Employment Standards TRIBUNAL

An appeal

- by -

Whitaker Consulting Ltd.

- 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: Matthew Westphal

FILE No.: 2005A/175

DATE OF DECISION: March 9, 2006

DECISION

SUBMISSIONS

Ib S. Petersen	On behalf of Whitaker Consulting Ltd.
J. Paul Harvey	On behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Whitaker Consulting Ltd. (the "Employer") under s. 112 of the *Employment Standards Act* (the "*Act*") of Determination ER #113-030, dated August 18, 2005 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards.

2. Following an investigation of a complaint filed by Shirley R. Monahan ("Monahan"), the Delegate ordered the Employer to pay Monahan compensation for length of service plus vacation pay and interest, and imposed two administrative penalties, of $500.00 each, for violations of sections 28 and 63 of the *Act*.

3. The Tribunal has decided that this case can be decided without an oral hearing.

ISSUE

4. Did the Delegate err in law or fail to observe the principles of natural justice in issuing the Determination against the Employer?

BACKGROUND

5. The Employer formerly operated an internet marketing business. Monahan worked for the Employer from May 2000 until June 9, 2003, first as Office Assistant Manager and then as General Office Manager.

6. In her complaint to the Director, Monahan alleged that the Employer had terminated her employment and that she was owed annual vacation pay and compensation for length of service. Monahan relied upon the Record of Employment form (the "ROE") prepared by Colin Choo ("Choo"), the Employer's Accounts Manager. The ROE indicated that the Employer owed Monahan $6,125.50 in "old vacation pay", and that Monahan's employment ended because of "shortage of work". The Employer took the position that Monahan had quit, and that it owed her no money. The Employer maintained that the ROE was not accurate in stating that Monahan was owed vacation pay and had been laid off because of a shortage of work, and explained this inaccuracy as being the result of Monahan's having influenced how Choo filled out the ROE.

7. The Delegate issued the Employer with a Demand for Records, but the employment records for Monahan provided by the Employer were incomplete and not in compliance with s. 28 of the *Act*.

8. After a mediation failed to resolve Monahan's complaint, the Delegate informed the parties that the complaint would be decided by way of an investigation. The Employer, by then represented by legal counsel, argued that as credibility was central to the dispute, the Delegate should adjudicate Monahan's

complaint by way of a hearing, and not an investigation. Monahan had moved to Ontario soon after her employment ended. The Delegate decided to adjudicate Monahan's complaint by way of an investigation, stating as follows:

> Branch policy in cases of business closure where parties are out of the Country or the Province and not returning would be to conduct an investigation. The grounds of appeal are the same for an investigation and for a hearing.

9. The Delegate dismissed Monahan's claim that she was owed vacation pay, based both on his assessment of the parties' evidence and his conclusion that Monahan may have had some influence over Choo's having indicated on the ROE that Monahan was owed $6,125.50 in "old vacation pay". However, the Delegate concluded that the Employer had dismissed Monahan, and that she was, therefore, entitled to compensation for length of service.

SUBMISSIONS

10. The Employer submits that the Delegate both erred in law and failed to observe the principles of natural justice in making the Determination. Its appeal focuses on three factors: (1) the Delegate's decision to resolve Monahan's complaint by way of an investigation, and not an oral hearing; (2) the Delegate's conduct of the investigation; and (3) the Delegate's treatment of Monahan's ROE. First, according to the Employer, credibility was central to the issues of whether Monahan had taken vacation and whether Monahan had quit or been laid off; thus, in the circumstances, fairness required that the Delegate conduct a hearing at which credibility could be tested through cross-examination. Second, the Employer argues that, having decided to proceed by way of an investigation, the Delegate failed to interview witnesses the Employer had brought to his attention. Finally, the Employer says that in light of the Delegate's rejection of the statement in the ROE that Monahan was owed $6,125.50 in "old vacation pay", and the Delegate's finding that Monahan had influenced the completion of the ROE in some way, the Delegate ought not to have relied on the statement in the ROE that Monahan's employment terminated as a result of a shortage of work. The Employer also asserts that the penalty for the contravention of s. 28 was inappropriate because Monahan herself had been responsible for any deficiencies in the Employer's payroll documents.

11. The Delegate defends the decision not to conduct an oral hearing based on the fact that Monahan was living in Ontario, and on the policy of the Employment Standards Branch to resolve complaints by way of an investigation in circumstances in which a business had closed and one party was no longer in the province. The Delegate also maintains that both the Employer and Monahan were given an opportunity to participate in the investigation and to submit evidence, including evidence gathered from other witnesses, in support of their respective positions. The Delegate points out that the Employer had at various times refused to participate in the investigation, and only really participated after retaining counsel and in the face of an impending deadline for issuing the Determination. The Delegate argues that the Employer was responsible for bringing forward all relevant evidence it wished to rely upon in support of its claim that Monahan had quit. The Delegate emphasizes that he did not find that Monahan had filled out the ROE herself, and notes that the Employer has never sought to amend the ROE with Human Resources Development Canada.

12. In its reply submission the Employer denies that it had failed to participate in the investigation, and argues again that the fairest approach in this case would have been for the Delegate to hold a hearing. The Employer also takes issue with the Delegate's position about the role of the parties in an investigation. In

particular, it disputes the Delegate's assertion that it should have provided written statements or affidavits from any witness whose evidence it proposed to rely on. The Employer states:

> The Employer did provide the Delegate with a summary of the evidence of its witnesses and what they would say. The Complainant provided her story (not in sworn form -- nor was she required to do so). The conflict between the Employer's evidence and the Complainant's can only be resolved through a proper assessment of the statements. Where there is a hearing, that process is the parties' responsibility through calling witnesses, cross-examination of witnesses etc. In the case of a hearing [*sic*], the Delegate is responsible for assembling the relevant information, contacting and interviewing "witnesses" and assessing their credibility. Sworn statements would not have been of assistance.

13. Monahan did not appeal the Delegate's rejection of her claim for vacation pay, but provided a submission reiterating her version of the facts concerning the termination of her employment. She denies the Employer's claim that she quit on June 9, 2003 in an emotional scene in the office, and says that "This is probably one of the easiest lies to prove, although it doesn't appear to have been investigated." Further, according to Monahan, the reason she moved back to Ontario following her lay off was her lack of any financial alternative.

14. The Tribunal's general practice is that after an appellant makes its initial appeal submission, the Director and respondent may respond, and then the appellant may make a final reply. In this case, however, the Delegate sent the Tribunal a further submission in reply to the Employer's reply. This unsolicited submission contained nothing that the Delegate could not have said in his first submission, so I have not considered it in making this decision.

ANALYSIS

The scope of this appeal

15. Since Monahan has not appealed the Determination as it relates to her claim for vacation pay, the only issue is the Employer's appeal of the Determination as it relates to Monahan's entitlement to compensation for length of service, and for the two administrative penalties.

The administrative penalty for the contravention of s. 28

16. The Employer does not dispute that it had failed to maintain all payroll records it was required to keep under s. 28 of the *Act*. Its only argument contesting the administrative penalty for contravening s. 28 was that the contravention was Monahan's fault. The Employer says that from the time Monahan became the Employer's general office manager in August 2001,

> …she was responsible for the supervision of all office staff, including handling all vacation requests and time off (including for herself), issuing Records of Employments [*sic*] (ROEs), dispute handling, purchasing requirements, and the smooth running of the office with around 10 employees. Regrettably, if the documentation is incomplete, this is, in large measure, because Ms. Monahan did not keep the appropriate records, as was her responsibility. She was in charge of the running of the office. She now unfairly seeks to take advantage of her own failure and the trust placed in her by the Employer to properly carry out the duties of her employment. In the circumstances, a penalty is inappropriate.

17. This submission is, with respect, without merit. Even if I accepted that the deficiency in the Employer's record-keeping was Monahan's fault, she is not seeking to "take advantage" of this fact, nor will she benefit in any way from the imposition of a $500 administrative penalty upon the Employer. The *Act* imposes the obligation to keep payroll records on "an employer". Thus, it is an employer that is liable for any failure to fulfill this obligation, regardless of the role any particular employee actually played in maintaining the employer's payroll records. The *Act* does not provide the Tribunal with any power to relieve an employer from an administrative penalty for such a contravention. Accordingly, I dismiss the Employer's appeal as it relates to the $500 administrative penalty for its failure to keep all required payroll records.

The Delegate's finding that Monahan had not quit

18. Although the Employer relies on both error of law and breach of natural justice as grounds of appeal, it has not specified how the Delegate erred in law in finding that Monahan did not quit, but rather, was terminated by the Employer. The Employer has taken issue with the fact that the Delegate relied in part on the ROE as evidence that the Employer laid Monahan off, but did not rely on the notation on the ROE that the Employer owed Monahan "old vacation pay". However, more than just disagreement with how the Delegate weighed and assessed the evidence before him is required in order to establish an error of law. As the Tribunal held in *Britco Structures Ltd.*, BC EST #D260/03, an error of law, for the purposes of s. 112 of the *Act*, is

> (1) A misinterpretation or misapplication of a section of the *Act*;
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> (2) A misapplication of an applicable principle of general law;
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> (3) Acting without any evidence;
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> (4) Acting on a view of the facts which could not reasonably be entertained; and
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> (5) Exercising discretion in a fashion that is wrong in principle.

19. It was open to the Delegate to find that the ROE was accurate in one respect, and not in another. The Employer has not shown that the Delegate erred in law.

20. In my view, the true basis for the Employer's appeal is its claim that the Delegate failed to observe the principles of natural justice. The Employer argues that the Delegate failed to observe the principles of natural justice in two respects: first, by adjudicating Monahan's complaint by way of an investigation, rather than by way of a hearing, and second, by failing to contact all relevant witnesses in the course of his investigation.

The decision to proceed by way of investigation, not a hearing

21. As noted, the Employer had urged the Delegate to conduct an oral hearing. Both before the Delegate and before the Tribunal, the Employer linked the need to hold an oral hearing with the amendment of the grounds of appeal in s. 112.

22. Prior to the amendment of the *Act* in 2002 (see *J.C. Creations o/a Heavenly Bodies Sport -and- The Director of Employment Standards*, BC EST # RD317/03 for a discussion of these amendments), the

Tribunal had the power under s. 108(2) of the *Act* to "decide all questions of fact or law arising in the course of an appeal or review", but s. 108 has been repealed. The 2002 amendments had the effect of defining more narrowly the Tribunal's jurisdiction to review determinations of the Director:

> **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.

23. The Employer argues as follows:

> In its initial submission to the Delegate, Whitaker expressly requested a hearing before the Delegate. Whitaker's counsel argued:
>
> > As you will note from the submission, there are factual issues and, in my view, a hearing is the only way to fairly and properly resolve those issues. While I understand, your reliance on Branch policy to determine this matter without a hearing, certainly the documentation from the Branch to my clients suggests that a hearing was contemplated. In fact, if no hearing is held, given the changes to the appeal provisions (s. 112), I submit that they have been denied a fair hearing in accordance with the principles of natural justice.
>
> Respectfully, the changes to Section 112, requires that the Delegate has a greater responsibility to ensure that there is a proper factual foundation for the Determination. In the past the Tribunal had greater review powers with respect to factual findings.
>
> …
>
> In my view, blanket and blind reliance [upon] branch policy is not generally proper grounds for refusing a hearing. With respect, the branch must assess the nature of the case and the need for a hearing or not.

24. In essence, the Employer's argument on this point seems to be that the Delegate denied it natural justice by fettering its discretion about whether to conduct an oral hearing or not. As a general rule, a statutory decision maker such as the Director is permitted to create policies and guidelines for the exercise of statutory authority, but it is not permitted to fetter its discretion by treating such policies as binding upon it and excluding other valid or relevant reasons for the exercise of its discretion: see *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2. In deciding to resolve Monahan's complaint by way of an investigation, rather than conducting an oral hearing, the Delegate relied on a policy of the Employment Standards Branch that where a business has closed and one party has left the province and is not returning, the Branch will conduct an investigation. There is no indication that the Delegate considered whether the nature of the complaint, which involved issues of credibility, was such that justice could best be done through an oral hearing, or whether an oral hearing could have been held with, for example, Monahan participating by telephone.

25. However, it is not necessary that I decide whether the Delegate's reliance on Branch policy on this point constituted a fettering of his discretion, because such a fettering would not, in and of itself, provide a basis for setting aside the Determination. There is a distinction between applying a policy which dictates the substantive outcome of a case, and applying one that dictates the procedure to be followed in deciding the substantive outcome of a case. If I were persuaded that Monahan's complaint could only have been resolved through an oral hearing, then the Delegate's fettering of his discretion regarding the holding of an oral hearing would be grounds for reversal.

26. In my view, however, it was possible to do justice in this case by way of an investigation, although I will consider later in this decision whether the investigation conducted by the Delegate was adequate. It is well established that there is no absolute right to an oral hearing, whether before a delegate of the Director or before the Tribunal: *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. Indeed, prior to the amendments to the *Act* in 2002, the Director considered complaints exclusively by means of investigations. During that period, the Tribunal held that the Director of Employment Standards was not required to give employers any opportunity to cross-examine a complainant employee as part of the investigative process: *Sun Wah Supermarket Ltd.*, BC EST #D324/96. Although, as the Employer notes, the Tribunal at that time had greater jurisdiction to consider appeals concerning factual findings, in my view it would require express statutory wording to require the holding of oral hearings to counterbalance the diminished scope of the Tribunal's jurisdiction to review decisions on issues of fact and mixed fact and law.

27. Accordingly, I find that the Delegate's decision to resolve this complaint through an investigation, rather than an oral hearing, did not, in and of itself, constitute a failure to observe the principles of natural justice.

Did the Delegate conduct a sufficiently thorough investigation?

28. The Delegate accepted the evidence of Monahan over that of the Employer in finding that Monahan had been terminated, rather than having quit in the presence of Choo and David Foote ("Foote"). He discussed this finding as follows:

> Whitaker's position is that Monahan quit in an emotional outpouring one day simply deciding to walk out announcing she quit. Whitaker provided no corroborating evidence from Choo or David Foote in support that Monahan quit.

29. In his submissions to the Tribunal, the Delegate points out that he had had great difficulty in obtaining information or cooperation from the Employer until its current counsel became involved, some nine months after Monahan had filed her complaint. He expressed his position as follows:

> An investigation of a closed business entity where records requested voluntarily later had to be Demanded, coupled with inadequate Employer response for months until counsel became involved is not the fault of the investigating officer. Reasonable attempts were made to gather information, records and any evidence that might help me decide the matters of claim. There was an opportunity prior to counsel's involvement and after for Whitaker and for counsel on the employer's behalf to have provided written statements and/or affidavits to me from any alleged witness for consideration. <u>At no time was David Foote's or Colin Choo's address or phone number made available to me by the employer or by counsel</u>. David Foote was not an employee. Colin Choo was a former employee and Account Manager who filled in the [*sic*] Monahan's

> Record of Employment form. The burden to provide supporting and corroborative evidence in a dispute rests in large part on the party who chooses to rely on that information and evidence.
>
> [emphasis in original]

30. The Employer challenges this reasoning, and argues that it was not required to provide any written statement, affidavit, or statutory declaration. Rather, it says that it was sufficient that it adverted to the evidence of Choo and Foote, and that it was up to the Delegate to interview these witnesses before issuing the Determination. In its submission to the Delegate, the Employer had claimed that Monahan in effect wrote her own ROE (which Choo signed) and also stated as follows:

> Despite her claim for compensation for length of service, Ms. Monahan quit from her employment. Ms. Monahan kept bringing her domestic issues to the work place. On June 9, 2003, during an outburst concerning her domestic situation, she announced that she was quitting (without notice). She did so in front of Mr. Colin Choo, the accounts manager, and Mr. David Foote, an independent businessman who happened to be visiting the Employer's premises at the time. Mr. Foote heard her say that she was going to go back to Ontario. The Employer's president, Mr. Jonathan Allaby, asked her to take some time off to reconsider. She refused and left the office. Later that day, she called Mr. Nick Allaby, who was in California on business, and told him that she had quit and would not come back to the Employer. She intended to return to Ontario, which she did a few weeks later.

31. In my view, the crux of this appeal is this: was the Delegate required at least to attempt to interview Foote and Choo to determine what, if any, evidence they had regarding whether Monahan had quit and whether she had influenced how Choo filled out the ROE, or was the Employer responsible for providing their evidence in the form of witness statements, affidavits, or statutory declarations?

32. I sympathize with the Delegate's frustration with the difficulty he encountered in obtaining the Employer's cooperation, but I am troubled by the fact that implicitly, the Delegate appears to be stating that if the Employer had provided an address or telephone number for Foote or Choo, then he would have contacted them. My review of the record does not indicate that the Delegate ever requested that information, but given that the Delegate concedes that Choo and Foote had relevant information, it cannot be the case that whether he should have obtained that information from them depended on whether the Employer provided their addresses or telephone numbers. In my respectful view, the Delegate, having chosen to proceed by way of an investigation, should have at least attempted to interview these witnesses.

33. Regardless of whether a delegate decides to proceed by way of investigation or adjudicative hearing, he or she will (subject to s. 76) ultimately issue a determination, but the nature of the delegate's role in gathering evidence upon which to base that determination will vary depending on whether the procedure is an investigation or an adjudicative hearing. If the delegate chooses to hold a hearing, then the delegate "schedules and convenes a hearing with both parties present, and adopts practices and a posture more akin to that of a judge or adjudicator": *Kyle Freney*, BC EST #D130/04. At such an oral hearing,

> …the parties are expected to provide whatever evidence they have in support of their respective positions. The delegate then makes a decision on the basis of the evidence presented at the hearing rather than on the basis of whatever evidence or information he or she might have been able to gather through an investigative process.
>
> (*Donald Healey*, BC EST #207/04)

34. In an oral hearing, the delegate's role is more like that of a traditional adjudicator in the sense that it is up to the parties to bring forth all relevant evidence and submissions for the delegate's consideration. The failure to adduce such evidence will result in a determination's being issued without it, and possibly, in the delegate's drawing an adverse inference from the failure to present such evidence.

35. If, on the other hand, the delegate conducts an investigation, then he or she performs a more inquisitorial function (*John Ladd's Imported Motor Car Company operating as John Ladd B.M.W.*, BC EST #D313/96) with corresponding powers to gather relevant evidence not only from the parties, but from non-parties if necessary. Section 77 of the *Act* provides that "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." A failure to fulfill this obligation constitutes a breach of natural justice.

36. That is not to say that in an investigation only a delegate is responsible for seeking out and obtaining all possible evidence. The Director is entitled to expect that parties will participate in investigations. A party may not "sit in the weeds", refusing to cooperate in an investigation, and then appeal a determination based on evidence that could have been provided to the Director: *Tri-West Tractor Ltd.*, BC EST #D268/96. Thus, I do not entirely agree with the Employer's suggestion that "if the Delegate is conducting an investigation it is…up to him to ferret out the evidence and determine the truth of the matter." Nevertheless, in an investigation the Director's delegate plays the primary role in gathering evidence, whether from the parties directly or by other means.

37. Given that role, a delegate is required to perform a thorough investigation. As the Tribunal held in *Paul Miner*, BC EST #D031/98 (Reconsideration of BC EST #D472/97), "The Director's delegate must perform a thorough investigation and interview all the witnesses with a potentially important contribution to make, but this does not include each and every individual who may have something to say about the incident in question." Just how far a delegate is required to go in investigating a complaint will depend on the circumstances of the case. In *Island Scallops Ltd.*, BC EST #D198/02, the Tribunal held as follows about the Director's obligation under s. 77:

> In my view, the nature of the duty of the Delegate under s. 77 of the *Act* must depend on the matter which is in issue between the parties. At minimum, the Delegate must provide an opportunity to the parties to provide information, and to consider and respond to important allegations, on a critical matter in issue, before the Delegate issues a Determination. Each case will turn on its own facts. While a Delegate has considerable discretion over the investigation process, in this case given that one of the issues was the existence or non-existence of an oral contract for a fixed term, I would have thought it essential, in order to assess credibility of the parties, to interview both parties. In my view, in the circumstances of this case, the failure to interview Mr. Saunders was a breach of s. 77 of the *Act*.

38. The Delegate argues, however, that it was sufficient that he gave the Employer a reasonable opportunity to provide evidence of Choo and Foote to support its position, and that the Employer must bear the consequences of its failure to do so. In this respect, this case bears many similarities to *Mac's Convenience Stores Inc.*, BC EST # D185/05. In that case, as well, the employer argued that there had been a denial of natural justice because the delegate had failed to interview certain witnesses. The Tribunal found, at para. 33, that the employer had received a fair hearing:

> The employer's final natural justice ground is that the Delegate failed to conduct a fair investigation because she did not seek out or compel witnesses from Mac's to give evidence with respect to the employee's complaint. The question whether this Tribunal might quash a

> determination for failure by a Delegate to be sufficiently proactive in an investigation is an interesting question, which need not be decided in this case. That is because, in my view, natural justice did not, in the circumstances of this case, require the Delegate to insist on calling witnesses to effectively shore up Mac's case in circumstances where Mac's had legal counsel, plenty of notice and a full opportunity to put its side of the case forward. In disclosing the complete package of information to the employer and giving the employer a full and fair opportunity to reply, the Delegate in my view demonstrated an even-handed approach to this matter. No breach of natural justice has been established.

39. I am not aware whether all of the facts in *Mac's Convenience Stores Inc.* are the same as in the case at bar, but I find that in the circumstances of this case, natural justice did require that the Delegate at least attempt to interview Choo and Foote. In concluding that Monahan had not quit, the Delegate relied on his findings about the accuracy of the ROE and the extent to which Monahan influenced Choo in filling it out: he held that the notation about "old vacation pay" was inaccurate and had possibly been influenced by Monahan, but he relied on the notation about Monahan's having been laid off as evidence of the reasons for the termination of Monahan's employment. It seems to me that the best evidence of whether the ROE was accurate, and whether it had been improperly influenced by Monahan, would have been that of Choo himself, as the person who filled out and filed the ROE. Yet the Delegate made findings about the ROE without attempting to speak to Choo.

40. Similarly, the Employer alleged that Monahan quit at a meeting at which Foote and Choo were present. They could have either corroborated the Employer's account, or supported Monahan's version of events. If, as Monahan now claims, Foote was actually an employee and not an independent witness, that fact could have been taken into account in weighing his evidence. Yet again, the Delegate appears to have made no effort to ask them what, if anything, they witnessed about the termination of Monahan's employment.

41. Although the Delegate rightly notes that the Employer has never attempted to revise Monahan's ROE to indicate that her employment terminated because she quit, and not because she was laid off, this does not, in my view, estop the Employer from taking the position before the Delegate and the Tribunal that Monahan quit. (The Employer's explanation for its failure to correct the ROE was that it had no desire to prevent Monahan from receiving Employment Insurance ("EI") benefits.) An estoppel by conduct or representation (estoppel *in pais*) arises where a person (1) makes a representation of fact intended to induce a course of conduct by the person to whom the representation was given; (2) the person to whom the representation was made acts as a result of the representation; and (3) the person suffers detriment by reason of his or her actions. See *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51 (H.L.), at p. 57, cited in *Abbott v. Canada*, [2001] 3 F.C. 342, 2001 FCT 242 at para. 69. In this case, even if the ROE constituted a representation to Monahan, she suffered no detriment as a result of relying upon it (such as by applying for EI benefits); if the ROE had stated that she had quit her job instead of that she had been laid off, she would have been unable to receive any EI benefits at all. Thus, I do not consider that the Employer is estopped from taking the position before the Delegate and the Tribunal that the ROE had not accurately stated why Monahan's employment ended.

42. This is also not a case in which the Employer "sat in the weeds", saying nothing about the evidence of Foote and Choo. Although the Employer did not provide a statutory declaration or a witness statement from either man, it did advert to the fact that they had relevant, and potentially dispositive, evidence. It seems clear that the Employer expected that the Delegate would investigate by interviewing Choo and Foote, and I do not think that its expectation was unreasonable in the circumstances. While it would have been more effective advocacy for the Employer to have provided detailed witness statements or statutory

declarations for Foote and Choo, its failure to do so did not, in my respectful view, relieve the Delegate of his duty to conduct a thorough investigation.

43. Further, though it might be said that a statement in a lawyer's submission about evidence is not, itself, evidence (see *Mac's Convenience Stores*, *supra* at para. 23), I would characterize the statement by the Employer's counsel that Foote said that he witnessed Monahan quitting as hearsay evidence. In *D'Hondt Farms Ltd.*, BCEST #RD021/05 (relied upon by the Tribunal in *Mac's*), the reconsideration panel, in refusing to grant reconsideration because the applicant provided only a letter from counsel and not a statutory declaration, relied in part on the nature of the reconsideration process:

> The Panel has considered whether, in the circumstances before us, we should exercise our power to issue an order requiring the parties to attend before us for a more thorough airing of this issue. We have concluded that we should not. Ours is not an inquisitorial process. The statutory appeal process places the obligation on the parties to advance their case before the Tribunal. This is so *a fortiori* on reconsideration, which is an exceptional remedy. If a party wishes to access the reconsideration process - and particularly if as here that party, through counsel, seeks to and has been given the opportunity to further elaborate upon a natural justice ground - it is that party's responsibility to provide direct and cogent evidence in support. This has not been done.
>
> [emphasis added]

44. An investigation by a delegate of the Director, by contrast, is an inquisitorial process. The principal reason for the general rule against admitting hearsay evidence for the truth of its contents is the inability to observe the witness's demeanour and test that evidence through cross-examination, since the person who allegedly made the out-of-court statement is not before the court. However, in the context of an investigation, the Delegate was not required simply to take the Employer's word for what Foote and Choo said; he was free to contact those witnesses and interview them directly. Thus, in my respectful view, in this case the Employer's reference to the evidence of Foote and Choo required the Delegate at least to attempt to interview these witnesses in order to conduct a thorough investigation, and the Delegate's failure to do so constituted a breach of natural justice.

Remedy

45. I have already dismissed the Employer's appeal as it relates to the $500.00 penalty for the breach of s. 28. The appropriate remedy for the Delegate's failure to observe the principles of natural justice is to refer Monahan's complaint back to the Director for a new investigation or hearing before a different delegate. The Tribunal will make such an order in situations where, by reason of nature of the allegations, the interests at stake, and the nature of the decision maker's function, a reasonable apprehension of bias would arise if the matter were referred back to the same delegate for further investigation: *Director of Employment Standards*, BC EST#RD635/01; *Baum Publications Ltd.*, BC EST # D090/05 at paras. 43-53. The panel in *Director of Employment Standards* decided that no reasonable apprehension of bias would arise from referring the matter back to the original delegate, on two bases: (1) the delegate had not made findings of credibility, but had avoided the issue of credibility as a result of an erroneous view of who bore the onus on an issue; and (2) the delegate made the decision following an investigation, rather than a "quasi-judicial process" such as a labour arbitration or court hearing. In *Baum Publications*, by contrast, the Tribunal concluded that a new hearing before a different delegate was necessary, because the previous delegate had made findings of credibility following an oral hearing.

46. This case lies somewhere between *Director of Employment Standards* and *Baum Publications*, because although the Delegate conducted an investigation rather than an oral hearing, he did make findings of credibility. In finding as a fact that Monahan had not quit her job, but had been laid off by the Employer, the Delegate necessarily concluded that Monahan, and not the Employer, was telling the truth on this point. In my view, this finding outweighs the fact that the Delegate did not conduct a "quasi-judicial hearing", and even though I do not believe the Delegate would have any actual bias, there would be a reasonable apprehension of bias if he were asked to revisit his findings of credibility in light of new evidence. Accordingly, the proper remedy for the Delegate's failure to observe the principles of natural justice is to refer this matter back to the Director for a new investigation or oral hearing before a different delegate.

ORDER

47. I order, pursuant to s. 115 of the *Act*, that the Determination is confirmed as it relates to the $500.00 penalty imposed for the Employer's contravention of s. 28, and it is cancelled as it relates to the compensation for length of service issue. The Respondent's complaint regarding compensation for length of service is referred back to the Director of Employment Standards for a new investigation or oral hearing before a different delegate.

Matthew Westphal
Member
Employment Standards Tribunal