Employment Standards TRIBUNAL

An appeal

- by -

Northern Springs Developments Inc.
("Northern Springs")

- 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: Raewyn J. Brewer

FILE No.: 2012A/27

DATE OF DECISION: July 10, 2012

DECISION

SUBMISSIONS

Lance Pace	on behalf of Northern Springs Developments Inc.
Karen A. Haynes	on her own behalf
Kristine Booth	on behalf of the Director of Employment Standards

INTRODUCTION

1. On August 26, 2011, Karen A. Haynes ("Ms. Haynes") filed a complaint against her employer. In that complaint, Ms. Haynes alleged that Northern Springs Developments Inc. ("Northern Springs") was refusing to allow her to return to her former position, following her maternity leave, contrary to section 54 of the *Employment Standards Act* (the "*Act*"). An investigation was conducted and on February 6, 2012, a delegate (the "Delegate") on behalf of the Director of Employment Standards (the "Director") issued a Determination (the "Determination").

2. The Determination found that Northern Springs had contravened section 54(2)(a) of the *Act* by terminating Ms. Haynes' employment because of her maternity leave; or, in the alternative, Northern Springs had contravened section 54(3) by failing to place Ms. Haynes in the position she held before taking leave, or in a comparable position, once her leave concluded. Pursuant to the Director's discretion under section 79(2) of the *Act*, the Determination required Northern Springs to pay Ms. Haynes compensation in the amount of $3,921.93 under section 79(2)(c). One $500.00 penalty was assessed for the contravention.

3. Northern Springs now appeals the Determination on three grounds: the Director erred in law; the Director failed to observe the principles of natural justice; and that new evidence is available that was not available at the time the Determination was being made. Northern Springs made no arguments regarding the remedy.

4. I am adjudicating this appeal based on the parties' written submissions. I have before me initial and reply submissions from Northern Springs, reply and final submissions from the Delegate on behalf of the Director, and a reply submission from Ms. Haynes. I also have before me in response to my request, an additional submission from each of Northern Springs and the Delegate regarding the timing of Ms. Haynes' maternity leave. I have also thoroughly reviewed the section 112(5) "record" that was before the Delegate when she was making the Determination.

FACTS

5. In September 2009, Ms. Haynes was hired as a personal assistant to Mr. Pace (the sole director and officer for Northern Springs). By November 2009, Ms. Haynes' position changed to administrative assistant and included reception duties and scheduling. She worked approximately 35 hours per week. Shortly thereafter, Ms. Haynes became pregnant.

6. Due to complications in her pregnancy, Ms. Haynes' doctor placed her on bed rest. A doctor's note dated May 12, 2010, stated that Ms. Haynes could only work reduced shifts of four hours per day and that in the future she may have to stop working completely. As it turned out, within a week, Ms. Haynes was placed on full bed rest. On May 18, 2010, Ms. Haynes was issued a record of employment (ROE) for insurance

purposes that coded the reason for leaving as "F" for maternity and indicated the expected date of recall was unknown. Mr. Pace signed the ROE on behalf of Northern Springs.

7. Ms. Haynes' son was born on September 17, 2010. Ms. Haynes believed that her pregnancy/maternity and parental leave under the *Act* (sections 50 and 51, respectively) started September 17, 2010, and would conclude on September 17, 2011. She viewed the time that she was on bed rest as medical leave.

8. Ms. Haynes first contacted Mr. Pace regarding her return to work on August 1, 2011. In her email, Ms. Haynes described her understanding that another employee was filling the position she held prior to going on leave and asked when she could meet with Mr. Pace to discuss her return. Ms. Haynes also expressed that she had hoped for a miracle to stay home with her son, but knew she "should stop dreaming and start planning on returning back to the work force".

9. Mr. Pace replied to the email on August 2, 2011. He noted that the person filling the job "was well suited to scheduling having been a caregiver herself and knowing many of the clients" and that he had "been thinking about how we can work with your requirements, talents and availability." He inquired as to Ms. Haynes' familiarity with Facebook and Twitter.

10. On August 7, 2011, Ms. Haynes answered the questions posed by Mr. Pace about her familiarity with Facebook and Twitter, and again asked when she and Mr. Pace could meet.

11. On August 19, 2011, after receiving no further contact from Mr. Pace, Ms. Haynes sent another email message requesting she be provided with as much notice as possible if she were not going to be returned to work.

12. That same day, Mr. Pace responded by email and described a part-time, "few hours in the mornings" position attending to newsletters, communications and marketing. The email concluded by confirming that he was not making any promises "as to what it ends up being, but as long as it is productive and contributes to the operations, we will give it a try."

13. In her response of August 22, 2011, Ms. Haynes' clarified that she was not interested in part-time work and requested that if full-time work was not available, Mr. Pace advise her as soon as possible. Later that day, Mr. Pace sent an email in which he suggested Ms. Haynes come to the office to "discuss the opportunities […] My thoughts are about a variety of duties, including some office, some cleaning and some companion care plus others?"

14. Before the Delegate, Mr. Pace's stated this August 22, 2011, email was an example of how he repeatedly invited Ms. Haynes to come to the Northern Springs' office to discuss her return and his ongoing commitment to tailoring job positions to each employee's talents and choices. In contrast, Ms. Haynes submitted this email evidenced that Mr. Pace did not intend to return Ms. Haynes to either the position she had held before commencing her leave or a comparable one.

15. On August 26, 2011, Ms. Haynes filed a complaint against OmniCare for People at Home Corporation ("OmniCare") and City Pulse Research & Marketing. When she first filed her complaint, Ms. Haynes wished to return to a position in which she would have comparable terms and conditions of employment. While originally filed against OmniCare, the parties subsequently agreed that Northern Springs was in fact Ms. Haynes' employer and the complaint proceeded against Northern Springs. Mr. Pace is the sole director and officer for Northern Springs and he represented Northern Springs throughout the investigation and in the submissions to the Tribunal.

16. In an email of September 2, 2011, Ms. Haynes requested further clarification from Mr. Pace. Ms. Haynes explained that she understood that she was not being returned to her original position and asked whether she was being offered a few hours in the office with the possibility of a position doing some companion care. She also described her understanding of section 54 of the *Act* and stressed she was not interested in housecleaning.

17. On September 6, 2011, Mr. Pace responded by email and stated that the 52-week leave period started prior to the birth of Ms. Haynes' son and that her absence extended well beyond this. He noted that Ms. Haynes commendable talents were the basis for "working forward."

18. When the Delegate first contacted Mr. Pace on September 7, 2011, Mr. Pace advised her that Ms. Haynes was no longer a Northern Springs' employee. He claimed that he held a position for Ms. Haynes until 52 weeks after her leave request (i.e. May 18, 2011). Therefore, when Ms. Haynes contacted him in August 2011, the leave period had lapsed and therefore she was no longer an employee. Later that day, Mr. Pace confirmed to the Delegate that at no time in, or before, May 2011 did he attempt to recall Ms. Haynes to work. He also affirmed that the job Ms. Haynes thought was hers did not in fact belong to her because her replacement was "doing a better job." He also explained that he provided Ms. Haynes with an opportunity to come back to work, but that she was not partial to the proposal. Mr. Pace expressed he had intended to create a position for Ms. Haynes; however, she did not accept the opportunity and thus, in essence, had quit.

19. Mr. Pace also expressed to the Delegate, and subsequently confirmed in an email, that the position he had in mind for Ms. Haynes would be shifts of around four hours in duration so that her family needs, as he viewed them, could be accommodated.

20. On September 8, 2011, the Delegate sent a letter by email to Northern Springs outlining the parties' positions and the Delegate's understandings of Ms. Haynes' claim. These understandings were based on conversations she had with both parties and a review of the email correspondence. The Delegate sought greater details from Northern Springs on any of the terms and conditions of Ms. Haynes' position prior to commencing her leave, or the position which Mr. Pace viewed as comparable, and asked that these be provided by September 22, 2011. The Delegate clearly articulated that this was Northern Springs' opportunity to provide any and all evidence to demonstrate the requirements of section 54 had been met and stated that the onus rested with Northern Springs to demonstrate statutory compliance with section 54(2)(a). The letter concluded by stating that if Northern Springs wished to discuss voluntarily resolving the dispute, to contact the Delegate by September 22, 2011.

21. In reply, and specifically in response to the request for voluntary resolution, Mr. Pace sent an email to the Delegate on September 19, 2011, stating "that the intent from the start of correspondence with Ms. Haynes was to get her back to work as Administrative Assistant for Northern Springs with the same hours and scope." The letter confirmed the hours (6.67 per day) and wage ($14.00 per hour) would be the same upon her return "as required under Employment Standards regulations." Mr. Pace also stated that he would prefer if Ms. Haynes came to the office to plan for her return and asked the Delegate if she would be communicating with Ms. Haynes in this regard. The email concluded with the following paragraph:

> We are moving forward on the understanding Ms. Haynes wants to return to the Administrative Assistant as outlined above, however if we have not received a reply from either Employment Standards or Ms. Haynes by the date indicated on your letter [September 22], we would request an extension for one week to provide any additional evidence.

22. Upon receiving an out of office reply from the Delegate, Mr. Pace forwarded the September 19, 2011, email to Ms. Haynes and sent a copy by registered letter. Ms. Haynes did not pick up the letter at the post office.

23. On September 22, 2011, the Delegate replied to the September 19, 2011, email stating that Mr. Pace's position had not been communicated to Ms. Haynes (the Delegate was unaware Mr. Pace had forwarded the email directly to Ms. Haynes). The Delegate granted Mr. Pace's request for an additional week to provide any additional argument or evidence regarding whether the requirements of section 54 had been met. Materials were to be delivered to the Delegate by October 3, 2011.

24. On October 3, 2011, Mr. Pace sent the Delegate another email. He outlined his philosophy that family comes first and stated that he wanted to voluntarily resolve the dispute by having Ms. Haynes return as an administrative assistant with the same hours and pay as prior to her leave.

25. On October 5, 2011, Ms. Haynes responded to Mr. Pace's email of September 19, 2011. That is, the email originally sent to the Delegate and then forwarded to Ms. Haynes. Ms. Haynes requested a clear outline and job description and communicated her frustration with the offer of cleaner, caregiver and morning office work.

26. On October 11, 2011, Mr. Pace sent an email to Ms. Haynes stating that Northern Springs had been in touch with Employment Standards (not the Delegate) and had been advised their responsibility ceased in September. Mr. Pace explained that he viewed Ms. Haynes' failure to respond to the September 19, 2011 email before October 5, 2011, and her failure to pick up the letter, as signifying disinterest in the job. Mr. Pace stated that Northern Springs had "moved on."

27. The Delegate completed her investigation and on February 6, 2012, rendered the Determination.

THE DETERMINATION

28. The Determination addressed two issues:

> (1) Did Northern Springs contravene section 54 of the *Act* (a) by terminating Ms. Haynes' employment for reasons related to her leave under Part 6 of the *Act*; or (b) by failing to place Ms. Haynes in the position she held before taking leave under Part 6 of the *Act*, or in a comparable position once her leave concluded?
>
> (2) If the *Act* was contravened in either way, should the Director impose a remedy in accordance with section 79 of the *Act*? If so, what should that remedy be?

29. The Determination found that Northern Springs had contravened section 54(2)(a) of the *Act* by terminating Ms. Haynes' employment because of her maternity leave; or, in the alternative, Northern Springs had contravened section 54(3) by failing to place Ms. Haynes in the position she held before taking leave, or in a comparable position, once her leave concluded. Pursuant to the Director's discretion under section 79(2) of the *Act*, the Determination required Northern Springs to pay Ms. Haynes compensation in the amount of $3,921.93 under section 79(2)(c). One $500.00 penalty was assessed for the contravention.

30. The Determination set out the reasons why section 54 of the *Act* applied to Ms. Haynes' employment at Northern Springs. First, Mr. Pace clearly understood Ms. Haynes was pregnant and going on maternity leave. Therefore, sections 50 and 51 of the *Act* applied to Ms. Haynes even though she did not submit a written request in advance of her maternity leave as required under section 50(4).

31. Second, Northern Springs allowed Ms. Haynes to continue her leave beyond May 2011. There was no evidence that an agreement was made with respect to an expected date of return for Ms. Haynes and the ROE recall date was marked unknown. The Delegate accepted Ms. Haynes' evidence that she believed the 52

weeks of leave started after she gave birth (September 17, 2010) and continued until she stopped receiving employment insurance benefits (September 17, 2011). Further, at no time did Mr. Pace contact Ms. Haynes to confirm her return date or make any attempt to recall her. Therefore, Northern Springs allowed Ms. Haynes to continue a leave from her employment beyond May 2011.

32. Third, the Delegate concluded that Part 6 of the *Act* ("Leaves and Jury Duty") does not include a provision that deems the termination of employment after the timeframe set by the *Act* for the leave concludes. Therefore, in the context of acknowledged ambiguity as to the date of Ms. Haynes' return, the Delegate found Northern Springs was not alleviated from its section 54 statutory duties after conclusion of the 52-week timeline.

33. The Delegate carefully reviewed the three arguments advanced in support of Northern Springs' position that it did not contravene section 54 of the *Act*: (1) Ms. Haynes' employment officially ended in May 2011, 52 weeks after her leave began; (2) Ms. Haynes had resigned prior to September 7, 2011, when the Delegate first contacted Mr. Pace; and (3) Ms. Haynes refused to return to the administrative assistant position (or a comparable position) after it was offered to her on September 19, 2011.

34. Based on the evidence, the Delegate found that as of September 7, 2011, when she first contacted Mr. Pace, Northern Springs viewed the employment relationship as no longer existing. The Delegate then turned her attention to determining who ended the employment relationship and when, as a termination by Northern Springs would constitute a breach of section 54(2)(a).

35. Despite Northern Springs' contention that Ms. Haynes resigned, the Delegate found no compelling evidence to suggest this was the case. In fact, the Delegate noted that Ms. Haynes' communications with Mr. Pace supported the opposite conclusion; she was actively seeking her return to work. The Delegate then concluded that Northern Springs terminated Ms. Haynes' employment on September 7, 2011, when Mr. Pace communicated to the Delegate that Northern Springs no longer considered itself Ms. Haynes' employer.

36. Having found Ms. Haynes was terminated, the issue was whether the termination was related to her leave. Pursuant to section 126(4)(c) of the *Act*, the burden was on Northern Springs to prove that Ms. Haynes' maternity leave was not the reason for terminating her employment. Northern Springs made no argument regarding why the termination was unrelated to Ms. Haynes' leave. Rather, Northern Springs argued Ms. Haynes was terminated because she did not return to work when she ought to have in May 2011. As characterized by the Delegate:

> Northern Springs, whether it was aware or not, was responsible to recall Ms. Haynes and affirmed that it made no attempt to do so. In essence, Northern Springs terminated Ms. Haynes' employment because it failed to meet the responsibilities it bore as an employer. Northern Springs did not recall Ms. Haynes and then terminated her because she did not return to work. I find that this termination is directly, albeit perhaps unintentionally, related to her leave under Part 6.

37. Next, the Delegate addressed Northern Springs' alternative argument that it fulfilled its obligations under the *Act* by attempting to return Ms. Haynes to her position as administrative assistant, or a comparable position, to which she refused. The Delegate detailed the evidence before her and concluded that Mr. Pace preferred Ms. Haynes' replacement and the alternative position offered to Ms. Haynes was not comparable in hours, duties, or scope to the position she previously held.

38. The Determination specifically addressed the September 19, 2011, email. The Delegate concluded that if Northern Springs viewed the email as a proposal of recall, Ms. Haynes did not reject it. Rather, in the context of time lapses between prior communications, no specified timeline for a reply, the variety of duties and

hours that had previously been put forward to her, and the fact that Ms. Haynes was told how well of a job her replacement was doing, the Delegate found it was reasonable for Ms. Haynes to request further clarification about the position.

ARGUMENTS

39. Northern Springs seeks to have the Determination cancelled and made lengthy submissions in support of its position. In my view, Northern Springs' arguments are best distilled as follows: first, the Delegate incorrectly applied the section 2 purposes of the *Act*, specifically subsections 2(b), (c), (d) and (f); second, the Determination contains numerous factual errors because the Delegate misinterpreted and misunderstood the evidence before her; third, the Delegate may have been biased against Northern Springs; and fourth, new evidence is available.

40. Further, in my view, the theme running through Northern Springs' submissions, and what appears to be the crux of Northern Springs' argument on appeal, is the assertion that Ms. Haynes had the option to return to her position as administrative assistant with the same hours and duties on September 19, 2011. Accordingly, as argued by Northern Springs, they did everything required under the *Act* and had Ms. Haynes reported to work on September 19, 2011, "she would be employed in the same position of Administration Assistant for Northern Springs."

41. In response, the Director submits that Northern Springs fails on all grounds to meet the onus associated with cancelling a determination and seeks to have the Determination confirmed.

42. According to the Director, Northern Springs did not present clear or compelling argument regarding how the Delegate made an error in law with respect to application of the section 2 purposes of the *Act*. In terms of Northern Springs' contention that Ms. Haynes' leave ended on September 17, 2011, and therefore she ought to have reported to work the following Monday, September 19, 2011, the Director first notes that this contradicts the original position asserted by Northern Springs during the investigation. Second, the Director argues that there was sufficient evidence to support the finding that Northern Springs contravened section 54(2)(a) of the *Act*, or in the alternative, section 54(3).

43. In response to the natural justice argument, the Director submits that an un-biased decision-maker who had no interest in the outcome made the Determination. Finally, in the Director's view, the voluminous evidence and argument Northern Springs sought to include on appeal do not meet the test for new evidence.

ANALYSIS

44. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *Act*, which reads:

> 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:
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> a) the director erred in law;
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> 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.

45. 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.

46. At the outset, I wish to emphasize the limited nature of an appeal to the Tribunal. The Tribunal is not mandated to conduct a new hearing. The Tribunal's role is much more circumscribed – to review the Determination, and the process followed in making it, to determine if the Delegate made any significant legal errors or conducted an unfair process in making the Determination.

47. Northern Springs has requested that the Determination be cancelled on each of the grounds set out in section 112. I will deal with these grounds in reverse order.

Has evidence become available that was not available at the time the Determination was being made?

48. In order to support Northern Springs' arguments made on appeal, Northern Springs filed extensive evidentiary materials, including:

- Ms. Haynes' resume and reference letters of September 2009;
- personnel data form (payroll) for Ms. Haynes dated September 28, 2009;
- excerpts from Ms. Haynes' time sheet entries dated October 2009;
- email exchanges between Mr. Pace and Ms. Haynes dated October 2009 to January 2010;
- emails regarding chalet bookings made by Ms. Haynes dated February 2010;
- an email from an employee communicating her resignation dated February 16, 2010;
- a BC Registry Services Annual Report Reminder for Omnicare for 2011;
- emails, dated October 6, 2011 and October 11, 2011, and a letter from an employee regarding conversations she had with staff of the Employment Standards Branch (not the Delegate) regarding grounds for termination when an employee does not return to work and the duties of an employer under section 54 of the Act;
- a Holiday card from Ms. Haynes to Mr. Pace (undated);
- an excerpt from the internet regarding Generation X workers; and
- emails and a letter from current employees of Northern Springs supporting the submission that Mr. Pace is a flexible and supportive employer who facilitates staff develop and allows them to align their strengths and intentions with Northern Springs' corporate philosophy.

49. In the oft-cited *Davies et al (Merilus Technologies Inc.)* BC EST # D171/03, the Tribunal set out the following test regarding the ground for "new evidence":

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). 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. The key

> aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
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> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

50. In this case, Northern Springs does not argue that the evidence it now seeks to put forward was unavailable during the investigation and prior to the Determination being made. Rather, Northern Springs makes the following argument:

> [Northern Springs] believed that the Delegate would understand the evidence in the same context and understanding from which it was presented. Unfortunately, that is not the case therefore additional corroborating evidence is now provided for the same purpose.

51. The additional evidence is therefore similar to that presented during the investigation, evidence which failed to persuade the Delegate that Ms. Haynes' complaint should be dismissed. As such, this ground of appeal constitutes an attempt by Northern Springs to shore up a case that failed at first instance, and to re-argue it before the Tribunal. It is incumbent on a party to present all arguments and evidence that the party may reasonably expect should be presented *before* a determination is made. Evidence led on appeal simply to corroborate arguments and submissions made during the investigation is not the basis for considering new evidence. The additional evidence adduced by Northern Springs is simply not evidence that was "not available" as that phrase has been interpreted when considering the requirements of section 112(1)(c). I add that even if I were to accept the additional evidence as "fresh evidence", there was no evidence before me that could have led the Director to a different conclusion on a material issue.

52. This ground of appeal is dismissed.

Did the Director fail to observe the principles of natural justice in making the Determination?

53. Ground 112(b) requires the Director to observe the principles of natural justice in making the Determination. In *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, the right to receive reasons for the decision, and the right to be heard by an independent decision-maker.

54. The only procedural fairness issue raised by Northern Springs involves the independence of the Delegate. Northern Springs questions whether the Delegate is an independent decision-maker and suggests the Delegate was biased against Northern Springs. Northern Springs contends the "Delegate most certainly has an interest in the outcome… performance review, supervisor's perception of the investigation, challenge to the application of the laws […]." Northern Springs also raises concerns about the fact that the Delegate maintained the file after moving from one Branch office to another.

55. I commence my analysis of this allegation by noting the standard for a finding of reasonable apprehension of bias is high. There is a presumption of impartiality. The Tribunal has accepted the well-known and clear test for determining if a reasonable apprehension of bias arises - whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98)).

56. The Tribunal has also noted that the test is an objective one, that because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541, and that the evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias.

57. There is no evidence – let alone clear evidence – that would justify a conclusion that the Delegate had pre-judged Ms. Haynes' complaint. Bias is not demonstrated by simply showing the Director did not accept the position of Northern Springs and reached other conclusions on the facts. I find the burden on Northern Springs has not been met; the allegation of bias is not proven and this ground of appeal is dismissed.

Did the Director err in law?

58. One of the central issues in this case concerned the interpretation and application of section 54 of the *Act*, the relevant portions of which are reproduced below:

> **54** (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.
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> (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
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> (a) terminate employment, or
>
> (b) change a condition of employment without the employee's written consent.
>
> (3) As soon as the leave ends, the employer must place the employee
>
> (a) in the position the employee held before taking leave under this Part, or
>
> (b) in a comparable position.

59. As outlined in greater detail above, the Delegate clearly set out the reasons why section 54 of the *Act* applied to Ms. Haynes' employment at Northern Springs, determined on the facts that the employment relationship had ended on September 7, 2011, and then further considered the facts before her to determine who ended the employment relationship and when. The Delegate concluded that Ms. Haynes' termination was directly related to her leave under Part 6 of the *Act* and therefore Northern Springs had contravened section 54(2)(a).

60. The Determination also addressed Northern Springs' alternative argument that it fulfilled its obligations under the *Act* by attempting to return Ms. Haynes to her position as administrative assistant, or a comparable position, to which she refused. The Delegate detailed the evidence before her, including the September 19, 2011, email, and concluded that Mr. Pace preferred Ms. Haynes' replacement and the alternative position offered to Ms. Haynes was not comparable in hours or scope to the position she previously held. Thus, in the alternative, Northern Springs was found to have contravened section 54(3) of the *Act*.

61. Northern Springs also submits the Delegate incorrectly applied the purposes of the *Act*, specifically the following subsections:

b) to promote the fair treatment of employees and employers;

c) to encourage open communication between employers and employees;

d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*;

f) to contribute in assisting employees to meet work and family responsibilities.

62. As I understand Northern Springs' submissions, Northern Springs' argument is tied to Mr. Pace's personal and Northern Springs' corporate philosophy that (a) employees (and their families) should be supported and developed in a manner that aligns with their strengths and choices and (b) open lines of communication should be maintained. While admirable philosophies, they have no bearing on the interpretation of section 2 of the *Act*.

63. Thus, I am not persuaded that the Delegate erred in law. I can find no indication in the material or in the evidence to support the argument that the delegate applied the wrong legal test in respect of her conclusions. Much of Northern Springs' submissions can only be considered a re-argument of its case and a challenge to the Director's findings of fact with a view to obtaining a more favourable decision. Indeed, in its various (and voluminous) submissions Northern Springs has attacked virtually every finding of fact or legal conclusion that the Delegate made that might be considered adverse to its interests. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Re: Britco Structures Ltd.*, BC EST # D260/03). The occasions on which an alleged error of fact amounts to an error of law are few.

64. In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if he or she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST # D028/06).

65. I am not persuaded that the Delegate in any way erred in law in reaching her conclusions and there is nothing before me to support an argument that the findings of fact made by the delegate could not be reasonably made on the evidence before her.

ORDER

66. Pursuant to section 115(1) of the *Act*, I order that this appeal be dismissed and that the Determination dated February 6, 2012, be confirmed.

Raewyn J. Brewer
Member
Employment Standards Tribunal