



An appeal

- by -

Khaira Enterprises Ltd.
(“Khaira”)

- 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.: 2011A/20

DATE OF DECISION: June 28, 2011

DECISION

SUBMISSIONS

Pir Indar Sahota	counsel for Khaira Enterprises Ltd.
Ros Salvador	counsel for twenty-five former employees
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. On February 4, 2011, the Director issued a Determination against Khaira Enterprises Ltd. (“Khaira”) on behalf of fifty-eight former employees of Khaira, some of whom had complained to the Director that they were not receiving wages from their employment with Khaira.
2. Following an initial review of the complaints, the Director decided to conduct an investigation under section 76(2) of the *Employment Standards Act* (the “Act”). Khaira was notified of that decision on July 22, 2010, and the investigation was commenced. Following the investigation, the Director found Khaira had contravened Part 3, sections 16, 17, 18, 21 and 28 and Part 5, section 46 the *Act* and Part 7, had contravened section 37.9 of the *Employment Standards Regulation* (the “Regulation”) and that the former employees were owed regular and overtime wages, annual and statutory holiday pay, compensation for length of service, return of unauthorized deductions and interest in the amount of \$236,800.52.
3. The Director also imposed administrative penalties on Khaira under Section 29(1) of the *Employment Standards Regulation* in the amount of \$3,500.00.
4. The total amount of the Determination is \$240,300.52. The Director has ordered Khaira to pay that amount.
5. Khaira has appealed the Determination, submitting the Director erred in law and failed to observe the principles of natural justice in making the Determination. Khaira has also grounded the appeal on evidence coming available that was not available at the time the Determination was being made. Khaira seeks to have the Determination varied by the Tribunal or referred back to the Director.
6. Khaira seeks an oral hearing on this appeal. The Tribunal has a discretion whether to hold an oral hearing on an appeal, whether or not there is a request for an oral hearing: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. It would be rare in an appeal such as this one, which is substantially grounded in how the Director dealt with the evidence in making findings and drawing conclusions of fact, that the Tribunal would conduct an oral hearing. If Khaira is able to show a reviewable error in the factual findings of the Director, the appropriate response would be to refer the matter back to re-examine those areas in which the error was made. The alleged errors of law in applying provisions of the *Act* do not require additional evidence. Accordingly, in this case, the Tribunal has decided an oral hearing is not necessary and this appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

7. The general issue in this appeal is whether Khaira has shown the Director has committed any reviewable error in making the Determination. There is also a preliminary issue relating to whether the additional evidence submitted with the appeal satisfies the conditions for allowing such evidence to be included and considered in an appeal.

FACTS

8. The facts relevant to this appeal are those found in the Determination. The Tribunal is bound by those facts and has no authority to disturb the findings of fact made in a Determination unless an appellant is able to demonstrate an error of law has been made by the Director in making those findings. In this context, an error of law would arise where the Director has made a finding of fact that is based on a view of the evidence that is irrational, perverse or unreasonable or is based on no evidence at all or if a finding of fact is the result of a breach of section 77 of the *Act* or a denial of procedural fairness.
9. The Determination is lengthy, comprising 113 pages. I do not intend to recite all of the findings of fact made by the Director except where they bear on a ground of appeal or an argument raised by one of the parties.
10. By way of background, the Determination indicates that Khaira does reforestation work throughout British Columbia, mostly through contracts from the BC Ministry of Forests. The work done by Khaira includes tree planting, brushing (clearing bushes and cutting grass using hand tools around newly planted trees to allow growth) and other silviculture work. In, or around, July 2010 the Director received information that some employees of Khaira were not receiving their wages. The initial scope of the investigation concerned unpaid wage claims for work done in Golden and Revelstoke, but on July 22, 2010, was expanded to include all work done by Khaira in the six months preceding that date at several other locations in the province: Texada Island, Powell River, Kamloops, and Salmon Arm.
11. The Director received evidence from the workers, from Khaira and from third parties relating to: the nature of the work done by each of Khaira's workers; the living accommodations of the workers at the various locations; the pay rate, the hours and days of work and the travel time at each of the various locations; deductions from wages; the length of the employment of the workers; and the payment of wages. The Director received payroll records from Khaira for many, but not all, of the workers included in the investigation.

ARGUMENT

12. Khaira has submitted its appeal and the arguments in support under each of the allowable grounds of appeal. Its arguments and the responses from counsel for twenty-five of the former employees and from the Director will be laid out under each of those grounds.

Error of Law

13. Counsel for Khaira says the Director erred in law by not giving Khaira the opportunity to respond to and cross-examine on information received from third parties and used by the Director in the Determination. Included in this third party information are statements from Mr. Jeff Fukumoto, Woodlands Manager at British Columbia Timber Sales ("BCTS"), who provided the Director with information regarding the travel time to each of the worksites included in Khaira's contracts with BCTS in Revelstoke and Golden, from Mr. Kim Peel, Senior Silviculture Specialist at Forsite – the company that had awarded Khaira the tree

planting contracts in Kamloops – who provided information about the scope of the contracts and the travel time required to the worksites used in performing those contracts, from Mr. John Betts, a representative of Western Silviculture Contractor's Association, who provided the Director with information regarding standard industry piece and hourly rates, and from Ms. Trisha, a representative at Canada West RV Park, who was contacted to gather information about the Khaira employees who stayed at the RV Park during their work in Revelstoke.

14. Counsel for Khaira also says the Director erred by not providing Khaira with an opportunity to cross-examine Mr. Jordan Tesluk, who had provided the Director with a written opinion, which was given to Khaira during the investigation, that included information on industry practice relating to hours of work, travel time and personal vehicles use.
15. Counsel for Khaira says under section 37.9(7) of the *Regulation*, Khaira was entitled to deduct \$25.00 a day for camp cost and boarding and the Director erred in law by ignoring the written agreement, purportedly signed by a large number of employees, which allowed them to make that deduction. Counsel also says the Director ignored standard practices in the silviculture industry and imposed a decision that suited the Director and the employees.
16. In response to this aspect of the appeal, counsel for the twenty-five former employees says Khaira has not shown an error of law. She notes that Khaira does not deny receiving information about the statements provided by the third parties or receiving Mr. Tesluk's opinion. She submits that no information has been provided stating why no effort was made to respond to this information or why no request was made to cross-examine these individuals before the Determination was issued. She refers to p. R42 of the Determination, where the Director indicates Khaira was provided with the opinion of Mr. Tesluk and did not "dispute, question, or challenge his opinions".
17. Counsel says that in any event, if there was some irregularity in how the Director dealt with the third party information and Mr. Tesluk's opinion, such irregularity is immaterial to the outcome of the complaints and, as Khaira has not shown the result would have been different had they challenged the information provided by these persons, the Tribunal can confirm the Determination.
18. Counsel says Khaira was given ample opportunity to make submissions on all aspects of the complaints and there is nothing in the appeal demonstrating Khaira was deprived of its ability to make a full reply to the claims.
19. She says the Director did not "ignore" what Khaira refers to as the written agreement in considering the deductions made for food and lodging. Rather, counsel says, the Director found the document to be an attempt, made after the fact, to meet the requirement of having written authorization to make deductions from wages, was not credible and, as a result, gave it no effect. Counsel points out that of the 58 workers included in the Determination, only nine were silviculture workers as that term is defined in section 1 of the *Regulation* and section 37.9(7) had no relevance for 49 of the workers covered by the Determination.
20. In respect of Khaira's argument alleging the Director ignored "standard practices" in the silviculture industry, counsel says the only evidence of industry practice was provided by Mr. Tesluk. She says Khaira provided no evidence of their own concerning industry practice, even though, she submits, with the exercise of due diligence they could have done so. She says Khaira's statements in the appeal about what is "industry practice" are not evidence and should be ignored.

21. In his response on this ground, the Director says Khaira, represented by its legal counsel at the time and its directors, Khalid Mahmood Bajwa and Hardilpreet Singh Sidhu, were given a number of opportunities during the investigation to respond to the claims raised. Those opportunities are detailed in the Determination at pages R20 to R23 and at page R28.
22. The Director says the third party information was acquired because of the contradictory evidence coming from the employees and Khaira on the matter of travel time. The matter of travel time was an issue about which Khaira was given several opportunities to provide evidence and submissions. The Director says Khaira was provided with Mr. Tesluk's written opinion and did not dispute or challenge it.
23. In respect of the food and lodging issue, the Director makes two points. First, he says Khaira chose to pay employees hourly rates on the Texada Island, Powell River, Revelstoke and Golden contracts. As found at pages R36 and R37 of the Determination, the employment of employees who did not meet the definition of "silviculture worker" in section 1 of the *Regulation*, which included employees paid an hourly rate and those not paid "primarily on a piece rate basis", was not governed by section 37.9 of the *Regulation* and Khaira was not entitled to charge those employees \$25.00 for camp costs. Second, the written agreement presented by Khaira was reviewed in detail and found to be not credible. The Director refers to the analysis at pages R34 to R37 of the Determination.
24. The Director says Khaira has not provided any details in the appeal of the "standard practice" in the silviculture industry that is relied on in their appeal. In any event, the Director says such practices must comply with the requirements of the *Act* and, under section 4, agreements to accept something less than the minimum standards provided in the *Act* have no effect.

Principles of Natural Justice

25. Counsel for Khaira says the Director failed to examine principles of natural justice in making the Determination, ignoring the submissions of Khaira in reaching a conclusion which suited the Director and the employees. Counsel says the Director ignored contradictions in the claims made by employees to make findings against Khaira. Counsel notes there was no original daily diary provided by any employee, a fact which he says the Director failed to take into consideration. He says the Director totally ignored evidence provided by Khaira about the standard industry practice on the issue of travel time.
26. Counsel says the Director ordered Khaira to pay five employees for the cost of food even though that cost was incurred by the employees directly and was not an amount deducted from their wages.
27. Counsel argues the Director erred in finding employees were continuously employed for more than three months and entitled to length of service compensation.
28. Counsel says that in finding some employees were terminated by the failure of Khaira to pay their wages in a timely fashion, the Director failed to recognize that Khaira's inability to pay wages was the result of losing the contract because of the poor quality work performed by the employees.
29. On the issue of the hourly and piece work wage rate, counsel says the Director failed to give effect to a local newspaper advertisement which clearly mentioned what those rates would be. He says the Director erred in relying on information provided by the employees when that information provided different rates for piece work.

30. In response, counsel for the twenty-five former employees submits there is no breach of principles of natural justice. She says the apparent inconsistency among the employees concerning the wage rates was because the employees were given inconsistent information by Mr. Bajwa, who, it is noted in the Determination, had a tendency to make vague statements and promises about wages and bonuses.
31. In response to Khaira's position on travel time, counsel reiterates that Khaira did not challenge the opinion of Mr. Tesluk or seek to provide any evidence of industry practice during the investigation. Counsel argues that Khaira has shown no basis for being allowed to submit additional evidence relating to what is allegedly the industry practice on travel time.
32. Counsel says the assertion by Khaira about not deducting money from the wages of five employees is wrong. She says Khaira has not provided all of the wage stubs for the employees and an examination of all the wage stubs do show the deductions recorded in the Determination were taken from the wages of these employees.
33. Counsel says the Director made no error in finding the employees had been employed by Khaira for three months prior to July 17, when their employment was found to have been terminated. She says the two short gaps in their employment between March 17 and July 17 did not affect the continuity of their employment with Khaira. She also says the Director made no error in finding section 65 did not affect the entitlement of those employees to compensation for length of service.
34. In respect of the hourly and piece work wage rate calculations and hours of work calculations, counsel for the twenty-five former employees says the Director had evidence from many sources, weighed the information, made judgements about the credibility and reliability of the information and reached conclusions on that evidence that were reasonable and supportable on the evidence. She says the inconsistencies relied on by Khaira are minor and the chart presented with their appeal is inaccurate and arbitrarily excludes considerable information.
35. The Director rejects Khaira's assertion that he ignored evidence and information provided by Khaira in order to make a decision that suited him and the employees. Rather, the Director says, he issued a Determination that was based on an analysis of the information provided. The Director notes the information provided by Khaira was incomplete, inaccurate and questionable. The Director refers to the comments and analysis at pages R29 to R33 and R45 to R46 in the Determination. The Director says completely accurate findings could not be made, primarily because Khaira failed to keep complete and accurate payroll records as required by section 28 of the *Act* but also because the employees had not kept their own records. The Director says he used the best evidence available.
36. The Director says Khaira never provided him with the charts that were provided as Exhibit B with the appeal. Accordingly, he says the documents could not have been "ignored" as Khaira alleges in their argument. The Director adds that these documents were likely available before the Determination was made and could have been provided during the investigation.
37. The Director says Khaira is incorrect in asserting they were ordered to pay the deducted amount for employees who were staying in a motel for food costs paid by the employees themselves. Khaira was required to repay amounts deducted by them which were identified in wage statements for the employees provided by Khaira and for which Khaira had not received written authorization to deduct.
38. The Director says the cost incurred by Khaira to provide food and lodging is irrelevant, as is the quality of the food provided and the camp conditions. The issue was unauthorized deductions and Khaira could not

establish the employees had given written authorization to deduct the amounts taken from the employees' wages.

39. The Director says there was no error made in finding some employees were entitled to compensation for length of service. The Director says he did not decide, as suggested in the appeal, that the entitled employees "were regularly employed and worked continuously for three months". Rather, he found the entitled employees to have been employed for three months prior to the termination of their employment. He says there was no evidence that employees who worked for another company during a short waiting period between contracts were terminated from their employment with Khaira or that employees were terminated at the end of each contract. The Records of Employment issued by Khaira to these employees showed their employment period as being from March to July 2010.
40. The Director says he considered the matter of the cancellation of the contract in Kamloops before the Determination was issued and found no basis for allowing that matter to be used to offset wages owing.
41. The Director says Exhibit E was not provided during the investigation of the claims. He says this is simply an unjustified attempt to introduce new evidence and reargue the case. The Director says the newspaper advertisements that were provided were considered along with other evidence relating to hourly wage rates, but little weight was given to them because Khaira stated during the investigation that the employees were being paid \$0.18 to \$0.20 a tree for that work. The advertisement attached to the appeal as Exhibit F was never provided to the Director. Additionally, Khaira never provided the piece rates used to calculate wages paid to the employees despite numerous requests by the Director.
42. The Director says the conclusion that the primary reason employees stopped working on July 17 was Khaira's failure to pay wages in a timely fashion was a finding of fact based on the available evidence and a complete analysis of that conclusion is found in the Determination at pages R50 to R52.

New Evidence

43. Counsel for Khaira has submitted a large number of documents with the appeal, most of which were not provided to the Director before the Determination was made. These documents, and the reason for seeking to have them accepted into the appeal, are as follows:
 - Exhibit G – a list of old (previous) employees of Khaira and new employees brought to Khaira by them; the objective of these documents is to show these employees were not unaware of the wages and other conditions of work at Khaira;
 - Exhibit H – E-mails from six other employers in the silviculture industry indicating it is not the practice in the industry to pay travel time and stating hourly and piece work wage rates paid by some of those companies;
 - Documents showing employees who left Khaira to work for Dewan Enterprises Ltd. when the Kamloops contract was terminated and re-let to that company were paid a piece rate of 16 to 17 cents a tree, except in a very difficult block, where they were paid 20 cents a tree, which was substantially less than the 20 cents a tree the director found to be the rate payable to Khaira employees doing much the same work;
 - The Determination - the two female employees named in the Determination were not employees of Khaira;

- Exhibit I – correspondence relating to a WCB claim by Moka Balikama relating to an injury that occurred on June 1, 2010 when Khaira says he was not employed by them and which Khaira says bears on his credibility;
- Exhibit J – documents showing one of the employees was given more in the Determination than he claimed in his complaint;
- Exhibit K –grocery and motel bills and other expenses incurred by Khaira, which Khaira says the Director did not consider;
- Exhibit L – a statement attributed to the owner of an RV Park in Texada indicating the workers appeared to be “happy and treated fairly”;
- Exhibit M – letters from two employees, one indicating a pay deduction for food and lodging had been discussed with employees before work commenced on the Texada Island contract and the other indicating he was told he would receive \$16.00 and hour for brushing and had no problem with the deductions that were on his pay stub; and
- A collection of documents with the front page headed “General Job Information” and the others containing signatures.

44. Counsel for the twenty-five former employees says none of the above documents are new documents; all of them, or in some cases the information contained in them, could, with some diligence on the part of Khaira, have been provided to the Director before the Determination was made. In respect of the assertion concerning the two female employees, counsel says Khaira is submitting new arguments under the guise of new evidence; she says no new “evidence” supporting the assertion made about these employees has been provided. Counsel says much of the allegedly “new evidence” are just bare assertions that cannot be considered evidence and are inadmissible in this appeal.

45. The Director has responded to each part of the allegedly new evidence.

46. He says Khaira has not attempted to explain how they came to be aware that some employees had previously worked for them. He says Exhibit G has little probative value; the fact that employees were not paid in accordance with the *Act* in previous years is not an argument for allowing the *Act* to be contravened in this case and would not provide a basis for altering the Determination.

47. The Director says the reference by Khaira to industry practice and the inclusion of Exhibit H in the appeal do not assist Khaira in their appeal. He says the six e-mails in Exhibit H do not show that travel time is not paid, only that some employers in the industry have different ways of paying travel time.

48. The Director says the evidence about the piece work rates is completely irrelevant, as the Director made a finding of fact about the piece work rate based on a statement made by representatives of Khaira at a fact finding meeting.

49. The Director says the material relating to Moca (Moka) Balikama has no bearing on the Determination in respect of him, except to confirm that he was employed by Khaira from June 17 to July 17, 2010, which is consistent with his claim that he worked one month for Khaira.

50. The Director says Khaira provided no evidence relating to the wage rate for the employee to whom Exhibit J applies. A finding of fact was made about this employee’s wage rate. The complaint form for this employee

indicates he worked overtime and provides an “estimate” of the wages owing of “\$967 net”, which was placed on the line relating to NSF cheques.

51. The Director says the expenses incurred by Khaira for grocery, motel and other expenses are irrelevant, as the issue was not whether Khaira incurred expenses, but whether Khaira had received written authorization from their employees to deduct these amounts from wages. The Director also notes Khaira never provided the first seven pages of Exhibit K during the investigation although it clearly could have. He says Exhibit J is also irrelevant.
52. The Director says he reviewed the letters that are Exhibit M and discusses the letter from Mr. Niyomahoro at pages R44 and R45 of the Determination.
53. The Director says Khaira had the opportunity to provide information relating to the reasons for stopping work but never did. In any event, the loss incurred is a business loss which, by operation of section 21 of the *Act*, may not be passed on to the employees.
54. Counsel for Khaira has submitted a final reply to the response of the Director, which predominantly restates the arguments made in the initial appeal submission, adding some additional facts to the appeal and formally requesting an oral hearing on the appeal.

ANALYSIS

55. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 made.*

56. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
57. As I have indicated above, the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
58. Khaira has asserted error of law by the Director as one of the grounds of their appeal. 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.

59. The Tribunal has also recognized that a failure to observe principles of natural justice is a species of error of law: see *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03.

New Evidence

60. Khaira has, in part, grounded this appeal on subsection 112(1)(c): new evidence becoming available that was not available when the Determination was made. I shall first address whether there is any new evidence and whether any of this alleged new material will be considered in this appeal, as my conclusions in this area will determine several aspects of the appeal.

61. As stated by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03:

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made.

62. The Tribunal is given discretion to accept or refuse new or additional evidence and has taken a relatively strict approach to the exercise of this discretion. This approach is consistent with the purpose and objective of ensuring quick, fair and efficient resolution of disputes arising under the *Act*. The Tribunal tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint or investigation 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. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.

63. I conclude the new evidence submitted with this appeal will not be accepted.

64. I note first that significant portions of the material submitted with the appeal are not new evidence. Some of the material, Exhibits A, B, C, a large part of E, part of I, J, K and M, is in the section 112(5) Record and was before the Director when the Determination was made. The document which is headed General Job Information and the three attached pages containing signatures was also provided by Khaira during the investigation and considered by the Director in the Determination. While some of the documents mentioned – such as Exhibits A and B – are “new” in one sense, in substance they are simply a compilation or written transcription of information submitted by Khaira to the Director during the investigation.

65. It is apparent that all of the material that was not provided to the Director during the investigation and which Khaira seeks to submit with the appeal was available at the time the Determination was being made and could have been provided to the Director by Khaira during the investigation process. This comment applies to Exhibit D, that part of Exhibit E that is not already in the section 112(5) Record, Exhibit F, Exhibit G, Exhibit H and Exhibit L. Examining these documents in the context of the grounds of appeal advanced by Khaira, I do not consider any of them, with the exception of those found in Exhibits F and H, to be relevant to any material issue arising in the appeal. Exhibit F is only marginally relevant and not at all probative; I do not find Exhibit H to have sufficient probative value that it would be likely to lead to a different result than what is found in the Determination.

66. The documents in Exhibit D were created in June 2010. Khaira does not indicate how or when they acquired those documents or why they could not have provided them to the Director before the Determination was made. Further, even if I accepted they may not have been reasonably available to them before the Determination was made, I do not find them to be probative on any issue raised in the appeal. The documents do nothing more than provide another example of Khaira's dispute with the Director finding some employees were entitled to length of service compensation. For reasons that will follow, I do not accept their argument on this issue, making the information contained in these documents, from that perspective at least, unhelpful. Khaira has also referred to these documents in challenging the Director's finding on the piece work rate for the Kamloops contract. My comments below, on Exhibit F, also apply to this exhibit, to the extent it is sought to be used to challenge the Director's finding on the piece work rate for Khaira's employees for that contract.
67. In respect of Exhibit E, the Director is correct when he says section 21 of the *Act* does not allow the loss of the contract in Kamloops and the associated monetary loss to the business to deprive employees of all or part of wages earned and payable under the *Act*. That is clear from subsections 21(1) and (2) of the *Act*:
- (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
 - (2) *An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*
68. Exhibit F adds nothing to the information that was before the Director during the investigation. The decision of the Director on the rates was based on information received directly from Mr. Bajwa, one of the directors of Khaira, who said the employees were receiving between \$0.18 and \$0.20 per tree on that contract. The document which is Exhibit H is both superfluous and not probative, in the sense described above. The Determination indicates the Director did not ignore the newspaper advertisements placed by Khaira, but found other evidence relating to rates of pay to be more compelling.
69. The documents in Exhibit H have been created after the issuance of the Determination. The exhibit comprises six e-mail exchanges between a fictional character named "Tony" and five companies involved in the silviculture industry, although it is not apparent that the companies are involved in the industry in British Columbia. The documents purport to show the "practice" in the industry relating to the payment of travel time. As a group, there is no consistency in the comments relating to payment of travel time. Some responses indicate travel time is not paid, other responses indicate it is "generally" not paid and another response indicates it is included in the hours of work. Even if I were inclined to allow the document into the appeal, it is hardly compelling evidence of industry practice. I am not, however inclined to allow this evidence. On October 13, 2010, Khaira, through its legal counsel at the time, was provided with a copy of the opinion from Mr. Tesluk which expressed his view on the payment of travel time in the silviculture industry in this province. Khaira did not provide any evidence challenging Mr. Tesluk's view during the investigation, although they had ample time to do so. It would be inconsistent with the objectives of the *Act* and with the Tribunal's approach to the administration of section 112(1)(c), and new evidence generally, to allow Khaira to now challenge that opinion by allowing information to be included in the appeal that could, with the exercise of some diligence, have been provided during the investigation. In this respect, I have not overlooked the fact that Khaira was represented by legal counsel during the investigation.
70. Exhibit L is irrelevant to any issues raised in the appeal.

71. The assertions of fact respecting the two female employees, if they were not provided to the Director during the investigation, represent an inappropriate attempt to introduce new evidence and argument at the appeal stage and are not accepted. If this argument was made during the investigation, it is apparent the Director did not accept it, as he found those persons to be employees and entitled to wages. Khaira has not met its burden of establishing a reviewable error.
72. As a result of the above conclusions on the evidence submitted with the appeal submission, this appeal will be decided on the Determination, the material in the section 112(5) Record and the submissions of the parties.
73. I will address the other grounds of appeal and the arguments raised in them as they have been laid out by Khaira.

Error of Law

74. There are three elements to this ground of appeal. The first is that Khaira had no opportunity to cross-examine third parties in respect of information provided to the Director during the investigation; the second is that the Director ignored the written agreement purporting to allow Khaira to deduct \$25.00 a day from employees' wages for camp costs and boarding and lodging; the third is that the Director ignored standard practice in the silviculture industry and imposed a decision which suited the Directors and employees.
75. I do not find that Khaira has demonstrated the Director committed any error of law in making the Determination.
76. In the circumstances of the matters that came to the attention of the Director in July 2010 in several complaints from employees concerning possible non-compliance with the *Act* by Khaira in its operations throughout the province, the Director exercised discretion under section 76(2) to conduct an investigation. The Determination, at pages R20 to R23, sets out the steps taken by the Director in conducting the investigation. These include fact finding meetings, e-mails and personal communications with representatives of Khaira, communications through Khaira's legal counsel at the time, receipt and delivery of information between the parties and submissions on the respective position of the parties. A review of the information found in the Determination and the section 112(5) Record indicates the following:
- In an August 10, 2010, e-mail, the Director noted that the employees were disputing several aspects of the information that had been provided by Khaira to that date, including the time sheets, the June 2010 job description, that they were given pay stubs, the wage rate and the deductions. In the e-mail, the Director says: "if you wish to respond to this e-mail, kindly do so no later than 4:00 pm on Monday August 16, 2010".
 - On August 16, 2010, a meeting took place; Khaira provided their response to several of the claims and made general responses on the wage rates issue, the time sheets, travel time and the job description. Khaira also provided a written submission on those matters by letter dated the same date.
 - On August 17, 2010, Khaira made more substantive submissions on travel relating to the Golden contract.
 - On October 13, 2010, the Director invited counsel acting for Khaira at the time to provide submissions outlining Khaira's position regarding over 50 employees who worked for Khaira in the six month claim period.

- On November 2, 2010, a fax was sent to legal counsel for Khaira (with copies to Mr. Bajwa and Mr. Sidhu) asking for information on several specific matters set out in that fax.
 - On November 15, 2010, the Director received a submission from counsel for Khaira that included submissions on rate of pay, deductions and hours of work.
77. Khaira was provided with all of the submissions and documents submitted to the Director by individual employees and by counsel acting on behalf of the twenty-five former employees.
78. Section 77 of the *Act* states:
- 77 *If an investigation is conducted, the director must make reasonable efforts to give the person under investigation an opportunity to respond.*
79. An investigation under the *Employment Standards 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 S.C.R. 602. 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 O.R. (2d) 292. It has been held, for example, that the Director during an investigation should not be placed in a procedural strait-jacket: *Isulpro Industries Inc.*, BC EST # D405/98. In the case of investigations under the *Act*, the Director's obligation to ensure procedural fairness will almost invariably require notice to the employer and employee, with the particular obligation being that the notice must be adequate in all the circumstances to inform the parties of the substance of the matter or matters before the Director, to afford those concerned a reasonable opportunity to present evidence and argument on those matters and to respond to the position of the other party.
80. There can be no argument that the Director complied with the requirements of section 77 and the requirement to ensure procedural fairness in conducting the investigation. Khaira was, throughout the investigation, provided with notice of the substance of the claims being made, given all of the information submitted to the Director by or on behalf of former employees and given full opportunity to provide their response to that information. It is clear from the section 112(5) Record that Khaira took advantage of this opportunity. The suggestion from counsel for Khaira that the Director was only seeking information, not submissions, from Khaira and not providing documents received from other parties is not borne out by an examination of the section 112(5) Record.
81. In respect of the information about the travel times for some of the contracts provided to the Director by the third parties, while it would have been preferable to have given the information acquired from those individuals to Khaira, I do not find the failure to do so was an error of law or a breach of principles of natural justice.
82. The Director received information from third parties on the travel times for the Kamloops, Revelstoke, and Golden contracts. The Director used that evidence, but did not rely exclusively on it, in deciding the travel times on those contracts. Khaira, for its part, was aware that travel time was an issue; they were provided with the claims of the employees for travel time; they were given an opportunity to respond and did provide a response on the travel time claims. They provided evidence of the travel times on all of the contracts that were under scrutiny. The Director did not accept the evidence of travel times provided by Khaira. In this appeal, Khaira has done no more than resubmit the evidence of travel times that was not accepted by the Director and that is not sufficient to meet the burden on them of showing a reviewable error. They have

made no attempt in this appeal to show the information received from the third parties on the travel times for Kamloops, Revelstoke, and Golden was wrong and should not have been accepted by the Director.

83. With respect to the information received from Mr. Betts, it appears the only use made of that evidence was to support Khaira's position that they had never agreed to pay any employee \$25.00 an hour. There is no indication the Director relied on the information provided by Ms. Trisha.
84. Khaira had the opinion of Mr. Tesluk, as mentioned above, and had ample time to respond to it with their view on the matters covered by that opinion.
85. In respect of Khaira's argument relating to section 37.9(7) of the *Regulation*, I reject it completely. First, as noted in the submissions of the responding parties, only nine of the employees would have been covered by section 37.9. Second, the employee being charged \$25.00 a day must agree in writing to that charge. For the other employees, Khaira would need to show a written assignment of wages to meet a credit obligation. Third, the Director rejected the document which was purported to represent the written authorization for the imposition of a camp charge. The reasons for rejecting that document are found in the Determination at pages R45 and R46. There is no basis for saying the Director ignored the document, although it is quite correct to say the Director gave it no effect because he found it not to be credible. Nothing in this appeal demonstrates the reasoning and the conclusion of the Director regarding that document was irrational, perverse or unreasonable.
86. There is no evidence that the Director ignored standard practices in the silviculture industry. The only evidence of standard industry practice was provided to the Director in Mr. Tesluk's opinion. I agree with two points made in the responding submissions: that the uncorroborated statements of Khaira about what constitutes standard practice are not evidence; and a purported practice that does not conform to the requirements of the *Act* cannot be used to deny an employee the minimum employment standards set out in the *Act*.
87. I will address one other aspect of the appeal under this ground. Although the argument is raised under the natural justice heading, the compensation for length of service issue raised by Khaira is in reality based on an alleged error of law: that the Director used section 66 to find employees were terminated on July 17 and that the Director found some employees met the three month requirement for entitlement to length of service compensation.
88. I will first deal with the section 66 finding. As I stated in *Robert Craig*, BC EST # D052/10:

. . . in *Isle Three Holdings Ltd.*, BC EST #D084/08 (confirmed on reconsideration, BC EST # RD124/08), the Tribunal provided an overview of the interpretation and operation of section 66 within the *Act*. Included in the analysis of that decision are the following comments, found at paras. 27-31:

Section 66 of the *Act* states:

If a condition of employment is substantially altered, the director may determine that the employment has been terminated.

An accurate summary of the elements of this statutory provision is found in *Bogie and Bacall Hair Design Inc.*, BC EST # D062/08, at para 41:

Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There must be a finding that there is a

change in the conditions of employment, that the change is substantial and that the change constitutes termination.

Conditions of employment is defined in Section 1 of the *Act* to mean all matters and circumstances that in any way affect the employment relationship. The alteration must be substantial, or “sufficiently material that it could be described as being a fundamental change in the employment relationship”: see *Helliker*, BC EST #D338/97, (Reconsideration of BC EST#D357/96). The focus of the examination in Section 66 is the employment relationship in place at the time of the alteration: *Helliker, supra*.

The Tribunal has indicated that the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:

- a) the nature of the employment relationship;
- b) the conditions of employment;
- c) the alterations that have been made;
- d) the legitimate expectations of the parties; and
- e) whether there are any implied or express agreements or understandings.

(see for example, *Helliker*, BC EST # D338/97; *A.J. Leisure Group Inc.*, BC EST # D036/98; *Task Force Building Services Inc.*, BC EST # D047/98; and *Big River Brewing Company Ltd.*, BC EST # D324/02)

The language of section 66 gives the Director discretion to decide the employment of the employee has been terminated. The exercise of that discretion is reviewable by the Tribunal: *Jaeger*, BC EST # D244/99, *Jody L. Goudreau*, BC EST # D066/98; and *Takarabe and others*, BC EST # D160/98. As expressed in the last decision, the Director must exercise discretion for *bona fide* reasons, must not be arbitrary and must not base the decision on irrelevant factors.

As well, the Tribunal has endorsed an approach to section 66 which requires the Director to be guided in that exercise of discretion by the purposes and objects of the *Act*, which is remedial legislation “that exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed”: *Barry McPhee*, BC EST # D183/97.

89. In this case, some employees of Khaira stopped working on July 17, 2010. The Director found the primary reason for their stopping work was Khaira’s failure to pay wages in a timely way. This was a conclusion the Director was justified in reaching on the available evidence. The Director also found the non payment of wages by Khaira was a substantial breach of a condition of employment and justified finding the employment of the affected employees had been terminated. In my view, that was a finding the Director was entitled to make on the facts. It was made in the context of the exercise of discretion given to the Director in section 66. Khaira has not shown that exercise of discretion is reviewable within the principles described in the excerpt from *Craig, supra*.
90. On the section 63 issue, counsel for Khaira has premised his argument on a misreading of the opening words of that section, which state:
- 63** (1) After three consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks’ wages as compensation for length of service.
91. Counsel for Khaira has read that provision as requiring three continuous months of work to qualify for entitlement to length of service compensation. That reading is incorrect. The *Act* distinguishes between

employment and “work”, with the former being the relationship between employee and employer and the latter being defined in section 1 of the *Act* as “*the labour or services an employee performs for an employer*”. The relationship, once formed can continue to exist, even through periods of no work being performed, until it is ended by either the employer or the employee, by the effluxion of time or by the operation of law, as it would be in the circumstances described in subsection 63(5) or by a finding of termination under section 66 of the *Act*.

92. The Director found that some employees had been employed for more than three consecutive months and, even though there were breaks between the periods of work they performed on the various contracts, there was no evidence their employment with Khaira had been brought to an end during those breaks. It is not relevant that some employees found alternate employment during the breaks. The *Act* does not compel such a conclusion and, applying the statutory principles espoused in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1003, that the *Act* should be interpreted in a way that encourages employers to comply with the minimum requirements and so extends its protections to as many employees as possible, I would require clear language to reach a conclusion that it does.
93. Absent some evidence, or some other basis for finding the employment of the affected employees was terminated during the short breaks in work between contracts, the finding of the Director was both justified on the facts and correct at law. Khaira’s argument to the contrary is dismissed.
94. For much the same reason as above, I find no error of law in the conclusion of the Director that, because of the termination of employment resulting from Khaira’s failure to pay wages, section 65 did not apply to remove the affected employees from the benefit provided by section 63 of the *Act*.

Principles of Natural Justice

95. As indicated above, a party asserting a failure to observe principles of natural justice bears the burden of establishing such a breach. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal has briefly summarized the natural justice concerns that typically operate in the context of this ground of appeal:

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.

96. Khaira was accorded the rights described above. I have already addressed the length of service compensation issue that is raised in the appeal as an alleged breach of natural justice and have dismissed it. The other natural justice issues represent nothing more than attempts to reformulate and resubmit arguments on matters that were considered and decided by the Director in the Determination.
97. Khaira says the Director ignored their position on travel time and work time, ignored the inconsistencies in the information provided by the employees on these matters and made decisions which suited him and the employees. I disagree. A full and fair reading of the Determination indicates the Director was alert to the differences in the evidence provided by all of the parties. In some instances the differences among the parties was small, in other instances, it was substantial. There is no indication in the Determination that the Director did not consider all of the information that had been provided and acquired and make reasoned decisions

based on that information. The Director did not simply accept all of the claims made by the employees. In respect of the hours of work, he considered Khaira's records, which he found not to be credible, reviewed the records provided by seven employees, which he found to be relatively complete and consistent, considered the information provided by another employee, who he also found credible, and considered information provided by other employees, but did not necessarily accept that information in its entirety. In respect of the travel time, he considered the information provided by Khaira, which he found generally understated the travel time required, the information provided by the employees, which he found generally overstated the travel time required, and external information, including internet sources and information provided by third parties.

98. The analysis in the Determination confirms the Director's submission that findings on travel time and hours of work were based on a balance of probabilities approach, giving consideration to all of the information and evidence provided and looking for consistency and common sense in resolving all of that evidence and information. Khaira's appeal shows only that they disagree with the findings of fact made by the Director. Khaira has not shown there is any error in those findings. More particularly, Khaira has not met the burden of showing a failure to observe principles of natural justice in making the Determination.
99. In support of its argument on travel time, Khaira has attempted to introduce new information in the form of distance charts and site locations. I have not allowed that information to be included in the appeal for the reasons stated above; it is not a function of the appeal process to allow a dissatisfied party to raise and develop new avenues of argument on matters that should have and could have been raised in the complaint process. I also agree with the comment made by the Director in response to other new information submitted by Khaira with the appeal: that it cannot be a breach of natural justice to not consider evidence that was never presented during the investigation.
100. I also agree that Khaira's argument about the purported food deduction for five employees is misplaced. The finding on these five employees was not that they should be reimbursed for the cost of food which they bought themselves. The Determination indicates Khaira was ordered to repay money improperly deducted from these employees. The material in the section 112(5) Record shows, contrary to Khaira's assertion, that the money ordered to be repaid was money actually deducted from the wages of these five employees. The deductions were made without the written authorization of the employees. It is irrelevant whether these employees opted to stay in the motel or were aware \$25.00 a day would be deducted from their wages. The Director correctly found this deduction to be a contravention of section 21 of the *Act* and ordered it to be repaid to those employees. In any event, the matter raised here does not engage an issue of natural justice, but represents another instance of Khaira disagreeing with a finding of fact made by the Director in the Determination and seeking to have the Tribunal alter that finding.
101. Khaira has not shown there was a failure to observe principles of natural justice in the Director's allegedly ignoring evidence of industry practice, allegedly ignoring the evidence of the hourly and piece work rate in the newspaper advertisements and in not denying compensation to employees who stopped working on July 17, 2010.
102. None of Khaira's arguments on these points show any denial of natural justice. They only restate the arguments made to the Director on each of these points, all of which were considered and rejected by the Director on the facts which were available to him. As I have stated in this decision, it is not an appropriate use of the appeal process to seek to have the Tribunal alter findings made by the Director without demonstrating an error in the Determination under one of the grounds in section 112 of the *Act*.
103. In sum, and for the above reasons, the appeal is dismissed.

ORDER

- ^{104.} Pursuant to section 115 of the *Act*, I order the Determination dated February 4, 2011 be confirmed subject to my Orders in *Gerare Biyaruwanga* (BC EST # D059/11), *Joseph Mukunano* (BC EST # D060/11), *Pasteur Nsekerabanyanka* (BC EST # D061/11), *Ngerageze Heritier Guillaume* (BC EST # D062/11), *Jean Claude Nabulizi* (BC EST # D063/11), *Mitima Robert Migabo* (BC EST # D064/11), *Toms Mupenda Masumbuko* (BC EST # D065/11), *DeDieu Kibasi* (BC EST # D066/11).

David B. Stevenson
Member
Employment Standards Tribunal