant, and he did, in fact, respond to. I agree with the Employer that the statement by the CPABC about CPAs practising professional accounting being required to apply for a public practice

licence simply buttresses the key point, being that the services listed in section 47(1) are a subset of accounting services.

63. Accordingly, I dismiss this ground of appeal.

Code of Conduct

64. As held by this Tribunal in *1115844 B.C. Ltd. (Re)*, 2022 BCEST 5 at para 71, "…credibility assessments are factual findings and thus any alleged error is not about a breach of natural justice but error in the Delegate's findings of fact." This Tribunal further held in that decision at para 72 that, "…it is not the place of the Tribunal to review factual findings about credibility unless the alleged error rises to an error of law."

65. It was also held by this Tribunal in *Gaspar* at para 51 that:

> … It is fair to say that many, if not most, of Determinations are decided on an assessment of the credibility of the evidence presented by the parties to a complaint. As acknowledged by the Director this was one of those many cases. The Director is the decision-maker in the first instance and is the first to hear what people – witnesses – have to say. It is not for the Tribunal to second guess a finding of credibility that is otherwise grounded in the evidence before the Director and adequately reasoned but the Tribunal will, where called upon, decide whether it was or was not reasonable for the Director to reach conclusions on credibility using the complaint process adopted. …

66. In this case, I find that the Delegate did not commit an error of law in making her credibility determination. Her finding of credibility, particularly regarding the Appellant's acknowledgment that he is bound by the CPA Code of Conduct, is grounded in the evidence and adequately reasoned in the Determination. It is not open to me to interfere with the Delegate's assessment of credibility without a strong basis on which to do so, which I do not find in this case.

67. Accordingly, I dismiss this ground of appeal.

ORDER

68. I order that the Determination be confirmed pursuant to section 115 of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal

Notice: Page two (2) of this version of the reasons for decision has been amended in accordance with the Corrigendum issued by the Tribunal on July 19, 2022. The SUBMISSIONS section on page two (2) has been amended to add co-counsel Erin S. White for the Respondent.