Employment Standards TRIBUNAL

An appeal

- by -

Baum Publications Ltd.
(the "Employer")

- 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: Matthew Westphal

FILE No.: 2005A/56

DATE OF DECISION: June 28, 2005

DECISION

SUBMISSIONS

Joe Coutts	On behalf of the Employer
Cameron Fast Lisa Martyn	On behalf of the Respondent Lisa Martyn
Ken White	On behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Baum Publications Ltd. (the "Employer") under s. 112 of the *Employment Standards Act* (the "*Act*") of Determination ER # 121-448 , dated February 28, 2005 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards. The Delegate ordered the Employer to pay its former employee Lisa Martyn (the "Respondent") $15,926.00 in unpaid overtime and accrued interest, and imposed an administrative penalty of $500.00 for having contravened s. 40 of the *Act*.

2. The Tribunal has decided that this case can be decided without an oral hearing. Based on my review of the Determination, the submissions of the parties, and the record provided to me, I am canceling the Determination and referring the Respondent's complaint back to the Director of Employment Standards for a new hearing before a different delegate of the Director.

PRELIMINARY RULING

3. In reviewing the file, I learned that during the hearing before the Delegate, and during her first submission to the Tribunal on this appeal, the Respondent was represented by Mr. Cameron Fast of the Law Students' Legal Advice Program at the University of British Columbia Faculty of Law. Mr. Fast was a student in a class I taught at the Faculty of Law in the fall of 2003. Out of an abundance of caution, I disclosed this fact to all parties and asked whether anyone objected to my adjudicating this appeal, and if so, on what basis. The Employer and the Delegate made no objection. The Respondent pointed out that Mr. Fast was no longer representing her, as he had since graduated from law school. She stated that she understood that the Tribunal's decision would be made fairly and in an unbiased fashion, and that she had no objection to my adjudicating this appeal unless I considered that I would be biased against her on account of my previous association with Mr. Fast.

4. Although no party has suggested that I should recuse myself from deciding this appeal, I will, nevertheless, consider the issue of potential bias, as articulated most recently by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. Having considered the matter, I am satisfied that I have no actual bias for or against any of the parties. The question then becomes whether there is nevertheless a reasonable apprehension of bias as a result of my prior association with Mr. Fast. The test for a decision maker in such circumstances is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that I, whether consciously or unconsciously, could not decide this matter fairly: *Wewaykum, supra* at para. 74. In my view, the fact that someone who was counsel to one of the parties at the hearing

below and for part of this appeal was one of more than 50 students in a class I taught in 2003, does not give rise to a reasonable apprehension of bias according to this test. Accordingly, I will adjudicate this appeal.

ISSUES

5. 1. Did the Delegate fail to observe the principles of natural justice in making the Determination?

6. 2. Did the Director err in law in finding that the Respondent was not a manager and thus, not entitled to receive overtime wages?

7. 3. Did the Delegate err in law and breach the principles of natural justice in his treatment of certain evidence in calculating the amount of overtime to which the Respondent was entitled?

8. In light of my finding that the Delegate failed to comply with the principles of natural justice in making the Determination, and that the Respondent's complaint should be referred back to the Director for a new hearing before a different delegate, I need not decide the second and third issues.

BACKGROUND

9. The Employer is a publisher of trade magazines. The Respondent worked for the Employer from November 1, 2000 to August 22, 2003, first as an editorial assistant and web designer, and then as an editor. From January 2003 until the Employer dismissed her on August 22, 2003, the Respondent was the editor of *Contractors Rental* and *Recycling Product News*, two of the publications produced by the Employer.

10. After her dismissal, the Respondent filed a complaint with the Employment Standards Branch claiming that she had worked many hours of overtime without receiving any overtime pay. The Employer opposed the complaint on the basis that the Respondent had been a manager for the purposes of ss. 1(1) and 34(f) of the *Employment Standards Regulation*, B.C. Reg. 396/95, and was thus not entitled to receive overtime pay. After an unsuccessful attempt at mediation, the Respondent's complaint went before the Delegate for adjudication in a hearing. The Respondent was represented by Mr. Fast. The Employer was not represented by legal counsel.

11. After the hearing--the details of which I will discuss in the remainder of this decision--the Delegate held that the Respondent was not a manager, and was thus entitled to overtime pay. The Delegate accepted the Respondent's calculation of the amount of overtime she had worked, and issued the Determination. The Employer, now represented by legal counsel, brought this appeal.

SUBMISSIONS

12. The Employer raises three grounds of appeal. It claims that the Delegate had erred in finding that the Respondent was not a manager. It argues that the Delegate failed to comply with the requirements of natural justice in not permitting one of its witnesses, Mr. Ian Stuart, to give evidence at the hearing. Finally, the Employer says that the Delegate erred in accepting the Respondent's calculation of the number of overtime hours that she worked, because he refused to consider relevant evidence of her work hours, namely, security logs maintained by the Employer's security company.

13. The Employer argues that the Delegate failed to comply with the requirements of natural justice in his handling of the issue of whether Mr. Stuart, whose position is Sales Manager and Associate Publisher, and who was the Respondent's immediate superior at *Recycling Product News*, could testify. The Employer claims that Mr. Stuart was introduced at the outset of the hearing as a witness, but that when it attempted to call Mr. Stuart to testify, the Delegate expressed surprise and concern, because Mr. Stuart had not been excluded during the testimony of other witnesses. Counsel for the Respondent objected to Mr. Stuart's testifying, and during a discussion about this issue, the Employer had Mr. Stuart leave the hearing because it believed that the Delegate was not going to permit him to testify.

14. The evidence of both the Respondent and the Delegate is that Mr. Stuart was never introduced as a witness at the hearing. They emphasize that Mr. Stuart left the hearing before the Delegate had made any ruling on the Respondent's objection. Accordingly, they characterize the events as a unilateral decision by the Employer not to call Mr. Stuart as a witness, which did not constitute a breach of the principles of natural justice.

15. In light of my decision that there was a breach of natural justice, I will not summarize the submissions of the parties on the other grounds of appeal.

ANALYSIS

The requirements of natural justice

16. The Supreme Court of Canada has stated that "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at 653. The Tribunal has jurisdiction to review determinations of the Director of Employment Standards based on breach of this common law duty, because s. 112(1)(b) of the *Act* states that a person served with a determination may appeal it to the Tribunal on the basis that "the director failed to observe the principles of natural justice in making the determination". Thus, the Delegate, in adjudicating the Respondent's complaint and making the Determination, had a duty to observe the principles of natural justice, or to put it another way, a duty of procedural fairness.

17. The content of the duty of procedural fairness varies according to the circumstances, but it generally involves giving interested persons a fair opportunity to participate in the decision making process before any action detrimental to their interests is taken. As the Tribunal held in *CCD Corporate and Career Development Inc.*, BC EST#D068/04:

> The law takes a flexible approach to what constitutes a form of hearing sufficient to meet the requirements of natural justice. The question as to what is required depends on the facts and circumstances of each case and the subject matter under consideration (*Knight v. Indian Head School Division (No. 19)*, [1990] 1 S.C.R. 653). For instance, the rules of natural justice do not require that there always be an oral or in-person hearing. An exchange of written materials may suffice (*Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board* (1994), 21 Admin. L.R. (2d) 248 (S.C.C.)). What is required is that the parties must know the case being made against them and be given an opportunity to reply. They must be given a fair opportunity to correct or controvert any relevant and prejudicial statement (*Emery v. Alberta (Workers Compensation Board, Appeals Commission)*, 2000 ABQB 704).

18. Broadly speaking, natural justice requires that parties be given notice of the case, be told the case against them, and be afforded a fair opportunity of answering it: *Kaloti (c.o.b. National Courier Service)*, BC EST#D232/99. The issue in this case is whether the Employer was denied a fair opportunity of answering the Respondent's complaint that she was owed overtime, by leading evidence relevant to the issue of whether the Respondent was a manager, and thus not entitled to receive overtime pay.

19. A refusal to admit relevant evidence can be a breach of natural justice, but this is not the invariable result of such a ruling; see *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471. Whether a refusal to admit relevant evidence denies a party a fair hearing will depend on the circumstances of each case. This case does not involve a refusal, as such, to admit evidence, but as I will discuss below, a breach of natural justice can result even without a ruling on whether the evidence will be admitted.

20. Where a breach of the rules of natural justice is found, it is not necessary to ask whether the breach altered the outcome of the hearing. As Le Dain J. held in *Cardinal*, *supra* at 661:

> …the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

21. The Court reaffirmed this proposition in Université du Québec à Trois-Rivières, supra.

The hearing below

22. Despite the conflicting evidence I received about what precisely happened at the hearing before the Delegate, I find that I am able to decide this appeal without holding an oral hearing. A close analysis of the parties' submissions establishes that they agree about almost all of the relevant facts of what happened at the hearing before the Delegate:

- At the outset of the hearing, introductions took place. The Respondent and Mr. Buser, at least, were definitely introduced as witnesses.
- No one requested that the Delegate exclude witnesses from the hearing during the testimony of other witnesses.
- The Delegate did not exclude any witnesses on his own initiative, and in particular, did not exclude Mr. Buser during the testimony of the Respondent even though it was made clear that Mr. Buser would be testifying.
- When the Employer sought to have Mr. Stuart testify, the Delegate expressed surprise.
- The Delegate also expressed concern about Mr. Stuart testifying, because Mr. Stuart had not been excluded during the Respondent's testimony.
- Mr. Fast, on behalf of the Respondent, objected to Mr. Stuart's being able to testify.
- There followed a discussion about this issue. During this discussion, the Director did not rule that Mr. Stuart could not testify, but neither did he rule that Mr. Stuart could testify.
- Mr. Stuart left the hearing and did not return.

- The Delegate indicated that Mr. Baum--who had likewise been present throughout the Respondent's testimony--could testify.
- The Employer did not call Mr. Baum as a witness.

23. The principal factual disagreement concerns whether Mr. Lupton stated at the outset of the hearing that Mr. Stuart was attending as a witness or an observer. Indeed, the Delegate does not recall that Mr. Lupton presented the case at all on behalf of the Employer. In his submission the Delegate states that he "was told that Mr. Buser would be the only one giving evidence and presenting the case for the employer". Likewise, in the Reasons for the Determination the Delegate lists "Lawrence Buser, for the Employer" as the only appearance on behalf of the Employer on the cover page, and writes "Lawrence Buser ("Buser") on behalf of Baum presented the following position," before summarizing the Employer's arguments.

24. However, neither the Employer nor the Respondent recalls that Mr. Buser told the Delegate that he would be presenting the case on behalf of the Employer, nor that Mr. Buser in fact acted as more than a witness at the hearing. In its original appeal submission the Employer stated:

> On behalf of the Employer, Sam Lupton, an associate publisher, introduced himself, as well as Lawrence Buser, Ian Stuart and Engelbert Baum. Mr. Lupton advised that Mr. Buser would testify for the Employer, as would Mr. Stuart, if necessary, and that Mr. Baum was there as an observer.
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> […]
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> We note that Mr. Lupton's appearance was not noted or referred to in any way in the Reasons for the Determination.

25. In the submission he wrote on behalf of the Respondent, Mr. Fast stated:

> The Respondent recollects that […] Sam Lupton introduced himself as counsel for Baum Publications Ltd., Mr. Lawrence Buser as a witness, and Mr. Ian Stuart and Mr. Engelbert Baum as observers.

26. In its reply submission, the Employer states:

> In our submission, the Delegate misheard what he was told. Mr. Lupton did not indicate that "Mr. Buser would be the only one giving evidence." Rather, he advised that Mr. Buser and Mr. Stuart would give evidence. The only reason Mr. Stuart attended the hearing and the only reason he took time away from work was to provide evidence. The Employer did not require a second observer.
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> […]
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> Further, in contrast to Mr. Fast's recollection, Mr. Lupton is certain he did not introduce himself as counsel.

27. In her final submission, the Respondent recalled that Mr. Lupton had acted as counsel for the Employer.

28. Since both the Respondent and the Employer agree that it was Mr. Lupton, and not Mr. Buser, who introduced himself as the person presenting the case on behalf of the Employer, and who actually did present the case on behalf of the Employer, I prefer their evidence on this point to the Delegate's recollection that it was Mr. Buser who did so.

29. The parties disagree about whether Mr. Lupton introduced Mr. Stuart at the outset of the hearing as an observer or as a witness, but it is not necessary for me to decide what precisely was said, because, as I will explain below, under the circumstances of this hearing, procedural fairness required that the Delegate permit Mr. Stuart to testify even if he had not been introduced as a witness.

Did the Delegate comply with the requirements of natural justice?

30. The essence of the Employer's submission is that the Delegate, through his conduct of the hearing, deprived it of a fair opportunity to present relevant evidence to meet the Respondent's complaint. The Respondent argues that the Delegate never made any ruling preventing the Employer from calling Mr. Stuart to give evidence, and that the Employer simply elected not to call Mr. Stuart as a witness.

31. The Employer states that it had intended to call Mr. Stuart as a witness to give the following evidence:

> Mr. Stuart intended to testify that, in contrast to the Complainant's assertion, he did not give her directions on editorial content of the magazines and that she, in fact, would advise him of sales to pursue. He also intended to confirm his first-hand knowledge of the duties she performed as the editor of the two magazines.

32. In my view, Mr. Stuart's evidence would have been relevant to the question of whether the Respondent was a manager, which was the central issue before the Delegate.

33. Most of the parties' disagreement centres not on the facts of how the hearing unfolded, but on how to interpret them. Although I have no evidence before me of exactly what was said during the discussion about Mr. Fast's objection, everyone agrees that Mr. Stuart left the hearing at some point during the discussion. The Respondent and the Delegate interpret Mr. Stuart's withdrawal as a unilateral decision by the Employer not to call Mr. Stuart as a witness, at a time when the Delegate had made no ruling that Mr. Stuart could not testify. The Employer interpreted the Delegate's comments at the hearing as indicating that he had decided he would not permit Mr. Stuart to testify. The Delegate's recollection is that there was a discussion between the parties about whether Mr. Stuart could testify, and "before I had to rule on the matter, the employer decided not to call Mr. Stuart as a witness."

34. Previous decisions of the Tribunal have established that a decision maker is entitled to exclude witnesses from a hearing during others' testimony. In *Collectrite Services Kelowna Ltd.*, BC EST #D240/00, the Tribunal upheld a decision in which the adjudicator had refused to permit a party to participate throughout the entire hearing via speakerphone. It explained the basis for the exclusion of witnesses in the following terms:

> It is important to distinguish between witnesses and parties. The parties, including the principal of a corporate party, of course are entitled as of right to be present (except in some exceptional circumstances) throughout the hearing. However the situation is different for a witness who is not one of the parties. It is not the function of a witness to question other witnesses or other parties giving evidence. In fact it is common practice for witnesses to be excluded from the hearing except when giving their evidence. As noted by John Sopinka (now Justice Sopinka of the Supreme Court of Canada) in his leading text on civil evidence:
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> > The purpose of excluding witnesses is to preserve a witness' testimony in its original state. A witness listening to the evidence given by another may be influenced by the latter's testimony, and accordingly change his evidence to conform with it. Also, by being present in the courtroom and listening to testimony prior to giving his evidence, he may be able to

> anticipate, and thereby reduce the effectiveness of the cross-examination that he will ultimately face.
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> (Sopinka and Lederman, *The Law of Evidence in Civil Cases*; Butterworths, Toronto)

35. Although in *Collectrite* the Tribunal was referring to the power of a Tribunal adjudicator to exclude witnesses, the same principles permit a delegate of the Director of Employment Standards adjudicating a complaint by way of a hearing to exclude witnesses, whether or not any party requests such an exclusion.

36. The issue before me, however, relates not to the Delegate's power to exclude witnesses, but to the Delegate's power not to permit a witness to testify on the basis that he had not been excluded. Some courts have considered this issue. For example, in *McIntyre v. Canada (Treasury Board)*, [1996] F.C.J. No. 900 (Q.L.) (F.C.-T.D.), Reed J. considered an application for judicial review of the federal Public Service Staff Relations Board based, *inter alia*, on issues of natural justice. The applicant's counsel before the Board had requested and obtained an order excluding witnesses at the outset of the hearing. The applicant later sought to call as a witness a person who had been present throughout the hearing, and was refused. Reed J. held "There was no unfairness or breach of natural justice in refusing that request. Indeed, a contrary decision would have been unfair" (para. 3). In *Canadian Radio-television and Telecommunications Commission v. Canada (Human Rights Tribunal)*, [1991] 1 F.C. 141 (T.D.), MacKay J. held that the Canadian Human Rights Tribunal could not, without violating its duty of fairness, exclude a witness who was also the person designated by a corporate body to instruct counsel at the hearing. However, MacKay J. held that in such circumstances, the tribunal must carefully consider what weight to give to the testimony of that person, given that he was present during the testimony of others (para. 28). To similar effect is *Gill v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1147 (F.C.-T.D.), where the court held that an adjudicator erred in refusing to permit a party to testify. In that case the adjudicator had clearly indicated that each side must clearly state who would be a witness, and those people would be excluded. During the hearing, however, counsel for the party decided that she needed to testify. The court held that even though the witness had been present for the testimony of others, she was entitled to be present and to testify, and the adjudicator could have avoided prejudice by giving less weight to her evidence (para. 30).

37. From these authorities, it is apparent that only rarely will a party, or the person instructing counsel on behalf of a party, be excluded from a hearing. Mr. Stuart was not such a person, but these authorities also show that whether or not a decision maker can refuse to permit a person to testify on the basis that he or she was not excluded, will depend on how clearly the ground rules of the hearing were explained at the outset. Further, even if a party was warned that witnesses would be excluded but changed its mind as the hearing progressed, an alternative to not permitting a witness to testify at all is to allow the testimony, and, if necessary, to give that evidence less weight if there are concerns that the witness has tailored the evidence to fit that of other witnesses. Thus, there is no general rule of evidence that witnesses may only testify if they have been excluded.

38. Based on the evidence before me, I find that the Delegate, at the outset of the hearing, did not make it clear to the parties that he would be excluding witnesses from the hearing, and therefore needed to know exactly who would, or might, be testifying. It is also common ground that no party requested that witnesses be excluded. In my view, given the absence of notice to the parties regarding exclusion, and of any request that witnesses be excluded, it would have been a violation of procedural fairness if the Delegate had prevented the Employer from adducing evidence relevant to its case and ruled that Mr. Stuart could not testify. For that reason, it does not matter whether or not Mr. Lupton clearly indicated

that Mr. Stuart would be a witness, because even if he did not, and later changed his mind about calling Mr. Stuart, there was no basis for the Delegate not to permit him to testify.

39. Of course, the issue before me is complicated by the fact that the Delegate did not in fact make any ruling one way or the other about whether Mr. Stuart could testify, and in the course of the discussion on this issue Mr. Stuart left the hearing (either on the instructions or with the approval of Mr. Baum). It certainly would have been preferable had the Employer insisted on receiving a ruling from the Delegate on the Respondent's objection to Mr. Stuart's testifying, before it either directed or allowed Mr. Stuart to leave the hearing. Nevertheless, in considering whether the Employer was denied procedural fairness I must bear in mind that the Employer was not represented by legal counsel at the hearing before the Delegate.

40. The Respondent has argued that "the Delegate did not disallow Mr. Lupton from calling witnesses, but instead Baum Publications Ltd. simply did not call Mr. Stuart." While this statement is, strictly speaking, factually correct, it does not take into account that the Employer's decision not to have Mr. Stuart testify did not occur in a vacuum. It occurred in the context of a discussion in which the Delegate had expressed "concerns" about whether Mr. Stuart could testify, and counsel for the Respondent had objected to Mr. Stuart's testifying. The Employer has stated that Mr. Stuart left because the Employer's representatives believed that the Delegate was not going to permit Mr. Stuart to testify. There is no evidence before me that causes me to doubt that this was the reason why Mr. Stuart left the hearing. Thus, this is a different case from *Kaloti, supra*, in which the principal of one party left a hearing, apparently to attend an appointment elsewhere, and later claimed that his inability to testify had been a denial of natural justice. In that case, the party had been represented by legal counsel, and there had been no objection to the witness' testifying; rather, the witness left because he found it convenient, even though he had been given ample notice of the hearing.

41. I find it curious that the Delegate, after having expressed reservations about whether Mr. Stuart could testify after having been present for the Respondent's testimony, was apparently prepared to allow Mr. Baum to testify even though he had likewise been present throughout the entire hearing, and had not been introduced as a witness. The Respondent argues that this demonstrates that the Delegate was prepared to hear all relevant evidence, and that the Employer simply decided not to call Mr. Stuart as a witness. But although the Delegate appears to have been clear in informing the Employer that Mr. Baum could testify, there is no evidence to indicate that he was equally clear about whether Mr. Stuart could testify. In fact, the evidence is to the contrary, because the Delegate did not make any ruling on this point, and never told the Employer that Mr. Stuart could testify. The Employer has stated that Mr. Baum would not have been able to give the same evidence as Mr. Stuart would have, and I have no reason to doubt that this is so. Thus, in my view, the Delegate's apparent willingness to permit Mr. Baum testify was not a corrective to his failure to make it clear to the Employer that Mr. Stuart could testify.

42. Although this case falls close to the line, I find that, in all the circumstances, the Delegate failed to observe the principles of natural justice in his conduct of the hearing. The Employer must bear some of the responsibility for what happened in the hearing because it released Mr. Stuart from the hearing without first obtaining a ruling from the Delegate on the Respondent's objection. However, as the decision maker presiding over the hearing, the Delegate was the person responsible for ensuring that each party received a fair hearing. This obligation is particularly important where, as is typically the case in hearings conducted by delegates (and by the Tribunal, for that matter) one or both parties is not represented by legal counsel. The Delegate expressed concerns about whether Mr. Stuart could testify, and the Respondent objected to Mr. Stuart's testifying. This discussion led the Employer to believe that the Delegate would not permit Mr. Stuart to testify, so Mr. Stuart left the hearing. As I stated above, in my view it would have been a breach of natural justice for the Delegate to have prevented the Employer

from having Mr. Stuart testify to give what would have been relevant evidence, when there had been no request for exclusion and no notice to the parties that all witnesses would be excluded. The Delegate has not said, and I cannot know, whether he would have permitted Mr. Stuart to testify had the Employer insisted on a ruling before Mr. Stuart left. In my respectful view, if the Delegate had been prepared to permit Mr. Stuart testify, he could, and should, have made this clear to the Employer at some point before Mr. Stuart had left, so that that Employer would have been in a position to make an informed decision about whether to have Mr. Stuart testify. The Delegate's failure to do so resulted in an unfair hearing, and is fatal to his finding that the Employer had not established that the Respondent was a manager.

What is the appropriate remedy?

43. In light of my finding that the Delegate failed to comply with the requirements of natural justice in making the Determination, I can either adjudicate the Respondent's complaint myself, or refer it back to the Director of Employment Standards for either a rehearing before the Delegate, or a new hearing before a different delegate of the Director.

44. I find that this is not an appropriate case for me to adjudicate on the merits. The breach of natural justice resulted in the Delegate's adjudicating the complaint without hearing the evidence of Mr. Stuart. I do not have that evidence before me, and since findings of credibility must be made, I would likely need to hold a full oral hearing myself. This option, in my view, is no more efficient than referring the matter back to the Director. Further, since the Director has chosen, under s. 76(3) of the *Act*, to adjudicate this complaint by way of a full oral hearing, the most appropriate remedy for a breach of natural justice at such a hearing is to refer the matter back to the Director to correct the breach.

45. That raises the question of whether the breach can be corrected by a rehearing before the Delegate, or requires an entirely new hearing before a different delegate of the Director of Employment Standards. The Tribunal considered this issue in *Director of Employment Standards (re: Ningfei Zhang)*, BC EST#RD635/01. The original Tribunal adjudicator (*Zhang*, BC EST #D130/01) had allowed an appeal from a determination that an employee was owed money for some of the hours he claimed to have worked. The adjudicator referred the matter back to the Director, and specifically ordered that the Director have the complaint reinvestigated by a delegate other than the delegate who had issued the original determination. The basis for this order was the adjudicator's conclusion that the delegate had made adverse findings about the complainant's credibility. The Director flouted the order and had the same delegate perform the reinvestigation, and report back to the Tribunal. The Tribunal adjudicator reiterated his order that the complaint be reinvestigated by a different delegate, and the Director sought reconsideration of that decision.

46. Although the reconsideration panel of the Tribunal was clearly troubled by the Director's conduct, it set aside the adjudicator's order requiring reinvestigation by a different delegate, and considered the basis upon which such an order could be made. It held that:

> As a matter of principle, the Director's discretion to deploy limited personnel resources as the Director considers appropriate, and based on information the Tribunal does not necessarily possess, ought only to be interfered with where an Adjudicator finds that the deployment of personnel would contravene a legal principle, such as the principle regarding bias.
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> [emphasis in original]

47. The reconsideration panel held that "it is clearly open to the Tribunal to refer a matter back to the Director with directions in circumstances where the Tribunal properly concludes that the delegate in question was subject to bias or a reasonable apprehension of bias." The panel went on to state:

> One species of reasonable apprehension of bias arises where a decision-maker is asked to conduct a quasi-judicial adjudication having already formed a negative view about a person's credibility. As wisely noted in *British Columbia Nurses' Union v. British Columbia Women's Hospital*, [1997] B.C.J. No. 855 (C.A.) at para. 14:
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> > It is, in my opinion, completely unrealistic to expect a decision maker to free his or her mind from a previous conclusion that someone is, in essence, lying, and to reach a new and entirely balanced conclusion free from that previous settled decision on the basis of new evidence which may do nothing more than add another piece to the total puzzle of credibility and fact finding.

48. The panel held that the decision whether to refer a matter back to the same decision maker depends on the nature of the allegations, the interests at stake, and the nature of the decision maker's function. The panel found significant differences between the case before it, and *British Columbia Nurses' Union, supra.* First, it held that the delegate had not made adverse findings about the complainant's credibility, but rather, had avoided the issue of credibility altogether by relying on available documentary evidence. Second, the panel placed weight on the fact that the process at issue was an investigation, rather than a "the kind of pure quasi-judicial role exercised by labour arbitrators in dismissal cases." The panel characterized the delegate's decision as an incomplete investigation based on an erroneous view of who bore the onus of proving how many hours the employee had worked, and held that no reasonable apprehension of bias arose from having the same delegate investigate the matter more fully.

49. In this case, by contrast, the Delegate made his decision by way of an adjudicative hearing, which falls into the same quasi-judicial category as the hearing considered in *British Columbia Nurses' Union, supra.* The interests at stake are also significant, given that what is at issue is whether the Employer owes the Respondent almost $16,000.00 in unpaid overtime and interest, in addition to being liable to pay a $500.00 administrative penalty.

50. Finally, the nature of the allegations, and the findings that the Delegate has already made, involve issues of credibility. What is in dispute in the Respondent's complaint is not just the legal characterization of facts, but the facts themselves, such as the extent to which the Respondent had autonomous decision-making power in her role as editor of two of the Employer's publications. In this case, unlike in *Director of Employment Standards, supra*, the Delegate has made findings on credibility. For example, the Respondent had testified that she had kept a record of the hours she worked on two calendars that she had left on the Employer's premises, and that the time records she provided to the Delegate were an attempt to reconstruct the records on those calendars. Mr. Buser, on the other hand, had testified that he had specifically asked the Respondent whether she kept a record of her overtime, and that she had said that she did not. He said that she had made this statement during a conversation in which she told him that she felt "ripped off" by the Employer, and would "take care of it" when she left. Mr. Buser testified that he had made a note of this conversation at the time because of concerns that the Respondent's departure could cause problems for the Employer. He stated that he could provide these notes, but that they did not refer to the Respondent's statement about not recording her overtime hours.

51. The Delegate rejected Mr. Buser's evidence:

> I prefer the evidence of Martyn to that of Buser on this issue. It makes no sense for Buser to make notes of a discussion he had with Martyn because it could lead to a problem for Baum and leave out of the notes the most important aspect – the overtime hours.

52. Clearly, the Delegate did not believe Mr. Buser's testimony about what the Respondent told him. It is true that this finding of credibility bears on the issue of how much the Employer owed the Respondent in unpaid overtime, and not on the threshold issue of whether Respondent's job duties made her a manager, but the Delegate generally preferred the evidence of the Respondent about her job duties to that of Mr. Buser.

53. I have no reason to believe that the Delegate has any actual bias as a result of his decision, or that he would not do his best to approach the evidence of Mr. Stuart with an open mind. Nevertheless, in my view, given that the Delegate has already, after holding a quasi-judicial adjudicative hearing, reached a conclusion about Mr. Buser's credibility on at least some points, weighed evidence, and found that the Respondent was not a manager, a reasonable apprehension of bias would arise if he were called upon to revisit his decision in light of new evidence. In the circumstances of this case, natural justice requires a new hearing before a different delegate of the Director of Employment Standards.

54. As a final note, the Employer has also raised the issue of whether the Delegate erred in law or failed to comply with the principles of natural justice in not considering alarm records as reliable evidence that contradicts the Respondent's reconstruction of the hours she worked. In light of my decision to refer the Respondent's complaint back to the Director for a new hearing before a different delegate, it is not necessary for me to decide this question. The issues of (1) whether these records are admissible, (2) if so, whether they have any probative value, with or without evidence of which alarm code belonged to the Respondent, and (3) who bears the onus of providing evidence to identify which alarm code belonged to the Respondent, are all matters to be decided by the new delegate, should either party seek to introduce the alarm records into evidence.

ORDER

55. I order, pursuant s. 115 of the *Act*, that the Determination be cancelled and that the Respondent's complaint be referred back to the Director of Employment Standards for a new hearing before a different delegate.

Matthew Westphal
Member
Employment Standards Tribunal