Employment Standards TRIBUNAL

An appeal

\- by -

Jennifer Oster
(“Oster”)

\- 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.: 2008A/102

DATE OF DECISION: December 15, 2008

DECISION

SUBMISSIONS

Thomas F. Beasley	on behalf of Jennifer Oster
Russ Kronstrom	on behalf of Tight Line Ventures Ltd.
J.R. Dunne	on behalf of the Director

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Jennifer Oster ("Oster") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 22, 2008.

2. The Determination was made on a complaint filed by Oster against Tight Line Ventures Ltd. carrying on business as McDonald's Restaurant ("Ventures"). The complaint alleged Ventures had contravened Part 2, Section 8, Part 3, Sections 16 and 28, Part 4, Sections 33, 36 and 40, Part 8, Section 63 and Part 10, Section 83 and, as a consequence, Oster was owed wages and compensation relating to those contraventions.

3. The Director found that no wages were owed, but that Ventures had contravened Section 46 of the *Employment Standards Regulation* (the *"Regulations"*) by failing to produce employment records for Oster when required to do so by the Director.

4. The appeal asserts the Director erred in law. Four errors of law are identified in the appeal:

   a) The Determination was made on the basis of an incomplete record. Although Ventures had failed to produce payroll records as demanded by the Director, the Director made findings of fact against the complainant without a review of such records;

   b) The Director failed to issue subpoenas requested by Oster;

   c) The Director made findings of fact in the Determination that were not supported by first-hand testimony or documentary evidence; and

   d) The Director referred to facts in the Determination that were never presented at the complaint hearing.

5. The appeal also alleges the Director failed to observe principles of natural justice in making the Determination. Six such errors are identified in the appeal

   a) Insufficient weight was given to the written summary of evidence provided by Oster's representative, Sharon Charboneau, which had the effect of limiting her evidence to that evidence produced at the complaint hearing. The same limitation was not applied to Ventures' evidence;

b) The Director provided unjustifiably high weight to undocumented evidence provided by Ventures;

c) The Director failed to test the virility of the evidence presented at the hearing. No telephone calls were made to obtain evidence or documents from any parties mentioned at the hearing;

d) The Director failed to ensure the proper entry of evidence in the context of a hearing involving two inexperienced litigants;

e) The Director refused to issue subpoenas requested by Oster; and

f) The Director did not conduct an investigation into Oster's complaint, as was requested by her.

6. The specifics of these grounds of appeal will be addressed later in this decision. The appeal also seeks to submit evidence on the appeal that was not available at the time the Determination was made. In particular, Oster wants Ventures to provide the payroll records that were not produced to the Director. This ground also refers to material which is in the possession of the RCMP relating to an investigation of a possible theft of moneys from the McDonalds Restaurant in which Oster worked.

7. The appeal includes two affidavits filed in support of the grounds and the arguments made; one sworn by Oster and the other sworn by Sharon Charboneau. In part, these affidavits reflect on findings of fact made in the Determination.

8. The appeal asks that the findings of fact made in the Determination be reversed or, alternatively, that the matter be referred back to the Director for a new hearing requiring production of the complete records of Ventures, attendance of witnesses and a full evidentiary review.

9. Oster seeks an in-person hearing. The Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

10. The issue in this appeal is whether Oster has shown any reviewable errors in the Determination.

THE FACTS

11. The facts require some review since, as indicated above, Oster has filed two affidavits which challenge some of the factual findings and conclusions made in the Determination.

12. Ventures operates a McDonald's restaurant. In September 2007, Oster was employed at the restaurant as a team leader at a rate of $10.00 an hour. Her last day of work was September 14, 2007. Her employment status was one of the issues addressed in the Determination. Oster filed a complaint with the Director on September 24, 2007.

13. The complaint was prepared on her behalf by Sharon Charboneau. It was a comprehensive complaint raising several provisions of the *Act*. The covering letter with the complaint introduced Ms. Charboneau, and provided some background to the complaint.

14. Originally, Ms. Charboneau had been contacted by the mother of another employee who, along with Oster, had been accused of stealing money from the restaurant. She met with Oster and this other employee on August 31, 2007. On September 1, 2007, Ms. Charboneau contacted Russ Kronstrom, the owner of Ventures, and the restaurant, and advised him of her involvement on behalf of Oster. She asked to meet with him. He declined the invitation at that time, indicating a police investigation was underway, but indicated he would be pleased to meet once the investigation was concluded. Ms. Charboneau stated in the letter that Mr. Kronstrom, in response to a question from her, confirmed Oster was an employee and would remain so pending the conclusion of the police investigation.

15. On September 14, 2007, Oster was suspended without pay pending the outcome of the police investigation. The letter suspending her was hand written and signed by Mr. Kronstrom. The body of the letter states:

> Jennifer, as of Sept. 14, 2007, you will be suspended, without pay, until the completion of the RCMP investigation.
>
> With the safety of my crew and managers and complying with the RCMP request, this suspension will be reviewed after the RCMP investigation is complete and all findings are communicated.

16. Based on comments made in the Determination, it appears Ventures requested the RCMP to suspend the investigation a short time after Oster was suspended. On, or about, September 21, 2007, Anna Colona, Operations Supervisor for Ventures, attempted to contact Oster. On September 22, 2007, Ms. Charboneau sent a fax to Ms. Colona stating that any contact with Oster should be made through her and that she had advised Oster not to return any phone calls or agree to any meetings with Ms. Colona or Mr. Kronstrom pending the outcome of the Employment Standards and Human Rights complaints which had been filed by Oster.

17. The complaint set out the following claims:

- wages for dismissal without just cause;
- compensation for conduct by Ventures contravening Section 83(1) (a), (b) and (c) of the *Act*;
- compensation for conduct by Ventures contravening Section 8 of the *Act*;
- overtime wages;
- unpaid wages;
- minimum daily pay; and
- vacation pay.

18. An effort to resolve the complaint short of a Determination was unsuccessful. The Director decided to conduct an oral hearing on the claims made in the complaint. The file does not contain the notice of hearing, but based on a reference in the Determination it was issued on February 4, 2008. In a communication dated March 18, 2008, Ms. Charboneau, on behalf of Oster, provided the delegate who at that time had conduct of the file, with a list of those persons Oster intended to call as witnesses, provided some additional documents and requested summonses be issued for three individuals: Corporal T. Creed of the Sechelt RCMP Detachment Office, Mr Kronstrom and Steve Rutherford, Human Resources Manager for McDonald's Restaurants of Canada. The reason for each requested summons was provided in the communication.

19. In response to the request for summonses, the delegate asked for further information. In a communication sent to Ms. Charboneau on April 3, 2008, the delegate indicated there were concerns regarding the issuance of summonses. The communication spoke to the potential relevance of the evidence of Mr. Rutherford and an understanding that the information that was being sought from the other two witnesses would be available by telephone. The communication included the following:

> At this time, based on the availability of Mr. Kronstrom, Constable Hill and information you provided regarding Mr. Rutherford's testimony, the Adjudicator is not prepared to issue the summonses to the witnesses unless you can establish what relation the witness has to the events in question and confirm the willingness of Anne Parrish and Jennifer Oster to proceed with the serving of the summons and the fees.

20. There was no specific reply to the above statement, however in a communication sent to the same delegate on or about April 4, 2008, Ms. Charboneau asked the delegate to confirm whether a copy of the summonses would be provided to the complainant.

21. The Director conducted a complaint hearing on April 22, 2008. At the commencement of the hearing, Ms. Parrish, who represented Oster at the complaint hearing, alleged the Director had breached the requirements of natural justice by failing to conduct an investigation, by failing to call a pre-hearing conference and by refusing to comply with the request for summonses. Ms. Parrish also complained that a complete set of payroll records for Oster had not been provided. The Determination contains a response to these matters. Ms. Parrish made an allegation of bias, but apparently did not advance any substantive argument on that allegation. The Determination also notes it was clarified that Mr. Kronstrom and Constable Hill would be available by telephone but that neither Oster nor Ventures asked for either to be called to give testimony by telephone.

22. The Determination notes the receipt of the complaint information and details that were prepared and submitted to the Director on Oster's behalf by Ms. Charboneau, but also notes Ms. Charboneau did not testify (although present and available) and therefore her written summary was considered a "weaker or lesser form of evidence" and weighed accordingly.

23. The Director heard directly from only Oster and Ms. Colona. The Determination states that only information considered relevant is set out: see page 9 of the Determination.

24. The Determination lists nine issues that were in dispute:

1. Did Ventures falsely represent the availability of a position and the wage rate in contravention of Section 8 of the *Act*?
2. Did Ventures contravene Section 83 of the *Act* by refusing to employ or refusing to continue to employ Oster because of a complaint or investigation that may be or had been made under the *Act*?
3. Did Ventures contravene Section 66 of the *Act*?
4. Is Oster owed regular wages for September 9, 2007?
5. Is Oster owed overtime wages pursuant to Section 40 of the *Act*?
6. Did Oster receive 8 consecutive hours free from work pursuant to Section 36 of the *Act*?
7. Is Oster owed wages for benefits or cleaning of her uniform?
8. Is Oster owed minimum daily pay for attending meetings?
9. What is the status of Oster's employment? That is, is she still employed or has she been terminated and if she is terminated is she entitled to compensation for length of service?

25. The Determination considered each of the issues in turn and reached legal and factual conclusions on them.

ARGUMENT

26. Oster argues the Director committed several errors of law. These errors emanate primarily from the refusal of the Director to accede to the request by Oster for summonses to compel the attendance of Mr. Kronstrom, Mr. Rutherford and Constable Hill, along with documents in their possession, which, it is argued, resulted in a Determination that was based on an incomplete set of facts, in findings of fact that were not based on first-hand testimony or documentary evidence and in findings of fact that were not based on any evidence that was presented at the hearing. The thrust of this argument, which is fleshed out more in the final reply than in the initial submission, goes to three points.

27. First, even though Ventures failed to comply with the Director's demand for employer records, which would have provided the Director, and the complainant, with an accurate set of records from which to argue Oster's claim for unpaid wages, the Director made findings against Oster's claim in areas which would have been included in those records.

28. Second, the purpose for requesting the summonses was given to the delegate who had conduct of the file and the attendance of some of the witnesses by telephone would not bring the documents, nor the information contained in them, to the complaint hearing. I digress here to note that the request from Ms. Charboneau for summonses did include reference to production of certain documents For example, the summons for Corporal Creed included the request to have him, "make available Cstble Carmen Hill's file on the employer's charge of theft against Ms. Oster . . ."; the summons for Mr. Rutherford, "to make

available the corporate policies and procedures which apply to employees, . . . to provide job descriptions and pay schedules which would have applied to Ms. Oster . . ."; and the summons for Mr. Kronstrom, "to produce all records relating to Ms. Oster's employment history . . . evidence of theft . . . the results of any forensic audit of the missing money . . . the video referred to as "evidence" of theft . . . copies of all management rules and procedures practised in his operation and proof that these rules were made known to all employees . . ."

29. Third, the Director made findings of fact on unsupported, or no, evidence. Oster says the representative of Ventures gave evidence about documents, policies and records that were neither produced by Ventures nor requested by the Director. The affidavits of Oster and Ms. Charboneau list evidence that was not before the hearing but was considered by the Director and findings that were made by the Director that were not based on any evidence presented at the complaint hearing. The following matters are identified in those affidavits:

- evidence relating to employer policies and Oster's knowledge of the same, particularly any policy relating to cash handling or the presence of non-employees in the restaurant after closing;
- evidence relating to any theft;
- evidence relating to Kevin Parrish, as described at pages 4-5[1] of the Determination;
- evidence relating to a written statement from Ms. Colona;
- evidence relating to Oster's cash drawer being balanced before she went to the washroom;
- evidence relating to any request for Oster to take a polygraph;
- evidence relating to the exact nature of a telephone discussion between Ms. Charboneau and Ms. Colona;
- evidence relating to a cash shortages or the amounts of any such shortages; and
- evidence relating to Oster being asked to return to work.

30. Oster argues the Director failed to observe principles of natural justice in making the Determination in the way some of the material submitted at the complaint hearing was treated. Oster specifically mentions the failure of the Director to rely on the complaint submission, which both initiated the complaint process and provided the initial evidentiary basis for the alleged contraventions of the *Act*. Oster also argues that decisions made by the Director in the handling of the file, including decisions made by the delegate who had initial conduct of the file, breached principles of natural justice because they unfairly limited the ability of Oster to present her case.

31. Oster also contends the Director gave undue weight to assertions made by the representative of Ventures that were unsupported by any evidence presented, including accusations of theft and breach of policy and refusal to take a polygraph test. Oster says the Director ignored inconsistencies between some of the evidence and the oral evidence given by the representative of Ventures.

[1] This reference appears at pages 9-10 of the Determination which was provided with the Appeal.

32. Oster also contends that the manner in which the Director conducted the complaint hearing gives rise to concerns about its fairness, citing the decision of the Director to press on with the hearing when it was apparent that Ventures was grounding aspects of its case on documentary evidence that should have been provided by Ventures or whose production was requested by Oster and refused by the Director.

33. The response of the Director to these arguments is very general. The Director says the Determination contains an accurate record of the hearing; that Oster fully participated in the complaint process, including the complaint hearing, and that she was given a full opportunity to present her case. The Director says all relevant evidence presented at the hearing was considered in making the Determination. The Director submits the affidavit material submitted with the appeal is simply an attempt by Oster to "enhance the evidence given at the hearing or re-argue the case".

34. In particular, the Director says Ms. Charboneau's affidavit is an attempt to add new arguments based on evidence that was either available at the hearing or could have been provided at the hearing and to give her affidavit any consideration "would be extremely prejudicial to the hearing process".

35. In response to the argument that the failure to conduct an investigation of the complaint, instead of, or in addition to, a complaint hearing, the Director says that is a matter of choice for the Director and in the circumstances of this case, the Director decided to have only a complaint hearing. The Director notes that Ms. Charboneau, in a January 30, 2008 e-mail to the delegate agreed on behalf of Oster that the matter should proceed to a complaint hearing.

36. The Director says the response to the argument relating to the issuance of summonses is provided in the Determination. In that respect, the Determination says the following:

> As the adjudicator on the file I did not refuse the requests for the summonses. Rather, I had the Branch Delegate who was acting as conduct officer on the file, request further information on the summons requests prior to authorizing their issuance. Specifically, I requested relevance of the above individual's [sic] testimony, whether this information could be obtained without the use of a summons, and whether evidence from these individuals could be obtained over the telephone. I also wanted clarification as to whether Ms. Oster was prepared to serve the summons and provided the necessary conduct money. Ms. Oster did not provide the requested information.

37. The Director specifically comments on the RCMP file and the surveillance video, saying that matter was also addressed in the Determination and adding:

> . . . the surveillance video was not entered into evidence by the employer and its content was not relied on by the employer for any purpose. The employer's testimony regarding this video was that its contents gave them reason to be concerned and they contacted the RCMP.

38. Ventures has filed a response to the appeal which does no more than deny contravening the *Act* and agree with the Determination.

39. The final reply submitted on behalf of Oster challenges several areas of the Director's response and submits it is, for the most part, not responsive to the grounds of appeal.

ANALYSIS

40. 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.*

41. The Tribunal has consistently indicated 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.

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. 112(1) (b). See also *Flora Faqiri*, BC EST #D107/05.

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.

47. I will approach the appeal by considering the issues that were identified by the Director in the Determination and the findings and reasoning relating to each.

48. Before addressing the Determination, I will address the argument made by the Director concerning the affidavit material. The Director says this material is an attempt to re-argue the case, introduce new argument or seek a re-weighing of the evidence and, as such, does not meet the test for new evidence. There is no doubt that some parts of the affidavits are accurately characterized as seeking to re-frame the evidence and re-argue aspects of Oster's claim. However, the affidavits do speak substantially to the grounds on which this appeal is based and the arguments made in support of those grounds. The type of objection being raised by the director here was considered in the *J.C. Creations* decision, where the Tribunal said, at p. 14:

> . . . it is essential to the purposes of the legislation that parties who have been denied a chance to be heard not be prevented from proving a breach of procedural fairness on appeal by not being able to submit the relevant evidence in support. To not allow a party to do so would put them in a "catch 22" situation, and would be inconsistent with the purpose of the Act to provide fair as well as efficient procedures: Section 2(d) of the Act. Adducing evidence to show a breach of procedural fairness is a very different matter from adducing evidence for the first time on appeal for the purpose of having the truth of the evidence accepted "on the merits".
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> This distinction, which reinforces the fairness requirement in the Act, is consistent with elementary administrative law principles. Even on judicial review, courts allow "new evidence" to be tendered to show jurisdictional error such as a breach of procedural fairness: Evans Forest Products Ltd. v. British Columbia (Chief Forester), [1995] B.C.J. No. 729 (S.C.). Brown and Evans, in Judicial Review of Administrative Action in Canada (2003) at pp. 6-56, 57, accurately summarize the law as follows:
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> > . . . any evidence that relates to an excess of jurisdiction is admissible, as is evidence in support of the allegation that there was "no evidence" in support of a material finding of fact made by an administrative tribunal, evidence establishing an insufficient basis for the administrative action taken, or evidence of a breach of a duty of fairness . . .
>
> Breaches of procedural fairness are often not apparent on the record. Courts have long recognized that the traditionally restrictive "fresh evidence" principles cannot apply to evidence adduced to demonstrate a breach of procedural fairness. Justice and necessity require that evidence concerning such alleged breaches can be received so that procedural fairness allegations can be meaningfully raised and addressed.

49. It follows that the affidavit material, which clearly goes to allegations of findings of fact made on no evidence and natural justice (procedural fairness) considerations, will be received and considered in this appeal.

50. As indicated above, the Director identified and considered nine issues in the Determination.

1. *Did Ventures falsely represent the availability of a position and the wage rate in contravention of Section 8 of the Act?*

51. The conclusion reached by the Director on this issue is based on an application of the law relating to Section 8. The Director applied a well established legal conclusion limiting the application of Section 8 to pre-hiring practices and concluded Oster's claim fell outside the scope of Section 8 because it related to an alleged promise of a promotion and wage increase that did not occur at the pre-hiring stage. The Determination says the conclusion on the Section 8 claim is based on Oster's evidence and argument.

Nothing in the appeal takes any issue with the factual foundation for this conclusion or with the correctness of the Director's application of the legal conclusion.

52. Oster has not shown any error in the Director's conclusion on the Section 8 claim.

2. Did Ventures contravene Section 83 of the Act by refusing to employ or refusing to continue to employ Oster because of a complaint or investigation that may be or had been made under the Act?

53. The conclusion reached by the Director on this issue is based on an assessment of the evidence applied to the obligation on a person raising a contravention of Section 83 of the *Act* to show that the employer committed any of the prohibited actions found in that provision and the actions of the employer were motivated at least in part, *"because a complaint . . . may be or has been made under this Act"*. In other words, there must be "some evidence" that the actions were motivated by the employee's direct or potential involvement under the *Act*: *Burnaby Select Taxi Ltd. and Zolton Kiss*, BC EST #091/96.

54. The reasoning of the Director proceeds from the conclusion that "the earliest Ventures would have been aware that a complaint had been filed or was being filed was September 22, 2007 . . . Ms. Oster did not file a complaint until after her suspension". The Director makes reference to the telephone call from Ms. Charboneau to Mr. Kronstrom on September 1, 2007 and states, "there is no objective evidence to demonstrate that Ventures regarded this event in a negative manner such that it was considered in the decision to suspend Ms. Oster from her employment".

55. In regard to the decision to suspend Ms. Oster "until the completion of the RCMP investigation", the following evidence is set out in the Determination:

> ". . . on September 14, 2007 she [Oster] was sat down in front of customers in the restaurant by Mr. Kronstrom and Ms. Colona and was given a written suspension notice to read and then sign." (page 10)
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> ". . . she [Oster] was told [by Ms. Colona] that she would be let go if she did not fill out the questionnaire". (page 10)
>
> "Ms. Colona states that video surveillance cameras had been installed in the restaurant in July 2007 so she reviewed the videos and noted some suspicious activity. Ms. Colona states that the safety and security procedures for the restaurant require that once the doors are closed only employees are allowed in the restaurant. Ms. Colona states the video camera showed that this procedure was not being followed. Ms. Colona states that as Ms. Oster was not following the procedure correctly she needed to discuss the procedure with her. She states that at this meeting Ms. Oster was in tears. Ms Colona states that Ms. Oster offered to pay back the money and that she would also try to get Brad to repay[2]". (page 12)
>
> ". . . in her [Ms. Colona's] discussion with the RCMP they suggested a written questionnaire and polygraph tests. Ms. Colona states that Ms. Oster refused the polygraph test. Ms. Colona states that she advised Ms. Oster that if she refused the polygraph test she would be suspended[3]". (page 12)

[2] This assertion by Ms. Colona was denied by Oster in her evidence.
[3] Oster denies refusing any polygraph test. She says that she was not asked to take a polygraph test.

> "Ms. Colona states that subsequent to the issuance of the suspension notice she called Ms. Oster on September 21, 2007 and left a message for her to come in to meet with her as Ventures had decided to drop the RCMP investigation". (page 12)
>
> ". . . dealing with the questionnaire, Ms. Colona stated she did not threaten Ms. Oster at any time and that Ms. Oster filled out the questionnaire as she wanted to be involved in the process of eliminating her as a suspect". (page 13)
>
> "With regard to the suspension, Ms. Colona stated under cross examination the RCMP had advised her that Ventures could suspend an employee without pay during the investigation and Mr. Kronstrom as the owner of the restaurant had the authority to do this. Ms. Colona also confirmed this was a serious matter and the reason for the suspension was for the safety and security of all employees. Ms. Colona further responded under cross examination that employees were not to be in the restaurant alone and they were not to leave money out on the counter". (page 13)

56. The following conclusions and comments regarding the suspension are found in the "Findings and Analysis" section of the Determination:

> ". . . this is not a case where the employer has asserted they had just cause for termination". (page 15)
>
> "Ms. Oster's testimony was that she was confronted by Ms. Colona on August 27, 2007 with regard to the cash shortages at the restaurant". (page 15)
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> ". . . Ms. Oster was suspended from Ventures on September 14, 2007, pending an RCMP investigation. On September 21, 2007, Ms. Colona attempted to contact Ms. Oster to request a meeting. . . . On September 22, 2007, Ms. Colona received a fax message from Ms. Charboneau. . . .
>
> Ventures made no further attempt to contact Ms. Oster or Ms. Charboneau after receiving this fax message". (page 16)
>
> "I find that there were cash shortages at the restaurant and these shortages occurred on Ms. Oster's shift". (page 16)
>
> "Ventures has the right to investigate cash shortages at the restaurant and has the right to discipline employees for infractions relating to cash handling policies. Ventures was conducting an investigation into the cash shortages and as part of this investigation they suspended Ms. Oster on September 14, 2007 pending the outcome of the RCMP investigation". (page 16)
>
> "The undisputed facts are that there were cash shortages and that Ventures was investigating these shortages through an RCMP investigation. Ms. Colona gave evidence under cross examination that the reasons for Ms. Oster's suspension were for the safety and security of staff. Ms. Colona also stated that the RCMP had advised her that she could suspend someone. . . . This is not a case where Ventures is fabricating an issue or being punitive, rather there was a very real issue of cash shortages that could warrant discipline. I make no findings as to whether theft actually occurred or whether Ms. Oster had any involvement in theft activity. However, I find that although the decision to discipline may be a unilateral decision on the part of Ventures, I find that the discipline given to Ms. Oster was not a vague attempt by Ventures to unilaterally withdraw work from Ms. Oster or to place her in a temporary layoff and as such is not a substantial alteration to the terms and conditions of employment". (page 19)
>
> ". . . I find that the failure to return Ms. Oster to work was not a unilateral decision made by Ventures. That is, Ms. Oster's employment status was partially her own doing . . .". (page 20)

57. The affidavits of Oster and Ms. Charboneau add the following evidence to this aspect of the appeal:

> "These pieces of evidence, which were not presented at the Hearing, yet are referred to in the Determination, include, but are limited to, the following:
>
> a) Evidence of a cash shortage;
>
> b) Any written policy regarding cash handling or the presence of non-workers in the restaurant after closing time; . . .
>
> d) Any refusal by me to take a polygraph; and
>
> e) The employer requesting me to return to work." (Oster affidavit, para. 7)
>
> "Although I was suspended by [Ventures] pending the outcome of the RCMP investigation, I was never questioned or involved in the RCMP investigation". (Oster affidavit, para. 14)
>
> "I expressly deny that allegation [that I refused to take a polygraph test]". (Oster affidavit, para. 25)
>
> ". . . the delegate refers to Ms. Colona's evidence regarding the restaurant's policy that once the restaurant doors were closed, only employees were allowed in the restaurant. To my recollection, that was not in evidence at the Hearing. The Policy was not tendered in evidence at the hearing". (Oster affidavit, para. 31)
>
> "The employer also stated that I was suspended for contravening safety policies by counting cash in front of a window. Again this was not questioned by the Delegate". (Oster affidavit, para. 32)
>
> "The Delegate made no request to see a copy of these policies, nor did the delegate investigate whether or not I had been informed of these policies". (Oster affidavit, para. 33; this same assertion is in the Charboneau affidavit, para. 38)
>
> "On September 1, 2007, I contacted Russ Kronstrum [sic], the owner of [Ventures], to request a meeting to discuss employment standards issues, and [Oster's] alleged misconduct involving an alleged theft of money from [Ventures]. I explained my background and what appeared to be employment standards concerns . . .". (Charboneau affidavit, para. 5)
>
> "There was no evidence before the Delegate about:
>
> a) Employer policies and Oster's knowledge of the same;
>
> b) Evidence of any theft; . . .
>
> e) Ms. Oster's cash drawer being balanced before she went to the washroom;
>
> f) Any request to Oster for a polygraph;" (Charboneau affidavit, para. 39)
>
> "The videotape . . . was not presented as evidence at the hearing". (Charboneau affidavit, para. 43)

58. Based on a review of all of the Determination, the appeal and the submissions relating to the appeal, I accept Oster's argument that the Director made findings of fact on this issue without any valid objective evidence. In particular, I find the Director reached conclusions about the existence of employer policies and the factual basis for the suspension of Oster on September 14, 2007 that were not justified or grounded on the evidence provided at the complaint hearing. As was noted in the April 3, 2007 e-mail to

Ms. Charboneau from the delegate who had conduct of the file and was dealing with the requests for summonses, "the onus is on the employer to prove it had just cause to terminate". I will have more to say about the September 14 suspension later in this decision, but it is absolutely clear that the suspension was viewed, by Ventures and by the Director, as disciplinary and justified: see above and page 19 of the Determination. In that context, proof offered by Ventures to establish the factual basis for the suspension, as a disciplinary matter, fell well below what is required to show just cause. As I have already said, the conclusions of the Director on the reasons for the suspension were made without any valid objective evidence. I agree completely with the argument made on behalf of Oster that it is unreasonable to accept an employee may be suspended for "the safety and security" of other employees without requiring the employer to show the alleged misconduct, demonstrate that the "safety and security" of other employees has been or may be compromised by the conduct of the employee and that the employee may be suspended for such conduct[4]. The reality is, and it holds particularly true in the circumstances of the suspension issued to Oster, that a lengthy or indefinite suspension is a *de facto* dismissal since an employee is unlikely to be able to wait out a lengthy or indefinite suspension and will find other employment.

59. The evidence required to allow the Director to make findings on the suspension might have been at the complaint hearing if the summonses requested by Ms. Charboneau had been issued (and I will also have more to say on this aspect of the appeal later in this decision), but it was denied by the Director. Ms. Charboneau requested summonses to have both the video evidence and the employer's policies and procedures brought to the complaint hearing. The Director may not refuse a request from a party in the complaint process for an order to have information produced, deny that request on the grounds of relevance and then reach conclusions about what that evidence might have been, not only giving it relevance, but making it determinative of a claim under the *Act*. It is, as Oster submits, prejudicial and unfair.

60. However, having said that, I am unable to find this conclusion assists Oster in respect of her claim under Section 83 for the September 14, 2007 suspension or for any matter preceding that date. That is because, unlike a termination under section 63 of the *Act*, Section 83 does not require that the prohibited actions by an employer *vis* an employee be grounded in just cause, reasonableness or even correctness. It will be helpful to set out the full text of that provision:

> *83. (1) An employer must not*
>
> *(a) refuse to employ or refuse to continue to employ a person,*
>
> *(b) threaten to dismiss or otherwise threaten a person,*
>
> *(c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment,*
>
> *(d) intimidate or coerce or impose a monetary or other penalty on a person,*
>
> *because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.*

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[4] I also note here that there was some inconsistency in the position of the employer on the suspension, where the Determination attributes evidence to Ms. Colona which referred to an alleged refusal by Oster, on or about September 11, 2007, to take a polygraph test and the threat by Ms. Colona that such a refusal would result in a suspension. I must presume the director found this evidence to be relevant in some way, since the Determination states only evidence "relevant to [the] determination" is set out.

61. Section 83 prohibits an employer from taking any of the listed actions against an employee only if those prohibited actions are motivated in whole or in part by the employee's direct or potential involvement under the *Act*. That is not to say the described conduct may not run afoul of other provisions of the *Act*, but Section 83 requires proof of both prohibited conduct and improper motivation. The employee has the burden of demonstrating improper motive. This requirement is grounded in considerations of fairness and efficiency: see *Gordon Cameron*, BC EST #RD100/06. As the Director indicated in the Determination, while one might speculate about the motivation of Ventures in suspending Oster on September 14, there is no direct evidence of improper motivation and, while there is some circumstantial evidence, I cannot disagree that the weight of the totality of the evidence does not tip the balance in favour of finding a contravention of Section 83 for that suspension.

62. On the other hand, the Determination is completely silent on the Section 83 issue in the context of the decision of Ventures to not return Oster to active employment following their decision to "drop the RCMP investigation". It is apparent on the face of the Determination that the Director was alert to the circumstances which occurred on September 21 and 22, 2007 and the consequences to Oster.

63. The obvious purpose and objective of Section 83 of the *Act* is to protect employees from certain types of employer conduct that might have a chilling effect on an employee's right to the minimum employment standards. That is an important benefit to employees. An assessment of the evidence must be critical and consistent with the purposes of the legislation and the objectives of the *Act*.

64. Seldom will an employer admit to any improper motivation and, most probably, will deny such motivation. The true motivation of the employer will typically have to be determined by reference to circumstantial evidence. However, the fact that the evidence is circumstantial does not mean that the allegations cannot be proved. Circumstantial evidence will be enough to prove allegations if it can be said that the evidence is not subject to any other rational explanation. In other words, if on the whole of the evidence the only likely explanation is that Ventures continued their indefinite suspension of Oster because she had made a complaint under the *Act*, that will be enough to show a contravention of Section 83.

65. The obvious, and undisputed, facts are these: on September 14, Oster was suspended; the suspension note cited the "safety" of other staff and managers, "and complying with the RCMP request", even though it appears on its face to be unrelated to the RCMP investigation but based on breach of employer policy[5]; it was "to be reviewed after the RCMP investigation is completed and all findings are communicated"; the RCMP investigation was dropped by Ventures on or about September 21; close to the same time the investigation was dropped, Ms. Colona called Oster to request her attendance at a meeting; on September 22, Ms. Charboneau advised Ms. Colona by fax that any requests to contact Oster should go through her; in the same fax, Ms. Charboneau indicated that complaints under the *Act* and the Human Rights Code had been filed; no further efforts were made by Ventures to have Oster return to work, there was no further communication of any sort between Ventures and either Oster or Ms. Charboneau and Oster's indefinite suspension continued for no apparent reason. In brief terms, on September 22, 2007, Ventures was aware Oster had filed an employment standards complaint and after that date there was no effort on the part of Ventures to continue her employment.

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[5] I also note that what is described in the September 14, 2007 suspension letter as "the safety of my crew and managers", becomes "safety and security of the staff" in the evidence of Ms. Colona as set out in the Determination.

66. There is some reference in the Determination to the failure by Ventures to make any effort to contact Oster through Ms. Charboneau. The Determination notes that Ms. Colona was asked about this failure at the complaint hearing, and her response was that "Ms. Oster was her employee and she was trying to reach out to Ms. Oster and not Ms. Charboneau". In my view, that is not a reason. It is telling that Ventures does not profess to have any reason, justified or unjustified, for continuing the suspension imposed on Oster on September 14 as is the complete absence of any attempt to communicate, directly or indirectly, with Oster. The failure by Ventures to return Oster to her employment at the restaurant can only be viewed as a refusal to employ or to continue to employ Oster, conduct which is prohibited by Section 83(1) of the *Act*. I will have more to say later about the Director's view that Oster continued to be an employee of Ventures after the indefinite suspension was imposed.

67. I am also satisfied that the evidence supports a conclusion that Ventures was motivated to ignore Ms. Charboneau and continue Oster's indefinite suspension by their knowledge that Oster had filed a complaint to employment standards and that Ms. Charboneau was representing her on that complaint. There is no other logical conclusion. The decision by Ventures to ignore Ms. Charboneau and continue the indefinite suspension is inconsistent with their decision to drop the RCMP investigation, their assurance when the suspension was imposed that it would be "reviewed" when the RCMP investigation was concluded, the absence of any justification to continue the indefinite suspension, the attempt by Ventures before they were told Oster had filed a complaint to meet with her, Ms. Colona's view that Oster was a dedicated employee with no previous disciplinary record and the apparent assertion from Ms. Colona that Ventures was trying "to reach out" to Oster after the RCMP investigation was dropped.

68. The Determination as it relates to the section 83 issue is cancelled and this issue will be referred back to the Director.

3. Did Ventures contravene section 66 of the Act?

69. As an opening remark, it is not technically possible to "contravene" section 66 of the *Act*. That provision states:

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

70. 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. The Tribunal will interfere in a discretionary decision of the Director if it is shown that the Director "made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable": *Jody L. Goudreau*, *supra*. Unreasonable in this context being:

> . . . a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"
>
> Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229

71. As expressed in the *Takarbe* decision, the Director must exercise discretion for *bona fide* reasons, must not be arbitrary and must not base the decision on irrelevant factors.

72. 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.

73. 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*.

74. 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)

75. If employment has been terminated, the contravention will, in the vast majority of cases, arise in section 63, as it would here. The only question under section 66 is whether the factors exist which compel a conclusion that the employment of the employee has been terminated.

76. In the Determination, the Director decided there was no termination of employment. The Director considered the following factors were relevant to that conclusion: first, in respect of the promotion and wage raise that was allegedly promised to Oster by Mr. Kronstrom, but not given, there was no actual alteration of any term or condition of employment; second, that Oster stated she had not quit her employment; third, in respect of the indefinite disciplinary suspension, that the *Act* does not regulate Ventures right to discipline Oster, that there were grounds for discipline and that the discipline imposed was not a vague attempt by Ventures to withhold work from Oster or to place her on a temporary layoff; and fourth, in respect of the failure to return Oster to work "after her suspension", that was not a unilateral decision by Ventures but was partially her own doing.

77. I need make no comment about the alleged promise of a promotion and wage raise, as I agree that even if the promise was made and not kept, that would not qualify as a substantial alteration of a condition of employment unless there was evidence that the keeping of all promises made within the employment relationship was a condition of employment specifically discussed and agreed between the employer and employee. There is no evidence of that sort here.

78. I would add, however, that the Director's apparent requirement that a termination under section 66 requires that Oster quit her employment is to introduce an irrelevant factor into the decision making process in that provision. As I recently stated in *Isle Three Holdings Ltd. carrying on business as Thrifty Foods*, BC EST #D084/08:

> The *Act* does not require an employee to terminate their employment in order to file a complaint alleging the employer has substantially altered a condition of employment. To import such a requirement would offend the stated purposes in Section 2 of the *Act* of ensuring that *"employees in British Columbia receive at least basic standards of compensation and conditions of employment"* and contributing in *"assisting employees to meet work and family responsibilities"*.

79. On the matter of the suspension, both the initial suspension and its continuation, I do not agree with the reasoning of the Director in deciding the suspension, and its continuation, were not a substantial alteration of a condition of employment.

80. First, it is not entirely correct to say the *Act* does not regulate an employer's right to discipline. Rather, the *Act* does not recognize an employer has any "right" to discipline an employee; there is, in other words, no provision in the *Act* that allows an employer to make a unilateral decision to suspend an employee for disciplinary reasons.

81. The *Act* recognizes the right of an employer to terminate an employee, provided the employer gives written notice, pays compensation in lieu of written notice, provides a combination of written notice and compensation or has just cause. A termination may be disciplinary, but in such case, just cause must be shown by the employer if it is done without written notice. In this case, the decision of the Director has the effect of endorsing an indefinite disciplinary suspension without any requirement to show just cause. I do not suggest that an employer cannot suspend an employee for disciplinary reasons. The Tribunal has recognized disciplinary suspensions as a valid step in what is commonly described as "progressive discipline" and they can come into play when the Tribunal considers whether an employer has shown just cause for terminating an employee. In the usual case, an employee will not seek to challenge a disciplinary suspension under the *Act*. There are two obvious reasons: first, because there is no arbitration provision in the *Act*; and second, because there is no apparent remedy even if the suspension is without cause. As indicated earlier, the *Act* deals only with the consequences of termination of employment, but it is wrong to conclude that a disciplinary suspension cannot be found to be a termination of employment.

82. In analysing this issue, the Determination correctly summarizes the statutory elements of section 66 of the *Act*. They are also set out above. Central features of section 66 are that the Director has discretion, but the test of what constitutes a substantial change is an objective one which requires a consideration of several factors, including the kind of alterations made, the legitimate expectations of the employer and employee and whether there are any implied or express agreements or understandings relating to the kind of alterations made.

83. I do not accept that any reasonable person would consider the unilateral decision by Ventures to suspend Oster, entirely denying her work and wages for an indefinite period without establishing any cause for that suspension, to be anything other that a fundamental and substantial change to Oster's conditions of employment and I find the Director was wrong to conclude otherwise. I do not forego the possibility that in some employment relationships, the unilateral right of an employer to impose a disciplinary suspension for just cause may be within the legitimate expectations of the parties, but in this case Ventures made no effort to show there was such an expectation in this employment relationship, if there was, that it applied to allow the suspension which was imposed by Ventures here. In any event, the existence of such a

condition of employment in this case is inconsistent with the representations McDonald's makes to its employees and potential employees, as described in the documents received in the complaint hearing and marked as Exhibit 3.

84. The other question is what bearing this error has on the decision of the Director on section 66, since the Director never actually got to the discretionary aspect of that provision. In my view, an analysis of the relevant factors the Director should have considered compels the conclusion which should have been reached on this issue. As I have already indicated the Director's views on the suspension were incorrect and led to a wrong conclusion on the effect of the suspension and its continuation. As well, when an employee is suspended indefinitely from their employment, there is no obligation on the employee to clarify their status. The obligation is on the employer to clarify the status of the employee and, in the face of a failure to do so, consequences dictated by application of specific provisions of the *Act* and it objects and purposes will decide that status.

85. The *Act* accepts the right of an employer to layoff an employee. If the layoff exceeds a "temporary layoff" as that term is defined in section 1, the employee is, by operation of law, deemed to be terminated. Here, the suspension imposed on Oster on September 14, 2007 was still in effect on the date of the complaint hearting more than six months later – well beyond the maximum twenty weeks allowed for a temporary layoff – and quite probably was still in effect when the Determination was issued, more than three months after the complaint hearing. A layoff is only defined in the *Act* by its affect on an employee's wages. Section 62 reads:

> *62. In this Part, "week of layoff" means a week in which an employee earns less that 50% of the employee's weekly wages, at the regular rate, averaged over the previous 8 weeks.*

86. Based on the evidence that Oster did not return to work for Ventures after September 14, 2007 and, it would logically follow, earned no wages with Ventures in any week after that date, each week of her "suspension" or absence from work after that date would, on its face, satisfy the definition of "week of layoff" in section 62 of the *Act*. The Director did not consider this provision in deciding Oster's employment status or the issue under section 66. Nor did the Director consider the affect of the definition of "temporary layoff", presumably because of the conclusion that Oster had not been placed on temporary layoff. This failure to consider the statutory provisions relating to layoff and their statutory affect on her status under the *Act* is a reviewable error that adversely impacts the conclusion reached by the Director on both the section 66 issue and the issue of her employment status, which is identified in the Determination as issue number 9. As well as being contrary to specific statutory provisions, it is manifestly unfair to an employee for an employer to fail or refuse to convey to that employee their status, keeping the employee's status in a state of uncertainty that has the effect of denying statutory rights – in this case, the right to consideration for length of service compensation.

87. The Director seems to have considered Oster to have been on some kind of "leave", initiated by a disciplinary suspension, pending the outcome of her complaint. The problem with that conclusion is twofold. First, the *Act* contains several leave provisions: see Part 6. Except when an employee is required to attend jury duty, all leaves are initiated by a request from an employee; they are not unilaterally imposed by the employer. Oster made no request for any leave and the Director does not describe the basis or reason for this leave. Second, as I have already alluded to, such a conclusion is inconsistent with provisions in the *Act* relating to the statutory consequences of an extended period of layoff. Simply put, Oster's absence was a unilaterally imposed decision by Ventures to exclude her from work; it had the affect of denying her wages and should have been viewed in that context. In reaching

this conclusion, I adopt the following comment by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 25:

> In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

88. While the *Rizzo & Rizzo Shoes Ltd.* case was considering a matter which arose under the Ontario employment standards legislation, the statement made by the Court applies equally to the *Act*. It defies common sense to accept, in the context of employment at a McDonald's restaurant, that an indefinite suspension from work exceeding six months is not a termination of that employment giving rise to the rights and protections provided in Part 8 the *Act*. There is nothing in the facts to suggest the conduct of Ventures was intended to do anything other than frustrate the employment relationship and it should have been considered in that context.

89. In sum, the decision of the Director has imposed a status on Oster - employee on indefinite unilaterally imposed leave - that is not recognized in the *Act* and is inconsistent with provisions that regulate employer decisions that adversely affect the employment of employees. The Director's finding that Venture's decision was "not a vague attempt to . . . unilaterally withdraw work . . . or to place [Oster] in a temporary layoff" is an absurd conclusion that is not supported on either the facts or the *Act*.

90. When the relevant statutory provisions and factors are considered there is no other available decision than Oster's employment was terminated by the imposition of the disciplinary suspension on September 14, 2007 and the continuation of a suspension from work for an indefinite period after September 21, 2007. The finding by the Director on the issue relating to section 66 is cancelled.

4. Is Oster owed regular wages for September 9, 2007?

91. I can find no error in the conclusion of the Director on this issue. It is based on findings of fact, which are not challenged, applied to provisions of the *Act*. Oster has not shown in the appeal there is any basis, factual or legal, for claiming entitlement to wages for this day.

92. The Director's conclusion on this issue is confirmed.

5. Is Oster owed overtime wages pursuant to section 40 of the Act?

93. Many of Oster's arguments relating to errors of law by the Director and the failure of the Director to observe principles of natural justice address the findings of the Director on this issue. In particular, Oster contends that the refusal of the Director to issue the summonses requested by Oster was an error of law and denial of natural justice and that the findings of fact that were related to and consequential on the

absence of evidence which Oster sought to have produced through the summonses were also errors of law and breached principles of natural justice.

94. I will first address the natural justice aspects of this issue.

95. It is trite that the Director, like every public authority making an administrative decision that is not legislative in nature and which affects the rights, privileges or interests of an individual, has a duty to observe principles of natural justice: see *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at 653. The attributes of natural justice that apply in a given context will vary according to the character of the decision made. A function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. A discretionary and policy oriented decision will typically not be entitled to procedural protection. Between the judicial decisions and those which are discretionary and policy oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum: see *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602.

96. The statutory responsibility of the Director is to decide complaints under the *Act*. The Tribunal has always appreciated that in carrying out that responsibility, the Director exercises functions which, if being characterized, would include legislative, investigative and judicial decision making processes: see *Cineplex Odeon Corp.*, BC EST #D577/97 and *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST #D405/98. When investigating a complaint, the Director is specifically directed to give the "person under investigation an opportunity to respond": section 77.

97. As a broad and general statement, the Tribunal has summarized the nature of the duty as it applies to the functions of the Director dealing with complaints under the *Act* in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

> 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 *BWI Business World Incorporated*, BC EST #D050/96).

98. Many of the comments made by the Tribunal, and which are echoed in several later decisions, were made in the context of a complaint process which was predominantly investigative. That process is described in the following comments by the Tribunal in *Milan Holdings Ltd.*, BC EST#D313/98 (Reconsideration of BC EST #D559/97, at p 12:

> The office of Director is unique, significant and central to the effectiveness of the *Employment Standards Act*. Under Part 10 of the *Act*, the Director is given a series of quintessential investigative powers. The Director may enter and inspect premises: s. 85. She may, with or without complaint, investigate a person to ensure compliance with the *Act*: s. 76. She may receive confidential information: s. 75. The Director's *Inquiry Act* powers extend to this investigative role: s. 84.
>
> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to.

> Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77, which requires only that "If an investigation is conducted, the director must make reasonable efforts to a give a person under investigation an opportunity to respond".

99. The complaint investigation process described above was not used by the Director in this case. Rather, the process used resembled what is referred to above as "the cool detachment of a quasi-judicial hearing". One of the natural justice arguments made by Oster is that the Director failed to observe principles of natural justice in failing to conduct "an investigation" on the complaint, as requested by Oster, through Ms. Charboneau. I accept the Director did not conduct "an investigation" in the sense described in *Milan Holdings Ltd.*, but the argument that such a failure is of itself a breach of natural justice is a difficult one for Oster. Following amendments to the *Act* in May 2002, the Director is not statutorily required to "investigate" a complaint made under the *Act*. Section 76 requires the Director "accept and review" a complaint made under section 74. The *Act* now appears to provide the Director with a level of discretion about whether to conduct an investigation and does not direct how an investigation is to be conducted.

100. The appeal does not indicate how the failure to conduct an "investigation", of itself, amounted to a failure to observe principles of natural justice. It may well be that there was a failure to observe principles of natural justice within the complaint process selected by the Director, but that would be substantially different than there being a breach arising directly from the process chosen.

101. Oster argues the Director failed to take into account her age and inexperience in how the complaint hearing was conducted, in terms of what evidence was accepted, how that evidence was weighed and how the hearing was conducted generally.

102. Oster says the Director placed too much credibility on the oral evidence given by Ms. Colona on behalf of Ventures, particularly in light of Ventures' failure to produce the employer records demanded by the Director and the obvious inconsistencies in Ms. Colona's evidence. Oster's argument is also critical of the Director for failing to follow up on Ventures' evidence relating to their policies and practices, Oster's knowledge of the same and stating facts that were not in evidence.

103. Decisions regarding how a party will conduct its case are to be made by the party: see *Parduman Singh Kaloti and Kamlesh Devi Kaloti operating as National Courier Service*, BC EST #D232/99 (Reconsideration of BC EST #D521/98). The Director cannot be responsible for Oster's decision to conduct her own case, with the assistance of Mrs. Parrish.

104. However, the person presiding over the hearing is responsible for ensuring that each party receives a fair hearing. This obligation is particularly important where, as is typically the case in complaint hearings conducted by the Director, one or both parties are self-represented. The Director owes a duty of fairness to self-represented parties which goes beyond simply providing the normally accepted elements of fair treatment and will include actual efforts to accommodate the parties' unfamiliarity with the process. The Director must understand the problems a self-represented party appearing at a complaint hearing, which may include, but not be limited to, an ignorance of the provisions of the *Act*, unfamiliarity with advocacy and the procedure being used by the Director, difficulty in marshalling facts, an inability to cross-examine and test evidence and a general failure to understand or appreciate directions given or their obligation to comply with orders.

105. In respect of the first point, above, the scope of the Director's duty must recognize that the Director has the primary statutory obligation of ensuring compliance with the *Act* and will in all probability be perceived by the parties. The Director is recognized as a party to the processes under the *Act* because he has an interest in protecting the integrity of the *Act*. The Director knows, or ought to know, the issues, the provisions of the *Act* bearing on those issues and the law relating to those provisions. The objectives of fairness and efficiency in the *Act* would suggest the Director has a duty to ensure the parties clearly understand these aspects of the complaint and how they may affect the complaint hearing. As well, considering the nature of the complaint process overall and the role of the Director and his delegates in that process specifically and under the *Act* generally, a delegate conducting a complaint hearing has both the right and the duty to be interventionist although in doing so must walk the fine line between ensuring fairness and losing neutrality. In the context of the complaint process, the boundaries of legitimate intervention are flexible and will be influenced by the statutory duty of the Director under the *Act*, the need for intervention and its affect on the fairness of the complaint hearing.

106. Returning from these general comments to the arguments raised specific to this case, it is improbable that an inexperienced self-represented party will have sufficient knowledge to point out the frailties of evidence provided at the hearing. This particular feature of these complaint hearings generates a duty on the delegate conducting the complaint hearing to ensure that the evidence received and relied on is relevant, accurate, reliable and fair. Imposing this obligation is also consistent with the purposes of the *Act*, which require "fair and efficient procedures for resolving disputes" and with principles of natural justice that demand procedural fairness.

107. In this respect, I agree with Oster that the complaint hearing fell short of that obligation. The Director accepted evidence which was inaccurate, considered that evidence relevant and, to some extent, relied on that evidence in making the Determination. The evidence to which I refer is identified in paragraphs 39 and 40 of Ms. Charboneau's affidavit and paragraph 7 of Oster's affidavit and is set out above. The Director also received and relied on evidence about the existence of and the content of documents that was unsupported by any of those documents as they were not introduced at the complaint hearing. This may not be a valid consideration in all cases, but it is in this case, where the documents being addressed were sought by the Director in a demand that was ignored by Ventures and were sought by Oster in a summons, which was refused by the Director, there is an obvious unfairness to Oster which cannot be ignored. Her inability to have reference to those documents in presenting her case denied her the opportunity to either challenge the oral evidence given by Ms. Colona or to rely on the content of the documents to support her claim.

108. On the natural justice argument, Oster adds that the refusal of the Director to issue the requested summonses is a breach of natural justice and an error in law. I agree.

109. Section 84 of the *Act* provides the Director with the power and authority of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*. Section 15 of the *Inquiry Act* is relevant, and reads:

> *15 (1) The commissioners acting under a commission issued under this Part, by summons, may require a person*
>
> *(a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and*
>
> *(b) to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry.*

> *(2) A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons.*

110. As a matter of law, the power to summons documents encompasses all documents *"touching or in any way relating"* to the subject matter of the complaint hearing. The request from Ms. Charboneau was quite particular in its description of the relationship of the witnesses and the documents to Oster's claim. The Director's apparent requirement to demonstrate the relevance of the testimony of each witness is to introduce a requirement that does not exist in the *Inquiry Act*. The Director improperly fettered his discretion by introducing this requirement.

111. In the natural justice context, the refusal of the Director to issue the summonses prevented Oster from having the opportunity to place potentially relevant evidence before the complaint hearing. I agree completely with the submission of Oster that having some of the witnesses available over the telephone does not get the documents into the complaint hearing.

112. The Determination on this issue must be cancelled.

6. Did Oster receive 8 consecutive hours free between shifts pursuant to section 36 of the Act?

113. For the same reasons as I have provided on the preceding issue, the Determination on this issue must be cancelled. It is unfair for the Director to have refused the summons for Ventures to produce employer records and then make adverse findings against Oster's claim.

7. Is Oster owed wages for benefits or cleaning her uniform?

114. I can find no error in the director's conclusion on this issue. Oster made no claim that she was charged for benefits or for cleaning her uniform. The evidence which was presented suggested Oster was, as required by section 25 of the *Act*, paid an amount for cleaning her uniform. There is nothing in the appeal specific to this finding and I am unable to find an error of law or breach of natural justice in respect of it. In respect of the benefits, it appears that Oster was attempting to enforce on Ventures what she understood to be a policy of McDonald's Restaurants of Canada Limited to provide benefits to its employees. The conclusion of the Director concerning the lack of jurisdiction under the *Act* for the Director to enforce such a requirement against Ventures absent an employment agreement with Oster to provide such benefits is correct.

8. Is Oster owed minimum daily pay for attending meetings?

115. This issue does not appear to have been pursued by Oster at the complaint hearing. The Determination indicates that Oster did not provide any direct evidence on this claim. This issue is not mentioned in the appeal or in the affidavit material provided with the appeal. In the absence of any reference to this issue in the appeal, I find that Oster has not met the burden of demonstrating some error in the Determination on this issue. This aspect of the Determination is confirmed.

9. What is the status of Oster's employment?

116. This issue has already been fully addressed above. Simply put, the Director erred in law in concluding Oster continued to be an employee of Ventures "on leave". The Director's conclusion on this issue is cancelled.

The Remedy

117. Based on the above conclusions, I must decide what the resulting order should be. I have the options of varying the Determination, adjudicating the complaint myself or referring the matters which are affected by this decision back to the Director.

118. This is not an appropriate case to vary the Determination. My decision on particular elements of the Determination and, particularly, some of the legal conclusions reached by the Director, are clear enough to guide any further consideration of Oster's claims.

119. Nor is this an appropriate case for me to adjudicate Oster's claims. The breach of natural justice resulted in the Director's failure to ensure relevant evidence was before the hearing and relying on inaccurate, irrelevant and unsupported evidence in making findings against Oster's claim. I do not, however, have any of that evidence before me and would need to hold a full oral hearing myself.

120. To do so would not be any more efficient than referring the matter back to the Director. I therefore order that the matters in the Determination which have been cancelled be referred back to the Director. In the circumstances, the most appropriate remedy is to order these matters be dealt with by a different delegate: see *Director of Employment Standards (Re Ningfei Zhang)* BC EST #RD 635/01 and *Baum Publications Ltd.*, BC EST #D090/05 at paras. 43-50.

121. The Determination was made by way of a quasi-judicial adjudication. While the delegate conducting the complaint hearing made no specific findings on credibility, he made several findings of fact against Oster, rejecting her evidence in the process. Many elements of Oster's claims depend on findings of fact based on a careful review of the evidence. It is not realistic to expect the delegate who conducted the complaint hearing to divorce his mind from all of the perceptions and findings of fact already made, return to a new body of evidence and reach a balanced decision based on that evidence.

ORDER

122. Pursuant to Section 115 of the *Act*, I order that those matters which relate to issues 2, 3, 5, 6, and 9 in the Determination dated August 6, 2008 are cancelled and those matters are referred back to the Director. The balance of the Determination is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal