

An appeal

- by -

Thomas Roy, carrying on business as Cascadia Biological Services
(“CBS”)

- 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.: 2017A/15

DATE OF DECISION: April 10, 2017

DECISION

SUBMISSIONS

Mark Norton

counsel for Thomas Roy, carrying on business as Cascadia Biological Services

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Thomas Roy, carrying on business as Cascadia Biological Services (“CBS”), has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 20, 2016.
2. The Determination found CBS had contravened Part 3, sections 17 and 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Elizabeth Thompson (“Ms. Thompson”) and ordered CBS to pay Ms. Thompson wages in the amount of \$12,563.28 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$14,063.88.
3. This appeal is grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. CBS seeks to have the Determination cancelled and the matter referred back to the Director.
4. In correspondence dated February 2, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to CBS, which has been provided with the opportunity to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts it as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

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

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*

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

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

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

9. Ms. Thompson filed a complaint in November 2015, alleging CBS had contravened the *Act* by failing to pay all wages owed to her.
10. CBS conducts biological assessments and supports proponents of works and projects on public and private land. Ms. Thompson worked for CBS between November 2, 2014, and May 22, 2015.
11. There was a close personal relationship between Thomas Roy (“Mr. Roy”) and Ms. Thompson which appears to have led to the employment relationship. When the first deteriorated, in the spring of 2015, the second ended.
12. The Director found the complaint had been brought within the time limit set out in section 74(3) of the *Act*. This conclusion was based on the evidence of Ms. Thompson and two independent parties who had observed Ms. Thompson working for CBS on and around the day found to be the date of her last work with CBS.
13. The Director found an employment relationship between CBS and Ms. Thompson.
14. The Director found that between November 2, 2014, and April 15, 2015, Ms. Thompson worked forty hours a week, 5 days a week and after April 15, 2015, until May 22, 2015, she had worked a total of 65 hours. In making this finding, the Director conducted an extensive examination of the respective positions of the parties and the evidence relating to those positions, deciding, for reasons which do not need to be repeated here, that Ms. Thompson’s evidence concerning the hours she worked was more reliable than that of Mr. Roy, whose evidence on this issue was considered by the Director to be internally inconsistent, providing contradictory information at various points in the complaint process and making statements that were inconsistent with evidence provided by CBS, externally inconsistent, being at odds with accepted objective and third party evidence, was designed to deliberately minimize the extent and scope of Ms. Thompson’s involvement in the business and, in respect of at least one matter, simply untrue.
15. The Director acknowledged Ms. Thompson’s evidence was not without its difficulties, but found that, overall, it had the benefit of internal and external consistency and overall was more reliable than that of Mr. Roy.
16. The Director found Ms. Thompson had also worked weekends on a project called the Glenshire Site, constructing a fence. This work was distinct from the work she performed for CBS during the forty-hour week and she was paid for this work.

17. The Director found CBS and Ms. Thompson had agreed she would be paid \$20.00 an hour.
18. CBS was served with a Demand for Employer Records on January 28, 2016. CBS never responded to this demand, even though CBS was given an extended opportunity to do so. There was no evidence that CBS maintained a payroll record for Ms. Thompson. Initially both parties considered her position to be an unpaid internship, not subject to the *Act*.
19. The investigation of Ms. Thompson's complaint was conducted over a period of approximately twelve months. The record is extensive, 900 pages, including 55 pages of investigative notes, and although much of it is duplicative, the record provides a comprehensive picture of the complaint process, including communications between the Director and CBS – most of it through its legal counsel.

ARGUMENT

20. CBS submits the entire process conducted by the Director was flawed and denied CBS “the most basic tenants [*sic*] of natural justice”.
21. CBS argues the Director's failure to observe principles of natural justice arises from the following:
 - the refusal of the Director to obtain evidence or information from Service Canada relating to a request for employment insurance benefits for Ms. Thompson that was denied;
 - the failure of the Director to obtain a computer hard drive in the possession of Ms. Thompson that she had removed from the property in which she and Mr. Roy lived until she was evicted by order of the Court;
 - by not obtaining financial documents involving Family Court proceedings between Ms. Thompson and her ex-husband;
 - by refusing to conduct an oral complaint hearing in order to test the credibility of Ms. Thompson and her evidence and of other evidence filed in support of her claim;
 - by ignoring a letter signed by Ms. Thompson where she “admits being paid all monies up to and including April 17, 2015”;
 - by relying on hand written summary notes of an interview between Mr. Roy and an investigator at the College of Applied Biology to make a finding adverse to Mr. Roy's credibility;
 - by ignoring evidence going to the credibility of Ms. Thompson; and
 - by relying on a transcript, prepared by Ms. Thompson, of a video viewed by the Director in the presence of Mr. Roy's legal counsel.
22. CBS says the documents it sought to have produced were relevant to issues in dispute and the failure or refusal by the Director to obtain the documents was a breach of natural justice. CBS submits all of these documents go to the issue of credibility, as did the request for an oral complaint hearing, and were necessary to resolve inconsistencies in Ms. Thompson's evidence.
23. CBS also asserts the Director failed to observe principles of natural justice by failing to consider key evidence of CBS.

24. CBS submits the Director erred in law by failing to follow the legal tests for determining credibility because the Director had no opportunity to assess the demeanor of persons providing evidence and gave no special consideration to the evidence of the parties to the proceedings.
25. CBS says the Director erred in deciding Ms. Thompson was an employee of CBS after April 2015.

ANALYSIS

26. 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.*

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

28. 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.

29. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. d.b.a Honda North*, BC EST # D043/99.

30. 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.

31. I am not persuaded this appeal has any reasonable prospect of succeeding. I shall address each of the grounds of appeal, commencing with the submissions that assert the Director failed to observe principles of natural justice in making the Determination.

32. The Director conducted an investigation of Ms. Thompson's complaint. It is firmly established that where an investigation under the *Act* is conducted by the Director the duty of fairness will almost invariably require notice to the employer and employee. That duty is, in fact, codified; section 77 of the *Act* relates specifically to investigations under the *Act*. It provides as follows:

77 *If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

33. The general principle flowing from that statutory duty is that the notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. There is no doubt the Director met the statutory obligation expressed in section 77 and satisfied the general principle in this case. The record clearly shows CBS was given notice of the claim being made by Ms. Thompson and was given sufficient information to enable it to

make representations on its own behalf, to effectively prepare its own case and to answer Ms. Thompson's claim.

34. With respect to the requirements of section 77, the record before me shows that the Director gave CBS, through letters, e-mails and telephone communications, notice of the claims and a more than adequate opportunity to respond to the substance of Ms. Thompson's complaint. It might be noted here that section 77 does not create a general disclosure obligation such as that found in the B.C. Supreme Court Rules. Thus, in response to a point raised in the appeal submission, even if the Director did not provide to CBS, either at the outset or during the course of the investigation, every single document that was received by the Director during the course of the investigation, the section 77 obligation was discharged if the general thrust of the complaint, and the supporting evidence, was made known to CBS: see *Urban Native Indian Education Society*, BC EST # D309/99. There is no submission from CBS, nor any suggestion from the record, that CBS was not aware of the exact nature of the complaint and the evidence supporting it.
35. That much is apparent from the fact that CBS, at one point or another during the complaint process, disputed every element of Ms. Thompson's claim.
36. An investigation under the *Act* does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. Indeed, the attributes of natural justice may vary according to the character of the decision and the context in which it applies: *Martineau v. Matsqui Disciplinary Board*, [1980] 1 SCR 602.
37. The appropriate procedures will in each case depend on the provisions of the statute and the context in which they are applied: *Downing v. Graydon*, (1978) 21 OR (2d) 292. Neither section 77 of the *Act*, nor procedural fairness in administrative law, is intended to be formal and burdensome. That is particularly true in the employment standards context which is designed to be a relatively quick and cheap means of resolving employment disputes. It has been held, for example, that the Director during an investigation should not be placed in a procedural strait-jacket: *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST # D405/98.
38. The statutory requirement found in section 77 of the *Act* is substantially reflected in the natural justice concerns the Tribunal has indicated typically operate in the context of the complaint process. These concerns have been briefly summarized by the Tribunal in an oft-quoted excerpt from *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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

39. CBS has partially grounded the natural justice issue on an alleged failure by the Director to provide it with the above described procedural rights. However, the Determination and the material in the record do not support this allegation. Rather, the Determination records and the record indicates that in every relevant respect CBS was provided with the opportunity required by section 77 of the *Act* and the principles of natural justice to know the case it had to meet, present its position, including evidence to support that position, and to respond to the position presented by Ms. Thompson and the evidence provided in support of that position.

40. CBS has raised a specific argument alleging breach of natural justice relating to what is characterized as a failure or refusal by the Director to obtain certain information and evidence: a file from Service Canada, a hard drive from Ms. Thompson, and financial information from a Family Court matter involving Ms. Thompson.
41. CBS contends the information contained in all or any of these sources might have been relevant to a material issue in dispute.
42. The question whether this Tribunal might set aside a Determination for failure by the Director 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, nothing in the principles of natural justice required the Director to obtain the Service Canada file, the hard drive, or financial information from Family Court in order to effectively make or shore up CBS' case in circumstances where CBS had legal counsel, plenty of notice and a full opportunity to put its side of the case forward.
43. It is anathema to the statutory objective of a quick and efficient resolution of disputes under the *Act* that a party could point here and there, alleging some matter might be relevant to their case and thereby delaying the process. Much more would be needed than the assertions of potential relevance that were made by counsel for CBS in this case. There is not a single shred of evidence supporting the potential relevance of any material contained in these sources; there is nothing here indicating CBS made any attempt of its own to obtain the information it now says might help their case. Of particular note, is the exchange between counsel for CBS and the Director in the record concerning the hard drive, where CBS' legal counsel indicates Mr. Roy would not attempt to recover the hard drive on his own because he has spent much money already on matters involving Ms. Thompson. I am also somewhat troubled by the demands relating to the hard drive because that item is, apparently, created by Mr. Roy, yet nowhere does he make any effort to provide the Director with some objective evidence indicating what relevant information might be found on the hard drive, rather than simply asserting the supposition made.
44. In any event, all of the material in the record points to a likelihood there was no relevant information on the hard drive. CBS provided no employment records. It claimed all employment records were "stolen", but that is, in a word, incredulous. Even if, as CBS says, some information relating to Ms. Thompson's employment was on a missing hard drive, that is far from the only source of relevant employee information. There are canceled cheques, payments made to and acknowledged by provincial and federal bodies to whom an employer is required to report and submit money and information, wage statements and bank records showing wage payments that would exist independently of a record of hours and days of work. CBS ignored a Demand for Employer Records; Mr. Roy never provided any evidence of what might actually be on the hard drive. CBS did provide information, backed up with documents, including bank statements, that between November 23, 2014, and April 30, 2015, Ms. Thompson was paid \$6,360.00 for 318 hours of work. There was no indication from CBS there was other information relating to Ms. Thompson's days, hours of work and wages paid that had been lost or taken.
45. The requests of CBS were for the sole purpose of gathering evidence that might assist in their attack on Ms. Thompson's credibility.
46. It is not the responsibility or the function of the Director to help a party make its case. It is the function of the Director to consider the case a party presents. It was at all times CBS' responsibility to ensure that it had met its evidentiary burden in answer to Ms. Thompson's claims that she was entitled to wages. The Director is entitled to expect that parties will participate in the investigations and provide all evidence relevant to their position, or a reasonably believable explanation for being unable to provide.

47. Implicit in the argument made by CBS is the suggestion that in conducting an investigation on a complaint it is up to the Director to ferret out evidence and determine the truth of the matter. Such a suggestion ignores both the purposes and objectives in resolving complaints under the *Act* and the comments of the Tribunal in *James Hubert D'Hondt operating as D'Hondt Farms*, BC EST # RD021/05 (Reconsideration of BC EST # D144/04), that for the Director to take a pro-active role on behalf of one party or another could reflect on the Director's impartiality and give rise to allegations of bias from the other party or parties.
48. Without some evidence that anything in these sources would, not might or may, provide information going to a point that is both relevant to the issues being considered and were unavailable from any other source, CBS has not met its burden in showing a natural justice breach.
49. I find, in the circumstances, the Director did not fail to observe principles of natural justice by refusing to chase evidence whose relevance was not, even on a *prima facie* level, established by CBS; this argument has no merit.
50. CBS argues the Director failed to observe principles of natural justice by failing to conduct a hearing to address credibility.
51. The *Act* provides the Director with a level of discretion about whether to conduct an investigation and does not direct how an investigation is to be conducted. The decision of the Director about the complaint process is not *per se* open to challenge on natural justice grounds. There may well be a failure to observe principles of natural justice within the complaint process selected by the Director, but that would be substantially different than there being a breach arising directly from the process chosen and would have to be established on objective evidence. Accordingly, the decision of the Director to investigate rather than conduct a hearing on the complaint does not indicate in any way a breach of natural justice: see *Jennifer Oster*, BC EST # D120/08.
52. The burden is on CBS to show the complaint process chosen by the Director was a breach of natural justice.
53. I have already decided the Director did not deny the procedural rights required in section 77 of the *Act* and principles of natural justice, as expressed in *Imperial Limousine Service Ltd.*, *supra*, within the process chosen for administering the complaint. I am not convinced that not holding an oral hearing affects that conclusion. In dealing with arguments of this sort, the Tribunal has been alert to the objects of the *Act* as socially beneficial legislation, the stated purpose of the *Act* – to provide fair and efficient procedures for resolving disputes under the *Act* – and, on a more pragmatic note, the potential consequences of compelling the Director to adopt procedures that might unnecessarily judicialize the process. In that context, I adopt the following comment by the Tribunal in *Milan Holdings Ltd.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97), at p 12:

The office of Director is unique, significant and central to the effectiveness of the *Employment Standards Act*. Under Part 10 of the *Act*, the Director is given a series of quintessential investigative powers. The Director may enter and inspect premises: s. 85. She may, with or without complaint, investigate a person to ensure compliance with the *Act*: s. 76. She may receive confidential information: s. 75. The Director's *Inquiry Act* powers extend to this investigative role: s. 84. An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77,

which requires only that “If an investigation is conducted, the director must make reasonable efforts to a give a person under investigation an opportunity to respond”.

54. I will restate a point made above: the Director has discretion over the process chosen to administer complaints which, subject to the requirements of section 77 and principles of natural justice, will not be supervised by the Tribunal.

55. In response to the request by counsel for CBS for an oral complaint hearing, the Director stated, in a communication to counsel for CBS dated August 26, 2016:

I do not see a Complaint Hearing now as appropriate, given the investigation’s status. There are only a few issues remaining. I am capable of determining whose evidence is preferable based on its consistency with proven facts based on the best evidence available.

56. The “few issues remaining” referred to by the Director were the hours worked by Ms. Thompson and the hourly rate. An analysis of the Determination and the record indicate both those issues were decided on an assessment of objective evidence, most of which was provided by CBS or not disputed by them. CBS has not identified how an oral hearing would have altered those findings.

57. The arguments made by CBS have not persuaded me that the decision of the Director not to have an oral complaint hearing denied CBS the procedural protection required by the *Act* or breached the principles of natural justice. The process chosen by the Director in this case is consistent with the provisions of the *Act* allowing the Director to investigate complaints in the “informal, flexible and dynamic fashion” contemplated within the investigative process.

58. CBS argues the Director ignored a letter signed by Ms. Thompson, in which it is alleged she “admits being paid all monies up to and including April 17, 2015”. I find this argument incredulous, as any reading of the letter, the record and the Determination would reveal: first, the letter was not ignored; second, the letter was prepared in reference to one project that Ms. Thompson worked on – the Glenshire Site fence; and third, that CBS was credited with this amount having been paid. At its core, this argument does nothing more than challenge findings of fact without providing any legal foundation for doing so. The findings of the Director relating to this letter were, in my view, not only solidly grounded in a clear reading of the letter and a fair assessment of the supporting evidence, but were correct.

59. CBS submits the Director ignored evidence going to the credibility of Ms. Thompson. CBS identifies four matters that were “ignored” by the Director. I reject the assertion upon which this submission is made. A reading of the Determination clearly shows the Director was alert to the “frailties” of Ms. Thompson’s evidence, including each of the matters identified by CBS. The Determination, and the record, show the Director engaged in a comprehensive assessment of the evidence provided by Ms. Thompson and Mr. Roy relative to all of the other evidence before deciding Ms. Thompson’s evidence was more internally and externally consistent, more reliable and therefore more worthy of accepting. This argument smacks of CBS seeking to have this panel of the Tribunal review the evidence and reach different conclusions on that evidence than were made by the Director without showing an error was made by the Director on one of the statutory grounds in section 112. The Tribunal has no authority to do this.

60. I reject completely the contention the Director failed to consider key evidence presented by CBS. This contention does not withstand any reasonable reading of the Determination and the record.

61. I will deal with the last two “natural justice” arguments together, as they both raise the same challenge. CBS says the Director erred by accepting and relying upon notes of an interview of Mr. Roy conducted by an

investigator for the College of Applied Biology and by relying on a transcript of a video prepared by Ms. Thompson.

62. The Director is not bound by strict rules of evidence. The Director did not err in accepting and considering the material provided by the College.
63. Respecting the contested portion of this material, it is not correct to say Mr. Roy was never given an opportunity to respond to that matter. The record indicates CBS was given the opportunity to know the Director intended to consider this statement in the Determination and to use it to assist in deciding what evidence to accept. The Director sent a summary of preliminary findings to each of the parties in early November, more than six weeks before the Determination was released. The contested matter, along with the Director's view of it, was included in those findings. The Director invited both comments and submissions on the preliminary findings. There was neither comment nor submission from Mr. Roy or CBS on this finding. This smacks of "lying in the weeds".
64. As well, this material did not stand on its own; it was one part of a larger body of evidence relied on by the Director in deciding the evidence provided by Ms. Thompson was, in contested areas, preferable to that of Mr. Roy.
65. I make the same point in respect of the transcript of the video tape, which was in the possession of CBS throughout the complaint process. There is no indication in the record or in the Determination that CBS contested any aspect of the transcript provided by Ms. Thompson or sought to provide its own transcript. The Determination indicates the transcript was considered in deciding the hourly rate CBS had agreed to pay Ms. Thompson. It was not the only evidence on that issue. In the Determination, the Director states, at R9:

The Employer acknowledged paying the Complainant \$20 per hours [*sic*] for some of her work. The Complainant provided a transcript of a video of her and the Employer speaking, prior to their separation, in which he confirmed he could provide training to assist the Complainant in achieving accreditation or certification and agreed to pay her \$20 per hour. The Employer made no submission regarding this evidence. He provided no evidence contradicting it.

66. An appeal is an error correction process. CBS has not shown how its procedural rights were compromised by any error it alleged against the Director, and specifically, it has not shown that the Director accepting and using the contested material is either a reviewable error or that it denied CBS a fair hearing.
67. This argument is rejected, as are all of the arguments supporting the "natural justice" ground of appeal.
68. CBS argues the Director erred in law because the correct legal test for deciding credibility was not followed. The argument of CBS does not identify what the "correct legal test" is or identify support for the contention made here.
69. The leading decision on determining the credibility of witnesses is *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say, “I believe him because I judge him to be telling the truth”, is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge’s finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. (at p. 356 – 357)

70. Nothing in the argument made by CBS shows the Director ignored the above direction and caution in deciding what evidence was preferable on the various points in dispute.
71. The Tribunal has accepted several factors which should be weighed in assessing the credibility of a party or witness: their motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses’ evidence. Furthermore, not only must the credibility of the witness be assessed, but the reliability of the evidence must also be analyzed: see *Ara Development Ltd.*, BC EST # D012/08.
72. The Director provided reasons, based on an analysis of the internal and external consistency of the evidence, for finding Ms. Thompson’s evidence to be preferable to Mr. Roy’s. The test for assessing credibility does not require the demeanour of the person giving evidence be observed and, in law, the personal demeanor of the particular witness is a weak basis on which to ground a finding of credibility. The real test of the truth of the story of a witness must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize in that place and those circumstances and consider those factors as were examined by the Director in this case: motive, self-interest, internal contradiction and inconsistencies, the degree of detail and overall forthrightness.
73. CBS has not established the Director committed an error of law in assessing the relative credibility of the evidence presented by Ms. Thompson and Mr. Roy. There is no inconsistency in the Director’s analysis with the legal test for determining credibility. This argument is nothing more than a last attempt by CBS to have the Tribunal reassess findings made by the Director without providing a legal basis for doing so.
74. I will not even grace the submission of CBS suggesting that the Director erred in law in not considering whether Ms. Thompson was an employee of CBS after “late March/April” with a response. That suggestion was never raised during the complaint investigation and, in any event, has been entirely put to rest by the finding of the Director – not challenged here – that Ms. Thompson was employed by CBS until May 22, 2015.
75. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

76. Pursuant to section 115 of the *Act*, I order the Determination dated December 20, 2016, be confirmed in the amount of \$14,063.88, together with any interest that has accrued under section 88 of the *Act*.

David Stevenson
Member
Employment Standards Tribunal