Citation: Euro Asia Transload Inc. (Re)
2022 BCEST 72

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Euro Asia Transload Inc.
("Euro Asia")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2022/184

DATE OF DECISION: December 6, 2022

DECISION

SUBMISSIONS

Peter Gall, K.C. — counsel for Euro Asia Transload Inc.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by Euro Asia Transload Inc. ("Euro Asia") of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the "deciding Delegate"), on August 24, 2022 (the "Determination").

2. The Determination found Euro Asia had contravened section 54 of the *ESA* in respect of the employment of Tyrell Meilleur ("Mr. Meilleur"). The Determination ordered Euro Asia to pay Mr. Meilleur wages, including vacation pay, in the total amount of $13,353.67, interest under section 88 of the *ESA* in the amount of $731.32, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $14,585.39.

3. Euro Asia has appealed the Determination on the grounds the delegates involved in the complaint process erred in law and failed to observe principles of natural justice in making the Determination.

4. In correspondence dated September 26, 2022, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the "record") from the Director, invited the parties to file any submissions on personal information or circumstances disclosure and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Euro Asia, in care of their legal counsel of record, and to Mr. Meilleur. Both have been provided with the opportunity to object to its completeness. Euro Asia, through its legal counsel, has accepted the record is complete. No objection to the completeness of the record has been received from Mr. Meilleur.

6. The Tribunal accepts the record is complete.

7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112 (2) have not been met.

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Meilleur will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

10. Euro Asia operates a warehouse and transportation business. At the relevant time, Euro Asia operated warehouses at two locations in the province: Richmond and Tsawwassen. Mr. Meilleur said that during his employment, with the exception of one day where he agreed to cover a shift at the Tsawwassen location for a fellow employee, he worked day shifts at the Richmond location. The deciding Delegate noted that Euro Asia did not disagree with Mr. Meilleur on this point or provide evidence showing that he had ever worked at the Tsawwassen location.

11. Mr. Meilleur was employed as a forklift operator from May 5, 2015, to July 7, 2020. At the time of his termination date, Mr. Meilleur's rate of pay was $26.00 an hour.

12. In September 2019, Mr. Meilleur requested and was granted a leave of absence from work for medical reasons. In January 2020, Mr. Meilleur advised his supervisor at the time, Suraj Suman ("Mr. Suman") that he and his partner had had a child and he would be off work until March 2020.

13. While his initial stated intention was to return in March 2020, he was not in a position to return until July 2020.

14. The record shows, and the deciding Delegate found, that Mr. Meilleur and Mr. Suman were in regular communication through the winter, spring, and early summer of 2020.

15. In early July, Mr. Meilleur communicated to Mr. Suman his availability to return to work on July 6, 2020.

16. Mr. Suman acknowledged that communication and instructed Mr. Meilleur to report for work on July 7, 2020, to Euro Asia's Tsawwassen location. There was some discussion between Mr. Suman and Mr. Meilleur about that instruction. Mr. Meilleur did not report for work on July 7, 2020.

17. Mr. Meilleur filed a complaint with the Employment Standards Branch on August 12, 2020, alleging Euro Asia had contravened the *ESA* by failing to return him to his original position after he took parental leave.

18. The deciding Delegate found Mr. Meilleur's original position was at the Richmond location. While there is no specific finding in the Determination, the record indicates he would perform substantially the same duties and have substantially the same responsibilities at the Tsawwassen location as he had at the Richmond location: see record, pages 25 and 78.

19. The sum of the evidence indicates Mr. Meilleur's original position was available when he indicated he was able to return – Mr. Meilleur had confirmed with other employees that there was work in his original position at the Richmond location and the deciding Delegate found Mr. Suman told Mr. Meilleur that "he believed it was temporary".

20. The deciding Delegate found the position at the Tsawwassen location was not "comparable" to Mr. Meilleur's original position. The reasons for that finding are set out at page R6 of the Determination. The finding was based on the deciding Delegate's finding that a relocation from Richmond to Tsawwassen would increase Mr. Meilleur's commute, resulting in increased costs that he could not, as a single father, afford.

21. In result, the deciding Delegate found Euro Asia had contravened section 54(3) of the *ESA*.

22. In deciding the appropriate remedy for the contravention, the deciding Delegate accepted that Mr. Meilleur had taken no steps to mitigate his losses.

23. Based on evidence that it was difficult to find employment in the transportation and warehousing industry in June and July 2020, and it continued to be "constricted" at the time Euro Asia failed to bring Mr. Meilleur back to work, the deciding Delegate found it was reasonable to award 4 months' wages for his losses occasioned by the contravention.

ARGUMENTS

24. Euro Asia argues the deciding Delegate erred in law and failed to observe principles of natural justice in making the Determination.

Error of Law

25. Euro Asia argues the deciding Delegate committed two errors of law: first, in interpreting and applying the test for employees returning to work following a leave provided in Part 6 of the *ESA* in the circumstances of this case; and second, by acting on a view of the facts that cannot be reasonably entertained.

26. In respect of these alleged errors of law, the submission made on behalf of Euro Asia says the deciding Delegate "failed to appreciate the significance" of several factual circumstances: that the operations of Euro Asia were different when it sought to return Mr. Meilleur to work than what they were when he went on leave; that Euro Asia's business needs had "changed considerably" during the relevant period because of impacts from Covid-19 virus; that the request to have Mr. Meilleur report to the Tsawwassen location was "based solely on its business needs"; that the work Mr. Meilleur would perform at either location was substantially the same; that Euro Asia would have "sought to accommodate" Mr. Meilleur at the Richmond location if it had understood he was refusing to report to the Tsawwassen location; and that there were many openings for workers with Mr. Meilleur's qualifications during the period June – October 2020, including with Euro Asia.

27. In their argument, Euro Asia makes the following points:

- the deciding Delegate failed to weigh the difference in Mr. Meilleur's role at the Richmond location and the proposed temporary role at the Tsawwassen location which, it is submitted, should have found the one difference on the positions – the commute – to be less consequential than the similarities in the duties and responsibilities he would have performed at both locations;
- the deciding Delegate failed to recognize, and give effect, to what are asserted to be "valid business reasons" for asking Mr. Meilleur to report to the Tsawwassen location on a temporary basis;
- the deciding Delegate failed to consider that Mr. Meilleur did not, at any time after July 6, 2020 reach out to Euro Asia to follow up on a return to work, which would have allowed them to have a discussion about possible ways of accommodating his concerns about reporting to the Tsawwassen location; and
- in the alternative, even if the decision of the deciding Delegate on section 54(3) was correct, the deciding Delegate erred in law in her approach to mitigation, as Euro Asia had work available during the period June 2020 – October 2020 that Mr. Meilleur could have performed.

28. As an alternative argument, Euro Asia says even if the deciding Delegate could be said to be correct on whether Euro Asia contravened section 54(3)(b), the deciding Delegate erred in law in her approach to Mr. Meilleur's duty to mitigate.

Natural Justice

29. Euro Asia says the delegates involved in investigating and deciding Mr. Meilleur's complaint failed to observe principles of natural justice in the way it investigated the complaint and processed the decision.

30. Euro Asia submits that in view of statements made by Mr. Meilleur about why, in his view, he was asked to work at the Tsawwassen location, it was incumbent on the deciding Delegate to hold an oral evidentiary hearing, allowing Euro Asia to cross examine, respond, and provide evidence of its business needs at the time.

31. Euro Asia infers it was not given sufficient opportunity to respond to Mr. Meilleur's assertions.

32. Euro Asia also says that even if an oral hearing is not required in this case, there was a failure to observe principles of natural justice in the way the investigation was conducted, although no explanation or foundation for that assertion is provided in their submission.

ANALYSIS

33. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more 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;
>
> (c) evidence has become available that was not available at the time the determination was being made.

34. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

35. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

36. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

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.

37. It is well established that the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's factual findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03. It follows that the facts upon which this appeal will be based are those found by the deciding Delegate in the Determination, and supported by the record, unless such findings constitute an error of law.

38. A party alleging a failure to comply with principles of natural justice, as Euro Asia has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.

39. A breach of natural justice can occur when a delegate had failed to consider relevant evidence: see for example *Daniel Alberto De Buen*, BCEST #D025/12. Such a failure can also be characterized as an error of law. However, there are limitations to intervening in a determination on that basis. As stated in *Jane Welch carrying on business as Windy Willows Farm*, BCEST D161/05 at para 40:

> . . . there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700,
>
> > …any attempt to determine whether an administrative decision-maker has considered "all of the evidence" as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.

40. There is no absolute right to an oral hearing and no principle that issues of credibility, even if they are shown, are required to be decided through an oral hearing. The decision of what process will be applied is a matter of discretion and is not generally reviewable unless there is an improper exercise of that discretion: see *Takarabe et al.*, BCEST #D160/98, and *Jody L. Goudreau et al.*, BC EST # D066/98. Failure by a delegate of the Director to meet the requirements of section 77 of the *ESA* or failure to observe principles of natural justice will likely not be viewed as a valid exercise of discretion.

Error of Law

41. In this case, the key legal issues before the deciding Delegate were: whether Euro Asia, given the facts that were before the deciding Delegate, and upon which findings were made, contravened section 54(3)(b); and, if so, what was the appropriate remedy for the contravention.

42. In respect of the first of those issues – whether Euro Asia had contravened section 54(3)(b) – Euro Asia says the deciding Delegate misinterpreted and misapplied that section and acted on a view of the facts that could not reasonably be entertained.

43. I disagree.

44. On the argument alleging an error in the interpretation and application of the relevant statutory provision, it is my view that the meaning of section 54(3)(b) is plainly and clearly expressed in its language – that the employer must place the employee whose leave under Part 6 of the *ESA* comes to an end in the same position the employee had before asking for leave, or in a comparable position – and that language directs both its interpretation and its application.

45. The argument made on behalf of Euro Asia provides no alternative interpretation than the one directed by the plain language. Rather, their argument centres on how the elements of that section were applied in the circumstances of the case.

46. The application of that provision directs the deciding Delegate to answer several questions: first: is the employee on a leave under Part 6; second, has the leave ended; and third, has the employer returned the employee to the position held before taking the leave, or to a comparable position. The answers to each of those questions are necessarily and logically driven by the facts before the deciding Delegate and the findings made on those facts.

47. In this case, the deciding Delegate found Mr. Meilleur was on a leave protected by the provisions of Part 6, that he and Euro Asia agreed for him to a return to work in early July 2020, and that Euro Asia did not place him in the position he held before his leave, or in a comparable position. I note here that accepting Euro Asia and Mr. Meilleur could agree to return to work during his leave period is consistent with the comments of the Tribunal in *Microb Resources Inc.*, 2020 BCEST 93 at paras. 55-56.

48. I have not been directed to any decision of the Tribunal addressing Part 6 of the *ESA* – and to my knowledge none exists – that has decided, *as a matter of law*, that economic differences between the employee's original position and the position into which the employee is sought to be placed can never affect the question of whether the positions are comparable. Fundamentally, the argument being made in this part of the appeal represents nothing more an effort to have this panel reweigh the evidence that was before the deciding Delegate and come to a different conclusion. Included in this effort is an attempt to add more "factual circumstances" to the case than were before the deciding Delegate when the Determination was made. I shall return to this point later in this decision.

49. I will note here that the Tribunal decision in *Northern Gold Foods Ltd.*, 2021 BCEST 35, and the reconsideration of that decision, do not provide any assistance for Euro Asia on this point, since a key finding in that case was that the delegate in that case erred *on the facts* in finding there was a difference in the compensation offered to the complainant when, *on the facts*, there was no difference.

50. At its root, the error of law asserted in this appeal is not with the interpretation and application of section 54(3)(b), but with the conclusion by the deciding Delegate that the position into which Euro Asia sought to place Mr. Meilleur was not comparable to his original position. That is a conclusion based on the facts before the deciding Delegate. This appeal simply disagrees with that conclusion. Rather than demonstrating how that conclusion was generated by a legally incorrect interpretation and application of section 54(3)(b), however, Euro Asia merely alleges that the deciding Delegate erred in law because she did not take into account the full range of factors that should have been considered, including several that were not provided by Euro Asia to either delegate involved in the complaint process or, in more precise terms, that the deciding Delegate failed to consider relevant evidence.

51. The failure of Euro Asia to demonstrate there was a legally incorrect interpretation and application of the relevant provision leads me to find there was no error in law in the interpretation and application of section 54(3)(b) in the Determination.

52. In the second part of the argument on the error of law ground of appeal, Euro Asia also asserts the deciding Delegate erred in law by acting on a view of the facts that could not reasonably be entertained.

53. As expressed above, the grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the deciding Delegate unless such findings raise an error of law. Findings of fact made by the deciding Delegate require deference. As noted above, asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.

54. To expand the above point, in order to establish the deciding Delegate committed an error of law on the facts, Euro Asia is required to show the findings of fact and the conclusions and inferences reached by the deciding Delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29. Put still another way, in terms analogous to jury trials, Euro Asia can only succeed if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the conclusion reached by the deciding Delegate, the emphasis being on the word "could".

55. The test for establishing that findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

56. This means it is unnecessary, in order for the deciding Delegate's decision to be upheld, that this panel must agree with her conclusions on the facts.

57. Euro Asia has accepted that the record before the deciding Delegate was complete. Neither party sought to introduce "new" evidence. Notwithstanding, in its appeal submission, Euro Asia offers an overview of

the facts which, they argue, when properly weighed should have led the deciding Delegate to a different result.

58. The weight to be ascribed to the evidence is a matter of fact, not of law: see *Beamriders Sound & Video*, BC EST #D028/06.

59. Euro Asia argues there were factors the deciding Delegate failed to consider in weighing the differences between Mr. Meilleur's original position and the position at the Tsawwassen location: that Mr. Meilleur's work duties, job title, status, hours of work, and rate of pay would have been the same; that the Tsawwassen location differed from the Richmond location by only 30 kilometres; that the assignment to the Tsawwassen location was temporary; and the assignment was "based solely" on Euro Asia's business needs.

60. An analysis of the above argument, and some conclusions respecting it, is required.

61. The fact there were similarities between Mr. Meilleur's position in Richmond and the one to which he was assigned in Tsawwassen is not new information; it was information that was before the deciding Delegate. There is no objective evidence that the deciding Delegate "failed to consider" this information.

62. Building on that point, the Tribunal will not presume the deciding Delegate ignored or failed to consider evidence unless it is objectively demonstrated that an express consideration of such evidence in the Determination is legally essential to the ultimate conclusion: see *Windy Willows*, *supra*.

63. Except in circumstances that do not arise in this case, there is no legal requirement for an administrative tribunal to recite all of the evidence before it in its reasons for decision. The deciding Delegate did not specifically refer to the similarities of the work at the two locations, but was aware of it. Euro Asia says it is an error of law on the facts not to have raised and considered them in assessing comparability. Nothing in Euro Asia's argument indicates why it was legally essential to the deciding Delegate's decision for this assessment to be done in the circumstances of this case. That said, I find the evidence of the similarities between Mr. Meilleur's work at Tsawwassen and Richmond was not sufficiently relevant or probative to require it to be considered expressly in the deciding Delegate's reasons and the deciding Delegate committed no error by not expressly considering them in the reasons for Determination.

64. Also, without specifically stating it, the argument of Euro Asia suggests the deciding Delegate placed too much weight on the commute, noting the two locations differed "only by approximately 30 kilometres" and that "many people make this commute". However, the relevance for the deciding Delegate was not the length of the commute but its negative impact on Mr. Meilleur. The distance of the commute is also not new information. The suggestion that the focus of that commute should be the distance, rather than its negative effect on Mr. Meilleur, substantially alters its import to the decision and does not represent a necessary consideration to the question being decided.

65. Euro Asia argues the deciding Delegate erred by failing to consider changes to their business and to their operational needs.

66. On a fair reading of the facts, I accept the business operations of Euro Asia were different when it sought to return Mr. Meilleur to a position than when he commenced his leaves.

67. However, the assertion that the request to Mr. Meilleur was made "solely" for business reasons and the inference in the argument made on behalf of Euro Asia that the assignment of Mr. Meilleur to the Tsawwassen location was occasioned by "significant" changes in the operational needs of their business are not supported by any evidence in the record. Euro Asia advanced no such claims during the investigation. More specifically, they did not advance any argument there was a "valid business reason", driven by "significant" changes for requesting Mr. Meilleur to report to the Tsawwassen location.

68. The only evidence in the record that touched upon the "operational needs" of Euro Asia is contained in the first communication the investigating delegate had with Mr. Suman, which records a part of the conversation as follows:

> They had a lot of employees so when he didn't show for shift, they filled it with someone else. Turnover is high and absenteeism is common, so they just moved along (record: page 3).

69. That statement was also repeated in the Determination, in the deciding Delegate's summary of the information provided by Euro Asia, at page R4:

> As it is very common for employees to fail to show up for shifts, Euro Asia would have simply called in a replacement after Mr. Meilleur failed to show up.

70. Nothing in the information provided by Euro Asia during the process speaks of the assignment of Mr. Meilleur to the Tsawwassen location being driven by significant changes to the operational needs of the business; the deciding Delegate can hardly be accused of failing to consider evidence that was not presented to her.

71. As there was no such evidence, the argument based on the comments of the Tribunal in *Kimberley Flint*, BC EST # D477/00, at page 6, do not apply to the circumstances of this case. The excerpt included in the appeal submission speaks to circumstances where the employee's original position has been eliminated by "significant changes" to the business of the employer; there is no such evidence in this case. Also, there was no evidence Euro Asia was unable to return Mr. Meilleur to his original position. The evidence suggests quite the opposite and is reflected in the statement in the appeal submission, para. 4(d), that had Mr. Meilleur been clear in his decision not to report to the Tsawwassen location, he would have been placed in a position at the Richmond location.

72. I find the reasons provided by the deciding Delegate, viewed contextually and taking a functional approach, support the conclusion reached. As noted above in para. 18, there was evidence before the deciding Delegate that the work Mr. Meilleur would perform as a forklift operator at either location would be substantially the same. As found above, Euro Asia has not demonstrated that it was legally essential to specifically refer to the similarities in the work that would be done by Mr. Meilleur at either location.

73. The central question before the deciding Delegate was whether the position to which Euro Asia sought to return Mr. Meilleur was "comparable" to his original position. That is a question of fact and may not be changed unless it is raised to the level of error of law.

74. Euro Asia has not shown that the findings of fact made by the deciding Delegate lacked any evidentiary foundation, it seeks only to have additional factors, which do not have an evidentiary foundation, included in the consideration and the resulting factors re-weighed.

75. In sum, I am not persuaded the deciding Delegate committed an error of law on the facts in deciding whether the position offered to Mr. Meilleur at the Tsawwassen location was comparable to his original position. The facts before the deciding Delegate allow for the conclusion reached on that question.

76. The appeal submission made on behalf of Euro Asia also alleges the deciding Delegate erred in law by failing to consider that Mr. Meilleur did not reach out to Euro Asia after July 6, to follow up about his return to work. The short answer to this argument is that it is the statutory responsibility of the employer, Euro Asia in this case, to initiate a return from a leave, not Mr. Meilleur's. In that respect, I agree with, and accept as an accurate statement of the law on section 54, the comment of the deciding Delegate, at page R6 of the Determination, that:

> Section 54 imposes a positive obligation on employers. An employer must take active steps to ensure that the employee is returned to work. It is not sufficient for an employer to wait for an employee to reach out before returning them to a comparable position . . .

77. Since there was no legal obligation in the *ESA* for Mr. Meilleur to "reach out" to Euro Asia, the argument on this point also fails. What happened instead was that Euro Asia wrote Mr. Meilleur out of his employment, treating him as having abandoned it. This occurred during the period statutorily protected under Part 6 of the *ESA*.

78. Euro Asia says, in the alternative, if there was no error in the finding of a contravention of section 54, the deciding Delegate nonetheless erred in law in its approach to his duty to mitigate.

79. The findings of the deciding Delegate on the remedy are set out above, at paras. 22-23. The deciding Delegate found Mr. Meilleur had not sought to mitigate his damages and that it was difficult to find employment in the transportation and warehousing industry in the period June to October, 2020. The deciding Delegate had also found the position at the Tsawwassen location was not comparable to his original position. Euro Asia failed to bring Mr. Meilleur back to work or offer him work at the Richmond location. I reiterate that it is the statutory responsibility of the employer, Euro Asia in this case, to initiate a return from a leave. The statement cited by counsel for Euro Asia from *Evans v. Teamsters Local Union No. 31,* 2008 SCC 20 (Can LII), [2008] 1 S.C.R. 661 does not apply here. There was no offer to Mr. Meilleur to return to his original position or to a comparable position once the parental leave statutorily granted, and protected, under Part 6 ended. I note again that Euro Asia considered Mr. Meilleur had abandoned his employment not long after he did not report to the Tsawwassen location. Euro Asia cannot argue Mr. Meilleur should have accepted his original, or a comparable, position when neither were offered to him.

80. In *Maltesen Masonry Ltd.*, BC EST #D070/10, the Tribunal stated the following:

> In respect of the first point, the appropriate remedy selected by the Director in this case was to provide Hardy with "compensation". The Tribunal has indicated in several decisions what considerations may go into determining the amount of compensation awarded: see *Afaga Beauty Service Ltd.*, *supra*; *W.G. McMahon Canada Limited*, BC EST # D386/99; *Angie MacKenzie*, BC EST # D033/00; *Britco Structures Ltd.* BC EST # D260/03; *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*, BC EST # D534/02; *Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.*, BC EST # D105/05; and *Rose Miller*, BC EST # D062/07. Each of these cases indicates the considerations identified are not exhaustive. In some cases, the Tribunal has clearly identified that payment of compensation flowing from a contravention of the *Act* is a statutory consequence of the failure to comply with a requirement of the *Act*. It does not represent a form of damages for breach of contract, to which the strict rules relating to proof of loss, mitigation and duplication of compensation are applicable. Instead, it is, predominantly, a form of remedy for having one's statutory rights violated or ignored: see *660 Management Services Ltd. et al*, BC EST # D147/05.
>
> Compensation under section 79(2)(c) is not determined by any formula and is necessarily calculated on information that is uncertain. In *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*, the Tribunal noted:
>
> > Given that awards made under section 79(4)(c) [now 79(2)(c)] cannot be estimated with precision since there is no clear formula (as is the case, for example, with compensation for length of service payable under section 63 or group termination pay under section 64), I do not think it appropriate for the Tribunal to, as it were, "micro-manage" such awards. In my view, such awards should only be disturbed where the award is based on a clearly erroneous footing or where the award does not take into account relevant factors.
>
> In this case, the Director considered certain matters in deciding what compensation should be paid to Hardy. While the reasoning is not as precise at it might have been, I am unable to find there is any basis for disturbing the Director's exercise of discretion or the award.

81. In the *Rite Style Manufacturing Ltd.* decision referenced above, Member Thornicroft noted:

> Compensation in lieu of reinstatement [section 79(2)(c)] should reflect an equivalent level of compensation—see e.g., *Tricom Services Inc.*, B.C.E.S.T. Decision No. D484/98; *W.G. McMahon Canada Ltd.*, B.C.E.S.T. Decision No. D386/99.

82. In this case, the deciding Delegate considered the amount of time Mr. Meilleur was unemployed, adjusted that period for his failure to mitigate, considered the general employment situation in the industry in which Mr. Meilleur might be expected to seek work, and decided the appropriate amount of compensation

83. I am of the same view as expressed in the final paragraph from *Maltesen*, above, and cannot find the remedy awarded to be wrong in law; it was entirely reasonable in the circumstances. This argument is dismissed.

Natural Justice

84. I am able to address Euro Asia's natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST # D050/96)

85. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Euro Asia was provided with the opportunity required by principles of natural justice to present their position to both the investigating and the deciding Delegate. Euro Asia has provided no objectively acceptable evidence showing otherwise.

86. There is nothing in the reasons, record, appeal form, or submissions showing that the investigating Delegate or the deciding Delegate failed to comply with the principles of natural justice (or with the requirements of section 77 of the *ESA*) in making the Determination. The record shows that Euro Asia knew the allegations against it and was given a full opportunity to respond before the Determination was made.

87. Euro Asia submits that the Director breached procedural fairness because it was not given sufficient opportunity to respond to Mr. Meilleur's assertions about race allegations. I have two responses to that: first, on the record it is apparent Mr. Suman did respond, indicating he was upset by them, asserting Euro Asia did not discriminate, and would be very willing to hire Mr. Meilleur back; and second, there is nothing in either the preliminary report or the Determination that remotely suggests that assertion was considered relevant to any issue decided in the Determination. The suggestion in the appeal submission, at para. 49, that the deciding Delegate "repeated in the Determination, and appeared to accept", the assertions made is a misreading, and misstatement, of the Determination, which only refers to those assertions in the context of setting out the information provided by Mr. Meilleur. There is no reference to them in the findings and analysis done by the deciding Delegate or any indication they were either accepted or were considered relevant and probative.

88. In answer to the contention that an oral hearing should have been held in this case, I refer to the principles stated above, at para. 37. I am satisfied the deciding Delegate complied with the requirements of both section 77 of the *ESA* and the principles of natural justice that operate in the context of this case in deciding how Mr. Meilleur's complaint would be processed and by the investigating Delegate in

conducting the complaint investigation. Nothing presented in this appeal has shown an improper exercise of discretion and the contention by Euro Asia that an oral hearing should have been held is rejected.

89. The natural justice ground of appeal is dismissed.

90. I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

91. Pursuant to section 115 of the *ESA*, I order the Determination dated August 24, 2022, be confirmed in the amount of $14,585.39 together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal