Employment Standards TRIBUNAL

An appeal

- by -

Angel M. Dean
("Dean")

- 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: Robert E. Groves

FILE No.: 2012A/40

DATE OF DECISION: July 19, 2012

DECISION

SUBMISSIONS

Angel M. Dean	on her own behalf
Richard Press	counsel for Kids & Company Corporate Child Care Services (BC) Ltd.
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought by Angel M. Dean ("Dean"). Dean challenges a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated March 27, 2012, on the grounds that the Delegate erred in law and failed to observe the principles of natural justice.

2. Dean had complained that her former employer, Kids & Company Corporate Child Care Services (BC) Ltd. (the "Employer") had contravened section 8 of the *Employment Standards Act* (the "*Act*") by misrepresenting the type of work and/or the conditions of employment being offered to her prior to her being hired.

3. Following a hearing of Dean's complaint, conducted on August 25, 2011, the Delegate determined that no contravention of section 8 had occurred.

4. I have reviewed the Determination, the Reasons for it, Dean's Appeal Form and her submissions, the record delivered to the Tribunal by the Director pursuant to section 112(5) of the *Act*, and a submission from counsel for the Employer.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic hearing.

FACTS

6. The Employer operates a corporate child care business. Dean was employed by the Employer, but attended for work on but one day, December 13, 2010.

7. Dean's position before the Delegate was that:

- The Employer had induced her to understand that she was being hired for the position of "Assistant Director," that she would not be working in the Infant/Toddler section of the program offered by the Employer, that her work day would start at 9:00 or 9:30am each day, and that she would work a full eight hour day.

- On her first day of work, however, she was asked to commence her duties at 8:30 am, she was assigned to work in the Infant/Toddler area, and she received no training for the Assistant Director position. Moreover, she was sent home before she had worked a full eight hours.
- She did not return to work for the Employer. She was unable to continue to work in the Infant/Toddler section as she has a chronic back problem which prevents her from doing the more strenuous tasks associated with that particular aspect of work in the Early Childhood Education ("ECE") field.
- While she was qualified to perform Infant/Toddler work, which involved the supervision of children up to about the age of three, she asserted that her disability prevented her from doing so, because the work was, for the most part, located close to the floor, involved a significant amount of lifting of the children, diaper changes, and the pushing of strollers. For these reasons, she stated that she had to be assigned to work with the children aged three to five in the Pre-School section of the program, where the physical demands were not as likely to exacerbate the difficulties she was experiencing with her back.

8. In his Reasons, the Delegate also referred to the following evidence presented by Dean:

- When she responded to the posting for the position that had appeared on the Employer's website, she referred the Employer to her resume that she had delivered previously. That resume gave no indication that she was unavailable for work in the Infant/Toddler section. However, she stated that employers wishing applicants to work in that area would specify that requirement in any posting.
- She was interviewed by a representative of the Employer ("Ms. T."), and told her about her problems with back pain. In an email that was forwarded to Ms. T. thereafter, she said she "cannot push strollers." She provided no further details regarding physical restrictions relating to her work. She believed, however, that the reference to pushing strollers would have to be interpreted to mean that she could perform none of the principal duties required in the Infant/Toddler section. Shortly thereafter, Ms. T. communicated to Dean that her inability to push strollers would not be a problem.
- She believed she was being hired as an "Assistant Director," that is, as an administrator. She believed she would only be required to perform child care when the regular staff members were on breaks, or when an absence meant that the staff to child ratios had dropped below the mandatory threshold.
- In her communications with the Employer prior to commencing work, the issue of her working in the Infant/Toddler program never came up. Specifically, in a letter dated November 19, 2010, the Employer stated that it was offering her the position of "2nd Assistant Director," not "Assistant Director/Infant Toddler Teacher."
- She received the following email from Ms. T. on November 22, 2010, prior to her commencing work:

> To the questions I can answer: I am looking for another assistant director...
>
> Your responsibilities would to be *(sic.)* the designate person/go to person for parents etc when I am not here at the centre. I am looking for a 3rd teacher in the Infant/Toddler room and you only have to worry about administration duties/supervisor duties when I am away on holidays/running errands/sick. I always need someone in charge when I am not

> here and looking for really strong candidates to be in this role. No worries about not being able to push strollers – we can always work that out.

- In response to this email, Dean testified that the "3rd teacher" referred to could not be her because she would have been only the "2nd" teacher, and if the reference was meant to apply to her it should have read "Assistant Director/Teacher." She also stated that it was not possible to combine Infant/Toddler work with Assistant Director work because the Infant/Toddler teaching job was a full-time position.
- She left work early on her first day of work. She denied that she was given the option to leave early. She asserted that she was told that she needed to leave, and she did so.

9. The Employer's position before the Delegate was that:

- Dean was hired into a position which contemplated she would perform both administrative and childcare duties. The only restriction Dean communicated was an inability to push strollers, which the Employer had no difficulty in accommodating.
- It was always understood that Dean's regular hours of work would be 9:00 am to 6:00 pm, at least after her orientation was complete. On her one day of employment, the Employer advised Dean she could leave early if she wished, and Dean accepted.

10. Ms. T., the Employer's Site Director, gave evidence at the hearing before the Delegate. The Delegate's Reasons say she said this:

- The Employer's worksite at the location in question has two rooms, one for Infants/Toddlers, and one for the Pre-School children.
- In July 2010, enrolment projections convinced the Employer that it required an additional Infant/Toddler teacher at the site. The Employer advertised the position nationally. Dean responded to the advertisement, and attached her resume, but she was not contacted because other qualified candidates were selected.
- In September 2010 Dean contacted the Employer stating that she understood it had a vacancy for a "Pre-School Instructor." Ms. T. acknowledged that such a position involved teaching children aged three to five years.
- Ms. T. felt that Dean was an attractive candidate because her cover letter mentioned that she had an Infant/Toddler licence. In an October 28, 2010 email, Dean inquired as to the wage rate the Employer was offering, and drew specific attention to the fact that she had ECE, Infant/Toddler, and Special Needs licences.
- There was no job description for the Assistant Director position at the location in question because the site was new. However, all the Employer's Assistant Director positions were primarily ECE positions, and involved teaching.
- Dean's regular work hours were to be 9:00 am to 6:00 pm. She was asked to attend at 8:30 am her first morning in order to introduce her to the other staff.
- Ms. T. advised Dean to keep the fact that she was a "director in training" secret, as Ms. T. was leaving to take up a position at another of the Employer's locations, and did not want to communicate that fact to all of the staff at that moment. The Employer's expectation, however,

was that Dean would become the Site Director at that location, based on her skills and experience.

- On Dean's first day of work, Ms. T. introduced her to the site's 1st Assistant Director. She told her that Dean was going to be the 2nd Assistant Director and would be job shadowing throughout that day. Ms. T. checked in with Dean during the day, and Dean told her that all was going well.
- As all the children had been picked up by 5:15 pm that first day, staff were given the option of going home if they wished. If they decided to stay, there was prep work to be done. Dean raised no questions or objections, and left early with the rest of the staff.
- Ms. T. was surprised to receive an email from Dean later that evening, advising that she could not continue to work for the Employer. The email raised three issues, two of which were relevant for the purposes of the Determination. Dean questioned her being required to work in the Infant/Toddler section, and the fact that her workday had ended fifteen minutes early.
- Ms. T. responded, indicating that she wished Dean had spoken to her about her concerns. She also told Dean that there was a management position pending for her in the very near future, and she encouraged her to come in and discuss the matter.
- Dean emailed in response that she would be willing to re-commence work with the Employer in January 2011 if the details of her employment were resolved satisfactorily by that date.
- The Employer declined to take Dean up on this offer. The reason given was that sufficient concerns had been raised about Dean's ability to communicate professionally that she would not be a good candidate for Site Director.
- Ms. T. acknowledged that the first time the term "Assistant Director/IT Teacher" was used was in an email from her to Dean after Dean had advised that she would not be returning to work.
- In an email to Dean dated December 14, 2010, Ms. T. referred to Dean's inability to "push strollers *etc.*" (italics added). When asked about the use of "etc." Ms. T. stated that it was "simply an error."
- When asked what she understood to be the reason for Dean's inability to push strollers, Ms. T. replied that she did not know and that she had simply taken this at face value as something they could accommodate.

11. Another representative of the Employer, its Director of Human Resources, gave evidence at the hearing ("Ms. B."). She testified that:

- The Employer regularly employed one or two Assistant Directors at each of its sites.
- Invariably, the Assistant Director positions were primarily teaching positions, with the added responsibility of acting as back-ups for the Site Director.
- Ms. B. interviewed Dean for the job in question, via telephone. Dean told her that she wished to work for the Employer to reduce her commuting time and to have an opportunity to move up in an organization.

- There was no job description for Dean's position because she simply had not had time to get it done.

12. For the Delegate, the principal issue for determination was whether the Employer misrepresented the type of work, or the conditions of employment associated with it, by representing that the Assistant Director position on offer was purely a managerial position that involved no teaching duties, or alternatively, a position that did not involve Infant/Toddler teaching duties.

13. The Delegate determined that the evidence did not support the case presented by Dean. The pre-hiring communications between Dean and the relevant representatives of the Employer occurred via email, for the most part. The basis for the Delegate's conclusion is captured in the following excerpt from his Reasons, in which he comments on a series of emails which passed between the parties:

> The exchange shows that Ms. Dean knew or should have known, prior to commencing employment, that the Assistant Director position was a teaching position with back-up managerial responsibilities. It also illustrates that Ms. Dean should have expected to be working in the Infant/Toddler section, but not required to push strollers. Why would the question of pushing strollers have been raised by Ms. Dean if she believed that she was moving into a purely managerial position? Further, there is no evidence in any of the documentation that Ms. Dean indicated at any time during the hiring process that there was any barrier to her working in the Infant/Toddler area beyond the inability to push strollers.

14. Dean also concluded that her early departure from work on her first day meant that the Employer had misrepresented its commitment to provide her with eight hours of work per shift. The Delegate did not deal with this point explicitly, but it is to be inferred from his Reasons that he accepted the Employer's evidence to the effect that Dean and other members of the staff were given the option to leave early on the day in question, and Dean took the Employer up on its offer.

15. The Delegate also appears to have concluded that there was no misrepresentation relating to Dean's hours of work generally. His Reasons state that both parties agreed that Dean would work from 9:00 am until 6:00 pm. They also state that the 8:30 am start time on the first day was for orientation purposes only.

ISSUE

16. On her Appeal Form, Dean claims that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

17. Has Dean established that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh, on these or any other grounds?

SUBMISSIONS OF THE PARTIES

18. Dean's submissions on appeal identify the following as matters with which the Tribunal should deal:

- The fact that the job offered to her was described as that of "Assistant Director" is a misrepresentation for two reasons. First, a managerial position was not yet available, and even if Dean was being hired as a managerial trainee, no training was to be provided until a managerial position did become available. Second, the majority of the work to be performed was as an Infant/Toddler teacher. Dean suggests that the reason the job was advertised in this manner was that Infant/Toddler teacher positions are difficult to fill, and so the Employer needed to

induce applicants to come to work based on promises that they would fulfill managerial roles when hired.

- The Delegate failed to consider the face to face interview that Dean had with Ms. T. on November 3, 2010. No notes of that meeting were produced, notwithstanding the Delegate's statement in his Reasons that he had notes prepared by both witnesses for the Employer. Dean says that Ms. T. allegedly misplaced her notes of that interview, and that the other notes from Ms. T. contained in the record were prepared as a result of an earlier telephone interview. She also asserts that she was told at the face to face interview with Ms. T. that it was a managerial position that was on offer, with perhaps some teaching work in the Pre-School area until a full managerial position was provided. However, on commencing work on December 13, 2010, Dean learned that the primary focus of the job was Infant/Toddler teaching, work she could not physically do, as a result of her chronic back pain.

- The failure of Ms. T. to produce her notes of the November 3, 2010, meeting is important. If Dean had been advised at that interview that the position involved Infant/Toddler teaching she would have informed Ms. T. that she could not work in that area for health reasons.

- The advertisement to which Dean responded requested the services of an "Early Childhood Educator." It made no reference to work in the Infant/Toddler area.

- Dean's September 2010 letter requesting work indicated that she understood there was a vacancy for a "Pre-School Instructor," and that she wished to apply for such a position. The inference I assume I am asked to draw from this wording is that Dean was not applying for work as an Infant/Toddler teacher, which is a different form of ECE work from that performed by a Pre-School Instructor. Therefore, in the event that Dean was asked to perform teaching work at all after she was hired, she expected that it would occur in the Pre-School section, and not in the Infant/Toddler area.

- There were two principal reasons why Dean restricted her communications regarding her physical limitations to the pushing of strollers. The first was that she was unaware there would be any Infant/Toddler teacher work involved in the position, at least in part because Ms. T. had not mentioned it in their November 3, 2010, interview. Second, when Ms. T. informed her in a later email of November 19, 2010, that she wished to see how Dean worked "in the child care environment and with managerial tasks," Dean became concerned that the work might involve pushing strollers "to help out." However, that did not mean that she was expecting regular work in the Infant/Toddler area.

- Ms. T.'s use of the word "etc." as part of the phrase "pushing strollers etc." in her December 14, 2010, email was no mistake. Ms. T. was aware, as a result of "information provided" at the November 3, 2010, face to face interview, that Dean suffered from back problems which prevented her from doing other tasks apart from pushing strollers.

- The Delegate failed to consider that Ms. T. did not query the reason why Dean could not push strollers. The reason, Dean asserts, is that she knew that Dean suffered from a chronic back injury. Dean alleges further, in fact, that the Employer decided to employ her to work in the Infant/Toddler area knowing that she could not perform the work. Dean says that the Employer did this to fulfill the legally mandated ratio of teachers to infants at the site. This was re-emphasized, she says, after Dean advised that she would not be returning after her first day, and Ms. T. emailed her asking her to come in to "work" the next day and they would discuss the matter. The conclusion to be drawn, says Dean, is that the Employer was more committed to

meeting its legal requirements than its responsibilities relating to the health and safety of the children, and the employees working at the site.

- Ms. T. was an unreliable witness. She did not disclose what was said at the November 3, 2010, face to face interview, and she "conveniently" misplaced her notes taken at that interview.
- Ms. T. denied any knowledge that Dean suffered from back problems, but acknowledged receipt of medical information suggesting otherwise. The record contains a certificate resulting from a medical examination of Dean dated December 8, 2010, which identified that Dean suffered from chronic back pain. The record also includes a doctor's note dated March 2009. It states that Dean was suffering from "lower back problems." It says further that she "should be sitting on a higher chair, and avoid pushing strollers." I do not know which of these documents was presented to Ms. T. Perhaps it was both of them. Given that they say much the same thing, it appears to matter little. The point is, Ms. T. was advised that Dean had problems with her back before she commenced to work for the Employer. Dean says that Ms. T. should have inferred from this information that Dean would be prevented from performing the tasks normally associated with Infant/Toddler teaching, including sitting on the ground, lifting heavy things, and most importantly, lifting infants.
- The *Child Care Licensing Regulation* requires the Employer to ensure that employees are physically capable of working with children and carrying out their duties. The burden to verify that Dean was healthy enough to do the work was on the Employer, and not on Dean.
- Dean did not believe that Ms. T. was referring to her as the "3rd teacher in the Infant/Toddler room" in Ms. T.'s November 22, 2010, email because she was being hired as the "2nd Assistant Director." Dean submits that she believed this meant she was the "2nd" teacher, and that she would teach in the Pre-School area, pending the position of Site Director coming available. She thought Ms. T.'s reference to a "3rd teacher" in her email referred to someone else that Ms. T. would be hiring to work in the Infant/Toddler area.
- Dean expected to receive managerial training as soon as she commenced to work for the Employer. That did not happen. Conversely, prior to commencing work she was never told she would be working as an Infant/Toddler teacher. It cannot be said, then, that the Assistant Director position was "dual" in the sense that it involved Infant/Toddler teaching. If it had, she would have been told that it did before she started to work. That did not happen either.
- The Delegate failed to consider the decision of Service Canada allowing her regular benefits as a result of the loss of her employment with the Employer. The March 28, 2011, letter from Service Canada on which she relies contains no reasons for the decision. Dean, however, states that a finding was made that she was forced to resign on health grounds because she was not advised of the type of work she would be asked to perform prior to her accepting the position with the Employer.
- The Delegate failed to find that the 8:30 am start time on Dean's first day of work was not a "one-off" thing, for orientation purposes. Rather, Ms. T. asked Dean to start work earlier than 9:00 am on a regular basis. Dean submits that this was yet another misrepresentation, as she had been told during the pre-hiring process that she would commence work at 9:00 am.
- As a result of the Delegate's making significant errors in his factual findings, and ignoring other facts, as outlined above, Dean submits that the Delegate was biased in favour of the Employer.

19. The position of the Employer, submitted by means of a submission delivered by its counsel, is that Dean bears the onus of proof and has not identified any errors of law or natural justice breaches in her appeal material. Instead, counsel submits, Dean's appeal is flawed because it asserts that the Delegate reached incorrect conclusions on the evidence, and invites the Tribunal to re-weigh that evidence and draw different factual conclusions.

20. Counsel argues that the Tribunal is not permitted to review a delegate's findings of fact, except to ensure that there is some evidentiary basis for them, and that they are reasonable having regard to that evidence. He says that the legal conclusion drawn by the Delegate that the Employer did not misrepresent the position on offer was supported by the evidence and was reasonable.

21. More specifically, counsel for the Employer says this:

- The Delegate's conclusion that the duties ascribed to the Assistant Director position included Infant/Toddler teaching duties was supported by pre-hire communications from the Employer to Dean concerning the position because they referenced teaching duties, distinguished between teaching and managerial duties, indicated that Dean would perform both, linked her remuneration to her qualifications as an Infant/Toddler teacher, and advised Dean that she would be working as an Infant/Toddler teacher unless the absence of the Site Director required her to give her attention to administrative and supervisory duties.
- The "Assistant Director" job title, standing alone, does not lead inexorably to a conclusion that the position was misrepresented. Even where the title for a job is inexact, or inapt, a determination whether there has been misrepresentation will depend on the evidence relating to what a complainant knew, or ought to have known, about the duties associated with the job prior to the commencement of the employment.
- Contrary to what Dean says in her submissions, the Delegate did consider all the material evidence. Counsel argues that Dean's complaint, in substance, is that the Delegate drew incorrect factual conclusions from that evidence. However, the Tribunal must defer to the Delegate in the fact-finding process, and absent an identifiable error of law, the fact that Dean disagrees with the Delegate's findings of fact provides no basis for interference with the Determination.
- Communications generated after Dean commenced work carry limited, if any, probative value for the purposes of determining whether any misrepresentations occurred that induced Dean to accept the position offered. Therefore, it is of little moment that Ms. T. may have asked Dean to return to work, presumably in the Infant/Toddler area, after Dean had advised her that she would work no further for the Employer if the work required her to teach in that area.
- Issues of credibility do not loom large in this case, because the bulk of the evidence was in documentary form. The principal issue for which the reliability of the witnesses did play a role was Dean's start time. The Delegate weighed the evidence and concluded that the Employer agreed with Dean that her regular start time would be 9:00 am, and that the 8:30 am start time on her first day was for orientation purposes only. It follows that the Delegate declined to accept Dean's position that the 8:30 am start time was not a "one-off" aberration, but was intended to be the regular start time. The Delegate was in the best position to make these findings, and the Tribunal should not interfere.
- The fact that the Delegate may not have expressly considered the evidence Dean presented relating to the decision of Service Canada to provide Dean with post-employment benefits does

not raise a concern that the Delegate failed to observe the principles of natural justice. Service Canada is a different forum which deals with different issues. The Employer was not a party to the proceedings that resulted in the Service Canada decision. There is no evidence that Service Canada even considered whether a misrepresentation of the type prescribed by section 8 of the *Act* had occurred. Put simply, the Service Canada decision is of no probative value for the purposes of these proceedings under the *Act*.

ANALYSIS

22. The appellate jurisdiction of the Tribunal is set out in section 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;
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> (c) evidence has become available that was not available at the time the determination was being made.

23. Section 115(1) of the *Act* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
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> (a) confirm, vary or cancel the determination under appeal, or
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> (b) refer the matter back to the director.

24. In the case at hand, Dean submits that the Employer contravened section 8 of the *Act*, which reads as follows:

> 8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
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> (a) the availability of a position;
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> (b) the type of work;
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> (c) the wages;
>
> (d) the conditions of employment.

25. Section 8 is not a provision of general application. It proscribes misrepresentations, by which is meant untrue statements, or conduct amounting to statements, of fact relating to the four matters referred to in subsections (a) to (d) only. Having said that, the scope of section 8 is broad, as it is to be expected that the four areas of concern set out in subsections (a) to (d) will permit examination of representations made in the pre-hiring context relating to what will normally be the most significant aspects of the pending relationship.

26. It is to be noted, also, that the types of misrepresentations captured in section 8 are in no way limited. They may be intentional misrepresentations. They may also be negligent, and even innocent misrepresentations. The subjective intentions of the representor are, therefore, largely irrelevant when it comes to deciding whether a misrepresentation of the type that is prohibited by section 8 has occurred. Intentions may,

however, bear on the remedy that may be warranted in the particular case (see *Parsons*, BC EST # D110/00, and *Agropur Cooperative*, BC EST # D126/09).

27. Having reviewed the appeal documents, the record, and the submissions of the parties, I find I must agree with the Delegate that no contravention of section 8 occurred in this case. My reasons follow.

28. Dean alleges that the Delegate committed errors of law. The difficulty I have with this assertion is that the bulk of Dean's arguments are, as counsel for the Employer states, attacks on the Delegate's findings of fact, rather than his application of the relevant legal principles.

29. The *Act* provides no opportunity for the Tribunal to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law. Errors of fact do not amount to errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's findings of fact if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in 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).

30. I understand that Dean believes that the Delegate's findings of fact are wrong, in several instances. I understand that she thinks the Delegate should have weighed, and interpreted, the evidence so as to arrive at different factual conclusions.

31. That is not the point. In order to succeed in this forum, Dean must show that the Delegate's findings of fact were perverse and inexplicable because there was no evidence on the basis of which any reasonable person could have made them.

32. I am not persuaded that Dean has shown that the Delegate committed errors of fact that amount to errors of law in this sense. In my opinion, there was at least some evidence on the basis of which a reasonable person could make the same findings of fact that were made by the Delegate. I also agree that in areas where there might be doubt, the Delegate is entitled to a degree of deference because it was the Delegate who conducted the hearing, heard the witnesses, and listened to the submissions of the parties, not this Tribunal. The fact that this Tribunal, or another delegate for that matter, might have interpreted the evidence differently is irrelevant.

33. I turn now to consider the specific challenges presented by Dean in her appeal material.

34. Dean argues that the Employer's describing the job on offer as an "Assistant Director" position was a misrepresentation on its face, because no managerial position was open at the time, and it was the Employer's intention that the successful candidate work in the Infant/Toddler area until a managerial position became available.

35. I decline to accept this characterization, because the email exchanges between the parties prior to December 13, 2010, reveal what the Employer was intending to describe when referring to the "Assistant Director" role. In fact, the position did not incorporate managerial duties solely, or even primarily. It also involved work with the children, although it contemplated that Dean would be assessed and then trained over time to prepare her for what was anticipated to be full-time managerial duties. I refer to the following:

- Ms. T.'s email to Dean of November 19, 2010, in which she offered Dean the position of "Assistant Director" at the site, but went on to say: "I would like to see how you work in the child care environment and with managerial tasks and then my plans would be to train my assistant directors really well for them to move on to open/take over future centres and maybe even this...location itself." A reasonable interpretation of this language is that the Employer was planning to have Dean perform work in the "child care environment," and that such work was different from the "managerial tasks" that it was expected Dean would also be exposed to. That, essentially, is what the Delegate decided.

- Dean's email to Ms. T. of November 21, 2010, in which she asks about the time frame the Employer was looking at for Dean's working "in a child care environment." The next sentence refers to the fact that Dean was not able to push strollers. These statements at least imply that Dean was aware she would be required to perform non-managerial classroom work, at least for a time.

- Ms. T.'s email to Dean of November 21, 2010, referred to above, in which she stated: "I am looking for a 3rd teacher in the Infant/Toddler room and you only have to worry about administration duties/supervisor duties when I am away on holidays/running errands/sick." A reasonable inference to be drawn from this statement is that Dean would be performing managerial duties in the absence of Ms. T., and other duties, presumably teaching, when Ms. T. was present.

- Ms. T.'s email to Dean of November 23, 2010, in which she stated that Dean was "an ideal candidate to be a director in training." A reasonable person reading that could conclude that a managerial position was planned, but that managerial duties would not be assumed for a time after the commencement of employment because there would need to be some training.

- Ms. T.'s email to Dean of November 24, 2010, in which Ms. T. asks Dean to agree to a particular hourly wage, "[a]nd then when you take over the Director role, it would increase. Please confirm and I appreciate you being so patient." This confirms that the position might not be managerial, at least at the beginning. It implies that other duties would be performed in the interim, for which the pay would be less than should be expected if and when Dean moved up.

36. In addition, in her submissions on appeal, Dean herself states that she was told the Assistant Director position would involve teaching. She says that she believed the teaching would be in the Pre-School area, but it was teaching nevertheless. It was not unreasonable, then, for the Delegate to conclude the Assistant Director position was not a purely managerial position, that managerial duties might be delayed for training, or until the Site Director was absent, or her position had become vacant, and that there was no misrepresentation when Dean discovered the position would require her to do teaching.

37. I pause to say that I place no weight on Dean's gratuitous assertion that the Employer misrepresented the nature of the position on offer to induce qualified Infant/Toddler applicants to apply for what appeared to be managerial positions, when all the Employer was planning to do was have them work in the Infant/Toddler area because Infant/Toddler teaching positions were difficult to fill. There was no evidence to support this allegation, and so it is entirely speculative.

38. Even if it is true that Dean performed Infant/Toddler work, for the most part, on her sole day of work for the Employer, it does not appear to be disputed that she was doing so as part of her job-shadowing of the

other Assistant Director who was already working at the site. Thus, it is difficult for Dean to contend that she received no training for the Assistant Director position.

39. Even if it can be said that Dean knew, or ought to have known, that the position on offer involved teaching duties, however, she argues, in addition, that the Employer should have been aware that she was not available for teaching work in the Infant/Toddler area, because her September 2010 letter specifically mentioned that she was interested in teaching in the Pre-School. She submits, therefore, that any subsequent discussions must be interpreted in light of that limitation.

40. Dean's expression of interest in working for the Employer, however, was made in the context of her stated understanding that there was a vacancy in the Pre-School area. Dean went on in her letter to describe her qualifications, including the fact that she possessed an Infant/Toddler licence. She also stated that she had worked previously in the Toddler program. When Dean had applied previously for a position with the Employer, it was clearly stated that the Employer was seeking a person who could work in the Infant/Toddler program. There was nothing in Dean's letter which even remotely suggested she had limitations which would prevent her from working with infants and toddlers. Moreover, when Dean later asked about the remuneration she would receive, in the email dated October 28, 2010, she specifically referred to her various qualifications in the ECE field, including her Infant/Toddler licence. I cannot say that it would have been unreasonable in the sense of being perverse or inexplicable for anyone reviewing this history, and this documentary record, to conclude that Dean was fully qualified to work in all of the ECE areas, and that consideration of her application, and in particular her remuneration, should be predicated on this reality.

41. Dean places great emphasis on the November 3, 2010, face to face interview with Ms. T. On appeal, she states that she was told at that meeting that the position was a managerial one, with perhaps some teaching work in the Pre-School area until a full managerial position was provided. She also says that Ms. T. was made aware at the meeting that Dean suffered from back problems which prevented her from doing tasks apart from pushing strollers.

42. In his submission on appeal, the Delegate says that the reason why the November 3, 2010, was not dealt with in more detail in the Determination was that Dean made no specific reference to it at the hearing other than in the context of the email exchanges between herself and Ms. T. setting the interview date. Apart from that, the Delegate states that Dean testified she told Ms. T. about her back problems when they met, and this was reflected in the Determination. More importantly, the Delegate asserts that in cross examination Dean was asked about the interview and confirmed that it consisted of a general discussion, and did not relate to a specific position. The Delegate expresses puzzlement that Dean is taking pains to stress the importance of what was said at that interview now.

43. Dean does not address these statements in her reply to the Delegate's submission. I can only infer from this that she does not dispute the Delegate's account of what transpired at the hearing. It follows that I must conclude the discussions at the November 3, 2010, meeting were not dealt with in any detail by any party at the hearing and little emphasis was placed on what was said at the time. That being so, it is not surprising that the Delegate did not make reference to it as an important step in the overall narrative set out in his Determination. The fact that Dean wishes to make much of it now is of no moment. The time when Dean should have stressed the importance of what was said at the November 3, 2010, meeting was at the hearing before the Delegate. An appeal is not a forum that is designed to permit parties who are disappointed by a result at first instance to tender evidence to the Tribunal that is said to be of critical importance, when that evidence was not developed adequately, or at all, in the proceedings that resulted in the issuance of the determination under review.

44. Dean also queries the fact that Ms. T. misplaced her notes of the discussions at the November 3, 2010, meeting. Again, there is no indication in the material that this was identified as an issue at the hearing, but even if one could say that the disappearance of the notes might raise a suspicion, it was for the Delegate to determine Ms. T.'s *bona fides*. The Delegate nowhere questions Ms. T.'s motives, and there is nothing in the record to suggest that the Delegate was incorrect in that regard. Ms. T. said that she misplaced her notes of the November 3, 2010, meeting, and the Delegate appears to have accepted this explanation, as he was entitled to do. The mere fact that the notes were misplaced does not automatically mean that they contained material that would have aided Dean in building her case, or that Ms. T.'s motives were sinister, or that her evidence was otherwise unreliable.

45. I also do not accept Dean's other allegation that Ms. T. was an unreliable witness because she did not disclose what was said at the November 3, 2010, meeting. Ms. T. did give testimony at the hearing before the Delegate. It would have been a simple matter for Dean or her representative to have asked Ms. T. questions under cross examination about the substance of what had been said at the meeting, if it was thought important. That does not appear to have occurred. The fault cannot lie with Ms. T.

46. Dean also states that Ms. T. should have queried why Dean could not push strollers, and argues that the reason she did not was because she knew that Dean suffered from chronic back pain. The evidence suggests that this is true, but I do not believe it assists Dean for the purposes of this appeal. The Delegate found that Ms. T. knew Dean had back issues.

47. What Dean goes on to say, however, is that her statement that she could not push strollers, and her informing Ms. T. that she had back problems, had to make Ms. T. aware as well that Dean could perform no regular Infant/Toddler teaching. I am unable to agree that the one necessarily entails the other. Indeed, a reasonable inference from the evidence, implicit in the findings of the Delegate, was that Ms. T. simply took Dean's statements that she had back problems and could not push strollers at face value. At no time did Dean tell Ms. T. that she could not perform Infant/Toddler teaching work. Instead, she appears to have assumed that Ms. T. would divine this based on the information about her back, and the pushing of strollers, that Dean did provide.

48. Dean submits that Ms. T.'s use of the word "etc." when referring to Dean's inability to push strollers must be interpreted to mean that Ms. T. knew Dean was incapable of performing other, perhaps all, of the tasks associated with Infant/Toddler work. That is certainly one possible interpretation. However, the Delegate appears to have rejected it. I see no error in the Delegate's approach. An equally reasonable interpretation is that Ms. T.'s use of "etc." meant other things associated with the pushing of strollers. It does not, of necessity, lead to an unassailable inference that Ms. T. knew that Dean was unable to perform the principal tasks required in the Infant/Toddler room.

49. Dean also argues that Ms. T. had an obligation as an ECE employer to ensure that Dean was physically able to do the work. Dean appears to say that this meant that Ms. T. should have asked probing questions of Dean, as a result of which she would have learned that Dean could not, indeed, perform any significant Infant/Toddler work. Dean submits that Ms. T. did not do this because she knew that Dean could not perform Infant/Toddler teaching work but this was unimportant as the Employer was only concerned about whether they could meet the mandated teacher/child ratio. Again, this is entirely speculative on Dean's part. There was no evidence to support such a contention.

50. Ms. T. appears to have fulfilled her obligations regarding Dean's ability to work when a medical examination was requisitioned, and a doctor's certificate produced. The certificate dated December 8, 2010, and an earlier doctor's note from March 2009, are included in the record. The certificate states that Dean was, to the best

of the physician's knowledge, "in good health," with the exception that she had "chronic back pain" and was "unable to push stroller." Significantly, in my view, the certificate says that Dean was taking no medications. The March 2009 note states that Dean was "having lower back problems," and that she "should be sitting in a higher chair and avoid pushing strollers."

51. Dean submits that these communications relating to her back issues were sufficient to alert Ms. T. to the fact that she could perform no regular Infant/Toddler teaching duties. Accepting for the sake of argument that such an interpretation is plausible, I am of the view that an equally reasonable interpretation of the evidence relating to Dean's physical limitations was that Dean had back issues that prevented her from pushing strollers, but that she was otherwise fit to perform Infant/Toddler teaching duties if necessary. The fact that Ms. T. specifically informed Dean that the Employer could accommodate her difficulty with strollers supports this interpretation.

52. Dean may have thought that Ms. T. understood that she could not perform Infant/Toddler work regularly, or at all, but reasonable inferences to be drawn from the evidence suggest that Ms. T. thought otherwise. Clearly, Ms. T. cannot be made responsible for the subjective motivations and beliefs operating in Dean's mind at the relevant time. It seems obvious that any misunderstandings could have been dispelled if Dean had simply told Ms. T. that her disability prevented her from performing Infant/Toddler teaching duties on a regular basis. Dean did not do that.

53. Dean says she restricted what she said about her physical limitations because she was never told that any Infant/Toddler teaching would be required of her. However, there were communications from Ms. T. which should, in my view, have alerted a reasonable person to the possibility that the Employer was expecting a successful applicant to perform such work.

54. On November 19, 2010, Ms. T. emailed Dean to say that she wished to see how Dean worked "in the child care environment" and then train her to take on more important managerial responsibilities. Ms. T. did not limit the "child care environment" to the Pre-School. It is clear that Dean was concerned about this reference because she emailed Ms. T. in response on November 21, 2010. In that email, Dean asked what "time frame" Ms. T. was looking at when she had referred to "working in the child care environment." She also decided to "mention" that she was "not able to push strollers, anymore, if that would be a requirement."

55. It is noteworthy that Dean's response focused on the time frame for her work in the "child care environment," and not on what she would actually be doing. Further, the only limitation Dean placed on her work in that environment was an inability to push strollers.

56. Dean submits that she mentioned her difficulty with strollers because she thought she might be required to "help out" with teaching duties, but that she did not consider she would be required to perform regular work in the Infant/Toddler section. I accept that this was Dean's belief. However, an equally plausible, and reasonable, interpretation is that Ms. T. was referring to the whole of the "child care environment," including both the Pre-School and the Infant/Toddler sections, when she employed that broad phrase, and that the only physical limitation she could expect regarding Dean was an inability to push strollers.

57. Ms. T. also emailed Dean on November 22, 2010, in response, in part, to a series of questions posed by Dean in an earlier email. One of those questions invited Ms. T. to give further information about the roles of the Assistant Directors at the site, given that Ms. T. had advised Dean that she already had one Assistant Director working there. Ms. T.'s November 22, 2010, email stated that she was looking for "another assistant director." It also said that "I am looking for a 3rd teacher in the Infant/Toddler room and you only have to worry about administration duties/supervisor duties when I am away on holidays/running errands/sick."

58. Dean argues that since she was being hired as the "2nd Assistant Director" she interpreted the reference to the "3rd teacher" in the Infant/Toddler room to be a reference to someone other than her. I must confess I find this submission highly strained. In any event, it would in no way be an error for a reasonable person reading this email to conclude that Ms. T. was referring to what she was looking for from Dean, should she be hired. Part of what she was looking for was a teacher in the Infant/Toddler room, who would also be capable of taking on managerial duties when Ms. T. was absent. This is precisely the conclusion drawn by the Delegate in the Determination. Dean may believe that the Delegate was wrong, but that is different from saying that the Delegate's decision on this point was unreasonable in the sense of being perverse or inexplicable. I am not persuaded that it was.

59. The problem that arose in this case is that Dean and the Employer appear to have had different views as to precisely what the job duties of the Assistant Director entailed, due in part, no doubt to the failure on the part of the Employer to provide Dean with a job description, or to describe the duties of the position with specificity in the job posting to which Dean responded. That this may be so is different, however, from saying that the Employer misrepresented the type of work or the conditions of employment associated with the position. A principal support for the Delegate's approach is that there is no indication in any of the material that the Employer ever informed Dean that the position would involve no Infant/Toddler teaching, or even very little, and that any teaching to be required would occur either solely, or primarily, in the Pre-School section.

60. I agree with the approach of the Delegate regarding the Service Canada decision. Those proceedings involved a different statute, and different policy objectives than those incorporated in the *Act*. The decision of Service Canada is in no way binding on the Director, or this Tribunal. The fact that Dean received benefits as a result of the Service Canada decision is of limited, if any, probative value in these proceedings.

61. I also agree with counsel's submission on behalf of the Employer regarding the Delegate's decision that there was no misrepresentation regarding Dean's start-time. The credibility of the witnesses is peculiarly within the purview of the Delegate, particularly where, as here, a hearing occurred. The evidence tendered on behalf of the Employer was that it was agreed that Dean would commence work at 9:00 am and that her 8:30 am start on her one and only day of work was to facilitate her orientation. Dean asserts that she was told she would be coming to work at 8:30 am every day thereafter, despite being informed earlier that her start-time would be 9:00 am or 9:30 am.

62. In the absence of written records that might have cast further light on the matter, the Delegate was entitled to make a finding based on the inherent probabilities emanating from the circumstances. He decided to accept the Employer's account of the factual realities and, in my opinion, Dean's bald assertion that the contrary is true is insufficient to warrant a conclusion that the Delegate erred in fact in a way that amounts to an error of law. The Employer's version is entirely reasonable. Conversely, it seems improbable that the Employer would induce Dean to commence work on a promise that she could start work later, and then advise her immediately upon her commencing to work that her start time would in fact be one half hour earlier than represented.

63. I have reached the same conclusion with respect to Dean's early departure time on her only day of work. The Delegate was in the best position to determine if Dean had tendered evidence sufficient to establish her contention that she was denied the opportunity to work a full day. The Delegate weighed the evidence and must have concluded that Dean had failed to meet that burden. I see nothing in the material that warrants interference with the Delegate's finding. The Employer's explanation for Dean's early departure is reasonable.

64. Dean also submits that the Delegate failed to observe the principles of natural justice. A challenge to a determination on this basis raises a concern that the procedure followed by a delegate was somehow unfair. Two principal components of fairness are that a party must be informed of the case she is required to meet, and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.

65. My review of the record, and the submissions received, gives no indication that Dean was misinformed about the substance of the Employer's case, or was deprived of the opportunity to present her evidence and submissions in reply. Indeed, in addition to the written materials supplied by Dean to the Delegate, there was a hearing at which Dean had an opportunity to tender evidence, cross examine the Employer's witnesses, and make submissions in final argument.

66. The allegation that the Delegate was biased is, in my view, frivolous, and should not have been made. Dean's submission on this point appears grounded on the assertion that since the Delegate made certain factual findings and, from her perspective, ignored other evidence, he must have been biased against her. As I have attempted to show in the analysis that appears above, I am of the view that there is no substance to this allegation. It cannot ground a successful claim of bias that a delegate merely disagrees with the case presented by a party, or the interpretation of the facts contained within it. If that were the test for bias, no decision-maker would be immune from exposure to a challenge to their impartiality brought on by a losing party.

ORDER

67. Pursuant to section 115 of the *Act*, I order that the Determination dated March 27, 2012, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal