

An appeal

- by -

KBT Holdings Ltd., carrying on business
as Ricky's Country Restaurant
(“KBT”)

- 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.: 2016A/88

DATE OF DECISION: September 28, 2016

DECISION

SUBMISSIONS

Kevin Thomas on behalf of KBT Holdings Ltd., carrying on business as Ricky's Country Restaurant

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), KBT Holdings Ltd., carrying on business as Ricky's Country Restaurant ("KBT") has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 22, 2016.
2. The Determination concluded that KBT contravened parts 8, section 63 of the *Act* in respect of the employment of Dale Elder ("Mr. Elder") and ordered KBT to pay wages to Mr. Elder in the amount of \$3,791.62, which amount includes compensation for length of service as well as vacation pay and accrued interest. The Determination also levied an administrative penalty against KBT in the amount of \$500.00 for breach of section 63 of the *Act*. The total amount of the Determination is \$4,291.62.
3. KBT has filed this appeal on the ground that the Director failed to observe the principles of natural justice in making the Determination. KBT seeks to have the Determination cancelled.
4. In a letter dated July 15, 2016, the Tribunal informed Mr. Elder and the Director that it had received an appeal by KBT, dated July 11, 2016, and enclosed a copy of the same for informational purposes only. The Tribunal specifically advised Mr. Elder and the Director that no submissions were requested from them at this time. In the same correspondence, the Tribunal requested the Director to provide the section 112(5) record (the "Record") by July 29, 2016.
5. On July 19, 2016, the Tribunal received the Record from the Director and forwarded a copy of the same to KBT and afforded the latter an opportunity to object to its completeness by August 5, 2016.
6. On August 9, 2016, four days after the expiry of the deadline for submitting objections to the completeness of the Record, Kevin Thomas ("Mr. Thomas"), the director of KBT, made the following submissions:

We note in the submissions to the Tribunal that were forwarded to us, the only reason for the Adjudicators (sic) Determination are the findings forwarded to us by her letter of Determination in this case. As our appeal is based on the Determination as being "Not Credible" in light of the "Principals (sic) of Natural Justice" we feel there needs to be some further explanation. The reasoning (sic) being her decision to ask Mr. Elder, (after he admitted he had been reprimanded ten or twelve times in the last ten months and could offer no argument to his defense other than "I'm only here for the money") firstly, "Then why are we here?" and then at the conclusion of the hearing ask him "if he wished to recant his previous responses and testimony." We find it hard to understand how this approach to the Determination could be reasonable or credible without further explanation.
7. On August 10, 2016, the Tribunal disclosed Mr. Thomas' submission of August 9, 2016, to the Director and provided the Director the opportunity to provide a written response no later than August 24, 2016.
8. On August 11, 2016, the Director responded to Mr. Thomas' submissions stating that the Record submitted by the Director is the Record that was before the Director at the time the Determination was made against

KBT. The Director further submitted that KBT's objections to the Record "did not deal with the completeness of the Record". I agree with the Director's submissions. I find that KBT's objections to the completeness of the Record are in effect submissions on the merits of KBT's appeal and not really objections to the completeness of the Record. Therefore, I accept the Record as complete.

9. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will access this appeal based solely on the Reasons for the Determination (the "Reasons"), the appeal submissions of KBT, and my review of the Record that was before the Director when the Determination was made. Under section 114 of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any reason listed in subsection 114(1). If satisfied, the appeal, or part of it, has some presumptive merit and should not be dismissed under subsection 114(1), the Tribunal will invite Mr. Elder and the Director to file reply submissions on the appeal. KBT will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

10. The issue to be considered at this stage of the proceeding is whether all or part of the appeal should be dismissed under section 114 under the *Act*.

THE FACTS

11. The background information provided in the Reasons state that KBT operates a restaurant and was incorporated on September 26, 2014. Mr. Thomas is its sole director.
12. Mr. Elder was employed with KBT as a cook from March 11, 2006, to January 26, 2016, at the rate of pay of \$14.50 per hour.
13. On February 15, 2016, Mr. Elder filed a complaint under section 74 of the *Act* against KBT alleging that the latter contravened the *Act* by failing to pay him compensation for length of service.
14. On April 20, 2016, the Director conducted a complaint hearing. At the outset of the hearing, the parties agreed that, if the delegate of the Director made a finding that compensation for length of service was owing to Mr. Elder, the amount payable was eight (8) weeks wages plus 6% vacation pay thereon for a total of \$3,750.28. The parties also agreed that Mr. Elder worked normal hours during his last eight (8) weeks of employment.
15. At the hearing, KBT provided its "Anti-bullying and Harassment" policy booklet which was signed by Mr. Elder; a summary of the reasons for Mr. Elder's termination of employment; documents pertaining to Mr. Elder's verbal reprimands and a written warning; written statements from employees of KBT; and Mr. Elder's payroll records.
16. KBT argued that it had just cause to terminate the employment of Mr. Elder as a result of his inappropriate behaviour. In support of its position, KBT produced four witnesses, namely, Mr. Thomas; Kim Hok ("Ms. Hok"), kitchen manager; Travis Zacharias ("Mr. Zacharias"), cook; and Eva Ryane ("Ms. Ryane"), cook. KBT also produced a written statement of Sandeep, a kitchen employee, who was not available to provide oral testimony at the hearing.
17. On his part, Mr. Elder provided evidence on his own behalf, unaided by any witnesses.

18. The Reasons meticulously set out the evidence of the parties, which the delegate considered in making relevant findings of facts and, ultimately, his decision that KBT did not have just cause to terminate Mr. Elder's employment.
19. Under the heading "Findings and Analysis" in the Reasons, the delegate, by way of a preamble, sets out the law governing termination of employment for cause before delineating her findings and reasons for concluding that KBT did not have just cause to terminate Mr. Elder. In particular, she states that section 63 of the *Act* establishes an employer's liability to pay compensation for length of service when terminating an employer. However, the liability to pay compensation for length of service is discharged where, among other things, the employer can demonstrate that it had just cause for terminating the employee. She then notes that the burden of proof to establish just cause rests with the employer and that just cause, generally, is demonstrated in one of two ways. The first is where the employer demonstrates that the employee's behaviour is so serious that the employment relationship cannot reasonably be expected to continue. In this regard, she notes that a single incident of misconduct may be sufficient to establish just cause for termination but this was not such a case for the following reasons:

While the Employer argued that Mr. Elder's ongoing foul language in the kitchen, socializing with servers instead of completing his kitchen duties, and negative attitude over the course of a year amounted to serious misconduct, Mr. Thomas admittedly responded to those behaviours by giving Mr. Elder leeway in consideration for his length of service and his personal issues. Mr. Thomas exercised his leeway by issuing Mr. Elder warnings, and having a number of coaching and developmental conversations with him. Thus, I find that Mr. Elder's behaviour for which he was repeatedly warned and coached did not rise to the significance of serious misconduct.

20. The delegate then goes on to note that the employer may also establish just cause for a series of minor misconducts. However, for the employer to successfully do this, it must demonstrate with sufficient evidence that it has communicated a clear standard of performance to the employee; provided the employee with a reasonable period to meet that standard; clearly informed the employee that failure to meet the standard will result in the termination of his employment; and show that there was a final culminating incident evidencing the employee's continued inability or unwillingness to meet the employer's standards. In concluding that KBT failed to adduce cogent evidence to establish just cause under the criteria set out above in this case, the delegate examined the evidence of all witnesses of KBT starting with Ms. Hok's:

In addition to providing some very general descriptions of Mr. Elder's behavior at work, Ms. Hok described an incident of insubordination, when Mr. Elder allegedly challenged her to kiss his backside. She stated that the incident occurred "six or seven months" prior to the complaint hearing, which would have been October or November 2015. She further stated that, after the incident happened, she talked about it with other employees and only informed Mr. Thomas about it two months later. Though he opted not to cross-examine Ms. Hok, Mr. Elder denied ever speaking to her in this fashion. Even if the incident occurred in the way Ms. Hok described it, and even if she had no authority to discipline employees, Ms. Hok occupied a supervisory role of some significance in the restaurant, and her reluctance to take any action with respect to this alleged incident for a two month period indicates that she willingly and passively, acquiesced to the alleged behaviour. Mr. Thomas testified that he "spoke" to Mr. Elder about the alleged incident, and referenced the paperwork he submitted for the hearing as proof. I could find nothing in the document evidence from KBT Holdings which references that specific alleged incident. Therefore, I conclude that the Employer did not consider the incident to be significant or serious enough to warrant any form of timely discipline or even dismissal.

The only action Ms. Hok took with respect to all the negative alleged behaviour that she attributed to Mr. Elder was to have a "chat" with him one night in January 2016. I find that Ms. Hok acquiesced to Mr. Elder's alleged concerning behaviour on an ongoing basis, and regularly chose not to deal with it with any degree of timely meaningfulness.

21. With respect to the written statement produced by KBT from a kitchen employee –Sandeep- the delegate chose not to assign any weight as the delegate felt that “it could not be verified.”
22. With respect to the evidence of Mr. Zacharias and Ms. Ryane, the delegate noted that they each provided general observations of Mr. Elder’s behaviour and referenced undated incidents in their testimonies. The delegate also noted that while Mr. Elder decided not to cross-examine both these witnesses, he denied directing profane language towards any of his co-workers specifically and said that he would only swear negatively during the times of “hurried frustration” in the busy kitchen.
23. The delegate also noted that Mr. Zacharias said that using profane language in the restaurant’s kitchen was common among cooks and Mr. Thomas did not dispute this evidence. In the circumstances, the delegate found that using profane language in the kitchen at KBT’s restaurant was “part of the workplace culture among the cooks”.
24. Furthermore, the delegate also found that when Mr. Elder directed foul language towards his co-workers or he used foul language as a way of venting his general frustrations due to the busy nature of the restaurant kitchen, KBT, each time, responded in the same manner by admonishing Mr. Elder’s behaviour and it was only on July 5, 2015, that KBT put Mr. Elder on notice that his “continued successful employment” was contingent on him immediately conducting himself in a respectful manner in the restaurant’s kitchen. KBT followed up this warning with another on August 16, 2015, when it informed Mr. Elder that his “job would be in jeopardy”, if he did not perform his kitchen duties as expected. KBT’s Mr. Thomas, next, in September 2015, had a verbal discussion with Mr. Elder advising him of the need to work in a safe manner and not to bring his personal issues to work and to manage his temper. Subsequent to the last discussion, the delegate notes Mr. Elder committed to making immediate improvements to his behaviour and there was no documentary record of further issues or disciplinary discussions. While the delegate notes that Mr. Thomas testified that Mr. Elder’s “concerning behaviour” continued, the delegate found that Mr. Thomas reacted to it by giving Mr. Elder the benefit of additional coaching and developmental conversations. The delegate also notes that both Mr. Thomas and Ms. Hok, out of consideration for Mr. Elder’s frustrations and his several years of employment with KBT, swept issues pertaining to Mr. Elder under the rug. The delegate also found, subsequent to September 2015, Mr. Thomas did not view Mr. Elder’s conduct to be “severe enough to summarily dismiss him in a timely manner”; or to put him on notice that his employment would be terminated, if the undesirable behaviours continued; or to impose any specific period of notice within which he would have to improve his behaviour.
25. With respect to Mr. Elder’s text to Mr. Zacharias on January 24, 2016, which served as the proverbial straw that broke the camel’s back and lead Mr. Thomas or KBT to dismiss Mr. Elder for cause, the delegate notes in the Reasons that Mr. Zacharias failed to provide context for the text message in his testimony but accepts that Mr. Zacharias may have felt intimidated upon reading the text.
26. On his part, the delegate notes, Mr. Elder testified there was a conflict between him and Mr. Zacharias during the evening of January 23, 2016, because the latter failed to participate in clean-up duties. As a result, Mr. Elder stated that he sent a text message to Mr. Zacharias to let him know that he was upset and would be speaking to Mr. Thomas. The delegate found Mr. Elder’s explanation for the text message to be “reasonable” and since, according to Mr. Thomas’ undisputed testimony, Mr. Elder had no authority to schedule or discipline KBT’s employees, a plain reading of the text did not reveal a legitimate threat. Therefore, according to the delegate, the text “did not constitute a culminating incident of sufficient severity to trigger the termination of Mr. Elder’s employment.” In concluding that KBT did not have just cause to terminate Mr. Elder’s employment, the delegate stated:

To put an employee on notice in July 2015 that his employment will be terminated if he continues to use offensive language towards his co-workers, and to further put an employee on notice in August 2015 that his employment will be terminated if he continues to slough off his work duties but then to allow the alleged behaviour to continue for a period of five to six months before taking action to terminate the employee's employment, amounts to, in my view, tolerating the alleged behaviour to the point of acquiescence. Whenever Mr. Elder's behaviour became a concern to Mr. Thomas, Mr. Thomas reacted by giving Mr. Elder leeway because he wanted Mr. Elder to succeed in his job.

I find, therefore, that while KBT Holding was certainly entitled to terminate the employment of Mr. Elder, it did not have just cause to do so. By failing to pay compensation for length of service, KBT Holdings contravened section 63 of the *Act* on January 28, 2016, the date all outstanding wages were due to be paid to Mr. Elder.

SUBMISSIONS OF KBT

27. Mr. Thomas, in his written submissions on behalf of KBT, states that KBT provided substantial written evidence, and produced four witnesses to prove that KBT had sufficient basis to dismiss Mr. Elder for just cause. He states that Mr. Elder did not dispute that he had been reprimanded on at least twelve (12) separate occasions in the past ten (10) months for “wilful disregard for company rules and policy, breach of duty, serious misconduct by way of bullying and harassment, theft and unsafe behaviour in his position in the kitchen” and did not offer any offer any “defence” to KBT's evidence or allegations at the hearing.
28. Mr. Thomas then goes on to describe in his written submissions, in five numbered paragraphs, “things which took place during the hearing” that he found “troublesome”. He states:
1. Upon arrival for the hearing the adjudicator introduced herself and advised us that she had not even had a chance to review the file or any submissions prior to the hearing even though the documentation had been provided well within the required time as laid out in the rules of the Employment Standards Complaint Hearings letter to us.
 2. The adjudicator asked the complainant repeatedly if he had anything to offer in his defense of the testimony of the witnesses and the employer or the documentation presented with the complainant answering “No” on each occasion. (sic)
 3. When I asked the complainant if he felt I was justified in terminating his employment based on the evidence provided he answered “yes I would have done the same thing.”
 4. The adjudicator asked the complainant Dale Elder “Then why are we here at this hearing.” (sic) then asked him if we (sic) wanted to recant his admission to committing the violations put forth in the testimony of the witnesses and my submissions. The complainant then responded “Yes”.
 5. In the letter provided by the adjudicator on the reasons for her findings she indicated that I (Mr. Thomas) never had any issues with respect to Dale Elder showing up on time for work or his hours worked. Clearly this is an error. In fact we had testimony from for (sic) two other witnesses that he would falsify his hours worked by signing out long after he had left his position. Documentation on reprimands in the employee's file about this very subject were provided.
29. Mr. Thomas also disputes the delegate's conclusion that he “swept the issues under the rug” with respect to the behaviour of Mr. Elder. He states that this conclusion “does not hold water” in light of the reprimands that KBT issued to Mr. Elder during the ten (10) months prior to the termination of his employment. He contends that the delegate failed to consider the said reprimands in making the Determination.

30. He also states that the delegate appears to have relied on Ms. Hok's "non-action to discipline" Mr. Elder previously to conclude that Mr. Elder was now unjustly dismissed. He states that Ms. Hok did not have the authority to dismiss Mr. Elder or discipline him. Only he had that authority as the owner/manager.
31. Mr. Thomas further submits that Mr. Elder was given every opportunity to correct his behaviour but failed to do so. He admits that he is only "guilty of some compassion" in granting Mr. Elder more time than he should have to correct his behaviour. He states that the delegate's decision in this case is not credible in light of the evidence of KBT and its witnesses. He states that KBT decision not to dismiss Mr. Elder "swiftly enough" is "not a strong enough reason" for the delegate to "dismiss the evidence presented and the behaviour of [Mr. Elder]".
32. Lastly, Mr. Thomas states that the delegate breached the principles of natural justice in asking Mr. Elder, at the end of the hearing, if he "wanted to recant his testimony".

ANALYSIS

33. The grounds of appeal are statutorily limited to those found in section 112(1) of the *Act*, which provides:
- (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 being made.
34. The Tribunal has consistently indicated that the *Act* is intended to be an error correction process, with the burden being on the appellant to persuade the Tribunal that there is an error in the determination under, at least, one of the statutory grounds identified in section 112 of the *Act*.
35. Where, as here, the appellant is alleging a denial of natural justice, the appellant must provide some evidence of support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
36. 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 or conclusions of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
37. As indicated previously, KBT, in the Appeal Form, has checked off the natural justice ground of appeal. Mr. Thomas' written submissions, in support of KBT's appeal, also advance the natural justice ground of appeal. He states in the preamble to his submissions that "I do not feel the findings of the adjudicator in this case to be at all credible or to observe the Principals (sic) of Natural Justice." In the balance of his submissions, Mr. Thomas flushes out his argument in support of the said ground of appeal which I have summarized in paragraphs 27 to 32 above.
38. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal summarized the natural justice concerns that typically operate in context of the natural justice ground of appeal as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her

delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (See: *B.W.I. Business World Incorporated*, BC EST # D050/06)

39. I do not find Mr. Thomas or KBT to have provided sufficient or cogent evidence to establish, on a balance of probabilities, that the delegate breached the principles of natural justice in making the Determination. It is evident from the very first sentence in Mr. Thomas' submissions that KBT is challenging the delegate's findings or conclusions of fact and arguing that the delegate failed to consider the evidence of KBT including particularly KBT's witnesses. Having said this, I note that a failure by the delegate to consider relevant evidence is indeed a breach of natural justice and an error of law. In this respect, I find noteworthy the following analysis of the Tribunal in *Jennifer Oster*, BC EST # D120/08, describing the relationship between errors of fact, error of law and failure to observe principles of natural justice at paragraphs 42 – 45:
42. 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.
 43. A failure to observe principles of natural justice is a species of error of law: see *J.C. Creations operating as Heavenly Bodies Sport*, BC EST #RD317/03. An appellant alleging a failure to observe principles of natural justice, as Oster does here, must provide some objectively cogent evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.
 44. 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. In the *Britco Structures Ltd.* decision, the Tribunal concluded that findings of fact were reviewable as errors of law under the third and fourth categories of the *Gemex* test; that is, if they are based on no evidence or on a view of the facts which could not reasonably be entertained. The Tribunal also noted that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, they are inconsistent with and contradictory to the evidence or they are without any rational foundation.
 45. Further, in the *Britco Structures Ltd.* decision the Tribunal also considered the possibility that a failure by the Director to consider relevant evidence could constitute a breach of natural justice, which would be reviewable by the Tribunal under s. 1121(b). See also *Flora Faqiri*, BC EST #D107/05.
40. In this case, however, I am not persuaded the delegate made an error of law or failed to observe principles of natural justice or ignored or failed to consider the evidence of KBT and its witnesses. I also do not find that there is any evidence of error of law on the part of the delegate under any one of the definitions of “error of law” set out in *Gemex Developments Corp.*, *supra*. Therefore, I do not find any basis to interfere with the Determination.

41. I also find support for my decision above in the following very instructive comments of the Tribunal in *Jennifer Oster, supra*, at paragraph 46:

46. The Tribunal has considered the limitations of intervening in a Determination on the basis the Director “failed to consider relevant evidence”, as reflected in the following excerpt from the analysis in *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05, at paras. 40-43:

...there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700,

...any attempt to determine whether an administrative decision-maker has considered “all of the evidence” as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.

Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence. Although the Director and his delegates have a duty, both under the Act and at common law, to provide reasons for their determinations, “[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision”: *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also *Manuel D. Gutierrez*, BC EST #D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate’s reasons.

Third, even if an appellant establishes that a delegate failed to consider relevant evidence, it does not automatically follow that the delegate failed to observe the principles of natural justice in making the determination. In *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R.471 at 491-92, Lamer C.J. held that the rejection of relevant evidence is not automatically a breach of natural justice; rather, whether it constitutes a breach of natural justice depends on the impact of the rejection of the evidence on the fairness of the proceeding:

For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

Relevant factors include the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue. Although *Université du Québec à Trois-Rivières* involved a refusal to permit a party to adduce relevant evidence, this reasoning applies with equal force to the question of whether a failure to consider relevant evidence denied a party a fair hearing. Thus, whether a failure to consider relevant evidence amounts to a breach of the principles of natural justice will depend on the particular circumstances of each case.

42. In this case, neither KBT nor its director, Mr. Thomas, has persuaded me that the delegate failed to consider relevant evidence of KBT and its witnesses. I find the delegate to have considered all of the evidence of all of

the witnesses of KBT as well as the evidence of Mr. Elder and, on the totality of the evidence, arrived at a decision that *could reasonably be entertained*. While I may have been inclined to reach different conclusions of fact on certain matters in my analysis of the evidence presented by the parties that, however, is not a relevant consideration or a basis for me to vary or reverse the delegate's conclusions of fact. Having said this, based on the applicable tests for finding an error of law delineated in *Jennifer Oster, supra*, and in *Gemex, supra*, I am not persuaded that the delegate made any palpable or overriding error or reached a clearly wrong conclusion of fact or acted without any evidence or a review of evidence that could not reasonably be entertained. In these circumstances, I find KBT has failed to discharge the burden on it to establish that the delegate breached the principles of natural justice or erred in law in making the Determination.

43. I also find no merit in Mr. Thomas' allegation that when he or KBT attended at the hearing, the adjudicator "had not even had a chance to review the file or any submissions prior to the hearing". I have read the Reasons and reviewed the Record (which contains all of the materials before the delegate at the Hearing before the Determination was made), and I am convinced that the delegate properly considered all of the evidence presented by both parties before making the Determination.
44. I also do not find any merit in Mr. Thomas' submission that the delegate breached the principles of natural justice by allowing or asking Mr. Elder if he wanted to "recant his testimony at the end of the proceedings". I do not find the delegate asked Mr. Elder whether he wanted to recant his testimony. The delegate asked for clarification from Mr. Elder why he would file a complaint if he thought, in response to a question from Mr. Thomas, that the latter was justified in firing him. The delegate notes that Mr. Elder's response was "because I want my \$3,700.00. I think I was wrongfully dismissed." The delegate concluded that this response of Mr. Elder was effectively a reversal of his earlier statement that he felt Mr. Thomas was justified in terminating his employment. I find that it was open for the delegate to seek clarification from Mr. Elder with respect to his testimony. I also find Mr. Thomas' characterization of this episode as an invitation by the delegate to Mr. Elder to recant his earlier testimony to be unfair. In any event, I do not find anything turns on this in this appeal.
45. In the result, I find that KBT's appeal has no reasonable prospect of succeeding and I dismiss it under section 114(1)(f) of the *Act*.

ORDER

46. Pursuant to section 115 of the *Act*, I order the Determination, dated June 22, 2016, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal