Employment Standards TRIBUNAL

An appeal

- by -

Alpha Neon Ltd.
("Alpha")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/81

DATE OF DECISION: October 4, 2011

DECISION

SUBMISSIONS

Ashley R. Ayliffe	counsel for Alpha Neon Ltd.
Adrian Tuck	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Alpha Neon Ltd. ("Alpha") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 17, 2011.

2. The Determination was made in respect of a complaint filed by Adrian Tuck ("Tuck"), who alleged he was owed wages. The Determination found that Alpha had contravened Part 3, sections 17 and 18 and Part 7, section 58 and Part 8, section 63 of the *Act*. The Director ordered Alpha to pay Tuck an amount which totalled $66,529.78, inclusive of wages and interest.

3. The Director also imposed administrative penalties on Alpha under Section 29(1) of the *Employment Standards Regulation* in the amount of $3000.00.

4. The total amount of the Determination is $69,529.78.

5. In this appeal, Alpha says the Director erred in law and failed to observe the principles of natural justice in making the Determination and seeks to have the Determination cancelled. On the Appeal Form, Alpha has also grounded this appeal in evidence coming available that was not available when the Determination was being made, but that ground has not been addressed in the initial appeal submission.

6. The Tribunal has discretion whether to hold an oral hearing on an appeal. While none of the parties has formally sought an oral hearing before the Tribunal, counsel for Alpha has suggested in its reply submission the Tribunal might allow Alpha's representative the opportunity to give "in-person evidence" to establish assertions of fact made in the appeal that are disputed by the Director. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing (see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*). There is a burden on an appellant to demonstrate there is a basis for the grounds of appeal relied on when challenging a Determination and, consistent with that burden, the appellant has a responsibility to ensure that any evidence and material thought to be relevant to the chosen grounds of appeal are provided in an acceptable form with the appeal. It is not a proper use of the appeal process for the Tribunal to hold oral hearings in order to allow an appellant to correct deficiencies in the appeal. We have decided no oral hearing will be held in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) "record", together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the "record".

ISSUE

7. The issues in this appeal are whether the Director erred in law or failed to comply with principles of natural justice in making the Determination. There is also an issue relating to whether the Tribunal will accept, and allow, the additional evidence that has been submitted with the appeal.

THE FACTS

8. The Determination provides the primary source for the facts on which this appeal will be addressed. Alpha has challenged some of the findings of fact made in the Determination. If those challenges are sustained, some of the findings made in the Determination will, obviously, be altered and the appeal will proceed on those facts. In outlining the facts of this case, I will note those areas where the factual findings made in the Determination are challenged by Alpha.

9. Alpha operates a neon signage and manufacturing business. Tuck was employed by Alpha as Production Manager and salesperson from March 13, 2006, until May 31, 2010. During that time, he earned a salary of $4000.00 a month plus commissions on sales. Alpha says there is no question that Tuck received no salary after May 19, 2010, and disputes whether the Director was correct in finding his salary in the period from March 19, 2010 to May 20, 2010 was $4000.00 a month paid on a bi-weekly basis.

10. The Director, applying section 66 of the *Act*, found Tuck's employment had been terminated as of May 31, 2010, and that he was entitled to length of service compensation. Alpha disputes this conclusion, not as a matter of fact so much as a matter of law, as there was no dispute on the facts that Alpha ceased to pay Tuck any salary after May 19, 2010, and ceased to pay him any wages at all after May 31, 2010.

11. Tuck filed his complaint with the Director on June 17, 2010. He claimed he was owed $122,019.10. This amount (the commission portion of which was not accepted in its entirety by the Director) included a claim for regular wages in the amount of $8,062.31 (net) and expenses in the amount of $16,763.60. The Determination clearly sets out these amounts were not disputed by Alpha. The claim for regular wages was directly referable to Tuck's claim for unpaid salary in the period March 1, 2010, to May 31, 2010. The Determination notes, on page R3, that Mr. Ziskos, who was representing Alpha during the complaint process, "confirmed both amounts [the salary claim and the expenses claim] are still owed to Mr. Tuck".

12. The Determination found that Alpha and Tuck agreed he was entitled to commissions in addition to his salary. The Determination describes the commission arrangement and found that some of the commissions claimed by Tuck were, applying section 80 of the *Act*, time barred. In considering the amount of commission wages owing to Tuck, the Director found the "unsigned agreement" between the parties provided that Tuck would be paid a 10%, or "full", commission on new deals and a commission rate to be determined at 3% or 5% for "in house and developed" accounts. The Director found commissions were, with the exception of some "pending approval sales", payable "once the commission sheet was approved or signed off by Mr. Ziskos". With respect to the "pending approval sales", the Director found these sales, some of which were made outside of the six month time frame referred to in section 80 but which remained pending according to the spreadsheets provided by Alpha and Tuck, should be included in Tuck's commission claim. Alpha disagrees with this finding, alleging it was made without evidence from either party.

13. The Determination found, based on an examination of commission sheets dating back to 2006, that Tuck's commissions, with few exceptions, were calculated at a rate of 10%. Based primarily on this evidence, the Director accepted the rate recorded in the various commission sheets posted to Tuck's account for the last

six months of his employment as the appropriate commission rate. Alpha disagrees with this finding, alleging that such finding ignores Alpha's "uncontroverted" evidence of what the commission arrangement was.

14. The Determination was issued following a complaint hearing and a supplemental process that addressed information that Alpha provided subsequent to the hearing and a question relating to the matter of commission entitlement on "pending approval sales".

15. The delegate of the Director who conducted the complaint hearing and issued the Determination had issued an earlier Determination against Alpha in a complaint by another employee. The Determination notes this circumstance was raised by that delegate with the parties at the outset of the complaint hearing and both agreed the previous involvement of that delegate in another matter involving Alpha did not compromise her ability to conduct a hearing on Tuck's complaint.

16. During the complaint hearing, the delegate accepted a written statement from the Office Manager for Alpha providing information concerning reports she prepared at the request of Mr. Ziskos relating to Tuck's outstanding accounts and information she received relating to communications between Mr. Ziskos and Tuck for a new employment agreement. Her statement included a discussion of Tuck's commission account, his expenses and his vacation pay. The statement also indicates she was unable to personally appear but would be available by phone if clarification of her statement was required.

17. The appeal includes documents that were not provided to the Director during the complaint process.

ARGUMENT AND ANALYSIS

18. The arguments of counsel for Alpha are separately framed under natural justice and errors in law headings. There is no reference in the initial appeal submission to a new evidence ground. I shall follow the format provided in the initial appeal submission in setting out the case for Alpha.

Natural Justice

19. Alpha raises two arguments in support of its natural justice ground. For ease of reference, when speaking to the natural justice issues which are specific to the delegate who conducted the complaint hearing and issued the Determination, I shall refer to this person as the "Delegate".

20. First, counsel for Alpha also says the Delegate breached principles of natural justice at the complaint hearing by ending Mr. Ziskos' cross examination of Tuck after approximately two minutes, thereby denying Mr. Ziskos an opportunity to fully question him.

21. Second, counsel for Alpha argues the involvement of the Delegate in conducting the complaint hearing gives rise to a reasonable apprehension of bias because of the same Delegate's involvement in making an earlier Determination against Alpha.

22. Briefly stated, the earlier Determination, issued in April 2008, involved a claim for unpaid commission wages by a former employee. One of the factual issues that needed to be decided was whether the former employee was terminated on January 15, 2007, as asserted by Mr. Ziskos, who was also representing Alpha in that matter, or some later date, as asserted by the former employee. At stake were commissions claimed by the former employee as payable to him in the period January 15, 2007, to the end of February 2007. In deciding that question, the Delegate, faced with conflicting evidence from Mr. Ziskos and the former employee, was

"not persuaded" by Mr. Ziskos' evidence that the former employee was terminated on January 15, 2007, and found it was "more likely" that the former employee was terminated sometime in February.

23. Counsel for Alpha does not allege actual bias, but says the Delegate's involvement in the earlier case, and given her findings against the credibility of Mr. Ziskos' evidence, satisfy the test for determining reasonable apprehension of bias as formulated in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at page 394, and in the Tribunal's decision *Dusty Investments Inc. dba Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98). Counsel argues the position of the Delegate in this case is no different than in several decisions of the Tribunal where a matter was referred back to a different delegate than the one issuing the Determination under appeal because that delegate had made findings of fact adverse to one of the parties and their continued involvement raised a reasonable apprehension of bias.

24. Alternatively, counsel says the Delegate should have allowed Mr. Ziskos more time to consider whether the Delegate should have conducted the hearing or provided him with the opportunity to consult legal counsel. Counsel submits the failure to do so was a breach of principles of natural justice.

Errors in Law

25. Counsel for Alpha has alleged several errors of law were made in the Determination.

26. Counsel says the Director erred by admitting the written statement provided by Alpha's office manager, arguing the statement was hearsay, it was never authenticated, the writer of the statement was not in attendance and no inquiry was made about whether she could attend, the written statement contains double hearsay and inaccuracies, it was prepared without the knowledge or approval of Alpha and it was wrongly understood by the delegate as having been prepared as evidence by Alpha.

27. Counsel for Alpha submits the Director erred in the findings of fact relating to the salary Tuck received up to May 20, 2010, saying the evidence was that Alpha stopped paying Tuck a salary on March 20, 2010, and the Director's finding fails to deal with that evidence and the communications between Alpha and Tuck that led to Alpha ceasing to pay Tuck a salary.

28. Counsel also argues the Director ignored Alpha's evidence regarding the commission structure and acted without any evidence in deciding there was commission owing on the accounts pending approval.

29. Counsel for Alpha submits the Director erred in deciding Tuck had been terminated by Alpha and was entitled to length of service compensation. Counsel says Tuck had adequate notice that Alpha was going to terminate the salary portion of his wage structure.

30. Counsel says Tuck was not entitled to the vacation pay awarded.

31. Finally, counsel for Alpha says the Director erred in finding a breach of section 17 of the *Act* and in imposing an administrative penalty for that contravention. Counsel says Tuck received reasonable notice by Alpha that his salary would not be paid.

Natural Justice

32. In reply, the Director says, firstly, that Mr. Ziskos' cross examination of Tuck was not ended after two minutes as alleged in the appeal submission. The Director notes there is no evidence from Mr. Ziskos

supporting this allegation and counsel, who was not present at the complaint hearing, is not in a position to make such an assertion.

33. In response to the bias argument, the Director makes several points. First, the parties were notified at the outset of the complaint hearing that the Delegate had a previous dealing with Mr. Ziskos and Alpha and inquired whether this dealing affected her ability to conduct the complaint hearing. Both parties agreed that it did not and the hearing proceeded on that basis. Second, the Director says that while the other matter involved a claim for commissions, the facts and circumstances were not the same as in this case. Finally, the Director says that assessing the evidence and applying the evidence in a manner favourable to one party is not demonstrative of bias against the other.

34. In response to the alternative argument relating to what counsel says was a breach of natural justice by failing to provide Mr. Ziskos some time to consider whether the Delegate should conduct the complaint hearing or to consult legal counsel on that matter, the Director says that Mr. Ziskos had approximately six weeks' notice of the complaint hearing, which provided ample opportunity to prepare or to seek legal advice. There was no request by Mr. Ziskos at any time for a delay or adjournment in order for him to consider the involvement of the Delegate or to seek legal advice.

Errors in Law

35. The Director contends there were no errors in law in making the Determination.

36. The Director says the assertions made by counsel for Alpha that the written statement from the Office Manager was hearsay and was prepared without the knowledge or consent of Alpha are not valid. Alpha had opportunity during the complaint hearing to challenge any of the evidence presented by Tuck and to provide their own evidence. In any event, Alpha was provided with a copy of the written statement well in advance of the complaint hearing date. No objection to the authenticity or content of the written statement was made by Alpha either prior to or at the complaint hearing; it was never an issue. Mr. Ziskos confirmed the Office Manager was on maternity leave. The statement that "all of the records provided for the hearing were prepared by Alpha" was not a finding by the Director, but a reference to evidence provided by Tuck. No issue or objection to that evidence was taken by Mr. Ziskos. Nor did Mr. Ziskos raise any issue about the content or authorship of the written statement. Most of the content of the written statement was affirmed by Tuck in his evidence.

37. In response to the argument concerning Tuck's salary, the Director says the argument made by Alpha attempts to misconstrue the findings made on Tuck's entitlement to salary and directly contradicts Alpha's evidence, which, in summary, was that Alpha agreed Tuck was entitled to receive his salary during the period under discussion but had not paid it due to Alpha's frustration with the lack of progress in negotiating a new commission structure.

38. In response to the matter of commission rates, the Director says the findings made in the Determination were based on the evidence that both parties submitted. The evidence indicated that while commissions could have been paid at 3%, 5% or 10%, depending on the type of sale made, Alpha consistently paid Tuck a commission at a rate of 10%. The Director says no mistake was made in accepting and applying what the parties had actually done under their agreement and in not accepting that all of the commission payments should be revisited and recalculated based on an application of the understanding reached in 2006 about what the commission structure would be.

39. On the matter of the commissions on the pending approval accounts, the Director says this issue was canvassed with Alpha subsequent to the complaint hearing. In an e-mail dated March 1, 2011, Mr. Ziskos was asked to provide his input on this issue, but failed to do so. The Director says this issue was decided on the available evidence.

40. In response to the arguments concerning length of service compensation, the Director says the facts supported a decision under section 66 of the *Act* that Tuck was terminated. There was no evidence that Tuck was provided the required written "working notice" that his job, as it existed prior to March 19, 2010, was coming to an end. The Director says that even if such notice had been provided, it would have been rendered of no effect as Tuck was allowed to continue working until May 20, 2010.

41. The Director says the submission alleging an error in law on vacation pay entitlement is not sufficiently delineated to address. The Director says the Determination is clear that vacation pay is owed by Alpha on the amounts awarded to Tuck. Nothing in the submission of counsel for Alpha demonstrates how that conclusion is wrong in law.

42. The Director notes the documents submitted with the appeal as tabs 21 through 28 were not before the Director when the Determination was being made and appear to have little relevance to the issues on appeal. Accordingly, says the Director, they do not appear to satisfy the Tribunal's test for admitting new documents on appeal.

43. Tuck has also filed two responses to the appeal. In the first, dated May 24, 2011, he raises some technical arguments relating to the filing of the appeal, which I need not address. In the second, filed June 6, 2011, he concurs with the response filed by the Director and also requests the Tribunal to review and correct the calculations done by the Director, based on the failure by the Director to attribute the commissions paid by Alpha in 2011 to the "oldest" commission owed rather than those which became payable within the section 80 recovery period.

44. I will comment on the last matter raised in Tuck's response in order to put it to rest at this stage. Tuck has filed no appeal of the Determination. Like Alpha, he is provided with a statutory time frame within which to appeal the Determination to the Tribunal. That time period expired on April 26, 2011. His effort to seek a review of the Determination represents an attempt to appeal the result and is considerably out of time. He has neither complied with the Tribunal's *Rules of Practice and Procedure* for filing an appeal nor requested an extension of the statutory time period for filing an appeal. It is improbable any such extension would be granted at this point. Accordingly, there is no appeal of the matter raised in Tuck's June 6, 2011, submission and it will not be addressed further in this decision.

45. Counsel for Alpha has filed a reply to the Director's response.

Natural Justice

46. Counsel says the blanket denial of the assertion relating to the ending of cross examination is not an answer to the allegations made, which in the absence of more positive response from the Delegate, should prevail.

47. Counsel says the Director has misapprehended the bias submissions as they relate to the 2008 Determination issued by the Delegate, noting it is not that findings of fact were made in that case against Mr. Ziskos, but that he was on the wrong side of an assessment of the credibility of evidence provided by him and the former employee in that case. Counsel submits the reasons provided by the Director in response to the alleged

failure by the Delegate to allow Mr. Ziskos an opportunity to consult legal counsel before conducting the complaint hearing are unreasonable and provides several reasons to support this view.

Errors in Law

48. Counsel for Alpha has replied to several elements of the Director's response on the arguments raised in the appeal submission. It suffices to say, at this stage, that counsel does not agree with the responses of the Director, viewing them to be, for the most part, unreasonable.

49. In reply to the Director's position on the new documents submitted with the appeal, counsel for Alpha acknowledges the documents are not "new" but should be treated as such because Alpha "was not given a reasonable opportunity to present them owing to the incomplete email correspondence subsequent to the hearing". Counsel says evidence is "effectively" unavailable at the time the Determination is made if the Director has failed to observe principles of natural justice or if it appears the failure to lead was a result of a misunderstanding between the delegate and the appellant and if such evidence is relevant. Counsel says the documents are relevant.

ANALYSIS

50. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

51. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied.

52. The Tribunal has established that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

53. An appeal to the Tribunal under Section 112 is not intended as an opportunity to resubmit the evidence and argument that was before the Director, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds.

54. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

55. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

56. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

57. The "new evidence" ground of appeal is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made: *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.

Natural Justice

58. I shall deal with each of the natural justice arguments in the order they have been presented by counsel for Alpha in the appeal submission.

59. The first alleges the Delegate breached principles of natural justice by ending Mr. Ziskos' cross examination of Tuck after two minutes and before he had an opportunity to fully question Tuck. This allegation is denied by the Delegate.

60. The burden is on Alpha to provide some evidence in support of its allegation of denial of natural justice. Not only has Alpha not established on any evidence that the Delegate did end Mr. Ziskos' cross examination as alleged, there is no evidence identifying how this was done, the circumstances in which it was done, what comments may have been made by the Delegate at the time of the alleged denial of natural justice and what, if any further matters Mr. Ziskos was prevented from exploring as a result of the alleged conduct by the Delegate. This evidence could have been provided by way of affidavit. The Tribunal has taken a broader view of additional evidence provided in the context of natural justice issues raised on appeal than with new evidence adduced in support of factual or legal challenges of the Determination on appeal: see for example *J.C. Creations (c.o.b. Heavenly Bodies Sport)*, BC EST # RD317/03 (Reconsideration of BC EST # D132/03).

61. Counsel for Alpha says the Delegate has simply denied the allegation, but it is not for the Delegate to disprove such an allegation, but for Alpha to prove it on clear and cogent evidence. Alpha has failed to prove the necessary evidence and has failed to meet the burden on them when alleging a breach of natural justice against a delegate. This argument fails.

62. Counsel for Alpha alleges a reasonable apprehension of bias. I do not accept the circumstances establish there was a reasonable apprehension of bias.

63. The test for finding a reasonable apprehension of bias is well known. In *R. v. R.D.S.,* [1997] 3 S.C.R. 484, the Supreme Court articulated the test as follows:

> When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. . . . It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. . . . The manner in which the test for bias should be applied was set out with great clarity by de Grandpre J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394:
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> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. . . ."
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> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold".

64. As noted in the appeal submission from Alpha, the Tribunal has adopted that test in several decisions, including *Dusty Investments Inc.*, *supra*. Counsel for Alpha has quoted from that decision in describing the test, but has omitted the reference in that decision to the need for the test to be met only on objective evidence that allows for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

65. An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

66. I return to *R. v. R.D.S., supra*, where the Supreme Court expressed the above concern in the following terms:

> Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the ***personal*** integrity of the judge, but the integrity of the entire administration of justice. (emphasis included)

67. Once again, the argument and allegation made by Alpha falters on the evidence. There is nothing in the evidence which indicates a "real likelihood or probability" that the delegate, having decided an earlier, and entirely unrelated, case against the facts asserted by Mr. Zoskis on behalf of Alpha, would for that reason be unable to impartially adjudicate Tuck's complaint on the facts that were presented in this case.

68. Counsel for Alpha relies on several decisions of the Tribunal where a matter was referred back for investigation and adjudication to a different delegate. This is not a case, however, where the Delegate was required to revisit the same set of facts and potentially reach different conclusions on those facts than were

made in an initial Determination. As previously indicated, this complaint offered entirely different circumstances than the one before the Delegate in 2007 and which led to the April 2008 Determination. While the claim in the earlier case was for commission wages, the issue of fact in dispute was the former employee's termination date.

69. Further, a consideration of a bias, or reasonable apprehension of bias, allegation against the Director, or one of his delegates, which is predominantly fact driven, must address and reflect the purposes of the legislation and the practical reality of the function of the Director, including his delegates, under the *Act*: see *Director of Employment Standards (Re Milan Holdings Inc.)*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). In that context, it should be noted that while the majority of the panel in the *Milan Holdings Inc.* case found there to be a reasonable apprehension of bias, they did so on the specific facts of that case, which they accepted as being summarized in the original decision as "the [delegate's] use of intemperate language - language that could give rise to a reasonable concern as to his neutrality."

70. It should also be noted the majority of the reconsideration panel agreed with the "major tenets" of the minority member's analysis of the legal principles applying to questions of reasonable apprehension of bias against the Director, or his delegates, including presumably his conclusion that:

> . . . the standards of "bias" which apply to determinations issued under s. 79(1) must take into account the practical reality of the antecedent investigative function and the overlap of investigative and decision-making functions over the course of many related matters, all of which is specifically authorized by the legislation.
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> . . . the *Act* specifically envisions the same delegate investigating and determining one or more related matters. Recognition of that specific overlap must be accompanied by recognition of the human reality that persons exercising these dual functions cannot be expected to function like courts or quasi-judicial tribunals. The standards for reasonable apprehension of bias must reflect that reality. Except where the case for bias is clear and strong, it is my opinion that candour and transparency on the part of a delegate should not taint his decision. (at pages 12-13)

71. The majority of the panel, and by implication the minority member, rejected the suggestion by the Director in *Milan* that the original decision meant a delegate "could not do repeat business" with an employer. Rather, the majority accepted the position of counsel for *Milan*, that the original decision:

> . . . stands for the wholly unremarkable proposition that a delegate . . . cannot prejudge, or appear to prejudge, the actions of a particular employer in regards to a particular act or set of circumstances on the basis of the delegate's preconceived notions about that employer, employers in that sector, or employers in general. Delegates are not expected to check their experience and common sense at the door of an investigation, along of course with an appreciation for the principles of procedural fairness and due process . . . . "

72. In my view, there is nothing in the facts or circumstances of this case which shows, to the degree of likelihood or probability necessary, the Delegate had pre-judged Tuck's complaint or had approached the complaint hearing with any preconceived notions about Mr. Ziskos or the validity of any evidence he might present. Counsel has not pointed to any intemperate language or established any conduct that might give rise to a legitimate concern about the Delegate's neutrality. The principles of reasonable apprehension of bias in the context of proceedings before the Director do not prevent a delegate from doing "repeat business" with an employer or its representatives. What defines a legitimate concern of a reasonable apprehension of bias is language or conduct by a delegate that, objectively viewed, make it likely or probable that the delegate approached the matters being considered with a biased state of mind.

73. The reasonable apprehension of bias argument fails.

74. I will also make some comment about the fact that the reasonable apprehension of bias allegation is raised for the first time in an appeal by legal counsel, notwithstanding Alpha was aware of the basis for the allegation at least since the complaint hearing. While I do not need to rely on these comments in making my decision on this allegation, they warrant stating. Mr. Ziskos knowingly and voluntarily acceded to the Delegate conducting the complaint hearing. No issue of bias was raised by him at any time during the process, notwithstanding he had more than six months to do so. He continued to deal with the Delegate over a considerable period following the complaint hearing, without exhibiting any apparent concern for potential bias. The conduct of Mr. Ziskos and Alpha in this regard echoes the kind of "lying in the weeds" conduct that has caused the Tribunal to reflect adversely on an appeal: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.

75. Finally, counsel for Alpha argues that, at a minimum, the Delegate should have allowed Mr. Ziskos the opportunity to seek legal counsel on the question raised by the Delegate at the outset of the complaint hearing. This suggestion misconstrues the role of a delegate in a complaint hearing and the potential problems that can be created where a delegate presiding over a complaint hearing assumes a role, in this case initiating an adjournment and possible delay in the complaint process, that might be objectively viewed as advocacy for one party or another (see *James Hubert D'Hondt operating D'Hondt Farms*, BC EST # RD021/05 (Reconsideration of BC EST # D144/04)). There is no indication that Mr. Ziskos was confused by the process or that the circumstances required the Delegate to be proactive in assisting either party. There is no merit to this argument and it is one, in any event, that does not raise any apparent natural justice concerns.

76. This ground of appeal is dismissed.

Errors in Law

77. Counsel says the Director erred in law by accepting and using the written statement from Alpha's Office Manager. I do not find this to be an error in law. The Director is not bound by the formal rules of evidence and may admit hearsay evidence. Indeed, even where the strict rules of evidence apply, hearsay evidence can be admitted, although in some circumstances it may not be accorded much weight. In this case, I do not see any basis for finding the written statement should not have been admitted or accorded weight. Alpha was provided with a copy of the written statement in advance of the complaint hearing, made no demand for the written statement to be authenticated, did not demand the attendance of the writer at the complaint hearing for cross examination and did not challenge the content of the written statement.

78. The appeal submission, which alleges the Director "relied heavily" on the written statement, does not provide any example of the Director relying on the contents of the written statement to determine key aspects of the complaint in the absence of any evidence other than that set out in the written statement. Having reviewed the material in the "record", the Determination and the written statement in some detail, I cannot find anything in the written statement, relating to key factual issues, that was not either agreed by the parties or found in one or other of the parties' evidence.

79. Even if the Director was mistaken about who had provided the written statement, that error did not affect the Director's ability to both receive and use the written statement. The material indicates Alpha was given the opportunity to know the case it had to meet, including being provided with the documents supporting that case prior to the complaint hearing, and was provided with the opportunity to meet the case, including the opportunity to challenge any adverse evidence. There is no indication in the "record" or in the Determination that Alpha contested any aspect of the written statement.

80. No error in law is shown in the Director's accepting and referring to the written statement provided by Alpha's Office Manager.

81. Counsel for Alpha says the Director erred in law in finding Tuck was entitled to a salary of $4,000.00 a month in the period from March 19, 2010, to May 20, 2010, and that Alpha contravened section 17 by failing to pay that salary. I find this argument does not raise a question of law at all, but a challenge to the delegate's findings of fact based on the evidence and the facts agreed by the parties. It warrants noting that nowhere in the material before the delegate did Alpha suggest it unilaterally altered Tuck's compensation package as of March 19, 2010, by eliminating the salary portion of his compensation. Alpha did say, and there was no dispute about this, that Tuck's salary was withheld (even though cheques were made) commencing March 19, 2010, in order to compel Tuck to renegotiate his wage structure, but never that it was ended. As well, in Mr. Ziskos' November 17, 2010, response to Tuck's claim, he says:

> Regarding the salary payment claim, for the five months of 2010, we feel that the payment he has already received was more than adequate according to our agreement.

82. Elsewhere in the response, Mr. Ziskos identified the wage portion of the agreement as $4,000.00 salary, benefits and commission. Nowhere in the response was there any indication the salary portion of the wage had been ended as of March 19, 2010. I cannot help but feel Alpha's position on unilaterally ending the salary portion of Tuck's wage in March 2010 is of recent origin. Even the May 17, 2010, memo from Mr. Ziskos to Mr. Tuck refers to the salary that was unpaid at that time as "arrears" and indicated at point 2 of the proposed terms of terminating his employment that, "Final salary to end May 31, 2010". Both of those statements are inconsistent with the assertion being made in the appeal submission that Tuck's salary had been ended March 19, 2010.

83. In any event, the Director had evidence on which the conclusion reached in the Determination could be based. The submission of Alpha does not demonstrate this finding was an error in law and this argument is dismissed.

84. Counsel for Alpha argues the Director erred in law by ignoring Alpha's evidence of the agreed commission structure and finding most of the commissions were payable at 10%. Based on an examination of the material in the "record" and the reasons for the Director's findings in the Determination, I find Alpha has not shown any error in law was made. The reasoning of the Director on this point, which is found at pages R7 and R8, is clearly linked to the evidence, which included not only evidence about what the commission agreement initially was, but evidence of the practice of the parties was over a period of more than four years and, more particularly, evidence of the commission rate that had been approved by Alpha on those sales falling within the section 80 claim period. The Director also found that Alpha, apparently notwithstanding the initial agreement, had acquiesced in the practice of paying Tuck at a commission rate of 10% on substantially all of his sales.

85. Counsel says the Director erred in law by finding Tuck was entitled to commission on "pending approval sales" without any evidence. I disagree that there was no evidence. An examination of the "record" and a reading of the Determination show there was evidence from Tuck on this aspect of his claim. There was no evidence from Alpha because they failed to respond in any meaningful way to the Director's inquiries on this aspect of the claim. The Director sent out a request to the parties by email on March 1, 2011, to provide a response on whether accounts designated as "pending approval" on the spreadsheets provided by both parties were to be included in the commission calculations. A follow up email, dated March 10, 2011, to Mr. Ziskos indicated no response had yet been received from him and set a deadline for response as March 14, 2011. On March 15, 2011, Mr. Ziskos emailed a response, which, in essence said, he would try to

dig up the available information and posited that the fact the sales were "under the pending approval column means that the contract is not conclusive". No other information concerning this question was received from Alpha. The opportunity was provided, but not taken. The only evidence on that matter was provided by Tuck. The Director was entitled to act on that evidence.

86. This argument is rejected.

87. Counsel says the Director erred in law in finding Tuck was terminated and entitled to compensation for length of service. No error in law has been shown in the decision of the Director finding Tuck was terminated and entitled to length of service compensation. A complete answer to this argument is found in the following excerpt from *Robert Craig*, BC EST # D052/10, applied to the facts of this case:

> . . . in *Isle Three Holdings Ltd., BC EST #D084/08* (confirmed on reconsideration, BC EST #RD124/08), the Tribunal provided an overview of the interpretation and operation of section 66 within the *Act*. Included in the analysis of that decision are the following comments, found at paras. 27-31:
>
> > Section 66 of the Act states:
> >
> > > *If a condition of employment is substantially altered, the director may determine that the employment has been terminated.*
> >
> > An accurate summary of the elements of this statutory provision is found in *Bogie and Bacall Hair Design Inc.*, BC EST #D062/08, at para 41:
> >
> > > Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There must be a finding that there is a change in the conditions of employment, that the change is substantial and that the change constitutes termination.
> >
> > Conditions of employment is defined in Section 1 of the *Act* to mean all matters and circumstances that in any way affect the employment relationship. The alteration must be substantial, or "sufficiently material that it could be described as being a fundamental change in the employment relationship": see *Helliker*, BC EST #D338/97, (Reconsideration of BC EST#D357/96). The focus of the examination in Section 66 is the employment relationship in place at the time of the alteration: *Helliker*, *supra*.
> >
> > The Tribunal has indicated that the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:
> >
> > a) the nature of the employment relationship;
> >
> > b) the conditions of employment;
> >
> > c) the alterations that have been made;
> >
> > d) the legitimate expectations of the parties; and
> >
> > e) whether there are any implied or express agreements or understandings.
> >
> > (see for example, *Helliker*, BC EST # D338/97; *A.J. Leisure Group Inc.*, BC EST # D036/98; *Task Force Building Services Inc.*, BC EST # D047/98; and *Big River Brewing Company Ltd.*, BC EST # D324/02)
> >
> > The language of section 66 gives the Director discretion to decide the employment of the employee has been terminated. The exercise of that discretion is reviewable by the Tribunal: *Jaeger*, BC EST # D244/99, *Jody L. Goudreau*, BC EST # D066/98; and *Takarabe and others*, BC EST # D160/98. As expressed in the last decision, the Director must exercise discretion for *bona fide* reasons, must not be arbitrary and must not base the decision on irrelevant factors.

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

88. The non-payment of wages has been found, and accepted, as an alteration going to the root of the employment relationship. The facts indisputably showed that Alpha held back Tuck's salary from March 19, 2010, and paid him no wages after May 19, 2010. On any test this is a substantial alteration of a condition of employment justifying a finding that an employee has been terminated.

89. This argument is dismissed.

90. On the basis of the foregoing, there is no need to address either the Director's finding on vacation pay entitlement or the administrative penalty imposed.

91. This ground of appeal is also dismissed.

92. I do not need to address in any detail the "new" evidence provided by Alpha with the appeal. The Tribunal is given discretion to accept or refuse new or additional evidence and has taken a relatively strict approach to the exercise of this discretion. This approach is consistent with the purpose and objective of ensuring quick, fair and efficient resolution of disputes arising under the *Act*. The Tribunal tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint or investigation process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.

93. I find this material does not satisfy the conditions considered by the Tribunal when deciding whether to accept new or additional evidence on an appeal. Principally, I find the proposed new evidence was reasonably available and could have been provided during the complaint process. I also find the material is not shown to be probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination. I find no merit in the suggestions that the failure of Alpha to provide this material to the Delegate during the complaint process was due to a failure on the part of the Delegate to observe principles of natural justice or that there was some unexplained "misunderstanding" between Mr. Ziskos and the Delegate.

94. Accordingly, this appeal is dismissed.

ORDER

95. Pursuant to section 115 of the *Act*, I order the Determination dated March 17, 2011, be confirmed in the amount of $69,529.78, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal