

An appeal

- by -

6307485 Canada Ltd. carrying on business as McDonald's Restaurant
(“McDonald’s”)

- 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.: 2009A/120

DATE OF DECISION: November 20, 2009

DECISION

SUBMISSIONS

Erin F. Berger	Counsel for 6307485 Canada Ltd. carrying on business as McDonald's Restaurant
Louie Canete	on his own behalf
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. On April 14, 2009, Mr. Danny Swidinsky, a director of 6307485 Canada Ltd. carrying on business as McDonald's Restaurant ("McDonald's"), appealed a determination (the "Initial Determination") that was issued against McDonald's on March 13, 2009, by a delegate of the Director of Employment Standards (the "Director") after the latter completed his investigation. The Initial Determination found that McDonald's contravened sections 8, 18, 40, 46 and 58 of the *Act* in respect of the employment of Louie Canete ("Mr. Canete") and ordered McDonald's to pay Mr. Canete \$2,244.88 for unpaid wages, overtime pay, statutory holiday pay, annual vacation pay and accrued interest pursuant to section 88 of the *Act*.
2. The Initial Determination also imposed five administrative penalties of \$500.00 each under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") for the said contraventions of the *Act*.
3. The total amount of the Initial Determination was \$4,744.88.
4. On June 17, 2009, I issued my decision in McDonald's appeal of the Initial Determination (see BC EST # D063/09). On the basis of my finding that the delegate, in making the Initial Determination, breached McDonald's natural justice rights I referred the matter back to the same delegate for further investigation of the matter pursuant to Section 115(1)(b) of the *Employment Standards Act* ("*Act*") with the expectation that a further investigation would serve to cure the previous breach of natural justice rights of McDonald's by the delegate.
5. As a result of my decision, the delegate conducted a further investigation of the matter and considered the evidence and submissions of McDonald's previously not considered and issued his determination on August 6, 2009, (the "New Determination") confirming both the findings and orders made in the Initial Determination without any variation.
6. McDonald's now appeals the New Determination on the sole ground that the Director failed to observe the principles of natural justice in making the New Determination.
7. McDonald's wants an oral hearing of the matter and seeks the New Determination changed or varied, although I am persuaded on its submissions that McDonald's is seeking a cancellation of the New Determination.
8. Pursuant to the Section 36 of the *Administrative Tribunal Act* (the "*ATA*"), which is incorporated in the *Act* (s.103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, the appeal of the New Determination can be adjudicated

on the basis of the Section 112(5) “record”, the written submissions of the parties and the Reasons for the New Determination.

ISSUE

9. Did the Director fail to observe the principles of natural justice in making the New Determination?

FACTS

10. Mr. Swidinsky is a franchise owner of a McDonald’s restaurant at 6060 Russ Baker Way, Richmond, British Columbia.
11. Mr. Canete was employed as a food service supervisor with McDonald’s from September 13, 2008, to November 29, 2008, at the rate of pay of \$10.00 per hour.
12. On January 8, 2009, Mr. Canete filed a complaint against McDonald’s under Section 74 of the *Act* alleging that the latter contravened the *Act* by misrepresenting to him his wage rate, failing to pay him regular and overtime wages and failing to pay him holiday pay (the “Complaint”). More specifically, Mr. Canete complained that he was hired by McDonald’s based on a promise of a wage rate of \$13.50 per hour for a period of two years. In support of this assertion, Mr. Canete provided the delegate a copy of the Expedited Labour Market Opinion (“ELMO”) document, which HRSDC sent to Mr. Swidinsky, that confirms Mr. Canete’s wage rate of \$13.50 and term of employment. This document appears to have been generated by HRSDC and followed the Application for an Expedited Labour Market Opinion (the “Application”) submitted by Mr. Swidinsky to Human Resources and Skills Development Canada (“HRSDC”) in respect of Mr. Canete’s employment. The Application, in the section delineating “Details of Job Offer”, shows Mr. Canete’s proposed salary of \$13.50 per hour as well as Mr. Swidinsky’s signature at the end of the Application certifying the information provided in the Application is true and accurate.
13. Mr. Canete submitted to the delegate that he accepted the terms of the ELMO but on his first day at work he was informed that he would be paid \$11.00 per hour and he actually received \$10.00 per hour in contravention of Section 8 of the *Act*. As a result, Mr. Canete claimed in his Complaint the difference in pay between the rate he was paid - \$10.00 per hour – and the rate he was offered as evidenced in the ELMO - \$13.50 per hour for the period November 17 to November 27, 2008. He also claimed overtime wages for the period September 13 to November 17, 2008, based on the adjusted rate.
14. Mr. Canete also claimed that on November 11, 2008, during the Remembrance Day holiday, he worked eight hours for which he should have been paid at time-and-a-half based on the \$13.50 per hour wage rate and not seven hours at \$10.00 per hour he was actually paid by McDonald’s.
15. Mr. Canete submitted his own record of hours he worked from September 13 to November 27, 2008, along with wage statements in support of his claims. According to Mr. Canete, his employment ended on November 29, 2008, when he attended work and was told he should not return.
16. On January 20, 2009, within two weeks after Mr. Canete filed the Complaint, the delegate sent McDonald’s a general notice of his investigation of the Complaint as well as a Demand for Records (the “Demand”) requesting production from McDonald’s of payroll records pertaining to Mr. Canete. In the Demand, the delegate specifically asked for the records to be produced on or before 4:00 p.m. on February 3, 2009.

17. On February 3, 2009, the delegate indicates Mr. Swidinsky responded to the January 20 correspondence by providing “certain payroll records by fax”. However, the delegate appears not to have been satisfied with those records and on February 5, 2009, he sent a further letter to McDonald’s delineating more specifically Mr. Canete’s claims in the Complaint and advised McDonald’s that the payroll records previously produced “do not provide Mr. Canete’s hours of work during the full period of his employment and do not include any wage statements”. The delegate requested McDonald’s to provide the records requested “and to either provide a reply to Mr. Canete’s allegations in writing or ... to arrange a time to discuss them in person by 4:00 p.m., February 13, 2009.”
18. On February 13, 2009, Mr. Swidinsky contacted the delegate by email and advised the latter that he had contracted pneumonia and was “restricted to the house except for medical appointments”. He further advised the delegate in the same email that he understood that his condition “may last up to one month” and he was not in any condition to go to his storage facility to retrieve additional documents at this time.
19. In response to Mr. Swidinsky’s email, the delegate on the same date sent an email to Mr. Swidinsky stating:
- I am sorry to hear about your illness Mr. Swidinsky. However, I would like to point out that these additional documents are not needed to respond to the substance of Mr. Canete’s complaint. Mr. Canete has provided documents showing he worked beyond 80 hours in a two week period without receiving his overtime rate of pay. Also, he had presented to you the Labour Market Opinion that states he should be paid at a different rate than what he received.
- I do not expect you to compromise your health for this investigation. However, if I am to postpone it, I will require medical proof of your condition, as well as the establishment of a new deadline within which you must reply to Mr. Canete’s allegations. Please contact me, preferably by phone, to discuss this matter further.
20. In response to the delegate’s email, Mr. Swidinsky, on the same date, sent a further email to the delegate advising that he would request a letter from his physician provided the delegate referred him to his authority in the *Act* for requiring medical proof from him. He further advised the delegate “I am unable at present to delve into this further until I am fully recuperated”.
21. In response to Mr. Swidinsky’s last email, the delegate, on the same date, sent Mr. Swidinsky an email stating *inter alia*:
- It is in the interest of all parties that Mr. Canete’s complaint is resolved in a timely and efficient manner. You have stated that you will not be participating due to illness and have provided no date at which you will comply with the demand for records or respond to the allegations. I am not obligated to allow parties to indefinitely wait out proceedings. I do not dispute that you are ill; however, if I am to postpone my investigation I require proof that you are in fact too sick to provide the records and to respond to Mr. Canete’s allegations.
- To clarify, if I am to permit a delay in responding to Mr. Canete’s allegations I require a note from a physician which specifies that you have pneumonia and that you are restricted to your house. You must provide this by February 20 or provide a date by which you can send this information to the Branch.
22. On February 18, 2009, Mr. Swidinsky sent an email to the delegate attaching, in PDF form, his doctor’s note dated February 14, 2009. The doctor’s note stated that Mr. Swidinsky “has been ill with bronchitis [from] January 24/09 to today and will need at least two weeks to recover”.

23. After Mr. Swidinsky's last email, the delegate stated in the Initial Determination that he emailed Mr. Swidinsky and advised the latter that he had not received any indication whether Mr. Swidinsky disagreed with Mr. Canete's allegations although invited to respond. The delegate also noted that that he did not inform Mr. Swidinsky that he was postponing his investigation. Unfortunately, the Section 112 record did not contain that email, although all other emails referenced above were part of the record produced.
24. McDonald's appealed the Initial Determination on the grounds that the Director erred in law and breached the principles of natural justice in making the Determination. As indicated previously, in my decision (see BC EST # D063/09), I concluded that the delegate, in making the Initial Determination, breached McDonald's natural justice rights and therefore I referred the matter back to the same delegate for further investigation of the matter pursuant to Section 115(1) (b).
25. Subsequently, the delegate conducted a further investigation of the matter and considered the evidence and submissions of McDonald's previously not considered including those materials McDonald's submitted in the appeal of the Initial Determination including, but not limited to, the affidavit of Mr. Swidinsky sworn on April 8, 2009; the Affidavit of Erwin Patrick Uy ("Mr. Uy"), the restaurant manager of McDonald's, sworn on April 14, 2009; payroll records of McDonald's and shift schedule pertinent to Mr. Canete; submissions and documents of Mr. Canete, submissions of Ms. Erin Berger ("Ms. Berger"), counsel for McDonald's, dated June 5, 2008; and further submissions of both parties during the second investigation leading to the New Determination including Mr. Swidinsky's email of March 16, 2009.
26. In the New Determination, the delegate confirmed both the findings and orders made in the Initial Determination without any variation. In his reasons for the New Determination, the delegate reviews and sets out some of the more pertinent information and submissions of both parties he reviewed and which he based his Determination on. With respect to the submissions of Mr. Canete, they are for the most part similar in content to the submissions Mr. Canete made previously in the investigation leading to the Initial Determination and they are briefly referred to earlier in this section.
27. With respect to the submissions and evidence of McDonald's on appeal, the delegate notes that Mr. Swidinsky contends that he advanced Mr. Canete \$1,050.00 to assist the latter to purchase a laptop. However, the advance was pursuant to an agreement with Mr. Canete that the latter would repay the amount advanced starting in his first pay period in January 2009.
28. The delegate further notes that Mr. Swidinsky states that he spoke with Mr. Canete on or about September 11, 2008, when he met him at the McDonald's restaurant. Mr. Canete had in hand the ELMO document or agreement, which he had Mr. Swidinsky fill out. Mr. Swidinsky states that while the ELMO document stated the wage rate of \$13.50 because that was the minimum acceptable or required by HRSDC in the Application, Mr. Canete clearly knew that he was to be paid \$10 per hour.
29. The delegate also notes that Mr. Swidinsky submitted that after HRSDC approved the Application on September 17, 2008, Mr. Canete underwent an orientation process at McDonald's later in September, and was provided with further employment forms by Mr. Uy including one that indicated that Mr. Canete agreed to a wage rate of \$10 per hour.
30. With respect to the question of the last day of Mr. Canete's employment at McDonald's, the delegate noted that Mr. Swidinsky, in his submissions, denies Mr. Canete worked beyond November 16, 2009. In support thereof, Mr. Swidinsky submitted McDonald's shift schedules subsequent to November 16, which shows Mr. Canete's name appearing for a shift until November 22, but a line is crossed through his name on each occurrence and his name is substituted with another employee's name.

31. With respect to Mr. Canete's claim for overtime pay, the delegate notes that Mr. Swidinsky did not deny that Mr. Canete worked overtime hours but he asserts that it was due to an agreement with Mr. Uy to which he was not a party and did not approve.
32. With respect to Mr. Canete's claim for statutory holiday pay for November 11, 2008, Mr. Swidinsky argued that Mr. Canete was paid his holiday pay and further contended that this is shown on the appropriate wage statement for the relevant period.
33. With respect to the Affidavit of Mr. Uy, the delegate summarizes it and notes that in his affidavit Mr. Uy explains how he assisted Mr. Canete to obtain a job with McDonald's and attempts to corroborate Mr. Swidinsky's Affidavit and evidence that the \$13.50 wage rate appearing on the ELMO or the HRSDC documents was simply to have HRSDC approve the employment paperwork for Mr. Canete and that the latter knew that he was only to be paid \$10 per hour. The delegate also notes that Mr. Uy states Mr. Canete began working with McDonald's at the beginning of October 2008 and not earlier in mid-September as claimed by Mr. Canete.
34. The delegate further notes that Mr. Uy, while admitting that Mr. Canete worked overtime hours at McDonald's, contends that Mr. Canete was told he would only be paid at his regular wage rate of \$10 per hour for overtime work.
35. As concerns the last day of employment of Mr. Canete, the delegate notes that Mr. Uy's evidence is that Mr. Canete did not show up for a shift at work in the middle of November 2008 and thereafter never returned, nor answered his phone. Therefore, he could not be reached, according to Mr. Uy.
36. In analyzing the evidence of the parties, the delegate noted the Application and the ELMO document provided by McDonald's in its submissions contains a declaration, affirmed by Mr. Swidinsky, that Mr. Canete will be paid a wage rate that meets or exceeds the prevailing wage rate for the occupation he was being hired for in the geographic region where the work was to take place. The delegate further notes that the said document showed the prevailing wage rate for the "Lower Mainland Southwest" region where Mr. Canete was to work for McDonald's is \$13.48 per hour, notes the delegate. The document also provides that the signor understands that the information contained in the Application may be provided for the purposes of enforcement of Provincial Legislation, including Employment Standards and that the information provided is true and accurate. In the circumstances, the delegate states that he is "more inclined to believe Mr. Canete was offered \$13.50, as opposed to Mr. Swidinsky having falsely declared this amount to HRSDC through collusion with Mr. Canete for the purpose of obtaining the ELMO". Accordingly, the delegate concluded that McDonald's contravened section 8 of the *Act* when it paid Mr. Canete the lower \$10.00 rate after he commenced his employment.
37. With respect to Mr. Canete's claim for outstanding regular and overtime wages, the delegate noted that upon review of Mr. Canete's records it was clear that in certain pay periods he worked in excess of 80 hours over a two week period but did not receive the overtime rate of pay for those hours. The delegate also noted that McDonald's agreed that Mr. Canete is entitled to overtime pay, but at the rate of \$10.00 which Mr. Uy said was negotiated with Mr. Canete. The delegate having determined that the regular wage rate of Mr. Canete was \$13.50 per hour, concluded that it would be appropriate to calculate Mr. Canete's claim for overtime pay for the period October 2 until November 16, 2008, on the basis of the said rate and not the reduced rate of \$10 per hour he was paid.
38. With respect to Mr. Canete's claim that he worked at McDonald's from September 13 until September 30 and McDonald's claim that \$1,050.00 was paid to him as an advance the latter requested, the delegate reasoned

that if it were an advance, query why it was identified as a bonus on Mr. Canete's wage statement. According to the delegate, Mr. Canete's hours of work during the period September 13 to September 30, 2008, appear to be consistent with the payment of the \$1,050.00 he received at the end of that pay period. Accordingly, the delegate concluded "it is more probable than not that Mr. Canete worked the hours claimed from September 13 until September 30, 2008" and rejected McDonald's assertion that the payment was an advance.

39. With respect to Mr. Canete's claim that he worked during the period November 17 until November 27, 2008, the delegate again preferred the evidence of Mr. Canete over McDonald's or Mr. Swidinsky's evidence. In particular, the delegate noted that the Affidavit of Mr. Uy submitted by McDonald's indicated that Mr. Canete did not show up for work after November 16 and could not be reached. However, the delegate preferred the evidence of Mr. Canete who indicated that the pay date for his pay period in mid-November was November 21, 2008, and had he not been available for contact as claimed by Mr. Uy, he could not have received his paycheque. He also presented text messages showing the exchanges that took place between himself and Mr. Uy as well as with Mr. Swidinsky during the relevant period, and those messages appear to suggest that he was available and in contact with McDonald's during the material time in question.
40. With respect to the matter of Mr. Canete's last day of work, the delegate notes that Mr. Swidinsky, based on the shift schedule of McDonald's, argued that Mr. Canete's last day of work was November 16, 2008. However, the delegate preferred the evidence of Mr. Canete on this point and rejected Mr. Swidinsky's evidence questioning the latter's credibility as doubtful in light of the evidence of Mr. Swidinsky that "he attempted to deceive HRSDC with inaccurate documentation".
41. With respect to Mr. Canete's claim for statutory holiday pay for time worked on Remembrance Day on November 11, 2008, the delegate noted that Mr. Canete was paid for 8 hours of work at the rate of \$10 per hour and \$70 for an average day's pay. According to the delegate, Mr. Canete should have been paid for 8 hours work at time-and-a-half based on the adjusted wage rate of \$13.50 and an average day's pay in compliance with section 46 of the *Act*.
42. Based on the delegate's findings of contraventions on the part of McDonald's set out above, the delegate sought to employ "make-whole" remedies in section 79 of the *Act* with a view to putting Mr. Canete in the same situation as if the contraventions had not occurred. In this regard, the delegate awarded Mr. Canete regular wages and overtime wages as well as statutory holiday pay and vacation pay based on his proper wage rate of \$13.50, taking into consideration what was actually paid to him by McDonald's at the lower wage rate of \$10 per hour. I do not find it necessary to set out the specific calculations here in respect of the amounts awarded under the heads claimed by Mr. Canete.

SUBMISSIONS OF MCDONALD'S

43. McDonald's, through its legal counsel, Ms. Berger, submits several bases for McDonald's argument that the Director failed to observe the principles of natural justice in making the New Determination. First, Ms. Berger argues, "at the hearing in the first instance the adjudicator [the delegate] demonstrated bias towards Mr. Swidinsky, which prevented a fair hearing". She further states that "allowing the same adjudicator to make a determination in this matter a second time when there was a personality conflict involved between the adjudicator and the appellant was patently unfair".
44. Ms. Berger reiterates an argument she previously made in context of the appeal of the Initial Determination that failure by the Director or the delegate to allow the parties to call "*viva voce* evidence" or provide the "opportunity for full explanation" and "an opportunity to resolve the record and resolve any inconsistencies" constitutes breach of natural justice on the part of the Director.

45. Ms. Berger also asserts that the delegate ignored the evidence of Mr. Uy “which was provided in the form of an affidavit” which arguably supports Mr. Swidinsky’s account of events. Ms. Berger also suggests that it is improper and patently unreasonable of the delegate to conclude that Mr. Canete was still employed up to November 22, 2008, when the documentary evidence of the shifts schedule produced by McDonald’s showed Mr. Canete’s name appearing until November 22 (but crossed out after November 16).
46. Ms. Berger also submits that the delegate’s failure to hold a full hearing prevented a proper testing and cross-examination of the parties on the evidence concerning the alleged advance of \$1,050.00 made by McDonald’s to Mr. Canete. According to Ms. Berger, the Tribunal should order a hearing before a new adjudicator, as that would be the only way to ensure a fair hearing for McDonald’s.
47. Ms. Berger also accuses the Director of attempting to penalize McDonald’s on the basis of provisions of the ELMO or the Application or the HRSDC documents. She contends that the Director lacks jurisdiction to enforce the terms or provisions in these documents.
48. Ms. Berger further argues that there has been no breach of Section 8 of the *Act* because no misrepresentation was made to Mr. Canete regarding his terms of employment. She states that Mr. Canete agreed to the \$10.00 per hour wage rate and benefited as a result “from coming to Canada” and “obtaining the work experience”. Mr. Canete and Mr. Swidinsky made their own agreement, according to Ms. Berger. In the circumstances, the Director’s finding of a breach of Section 8 of the *Act*, states Ms. Berger, “is a back door attempt to penalize Mr. Swidinsky for paying a different wage in his agreement with an immigrant employee than what he wrote on the [ELMO or Application] and what was declared to HRSDC despite the agreement of the employee”.
49. Finally, Ms. Berger submits since there was no breach of section 8 on the part of McDonald's and since the other contraventions and breaches the delegate found in the New Determination are based on the assumption that the appropriate wage rate for Mr. Canete is \$13.50 and not \$10.00 no “additional penalties [apply to McDonald’s]”.

SUBMISSIONS OF THE DIRECTOR

50. With respect to McDonald’s allegation of bias on the part of the delegate, the Director states that McDonald’s has not provided any argument beyond a bare assertion that bias exists on the part of the delegate or that there was a “personality conflict” between the delegate and Mr. Swidinsky. Accordingly, the Director submits that the allegation of bias is without merit.
51. With respect to McDonald’s contention that the matter should not have been returned to the same delegate to investigate in the circumstances, the Director submits that the delegate made no adverse findings of credibility against any representative of McDonald’s during the initial investigation since the investigation was conducted without the benefit of the submissions of McDonald’s and, therefore, there should not be any issue with remitting the matter back to the delegate to investigate.
52. The Director also submits that contrary to the claim of McDonald’s that the delegate demonstrated bias towards Mr. Swidinsky “at the hearing in the first instance”, there was no hearing held in the matter. The Initial Determination was made after the delegate conducted an investigation and not a hearing.
53. With respect to McDonald’s contention that an oral hearing of the evidence is required in this matter, the Director submits that the duty of fairness does not require that the Director conduct an oral hearing. Moreover, the Director notes that Mr. Swidinsky did not attempt to provide the Director with *viva voce*

evidence nor protested the method employed by the Director to resolve the Complaint throughout the investigation process and therefore McDonald's should not be raising this objection after the determination.

54. Furthermore, the Director submits that although Ms. Berger did not communicate with the Branch during the second investigation of the matter, she was copied with relevant correspondences and did not raise the issue of an oral hearing during that investigation. Notwithstanding, the Director submits that the primary requirements of natural justice in this case have been met as McDonald's knew the case against it and had the opportunity to respond. Therefore, the Director submits that there is no real basis for McDonald's to argue for an oral hearing now.
55. In response to McDonald's argument that the delegate did not weigh the evidence submitted by the parties in favour of McDonald's, the Director submits that the delegate considered all evidence submitted by the parties and "arrived at a decision that could be reasonably entertained based on that evidence". The Director further contends that the mere fact that the delegate did not endorse McDonald's position does not follow that the evidence presented by McDonald's was not considered.
56. Finally, the Director argues in response to McDonald's contention that it did not breach section 8 of the *Act*, that the delegate arrived at the opposite conclusion and did so acting "on a view of the evidence which could be reasonably entertained".

SUBMISSIONS OF MR. CANETE

57. I have very carefully reviewed Mr. Canete's submissions that I find largely to be reiteration of information and evidence he provided to the delegate in the investigation leading to the Initial Determination. While I have set out some of these submissions under the heading Facts in this decision, I do not find it particularly helpful or necessary to set out the balance of it here in order to deal with the appeal of the New Determination.

ANALYSIS

58. Under the natural justice ground of appeal, counsel for McDonald's, Ms. Berger, *inter alia*, submits, "at the hearing in the first instance the adjudicator demonstrated bias towards Mr. Swidinsky, which prevented a fair hearing".
59. In *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 56 the Supreme Court of Canada expounded on bias stating:

The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484, at para. 106.)

60. As to the test or standard of proof for establishing bias, the Court referred to its earlier decision in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, and stated at paragraph 60:

In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

61. In this case, McDonald’s has made a bare assertion of bias on the part of the delegate and adduced no compelling evidence to substantiate this claim. In my view, an allegation of bias is a very serious matter as it impugns the adjudication process and equally challenges the integrity of the decision-maker and therefore it should not be made lightly without any basis.
62. With respect to Ms. Berger’s related submission that “allowing the same adjudicator to make a determination in this matter a second time when there was a personality conflict involved between the adjudicator and the appellant was patently unfair”, again I find this assertion to be nothing more than a bare assertion without any foundation in evidence. If Ms. Berger is referring to the exchange between the delegate and Mr. Swidinsky in the initial investigation when the delegate required medical proof from Mr. Swidinsky in context of Mr. Swidinsky’s request to postpone the investigation while he was ill, I do not find that such a request or what transpired thereafter with the delegate proceeding with his investigation and making the Initial Determination shows “personality conflict” between the delegate and Mr. Swidinsky as to make it “patently unfair” for the delegate to participate in the subsequent investigation as ordered by me in my decision on appeal of the Initial Determination. There is no evidence that the delegate was coming into the second investigation with an unopened mind or with some personal vendetta or dislike for Mr. Swidinsky for any reason related to his first investigation.
63. With respect to Ms. Berger’s argument that the failure of the Director or the delegate to allow the parties to call “*nova voce* evidence” or provide the “opportunity for full explanation” and “an opportunity to resolve the record and resolve any inconsistencies” constitutes breach of natural justice on the part of the Director. Essentially, Ms. Berger is reiterating the argument she advanced on behalf of McDonald’s in the appeal of the Initial Determination that an oral hearing of the matter is warranted. This argument was rejected by me then and I reject it again. In my view, while the Director is mandated under Section 76 to “accept and review a complaint made under section 74” and afforded the discretion to conduct an investigation under section 76(2), he is not required under the *Act* to hold a hearing of any complaints, although he has such discretion under Section 76 of the *Act*. He may simply make a determination on the basis of his investigation, provided he gives “the person under investigation an opportunity to respond” under section 77.
64. In addition, I note that the Supreme Court of Canada stated in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] S.C.J. No. 39:

...it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.

65. In this case, I find that the delegate complied with the duty of fairness when affording both parties an opportunity to present their case to him during the second investigation leading to the New Determination.
66. I also find no merit in Ms. Berger's assertion that the delegate ignored the evidence of Mr. Uy provided in the form of an affidavit and improperly concluded that Mr. Canete was still employed up to November 22, 2008, when the shifts schedule produced by McDonald's showed Mr. Canete's name appearing until November 22 but crossed out after November 16. I agree with the Director that the delegate weighed the evidence of both parties and found greater internal consistency in the evidence adduced by Mr. Canete and it was open to the delegate to prefer the version of events presented by Mr. Canete. I find that McDonald's in this regard is trying to get the Tribunal to become involved in the investigation and assessment of credibility of the parties with a view to persuading the Tribunal to reject the delegate's credibility findings. In my view, it is not the role of the Tribunal on an appeal to substitute its opinion for that of the Director or the delegate unless there is a clear and fundamental error in law. In this case, it is my view that the delegate made a reasoned and reasonable decision based on the evidence presented and the submissions made to him by both parties. I see absolutely no basis to disturb the delegate's assessment of credibility or lack thereof of McDonald's witnesses and preference of the evidence of Mr. Canete.
67. With respect to Ms. Berger's contention that the Director is attempting to penalize McDonald's on the basis of the contents of the ELMO or the Application and that the Director lacks jurisdiction to enforce the terms in these documents, I again do not find any merit in those submissions. The ELMO and the Application documents contain certain representations which relate to the employment of Mr. Canete and they are useful in determining Mr. Canete's Complaint as they evidence what McDonald's and Mr. Swidinsky agreed to at the outset of Mr. Canete's employment with McDonald's. The delegate, in considering this relevant evidence in context of his investigation of the Complaint, does not mean that the delegate is enforcing the terms of the ELMO or the Application documents.
68. Finally, I also reject Ms. Berger's conclusion that the delegate's finding of the breach of Section 8 of the *Act* on the part of McDonald's "is a back door attempt to penalize Mr. Swidinsky for paying a different wage in his agreement with an immigrant employee than what he wrote on the [ELMO or Application] and what was declared to HRSDC despite the agreement of the employee". The delegate made a finding based on the evidence of both parties that Mr. Swidinsky and McDonald's represented to Mr. Canete a wage rate of \$13.50 and not \$10.00 per hour and rejected McDonald's argument that the parties had agreed to a \$10.00 wage rate. In the circumstances there is a sufficient basis for the delegate's finding of a breach of section 8 contrary to Ms. Berger's contention that no breach has occurred here.

ORDER

69. Pursuant to Section 115 of the *Act*, I order that the New Determination dated August 6, 2009, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal