Employment Standards TRIBUNAL

An appeal

- by -

Britco Structures Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

ADJUDICATOR: Alison H. Narod

FILE No.: 2003A/84

DATE OF HEARING: June 17, 2003

DATE OF DECISION: August 27, 2003

DECISION

OVERVIEW

This is an appeal by the Employer pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director's Delegate issued on February 12, 2003. In that Determination, the Delegate found that the Employer had violated section 54(2) of the *Act* which prohibits an employer from terminating an employee's employment because of an employee's pregnancy or a leave allowed by Part 6 of the *Act* (which Part includes pregnancy leave). The Delegate also found that the Employer breached section 54(3) of the *Act* by failing to return the Employee, at the end of her pregnancy leave, to the position she held before taking the leave or to a comparable position. As a remedy under section 79(4) of the *Act*, the Delegate found that the Employee was entitled to 8 weeks' wages to compensate for the approximately 8 weeks of unemployment she endured from the time she was to return to work from pregnancy leave to the time she found work, as well as to a further 8 weeks' compensation for the loss of her long-term employment prospects with the Employer which, but for the leave, would have been "excellent", and which loss the Employer could have, but did not, assist in the Employee in mitigating.

There is no dispute that the Employer terminated the Employee's employment while she was on pregnancy leave and did not return her to her former or a comparable position. The Employer's position, in a nutshell, is that it decided to eliminate the Employee's position for economic and business reasons and it had no comparable positions. According to section 126(4)(b) of the *Act*, the Employer bears the burden of proving that if it terminated an Employee's employment, it did not do so because she was pregnant or on pregnancy leave.

Grounds for Appeal

The Employer files this appeal under s. 112 of the *Act*. Subsection 112(1) states:

> 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.

Subsection 115(1) of the *Act* states:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the Director.

The Employer says that its grounds for appeal are that the Director failed to observe the principles of natural justice in making the Determination and that the Director erred in law.

The Employer also alleges, as a preliminary matter, that the Determination ought to be cancelled because the wrong party was named as the Employer. The party named in the Determination is Britco Structures Ltd. That entity is not an operating company and has no employees. The Employer says that the Employee was employed by "Britco Structures", which is a partnership and a separate company from Britco Structures Ltd. The Employer says that Britco Structures is the operating entity that was the Employee's Employer. The Employer says that an error in naming the proper party is a substantive matter which justifies setting aside the Determination.

The parties each made written submissions, which included detailed legal submissions by counsel for the Employer. Additionally, a hearing was held at which the Employee gave evidence as did Rick McClymont, the Managing Partner of the Employer and one of its owners. Neither party was represented by counsel at the hearing.

FACTS

The Employer manufactures portable and modular structures. It has an office in Surrey and a factory in Agassiz, B.C. Employees of a related business, Britco Leasing, also work out of the Surrey office. There is a measure of interrelationship between the two operations. Employees of one business perform work for the other from time to time. Among other things, the Britco Structures receptionist fielded calls for both businesses.

The Employee commenced employment with the Employer on April 14, 2000. She provided secretarial and clerical support services to the Employer's design and sales staff.

According to the Employer, when the Employee's employment first commenced, the Employer's business was brisk. As time went on, the economy slowed and the Employer's volume of work diminished significantly, particularly in the period from April 2000 to January 2002.

In the Fall of 2000, the Employer's Manager of Design left and his position was not replaced. At the time, the Employer had 20 employees at Surrey. Britco Leasing had 5 or 6 employees.

In late 2000, the Employee announced that she was pregnant and would be going on pregnancy leave. She ultimately went on pregnancy leave in May, 2001.

Prior to February, 2001, there were 3 Designers and 3 Sales staff in the Surrey office. In February, 2001, two of the Designers were relocated to the Agassiz factory. The third Designer stayed in Surrey. As a result of the relocation, there was less work for the Employee to do for the group of Designers as a whole. Additionally, the sales staff became more adept at using their computers, further reducing the Employee's workload. Concurrent with this reduction in work, the Employee took on additional work both for Britco Structures and Britco Leasing. As noted below, the parties disagree about the volume of this work. The Employee continued to be a full-time employee.

Before the Employee left on pregnancy leave, she was asked to use up her outstanding vacation. It was agreed that she would do this by taking one day off per week as vacation over the two months before she commenced her pregnancy leave.

Additionally, the Employee was advised by her boss, Mr. Ridley, that an employee of Britco Leasing, Ms. Greening, would assume some of her duties in her absence. At the time, Ms. Greening worked part-time,

3 days per week, performing collections work for Britco Leasing. The Employee says she was told that Ms. Greening's hours would be increased to full time, 5 days per week, while the Employee was on maternity leave and that Ms. Greening would return to part-time hours on the Employee's return. Additionally, she was told that other employees would assume some of her duties in her absence. The Employer did not contradict this.

As noted, the Employee commenced pregnancy leave in May, 2001. At no time before she went on leave was she told that there was any prospect that her position would be changed or eliminated in her absence. There is no evidence that the Employer decided, before she went on pregnancy leave, that it would eliminate her position at some time in the future.

The Employer did not hire a new employee to replace the Employee during her absence. It says that some of the work she performed before she left was done by Ms. Greening, some was distributed amongst remaining employees and the balance of the work was simply no longer done.

In the Fall of 2001, a Sales person left, leaving two remaining Sales persons.

According to the Employee, in January, 2002, she contacted her boss, Mr. Ridley, to tell him that she was ready to return to work whenever she was needed and that her pregnancy leave would end in March. The Employee testified that she did this to let the Employer have an opportunity to give Ms. Greening notice that her part-time hours would resume. Mr. Ridley told her there would be no problem and he would get back to her with a date for her return.

According to the Employee, she did not hear from Mr. Ridley and so called him again a short time later. At that time he told her that there was no job for her to return to. The Employee advised him that the Employer was obliged to put her back in her former position on her return from pregnancy leave. She informed him that she was willing to return to her job on a part-time basis. She inquired about the possibility of filling the position of a co-worker who, unbeknownst to the Employer at the time, was pregnant and was going to seek to take pregnancy leave in the summer. The Employee also inquired about a new position recently filled at Britco Leasing, known as Customer Service Representative. He told her that he was unaware of the co-worker's pregnancy leave and that the new position at Britco Leasing involved different duties from hers. He said he would talk further with the owners and get back to her, but he never did.

The Employer does not contest the Employee's evidence about her exchanges with Mr. Ridley.

During the hearing, it became clear that the Customer Service Representative position was filled before the Employee left on pregnancy and that it did indeed involve substantially different skills, abilities and duties than the Employee's position.

In any event, within days of her last conversation with Mr. Ridley, the Employee received a letter dated January 25, 2002 from her Employer advising that her employment was terminated. The letter contained a cheque for severance pay equivalent to 3 weeks pay, which was 1 week more than the 2 weeks pay the Employer believed was normally required. The letter said she would be provided with a reference letter, but this letter was not provided to her until November 13, 2002. According to the Employee, the lack of a reference letter hindered her job search.

The Employer acknowledged that the decision to eliminate the Employee's position and terminate her employment was made in January, 2002 after it was contacted by the Employee. It said it made this

decision because it was clear at that time that there was insufficient work for the Employee to do. In support of this, it said that its work could fluctuate in volume over time and said that it would take about 8 months to bring a contract for work to fruition. The contracts the Employer had been working on over the prior months did not indicate that volume would change. It decided it would be better for the Employee to have notice of termination sooner rather than later. It had no explanation for why it took the decision in January, 2002 instead of in March, 2002 when her maternity was scheduled to end and the prognosis for future volume of work would be more certain.

The Employer's position is that the Employee's employment was not terminated because of her pregnancy. Rather, her position ceased to exist. The Employer said that because of the decline in the Employer's business and the relocation of the Designers, who were now doing more of the work the Employee previously did, the Employee's work declined by about 50-60%. The volume of work declined further after May 2001.

Additionally, the Employer says it was not entirely convinced the Employee would return to work because she now had 2 children. Mr. McClymont said he did not think terminating her employment would be a problem as he thought at some time she would advise she was not coming back.

The Employer said the failure to provide the promised letter of reference was an oversight. Mr. Ridley erroneously thought he had already supplied it. A reasonable and fair letter was ultimately supplied.

The Employer submits that it did not act with any improper motivation. It was fair and reasonable with the Employee.

The Employee disagrees that her work evaporated. She says that her work evolved from the time she commenced employment with the Employer. She did not work strictly for the Designers and Sales people. She acknowledges that, after the Designers were relocated, her work diminished by about half, but says she took on additional work that more than compensated for the loss of that work. For instance, by the time she went on pregnancy leave, she was relieving for 1 ¼ hours a day on reception, she did more work with the Sales people, she attended meetings to take minutes and says she did additional work for Britco Leasing. The Employer agreed that she performed work for Britco Leasing and concedes that she took on additional work after the Designers were relocated, but said this was "make work".

When the Employee went on pregnancy leave, Ms. Greenings' hours were increased by two days per week to cover her work. At the hearing, Mr. McClymont's evidence was that Ms. Greening continued to work full time until August, 2002 when her hours were reduced to 5 hours a day, 5 days a week. In September or October, 2002, she was injured in a motor vehicle accident. She was off work for about 6 to 8 weeks, during which time a temporary employee replaced her. The temporary employee worked full-time hours. Ms. Greening subsequently returned to work, gradually increasing her hours. Ms. Greening was not called as a witness.

It was clear during the hearing that Mr. McClymont was somewhat, but not fully familiar with the Employee's work duties or the amount of time she spent doing each of them. Mr. McClymont was not her immediate superior. Mr. Ridley was. The Employee listed her work duties and Mr. McClymont acknowledged that she did most, if not all of them, before commencing her pregnancy leave, but he disagreed with her about how much work there was and whether her job had "evolved" as she asserted. In his view, the duties she listed in her evidence were encompassed in the job description she was given at the start of her employment.

Mr. Ridley was not called as a witness. No explanation was provided for not calling Ms. Greening or Mr. Ridley as a witness. I am entitled to draw an adverse inference from the failure to call them; that their evidence, if adduced, would not have assisted the Employer's case. Accordingly, I prefer the Employee's evidence over the Employer's evidence with respect to what the Employee's work duties were during her employment with the Employer.

According to the Employee, in July, 2002, she applied to relieve in the Accounts Receivables position while the incumbent was on pregnancy leave, but was unsuccessful. She was told the Employer had more qualified applicants. The Employee notes that she performed some relief work for this position when the incumbent was off on an earlier maternity leave. She maintains that she was qualified by this experience and prior similar work experience to do accounts receivables work. She considers this work was comparable work within the meaning of the *Employment Standards Act* which ought to have been given to her. She acknowledges that the work duties were not similar to her former position, but says it was comparable in terms of work flow.

The Employee also considers the Customer Service Representative position to be a comparable position. She thought it would overlap with her position, but did not know which of its duties would overlap.

In my view, neither the Accounts Receivable nor the Customer Service Representative positions were comparable positions to the Employee's former position.

The Employee ultimately found part-time employment, 2 days a week, which lasted from the end of April, 2002 until March 2003 and which paid $180 per week.

PRELIMINARY MATTER

The Employer is correct that there is tribunal jurisprudence to the effect that the identity of a party is not a mere technicality, rather it is a substantive matter (*470999 B.C. Ltd.* BC EST #DO42/99; *Smoother Movers Ltd.*, BC EST #DO94/99; and *Mission Bingo Association*, BC EST #D592/01). The latter two cases refer to the first. The first makes it clear that not all errors in naming a party are substantive in nature. The underlying policy issue is one which relates to natural justice and prejudice. Naming a completely different person than the one intended can prejudice that person and deprive it of the opportunity to consider its position, be heard and, if necessary, appeal.

In the instant case, none of those concerns arise. The Employer says it is a partnership known as "Britco Structures". The evidence is that the Employer is owned by Rick McClymont and David Taft. The Delegate dealt with Mr. McClymont as the Employer's representative from the outset. Mr. McClymont made submissions to the Delegate and appeared at the appeal on behalf of the Employer. There was no allegation that the Employer was prejudiced by being named as Britco Structures Ltd. rather than as a partnership carrying on business as Britco Structures.

In *Smoother Movers Ltd.*, the Tribunal noted that the Director is not precluded from issuing a correct determination and in so doing the person named in it will have an opportunity to appeal that corrected determination in accordance with the requirements of the *Act*. In that case, the Tribunal referred the identity of the Employer back to the Director. In the instant case, I have decided to take the same course. As noted, the evidence before me is that Mr. McClymont and Mr. Taft are both owners of the partnership operating as "Britco Structures" and of Britco Leasing Ltd. It is not clear, however, whether Britco

Structures Ltd. and/or Britco Leasing Ltd. are also partners in the partnership. Accordingly, the preferable course is to refer the matter of the identity of the Employer back to the Director.

(A) BREACH OF NATURAL JUSTICE

The Employer alleges that the Director breached the principles of natural justice by failing to give it an opportunity to respond to the Employee's allegations, failing to conduct a proper investigation and failing to consider relevant evidence in making the Determination.

Failure to Provide Opportunity to Respond

The Employer says it was not given an opportunity to respond to the Employee's letter to the Delegate dated November 12, 2002. It says allegations contained in that letter were accepted and formed part of the basis of the Determination. Therefore, the Employer was denied natural justice when it was not provided with full disclosure and an opportunity to respond to the allegations in that letter which were material to the Delegate's Determination (in this regard it cites, *inter alia*, *Cineplex Odeon Corp.,* BC EST No. D577/97).

The November 12, 2002 letter was made in reply to the Employer's response to the Employee's complaint. Although the Delegate made submissions in this appeal, he did not deny the Employer's allegations that the Employee's November 12, 2002 letter was not supplied to the Employer prior to the Determination.

The principles of natural justice require, among other things, that a party to judicial or quasi-judicial proceedings has a right to be informed of the case it has to meet and to be heard in response. In the instant case, the Employer was informed of the complaint and was given an opportunity to respond, which it did. However, it was not informed of the Employee's reply to its response.

The task before the Delegate was to conduct an investigation, not to conduct a full-blown hearing and then to make a determination based on the evidence and submissions before him. Nevertheless, in such circumstances, the Delegate must provide the parties with sufficient disclosure of evidence and submissions that are material to the Determination so as to allow the parties an opportunity to know the case against them and respond. As noted, the Employer contends that the Delegate's alleged breaches of natural justice were material to the Determination. For the reasons set out below, I find that the Employer's appeal on this ground fails. The submissions contained in the Employee's November 12, 2002 letter, although not disclosed to the Employer, were not material to the portions of the Determination challenged by the Employer.

The Delegate set out the parties' respective submissions, followed by his findings and analysis.

With respect to s.54(3), the Delegate stated that, after reviewing and considering "the written submissions and arguments made by Britco", he was unable to conclude that the Employee's termination was for any reason other than her pregnancy leave.

It is therefore clear on the face of the Determination that the Delegate relied solely on the Employer's submissions in reaching his conclusions. Accordingly, the alleged error respecting natural justice was not material to the Delegate's finding under s.54(3).

The Delegate also found that the Employer breached s.54(3) by not returning her to the job she left or a comparable job.

After noting the Employer's failure to offer the Employee an alternate job, the Delegate went on to set out his key findings:

1. The Employee trained a part-time employee to take on some of her duties before she went on maternity leave;

2. That employee [Ms. Greening] is still performing those duties and that person still works for Britco;

3. This evidence (in (1) and (2)) does not support Britco's allegation that the Employee's position no longer exists; and

4. Britco's business reasons for failing to return the Employee to her duties, even on a part-time basis, are not apparent.

With respect to the first finding, although the Employer's written submissions do not mention that the Employee trained Ms. Greening, it conceded that point before me. Accordingly, there is nothing in the evidence before me that indicates that the alleged error respecting natural justice concerning this finding was material to this finding.

With respect to the second finding, there was no dispute in the parties' submissions to the Delegate that Ms. Greening performed some of the Employee's duties and that she continued to be employed throughout. The parties differed about the volume of that work and whether it diminished over time. The Delegate assessed and weighed the disputed evidence and made his findings as he was obliged to do. The parties maintained their positions in their submissions to me, although the Employer conceded that Ms. Greening's hours were reduced in August 2002 because of a motor vehicle accident, as the Employee had alleged to the Delegate. That exchange was not material to the Delegate's Determination. Accordingly, the Employer failed to establish that the alleged error respecting denial of natural justice was material to this finding.

With respect to the third point, the conclusion flows logically from the first two points. Given my findings, set out above, I am unable to find that the error respecting natural justice was material to this finding.

With respect to the fourth point, since the Delegate relied on the Employer's submissions, alone, respecting this finding, the alleged error respecting natural justice was not material to it.

The Delegate then considered the issue of remedy. He accepted that the Employee was unemployed from her scheduled return to work date of March 5, 2002 until April 26, 2002 when she commenced part-time employment. He awarded her 8 weeks' wages in compensation for this period of time.

The Delegate then went on to accept the Employee's submission that, had it not been for her leave, her long-term prospects with the Employer would have been excellent and he awarded her a further 8 weeks' wages in compensation. Additionally, he noted that the Employer could have assisted the Employee in mitigating her damages by providing her with a reference letter.

However, the Delegate's findings respecting remedy do not arise from the submissions made by the Employee in her November 12, 2002 letter. There, she makes no submissions about her future employment prospects or the effect of the Employer's failure to give her a reference letter on her job search. Accordingly, the alleged error respecting natural justice was not material to the Delegate's finding on the issue of remedy.

Failure to Conduct a Proper Investigation

The Employer also says that it was deprived of its right to natural justice because of the Delegate's failure to conduct a proper investigation. More specifically, it says that it was not provided with all of the information relating to the complaint, that it was not given a full opportunity to respond to the Employee's allegations, and that none of its employees were interviewed to substantiate the submissions made by the Employer's representative, Mr. McClymont. As a result of these failures, the Delegate accepted as fact the allegations made by the Employee.

The Tribunal has held that the investigation process envisioned by the *Act* does not require full disclosure to the parties of all of the materials or information obtained by the Delegate in the course of conducting an investigation as long as they are provided with sufficient details and copies of pertinent documents in order to adequately respond to the complaint (*Tina Argenti*, BC EST #D332/00, *O'Reilly*, BC EST #RD165/02, *Cyberbc.com AD & Host Services Inc.* BC EST #RD 344/02). In *O'Reilly*, the Tribunal held that the appellant had ample knowledge of the case it had to meet and was provided with reasonable opportunity to respond.

Whether or not a party ought to have an opportunity to respond to opposing parties' submissions will depend on the materiality of those submissions, as well as the stage in the process at which those submissions were made. The parties are entitled to know the case they must meet and to have an opportunity to be heard, but that does not mean that they have an unbridled right to make as many submissions as they wish on whatever subject they want to raise. For instance, a respondent is entitled to respond to a complainant's complaint. A complainant is entitled to reply to that response, but that right is generally limited to contradicting or clarifying new facts and issues raised in the respondent's response. After those exchanges have been made, the respondent is not entitled to make further submissions (or "sur-reply") as a right.

In my view, the opportunity to make further or "sur-reply" would only arise in unusual circumstances and its scope would not go further than the scope of reply. On appeal, therefore, at the very least, the appellant must demonstrate that the complainant raised new facts or issues before the Delegate that it ought to have had an opportunity to contradict or clarify and which were material to the Delegate's Determination. In the instant case, aside from the Employee's November 12, 2002 letter, which I have found was not material to the Delegate's Determination, the Employer has not identified what specific allegations it ought to have had an opportunity to respond to that were not disclosed and how they were material to the Tribunal's Determination. Nor has it indicated what were the submissions it would have made that ought to have materially affected the Tribunal's Determination.

With respect to the Employer's allegation that none of its employees were interviewed to substantiate submissions made by Mr. McClymont to the Delegate, the Employer only pointed to one person, Ms. Greening, as an employee who have ought to have been interviewed, arguing that this employee's evidence would have corroborated Mr. McClymont's submissions. However, at the hearing of this appeal, the Employer failed to call Ms. Greening as a witness. As noted, I am entitled to draw the adverse inference from that failure that her evidence would not have assisted the Employer.

Accordingly, I find that the Employer's allegations the Delegate failed to conduct a proper investigation do not succeed.

Failure to Consider Relevant Evidence

The Employer also alleges that the Delegate failed to consider relevant evidence in making the Determination. In this regard, it makes seven submissions, five of which were specifically addressed in the Determination. I am unable to conclude that they were not considered by the Delegate.

The Employer acknowledges that it did not disclose the remaining two allegations to the Delegate, and says that this was because it was not provided with a full opportunity to respond to the complaint and because a proper investigation was not conducted. Those two submissions are:

1. In March 2001, the Employee requested that she be allowed to work four days per week and her request was granted. The Employee worked only four days per week for two months prior to her maternity leave.

2. The Employee alleged in her November 12, 2002 letter that she was also performing work for Britco Leasing Ltd., a separate company. The Employer submits that, after the Designers' move to the Agassiz factory in February 2001, the Employee did perform some "make work" for Britco Leasing Ltd. because her duties as the Design/ Sales Secretary had diminished.

With respect to the first submission, that the Employee requested that she be allowed to work four days per week, etc., the evidence at the hearing established that the Employee was asked to use up her vacation time before she went on maternity leave. It was decided that she would take one day off for vacation per week for the two months prior to her maternity leave. Accordingly, there is no merit to this submission.

With respect to the second submission, the evidence at the hearing was that the Employee performed work for Britco Leasing Ltd. before and after the Designers were relocated to the Agassiz factory and that she performed additional work for Britco Leasing Ltd. after that time. There was no suggestion that this was "make work" for her. I find there is no merit to this submission.

Moreover, the evidence satisfies me that the Employer was aware of the Employee's complaint and could have made these submissions at any time, irrespective of what the Employee stated in her November 12, 2002 letter. The Delegate could not have erred in failing to consider evidence no one put before him. In any event, the Employer failed to establish the veracity of its allegations at the hearing. Accordingly, I find that the Delegate did not err in failing to consider relevant evidence, as alleged.

The Employer also alleges that the Delegate failed to consider relevant evidence in making the Determination and, in particular, in reaching the conclusion that the evidence did not support the Employer's allegation that the Employee's position no longer existed. More specifically, the Employer alleges:

> The Director also concluded that because the employee who took on some of [the Employee's] duties when she went on maternity leave still worked for the company and was performing those duties, the evidence did not support Britco's allegations that [the Employee's] position no longer existed.

That is not the precise finding made by the Delegate. The Delegate's finding was as follows:

> The evidence shows that [the Employee] trained a part-time employee to take on some of her duties before she went on maternity leave and that employee is still performing those duties. There is no dispute from either party that this person still works for Britco. This evidence does not support Britco's allegation that [the Employee's] position no longer exists.

The Delegate was merely stating that this evidence did not support the Employer's position that the Employee's position no longer existed. In my view, the Delegate was correct on this point. This evidence weighed against the Employer's allegation.

The Employer also asserts that the Delegate did not consider a three-paragraph letter from the Human Rights Commission dismissing a complaint made by the Employee against the Employer under the *Human Rights Code* (the "*Code*") on grounds set out in a separate document not produced to the Tribunal and not disclosed in the letter. In my view, that legislation is materially different from the relevant provisions of the *Employment Standards Act*. The mere fact that a person may not have a valid complaint under the *Code* does not mean she does not have a valid complaint under Part 6 and section 54 of the *Act*. The *Code* is anti-discrimination legislation. The *Act* sets out basic standards of compensation and conditions of employment. Among other things, Part 6 and section 54 of the *Act* provide for and protect terms and conditions of employment in the event of an employee's pregnancy or pregnancy leave. Accordingly, a letter from the Human Rights Commission disposing of a complaint under the *Code* is not necessarily relevant to or binding on the Director (or his or her Delegate) or on this Tribunal merely because it may deal with the same events that give rise to the instant complaint. In the instant case, I find the letter itself, which does not set out facts, issues or reasons, is irrelevant to the matters before me.

Ignoring Evidence

The Employer submits that the Delegate breached the principles of natural justice because he ignored evidence that the hours of work that Ms. Greening spent in support of the Design and Sales staff were reduced in August 2001. There is authority for the proposition that failure to consider a relevant portion or portions of the evidence is a breach of the principles of natural justice (*OPSEU v. Ontario* (1984), 5 D.L.R. (4th) 651 (Ont. Div. Ct.) and *Megins v. Ontario Racing Commission*, (2003) 225 D.L.R. (4th) 757). However, it is clear from the face of the Determination that the Delegate adverted to the evidence at issue and did not ignore it.

Alternative Conclusion re Natural Justice

In the event that I am wrong in concluding that the Director did not breach the principles of natural justice as alleged, I point out that I have conducted a full hearing and made findings based on the evidence and submissions before me. My findings on the merits are as set out under the heading "Facts", above, and under the heading "Alternate Findings", below, and elsewhere herein. In view of my findings on the merits following the hearing before me, any breach of natural justice committed by the Delegate has been cured in these appeal proceedings as the parties have had the opportunity to fully address the issues raised with respect to the alleged denial of natural justice (*Cyberbc.Com AD & Host Services Inc*., *supra*; *O'Reilly*, *supra* and *Modern Logic Inc.*, BC EST #D151/02).

(B) ERRORS OF LAW

The Employer alleges that the Delegate erred in law in three respects:

1. he erred in the application of sub-sections 54(2), 54(3) and 126(4)(b) of the *Act*;

2. he made material findings of fact which were not supported by the evidence; and

3. he erred in calculating the amount payable to the Employee.

As noted, subsection 112(1) sets out the grounds on which a party may make an appeal under the *Act*. The Employer's allegations raise the question of whether or not the errors alleged are indeed errors of law.

In a number of decisions of the Employment Standards Tribunal, panels have 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.

This definition was first enunciated in 1992 in *Assessor of Area 26 – Prince George v. Cal Investments,* (1992) Stated Case 335 (B.C.S.C.) and was later quoted with apparent approval by the B.C. Court of Appeal at 1984-8 of Stated Case 335 (see *Gemex, supra*, at para. 9, Quicklaw version). However, the question of whether or not the issue before the Court in that case was not strictly one of law, but rather one of fact or mixed law and fact, was not addressed by the B.C. Court of Appeal in *Gemex*.

Recent decisions of the Supreme Court of Canada have elaborated upon the distinction between questions of law and questions of mixed law and fact and, since *Gemex*, the Supreme Court of British Columbia has adverted to these distinctions in determining whether or not a tribunal or court which has jurisdiction to hear appeals of questions of law, alone, can hear appeals regarding questions of fact or mixed law and fact.

For instance, in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, it was said that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (para. 35 of the Quicklaw version). It was recognized that the distinction between law on the one hand and mixed law and fact on the other was difficult. Occasionally, what appears to be one may turn out to be the other.

It is clear from s. 112 of the *Act* that a question of fact, alone, is not within this Tribunal's jurisdiction. The following questions appear to me to remain: to what extent, if at all, can a question of mixed law and fact fall within the Tribunal's jurisdiction as being an error of law; and in what circumstances, if at all, can a question of fact be characterized as a question of law? I leave aside the question of whether or not such questions may also be breaches of natural justice.

The case of *Housen v. Nikolaisen*, 2000 SCC 33 gives some assistance. In that case, the majority of the Court concluded that a finding of negligence was a question of mixed law and fact. However, there were circumstances in which an embedded question of law might be extricable and reviewable according to the standards of appellate review applicable to a question of law. The majority stated, at paras. 36 and 37 of the Quicklaw version:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or simple error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" ….
>
> … It is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

According to that case, a question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

The post-*Gemex* cases dealing with appeals under the *Assessment Act* which have considered the *Southam* case have not considered the *Housen* case, although they appear to have come to a result consistent with each. In *Star of Fortune Gaming Management (B.C.) Ltd. v. British Columbia (Assessor of Area #10 – Burnaby/New Westminster)*, 2002 BCSC 1002, the B.C. Supreme Court considered an appeal under the *Assessment Act* which involved allegations that an administrative tribunal had erred in finding that a marine vessel fell within certain definitions specified in the *Act*. The Court considered both *Gemex* and *Southam*. The respondent argued that the question of whether a matter or thing fell within a legal definition was a question of fact and was therefore outside the Court's jurisdiction, which was limited to questions of law. The appellant argued that the issue was a question of law because it related to a misinterpretation or misapplication of the *Act*. The appellant suggested that the issue fell within the test for questions of law laid down in the *Southam* case because it was a question of statutory interpretation and one which may arise again in the future. The Court agreed that the question was one of law within the parameters defined in *Southam*. It involved a question of interpretation, at a level of some generality, of statutory provisions.

Accordingly, the Court appears to have concluded that the question was one of law because it related to a question of statutory interpretation which could be extricated from the more particular question, which was framed by the appellant as a question of fact, which was whether a particular matter or thing fell within a statutory definition.

In *O'Connell Holdings Ltd. v. British Columbia (Assessor of Area #4 – Nanaimo/Cowichan)*, 2003 BCSC 698, the Court again considered whether the issue on appeal fell within its jurisdiction under the *Assessment Act* which was limited to questions of law, alone. Again, the question related to whether or not certain matters or things fell within a definition set out in the *Assessment Act*. In addition to considering the *Star of Fortune Gaming Management (B.C.) Ltd.* case, and through it the *Gemex* case, as well as other authorities, the Court considered *Cominco Ltd. v. Assessor of Area #18 – Trail – Grand Forks*, [1982] B.C.J. No. 1205 (S.C.).

In *Cominco*, the question was whether or not the Assessment Appeal Board erred by determining that all of the items were properly assessable against the appellant. This question was said to be so broad and general in its scope as to amount to simply asking "was the decision right?" Because the Court's jurisdiction was to hear and determine cases submitted on questions of law alone, and because no question of law emerged from the question put, it was held in that case that the Court had no power to answer it.

The Court in *O'Connell Holdings Ltd.* found that the question as stated by the appellant did not define the Court's jurisdiction. The Court said:

> In framing the question put in the case at bar the appellant tracked the wording of the question put in *Star of Fortune Gaming, supra*. In deciding whether the question in this case relates to a question of law, it is necessary to consider what it is that the appellant wishes to have answered. If, as in *Star of Fortune Gaming, supra*, the issue is that of statutory interpretation, then the question put relates to a matter of law. If, as in *Cominco Ltd., supra*, the issue is whether the Board erred in deciding whether a particular thing or matter falls within the legal definition of its term, the question put relates to a matter of fact or mixed law and fact: see *Holliger Consolidated Goldmines Ltd., supra*. (para. 16, Quicklaw version)

The Court went on to say that the appeal ought not to be summarily dismissed because the stated case, as worded, may relate to a question of fact or mixed fact and law or that it may be so broad and general as to simply be asking whether the decision was right. It found:

> In my opinion, the question is a question of law to the extent that it relates to the issue of whether the Board erred in law in determining what legal principles are of application to the determination of whether the Containers are fixtures placed on the Property. (para. 18, Quicklaw version)

The Court stated that the wording of the stated case as chosen by the appellant did not define the Court's jurisdiction; the Court only had jurisdiction insofar as it relates to a matter of law arising in the proceeding (see para. 22).

The Court went on to state:

> The issue as to whether the Containers fall within the definition of fixtures is a matter of fact or a matter of mixed fact and law. In my opinion, when determining that the Containers were fixtures, the Board applied the correct legal definition of fixture. That is the extent of the court's jurisdiction on this appeal. (para. 33 of the Quicklaw version)

Accordingly, in that case, the Court looked at the question before it and found it was a question of fact or mixed law and fact and then determined the extent to which, if at all, a question of law arose from that question.

I find that the approach in *Star of Fortune Gaming Management* and *O'Connell Holdings Ltd.* can be applied in a manner that is consistent with *Gemex*. This can be done by finding that the definition of error of law in *Gemex* ought not to be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact, alone, or errors of mixed law and fact which do not contain extricable errors of law.

(1) Misapplication of Law

As noted above, the first error of law alleged by the Employer was that the Delegate erred in the application of subsections 54(2), 54(3) and 126(4)(b) of the *Act*. Those sections are set out below:

> 54(2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
>
> (a) terminate employment, or
>
> (b) change a condition of employment without the employee's written consent.
>
> (3) As soon as the leave ends, the employer must place the employee
>
> (a) in the position the employee held before taking leave under this Part, or
>
> (b) in a comparable position.
>
> 124(4) The burden is on the employer to prove …
>
> (b) that an employee's pregnancy, or leave allowance by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

Part 6 of the *Act*, which contains section 54, allows for pregnancy leave (s.50).

With respect to the first alleged error of law, the Employer does not allege that the Delegate erred in its interpretation of the *Act*. Rather, it alleges that the Delegate erred in the application of the relevant provisions of the *Act* to the facts. In this latter regard, it alleges that the facts are as it characterizes them, rather than as the Delegate characterized them.

As noted, the Supreme Court of Canada has said in *Southam, supra,* that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (paragraph 35). Since the Employer does not allege that the Delegate erred in interpreting the law or in determining what legal principles are applicable, it cannot allege that the Delegate erred in applying the incorrect legal test to the facts. Nor can it allege that the Delegate erred in applying the correct legal test to the facts the Employer accepts. I can only conclude that it alleges that the Delegate erred in applying the correct legal test to facts that the Employer disputes. Therefore, the question, in reality, is whether or not the Delegate erred in respect to the facts that the Employer disputes. This is a question of fact over which the Tribunal has no jurisdiction. The application of the law, correctly found, to allegedly erroneous errors of fact does not convert the issue into an error of law. I am unable to extricate a question of law from the question the Employer seeks to have answered.

(2) Allegation that Material Findings of Fact are not Supported by the Evidence

The Employer submits that a decision reviewable for error of law in the face of the record may be set aside if it is based on a material finding of fact that is not supported by the evidence, if the absence of evidence is apparent on the face of the record of the Tribunal's proceedings.

In this regard, the Employer reiterates the allegations referred to earlier that the Delegate failed to consider seven allegations of fact in concluding that the Employer's business reasons for failing to return the Employee to her duties were not apparent. As noted, I am unable to conclude that five of the seven challenged allegations of fact were not considered by the Delegate. Two of the seven were not considered because the Employer did not disclose them to the Delegate, despite having had an opportunity to do so. In any event, for the reasons set out above, there is no merit to the two allegations the Employer did not previously disclose to the Delegate.

Additionally, the Employer says that the Director's conclusion that there were duties for the Employee to return to was not supported by the evidence. In this regard, it again relies on the seven items of evidence referred to earlier. I repeat that there was no merit to two of the allegations and the balance of the allegations were adverted to and I am unable to conclude that the Delegate did not consider them. In any event, there was some evidence to support the Delegate's finding. That evidence included that Ms. Greening's work was increased from part-time to full-time so that she could perform work formerly performed by the Employee. Ms. Greening continued to perform these duties after the Employee was terminated. Additionally, other employees were assigned duties formerly performed by the Employee. (This was corroborated by the Employer in the hearing before me, although it disputed the volume of work the Employee performed when she went on pregnancy leave.) Further, when the Employee advised her boss she was ready to return to work, she was told it should not be a problem.

The Delegate was obliged to and did consider, evaluate and weigh the evidence. Although he did not assess the evidence in the manner advocated by the Employer, his assessment was based on some evidence and he did not err in law by making a finding that was unsupported by evidence. I find that the Delegate did not err in law by reaching his conclusion without any evidence.

The Employer says that the Delegate concluded that had it not been for her leave, the Employee's long-term prospects with the Employer would have been "excellent". The Employer submits that there is no evidence to support this conclusion and that, in fact, there was evidence to the contrary. As noted above, there was some evidence on which the Delegate could conclude that there were duties for the Employee to return to from her pregnancy leave. A part-time employee was given full-time hours to take on part of the Employee's work. Other duties formerly performed by the Employee were assigned to other persons. This situation carried on after the Employee was terminated. The part-time employee continued to work full-time hours until August, 2002 when her hours were reduced. She continued in employment throughout. (The evidence in the hearing before me was that when the employee was later injured in a motor vehicle accident a temporary employee was hired on a full time basis to replace her.)

As noted, the Delegate was obliged to and did consider, evaluate and weigh the evidence. His assessment, based on that evidence, was that the Employee's long term prospects with the Employer "had it not been for her leave", would have been excellent. Given that the work she formerly performed at the time she went on her leave continued, by and large, to be performed during her leave and after her termination, there was some evidence on which the Delegate could conclude that her long term prospects for continued employment with the Employer, but for her leave, would have been excellent (even though

it is possible that the number of hours she might have worked in future could have fluctuated). I do not find that the Delegate erred in law by reaching this conclusion without any evidence in support.

I add that I am unable to find that the conclusions of the Delegate which are challenged by the Employer are based on a view of the facts which cannot be reasonably entertained, as per the fourth test in *Gemex, supra*. That test has been restated as follows:

> … that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" … (*Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11 Richmond/Delta*, [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18, cited with approval in *British Columbia (Assessor Area No. 27-Peace River) v. Burlington Resources*, 2003 BCSC 1272)

The Employer did not establish that no reasonable person acting judicially and properly instructed could have come to the challenged conclusions reached by the Delegate on the evidence before him.

(3) Error in Calculating Amount Payable

The Delegate awarded the Employee sixteen weeks' wages less three weeks' compensation for length of service she was paid at the time of termination. The sixteen weeks was comprised of eight weeks' wages in compensation for loss of income from the time the Employee was to return from pregnancy leave on March 5, 2002 to the time she found part-time employment on April 26, 2002. Additionally, the Delegate made the following finding:

> I also accept [the Employee's] submission that, had it not been for her leave, her long-term prospects with Britco would have been excellent. I find [the Employee] is entitled to eight (8) weeks wages in compensation.

Section 79 of the *Act* sets out remedies that the Director or the Director's Delegate may award for contraventions of the *Act*. Among other things, where there has been a contravention of Part 6 of the *Act*, instead of reinstating an employee, the Director or the Director's Delegate may pay a person compensation instead of reinstating the person in employment (s.79(2)(c)) and/or pay an employee reasonable and actual out-of-pocket expenses incurred by him or her because of the contravention (s.79(2)(d)).

The Tribunal has held that the predecessor to s.79(2) [formerly s. 79(4)] allows for a complainant to be "made whole" at least in a financial sense, so as to place the complainant in essentially the same economic position they would have been in had the contravention not occurred. It has held that a "make whole" approach ought to be taken when fashioning remedies of a purely compensatory nature under this section (see *MacKenzie*, B.C.E.S.T. No. D033/00, *Afaga Beauty Service Ltd.*, B.C.E.S.T. Decision No. 318/97; *W.G. McMahon*, B.C.E.S.T. Decision No. 386/99). In *Afaga Beauty Service Ltd.*, the Tribunal wrote:

> This section of the Act [s.94(2)] is unique in that it anticipates that a former employee may be reinstated after an unjust dismissal or … can receive compensation instead of reinstatement. In the latter case, appropriate compensation for loss of employment normally is based on the

> circumstances of the employee, e.g., length of service with the employer, the time needed to find alternative employment, mitigation, other earnings during the period of unemployment, projected earnings from previous employment and the like.

In my view, the Delegate did not err in awarding sixteen weeks compensation. The Employee was entitled to compensation for the period of time the Employee was wholly unemployed following her scheduled return to work (March 5 to April 26, 2002). The Employee was also entitled to compensatory damages following the time she was able to secure part-time employment. The evidence adduced before me was that the Employee continued in part-time employment, two days a week, from the latter part of April 2002 until March 2003, during which time she earned $180.00 a week. The Employer did not allege or endeavour to establish that the Employee failed to mitigate her damages. The Employee contended she had difficulty finding work and that her job search was hindered by the fact that the Employer did not provide her with the promised letter of reference.

As noted, a "make whole" approach is appropriate in such circumstances. A more strict application of the make whole approach may well have resulted in a larger award than the Delegate ordered. In the circumstances, I do not find that the Delegate erred in awarding sixteen weeks' compensation in this case.

ALTERNATIVE FINDINGS

In the event that I have erred in my conclusions that the Delegate did not err in finding the Employer breached sections 54(2) and 54 (3), I will set out my findings respecting those matters. On reviewing the evidence and the parties' written and oral submissions, it is my conclusion that at the time the Employee went on pregnancy leave, the Employer was experiencing an economic downturn, but it continued to employ the Employee on a full-time basis and had not decided to eliminate her position. Although her workload had declined largely as a result of the transfer of the Designers from the Surrey office to the Agassiz factory, she performed additional work for it and for Britco Leasing Ltd. She was sufficiently employed that the Employer did not turn its mind to the viability of her job at the time. Nor did it do so for months afterward.

At the time of the Employee's departure on pregnancy leave, the vast majority of the organizational changes made to the Employer's operations had been in place for a number of months. Again, I note that the Employee was employed in a full-time capacity, although she was using up her vacation as per the Employer's request. The Employer planned to accommodate the Employee during her leave and return the Employee to her former position at its end.

Things progressed satisfactorily in the Employee's absence. A significant portion of the Employee's duties were assigned to a part-time employee of Britco Leasing Ltd., resulting in an increase in her hours by two days per week at least until August 2002 when they were reduced. (When that employee was later injured in a motor vehicle accident, a temporary employee was hired to work full time hours.) The balance of the Employee's duties were distributed amongst other employees and some of them were discontinued. The Employer did not turn its mind to the situation at all until January 2002, when the Employee inadvertently attracted its attention to the matter by indicating that she was ready to return to work at any time. At that time, the Employer reviewed the situation, found that it was doing just fine without her and decided to terminate her employment.

There was no satisfactory explanation from the Employer as to why it could not wait until the Employee's maternity leave concluded, to assess the circumstances at that time. The timing of the decision was clearly precipitated by the Employee's advising that she was willing to return to work.

In the circumstances, I am not satisfied that the Employer's business had reorganized in the Employee's absence so significantly as to justify refusing to return her to her former position and terminating her employment. The evidence persuades me that much, if not all, of the work she formerly did continued to be done, albeit by other people within Britco Structures and Britco Leasing.

The Act specifies that as soon as an employee's pregnancy leave ends, an employer "must" place the employee in the position the employee held before taking pregnancy leave or in a comparable position (section 54(3)). The Employee asked to be returned to work. The Employer did not do so. Instead, it terminated her employment. Accordingly, it violated section 54(3) of the Act.

The Act prohibits an employer from terminating an employee's employment because of an employee's pregnancy or a pregnancy leave permitted by the Act (section 54(2)). The burden is on the employer to prove that the employee's pregnancy or pregnancy leave is not the reason for terminating the employment (section 126(4)).

In the circumstances, the Employer has failed to discharge this onus. In my view, the Employee's announcement of her readiness to return to work from her maternity leave triggered the Employer's assessment that it no longer needed her services. It no longer needed her services because it had been able to successfully redistribute her duties to others in order to accommodate her pregnancy leave. In my view, it is not the intention of the Act to allow an employer to accommodate an employee's entitlement to pregnancy leave by redistributing her job duties and then rely on that accommodation to eliminate her position. The clear intention is to allow the leave and return the Employee to the position she formerly held or to a position comparable to it.

With respect to the comparability of the other positions identified by the Employee, it is my view that they are not in fact comparable. Each of the Accounts Receivables position and the Customer Service Representative position are substantially different jobs and are not comparable to the Employee's position. Moreover, neither of them were vacant at the time of the Employee's termination or the time when her pregnancy leave would have concluded. The Customer Representative Position was filled before she went on leave and the Accounts Receivable position was vacated several months after her pregnancy leave would have concluded.

ORDER

Accordingly, the appeal is dismissed on all points with the exception that the Determination will be referred back to the Delegate to determine the correct description of the partnership operating as Britco Structures.

Alison H. Narod
Adjudicator
Employment Standards Tribunal