



An appeal

- by -

Scott C. Krakiwsky  
(“Mr. Krakiwsky”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2015A/97

**DATE OF DECISION:** February 17, 2016

## DECISION

### SUBMISSIONS

Scott C. Krakiwsky	on his own behalf
Justin Maxwell	on behalf of Angus One Professional Recruitment Ltd.
Megan Roberts	on behalf of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Scott C. Krakiwsky (“Mr. Krakiwsky”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 5, 2015.
2. The Determination dismissed the complaint of Mr. Krakiwsky against his former employer, Angus One Professional Recruitment Ltd. (“Angus One”).
3. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. On July 15, 2015, the Tribunal notified the parties that an appeal had been received from Mr. Krakiwsky, requested production of the section 112(5) record (the “record”) from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
5. The “record” was provided by the Director to the Tribunal and a copy was sent to Mr. Krakiwsky, who was advised of his right to object to the completeness of the “record”. On July 31, 2015, the Tribunal received e-mail correspondence from Mr. Krakiwsky asserting the “record” provided by the Director was “not representative of the complete record that was available to the Delegate of the Director at the Adjudication”. Mr. Krakiwsky says only 29 of 723 pages of his document submission were included in the “record” provided to the Tribunal. He submits “the Adjudicator severely and narrowly restricted what constituted allowable evidence during the Adjudication”. He says:

In order to be allowed to proceed, I was ordered at the onset to substantially and hastily cull my document submission and to limit it only to direct evidence of violations by Angus One of section 83 of the Employment Standards Act.
6. Mr. Krakiwsky argues this action violated principles of natural justice, “as it made demands to cull my 723 pages of evidence in an unreasonable amount of time and that it hindered demonstrating the conditions of my employment.” He says that subsequently the Adjudicator relied on his failure to provide certain evidence, “evidence which was of a nature outside of the scope of limited permitted evidence”. He has attached documents to his correspondence exemplifying his point.
7. Responding to that correspondence, the Director says:

The Record provided to the Employment Standards Tribunal on July 16, 2015 is that which was relied upon for the Determination issued on June 5, 2015. As set out in pages 3 and 4 of the Determination,

during the hearing Mr. Krakiwsky specifically identified and confirmed that evidence he wished to rely upon as relevant to the issues to be determined. Accordingly he withdrew the balance of the evidence which he identified as not relevant or pertaining to the outstanding issues and such was not considered.

8. On October 29, 2015, in Tribunal Decision Number BC EST # D112/15, and without deciding Mr. Krakiwsky's objection to the record, I found the appeal could not be dismissed under section 114 of the *Act* and requested submissions from the Director and Angus One. Those submissions have been provided and I am able to address the issues raised by Mr. Krakiwsky in his appeal.

## FACTS

9. I will confine my recitation of the facts to those found in the Determination, appreciating there is some controversy about them that will need to be addressed later in this decision.
10. Angus One operates a temporary and permanent placement employment agency in Metro Vancouver. Mr. Krakiwsky was employed by Angus One as an "Administration Clerk". He commenced his employment on May 9, 2012; his last day worked was September 30, 2014. He filed a complaint with the Director in late October 2014, alleging Angus One had contravened the *Act* by failing to pay compensation for length of service, statutory holiday pay and concomitant annual vacation pay, not allowing him to take annual vacation time, falsely representing the conditions of his employment and terminating his employment after he attempted to claim and enforce his rights under the *Act*.
11. The Director conducted a complaint hearing on May 25, 2015, hearing evidence and argument from Mr. Krakiwsky on his own behalf and Sarah Angus, president of Angus One, and Justin Maxwell, Chief Operating Officer, on behalf of Angus One.
12. The reasons for Determination identified, under the heading "Preliminary Issues" a number of matters that arose prior to or during the complaint hearing. These include:
  1. Mr. Krakiwsky introducing a claim that Angus One had mistreated him and terminated his employment and in so doing had contravened section 83 of the *Act*;
  2. The Director adjourning the complaint hearing to give Angus One an opportunity to review the evidence and argument relating to the section 83 allegation and to determine if they wished to proceed;
  3. Angus One "voluntarily and without prejudice" paying Mr. Krakiwsky compensation for length of service, statutory holiday pay for Labour Day and concomitant vacation pay in the amounts claimed by him;
  4. Mr. Krakiwsky acknowledging his section 8 complaint pertained to pre-hiring provisions and was subject to the six month time limit in section 74 of the *Act*; and
  5. Mr. Krakiwsky identifying that portion of his documentary evidence and submission brief that applied to the outstanding issues in his complaint.
13. The reasons for Determination identify two issues:
  1. Did Angus One fail to allow Mr. Krakiwsky to take vacation time as set out under section 57 of the *Act*?

2. Did Angus One contravene section 83 of the *Act*? If so, what if any remedy is Mr. Krakiwsky entitled to?
14. A full summary of the evidence provided by the parties at the complaint hearing is found in the reasons for Determination. It is of some assistance to set out in this decision parts of that evidence summary.
15. Mr. Krakiwsky testified he was hired by Angus One in May 2012 as a temporary placement worker. Angus One provided him with work placements with their various clients. For a 27 month period prior to the termination of his employment, Mr. Krakiwsky was placed on assignment with DB Schenker. In June 2014, Mr. Krakiwsky and Barbara Gill (“Ms. Gill”), the Human Resources Manager at DB Schenker, discussed him coming to work permanently at DB Schenker. His placement term was coming to an end on June 30. Permanent employment with DB Schenker did not happen; his placement was extended for three months.
16. In September 2014, there were additional discussions with DB Schenker about permanent employment and during an interview on September 22, Mr. Krakiwsky advised DB Schenker as of October 1 he would be taking the vacation time he had accrued since starting his placement with them, as was his right under the *Act*. Mr. Krakiwsky testified Ms. Gill told him his employment would have to start October 1 and he would therefore not be able to take vacation time as planned.
17. On September 24, Ms. Gill advised Mr. Krakiwsky in an e-mail that DB Schenker had “submitted a requisition for approval to extend your agency contract for an additional three months, to the end of 2014”. He responded to the e-mail on September 26, expressing his disappointment with her response, in which he used the phrase, “Continuing to contract my services through Angus One is no longer an option”, a phrase he also used in an e-mail of the same date, to DB Schenker executive Dennis Ho. In the same e-mail, Mr. Krakiwsky stated: “I will no longer be available as an agency employee on Wednesday, October 1<sup>st</sup>”.
18. Mr. Krakiwsky was paid 4% annual vacation pay on each paycheque. When he made inquiries at Angus One about his vacation time, he says he was told temporary placement employees did not receive vacation time. On September 30, Mr. Krakiwsky attached an Employment Standards Self-Help Kit to an e-mail to Angus One that set out the requirements with respect to vacation time. Subsequent efforts were made by Angus One to arrange to speak with Mr. Krakiwsky. He advised them he was “unavailable” for a few days. In turn, he was advised DB Schenker had requested the assignment end as of September 30.
19. Mr. Krakiwsky received no further assignments from Angus One. He requested and was issued a Record of Employment, the final version being dated November 20, 2014, that included the comment, “Temporary Employment Contract Ended”.
20. The representatives of Angus One provided evidence on its behalf and confirmed much of Mr. Krakiwsky’s evidence. They did deny Mr. Krakiwsky was told he could not take vacation time or that temporary employees did not receive vacation time. They also denied the reason for Mr. Krakiwsky’s employment ending had anything to do with his request for vacation time. Angus One testified Mr. Krakiwsky was on temporary placement with DB Schenker who had the right to end the placement at any time, for any reason.
21. The Director found Angus One did not deny or interfere with Mr. Krakiwsky taking vacation time. Mr. Krakiwsky told Angus One on or about September 24 that he intended to take vacation time commencing October 1, and he did.
22. The Director found Mr. Krakiwsky’s last day worked was September 30, 2014; he received no wages after that date. As he had received his vacation pay on each pay cheque, the Director found he was not entitled to

any further wages during his vacation time and did not qualify for statutory holiday pay for the Thanksgiving statutory holiday he claimed.

23. The Director found no “convincing evidence” that the decision of DB Schenker not to hire Mr. Krakiwsky and his termination from Angus One were a result of him enforcing his right to vacation time. Rather, on “the evidence when considered as a whole”, the Director found the decision of DB Schenker was grounded in Mr. Krakiwsky’s dissatisfaction with them extending the temporary placement contract through Angus One and their corresponding lack of commitment to hiring him to a permanent position. The reasons for Determination in regard to this finding notes Mr. Krakiwsky’s statement to DB Schenker, repeated more than once, that continuing to contract him through Angus One was “no longer an option”.
24. The Director did not accept the argument that Angus One’s failure to make provision for vacation time with his assignment to DB Schenker resulted in him losing his placement as well as the opportunity for permanent placement, finding the evidence did not support this argument. The Director found no evidence was provided showing Mr. Krakiwsky had made himself available for or requested a subsequent placement or that Angus One withheld placement from him. The Director found no merit in the allegation by Mr. Krakiwsky that Angus One had interfered with his negotiations with DB Schenker for a permanent position.

## ARGUMENT

25. Mr. Krakiwsky has grounded this appeal in an allegation that the Director committed an error of law and failed to observe principles of natural justice in making the Determination. As I have noted above, following the delivery of the “record”, Mr. Krakiwsky objected to its completeness. In making his objection, he attached a section from the list of documents he had prepared for the complaint hearing. This section was not submitted as evidence during the complaint hearing, not being a set of documents Mr. Krakiwsky identified as being relevant to his complaint and on which he wished to rely. As a result of the Director making a finding that there was “no evidence . . . to show that Mr. Krakiwsky would be available for . . . placement . . .”, Mr. Krakiwsky seeks to have this set of documents, comprising five pages, included in the “record”. Notwithstanding the general tenor of his objection, Mr. Krakiwsky has not identified any other documents whose exclusion from the brief he prepared for the complaint hearing “hindered” his presenting his case or was relevant to some aspect of the matters considered at the complaint hearing. The five pages are e-mails sent to Angus One indicating his availability for work for the five weeks (plus 1 day) commencing October 17, 2014 and ending November 22, 2014.
26. I am satisfied these documents were not part of the “record” as they were never provided to the Director at the complaint hearing and were not “before” the Director when the Determination was being made. In his objection, Mr. Krakiwsky adds another ground of appeal: section 112(1) (c) - evidence becoming available that was not available when the Determination was being made. The Tribunal has frequently addressed the criteria relating to this ground, noting the Tribunal has discretion in regards to accepting new or additional evidence and has taken a relatively strict approach to the exercise of this discretion. The Tribunal tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made.

The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

27. Applying the above considerations, and apart from concerns relating to the timeliness of adding this new ground of appeal, I find the documents that are attached to the appeal filed by Mr. Krakiwsky should not be added to the “record” or considered in the appeal.
28. First, it is apparent that all of this evidence existed at the time the Determination was being made and was available. If Mr. Krakiwsky believed this evidence to be relevant and important, it should have been provided to the Director during the complaint hearing.
29. Second, much of the additional evidence submitted with the appeal is only marginally relevant and is not, on its face, probative. Even allowing for the fact that Mr. Krakiwsky notified Angus One of his availability, there continues to be no evidence that he requested another placement or that Angus One withheld available placements from him. There would need to be evidence on all three of these points to support the inference being sought by Mr. Krakiwsky.
30. Notwithstanding my decision on these documents, I accept Mr. Krakiwsky told Angus One he was available and willing to work “every day from October 17<sup>th</sup> onwards every week since”. That statement is included in his complaint; the complaint is in the “record” and was before the Director. The Director’s statement there was “no evidence” on that point is clearly inconsistent with the material in the “record” and is wrong. Having said that, without some evidence these communications were ignored and that he was passed over for suitable placements that arose during this period, Mr. Krakiwsky’s advising Angus One of his availability does not affect the overall finding. There is also no evidence Mr. Krakiwsky ever made an effort to follow-up for potential placement.
31. Accordingly, the appeal will be addressed on the findings made in the Determination except to the extent those findings show an error of law and are rejected or varied.
32. I shall set out Mr. Krakiwsky’s argument under the grounds he has chosen to rely on in this appeal, dealing first with the natural justice ground and then the error of law allegations. I need not address the “new evidence” ground he has added, having disposed of that ground above.

**(i) Failure to Observe Principles of Natural Justice**

33. In his appeal submission, Mr. Krakiwsky submits the process and the effect of requiring him to “cull” his supporting documents and submissions denied him a fair hearing.
34. In respect of the process for doing the “culling”, he indicates he was told by the Director he would have to “exempt” documents relating to matters Angus One had opted to make payment for and allowed approximately five minutes at the beginning of the complaint hearing to do so. In respect of the effect, he asserts he was barred during the complaint hearing from subsequently referring to, submitting or relying on any of the documents he had exempted from his material, even though the Director made a “no evidence” finding concerning facts that were included in this material.
35. On the section 57 issue, Mr. Krakiwsky argues the Director violated principles of natural justice by barring him from questioning representatives of Angus One regarding vacation entitlement on the basis Angus One had acknowledged an error in not providing vacation time. Mr. Krakiwsky argues this decision by the Director prevented him from asking any questions where the content of those questions “overlapped

vacation entitlement” and where, he contends, the purpose in asking questions concerning Angus One’s treatment of vacation entitlement was applicable to his section 83 complaint.

36. Mr. Krakiwsky clarifies that the purpose of his questioning on how entitlement to vacation time off was handled, was to demonstrate its incompatibility with the continued placement of employees, such as himself, in long term or recurring temporary assignments.
37. Mr. Krakiwsky also submits there was a breach of principles of natural justice by the Director in pre-determining that part of his complaint alleging a contravention of section 8.
38. It is submitted that the Director violated principles of natural justice by finding no merit in the allegation by Mr. Krakiwsky that Angus One had interfered with his ability to negotiate with DB Schenker for a permanent position, although the submission is not entirely clear how the principles of natural justice are engaged in the context of this point viewed as a whole.
39. Finally, Mr. Krakiwsky contends the Director failed to observe principles of natural justice in the decision regarding section 83 of the *Act*. He says the breach of principles of natural justice occurred by the Director failing to consider whether there had been an on-going contravention by Angus One of section 57 of the *Act* and the by the failure of the Director to consider Angus One’s role and responsibility to him as an employee of an employment agency. He also returns to his initial contention on the natural justice ground: that the Director prevented questions concerning the steps Angus One had taken to facilitate his vacation entitlement at DB Schenker, prevented questions about whether Angus One had ever allowed employees taking annual vacation entitlement to return to “an ongoing existing assignment” and prevented him from providing evidence from documents that had been required to remove from his document brief.

**(ii) Error of Law**

40. Mr. Krakiwsky submits the Director erred in law on the section 57 issue by asking the wrong question, which the Director framed as being whether Angus One failed to allow him to take vacation time, when the correct question ought to have been whether Angus One had contravened section 57 of the *Act*. Mr. Krakiwsky says the effect of this error was to place an irrelevant, and onerous, precondition to his demonstrating section 57 had been contravened. He submits the Director should have made a finding that Angus One had contravened section 57 of the *Act*.
41. He also submits the Director erred in law in finding he was taking vacation time in the period from October 1 to October 16, 2014. He says if that were so, he would have been entitled to statutory holiday pay for the Thanksgiving statutory holiday, when the Director found he was not. He argues there cannot be vacation time under the *Act* when Angus One neither granted vacation time nor acknowledged his right to take it. He also notes Angus One ignored his use of the Self-Help Kit requesting they acknowledge his right to vacation time and it was not until the complaint hearing that they acknowledged any error in respect of vacation time. More directly, Mr. Krakiwsky submits the Director erred in law in not finding he was entitled to statutory holiday pay for the Thanksgiving statutory holiday. He argues the Director failed to take into account the wording of section 58 of the *Act*, in deciding he had not qualified for statutory holiday pay for Thanksgiving. He contends that even though Angus One paid annual vacation pay on each pay cheque, that amount should be deemed to be paid, or payable, on those days on which annual vacation is taken.
42. In any event, he argues that since Angus One never acknowledged either his right to take annual vacation time commencing October 1, 2014, or that he was on annual vacation time, the Director should have found he was not taking vacation time during that period and the Tribunal should vary the Determination to record

that fact. He also says Angus One admitted during the complaint hearing that there was no record kept of the dates of annual vacation time off taken by an employee and on the basis of that admission, the Director should have found a contravention by Angus one of both section 28 and section 57 of the *Act*.

43. He also contends that, since he was not paid length of service compensation, statutory holiday pay and concomitant annual vacation pay until the day of the complaint hearing, “7 months and 23 days” after it should have been paid, according to the requirements of section 18 of the *Act*, the Tribunal should “clarify the law regarding lack of enforcement of section 18”, and refer the matter back to the Director to determine “whether an offence under section 18” has been committed.
44. Mr. Krakiwsky argues there was an error of law in the Director refusing to hear or consider submissions that Angus One was operating in contravention of its obligations as an “employment agency” licensed under the *Act*. While not specifically identifying the error of law, the nature of the submissions on this point indicate Mr. Krakiwsky feels the error of law has been made by the Director failing to effectively handle the evidence and draw correct conclusions of fact from that evidence.
45. Mr. Krakiwsky submits the Director erred by failing to appreciate the totality of the relationship between Mr. Krakiwsky and Angus One and the statutory obligation found in section 4 of the *Employment Standards Regulation* (the “*Regulation*”) on Angus One to act in his best interests. He also contends the Director failed “to listen to abundant evidence” regarding violations of section 83 and proceeds to set out more than three pages of evidence and argument relating to conclusions that should be drawn from that evidence.
46. In respect of the section 83 issue, Mr. Krakiwsky submits the Director erred by failing to appreciate and consider the relationship between the ongoing violation of section 57 and the contravention of section 83 of the *Act*. He submits the response of Angus One to his Self-Help request, which includes their view of his statutory right to vacation time off, and their subsequent termination of his employment was consistent with his allegation but the Director would not hear it. In his argument, he states:
- . . . I was not allowed to question whether they had attempted to arrange my vacation, and place a temp employee for the next two weeks to cover me. The adjudicator also prevented my questions regarding whether any temp employees have ever been able to return to any existing ongoing assignment.
47. Mr. Krakiwsky makes several other arguments relating to the handling of the evidence by the Director, conclusions drawn from the evidence, the refusal by the Director to allow certain evidence and evidentiary requirements placed on Mr. Krakiwsky by the Director, submitting all of these errors led the Director to the wrong finding.
48. The response of the Director has addressed Mr. Krakiwsky’s appeal under each of the grounds on which he relies.

**(i) Failure to Observe Principles of Natural Justice**

49. In respect of the allegations made by Mr. Krakiwsky concerning the section 8 aspect of his complaint, the Director disagrees with his characterization of what transpired at the complaint hearing. The Director’s response says Mr. Krakiwsky voluntarily withdrew this part of his complaint after being advised the argument and evidence relating to this aspect of his complaint would need to address the “nature of the alleged contravention as well as the time period in which it occurred in accordance with the application of section 74 of the *Act*”. The Director says he was not “required” to withdraw this aspect of his complaint nor was he told he could not provide evidence or that the matter had been predetermined.



50. In respect of Mr. Krakiwsky's assertions relating to being required to "cull" his evidence book, the Director says his statements that he was "required to provide an unalterable subset at the onset" and was "unable to reference material I had already provided in my evidence package" is wholly inaccurate. The Director says Mr. Krakiwsky routinely referred to and drew from his original evidence package and added documents to his "unalterable subset" many times during the complaint hearing.
51. The Director submits that even accepting the evidence presented and highlighted in Mr. Krakiwsky's appeal, there is nothing in it that would suggest its consideration would have changed the result in the Determination.
52. In response to Mr. Krakiwsky's allegation the Director prevented him from asking certain questions during cross-examination of representatives of Angus One, the Director says Mr. Krakiwsky engaged in "extensive questioning" of representatives of Angus One, the "relevant portions of which are included in p. 7-8 of the Determination." The Director acknowledges Mr. Krakiwsky was asked to "move forward" in his cross examination in respect of questions that had already been asked and answered or were not in dispute. The Director notes Mr. Krakiwsky never raised any allegations or concerns in respect of his allegations except through the appeal.

**(ii) Error of Law**

53. The Director reiterates the matters at issue at the commencement of the complaint hearing were Mr. Krakiwsky's complaint for false representation, statutory holiday pay for Thanksgiving, vacation time off and mistreatment for requesting vacation time off. The first matter at issue was withdrawn; the others were heard and determined. The Director submits the appeal is an expression of Mr. Krakiwsky's disagreement with the result. The assertion by Mr. Krakiwsky that the Director "reduced the issues to be determined" and failed to find various contraventions ignores section 76 of the *Act*, which allows the Director to stop adjudicating or investigating a complaint if the dispute that caused the complaint is resolved. Mr. Krakiwsky's claims for compensation for length of service, and statutory holiday pay, exclusive of Thanksgiving, were resolved; the outstanding claims were determined. In respect of those claims no violation was found.
54. The Director submits Mr. Krakiwsky's arguments relating to Angus One's general compliance with the *Act* and *Regulation* fail to appreciate the Director does not make decisions based on the wishes of a party but on whether there has been a contravention of the *Act* or *Regulation* at the end of the complaint process, taking into account the purposes of the *Act* as expressed in section 2. The Director says Mr. Krakiwsky made overarching arguments pertaining to Angus One's obligations as an employment agency that were considered in deciding the claims for entitlements at issue in the complaint hearing. The Director says there are other forums and procedures through which the Director can address general concerns that fall under the *Act* and *Regulation* but do not directly bear on Mr. Krakiwsky's claims for wages and vacation time.
55. Angus One has also filed a response, noting at the outset that Mr. Krakiwsky's claim for compensation for length of service, statutory holiday pay (for Labour Day) and concomitant vacation pay was paid by them prior to and during the complaint hearing and that Mr. Krakiwsky withdrew his section 8 complaint, admitting he had misunderstood the scope of section 8 and the time limit in section 74 of the *Act*.
56. Angus One says the claim under section 83 of the *Act*, which Mr. Krakiwsky introduced at the complaint hearing, was not supported on the facts.
57. Angus One outlines a summary of how the hearing progressed and expresses its view the Director provided a fair hearing, where both parties were able to present all of their evidence and argument.

58. Mr. Krakiwsky has been allowed to make a final reply to the responses of the Director and Angus One. He submits his not raising the allegations and concerns being made in his appeal prior to filing the appeal is not inconsistent with the notice he received directing he not contact the adjudicator after the hearing and with the requirement to submit appeals to the Tribunal. He also says it would have been disruptive to the hearing and potentially premature to raise the issue until the Determination had been issued.
59. Mr. Krakiwsky restates several of the arguments made in his appeal submission in the context of responding to the submissions of the Director and Angus One.
60. Mr. Krakiwsky uses his reply to request an examination of whether, under section 68(3) of the *Act*, the payment by Angus One of his claim for length of service compensation discharges their liability under section 63 and consideration of whether the time limit in section 74(4) would have barred the alleged “false representation” allegation, since, he submits, the representation he claimed was made could only have contravened section 8 when its untruthfulness became apparent.
61. Mr. Krakiwsky makes an assertion concerning what he identifies as a representation by Angus One that his time with DB Schenker was a sequential set of ongoing assignments. He says that representation is not true.
62. He says the response of the Director on the section 8 matter demonstrates the propensity to selectively choose evidence, ignoring such evidence as the continued offer of employment past September 30, 2014, and that the position he was in with DB Schenker was internally extended by them. His final comment is the assertion that Angus One “should have been compelled to act when the conditions of employment were not commensurate with the Employment Standards Act.”

## ANALYSIS

63. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, 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.*
64. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.
65. 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.
66. The grounds of appeal listed above 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 findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

**(i) Failure to Observe Principles of Natural Justice**

67. Mr. Krakiwsky relies heavily on his assertion the Director failed to observe principles of natural justice in making the Determination. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

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)

68. I am not persuaded the Director failed to observe principles of natural justice, denying Mr. Krakiwsky a fair hearing.

69. Regarding Mr. Krakiwsky's argument relating to what he alleges was a requirement to "cull" his document brief at the complaint hearing, I find nothing in the material in the file or in the appeal that shows Mr. Krakiwsky was denied the opportunity to present evidence and argument on the claims he was making in the complaint hearing. In light of the concessions made by Angus One at the complaint hearing, it was entirely reasonable for the Director to request Mr. Krakiwsky to re-examine his document and argument brief and limit the documents in accordance to their relevance to the remaining issues. In that respect, it appears Mr. Krakiwsky's efforts were largely correct. In this appeal, he has identified only five documents he now asserts have relevance to an argument he wishes to make in this appeal and those five documents speak to a fact that was included in the "record" and are not, in any event, probative – in the sense of being determinative of the point for which they are sought to be used. Their omission has not caused any injustice to Mr. Krakiwsky.

70. I find no breach of principles of natural justice relating to withdrawal of the section 8 allegation. Mr. Krakiwsky's perception that his section 8 complaint might have merit is simply wrong. Section 8 of the *Act* is a pre-hiring provision and covers only pre-hiring practices: see *Jeff Parsons*, BC EST # D110/00 (Reconsideration denied, BC EST # D513/00). On the undisputed facts, a complaint alleging Angus One contravened section 8 had no chance of succeeding. It was time barred: Mr. Krakiwsky had been hired by Angus One nearly 30 months before he alleged a contravention of section 8; section 74(4) of the *Act* requires a complaint alleging a contravention of that section be made within six months after the date of the contravention. It was entirely consistent with the statutory purpose of promoting fair and efficient procedures for resolving disputes under the *Act* to have that matter resolved at the outset. In any event, I am satisfied, on balance, that Mr. Krakiwsky voluntarily withdrew this part of his complaint; it would be completely inappropriate to allow him to resurrect it in this appeal and use it as a basis for acquiring a new hearing of his complaint.

71. In respect of the arguments relating to section 57 of the *Act*, I find no breach of principles of natural justice in the matters raised by Mr. Krakiwsky. There were few matters in dispute on the vacation time issue: Mr. Krakiwsky had worked for 27 months without vacation time off; he decided to take a period of vacation time commencing October 1, 2014, and notified Angus One (and DB Schenker) of this decision; he claimed he was told he could not take vacation time; Angus One denied he was told this; in any event, he took time off commencing October 1, as he had decided; one of the periods of placement with DB Schenker was to end September 30; he was not returned to that placement.

72. The appeal submission by Mr. Krakiwsky concerning the Director's handling of section 57 is extensive, occupying nearly 10 pages of Mr. Krakiwsky's 20 page appeal submission. The objectives of the submission on section 57 is variously stated at several points in the argument:

I would ask that the Employment Standards Tribunal vary the determination by considering whether an offence has been committed under section 57 of the Act. (page 3)

. . . I again ask that the Employment Standards Tribunal vary the determination to acknowledge that I did not have my vacation entitlement from October 1 to October 16, 2014. (page 10)

Consequently I ask that the Employment Standards Tribunal vary the determination and determine that an offence has been committed under section 57 and 28 of the Employment Standards Act. (page 10)

73. It seems Mr. Krakiwsky has a perception that not finding a contravention of section 57 provides a "leg up" for a review of the decision on his section 83 complaint. As he states at page 16 of his appeal submission:

I contend that the adjudicator failed to consider whether an offence under section 83 of the Employment Standards Act occurred by failing to consider whether an ongoing offence under section 57 of the Act occurred.

74. It is helpful to set out section 83 of the *Act* and state what Mr. Krakiwsky was required to do in order to establish a contravention of that provision:

83 (1) *An employer must not*

- (a) *refuse to employ or refuse to continue to employ a person,*
- (b) *threaten to dismiss or otherwise threaten a person,*
- (c) *discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or*
- (d) *intimidate or coerce or impose a monetary or other penalty on a person,*

*because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.*

75. To succeed in establishing an employer has contravened section 83 of the *Act*, an employee must show the actions of the employer were motivated at least in part by the prohibited ground. There must be "some evidence" the actions were motivated by the prohibited ground: *Zoltan Kiss*, BC EST # D122/96.

76. In this case, the burden on Mr. Krakiwsky required him to show, through objective evidence and on balance, that Angus One engaged in conduct against him that fell within one of the prohibited grounds. Showing Angus One's vacation time policy is *generally* inconsistent with the requirements of the *Act* or that, as a consequence of the nature of one's employment, taking vacation time might affect one's temporary placement do not go toward meeting this burden. Those facts are irrelevant for that purpose. I do not accept the Director's attempting to control the process of cross-examination to keep it within the scope of relevance is a breach of natural justice.

77. The Director made a finding that Mr. Krakiwsky's placement was set to come to term on September 30. The opportunity for him to continue the placement was offered by DB Schenker, but Mr. Krakiwsky told them this was "no longer an option", a position the Director found was unrelated to his deciding to take vacation time. In addition, Mr. Krakiwsky did take vacation time, an event that further limited his availability for continued placement with DB Schenker, or for that matter availability for placement generally. When he was

again available, the evidence was that Angus One had not found a suitable engagement or temporary assignment for him. Within all of that evidence there is none that remotely resembles evidence required for Mr. Krakiwsky to meet his legal burden under section 83. As well, there was no objective evidence linking the effect of his decision to take vacation time to his delivering an Employment Standards Self-Help Kit to Angus One.

**(ii) Error of Law**

78. 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.
79. The Tribunal noted in the *Britco Structures Ltd., supra*, that the test for establishing findings of fact constitute an error of law is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
80. Mr. Krakiwsky says the Director erred by asking the wrong question relating to his section 57 complaint. Complaints under section 57 are curious beasts because frequently there seems to be no real purpose in finding a contravention of that provision, particularly where a person’s opportunity for taking vacation time is gone. However, where the facts show the provision has been contravened, there seems to be no reason why an individual should not be entitled to the benefit of that finding and, if nothing else, a declaration of a contravention having occurred.
81. The Director says there is discretion under section 76 to “stop investigating or adjudicating a complaint if the dispute that caused the complaint is resolved.” That may be so, but there are two problems I have with that response: first, there is nothing in the Determination indicating the Director exercised such discretion and no reasons are provided that might inform the basis for the exercise of this discretion; and second, there is no indication the dispute about section 57 had been resolved.
82. The reply filed by Angus One says the Director found they had not contravened the *Act*. With respect, the Director made no such finding. The Director found the evidence provided did not convince [the Director] that Angus One denied or interfered with Mr. Krakiwsky’s opportunity to take vacation time as set out in section 57 of the *Act*. That is not the same as saying Angus One had not failed in its obligations under section 57 to ensure Mr. Krakiwsky was provided vacation time to which he was entitled under the *Act*.
83. I agree with Mr. Krakiwsky; the Director asked the wrong question. His complaint is quite clear: Angus One had either denied or refused to acknowledge vacation time entitlement. He is right that Angus One has never acknowledged his entitlement, as a temporary employee, to vacation time. Mr. Krakiwsky was seeking, at least, a declaration of his rights and whatever remedy might accompany that. One of the purposes of the *Act*

is to ensure employees get minimum conditions of employment. The role of the Director is not simply to adjudicate the immediate dispute, but to ensure, *vis.* the complainant, that the purposes of the *Act* are met. The Director has a broader obligation to Mr. Krakiwsky than suggested by the narrow approach taken to his section 57 complaint.

84. The evidence clearly shows, and I so find, that Angus One contravened section 57 of the *Act* by not providing him with the vacation time to which he was entitled under section 57. The uncontroverted fact is that Mr. Krakiwsky worked for 27 months without Angus One meeting its statutory obligation to ensure he was given vacation off: see section 57(2) of the *Act*. Accordingly, the Determination is varied to incorporate that finding and the matter of remedy and consequences is referred back to the Director.
85. I do not take the same view in respect of any of the other errors of law Mr. Krakiwsky alleges were made by the Director.
86. I find the Director did not commit an error of law in finding Mr. Krakiwsky took vacation time between October 1 and October 16. The finding was one of fact that is well supported on the evidence. Mr. Krakiwsky has not shown that finding of fact constitutes an error of law. His request for a variance to the Determination “to acknowledge that [he] did not have [any] vacation entitlement from October 1 to October 16, 2014” is denied.
87. I also reject his argument relating to statutory holiday pay entitlement for Thanksgiving. Mr. Krakiwsky neither worked nor earned wages during his vacation time; that is an undeniable fact. The applicable legislative provisions in section 46 are unambiguous: entitlement is based on work performed or wages earned for 15 of 30 calendar days preceding the statutory holiday. On the facts, Mr. Krakiwsky did not qualify. There is no “deeming” provision in section 46 that would allow annual vacation pay earned and previously paid out to be considered “earned wages” during the vacation time period. Section 58 does not assist Mr. Krakiwsky, as regardless of his being paid 4% annual vacation pay on each pay cheque without a written agreement authorizing Angus One to do so, he did not complain about that during his term of employment and that matter was not one raised in his complaint. Not only has the time limit for making such a complaint long passed, it would be grossly unfair to allow him to do so at this stage.
88. I do not find the Director erred in law by not determining whether Angus One had contravened section 18 of the *Act*. It is apparent the areas of dispute that might have engaged a consideration of section 18 were resolved. In those circumstances, which are apparent on the face of the “record” and in the reasons for Determination, the Director was entitled to exercise discretion under section 76 to cease investigating and adjudicating all aspects of those areas of dispute. While the improper exercise of discretion by the Director may amount to an error of law, there is a limit on the extent to which the Tribunal may interfere with an exercise of discretion see *Jody L Goudreau and another*, BC EST # D066/98. Mr. Krakiwsky has not demonstrated the Director’s exercise of discretion is one with which the Tribunal should interfere. It is rationally grounded in the facts and the authority of the Director under section 76. As well, I am not troubled that the Director did not directly address section 18 in the reasons for Determination as, unlike the section 57 issue, there is no indication it was ever raised by Mr. Krakiwsky in his complaint or during the complaint hearing.
89. There is no error of law because the Director did not examine the relationship between Mr. Krakiwsky and Angus One and decide whether Angus One had failed in its obligation to him as an employee of a “temporary and permanent employment agency”. The requirement to act in the interests of employees is not a statutory obligation but a requirement that must be shown at the time a licence is issued and, possibly, is a factor to be considered *if* the Director decides a review of the licence is warranted. It is not a statutory

entitlement belonging to an employee, but a statutory requirement relating to the administration of licensing under the *Act* by the Director. The Director's submission in this regard is correct, Mr. Krakiwsky's contentions around the treatment of temporary workers is properly addressed in a forum other than a complaint hearing.

90. A substantial portion of Mr. Krakiwsky's argument concerning section 83 challenges findings of fact and conclusions drawn from those findings without showing those matters raise an error of law. I am satisfied the findings and conclusions of the Director on this aspect of Mr. Krakiwsky's claim was grounded in evidence that was provided to the Director by both parties. The findings are not "perverse and inexplicable in the sense that they are made without any evidence". The view taken by the Director of that evidence, however much Mr. Krakiwsky disagrees with that view, is not "inconsistent with or contradictory to the evidence or without any rational foundation". In the absence of a demonstrated error of law relating to the facts, Mr. Krakiwsky is advancing an attack on the Determination the Tribunal is without authority to consider: see *Britco Structures Ltd.*, *supra*.
91. Some aspects of Mr. Krakiwsky's argument on this area of dispute are completely untenable. He says the Director violated principles of natural justice in not allowing him to ask questions about whether Angus One had attempted to arrange his vacation and place a temp employee with DB Schenker while he took time off. However, in the face of his conduct prior to September 30, his assertions that "continuing to contract my services through Angus One is no longer an option" and that he would "no longer be available as an agency employee on Wednesday, October 1<sup>st</sup>", and the absence of any evidence he ever sought the kind of accommodation suggested in this argument, there was absolutely no basis for the Director to allow the line of questioning he says he was prevented from exploring.
92. In his final reply, Mr. Krakiwsky requests the Tribunal use section 68(3) of the *Act* to decide whether the payment made by Angus One under section 63 discharges its liability under that provision. The Tribunal will not do so. The timing and nature of this request is completely unjustified. No rational basis for this request is provided in Mr. Krakiwsky's submission. This request has not been included in the appeal. If it had, he would have been told the authority in section 68 belongs to the Director, not the Tribunal and the place to have raised this question was the complaint hearing. For much the same reasons, the request to re-examine whether interest should have been paid on the amounts voluntarily paid by Angus One during the complaint process is rejected. If Mr. Krakiwsky felt either matter justified review by the Tribunal, and I doubt either would have, he should have raised them well before his final reply.
93. In sum, except for the matter of section 57 of the *Act*, the appeal is dismissed.
94. That does not, however, fully address the matter.
95. In assessing all of the material in the record and the submissions from Mr. Krakiwsky, I was concerned whether the Director had given full effect to the provisions of the *Act*, specifically whether DB Schenker should have been considered to be an employer in the circumstances of Mr. Krakiwsky's complaint.
96. This concern was raised with the parties and I have received submissions on the point from all of them. I will summarize each of them. The Director submits Mr. Krakiwsky's complaint was processed through several steps in the complaint process without any question being raised of whether DB Schenker should be considered an employer in the circumstances of the complaint. The Director says it was "an agreed fact" that "his employer at all material times remained Angus One" and that the Branch did assess whether there was an issue in dispute regarding Mr. Krakiwsky's employer but decided, following the assessment, there was no need to include DB Schenker in the process.

97. Angus One submits that during the “mediation hearing”, it was “confirmed” that Angus One was the employer of Mr. Krakiwsky. Angus One asserts the relationship was “touched upon” again at the commencement of the complaint hearing.
98. Mr. Krakiwsky contends the discussion at the mediation stage was limited to his confirming Angus One paid his wages.
99. None of the assertions made in the submissions of the parties are contained in the reasons for Determination. I question the legitimacy of any party making reference to what transpired during mediation efforts as that process, except to the extent it results in a recorded agreement, is conducted on a “without prejudice” basis and communications made during that process are covered by “mediation privilege”, which means that nothing that is said or proposed during mediation forms part of the record if the parties fail to agree and the matter has to proceed to adjudication.
100. To reiterate, there is no “assessment” made in the Determination concerning the nature of the relationship under the *Act* between Mr. Krakiwsky and DB Schenker.
101. The recorded facts in this matter reveal Mr. Krakiwsky worked for DB Schenker for an uninterrupted period of at least 27 months. In his complaint, Mr. Krakiwsky made allegations against DB Schenker. The first four sentences of the details of his complaint read:
- Angus One and the company to which I was placed, DB Schenker, both denied that I had any vacation entitlement as I was a temp. I worked continuously for at least 40hrs/week for 27 months at DB Schenker. I was attempting to take vacation October 1<sup>st</sup>. DB Schenker threatened that they would get rid of me if I tried to take a vacation.
102. Elsewhere in the complaint details, Mr. Krakiwsky states additional elements of a complaint that involve DB Schenker. The employer information provided on the complaint form includes reference to DB Schenker, identifying their business as the type of business where he worked, naming the supervisor he worked under at DB Schenker, giving their name in the box for providing the “Name and home phone number of owner” and giving their address as the place he worked.
103. Even in the face of this information and allegations, the Director did not appear to have considered whether DB Schenker should be included as an employer for the purpose of the *Act* and a party to the complaint. The Director has a statutory obligation to “receive and review” a complaint made under section 74: see section 76(1) of the *Act*. The Director is not bound by what is set out in the complaint. The Branch’s processes are designed to enable complainants to access their entitlements under the *Act* without requiring the depth and knowledge of its provisions that is accepted as being held by delegates of the Director. The role of the Director’s delegates is to give effect to the purposes of the *Act* ensuring a complainant is not denied rights provided by the *Act*, because of lack of skill, difficulties with language or failure to appreciate the full scope of operation of the *Act*. I adopt the comments of the Tribunal Member in *AZ Plumbing & Gas Inc.*, BC EST# D014/14, that “[i]t is also incumbent on the delegate to ask questions about allegations a party may have already made” (at para. 37).
104. Mr. Krakiwsky may not be aware of the full scope of the definition of employer in the *Act*, but it ought to have been obvious to the delegate receiving and reviewing his complaint that he had worked for DB Schenker for at least 27 months at the location of their business, had been supervised in his work by them and, more particularly, that he was including them as participants in the events he was complaining about.



105. While I have concerns about the Director's apparent failure to consider whether DB Schenker is an employer, on an analysis of the effect of this omission on the outcome of the complaint, I am not persuaded it is necessary to remit that matter to the delegate for further investigation in the circumstances of this case. I find Mr. Krakiwsky has been paid all amounts owing under the *Act*. The only outstanding matter is the remedy for the section 57 breach. With respect to that matter, Angus One has not challenged its status as the employer under the *Act*.

### **ORDER**

106. Pursuant to section 115 of the *Act*, I order the Determination be varied with respect to the finding relating to section 57 of the *Act*. In all other respects, the Determination is confirmed. Accordingly, the matter of remedy for the section 57 issue is referred back to the Director.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**