

An Application for Reconsideration

- by -

Gulf Coast Materials Ltd.
("Gulf Coast")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Elena Miller

FILE Nos.: 2015A/17, 2015A/18, 2015A/19,
2015A/20, 2015A/21, 2015A/22,
2015A/23

DATE OF DECISION: May 13, 2015

DECISION

SUBMISSIONS

David L. Cayley

counsel for Gulf Coast Materials Ltd.

OVERVIEW

1. Gulf Coast Materials Ltd. (“Gulf Coast”) applies pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of a Tribunal decision, BC EST # D003/15 (the “Appeal Decision”), by Member Groves (the “Member”) issued on January 6, 2015. The Appeal Decision confirmed seven Determinations (the “Determinations”) issued December 23, 2013, by a delegate (the “Delegate” or “Delegate Welder”) of the Director of Employment Standards (the “Director”), except with respect to one matter which was referred back to the Director.
2. A determination was issued with respect to the matter referred back to the Director, and that determination was varied in a Tribunal decision, BC EST # D027/15 (the “Further Appeal Decision”), issued on March 13, 2015. By letter dated April 7, 2015, Gulf Coast advised it is not applying for reconsideration of the Further Appeal Decision.
3. Accordingly, the matter before me is Gulf Coast’s application for reconsideration of the Appeal Decision.

ISSUE

4. Section 116(1) of the *Act* provides that the Tribunal may (a) reconsider a decision of the Tribunal; and (b) confirm, vary or cancel the decision or refer the matter back to the original panel or another panel. Accordingly, the first question is whether the Tribunal should exercise its discretion to reconsider the Appeal Decision. If so, the Tribunal may do any of the actions described in section 116(1)(b).

BACKGROUND

5. The factual background to this matter is set out in the Reasons for the Determinations of Delegate Welder and can be summarized as follows.
6. Gulf Coast operates a cement plant on Salt Spring Island, BC (Determination, para. 23). At all relevant times, Bhora Mayer and Mhinder Mayer, who are brothers, jointly owned Gulf Coast and were the sole directors of the corporation (Determination, para. 24). As noted in the Determination at paragraph 24:

Since 2007, the brothers have been involved in numerous business disputes and legal proceedings regarding the operation and governance of a number of companies in which they have joint ownership, including Gulf Coast.

7. One of the disputes between Bhora Mayer and Mhinder Mayer was whether the complainant Dan Helgesen (“Helgesen”) should work for Gulf Coast. For approximately 20 years before October 2007, Helgesen had worked for various companies either owned by Mhinder Mayer or jointly owned by Bhora Mayer and Mhinder Mayer (Determination, para. 25). Mhinder Mayer offered Helgesen employment with Gulf Coast at the Salt Spring Island plant starting on October 15, 2007; however, Bhora Mayer did not want Helgesen as a Gulf Coast employee (Determination, paras. 29 – 30).

8. Bhora Mayer advised Mhinder Mayer of this in writing on October 17, 2007, and advised Helgesen of this in writing on October 18, 2007 (Determination, paras. 30 – 31). He contacted the RCMP about assistance in removing Helgesen from the plant, but was told it was not a police matter (Determination, para. 32). He directed the payroll company for Gulf Coast not to pay Helgesen wages as he was not an employee (Determination, para. 33). He gave Helgesen another letter on October 19, 2007, confirming he was not employed, and he attempted to address the dispute with Mhinder Mayer through a shareholder meeting, but Mhinder Mayer failed to attend the meeting (Determination, paras. 34 – 39).
9. Despite Bhora Mayer’s objections, Helgesen performed work at the Salt Spring Island plant for Gulf Coast at the direction of Mhinder Mayer for several years, between October 15, 2007, and September 17, 2010. During this time, he received bi-weekly payments from Mhinder Mayer’s wife, Kelly Mayer, pursuant to a note signed by her. He was never paid by Gulf Coast nor recorded as an employee of Gulf Coast (Determination, paras. 42 – 46).
10. The evidence established that Helgesen performed customer service and office work tasks for Gulf Coast including quoting orders, organizing and retrieving purchases of supplies, dispatching, billing and answering phones, as well as work related to the production of concrete including designing mixes, batching concrete, maintenance, driving trucks and general labour (Determination, para. 232). There was no dispute that he had knowledge and skills pertinent to Gulf Coast’s business, as he had previously worked for Gulf Coast and had spent a significant portion of his career working in the concrete production industry (Determination, para. 236). He provided his labour and services to Gulf Coast under the direction of Mhinder Mayer, whom the evidence showed “was de facto controlling and directing the day-to-day affairs of Gulf Coast” (Determination, para. 239). There was no evidence that Helgesen’s labour and services benefitted anyone other than Gulf Coast (Determination, para. 245).
11. In July 2009, a Court found that Gulf Coast’s Articles of Association gave Bhora Mayer a second or casting vote (Determination, paras. 41 and 246). Helgesen eventually stopped working for Gulf Coast because Kelly Mayer could not continue paying him (Determination, para. 77). He first filed an employment standards complaint claiming Gulf Coast owed him wages on January 8, 2008, followed by series of such complaints, the last being filed on October 4, 2010 (Determination, para. 2). After a number of intervening events summarized in the Determination at paragraphs 3 – 22, the Delegate issued the Determinations on December 23, 2013. Gulf Coast appealed the Determinations, and the Appeal Decision was issued on January 6, 2015.

ARGUMENT

12. Gulf Coast states that it raises five broad grounds for reconsidering the Appeal Decision:
 - (a) The Member erred in law by declining to reverse the Director’s failure to dismiss the complaints as an abuse of process under s. 76(3) of the *Act*.
 - (b) The Member erred in law by misinterpreting the common law “indoor management rule”.
 - (c) The Director failed to observe the principles of natural justice by ignoring and rejecting the preliminary finding of the previous delegate, Mr. Wall.
 - (d) The Member failed to remedy the Director’s breach of natural justice by referring the matter back for an oral hearing.
 - (e) The Member failed to remedy the Director’s breach of natural justice in failing to determine this matter in a timely manner.

13. With respect to ground (a), Gulf Coast states its position throughout has been that the complaints were not made in good faith, and it sought on this basis to have them dismissed pursuant to section 76(3)(c) of the *Act*. It notes that Delegate Welder “declined to dismiss the complaints on this basis”, and it submits the Member erred in upholding her in that regard.
14. In support of ground (a), Gulf Coast notes the Delegate found that amounts Kelly Mayer paid to Helgesen were “wages” within the meaning of the *Act*, yet she “went on to find that Gulf Coast – and not Kelly Mayer or Mhinder Mayer – was Mr. Helgesen’s employer”. Gulf Coast submits these findings are “inconsistent”, and that the finding the payments by Kelly Mayer were wages “must, under the Act, be accompanied by a finding that the person paying the ‘wages’ is an ‘employer’”, citing the definition of “wages” in section 1 of the *Act*. Gulf Coast submits the “evidence is clear that Mr. Helgesen, assisted by Kelly Mayer and Mhinder Mayer – the latter of whom is a director of Gulf Coast – has brought these complaints in bad faith”.
15. With respect to ground (b), Gulf Coast submits the Delegate made an “impermissible collateral attack” on a judicial review decision which overturned an earlier determination of the complaints by a different delegate, *Gulf Coast Materials Ltd. v. Helgesen*, 2010 BCSC 1169 (the “Judicial Review Decision”). It submits that on appeal, it took issue with the Delegate’s finding that Helgesen was an employee of Gulf Coast notwithstanding Bhora Mayer’s objections, and the Member erred in upholding this finding. It adds with respect to the Delegate’s opinion that Bhora Mayer could have sought an injunction to stop Helgesen’s performance of work for Gulf Coast: “Is this the length to which employers in British Columbia are to reach in order to terminate an employee?”
16. In support of ground (b), Gulf Coast further submits that the result is a “double standard” for employers and employees, whereby employees are “entitled to be wilfully blind to potentially fatal defects in their appointment as employees – a perversion of the indoor management rule”, while employers are required “to commence costly court proceedings and obtain injunctive relief”. Gulf Coast submits there was no finding that Helgesen relied on representations from Mhinder Mayer regarding his authority to act on behalf of Gulf Coast, and that in the absence of such a finding, “there is no basis upon which to find that Mr. Helgesen acted reasonably in ignoring the warnings he received from Bhora Mayer and the obvious defects in the legitimacy of his purported employment with Gulf Coast”.
17. With respect to ground (c), Gulf Coast submits the Member “missed the issue”, because Gulf Coast did not argue on appeal that Delegate Welder did not have jurisdiction to reach a different conclusion from Delegate Wall. It submits the issue it raised was not one of jurisdiction but rather of natural justice, adding:
- The prejudice to Gulf Coast is obvious. Until such time as the Welder Reasons were received, Gulf Coast was unaware of the case it was to meet. At the very least, it reasonably expected that, should the Director reach conclusions different from those of Delegate Wall, it would be provided with notice and details. None have been forthcoming.
18. With respect to ground (d), Gulf Coast submits the Member erred in rejecting its argument on appeal that the Delegate was required to hold an oral hearing. It submits that in this case there were serious questions of credibility, and accordingly it was entitled to an opportunity for cross-examination. It submits in this regard:
- Clearly, key issues in this case turn on the credibility of the witnesses – in particular, the evidence of Mr. Helgesen and Mhinder and Kelly Mayer. Without the opportunity to cross-examine these witnesses, Gulf Coast – as can be seen from the findings of Delegate Welder, upheld by Member Groves – cannot make out its case.

19. With respect to ground (e), Gulf Coast submits that, in addition to the delays it complained of in its appeal, “there was also delay by Member Groves in providing the Appeal Decision”. Gulf Coast submits the Member erred in concluding the delay in the process before the Director was not inordinate and prejudicial to Gulf Coast for the reasons outlined in its appeal submission.
20. Gulf Coast concludes its application for reconsideration by reproducing the conclusion set out in its appeal submission, which it describes as “apt”. It submits the Appeal Decision should be set aside in its entirety or, in the alternative, the matter should be referred back to the Director for an oral hearing by a different delegate.

ANALYSIS

21. As noted earlier, section 116 of the *Act* provides that the Tribunal “may” reconsider a decision. The Tribunal exercises this discretion in a manner consistent with the purposes of the *Act* as set out in section 2, which includes providing “fair and efficient” dispute resolution procedures. It would be neither fair nor efficient if the Tribunal were to permit a party whose appeal has been dismissed an opportunity to simply re-argue their appeal before a different panel in hopes of a different outcome. Accordingly, the Tribunal requires that an application for reconsideration raise a matter which warrants exercise of the power to reconsider: *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97).
22. In the present case, most of Gulf Coast’s grounds for reconsideration reproduce arguments it made on appeal, express disagreement with the Member’s dismissal of those arguments, and effectively seek a re-hearing of the arguments and a different conclusion with respect to them. As noted in the preceding paragraph, that would not be an appropriate use of the power of reconsideration under the *Act*. The question is not whether I would have disposed of individual arguments raised by Gulf Coast in seeking to appeal the Determination in precisely the same way as the Member did in the Appeal Decision. Rather, the question is whether Gulf Coast has raised an issue of sufficient procedural or substantive significance concerning the Appeal Decision such that it should be reconsidered.
23. In that regard, I note Gulf Coast’s grounds for reconsideration of the Appeal Decision are largely substantive, not procedural. That is, Gulf Coast’s grounds for reconsideration do not specifically complain it was denied a fair hearing by the Member in respect to its appeal. I find in any event it is clear Gulf Coast was not denied a fair hearing of its appeal. The appeal was decided on the basis of the extensive written submissions provided by Gulf Coast and the other parties. Gulf Coast’s arguments on appeal were addressed in the Appeal Decision. While Gulf Coast disagrees with the Member’s conclusions on the merits of its arguments on appeal, it is plain that its arguments were considered by the Member in a procedurally fair manner.
24. Gulf Coast does make a bald allegation that “...in addition to the delays to date, there was also delay by Member Groves in providing the Appeal Decision”. Gulf Coast does not elaborate upon this submission, and I am not persuaded the time the Member took to receive and consider the parties’ submissions and then issue the Appeal Decision was unduly lengthy. Gulf Coast’s appeal was filed on January 29, 2014, and the submissions process in respect to the appeal closed on June 13, 2014. The Appeal Decision was issued just under seven months later, on January 6, 2015. Given the lengthy litigation history of this matter, and the size of the record provided to the Tribunal by the Director for appeal purposes under section 112 of the *Act* (1,701 pages long), I find the Member did not delay unduly in issuing the Appeal Decision.
25. Accordingly, I find Gulf Coast has not raised a significant issue with respect to the procedural fairness of the Appeal Decision, such as to justify reconsideration. I turn next to whether Gulf Coast has raised a significant issue with respect to the substance of the Appeal Decision, such as to justify reconsideration. I will first

consider Gulf Coast's grounds for reconsideration (c), (d) and (e), which take issue with the Member's substantive rejection of its allegations of procedural unfairness against the Delegate. I will then consider its grounds for reconsideration (a) and (b), which take issue with the Member's dismissal of its allegations of substantive error in the Determinations. I will consider whether any of the five grounds for reconsideration raise matters which warrant reconsideration of the Appeal Decision.

Reconsideration Ground (c)

26. In its reconsideration application, Gulf Coast reproduces the appeal submissions it made in respect to how the Delegate treated the March 1, 2013, preliminary finding of Delegate Wall that Mhinder Mayer may be the employer of Helgesen. Gulf Coast argued on appeal that it suffered "substantial prejudice when Delegate Clark Welder restarted the process and came to an entirely different factual conclusion from that arrived at previously" by Delegate Wall. It further submitted that "Delegate Clark Welder should have issued a determination in Gulf Coast's favour, consistent with the preliminary findings" of Delegate Wall, "or stated why this preliminary finding could be ignored or rejected".
27. These arguments were addressed at paragraphs 85 – 96 of the Appeal Decision. The Member noted that when Delegate Welder took conduct of the file she "advised the parties that she proposed to consider the complaints anew" (para. 86). As such, she considered she was not bound by the preliminary finding made in the incomplete process before Delegate Wall (para. 88). The Member noted Gulf Coast argued on appeal that it "constituted a failure of nature justice, for [Delegate Welder] to depart from the preliminary findings of Delegate Wall without explaining why it was proper to do so" (para. 87). However, he found it was open to Delegate Welder to take the approach she did (paras. 90 – 92). He further stated he rejected the submission of Gulf Coast "that it was a failure to adhere to the principles of natural justice for Delegate Welder to decline to be bound by the preliminary findings offered in Delegate Wall's March 1, 2013, letter" (para. 92).
28. The Member added that he was not persuaded the way Delegate Welder pursued the investigation afresh was unfair, noting that Gulf Coast had a full opportunity to argue the issue of who was the employer of Helgesen (paras. 93 – 94). He further stated:
- There can be no suggestion, therefore, that Gulf Coast was taken by surprise, or that it was lulled into a misapprehended view of the posture being taken by the Director as a result of the comments made by Delegate Wall in the March 1, 2013, letter, once Delegate Welder took over conduct of the file. (para. 94)
29. The Member concluded his consideration of this basis for appeal by stating:
- Delegate Welder has provided a detailed explanation in her Reasons why she came to different conclusions than those set out in Delegate Wall's March 1, 2013, letter. In the circumstances, I am not persuaded that the mere fact she disagreed with Delegate Wall's findings means that she failed to observe principles of natural justice. (para. 96)
30. Contrary to the reconsideration submissions of Gulf Coast, I find the Member did not "miss the issue" of natural justice in regard to this ground of appeal. In paragraphs 85 – 96 of the Appeal Decision, the Member expressly recognized the natural justice (procedural fairness) complaint that Gulf Coast raised, and he addressed it. In any event, I agree with the Member that there was no procedural unfairness to Gulf Coast in how Delegate Welder treated the preliminary finding of Delegate Wall. As noted in paragraphs 93 – 94 of the Appeal Decision, Delegate Welder specifically posed the question to the parties of who employed Helgesen. Gulf Coast therefore could not reasonably have assumed that she was merely adopting the preliminary finding of Delegate Wall in that regard. It had an opportunity to make submissions to the Delegate on the issue of who was Helgesen's employer, and it made submissions on that issue to Delegate Welder.

31. Contrary to Gulf Coast's reconsideration submission, Delegate Welder did not have to provide a detailed justification or explanation to the parties for why she proceeded in the manner she did with respect to Delegate Wall's finding. She explained sufficiently when she advised them that she would be considering the complaints anew and when she asked them to make submissions on who was Helgesen's employer. I find no error in the Member's conclusion that Delegate Welder was not bound by the preliminary finding of Delegate Wall. I further agree with the Member, for the reasons he gave in the Appeal Decision, that there was no procedural unfairness in the approach Delegate Welder took, in considering the complaints afresh and seeking submissions from the parties on the issue of who was Helgesen's employer.

32. Accordingly, I find reconsideration ground (c) does not warrant reconsideration of the Appeal Decision.

Reconsideration Ground (d)

33. Under this ground for reconsideration, Gulf Coast takes issue with the Member's dismissal of its argument that the Delegate breached natural justice by declining to hold an oral hearing. In particular, it submits that, as there was no oral hearing, it did not have an opportunity to cross-examine witnesses. It submits that, without an opportunity to cross-examine Helgesen, Mhinder Mayer and Kelly Mayer, it could not make out its case that Helgesen had filed the complaint in bad faith.

34. The Member gave reasons for rejecting this ground of appeal at paragraphs 97 – 121 of the Appeal Decision. Among other things, he noted (at para. 113) that tribunals are not obliged in all cases to allow cross examination of witnesses as of right. In the same paragraph, he quoted a passage from an administrative law text which states that the "only right which the rules of procedural fairness guarantee to parties is the right to rebut opposing evidence and to correct or contradict prejudicial statements", and that if this "can be achieved without recourse to cross-examination, then parties appearing before a tribunal are not entitled to it". The passage from the law text quoted at paragraph 113 of the Appeal Decision concludes:

The key is whether cross examination is the only effective method open to a party to answer the case made against it. As such, the availability of cross-examination as a matter of right, as with all other procedural requirements at common law, will largely depend upon the circumstances of the individual case and upon the nature of the particular tribunal involved.

35. In the present case, I am satisfied that cross examination was not the only effective method open to Gulf Coast to answer the case made against, and accordingly the Member was correct to find the Delegate did not deny Gulf Coast procedural fairness (natural justice) when she declined to hold an oral hearing. The case against Gulf Coast was that Helgesen had performed work for Gulf Coast at the direction of one of its directors, Mhinder Mayer, and had not received payment from Gulf Coast for the work he performed. Gulf Coast's answer to the case was that its other director Bhora Mayer, had told Helgesen not to perform work and that he would not be paid for it. Further, Gulf Coast argued that regular payments Kelly Mayer had made to Helgesen for performing the work was "wages" with the meaning of the *Act*, and that therefore Helgesen's employer in respect to the work he performed was one or both of Mhinder Mayer and Kelly Mayer, not Gulf Coast.

36. Gulf Coast was successful before the Delegate in its argument that the amounts Kelly Mayer had paid Helgesen for performing the work were "wages" within the meaning of the *Act*. Its argument that, having made this finding, the Delegate was obliged to find that Kelly Mayer was Helgesen's employer will be addressed below, under reconsideration ground (a). For purposes of this ground for reconsideration, it is sufficient to note that Gulf Coast succeeded in this argument without the need for cross-examination.

37. The Delegate also accepted as a fact that Bhora Mayer told Helgesen “on numerous occasions” not to perform work and that he would not be paid for it, and she accepted that a Court later found Gulf Coast’s Articles of Association gave Bhora Mayer the second or casting vote (Determination, para. 246). The Delegate also made a number of other findings of fact, including that Mhinder Mayer controlled and directed the day-to-day affairs of Gulf Coast, including directing the work of its employees; that the work Helgesen performed for Gulf Coast at Mhinder Mayer’s direction was for the benefit of Gulf Coast’s business and there was no evidence any other entity benefitted from it; and that, although Bhora Mayer objected to Helgesen working for Gulf Coast, he knew that his objections were not effective and took no further steps while Helgesen continued to work for Gulf Coast for a period of years, from October 2007 to September 2010 (Determination, paras. 232 – 250).
38. On the basis of her findings of fact on the evidence before her, the Delegate concluded that Gulf Coast fell within the definition of “employer” in the *Act* with respect to the work Helgesen performed for it. She found this was so even though Bhora Mayer objected to Mhinder Mayer’s direction that Helgesen perform the work. With respect to this circumstance and the arguments Gulf Coast made with respect to it, the Delegate reasoned that the “corporate dispute between Mhinder Mayer and Bhora Mayer does not prevent the Director from exercising her jurisdiction under the Act and applying the statutory requirements of the Act to ensure any and all employees of Gulf Coast receive minimum standards provided for by the legislation” (Determination, para. 251). The Delegate added, in part:
- ...corporate governance disputes between directors of a company do not allow an employer to refuse to pay an employee who has performed work for that employer. In spite of Bhora Mayer’s objections to Dan Helgesen’s employment, Gulf Coast did not get an injunction or in any other way prevent Dan Helgesen from performing work that benefitted Gulf Coast. All of the corporate governance issues that form the backdrop of Dan Helgesen’s complaint, while important, do not determine his employment status and entitlements under the Act. (Determination, para. 252, emphasis added)
39. I agree with the Member that Gulf Coast has not established what other relevant facts it could have elicited only by way of cross-examining Helgesen, Mhinder Mayer and Kelly Mayer that would have affected the outcome of the Determination. The Delegate already accepted as fact that Bhora Mayer had objected to Helgesen performing the work for Gulf Coast at Mhinder Mayer’s direction; that the amounts Kelly Mayer paid Helgesen for the work he performed were “wages” within the meaning of the *Act*; and that a Court later found that Gulf Coast’s Articles of Association gave Bhora Mayer the second or casting vote. Cross-examination was not needed to establish any of these facts which underlay Gulf Coast’s defence against the complaint.
40. To the extent that Gulf Coast further argued that, in performing the work at the direction of Mhinder Mayer and receiving payment for it from Kelly Mayer on the agreement that Gulf Coast would ultimately be liable, Helgesen had “conspired” with Mhinder Mayer and Kelly Mayer to make Gulf Coast responsible for paying his wages, the facts underlying that argument were also already in evidence. See, for example, paragraphs 42 – 46 of the Determination and in particular paragraph 45, which sets out a note written by Kelly Mayer dated January 9, 2008, as follows:
- This note is to say that I Kely (sic) Mayer am making a loan to Dan Helgesen. When Dan Helgesen gets paid from Gulf Coast Materials he has stated he will pay me back.
41. At paragraphs 280 – 286 of the Determination, the Delegate accepted Gulf Coast’s argument that the money Kelly Mayer paid to Helgesen was not a “loan” but rather “wages” within the meaning of the *Act*. The Delegate further held that giving effect to the agreement that Helgesen repay Kelly Mayer would be inconsistent with the *Act* (Determination, para. 285 – 286). The Delegate therefore treated the amounts paid

by Kelly Mayer as wages paid on behalf of Gulf Coast, requiring Gulf Coast to pay only the difference between those amounts and the amount of wages Helgesen earned during the relevant period: see paragraphs 287 – 288 of the Determination.

42. Accordingly, there was no need to cross-examine Helgesen, Kelly Mayer and Mhinder Mayer in order to establish they had agreed, or “conspired”, as Gulf Coast characterizes it, that Helgesen would perform work for Gulf Coast under Mhinder Mayer’s direction, and notwithstanding Bhora Mayer’s objection, and that Kelly Mayer would pay him on the understanding that he would pay her back when he “gets paid from Gulf Coast” (in the words of Kelly Mayer’s January 9, 2008, note). The Determination shows the Delegate was aware of this agreement, or “conspiracy” as Gulf Coast would have it. I agree with the Member that Gulf Coast has not established “what facts it might put to Helgesen, Mhinder Mayer, and Kelly Mayer in cross examination that it has not already laid for consideration before Delegate Welder” (Appeal Decision, para. 117).
43. I therefore find the Member did not err in concluding Gulf Coast was not denied a fair hearing (natural justice) because the Delegate declined to hold an oral hearing. Gulf Coast was able to present its case that the complaint was filed in bad faith or was an abuse of process because of an agreement or “conspiracy” between Helgesen, Kelly Mayer and Mhinder Mayer to employ Helgesen to do work for Gulf Coast and thereby make Gulf Coast liable to pay wages for the work he performed. Gulf Coast was able to present this argument to the Delegate but, as the Member found, the Delegate was not persuaded the complaint should be dismissed on a preliminary basis of bad faith or abuse of process.
44. I further agree with the Member’s upholding of this aspect of the Determination. In the circumstances, it was not bad faith or an abuse of process within the meaning of section 76(3) for Helgesen to have filed a complaint against Gulf Coast seeking payment of wages for the work he had performed for it. Helgesen and Mhinder Mayer did not keep the fact that Helgesen was performing work for Gulf Coast at the direction of Mhinder Mayer a secret from Bhora Mayer. The work was performed openly, and Bhora Mayer was, as the Delegate stated, “keenly aware” that his objections to it were ignored for a period of years (Determination, para. 250). As the Delegate further noted, despite being aware of Helgesen’s employment, “Gulf Coast did not get an injunction or in any other way prevent Dan Helgesen from performing work that benefitted Gulf Coast” (Determination, para. 252).
45. I agree with the Delegate that, as Bhora Mayer knew Helgesen was continuing to work for Gulf Coast despite the warnings and objections he gave in 2007, it was incumbent on Bhora Mayer to do more than just voice objections if he wished Gulf Coast not to be liable to pay wages for the work Helgesen was performing for it at the direction of its other director, Mhinder Mayer. It must be remembered that, at the time, the brothers were at loggerheads over the operation of the company, including with respect to the employment of Helgesen, and the Court had not yet determined that Bhora Mayer held the second or casting vote under the Articles of Association. This determination did not occur until July 31, 2009 (Determination, para. 41), two years after Bhora began objecting to Helgesen’s employment in 2007, and even after Helgesen filed his first employment standards complaint in 2008, seeking wages for the work he had performed to that point for Gulf Coast (Determination, para. 192).
46. Accordingly, in these circumstances, I find the Delegate did not err in declining to dismiss the complaint on the basis that it was filed in bad faith or constituted an abuse of process. The Delegate correctly concluded that Helgesen’s entitlement under the *Act* to be paid the wages he had earned for performing work for Gulf Coast at the direction of one of its directors, Mhinder Mayer, was not negated merely because the other director, Bhora Mayer, disagreed with the decision to employ Helgesen and attempted to prevent it by voicing objections to both Mhinder Mayer and Helgesen.

47. Having considered Gulf Coast's arguments under this ground for reconsideration, I am not persuaded to interfere with the Appeal Decision. I agree with the conclusion that the Delegate did not deny Gulf Coast a fair hearing (natural justice) when she declined to hold an oral hearing.

Reconsideration Ground (e)

48. Under this ground of reconsideration, Gulf Coast submits the Member erred in concluding the delay in the process before the Director was not inordinate and prejudicial to Gulf Coast. This issue is addressed in the Appeal Decision at paragraphs 122 – 130. I find no reviewable error in those paragraphs, or in the Member's conclusion that Gulf Coast has not shown that it has been prejudiced by the length of time this matter was before the Director. To the extent Gulf Coast relies on the effect of time on the memories of potential witnesses, I find it is not prejudiced because, as discussed above, there was no need for an oral evidentiary hearing given the undisputed evidence that was already before the Delegate.
49. The history of how the matter proceeded before the Director from the time Helgesen filed his first complaint to the issuance of the Determination is summarized at paragraphs 1 – 22 of the Determination. While the process before the Director was lengthy due to various issues and challenges which preceded Delegate Welder's assignment to determine the complaints, the matter then proceeded in a relatively expeditious manner before her. As set out in the Determination (paragraphs 15 – 22), she took conduct of the investigation of the complaints on May 17, 2013, investigated the matter afresh, including by asking questions and seeking submissions from the parties, and issued the Determination on December 23, 2013. I find there was no inordinate delay in Delegate Welder's fresh consideration and determination of the complaints.
50. In the Determination, Delegate Welder summarized the factual background to the complaints at paragraphs 23 – 47. The evidence and arguments of the parties are detailed in paragraphs 59 – 183, including summaries of evidence of individuals which were provided by way of affidavit, witness statements and written submissions. I find it is clear from the Determination that Gulf Coast was able to present its evidence and arguments to Delegate Welder in a fair and unprejudiced manner, notwithstanding the passage of time that elapsed from the time the first complaint was filed. I find Gulf Coast has not established the Member erred in concluding there was no procedural unfairness to it as a result of the passage of time from the filing of the first complaint to the issuance of the Determination.

Reconsideration Ground (a)

51. Under this ground of reconsideration, Gulf Coast submits the Member erred in finding the Delegate was not obliged to dismiss the complaint as an abuse of process under section 76(3) of the *Act*.
52. I have already addressed Gulf Coast's argument that the complaint should have been dismissed as an abuse of process or for bad faith, under reconsideration ground (d). For the reasons already given at paragraphs 37 – 39 of this decision, I find Gulf Coast has not established the complaints should have been dismissed on the basis that they were filed in bad faith or constituted an abuse of process. The Member therefore did not err in upholding the Determination in that regard.
53. Gulf Coast also argues, under this ground, that once the Delegate found the payments by Kelly Mayer to Helgesen for the work he performed for Gulf Coast was "wages", she had to find that Kelly Mayer, not Gulf Coast, was therefore the "employer". It says this is the case because "wages" are defined in section 1 of the *Act* as money "paid or payable by an employer". Therefore, because Kelly Mayer was found to have paid Helgesen wages, she must be his employer, and Gulf Coast must not be (presumably, because it did not pay him wages).

54. Gulf Coast's reconsideration application does not indicate that it raised this argument on appeal. If it did not, it cannot raise the argument for the first time on application for reconsideration of an appeal decision. In any event, the argument is without merit. "Wages" are defined in the *Act* as money "paid or payable by an employer". The fact that Kelly Mayer paid Helgesen's wages does not mean she was necessarily his employer, any more than the fact that Gulf Coast refused to pay his wages meant it was therefore not his employer.
55. The Delegate found that, while the money Kelly Mayer paid Helgesen was "wages" within the meaning of the *Act*, it was wages for work he had performed for the benefit of Gulf Coast. As such, wages for this work was "payable" by Gulf Coast, to the extent those wages had not already been paid by Kelly Mayer. The Delegate therefore found Gulf Coast was liable for the difference between the amount of wages Kelly Mayer had already paid Helgesen and the amount of wages he had earned through his work for Gulf Coast. This amount of wages was payable by Gulf Coast because it was his "employer" within the meaning of the *Act* (see in that regard paragraphs 228 – 253 of the Determination, under the heading "Who employed Dan Helgesen for the purposes of the Act?").
56. I find no basis to reconsider the Appeal Decision on this ground of reconsideration.

Reconsideration Ground (b)

57. Under this ground for reconsideration, Gulf Coast argues that all or parts of the Determination constitute a "collateral attack" on the Judicial Review Decision of Davies J. Gulf Coast relied on various observations Davies J. made in the course of the Judicial Review Decision about the matter. However, Davies J. was not deciding any issue of fact or law falling within the exclusive jurisdiction of the Tribunal or the Director. In particular, he was not deciding the merits of Helgesen's complaint.
58. The issue before Davies J. in the Judicial Review Decision was whether a previous decision of the Tribunal, which had upheld a previous determination of the Director, exceeded jurisdiction. In order to decide this issue, Davies J. noted some of the findings of fact made in the previous determination. In doing so, he was not purporting – and cannot be taken – to have made findings of fact with respect to the complaint. The hearing before Davies J. was not a hearing into the merits of the employment standards complaint, nor even into the merits of the previous determination (see, in that regard, the Judicial Review Decision at paragraphs 84 – 88 and 138).
59. Accordingly, the Delegate was not bound by any observations Davies J. may have made about findings of fact made by a previous delegate in a previous determination. The Delegate properly decided the facts relevant to the complaint on the basis of the evidence before her, as found in the written submissions of the parties, including witness statements and affidavits. Accordingly, the Determination is not a "collateral attack" on the Judicial Review Decision.
60. Gulf Coast also takes issue with the Delegate's observation that Bhora Mayer could have sought an injunction to stop Helgesen's performance of work for Gulf Coast, asking rhetorically: "Is this the length to which employers in British Columbia are to reach in order to terminate an employee?" It also argues that there was "no basis upon which to find that Mr. Helgesen acted reasonably in ignoring the warnings he received from Bhora Mayer" and that there were "obvious defects in the legitimacy of his purported employment with Gulf Coast".
61. I find these arguments provide no basis for reconsidering the Appeal Decision. At the time Helgesen performed work for Gulf Coast, Bhora Mayer and Mhinder Mayer were already embroiled in litigation about other disputes over the running of their jointly owned businesses, including Gulf Coast. The potential for

recourse to an injunction must be considered in that factual context. It was not until July 2009 that the Court held Bhora Mayer was entitled to the second or casting vote under the Articles of Association. This was long after Helgesen had begun work for Gulf Coast in 2007 and filed his first complaint in 2008.

62. In these circumstances, I am satisfied that, to the extent it is relevant, Helgesen did not act unreasonably in working for Gulf Coast at Mhinder Mayer's direction and on payments from Kelly Mayer, notwithstanding Bhora Mayer's objections. I note that, in calculating the amount of wages Gulf Coast owed for the work Helgesen had performed for it, the Delegate accepted Gulf Coast's argument that the amounts Kelly Mayer had paid Helgesen were wages. The Delegate therefore found Gulf Coast liable only for the difference between that amount, \$142,640.00, and the amount Helgesen had earned by his work, \$199,711.17, that difference being \$57, 071.17 plus interest (Determination, para. 288). This was so notwithstanding the work benefited only Gulf Coast (Determination, para. 245).
63. Gulf Coast's appeal of the Determination was unsuccessful for the reasons set out in the Appeal Decision. I have considered Gulf Coast's arguments in seeking reconsideration of the Appeal Decision. As explained above, I find none of the grounds for reconsideration raise a significant procedural or substantive issue with respect to the Appeal Decision. I am not persuaded by any of Gulf Coast's arguments to reconsider the Appeal Decision.

ORDER

64. For the reasons given, the application for reconsideration is dismissed. The Appeal Decision is confirmed.

Elena Miller
Member
Employment Standards Tribunal