

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

1115844 B.C. Ltd. carrying on business as Chicken World  
("Chicken World")

- 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:** Maia Tsurumi

**FILE NO.:** 2021/088

**DATE OF DECISION:** January 19, 2022

## DECISION

### SUBMISSIONS

Dallan Poulin	on behalf of 1115844 B.C. Ltd. carrying on business as Chicken World
Prejot Choongh	on her own behalf
Mitch Dermer	on behalf of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), 115844 B.C. Ltd. carrying on business as Chicken World (“Chicken World”) has filed an appeal of a determination (the “Determination”) issued by Ramona Muljar, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on September 3, 2021. The Delegate determined Chicken World breached sections 17 (paydays), 18 (payment of wages after termination), 40 (overtime), 45 (statutory holiday pay), 46 (work on a statutory holiday), and 58 (annual vacation pay) for failing to pay these amounts to the complainant (the “Complainant”). There was also accrued interest and three mandatory administrative penalties of \$500 each for the contraventions of sections 17, 40 and 46.
2. Chicken World appeals the Determination on the grounds that the Delegate failed to observe principles of natural justice.
3. For the reasons set out below, I dismiss the appeal.
4. My decision is based on the submissions made by Chicken World in its Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, the Reasons for the Determination (the “Reasons”), submissions made by the Complainant (“Complainant’s Submissions”), submissions made by the Director (“Director’s Submissions”) and Reply submissions from Chicken World (“Reply”).

### ISSUE(S)

5. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether this appeal should be allowed or dismissed.

### THE DETERMINATION

#### Background

6. Chicken World operates a fast-food restaurant at two locations in the Lower Mainland. The Complainant worked for Chicken World as a server from December 10, 2015 until November 1, 2018.
7. The Complaint was filed on December 3, 2018. The Delegate issued the Determination on September 3, 2021.

### Issues Before the Delegate

8. The issues before the Delegate were: (1) was the Complainant paid for all hours worked from November 2, 2017 to March 24, 2018; (2) did the Complainant work for Chicken World from March 25, 2018 (after her work permit expired) to November 1, 2018; and (3) if the Complainant worked for Chicken World from March 25 to November 1, 2018, was she owed wages?

### Preliminary Matters

9. A complaint hearing was scheduled for June 27, 2019, adjourned at the request of Chicken World, and rescheduled for September 23, 2019. On September 3, 2019, Chicken World asked for another adjournment because its sole director, Adeel Jahangir, needed to attend to his family in Pakistan and would not return until mid-November 2019. The Delegate granted the adjournment and decided to proceed with the complaint by way of investigation (the “Investigation”) instead of an adjudicative hearing. The Delegate informed the parties of this decision on September 10, 2019 (Record, pp. 161, 328, 351).

### Request for an oral hearing

10. On July 24, 2020, the Complainant’s counsel asked the Delegate for an oral hearing. The Delegate did not grant this request. The Delegate notes in the Reasons she denied the request for an oral hearing because at that time both Mr. Jahangir and the Complainant continued to be out of the country and would remain abroad for an indeterminate length of time. The Record provides further explanation for the Delegate’s decision (Record, pp. 161-162). It shows the Delegate considered the request and was not proceeding with an oral hearing because:
- a. Mr. Jahangir and the Complainant were out of the country;
  - b. since September 10, 2019, the Delegate had been investigating, including two investigative telephone calls with the Complainant, collecting extensive information from the Complainant and Chicken World and had providing the Complainant’s submissions and documents to Chicken World;
  - c. one of the purposes of the *ESA* set out in section 2, is having an efficient procedure for resolving disputes;
  - d. the *ESA* gives the Director (or Delegate) the discretion to determine whether an oral adjudication or an investigation will occur;
  - e. the Director (or Delegate) has the discretion to determine the most effective and reasonable procedure for investigations;
  - f. procedural fairness requires parties be given a fair and adequate opportunity to respond to a complaint and provide evidence in support of their position; and
  - g. the Delegate had reviewed the information and circumstances of this Complaint and did not find any reason, and counsel for the Complainant did not identify any reason, why the investigation would hinder either party’s right to a fair procedure.
11. At no time did Chicken World request an oral hearing.

### Evidence Relied on by the Delegate

12. The Reasons have a lengthy summary of the submissions and documents provided during the Investigation by the Complainant and Chicken World, as well as a summary of evidence from a third-party witness put forward by Chicken World (Reasons, pp. R3-R8). As this appeal only addresses allegations about a breach of natural justice and does not deal with the substantive merits of the Determination, this evidence is not repeated here except as it relates to the allegation the Delegate breached principles of natural justice in making her findings about credibility.
13. The Complainant's evidence about her hours of work and period of work was given by telephone and e-mail to the Delegate during the Investigation. She also provided screenshots of copies of work schedules distributed by Chicken World to its staff through a staff WhatsApp group chat, a Chicken World flyer, texts with food suppliers she said she dealt with on behalf of Chicken World after March 24, 2018, and texts relating to the dispute over her nicknames, which she said were used on the work schedules after March 24, 2018.
14. Chicken World also provided evidence by telephone and in written submissions about the Complainant's hours of work and period of work. It said the copies of the work schedules provided by the Complainant seemed to be like schedules Mr. Jahangir would create for staff, but as he could not find the originals, Chicken World cannot say for certain whether these schedules were accurate.
15. Although Chicken World was required under section 28 of the *ESA* to keep payroll records for four years from date of creation and was sent a Demand for Records, which specifically required it to submit a record of the Complainant's hours of work, Chicken World did not provide any such records. Instead, it provided wage statements, which it said were based on the hours the Complainant worked and provided sample e-mails from Mr. Jahangir to his accountant for payroll processing. The Delegate noted Mr. Jahangir created the work schedules and shared them via WhatsApp, yet he could not find these records in either location. Also, Chicken World said the wage statements were created from timecards each staff member filled out at the beginning and end of each shift but when asked why these timecards were not submitted as evidence, Chicken World did not elaborate other than to say it had submitted all records in its possession and had complied with the Demand.
16. Chicken World provided the Delegate with a copy of the Complainant's expired work permit.

### Attempts to Contact a Second Witness

17. As requested by Chicken World, the Delegate tried to speak to a second third-party witness, a K.L. In her Reasons, the Delegate says K.L. did not attend (by telephone) a scheduled interview and the Delegate made numerous subsequent attempts to contact her without success and thus the Delegate did not have her evidence.
18. As one of the alleged breaches of natural justice is that the Delegate did not do enough to get evidence from K.L., I set out here the information in the Record about the efforts the Delegate made during her Investigation to reach K.L.:

- a. on June 3, 2021, the Delegate called K.L. but there was no response and no voicemail option (Record, p. 34);
- b. on June 7, 2021, the Delegate called K.L. but the number seemed to be disconnected (Record, p. 34);
- c. on June 7, 2021, the Delegate sent the parties her Investigation Report in which she noted she was unable to contact K.L. during her Investigation at the phone number provided (Record, p. 280);
- d. on July 22, 2021, the Delegate called K.L. at a new number provided by Chicken World's counsel but the number was not in service (Record, pp. 34, 281);
- e. on July 22, 2021, the Delegate told Chicken World's counsel she had not been able to reach K.L. at the number provided and asked counsel to provide a current number by noon the next day if Chicken World wanted her testimony to be considered in her final decision (Record, p. 282; see also Appeal Form, p. 48);
- f. on July 22, 2021, Chicken World's counsel sent a corrected number for K.L. (Record, pp. 34, 282);
- g. on July 24, 2021, the Delegate called K.L. but there was no response and no voicemail option (Record, p. 34);
- h. on August 11, 2021, the Delegate reached K.L. by telephone and arranged a telephone interview for August 12, 2021, at 6:00 p.m. (Record, p. 34);
- i. on August 12, 2021, the Delegate called K.L. twice at, and after, the interview time but there was no response and no voicemail option (Record, p. 34);
- j. on August 16, 2021, the Delegate called K.L. but there was no response and no voicemail option (Record, p. 34);
- k. on August 19, 2021, the Delegate called K.L. but there was no response and no voicemail option (Record, p. 34);
- l. on August 21, 2021, the Delegate called K.L. but there was no response and no voicemail option (Record, p. 34); and
- m. on August 23, 2021, the Delegate called K.L. but the line did not ring and there was no voicemail option.

### The Delegate's Decision

*Was the Complainant paid for all hours of work from November 2, 2017 to March 24, 2018?*

19. The Delegate found the Complainant was not paid for all hours worked from November 2, 2017 to March 24, 2018.
20. The Delegate noted Chicken World questioned the Complainant's credibility as a witness. The Delegate found the Complainant's statements and submissions about her responsibilities and work hours to be coherent and generally credible and corroborated by documentation such as a flyer with Chicken World's

hours. The Delegate found the Complainant's information consistent throughout the Investigation and that she was forthcoming with information.

21. The Delegate did not find Chicken World or Mr. Jahangir's evidence credible because:
- a. there were several inconsistencies and omissions in Mr. Jahangir's information;
  - b. Mr. Jahangir was covert in providing additional information;
  - c. when asked why it did not submit the timecards as per the Demand for Records, Chicken World merely said it had "*provided all records in its possession and has complied with the Demand*";
  - d. when asked about the Complainant's work permit, Chicken World initially said it had no knowledge of the work permit and was never contacted by the Complainant or any person on her behalf (like an immigration consultant) to provide any information in support of her efforts to get another work permit. However, later in the Investigation, Chicken World submitted Mr. Jahangir had been aware of an immigration consultant working with the Complainant and he had prepared an offer letter at her request to submit with her work permit application;
  - e. Chicken World was not forthcoming in providing evidence relating to payments made to the Complainant like copies of cheques or payroll deposits;
  - f. Chicken World caused significant delay in the Investigation because of several consecutive hearing adjournment requests and subsequent requests to extend submission deadlines;
  - g. when asked whether the work schedules provided by the Complainant were accurate, Chicken World's answer was evasive and could not locate the originals; and
  - h. when asked whether the messages sent to the Complainant from Mr. Jahangir's telephone number in April 2018, were accurate, Chicken World said it could not verify the accuracy of the messages due to the passage of time. The Delegate found this an elusive and oblique response when the messages clearly came from Mr. Jahangir's telephone number, which was not denied.
22. The Delegate's conclusion was based on copies of the work schedules provided by the Complainant, which the Delegate found were a credible and true record of her hours of work. Chicken World had not submitted anything to refute the information in the work schedules.
- Did the Complainant work for Chicken World after March 24, 2021, and if so, was she owed wages?*
23. The Delegate found the Complainant worked for Chicken World from March 25, 2018, to November 1, 2018, and was not paid for all hours worked.
24. The Delegate preferred the Complainant's evidence, including information from her and text messages relating to food stock orders (most of which was chicken), which showed she was working at Chicken World after March 24, 2018. There was no other reasonable explanation as to why the Complainant would have messages where she is ordering and confirming food stock orders unless she continued to work at Chicken World. In coming to her conclusion, the Delegate also considered the evidence from a

third-party witness, L.P., who also worked at Chicken World. This witness's testimony did not support Chicken World's claim that the Complainant did not work for it after March 24, 2018.

25. The Delegate specifically rejected Chicken World's claim that the names ("Prem" and "Premchu") used in the work schedules after March 24, 2018, referred to Mr. Jahangir's wife, Aleena Fahid. The evidence of the Complainant and L.P. did not support Chicken World's position. Ms. Fahid's wage statements were only marginally relevant but, if anything, weakened Chicken World's credibility because no one named Aleena or Prem were listed in the work schedules for February 2018, although Ms. Fahid was paid for hours worked during this time. Also, in a text message between the Complainant and Mr. Jahangir's brother, he referred to her as "Prem" and the Complainant's submission that the entries for "Prem" or "Premchu" on the work schedules referred to her was generally credible based on the phonetic similarity of these nicknames to her name.

#### *Determination*

26. In the result, the Delegate determined the Complainant was owed \$73,237.64 for hours worked between November 2, 2017 and November 1, 2018, broken down as follows:
- a. \$10,503.89 in regular wages;
  - b. \$56,414.75 in overtime wages;
  - c. \$1,024.58 in statutory holiday pay;
  - d. \$2,394.00 as statutory holiday premium pay; and
  - e. \$2,900.42 in vacation pay.
27. The Complainant was also entitled to interest of \$6,628.21 under section 88 of the *ESA*.
28. The Delegate imposed mandatory penalties of \$500 each for Chicken World's breaches of sections 17 (paydays), 40 (overtime) and 46 (statutory holiday pay).

### **ARGUMENT(S)**

#### Chicken World

29. Chicken World submits the Delegate failed to observe principles of natural justice by:
- a. failing to conduct an oral hearing;
  - b. failing to thoroughly complete the Investigation because the Delegate did not obtain evidence from K.L.;
  - c. relying on adjournments and extensions of time granted to Chicken World as a reason to minimize its credibility; and
  - d. having a reasonable apprehension of bias because the Delegate relied on the adjournments and extensions of deadlines to minimize Chicken World's credibility.

### *Oral hearing*

30. Chicken World says in the circumstances of the Complaint, procedural fairness required an oral hearing because credibility issues were at the centre of the dispute and coloured every issue for determination. In support of its position, Chicken World relies on Tribunal decisions *Re Enviro Surface Care Ltd.*, BCEST #D037/10 and *Re C&W Salvage Ltd.*, BCEST #D103/12 and the fact that resolution of competing evidence from the parties was largely based on the Delegate's credibility assessment.
31. Chicken World further says the Delegate was alive to the credibility issues so when the Complainant requested an oral hearing, at a minimum, natural justice required the Delegate consider whether an oral hearing could be held and not to assume the parties were out of the country.

### *Ceasing efforts to get evidence from K.L.*

32. Chicken World acknowledges how far a delegate must go to investigate a complain depends on the circumstances but it says in the circumstances of the Complaint, procedural fairness required the Delegate to interview K.L. because: (1) the Delegate told Chicken World to provide a current telephone number for K.L. if it wanted the Delegate to consider K.L.'s evidence in her final decision; (2) K.L. was one of only two witnesses put forward; (3) Chicken World told the Delegate K.L. had material evidence that would corroborate Chicken World's evidence; and (4) credibility was central to the dispute.
33. Chicken World also appears to also submit in the alternative that if the Delegate was going to stop trying to contact K.L., she should have told Chicken World of this.

### *Credibility assessment*

34. Chicken World says the Delegate impermissibly relied on adjournments and extensions she granted to it as a reason to minimize Chicken World's credibility. This was procedurally unfair because the Delegate controlled the complaint process and granted those requests, did not tell Chicken World its successful adjournment and extension requests would be held against it and the Delegate's conclusion that it caused significant delay in the Investigation was wrong. The result was Chicken World did not know the case it had to meet with respect to credibility in relation to the adjournments and extensions and did not have an opportunity to respond to this. Chicken World cites *Huang v. Canada (Citizenship and Immigration)*, 2019 FC 1123 in support of its position.
35. According to Chicken World if the Delegate had not made negative findings about the adjournment and extension requests, the Delegate's findings on credibility would ultimately have been different and thus, the other findings in the Determination may have been different. Because credibility was central to resolution of the dispute, the Delegate's breach of procedural fairness in relation to the adjournments and extensions casts doubt on the fairness of the entire Investigation and Determination.

### *Reasonable apprehension of bias*

36. Chicken World's alternative position to its allegation of a breach of principles of natural justice in relation to the Delegate's credibility assessment is that the Delegate's conduct shows a reasonable apprehension of bias. The Delegate did not approach the question of whether Chicken World was credible with an open



mind because she had already determined based on the adjournments and extensions that Chicken World significantly delayed the Investigation and thus was less credible.

#### Complainant

37. The Complainant says there is no merit to the appeal. She further says the Delegate took a long time to come to her Determination and went through the Investigation very closely. Chicken World should answer the questions it was unable to answer during the Investigation, which resulted in a Determination in her favour. According to the Complainant, on appeal, Chicken World has not provided anything to prove the Determination was wrong.

#### Director of Employment Standards

38. The Director submits an oral hearing is not an absolute right and there is no natural justice principle that issues of credibility must be decided through an oral hearing. In this case, procedural fairness did not require an oral hearing because there were not two competing versions of events from the parties without any way to corroborate either version. The Delegate had a documentary record corroborating the Complainant's evidence and Chicken World's evidence was inconsistent, incomplete, and internally contradictory. Further, the Delegate's specific findings about credibility could be resolved on the documentary and witness evidence and did not require an oral hearing to resolve. The Delegate's finding that the Complainant's evidence about her hours worked was better than Chicken World's was based on the documents, witness statements, and Chicken World's failure to keep payroll records in accordance with the *ESA* and failure to provide its timecards. The Director says the documents largely speak to themselves.
39. Regarding the Delegate's attempt to contact K.L., the Director says the Delegate made a reasonable attempt to reach this witness.
40. The Director says the Delegate did not reach her conclusion based on an inference about the adjournment and extension requests. On the face of the Determination, the Delegate reached her conclusion based on the documentary record and the evidence of the parties about that record.

#### **ANALYSIS**

41. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on any of the following grounds:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;  
and
  - (c) evidence has become available that was not available at the time the determination was being made.

42. For the reasons that follow, I dismiss the appeal. There was no breach of principles of natural justice. Chicken World knew the case it had to meet and was given a fair opportunity to respond. There was no reasonable apprehension of bias. In other words, the Delegate's procedure was fair.
43. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure parties know the case made against them, are given an opportunity to reply to the case against them and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BCEST # D014/14 at para. 27 and *Re Imperial Limousine Service Ltd.*, BCEST #D014/05 at para. 27; see also *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 22.
44. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.
45. In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada identified a non-exhaustive list of factors that "should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances." Those factors are:
- a. the nature of the decision being made and the process followed in making it;
  - b. the nature of the statutory scheme and the terms of the statute under which the administrative decision was made;
  - c. the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated;
  - d. the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances;
  - e. the choice of procedures made by the administrative-decision maker and its institutional constraints. Important weight must be given to the choices of procedures adopted by the decision-maker and its institutional constraints:
- Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras. 23 – 28.
46. Before addressing each of Chicken World's specific allegations of breaches of principles of natural justice, I will apply the *Baker* factors to the circumstances of this case, which will inform my decision on each ground of appeal.
47. The nature of the decision was whether the Delegate would find Chicken World breached the *ESA* and the Complainant was not paid for all hours worked.
48. The process followed in making the decision was initially an adjudicative hearing, which was changed to an investigation under the *ESA*. The investigation involved: (1) telephone calls with the Complainant and Chicken World; (2) ongoing opportunities for written submissions from both parties; (3) cross-disclosure

of submissions and information, including documents; (4) review of written submissions; (5) repeated follow-up questions and requests for more information; (6) a telephone interview with a third party witness; (7) repeated attempts to contact a second third party witness; (8) consideration of an oral hearing request; (9) an investigation report with preliminary findings; (10) a final opportunity for written submissions; and (11) a Determination. The Delegate also considered and granted adjournment and extension requests.

49. Turning to the statutory scheme and the terms of the statute under which the Employment Standards Branch (the “Branch”) operates, the *ESA* involves the ongoing regulation of non-union employers. The purposes of the *ESA* are set out in section 2 and include ensuring employees in the province receive at least basic working compensation standards and conditions, promoting the fair treatment of employees and employers and providing fair and efficient procedures for resolving disputes under the *ESA*.
50. The Director’s authority under the *ESA* is broad and includes investigative powers to ensure compliance with the *ESA* and its regulations. The *ESA* does not require a complaint to have been made for an investigation to occur: *ESA*, sub-section 76(2). The Director also has considerable powers to compel persons to answer questions and order disclosure, as well as powers of entry and inspection: *ESA*, sections 84 – 85. An investigation is by its nature different from a quasi-judicial hearing. It is a dynamic process involving information collected from different persons in different circumstances over time. At different points during the investigation, the investigator may have different perspectives or viewpoints that lead them in one direction or another.
51. While the regulatory scheme does not require express notice of investigation, the Director must make reasonable efforts to give a person under investigation an opportunity to respond if an investigation is conducted: *ESA*, section 77. Section 77, which applied to the Investigation in this appeal, sets out the statutory scheme’s procedural fairness requirement for investigations that a person potentially subject to an adverse finding have an opportunity to respond: *The Director of Employment Standards (Re)*, BCEST #D313/98 at p. 12; *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, BCEST #RD317/03, pp. 16, 18. This modification of the common law standard is legislative recognition that the Director’s role is more subtle and complicated than a quasi-judicial role: *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, BCEST #D313/98, p. 12. Section 77 is not intended to be formal and burdensome, especially in the employment standards context, which is designed to be a relatively quick and cheap means of resolving employment disputes: *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, BCEST #RD317/03, p. 18, citing *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at p. 496.
52. The Determination is important to Chicken World given that a finding it breached the *ESA* is serious and its liability for unpaid wages is substantial. The Determination is also important to the Complainant who referred in submissions repeatedly to wanting justice to be done and is owed wages for many hours.
53. Under section 77, Chicken World’s legitimate expectations were that the Director would make reasonable efforts to give it an opportunity to respond, which also included full disclosure of the details of the Complaint. Chicken World also says it had a legitimate expectation the Delegate would inform it she would stop trying to interview K.L. and that she would use the adjournments and extensions against them in her credibility assessment.
54. The choice of procedure here was completely within the discretion of the Delegate. The *ESA* does not require a hearing and Branch decisions are made in a dynamic and fluid environment intended to ensure

basic working standards and conditions, fair treatment of employees and employers, and fair and efficient procedures. The Branch and the Director's delegates do not have unlimited resources to adjudicate, investigate and determine each complaint. Important weight must be given to the choices of procedures adopted by the decision-maker and its institutional constraints.

55. While I decide each ground of appeal on its own merits below, I conclude that, overall, the *Baker* factors indicate the circumstances of this case were at the lower end of the spectrum in terms of what procedural rights the duty of fairness required. While the nature of the decision meant it was significant for both Chicken World and the Complainant, the investigative process followed, the nature of the statutory scheme and the terms of the statute, especially section 77, which largely informs the parties' legitimate expectations, the choice of procedures, and the Branch's institutional constraints all lead me to my conclusion.

#### Oral hearing

56. I note both the Appellant and Delegate appear to conflate the Branch's prior practice of either holding an adjudicative hearing or conducting an investigation and the procedural right in some circumstances to an oral hearing in administrative law (Appeal Form, Schedule A, paras. 30-32, 45; Record, pp. 161-162). Even though the Delegate decided to ultimately proceed by way of investigation, this did not preclude her from holding an oral hearing and would not preclude a right to such a hearing if warranted by natural justice.
57. As Chicken World acknowledges, investigations do not require oral hearings: *Gaspar, Najera, Phan, Simon and Villahermosa (Re)*, 2018 BCEST 48, reconsidered in 2018 BCEST 69; *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, BCEST #RD317/03, p. 15; *BWI Business World Inc. (Re)*, BCEST #D050/96; *Re 6307485 Canada Ltd. (c.o.b. McDonald's Restaurant)*, BCEST #D121/09 at paras. 63-64. The Director is not required to give employers an opportunity to cross-examine a complainant employee as part of the investigative process: *Re Whittaker Consulting Ltd.*, BCEST #D033/06, paras. 26-27. Section 77 requires the Delegate give the person under investigation a reasonable opportunity to respond, which means the person must have full disclosure of the details of the complaint so that the opportunity to respond is reasonable and effective: *J.C. Creations Ltd. o/a Heavenly Bodies Sport (Re)*, BCEST #RD317/03, pp. 16, 18.
58. Chicken World says in certain circumstances the Tribunal has held an oral hearing was required to satisfy natural justice and that the circumstances in the Complaint are analogous so the Delegate should have held a hearing. It says credibility issues were at the centre of the dispute and coloured every issue for determination. It further says the Delegate had to consider whether an oral hearing should be held. From my summary of the Record above about the Complainant's request for a hearing and the Delegate's response, it is clear the Delegate did consider an oral hearing and denied the request for a number of reasons, not just because she believed the parties were out of the country. In any event, it ultimately matters not whether the Delegate relied on irrelevant considerations in denying the request, what matters is whether, in the circumstances, procedural fairness required a hearing. I find it did not.
59. First, as explained above, I find the investigation and determination process here was at the lower end of the spectrum in terms of what procedural rights the duty of fairness required.
60. Second, in almost any complaint adjudication or investigation, credibility will be important to some extent: *Gaspar, Najera, Phan, Simon and Villahermosa (Re)*, 2018 BCEST 48, para. 51, reconsidered in 2018 BCEST 69. Thus, the mere fact that there was competing evidence from the parties and so credibility

issues were central to the dispute is not helpful in determining whether this case required an oral hearing. Chicken World has not identified any specific aspect of the investigation that leads to a conclusion the credibility issues were such that the Delegate should have held an oral hearing. Neither, as noted by the Delegate, did the Complainant's counsel in July 2020 when requesting an oral hearing (Record, pp. 156-158, 162).

61. Third, I disagree with Chicken World that the circumstances of the Investigation were analogous to *Re Enviro Surface Care Ltd.*, BC#ST #D037/10 and *Re C&W Salvage Ltd.*, BCEST #D103/12. In *Re Enviro*, counsel repeatedly asked for an oral hearing, counsel made allegations of a fraudulently produced document, submitted an expert report about this document, the parties made submissions consisting largely of hearsay and there were issues of document relevance and admissibility. Further, the Delegate never explained why an oral hearing was not held. It is in these “*unique circumstances*” the Tribunal held procedural fairness required cross-examination at an oral hearing: *Re Enviro Surface Care Ltd.*, BCEST #D037/10, para. 34. *Re C&W Salvage Ltd.*, BCEST #D103/12 is entirely distinguishable too as there was no investigation. The delegate merely received written submissions and then issued a determination. Thus, the delegate did not follow an adjudicative process or an investigation although there were serious issues of credibility. The circumstances in this case were more like those in *Re Whittaker Consulting Ltd.*, BCEST #D033/06, and many complaints, where credibility was in issue in the sense each side disputed the other's version of events and one side even alleged fraud, but procedural fairness did not require an oral hearing.
62. Fourth, the Reasons and Record show that, in her Investigation, the Delegate repeatedly tested the evidence of both parties before arriving at her Determination. She spoke with both parties until they retained counsel, cross-disclosed submissions and evidence to each, followed-up and ran to ground apparent inconsistencies in the evidence from both parties (see e.g., Record, pp. 237-242) and interviewed by telephone the available third-party witness. Therefore, in the context of this specific Investigation, there is no basis on which to conclude there was any procedural unfairness to Chicken World because there was no hearing.
63. In summary, Chicken World has not shown the process adopted by the Delegate denied them the procedural protections reflected in section 77 of the *ESA*.

#### Interviewing K.L.

64. Chicken World alleges the Delegate breached her procedural fairness obligations because she did not conduct a thorough investigation, namely she did not interview K.L., and she did not tell Chicken World when she gave up trying to contact K.L.
65. At paragraph 16, above, I set out the numerous attempts the Delegate made to contact K.L. Given these efforts and the level of procedural requirement required in this Investigation, I find the Delegate did not breach principles of natural justice in not doing more than she did to contact K.L. Procedural fairness did not require the Delegate to pursue without end evidence from a witness Chicken World thought would corroborate its version of events. In fact, if it had, this would have been procedurally unfair to the Complainant. Moreover, section 77 required the Delegate ensure Chicken World knew the case it had to meet and had an opportunity to respond to it. The Delegate's inability to interview K.L., despite many attempts, did not adversely affect that right.

66. I do not find *Re Whittaker Consulting Ltd.*, BCEST #D033/06 indicates procedural fairness required the Delegate to continue to try to contact K.L. The issue in *Re Whittaker* was whether the delegate should have attempted to interview two witnesses put forward by the employer or whether the employer had to provide their evidence (see para. 31). Unlike in this case, the Delegate did not ask for their contact information, agreed they had relevant information, the proposed witnesses were directly implicated in potential fraud by the complainant and the main issue in dispute under the *ESA* and had the best evidence about some of this (see paras. 32-42).

67. I also find while it would have been best practice for the Delegate to tell Chicken World, she had been unable to interview K.L., procedural fairness did not require this. Chicken World could not reasonably expect the Delegate would make its case for it. It knew the Delegate had had problems when she first tried to contact K.L. in June 2021 and if it viewed K.L.'s evidence as important, it had the opportunity to submit a witness statement or summary of witness evidence from her.

#### Credibility assessment

68. Chicken World says the Delegate impermissibly relied on adjournments and extensions she granted to it as a reason to minimize Chicken World's credibility and it did not know the case it had to meet with respect to credibility in relation to the adjournments and extensions and did not have an opportunity to respond to this. Chicken World says the principle in *Huang v. Canada (Citizenship and Immigration)*, 2019 FC 1123 should guide my analysis. Chicken World also says if the Delegate had not made negative findings about the adjournment and extension requests, her credibility findings would ultimately have been different and thus, the other findings in the Determination may have been different.

69. I conclude the Delegate did not breach principles of procedural fairness in her credibility assessment or err in law in this regard.

70. First, regarding the case it had to meet, procedural fairness required Chicken World to know the case it had to meet with respect to the Complaint and Investigation, and have an opportunity to respond to that, not to know the case it must meet and an opportunity to respond to every individual aspect of the Investigation and the Delegate's decision-making.

71. Second, if the Delegate did find the significant delay caused by Chicken World's adjournment and extension requests negatively impacted their credibility, I agree with Chicken World this was an irrelevant consideration. However, as it acknowledges, 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. Chicken World states it cannot challenge findings of fact or credibility (Appeal Form, Schedule A, para. 35), however, that is what it is attempting to do with this ground of appeal.

72. Third, in terms of possible error in the Delegate's credibility findings, it is not the place of the Tribunal to review factual findings about credibility unless the alleged error rises to an error of law: *ESA*, s. 112(1). In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA). the British Columbia Court of Appeal defined questions of law in the context of appeal to the Tribunal. In this context, an error of law occurs in the following situations:

1. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
2. a misapplication by the decision-maker of an applicable principle of general law;
3. where a decision-maker acts without any evidence;
4. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
5. where the decision-maker is wrong in principle.

73. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.

74. The Delegate did not commit an error of law in her credibility determination. She applied the relevant legal process for assessing credibility and was not wrong in principle. The leading decision on determining the credibility of witnesses is *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354. At pages 356-357, the Court of Appeal held “*The real test of the truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*” There are other factors which should be weighed in assessing credibility: their motives, their powers of observation, their relationship to the parties, internal consistency of their evidence and inconsistencies and contradictions in relation to other witnesses’ evidence: *ARA Development Ltd. (Re)*, BCEST D012/08 at para. 37. Reliability of the evidence must also be analyzed. The Tribunal in *ARA Development Ltd. (Re)* summed it up as testing the oral evidence considering all other evidence: para. 37.

75. The Reasons and Record show the Delegate followed the applicable legal principles in determining the credibility of the parties. She tested each party’s evidence, repeatedly followed-up on apparent inconsistencies and giving each party opportunities to respond to her questions about their evidence. She considered whether what each party said was coherent and consistent with the documentary evidence, prior evidence from that party and the other party’s evidence, and whether the evidence was reasonable given all the facts. She considered whether there were reasonable explanations for the evidence other than what the parties submitted it established. She also tested the evidence in relation to evidence from a third-party.

76. Further, in her credibility findings, the Delegate did not act without evidence or on a view of the facts that could not reasonably be entertained. While the effect of the adjournment and extension requests was irrelevant, she had several reasonable grounds on which to prefer the Complainant’s evidence, including:

- a. the internal coherence and consistency of the Complainant’s evidence and its consistency with the documents;
- b. inconsistencies and omissions in Mr. Jahangir’s information;
- c. Mr. Jahangir’s response to the Delegate’s attempts to test his evidence;
- d. Mr. Jahangir changing his evidence about the work permit situation;

- e. Chicken World's failure to produce any payroll records other than wage statements, even though it admitted it created work schedules and used timecards and should have had copies of cheques and payroll deposits;
- f. Chicken World's evasive answers about the accuracy of the work schedules;
- g. Chicken World's refusal to verify the messages sent from Mr. Jahangir's telephone number in April 2018 were accurate when the messages clearly came from Mr. Jahangir's telephone number, which was not denied;
- h. Ms. Fahid's wage statements weakened Chicken World's credibility because no one named Aleena or Prem were listed in the work schedules for February 2018, although Ms. Fahid was paid for hours worked during this time; and
- i. the evidence from a third-party witness that did not corroborate Chicken World's version of the facts.

77. Fourth, I do not find the principle in *Huang v. Canada (Citizen and Immigration)*, 2019 FC 1123, applies to the facts of this case. In *Huang*, there was a breach of procedural fairness where the Refugee Protection Division made credibility findings at a *de novo* hearing based on the applicant's testimony at an earlier hearing without giving her the opportunity to address all the concerns arising from her previous testimony. *Huang* relates to procedural fairness in the refugee protection context, which is different from procedural fairness in the provincial employment standards framework. Procedural fairness rights under section 77 and the *Baker* factors here did not require the Delegate to put each specific consideration of her credibility assessment to Chicken World before making her a determination. *Huang* is also distinguishable on its facts from the circumstances of the Investigation. In *Huang*, the entirety of the adverse credibility findings in the second hearing arose from testimony at the first hearing, which the applicant did not have any notice about or opportunity to respond to. In this appeal, the Delegate made her credibility findings based on a number of considerations, only one of which was the delay caused by the adjournment and extension requests.

78. Finally, given my conclusion that the Delegate did not breach procedural fairness or commit a legal error in her credibility assessment because of her careful process of testing both parties' evidence and her application of the law in making her credibility findings, there is no basis on which to find if the Delegate had not made a negative finding about the effect of the adjournment and extension requests, then her credibility findings would have been different.

#### Reasonable apprehension of bias

79. I agree with Chicken World about the test for determining whether there is a reasonable apprehension of bias. The question I must answer is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude it is more likely than not the Delegate would not decide the Complaint fairly: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369 at para. 60; *Dusty Investments Inc. d.b.a. Honda North (Re)*, BCEST #D043/99 at pp. 7-8.

80. Chicken World says the Delegate did not approach the question of its credibility with an open mind because she had already determined based on the adjournments and extensions that it was less credible.



I do not find anything on the face of the Reasons or the Record indicating the Delegate approached her Investigation and credibility assessment without a fully open mind. The Reasons set out her many grounds for preferring the Complainant's evidence, only one of which was the delay caused by the adjournments and extensions. The Record shows the Delegate conducted a thorough Investigation, which included giving both parties multiple opportunities to satisfy her about potential inconsistencies and omissions. While the delay consideration may not have been relevant, a reasonable apprehension of bias does not arise here on the facts.

## **ORDER**

- <sup>81.</sup> Pursuant to sub-section 115(1)(a) of the *ESA*, I confirm the Determination dated September 3, 2021.

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**Maia Tsurumi**  
**Member**  
**Employment Standards Tribunal**