Employment Standards TRIBUNAL

An appeal

- by -

Sutherland Hills Rest Home Ltd.
("Sutherland Hills")

- 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: Shafik Bhalloo

FILE No.: 2011A/76

DATE OF DECISION: August 17, 2011

DECISION

SUBMISSIONS

Veronica Ukrainetz	counsel for Sutherland Hills Rest Home Ltd.
Christopher J. Butler	counsel for Celeste Fabris
Joe LeBlanc	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by the employer, Sutherland Hills Rest Home Ltd. ("Sutherland Hills"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on March 9, 2011.

2. The Determination found that Sutherland Hills had contravened the *Act* in respect of the employment of Celeste Fabris ("Ms. Fabris") and owed her $11,345.74. The amount included sums for compensation for length of service (s. 63(2)(b) of the *Act*), annual vacation pay (s. 58 of the *Act*), and $215.74 in interest in accordance with section 88 of the *Act*.

3. The Determination also imposed on Sutherland Hills an administrative penalty of $500, pursuant to section 29 of the *Employment Standards Regulation* (the "*Regulation*"), for contravention of section 63 of the *Act*.

4. Sutherland Hills appeals the Determination and in its Appeal Form identifies, in paragraph 2, two (2) grounds of appeal; namely, the Director erred in law and breached the principles of natural justice in making the Determination although in its written submissions primarily advances the error of law ground of appeal.

5. By way of remedy, Sutherland Hills is seeking a cancellation of the Determination and submits that the matter is not appropriate to refer back to the Director for reconsideration.

6. Before reviewing the parties' substantive submissions on appeal, there existed a preliminary issue of the timeliness of the appeal. More specifically, the Determination was issued on March 9, 2011, and the parties had until 4:30 p.m. on April 18, 2011, to file an appeal. The Tribunal received Sutherland Hills' appeal submission at 4:31 p.m. on April 18, 2011, and the attachments to those appeal submissions were received subsequently, at about 4:59 p.m. on the same day. Ms. Fabris took issue with the slightly late-filed appeal, and the Director did not express any position on the matter. After reviewing the submissions of the parties on the timeliness issue, pursuant to section 109)(1)(b), I granted an extension of time to Sutherland Hills to file its appeal and my reasons for the said decision are delineated at BC EST # D055/11. The parties were then afforded an opportunity to make further or final submissions and Sutherland Hills and the Director capitalized on that opportunity and made some final submissions. In this decision, I will focus on the substantive issues on appeal.

7. Pursuant to section 36 of the *Administrative Tribunal's Act* (the "*ATA*"), which is incorporated into the *Act* (s. 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal may be adjudicated on the basis of the section 112(5) "record" and the written submissions of the parties, as well as the Reasons for the Determination.

ISSUES

8. Did the Director err in law or breach the principles of natural justice in making the Determination?

FACTS

9. Ms. Fabris was employed at Sutherland Hills' Residential Care Home Facility in Kelowna as a Registered Nurse from June 23, 2002, to June 30, 2010.

10. On October 14, 2010, Ms. Fabris filed a complaint under section 74 of the *Act* alleging that Sutherland Hills contravened the *Act* by terminating her employment without payment of compensation for length of service (the "Complaint").

11. Subsequently, on November 30, 2010, both Sutherland Hills and Ms. Fabris participated in a mediation session, which, unfortunately, failed as the parties were not able to reach a resolution.

12. Subsequently, on January 25, 2011, the delegate of the Director (the "Delegate") held a hearing of the Complaint (the "Hearing") and Ms. Fabris represented herself at the Hearing, while Sutherland Hills was represented by its facility Manager, Wendy Calhoun ("Ms. Calhoun") and its Director of Care for the facility, Tara Lee Calhoun ("Ms. T. L. Calhoun").

13. In the Reasons for the Determination (the "Reasons"), the Delegate noted that while Ms. Fabris asserted that her employment was terminated by Sutherland Hills, the latter claimed that Ms. Fabris quit her employment. The Delegate also reviewed the evidence adduced by both parties to support their respective positions. More particularly, the Delegate noted that during the course of Ms. Fabris' employment with Sutherland Hills, she became concerned with the care that was afforded to one of the residents at the facility, which concern was shared by a number of other staff. Subsequently, the concern was brought to the attention of Sutherland Hills' management and an investigation was conducted into the matter, which entailed obtaining statements from staff members and interviewing the residents at the facility. During the same period, the concern was also brought to the attention of the family members of the residents at the facility, as well as the governmental regulatory agency in charge of regulating residential care home facilities.

14. Sutherland Hills, in its investigation of the matter, concluded that employees, including Ms. Fabris, who were involved in the matter, contributed to a hostile atmosphere at work and chose to suspend these employees. In the case of Ms. Fabris, Sutherland Hills suspended her for three (3) days without pay. In the suspension letter she received from Ms. Calhoun, it stated that she "displayed a lack of trust in the Management and [Sutherland Hills'] process for dealing with complaints and concerns" and that she "spoke inappropriately and discriminatory [*sic*] to fellow staff about another employee". The letter went on to state that her behaviour was "unacceptable and unprofessional behaviour, which creates a hostile and offensive environment". The letter was given to her on June 30, 2010, when she was at Sutherland Hills' facility to pick up her paycheque. Further, in her paycheque envelope, Ms. Fabris found a letter, dated July 28, 2010, from the owner of the facility, Fritz Wirtz ("Mr. Wirtz"), directed to her personally. The letter stated "I would encourage you to find employment somewhere else".

15. It should be noted that in advance of receiving both the letter from Mr. Wirtz and Ms. Calhoun's disciplinary letter, Ms. Fabris was on a medical leave due to the stress she was experiencing from the controversy surrounding the resident care issue at the facility. In the Reasons, the Delegate notes that Ms. Fabris, at the Hearing, stated that Mr. Wirtz, after the residential care issue at the facility became known, changed his attitude towards her dramatically and did not speak to her directly, but only communicated to her through other people. There was no eye-to-eye contact between her and Mr. Wirtz at work, and she felt ostracized and isolated for her

involvement or actions in the matter. As a result, she experienced stress and upset, and found it difficult to focus on her job. Because of this, she sought medical attention, and went on a medical stress leave on June 23, 2010, after obtaining a medical note from her doctor. She advised Ms. Calhoun of the medical leave she sought and informed the latter that she would not be able to work her then-scheduled shifts on June 25, 26, 27 and 28, 2010.

16. After receiving both the disciplinary letter from Ms. Calhoun and Mr. Wirtz's letter, Ms. Fabris again saw her doctor. She also consulted with a lawyer and, upon the advice of the latter; she contacted Sutherland Hills on July 5, 2010, and advised that she would not be returning to work. According to Ms. Fabris, she viewed the letter from Mr. Wirtz as terminating her employment because it indicated to her that he no longer wanted her as an employee.

17. As concerns the evidence of Sutherland Hills, the Delegate notes in the Reasons that Ms. Calhoun, on behalf of Sutherland Hills, explained that when the resident care issue arose, it was very upsetting to all those involved. Ultimately when it was determined that the issue was one of the environment at the facility and not the resident care, staff meetings were held and employees were told that the employer was very upset because of the dissension or division between the employees. The staff was also advised that the owner of Sutherland Hills, Mr. Wirtz, was very upset that some staff had contacted family members of the residents at the facility and voiced their concerns about the care at the facility. The staff was told to not contact family members of the residents of the facility, but they could take their concerns to the regulatory agency.

18. Ms. Calhoun also gave evidence that a decision was made to discipline the staff who were involved in the controversy and that she met with Ms. Fabris on June 30, 2010, to give her the disciplinary letter suspending Ms. Fabris for three (3) days, commencing July 1 and ending on July 3, 2010. Ms. Calhoun acknowledged that Ms. Fabris was upset during this meeting, and Ms. Calhoun assured her that she was a valued employee and that it was the management's hope that everyone would get over the situation and move on.

19. Ms. Calhoun also testified that she received a phone message from Ms. Fabris on July 5, 2010, informing her that she would not be returning to work. Subsequently, a week later, Ms. Calhoun received a letter from Ms. Fabris' counsel advising, *inter alia*, that Sutherland Hills had breached the *Community Care and Assisted Living Act* and wrongfully or constructively dismissed Ms. Fabris. The letter also indicated that Ms. Fabris was entitled to monetary damages, a retraction of the suspension and a rectification of her Record of Employment. Sutherland Hills did not respond to counsel's letter and took the position that Ms. Fabris had quit her employment. Ms. Calhoun then sent Ms. Fabris her final cheque on July 22, 2010, together with a letter acknowledging Ms. Fabris' message of July 5, 2010, that she would not be coming back to work.

20. The Delegate notes in the Reasons that Ms. Calhoun, at the Hearing, produced an unsigned copy of a letter, which she prepared on January 6, 2011, based on the instructions of Mr. Wirtz, which delineated a chronology of Ms. Fabris' employment and references to rates of pay and monies she was given or paid by Mr. Wirtz. The chronology showed that Ms. Fabris was treated well when employed at Sutherland Hills.

21. When the Delegate asked Ms. Calhoun why Mr. Wirtz was not in attendance at the Hearing to explain the letter or his intention in providing Ms. Fabris with the letter of June 28, 2010, Ms. Calhoun's response was that he did not want to attend and that he viewed Ms. Fabris to have quit her employment and therefore she was not entitled to any compensation for length of service.

22. The Delegate, in determining that Sutherland Hills contravened the *Act* by failing to pay Ms. Fabris compensation for length of service and annual vacation pay, relied upon section 66 of the *Act*, which section appears to incorporate into the *Act* the concept of constructive dismissal. The Delegate, after referring to the oft-quoted definition of constructive dismissal in the landmark decision of the Supreme Court of Canada in *Farber v. Royal*

Trust Company, [1997] 1 S.C.R. 846, considered the three-stage analysis for reviewing cases under section 66 set out in the Tribunal's decision in *Re Andy Tollasepp*, BC EST # D490/02:

(a) Was there an alteration of a condition of employment?

(b) Was the alteration substantial?

(c) Was the employment of the employee terminated?

23. With respect to the first question in the test, the Delegate stated:

> The first question to answer is: did this constitute an alteration of a condition of employment? I find that the answer is yes.
>
> From the evidence it appears the parties had an employment relationship of indefinite duration. That is to say it was not one where it was going to end at a specific time or that it was viewed as "term employment". It is reasonable to conclude that the relationship would continue until one of the parties brought it to an end. Until Ms. Fabris received the letter she would have had no cause to believe her employment at Sutherland was going to end. However when Mr. Wirtz, on behalf of the Employer gave her the letter encouraging her to find employment elsewhere he altered a condition of employment, that condition being the continuation of the employment contract between them. This is certainly a matter that affects the employment relationship between this employer and employee as contemplated in the definition of a "condition of employment" cited above.
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> When Mr. Wirtz gave Ms. Fabris the letter I find this indicated that he no longer wished to have her continue as an employee at the business. As noted above Mr. Wirtz did not attend the hearing so I do not have the benefit of his testimony with respect to the letter. Mr. Wirtz is one of the central figures in this case so his non attendance at the hearing to explain the letter leaves me to draw the inference that, Ms. Fabris could no longer rely on her employment as being on going [*sic*]. If Mr. Wirtz had intended to continue on with the employment relationship it would make no sense to be encouraging her to seek employment somewhere else. Based on the words in the letter and without the author's explanation I cannot come to a different conclusion of what those words were intended mean [*sic*].

24. With respect to second question in the test, the Delegate stated:

> In regards to the second part of the analysis, as to whether the alteration was substantial, I find that it was substantial. Continued employment and the income it provides is one of the cornerstones of any employment relationship and this one was no different. Any change in that status would have a profound effect on the relationship between the employer and employee. Ms. Fabris had been employed at Sutherland since June 23, 2002. There was no evidence she had given any indication she had intended to leave her employment prior to receiving the letter from Mr. Wirtz. The employment relationship would have continued on as it had in the previous eight years. The letter signalled a substantial change in the relationship in that Mr. Wirtz was making it clear to Ms. Fabris that he no longer wanted the status quo of an "ongoing" employment relationship to continue.

25. With respect to the third question in the test, the Delegate stated:

> In addressing the third question of the analysis: was the employment of the employee terminated, I find the answer is yes. The fact that Wendy Calhoun gave Ms. Fabris a three day suspension for her involvement in the client care issue indicates she did not see Ms. Fabris' behaviour as inconsistent with the continuation of the employment relationship. Mr. Wirtz apparently did not share the same view as Ms. Calhoun as he let Ms. Fabris know, through his June 28, 2010 letter, that the employment relationship was at an end when he encouraged her to find employment somewhere else. I must take into consideration the fact that Mr. Wirtz is not just another person working at Sutherland, he is the owner, therefore what he says matters greatly to an employee and has a substantial impact on the employment

> relationship. While Ms. Fabris answered to Ms. Calhoun in the organizational structure, Ms. Calhoun answered to Mr. Wirtz so what he says will carry more weight.
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> For the reasons outlined above, when Ms. Fabris received the letter from Mr. Wirtz the employment relationship was terminated. The termination was without notice or compensation for length of service.

26. The Delegate also explained that Ms. Fabris' voice-mail message of July 5, 2010, to Ms. Calhoun, wherein she expressed her intention not return to work, could not be viewed as Ms. Fabris' decision to quit her employment. The reason for this, argues the Delegate, is because the voice-mail message was left five (5) days after Ms. Fabris received the letter from Mr. Wirtz, which effectively terminated Ms. Fabris' employment.

SUBMISSIONS OF SUTHERLAND HILLS

27. In her written submissions, Counsel for Sutherland Hills delineates three grounds of appeal - errors of fact, errors of law and natural justice.

28. With respect to the errors of fact, counsel states that the Delegate made two (2) errors of fact amounting to errors of law, namely:

(a) the Delegate found that Mr. Wirtz's letter, encouraging Ms. Fabris to find employment elsewhere substantially altered the employment relationship between Ms. Fabris and Sutherland Hills; and

(b) the Delegate found that Mr. Wirtz's letter terminated Ms. Fabris' employment because of the contents and the position of Mr. Wirtz within Sutherland Hills.

29. Counsel argues that the above findings of fact are unsupportable in light of the evidence that:

- another employee received precisely the same Letter in the same circumstances and returned to work: (para's 5 and 6 of Calhoun's Stat Dec).
- "up to that point her relationship with Mr. Wirtz was very good and she considered him as much a friend as her employer" (page R3, 2nd to last para.) and "she [Ms. Fabris] had not met with Mr. Wirtz or received an explanation for the letter …." (p. R4, 2nd para. above Section "V.").
- the employment relationship/friendship between Mr. Wirtz and Ms. Fabris was long-standing (going back to 2002), and was such that Mr. Wirtz put Ms. Fabris into an acting management capacity and also had personal [sic] gifted her $4,200 (para. 7 of Calhoun's Stat Dec).
- "Ms. Calhoun saw that Ms. Fabris was very upset during this meeting so she assured her that she is a valued employee and it was management's hope that everyone could get over the situation and move on" (p. R4, last para.).

30. Counsel then goes on to argue:

> The <u>only</u> factual findings which the Delegate relied on to support his conclusion that s. 66 of the Act applied, were: (1) that the author of the letter was the 'owner' of Sutherland Hills (p. R8, top) and (2) that Ms. Calhoun did not see Ms. Fabris' behaviour as inconsistent with the continuation of the employment relationship (p. R7) (interestingly a factual find militating against an application of s. 66).
>
> The Delegate's other considerations in support of his s. 66 conclusion related to the 'inference' he drew of Mr. Wirtz' intent behind the letter, given Mr. Wirtz' non-attendance at the hearing (p. R7, middle para.) and the circular conclusion arising out of that inference that Ms. Fabris' employment and so income would end (which conclusion was supported by the irrelevant intent inference, not by relevant evidence).

Those considerations are not factual findings; but are flawed applications of the s. 66 three stage analysis (see p. R 6, middle), so are dealt with under the Section 2 "Error of Law" section of this submission.

Turning back to the factual findings which the Delegate did consider in applying the s. 66 three stage analysis, we have one factual finding in support of an s. 66 application, which is that the author of the letter was the owner of Sutherland Hills. There is absolutely no consideration of the fact that another employee received precisely the same Letter in the same circumstances and returned to work (so obviously did not interpret the Letter as the Delegate has chosen to interpret it). Nor is there any consideration that prior to the situation leading to Ms. Fabris' discipline and subsequent receipt of the Letter, she had a very good working and personal relationship with him and considered him a friend. The extent of that relationship was illustrated by the fact that she had been trusted in an acting manager capacity and had been the recipient of a substantial sum of money. The Delegate accepted without addressing this evidence at all, that it was reasonable for Ms. Fabris not to speak to Mr. Wirtz directly (or even speak again to Ms. Calhoun who had assured her she was a valued employee etc. prior to being given the Letter) and to reach her own conclusions regarding the intent of the letter. The Delegate also accepted Ms. Fabris' evidence that she did not speak to Mr. Wirtz because once his mind was made up, it was made up; but without speaking with Mr. Wirtz, she cannot have known about what he made his mind up [*sic*].

It is submitted, given this very relevant, but unconsidered evidence, the conclusion that the Letter constituted a s. 66 substantial alteration (being termination) supported by a single finding of fact – being that it was written by the owner – is "*irrational, perverse or inexplicable"* and so an error of law.

Errors of law are defined in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A.) at para. 9 [*Gemex*] as:

1. A misinterpretation or misapplication of a section of the Act;
2. A miscalculation 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.

Sutherland Hills respectfully submits that the Delegate applied s. 66 of the Act on a view of the facts per the fourth branch of the *Gemex* test, which could not reasonably be entertained given the other relevant but unconsidered facts as set out above. As such these errors of fact become errors of law and the Determination should not stand.

31. Counsel further amplifies her submissions on the error of law ground of appeal stating:

(a) The unspoken rejection of critical, relevant, evidence:

The Delegate also erred in law pursuant to the fourth branch of the *Gemex* test when he failed outright to consider relevant, and critical, evidence; namely the fact that the other employee who received the same Letter in the same circumstances returned to work. There is no mention of this evidence anywhere in the Determination. Therefore, this not [*sic*] a matter of "weight" rather a failure to consider key, pivotal evidence, the result of which constitutes an error of law and in the result, the Determination should not stand.

Alternatively, in the event that the Delegate, without saying so, did take into consideration the evidence of the employee in the same situation as Ms. Fabris, who did return to work after receiving the Letter, the Delegate committed an error of law when he rejected this key evidence without providing good and sufficient reason to do so. By rejecting this evidence, the Delegate has committed an error of law pursuant to the second branch of the *Gemex* test: a miscalculation of a principle of general law – being the evidentiary principle that relevant evidence be considered and weighed appropriately.

(b) The consideration of the 'intent' behind the Letter and the compounding errors which followed:

The Delegate also erred in law when he imported "intent" into the s. 66 analysis. The error was compounded by: the Delegate's inference of Mr. Wirtz' intent absent any evidence at the relevant times regarding Mr. Wirtz' intention; and the Delegate's conclusion, applying the second stage of the analysis, that the Letter constituted a substantial change, which conclusion turned on the inference of intent [*sic*]

Intent is not a relevant consideration in the circumstances before the Delegate. The Delegate accepted the evidence that the Letter was included with Ms. Fabris' pay and that there was no discussion between Ms. Fabris and Mr. Wirtz or Ms. Fabris and Ms. Calhoun about the Letter. "Intent" is only relevant if intent was explained by Sutherland Hills (its representatives) to Ms. Fabris at the relevant times (being upon delivery of the letter or subsequent to it). In the result, the Delegate ought to have assessed the Letter on its face and in the context of the relevant evidence before the Delegate.

Intent, quite simply, ought not to have been a consideration in the application of the s. 66 three stage analysis. This error was compounded by the "inference" given Mr. Wirtz' non-attendance at the hearing that he intended to terminate. That is not a proper application of an Inference [*sic*]:

> An adverse inference can be drawn when, without explanation, a party fails to testify or to call a witness who has knowledge of the facts and who would likely have been willing to assist the party. This failure creates an implied admission that the person's evidence would have been unfavourable to the party's case;
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> *Levesque v. Commeau* [1970] S.C.R. 1010 per Pigeon J. at p. 1012.

Before an inference, adverse or not, can be drawn, there must be competing relevant evidence. IN [*sic*] this case, not only was there no evidence to support the Delegate's inference regarding Mr. Wirtz's intention, intention was irrelevant.

The Supreme Court of Canada stated in *Housen v. Niolaisen* [2002] 2 S.C.R. 25; 2002 SCC 33 [*Housen*] that an appellate body may only interfere with factual conclusions "…*where the inference-drawing process itself is palpably in error…"* In the result, where the factual inference is not in relation to relevant evidence, the inference-drawing process is palpably in error.

Without any supporting relevant evidence, the Tribunal should find, as the Ontario Human Rights Tribunal found in the case of *Audmax Inc. v. Ontario*, [2011] O.J. No. 210, that the Determination is patently unreasonably [*sic*] by applying an adverse inference to irrelevant evidence to support a fundamental conclusion on a key and pivotal issue.

In the case of *Lambert v. Quinn*, [1994] O.J. No. 3 (Ont C.A.), referred to in the British Columbia Employment Standards Tribunal decision of *(Re) Ash (c.o.b. Spartan Refrigeration)* (2006), B.C.E.S.T.D. No. 31, at paragraph 16, the Court stated that the trial judge should have made clear findings of fact and credibility rather than leaving a key matter up to inference. The Tribunal in this case should interfere with the factual conclusion reached by the Board because there was no evidence before the Board to support the adverse inference regarding Mr. Wirtz's intention. This adverse inference is an error of fact which is properly construed as an error of law further to the case of *Emergency Health Services Commission* because it was not rationally connected to the evidence before the Delegate. Further, this error of law fits within the second branch of *Gemex* [*sic*] case because it is an error of the general law of evidence; the proper application and use of an adverse inference.

That inference could only have been drawn if Ms. Fabris gave the evidence that Mr. Wirtz told her that he intended to terminate her employment and Mr. Wirtz did not attend at the hearing to respond to this evidence. Ms. Fabris' evidence relating to her interpretation of the Letter was specifically that she and Mr. Wirtz did not discuss the letter (nor did she and any other representative of Sutherland Hills). In considering Ms. Fabris' evidence in support of her interpretation of the Letter, the Delegate ought to have considered and weighed all of the relevant evidence (which as previously submitted the Delegate did not

> do). As previously stated, an inference of intent in the absence of intent being a topic of discussion at the relevant time, is not relevant evidence.
>
> Also as previously stated within this submission, the Delegate, in applying the three stage analysis, did not apply a factual finding at all to the second part of the analysis. At p. R7, last full paragraph, the Delegate relies on the conclusion that Mr. Wirtz intended to terminate (by inferring this intent) to support the next conclusion that the Letter constituted a loss of income. Revisit what the letter actually said, [*sic*] it said: "*I would encourage you to find employment somewhere else"*. The letter did not say that Ms. Fabris would no longer be paid. Having already concluded (in applying the first branch of the test) that the Letter was intended to terminate Ms. Fabris' employment, the Delegate predetermined the outcome of the second and third branches of the test.
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> Sutherland Hills respectfully submits that this importation of intent into the s. 66 analysis in the circumstances before the Delegate and the inference reached by the Delegate and the application of this inference to justify the conclusions reached in each part of the s. 66 three stage analysis constitutes an error of law which falls within all five branches of the *Gemex* test.
>
> **IN SUMMARY**
>
> In summary, the Delegate's entire approach to the three branches of the s. 66 test is fundamentally flawed due to the errors of fact (which were so profound that they constitute errors of law) and the errors of fact. The Determination, quite simply, cannot and should not stand, due to these errors. It cannot be that an employer who encourages an unhappy employee to "*find employment somewhere else*" has effectively terminated that employee's employment. Unless that employee attempts to return to work and finds the door closed to her; or actually has a discussion with the letter writer or other representative of the Employer and confirms that the door is closed to her, the conclusion that such a statement equals a fundamental change equivalent to terminating an employee's employment without evidence that the employee's employment was actually terminated, cannot stand.

32. Counsel concludes her submissions by asking the Tribunal to cancel the Determination and reiterates that "without confirmation to Ms. Fabris that the door to continuing employment was closed, it cannot be properly concluded that the [letter from Mr. Wirtz]constituted a fundamental change pursuant to s. 66" [*sic*]

SUBMISSIONS OF MS. FABRIS

33. Counsel for Ms. Fabris argues that the Delegate made no errors of fact as alleged in the submissions of counsel for Sutherland Hills. Counsel explains the Delegate's finding that Mr. Wirtz's letter substantially altered the employment relationship between Ms. Fabris and Sutherland Hills is not an error of fact but rather a finding of law or, at least, mixed fact and law. He also submits that the Delegate's finding that the letter of Mr. Wirtz terminated Ms. Fabris' employment is a determination of law or, at least, mixed fact and law.

34. With respect to the relevance to Ms. Fabris' case of a similar or similarly worded letter of Mr. Wirtz that another employee, Ms. Sidhu, received and returned to work, counsel states:

> …the letter provided to the other employee and any resulting outcome or occurrence between the other employee and Sutherland Hills is *entirely irrelevant*. Each employee has its own distinct contract of employment with the employer and is entitled to respond and relate to the employer within the law as the employee deems appropriate in the circumstances. If the other employee chose not to react or respond to the letter it is that employee's own choice and has no bearing on Ms. Fabris' choice and response under her own employment contract with Sutherland Hills.
>
> Accordingly, the Delegate made no error of fact (or law) by disregarding the other employee's letter and return to work. For Ms. Fabris, the letter did constitute an alteration in her conditions of employment regardless of other employees.

> Sutherland Hills acknowledges that the Delegate considered evidence that Ms. Fabris' "relationship with Mr. Wirtz was very good and she considered him as much as a friend as her employer" and "she had not met with Mr. Wirtz or received an explanation for the letter".
>
> The existence of a very good relationship prior to the presentation of the letter and Mr. Wirtz's failure to meet or communicate with Ms. Fabris after sending the letter have been correctly interpreted by the Delegate as evidence of *how significant and destructive of the employment relationship the letter was for Ms. Fabris.*
>
> Similarly, the existence of a long-standing friendship, employment and management relationship and gifts between Mr. Wirtz and Ms. Fabris are correctly interpreted by the Delegate as evidence of a positive and strong bond which was shattered by Mr. Wirtz's letter.
>
> The Delegate's finding that Ms. Calhoun saw that *Ms. Fabris was very upset* to the point that Ms. Calhoun apparently "assured her" and "hoped everyone could get over the situation" is well supported and reasonable on the facts and corroborates that Ms. Fabris was in shock and upset by Mr. Wirtz's letter. Ms. Calhoun's statements and efforts in this regard are understandable in her role as manager.
>
> However, these assurances and hopes were not offered by Mr. Wirtz himself but apparently only by Ms. Calhoun *without Mr. Wirtz's express support or authority*. Therefore, Ms. Calhoun's assurances had little effect and were given little weight.
>
> Although the Delegate inaccurately referred to Mr. Wirtz as "the owner" of Sutherland Hill, he is, in fact, one of only two (2) directors of the company and operates it as the virtual owner. He did so over the entire course of Ms. Fabris' employment period.
>
> In the circumstances, the Delegate's finding of a long-standing friendship and employment relationship between Ms. Fabris and Mr. Wirtz *supports* his finding that *the alteration in the conditions* of Ms. Fabris' employment caused by the letter was *substantial.*
>
> Ms. Fabris relies on Section 112 of the Act. The "errors of fact" cited by Sutherland Hills do not constitute actual errors of fact or law.
>
> Further, if the "errors" cited by Sutherland Hills do amount to findings of fact, they are well supported by the evidentiary record. The Delegate's findings of fact are sound and in no way "irrational, perverse or inexplicable…" as claimed by Sutherland Hills and required by the ***Gemex*** and ***Delsom*** cases cited by Sutherland Hills.
>
> It is further submitted that the application of Section 66 of the Act is properly dealt with *as a consideration of law* applying to the facts and is not properly to be considered in these submissions under "errors of facts". Indeed the balance of Sutherland Hills' submission on this appeal under "errors of facts" deals with what should properly be dealt with under "errors of law".

35. On a related note, with respect to Sutherland Hills argument that the Delegate "rejected critical, relevant evidence" in not considering the letter of Mr. Wirtz to the other employee, counsel for Ms. Fabris reiterates:

> … this "other letter" is *entirely irrelevant* to the employment relationship between Ms. Fabris and Sutherland Hills. Accordingly, as a matter of law, the Delegate and this Tribunal are correct in entirely disregarding such letter as well as the actions by other employees after receiving such letter.
>
> In the circumstances, the Delegate made *no error in disregarding communications and employment relations between Sutherland Hills and its employees other than Ms. Fabris.*

36. With respect to Sutherland Hills' contention that the Delegate erred in considering the "intent" behind the letter which Mr. Wirtz tendered to Ms. Fabris, counsel for Ms. Fabris states:

> Although the Delegate has referred to "intent" regarding Mr. Wirtz's letter to Ms. Fabris, he does not ultimately rely upon Mr. Wirtz's "intent" but rather *the plain meaning and import of the letter itself* when it is read literally.

In fact, the Delegate correctly applied an "objective" test to the letter. On its own terms, it is reasonable and appropriate for the Delegate to conclude that the letter asserted a present intention to dismiss Ms. Fabris and that it was reasonable for Ms. Fabris to interpret it as she did and suffer the resulting shock and distress. The message conveyed by the letter was clear and unqualified.

Where the actions of an employer are enough to give rise to a dismissal, the employer's "intent to dismiss" is not a necessary ingredient.

> "The Courts have held that an employer's actions can constitute a repudiation of the agreement even if there was no intention to terminate the employment relationship."
>
> See *Quist v. Masse* 1998 ABPC 56
> *Hainsworth v. World Peace Forum Society* 2006 BCSC 809
> *Re Rubel Bronze et al v. Vos* [1918] 1 K.B. 315

Sutherland Hills goes on to incorrectly argue that the Delegate's consideration and analysis of the letter involves an "adverse inference" improperly taken by the Delegate resulting in an error of law.

As a matter of evidence, an "adverse inference" might arise where one party to the proceeding presents *admissible but possibly rebuttable* evidence and the other party to the proceeding fails to call an available witness to the contrary: see *Levesque v. Commeau* [1970] SCR 1010.

The Delegate in this case was being abundantly fair and open towards Sutherland Hills and merely found that the Sutherland Hills letter authored by Mr. Wirtz indicated an intent to dismiss without any further qualification or explanation. Mr. Wirtz, according to his manager, Ms. Calhoun, "did not want to show up" for the hearing. Apparently, Mr. Wirtz felt no need to qualify or explain the letter.

In the circumstances the Delegate is not making an "adverse inference" as argued by Sutherland Hills, but rather is simply weighing the available evidence before him and finding that it was not qualified or explained by Mr. Wirtz or Sutherland Hills, despite them having the opportunity to do so.

Sutherland Hills and Mr. Wirtz's non-appearance and failure in this regard *simply added to the already substantial weight of the evidence* before the Delegate.

Accordingly, Ms. Fabris submits that the Delegate relied on the plain language of the letter itself to reach his reasonable and proper conclusion. He made no "adverse inference" in respect of the letter.

In all the circumstances Sutherland Hills had a full opportunity to be heard and Mr. Wirtz simply elected not to attend. There was no breach of the *rules of natural justice* in respect of the letter and Mr. Wirtz's failure to testify.

Sutherland Hills also argues that to amount to a factor in the "constructive dismissal" the letter would not only have to "encourage (Ms. Fabris) to find employment somewhere else" but also state that "she would no longer be paid".

Ms. Fabris submits that such express and literal detail is not necessary to achieve "constructive dismissal". Indeed, a letter encouraging an employee to "find employment elsewhere" which also states that the employee "would no longer be paid" would amount to a *clear and express letter of dismissal* and no finding of "constructive dismissal" would be necessary.

In these circumstances the Employment Standards Tribunal does not have jurisdiction to interfere pursuant to s. 112 of the Act and the Delegate made no error in applying the facts to Section 66 of the *Employment Standards Act*. He made no error of fact or law as defined in the ***Gemex*** and ***Delsom*** cases or otherwise.

37. Ms. Fabris' counsel concludes his submissions by asking the Tribunal to affirm or uphold the Determination. He also asks the Tribunal to order compensation for Ms. Fabris for "her expenses in this appeal including legal costs, lawyer's fees, disbursements and taxes" and to assess Sutherland Hills a "further administrative penalty".

SUBMISSIONS OF THE DIRECTOR

38. With respect to Sutherland Hills' challenge to the Delegate's finding of fact that the letter of Mr. Wirtz received by Ms. Fabris advising her to find employment elsewhere constituted a substantial alteration of the employment relationship between Sutherland Hills and Ms. Fabris, the Delegate asserts:

> The unchallenged evidence of Ms. Fabris was that she worked for Sutherland for 8 years and up to the point of receiving that letter she had a good relationship with Mr. Wirtz, one of the owners of Sutherland and the author of the letter. Her evidence was that she considered the letter as a termination of the relations that had existed for 8 years. Ms. Fabris and Sutherland had for an 8 year period been parties to an implied contract of employment of an ongoing nature. The introduction of uncertainty as to the continuation of the relationship is an alteration and in my submission is a substantial alteration of the employment relationship.
>
> Sutherland in the appeal submission correctly points out the Tribunal does not have jurisdiction to interfere with errors of fact unless the errors of fact amount [to] errors of law. In order for errors of fact to become error [*sic*] of law they must be irrational, perverse, inexplicable and have no evidentiary basis. It is my view that the findings are supported by the unchallenged evidence given by Ms. Fabris.

39. On the basis of the foregoing analysis, the Director submits the Delegate's finding that the letter of Mr. Wirtz was a substantial alteration of the employment relationship between Sutherland and Ms. Fabris cannot be disturbed because it is "supportable [in evidence]" and not "perverse" or "inexplicable".

40. With respect to Sutherland Hills' allegation that the Delegate rejected critical, relevant evidence, namely, a similarly worded letter from Mr. Wirtz to another employee, the Delegate argues:

> I acknowledge the evidence was put in by the representatives of Sutherland that were present at the hearing, however I cannot see where an analysis of that evidence would have assisted me in determining the issue put in front [of] me. The issues were put in front of me [*sic*] were; did Sutherland terminate the employment of Ms. Fabris when it gave her the letter stating she is encouraged to find employment somewhere else or did Ms. Fabris voluntarily terminate her own employment. These issues were identified by parties prior to any evidence being lead.
>
> Ms. Sidhu did not appear as a witness for either side so have no knowledge [*sic*] of how she interpreted the letter she received. Sutherland has not set how this evidence would be relevant to the issues I was to decide. It is not a requirement of the Act that all employees who have experienced similar treatment by an employer interpret that treatment in exactly the same manner. It is quite possible that two employees could be treated in the same manner and have totally different impressions of the impact that the treatment has on the employment relationship, as seems to be the case here.
>
> In BCEST D166/04 Adjudicator Narod sets out:
>
> "The Delegate is entitled to manage the case before him and to decline to hear evidence that is not relevant. The fact that a Delegate does not refer in the Determination to evidence that was before him which one party thinks is relevant does not necessarily mean that it was not considered. Nor does it mean that there was a failure by the Delegate to observe the principles of natural justice."
>
> I did consider the evidence that another employee received a similar letter to the one received by Ms. Fabris however I did not then nor do I now see how that could have helped me answer the questions put to me by the parties of whether Ms. Fabris was terminated or did she quit. If Sutherland felt that this evidence was of such high probative value they should have called Ms. Sidhu as a witness where her take on receiving her letter could have been canvassed. At present it is not known how she interpreted the letter, she may well have the same view as Ms. Fabris that it was an alteration of a condition of employment [*sic*]. The fact that she is still employed there does not mean she could not hold that view.

41. With respect to the allegation of Sutherland Hills that the Delegate should not have drawn an adverse inference from the fact that Mr. Wirtz did not attend at the Hearing or give evidence with respect to his letter to Ms. Fabris, the Delegate references two (2) instructive Tribunal decisions to support his contention that it is appropriate to draw an adverse inference where a party fails to call as a witness someone with knowledge of the particulars. The Delegate then goes on to reason:

> In the present case Sutherland knew the claim being made by Ms. Fabris was based on the letter she received from Mr. Wirtz. This was set out in para. 3 of the letter dated July 8, 2010 from Ms. Fabris' counsel some three months before she filed her claim with Employment Standards.
>
> Sutherland knew or ought to have known that the letter was a relevant piece of evidence and an explanation of what the letter meant would be sought. When Ms. Wendy Calhoun was asked to explain why Mr. Wirtz was not present at the hearing she simply stated that "he did not want to show up". The answer given by Ms. Calhoun I believe to be true. However Mr. Wirtz was the only person who could have shed some light on what was intended by the letter and could have presented an alternative interpretation to one advanced by Ms. Fabris.
>
> Hearing from Mr. Wirtz could have assisted me in resolving the conflict in the employer's evidence where Ms. Calhoun was telling Ms. Fabris that she was a valued employee and it was hoped that the people involved could move on, and the sentiment expressed in the letter from Mr. Wirtz encouraging Ms. Fabris to seek employment somewhere else. A [*sic*] explanation was not provided and an inference was drawn on the letter based on what I submit is a supportable conclusion that it was an indication that Mr. Wirtz no longer wished to continue the employment relationship.

42. In conclusion, the Director repeats that the findings and conclusions in the Determination are supported by evidence and law and the Determination should be upheld.

THE DIRECTOR'S FINAL REPLY

43. In his Final Reply submitted on July 8, 2011, the Director disputes the characterization of Ms. Calhoun's testimony pertaining to the sworn Declaration she gave in the Appeal. The Declaration purported to explain the similarly worded letter of Mr. Wirtz to another employee of Sutherland Hills. The Director notes that based on the Delegate's notes of the Hearing, Ms. Calhoun did not, at the Hearing, explain the contents of the letter provided to the other employee nor did anyone else from Sutherland Hills. Similarly no one from Sutherland Hills explained the contents of the letter to Ms. Fabris. According to the Director the contents of the letter Ms. Fabris received and her perception thereof are central to Ms. Fabris' claim that she was dismissed. Sutherland Hills did not challenge that perception at the Hearing through cross- examination, according to the Director.

44. The Director further submits that when Sutherland Hills adduced its evidence, "there was no alternative interpretation of the note (or letter) advanced and no suggestion that the note (or letter) was not to be taken at face value or in the plain words on the note (or letter)".

45. The Director also submits that Sutherland Hills, in its appeal, continues not to challenge the interpretation of the note (I trust by the Delegate) as unreasonable. Instead, the Director submits that Sutherland Hills contends that the Delegate's "observation on what (he) concluded was Mr. Wirtz's intent has somehow flawed the [Delegate's] entire analysis". The Director denies that the Delegate made any finding on Mr. Wirtz's intent in terms of the letter to Ms. Fabris, but submits that the Delegate simply made "a logical conclusion that if Mr. Wirtz intended the relationship [with Ms. Fabris] to continue it would be inconsistent with that position to give Ms. Fabris a note suggesting that she seek work elsewhere".

46. The Director concludes that the Delegate was "fully aware that intent is not a consideration in cases involving section 66 of the Act" but "the actions of the employer and its impact on the employment relationship in place at the time that are uppermost".

FINAL REPLY OF SUTHERLAND HILLS

47. Sutherland Hills, in its Final Reply of July 22, 2011, in the first two (2) pages, largely reiterates and in some cases amplifies some previous arguments, and I do not find it necessary to reiterate those submissions here.

48. However, with respect to the Delegate's submission of May 12, 2011, counsel for Sutherland Hills makes the following reply:

> 10. page 1: "the introduction of uncertainty" – the Delegate is lowering the s. 66 bar even further that [*sic*] he did in his Determination, by suggesting that an employer action which introduces "uncertainty" as to continued employment constitutes a fundamental change. As these submissions progress, they leave behind the Background/setting for the contested Letter, which was that Ms. Fabris' conduct had contributed to an external investigation and she had received significant discipline, a 3 day suspension, the merits of which, while upsetting to her, were not contested by her. Ms. Fabris, by her conduct, had introduced uncertainty into the security of her continued employment. The Letter was a reaction to Ms. Fabris' misconduct, it did not occur in a vacuum.
>
> 11. pp. 3 – 4: Ms. Sidhu's interpretation of the Letter – the Delegate did receive objective evidence of Ms. Sidhu's response to the Letter, which was that she returned to employment. Therefore, she cannot have interpreted the Letter as a termination. Therefore, it was not necessary that she be called as a witness because the relevant evidence, being the evidence of her response, was put in (but not, as the Delegate has acknowledged, considered relevant by the Delegate).
>
> 12. p. 5: Mr. Wirtz & adverse inference – the Delegate is missing that what was in Mr. Wirtz' mind (that is, his intent), could not and should not have helped him resolve the conflict, because unless Mr. Wirtz explained this intent to Ms. Fabris, the evidence of his intent is not relevant, so should not be a consideration. In the circumstances of this case – where there was no discussion between the author of the letter and the recipient – we agree with Mr. Butler, that Mr. Wirtz' intent is not relevant to the determination of whether the employer's conduct has repudiated the relationship. That evidence not being relevant, there was no basis for drawing an adverse inference given Mr. Wirtz' non-appearance. Therefore, we maintain that the error of law – the consideration of the intent of the author of the Letter & the drawing of an adverse inference – were fundamental errors which went to the ultimate disposition of this matter.

49. With respect to the Director's Final Reply of July 8, 2011, counsel for Sutherland Hills replies:

> 13. We note that the Delegate, in his July 08, 2011 submission states that he is aware that intent is not a consideration. That however, is not supported by a plain reading of the Determination; the Delegate cannot rehabilitate the errors in the Determination through the submission writing process. (Similarly, the Delegate states that he did consider evidence which is not addressed at all in his Determination (eg. the evidence of relating to Ms. Sidhu receiving the same Letter) but that also is a rehabilitation of the Determination which is not proper for his submission process).
>
> 14. The Delegate also, in his July 08, 2011 submission references his notes; however those notes are not enclosed as part of the Record (per the Delegate's letter of May 12). In any event, Ms. Calhoun, in her statutory declaration is not saying that she explained the contents of the Letter (Exhibit "A"); she is saying that the [*sic*] gave the same letter that Ms. Fabris received (per Exhibit "A") to another employee and that other employee had also received the same discipline as Ms. Fabris.

ANALYSIS

50. Sutherland Hills challenges the Determination on the basis that:

1. The Delegate made errors of fact amounting to errors of law when he:
    (a) found that Mr. Wirtz's letter encouraging Ms. Fabris to find employment elsewhere, substantially altered the employment relationship between Ms. Fabris and Sutherland Hills; and
    (b) Mr. Wirtz's letter terminated Ms. Fabris' employment because of the contents and the position of Mr. Wirtz within Sutherland Hills.
2. The Delegate erred in law in failing to consider relevant and critical evidence, namely, that another employee, Ms. Sidhu, received a similar letter to the one Mr. Wirtz wrote to Ms. Fabris, and Ms. Sidhu returned to work.
3. The Delegate erred in law when he imported "intent" into the section 66 analysis and compounded that error by inferring Mr. Wirtz's intention absent any evidence, when intention was an irrelevant consideration.

51. As Sutherland Hills' appeal is primarily based on its contention that the Delegate, in one form or another, erred in law in making the Determination, it is important to note that the British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 is instructive on the subject of what constitutes an error of law. The Court of Appeal, in *Gemex*, defined the following instances as amounting to an error of law:

(1) A misinterpretation or misapplication of a section of the Act;
(2) A miscalculation 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) Exercising discretion in a fashion that is wrong in principle.

52. I also note that in *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal stated that the definition of error of law should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact, which do not contain extricable errors of law. The Tribunal also added that unless there is an allegation that the Delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the Delegate erred by applying the incorrect legal test to the facts.

53. It is also noteworthy that the Tribunal has indicated repeatedly in appeal cases that it does not have jurisdiction over questions of fact (see *Re Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re Koivisto (c.o.b. Finn Custom Luminum)*, BC EST # D006/05) unless the matter involves errors on findings of fact, which may amount to an error of law. As to the criteria for determining findings of fact which amount to an error of law, the Tribunal in *Re Funk*, BC EST # D195/04, explained that the appellant would have to show that the fact finder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" before an error of law will be found.

54. Where there is no evidence that the Delegate "acted without any evidence or on a view of evidence that could not reasonably be entertained" or committed a "palpable or overriding error" or arrived at a "clearly wrong

conclusion of fact", the Tribunal is reluctant to substitute the Delegate's findings of facts even if it is inclined to reach a different conclusion on the evidence.

55. I note that in this case, the Delegate relied upon the relevant provision in the *Act*, section 66 which effectively codifies the common law concept of "constructive dismissal":

> **Director may determine employment has been terminated**
>
> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

56. I also note that the Director relied on and applied the appropriate or relevant decision of the Tribunal in *Re Andy Tollasepp*, BC EST # D490/02, which delineates a three-part test for considering cases under section 66 of the *Act*, namely:

1. Was there an alteration of the condition of employment?
2. Was the alteration substantial?
3. Was the employment of the employee terminated?

57. Having said this, with respect to Sutherland Hills' first contention that the Delegate committed an error of fact amounting to an error of law when he found that Mr. Wirtz's letter encouraging Ms. Fabris to find employment elsewhere substantially altered the employment relationship between Ms. Fabris and Sutherland Hills, I note that the onus is on Sutherland Hills to show that the Delegate in this case committed a "palpable and overriding error" or that the finding of fact was "clearly wrong" or that he "acted without any evidence or on a view of evidence that could not reasonably be entertained". I am not persuaded such to be the case here. The Delegate explains that his finding or conclusion of fact that Mr. Wirtz's letter encouraging Ms. Fabris to find employment elsewhere substantially altered the employment relationship was based on the unchallenged evidence of Ms. Fabris that she worked for Sutherland Hills for eight (8) years and until she received Mr. Wirtz's letter she had a good relationship with Mr. Wirtz, and had no cause to believe her employment at Sutherland Hills was going to end. While I may have been inclined to reach a different conclusion of fact than the Delegate with respect to the significance of Mr. Wirtz's letter to Ms. Fabris, that is not the test nor a relevant consideration or a basis for me to vary or reverse the Delegate's conclusion of fact here.

58. While I agree with counsel for Sutherland Hills that the intention of Mr. Wirtz in writing the letter to Ms. Fabris is not relevant to the Determination under section 66 of the *Act* and while I find irrelevant Mr. Wirtz's non-attendance at the Hearing to explain the letter, and inappropriate the decision (if any) of the Delegate to draw a negative inference from Mr. Wirtz's non-attendance at the Hearing, I am not persuaded that that these factors were determinative of the Delegate's decision under the first part of the section 66 test in his Reasons for the Determination. I note that in the Reasons for the Determination, in the second paragraph at page R7, before his discussion relating to Mr. Wirtz's non-attendance at the Hearing, the Delegate had reached his conclusion, based on the words used by Mr. Wirtz in his letter to Ms. Fabris encouraging her to find employment elsewhere, that Sutherland Hills altered a condition of her employment. As indicated previously, while I may not have come to the same conclusion as the Delegate, I do not find that the Delgate's conclusion of fact in this case is "clearly wrong" or constitutes a "palpable and overriding error". I find that it was open to the Delegate to make such a conclusion, as it was also open to him, based on the evidence of Ms. Fabris's relatively long-term employment - 8 years - with Sutherland Hills, to find that Mr. Wirtz's letter was a substantial alteration of her terms of employment.

59. With respect to the third question in the test governing the application of section 66, namely, whether the employment of the employee is terminated, I note that the test for determining whether an employee has resigned or been terminated by her employer is an objective one. The test was delineated by Justice Galligan of the Ontario Supreme Court in *Rajput v. Menu Foods Ltd.* [1984] O.J. No. 2290 as follows:

> It seems to me that in deciding whether or not a person was entitled to think that he had been fired, or whether in fact the person had resigned, a Court ought to ask itself: What would a reasonable man understand from the words used in the context in which they were used in the particular industry, in the particular working place, and all of the surrounding circumstances?

60. I note that *Rajput* has been considered and applied in many cases subsequently including by our own Supreme Court in in *Assouline v. Ogivar Inc.* [1991] B.C.J. No. 3419.

61. Having said this, in this case, with respect to the third question in the test, counsel for Sutherland Hills, argues that it would be setting a very low mark for evidence of employer repudiation for the Tribunal to support a finding that an employer who suggests an employee should look elsewhere for employment has terminated the employee. I do not find counsel's argument persuasive. In my view when a reasonable person in Ms. Fabris's shoes, having worked for eight (8) years for an employer, receives a letter from her employer advising her to look for employment elsewhere, it is not unreasonable for that person or employee to consider that her employment has been terminated. I find that the Delegate in so concluding did not act on a view of evidence that could not reasonably be entertained or make a "palpable and overriding error", and I am loath to disturb the Delegate's findings of facts in these circumstances.

62. With respect to Sutherland Hills' contention that the Delegate erred in law when he failed to consider relevant and critical evidence, namely, that another employee who had received a similar letter to Ms. Fabris' but returned to work, this Tribunal has indicated previously (see *Re Economy Movers (2002) Ltd.*, BC EST # D026/07, and *Re Greenfield*, BC EST # D033/08) that one of the most significant tasks of a delegate at an adjudicative hearing is to assess and weigh the evidence presented and determine what evidence is not only relevant but also reliable. If a delegate fails to consider relevant evidence in making the determination, particularly if that evidence is determinative of an issue in the complaint, this could amount to a denial of natural justice. I also note that while a delegate may have failed to reference all of the evidence a party considers to be relevant, this does not, by that fact alone, constitute a reviewable error. The delegate is not required to recite all of the evidence in his Reasons (*Re Gutierrez*, BC EST # D108/05).

63. In this case, the Delegate, in his Reply submissions, indicates that he did consider the evidence of another employee receiving a similar letter to the one Ms. Fabris received from Mr. Wirtz and that employee returned to work. The Delegate indicates that he did not find that evidence relevant. Counsel for Sutherland Hills argues that this information is relevant as it goes to the issue of whether Ms. Fabris' interpretation of the letter was correct. I find myself in agreement with the Director and counsel for Ms. Fabris, that the letter sent to the other employee by Mr. Wirtz is not relevant to the employment relationship between Ms. Fabris and Sutherland Hills and certainly is not determinative of the penultimate issue in this matter, that is, whether Ms. Fabris' employment was terminated by Sutherland Hills when she received Mr. Wirtz's letter.

64. In the result, I dismiss Sutherland Hills' appeal.

65. I note that counsel for Ms. Fabris has requested, by way of a remedy for Ms. Fabris that she be awarded "legal costs, lawyer's fees, disbursements and taxes" and that the Tribunal should assess a "further administrative penalty" on Sutherland Hills. I note that neither the Director nor this Tribunal has jurisdiction in the *Act* or in the *Regulation* to award legal costs, lawyers fee, disbursements and/or taxes. Further, there is also no jurisdiction

under the *Act* or the *Regulation* for this Tribunal to assess a further administrative penalty on an appellant because the latter was unsuccessful in their appeal.

ORDER

66. Pursuant to section 115 of the *Act*, I order that the Determination dated March 9, 2011, be confirmed as issued, together with whatever additional interest may have accrued since the issuance of the Determination pursuant to section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal