An application for Reconsideration

- by -

Renshaw Travel Ltd.

- 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: Robert Groves

FILE No.: 2008A/56

DATE OF DECISION: August 26, 2008

DECISION

OVERVIEW

1. This is an application brought by Renshaw Travel Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") seeking reconsideration of a decision of a member of the Tribunal (the "Member") dated May 9, 2008 under #D050/08 (the "Original Decision").

2. The matter came on before the Member by way of an appeal filed by the Employer pursuant to section 112 of the *Act* in which the Employer challenged a determination of a delegate (the "Delegage") of the Director of Employment Standards (the "Director") dated February 1, 2008 (the "Determination"). In that Determination the Delegate decided that the Employer had contravened sections 17 and 58 of the *Act* and that a former employee of the Employer, one Dori Giffin ("Giffin"), was entitled to receive the sum of $3,960.31 in respect of annual vacation pay and accrued interest. The Delegate also imposed two administrative penalties for the contraventions. The total found to be owed by the Employer therefore came to $4,930.31.

3. In the Original Decision, the Member ordered that the Determination be confirmed.

4. I have before me the contents of the Tribunal file relating to the Employer's original appeal, the Original Decision, and the submissions of the Employer, the Director, and Ms. Giffin on this application for reconsideration.

5. There is no issue as to the timeliness of the application.

6. The Tribunal has determined that I will decide this application on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 26 of the Tribunal's Rules of Practice and Procedure.

FACTS

7. The Employer operates a travel agency. Its principal is Don Renshaw ("Renshaw"). Ms. Giffin is a travel agent. There is no dispute that Ms. Giffin provided travel agent services to the Employer on a commission basis from September 13, 2004 until March 30, 2007, but the nature of the legal relationship between them is contested.

8. Ms. Giffin asserted that she was an employee of the Employer for the purposes of the *Act*, and that the Employer had neglected to provide her with vacation pay, as required by section 58. The Employer argued that Ms. Giffin was an independent contractor, and as such she was not entitled to vacation pay.

9. Alternatively, the Employer argued that if the Delegate decided that Ms. Giffin was an employee, she had, in fact, received all the vacation pay that was owed to her. Both parties agreed that Ms. Giffin should receive 50% of the value of her sales as commission. Ms. Giffin stated that her percentage was exclusive of vacation pay. The Employer submitted that when it paid Ms. Giffin her commissions, the sums paid included her vacation pay entitlement.

10. The Delegate determined that Ms. Giffin was an employee for the purposes of the *Act*, and that the Employer had failed to pay vacation pay to which Ms. Giffin was entitled. In respect of the Employer's submissions concerning the latter issue, the Delegate referred to section 58(2)(b)(i) of the *Act* which authorizes payment of vacation pay to an employee on scheduled paydays if the employer and employee agree in writing to such an arrangement. Since there was no evidence of such an agreement in writing between the Employer and Ms. Giffin, the Delegate concluded that it was impermissible for the Employer to characterize part of the sums the Employer paid Ms. Giffin by way of commissions as vacation pay.

11. The Delegate also determined that the Employer had contravened section 17 of the *Act* when it was revealed during the hearing that the Employer paid its agents monthly, and not semi-monthly, as that section requires.

12. The Employer appealed the Determination pursuant to section 112 of the *Act*. The grounds the Employer identified on its Appeal Form were, first, that the Delegate had erred in law, and second, that evidence had become available that was not available at the time the Determination was being made. In a letter accompanying the Appeal Form the Employer explained that it was appealing the Delegate's finding that Ms. Giffin took no holidays during part of the period in which she was employed. In support of that assertion the Employer attached a document headed "Holidays 2006" summarizing the dates on which the Employer claimed certain individuals, including Ms. Giffin, had taken vacation during that year.

13. Although the Appeal Form may be said to have invited the Employer to consider whether the Determination should be challenged on the basis identified under section 112(b), namely, that the Delegate failed to observe the principles of natural justice in making the Determination, the Employer did not tick the box asserting this as a ground of appeal on the Form it delivered to the Tribunal. However, in another letter which appears to have been delivered to the Tribunal with the Appeal Form, the Employer alleged that the Delegate (referred to by the Employer in the letter as the "mediator") was biased in favour of Ms. Giffin during the proceedings and in making her Determination. In support of this assertion the Employer suggested that the Delegate accepted evidence tendered by the Employer for one purpose but not another, and that the Delegate said "we are here to make you money" in response to a statement made at the hearing by Ms. Giffin to the effect that she was "not here for the money but to teach Mr. Renshaw a lesson".

14. At a later point in the appeal process, after receiving a copy of the record of the proceedings before the Delegate the Director is required to provide pursuant to section 112(5) of the *Act*, the Employer faxed a further written submission to the Tribunal on April 21, 2008 directed principally at challenging the Delegate's finding that Ms. Giffin was an employee of the Employer, and not an independent contractor.

15. The April 21, 2008 submission also supplemented the Employer's identifying the existence of new evidence as a ground for appeal on its Appeal Form. It stated that the reason why the "Holidays 2006" document attached to its Form had not been adduced at the hearing conducted by the Delegate was that it had been misfiled. It also stated that Ms. Giffin's history of taking holidays had been of little concern because it was unforeseen that it would become "an issue to lie about".

16. In confirming the Determination in the Original Decision, the Member identified the following as the issues properly before him on the appeal:

- Whether the Employer could introduce new evidence on the appeal, and if so, whether that evidence showed that the Delegate erred in law in making the Determination.

- Whether the proceedings before the Delegate revealed bias, and therefore a failure to observe the principles of natural justice.

17. On the question of the new evidence relating to the holidays Ms. Giffin may or may not have taken while employed, the Member decided that the appeal could not succeed on this ground because the evidence was "available" to the Employer in the proceedings before the Delegate, as that word has been interpreted by the Tribunal when considering issues arising under section 112(1)(c) of the *Act*. In lay terms, the Member therefore concluded that the evidence was not "new".

18. But even if it could be said that the evidence was "new" in that sense, the Member concluded that the question whether Ms. Giffin had taken holidays was irrelevant to the issue of vacation pay for two reasons. First, the Member pointed out, as had the Delegate, that the period of time in respect of which the Delegate had decided Ms. Giffin had taken no holidays, which was the conclusion the Employer sought to challenge via the submission of the new evidence on appeal, was a period that was outside of the period the Delegate could properly consider under the *Act* for the purposes of claims relating to vacation pay. Second, the Member clarified that the obligation on an employer to pay vacation pay under the *Act* is separate and distinct from the obligation to permit an employee to take a vacation, with the result that even if the Delegate was in error in concluding that Ms. Giffin had taken no vacation, that error would have had no effect on the Delegate's finding that the Employer had failed to pay Ms. Giffin vacation pay.

19. The Member also rejected the Employer's arguments concerning bias, essentially on the basis that the Employer had failed to provide the clear and cogent evidence necessary to permit the Tribunal to make objective findings of fact demonstrating actual bias or a reasonable apprehension of bias. Regarding the Employer's concern that the Delegate had accepted some parts of the evidence in making findings of fact, and not others, the Member observed that this is a practical reality for those engaged in the process, and furthermore, precisely what the process requires of a delegate. As for the comment that "we are here to make you money", the Member concluded that while it was unfortunate, it was not demonstrative of bias, taken in context.

20. The Member declined to consider the Employer's submissions contained in the April 21, 2008 fax transmission relating to the Delegate's finding that Ms. Giffin was an employee and not an independent contractor. The reason the Member gave was that the issue of Ms. Giffin's status was not raised by the Employer at the time it filed its appeal. Rather, it was a new matter raised for the first time in a reply submission delivered several weeks after the statutory time limit for the filing of an appeal had expired. As the Employer had not requested an extension of time to argue this matter on the appeal, the Member concluded that it was not properly before him.

21. In its application for reconsideration the Employer has identified several issues which I summarize as follows. The Employer submits that:

- the proceedings before the Delegate were unfair, and in breach of the principles of natural justice, in that the Employment Standards Branch refused to provide Mr. Renshaw with a copy of Ms. Giffin's official complaint when he requested it. The Employer only received the complaint when it was delivered as part of the record provided by the Director during the proceedings on appeal, which placed it at a disadvantage. The Employer, through Renshaw, says that if it had been provided with the complaint form prior to the hearing "I would have

strengthened my arguments during that hearing...Based on the information in this document, the evidence I would have provided may have been different".

- the delivery of the complaint form is also important in terms of the fairness of the appeal process, particularly in light of the Member's decision that the Employer's arguments directed to the issue of whether Ms. Giffin was an independent contractor, and not an employee, were delivered late, and therefore would not be considered as they were not properly before him. It submits that it is unfair, and contrary to natural justice, that it be limited in placing information before the Tribunal on appeal "based on arbitrary deadlines", especially considering that it did not receive the complaint form until it received reply correspondence from the Tribunal enclosing the record provided by the Director pursuant to section 112(5) of the Act. The Employer goes on to argue that it is unfair that the document could have been released at any time but it was not made available until after the period for appeal had expired. It says that requesting an extension for issues in the appeal "was not an option nor was an extension offered". It submits that if the "issues" were properly considered, the result on appeal would have been different.

- the proceedings before the Delegate were unfair in that Ms. Giffin made statements, the veracity of which the Delegate accepted, which the Employer was not permitted to properly contradict. By way of example, the Employer refers to Ms. Giffin's evidence as to when she took holidays, which the Employer believed to be false, and which the Employer was unable to contradict properly at the hearing because it did not anticipate that the statements made by Ms. Giffin would be untrue. Put simply, the Employer asserts that it is unreasonable to expect it to bring evidence to a hearing in anticipation of Ms. Giffin's being untruthful.

- the Delegate focused her attention on payroll procedures, rather than on the issue whether Ms. Giffin was an employee or an independent contractor. In the result, the Employer says that "we were not permitted to present our case in a fair manner".

- the Delegate accepted Ms. Giffin's evidence at the hearing relating to the issues at stake in the proceedings, notwithstanding that the Employer had evidence from other witnesses to contradict it, particularly as it related to her status as an independent contractor. Ms. Giffin, on the other hand, had no witnesses to support her testimony.

- throughout the process leading to the Determination and the Original Decision, the Employer was "not...allowed to present all of (its) evidence for consideration" with the result that the promotion of fair treatment of employees and employers, a stated purpose of the Act, set out in section 2, had not been fulfilled.

- even on the facts presented, the Determination and Original Decision are "patently unfair" in confirming that Ms. Giffin is an employee, and not an independent contractor, for the purposes of the Act, having regard to the legal tests applicable.

22. The Director has delivered a reply submission which argues that the application for reconsideration should be dismissed because it raises no serious question of law, fact, principle or procedure that is so significant that it warrants a review of the Original Decision. In addition, the Director has attached a copy of a fax transmission from the Employment Standards Branch to the Employer suggesting that a copy of Ms. Giffin's complaint form was forwarded to the Employer, at the latter's request, several months before the hearing conducted by the Delegate.

23. In its reply submission, the Employer says the following:

- evidence crucial to the appeal was not received by the Employer until the Tribunal forwarded copies of the record provided by the Director, after the appeal period had expired.
- while the Director states that the complaint form was faxed to the Employer well before the hearing of the complaint, the material it provides in support is merely the fax cover sheet, and not a copy of the document faxed. The Employer repeats that it did not receive the complaint form until a copy of the record provided by the Director was forwarded to it during the course of the appeal proceedings.
- had all the information been received from the Delegate prior to her decision, the Employer "would have been better prepared in the hearing to prove Ms. Giffin was an independent contractor".
- the fact that the Employer did not tick a particular box on the Appeal Form should not preclude it from arguing a failure to observe the principles of natural justice in proceedings before the Tribunal. To decide otherwise would prefer form over substance.
- the principles of judicial economy, effective resource allocation, and finality of litigation, should not give way in this case to the values of procedural fairness and integrity.
- there is room for doubt as to Ms. Giffin's motivation in commencing proceedings under the Act, in light of her comment at the hearing that she wanted to "teach Mr. Renshaw a lesson".

24. I pause here to note that nowhere in the Employer's materials delivered on the application for reconsideration does it appear that the Employer specifically challenges that portion of the Original Decision which deals with the Employer's allegations of bias against the Delegate.

ISSUES

25. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the original panel, or another panel of the Tribunal?

ANALYSIS

26. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116(1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

27. Previous decisions of the Tribunal, taking their lead from *Milan Holdings* BCEST #D313/98, have consistently held that the reconsideration power is discretionary, and must be exercised with restraint. This attitude is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A losing party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision emanating from that process. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. In giving voice to these principles the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.

28. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant a reconsideration at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness: *Zone Construction Inc.* BCEST #RD053/06.

29. In my view, there are several elements of the Employer's submissions on this application which fail to meet the threshold for reconsideration that has been established by the Tribunal.

30. I first deal with the Employer's argument that the failure of the Employment Standards Branch to deliver a copy of Ms. Giffin's complaint form when it was requested constituted a breach of natural justice. Assuming for the moment that the Employer's allegation that it did not receive the form is accurate (a fact the Director challenges), there are nevertheless a number of reasons why this argument cannot succeed. If the Employer was concerned that it had requested a copy of the complaint form during the investigation process preceding the hearing before the Delegate, and did not receive it, one would have expected the Employer to have raised it as an issue at that hearing, and certainly in its initial submissions delivered with its Appeal Form to the Tribunal. It did not do so. The first time it appears the Employer raised the matter of a request for a copy of the complaint form from the Director was in its application for reconsideration now before me.

31. It must be remembered that an application for reconsideration concerns itself principally with an examination of an original decision of the Tribunal, in order to determine if it exhibits error. There can be no error in the Original Decision relating to this point, because the Employer did not raise the issue of an unfulfilled request for a copy of the complaint form with the Member on appeal. In my opinion, it is much too late for the Employer to raise it as an issue now.

32. Even if I were disposed to consider the point on the second stage of this application, I would nevertheless conclude that the Employer has failed to demonstrate that its inability to review Ms. Giffin's complaint form in a timely way would have led to any different result than that contained in the Original Decision. The complaint form is one of the documents that forms part of the record in this case, and I have had an opportunity to read it. The document sets out that the nature of Ms. Giffin's complaint is that the Employer failed to pay vacation pay. This was a major issue in the proceedings conducted by the Delegate. There is nothing in the record which suggests that the Employer was taken by surprise, or that

it was deprived of an opportunity to fully present its case on vacation pay at the hearing or otherwise prior to the Delegate's issuing the Determination on account of its not having a copy of the complaint form.

33. In deciding whether the Employer had to have a copy of the complaint form document in order for the principles of natural justice to be satisfied, I adopt the following comment from *Bero Investments Ltd.* BC EST #D035/06:

> There is no set level of procedural protection that must accompany a function of the Director. What is required is that the parties know the case being made against them and be given an opportunity to reply. It is not required that a party be provided with full particulars of the claim. It is sufficient that the person under investigation be provided with enough details of the claim to make the opportunity to respond meaningful.

34. This approach is embodied in section 77 of the *Act*, which mandates that the Director make reasonable efforts to give a person under investigation an opportunity to respond. Thus, the opportunity to respond is not characterized in absolute terms. A party is not necessarily entitled to the entirety of the evidence that may have been presented to the Director. In some cases, conveying the substance of the contents of a document to a party, rather than providing a copy of the document itself, may be all that the *Act* requires (see *Mountain View Christian Academy* BC EST #D048/04). The question in each case is whether the party has been provided with sufficient particulars of a claim to make the opportunity to respond effective (see *Bero*, *supra*).

35. While it is true the Employer has suggested in its reply submission in the proceedings on appeal that the complaint form might have been useful to it for the purposes of cross examination of Ms. Giffin at the hearing before the Delegate because Ms. Giffin had identified her hours of work as irregular, which the Employer believed was contrary to Ms. Giffin's evidence at that hearing, the fact is that the matter of Ms. Giffin's hours of work was clearly a live issue at the hearing, and one in respect of which both the Employer and Ms. Giffin appear to have led evidence. Indeed, the Reasons for the Determination disclose that the Delegate concluded Ms. Giffin's hours of work were "flexible".

36. The Employer suggests in its submissions that the result may have been different if it had been in possession of the complaint form at an earlier time, but it does not explain in detail why that might be so. It merely states that it would have been "better prepared" at the hearing to demonstrate that Ms. Giffin was an independent contractor, and not an employee. In my view, the bare assertion that a result might have been different if the document had been provided, without more, is insufficient to establish an error which would warrant the intervention of the Tribunal on an application for reconsideration.

37. I next address the Employer's submission that the Delegate unfairly accepted evidence presented by Ms. Giffin, but not evidence submitted by the Employer. This assertion is supplemented by a submission that the Delegate did not permit the Employer to adequately contradict Ms. Giffin's evidence, or to present all its evidence at the hearing. The Employer provides no particulars of the other evidence it might have submitted, but did not. I infer from the materials before me, however, that the Employer is referring to the evidence of Ms. Giffin's holidays, which it sought to introduce on appeal, despite the fact that the Employer had not produced it at the hearing before the Delegate essentially, the Employer states, because it would be "unreasonable to think that an employer would be required to bring evidence to potentially contradict any untrue statement any of its employees made at a determination".

38. In the Original Decision the Member decided that the evidence relating to Ms. Giffin's holidays was not "new" as it was available during the proceedings before the Delegate and the Employer could have

produced it if it had chosen to do so. The Member did not specifically address the Employer's point that it could not have anticipated Ms. Giffin's evidence regarding her holidays prior to her giving it at the hearing. But even if it could be said this was an omission on the part of the Member (and I am not convinced it was), it does not, in my opinion, advance the Employer's case on this application for reconsideration. The Member decided, correctly in my view, that the evidence relating to Ms. Giffin's holidays was irrelevant to the issues arising from the complaint, because a) the evidence related to a period of time outside the timeframe deemed relevant for the purposes of determining Ms. Giffin's entitlement to vacation pay under the *Act*, and b) Ms. Giffin's entitlement to vacation pay in no way depended on her history of taking holidays.

39. If the Employer believed that it was taken by surprise when Ms. Giffin gave her evidence relating to holidays, and if it believed that the evidence required a rebuttal, it should have requested that the Delegate grant an adjournment of the hearing so that it might marshal the necessary evidence in reply. There is no evidence the Employer requested an adjournment. It may be that the Employer believes the Delegate should have asked whether the Employer wished an adjournment. In my view, the Delegate had no obligation to do so. It was not the role of the Delegate to divine that an adjournment might be necessary in order for the Employer to make its case.

40. As for the Employer's assertion that the Delegate was wrong to accept some aspects of the evidence over others, the Member was again entirely correct when he pointed out that the *Act* makes it the role of the Director and his delegates to make findings of fact. The Tribunal has a very limited jurisdiction to review such findings. A principal reason for this is that the delegate has had the opportunity to deal directly from the parties, and the Tribunal has not. The Tribunal's duty in an appeal is to determine if a determination has been made in error. When it comes to an assertion made in an appeal that a delegate has made an error of fact, the Tribunal may only intervene if the alleged error of fact amounts to an error of law.

41. The occasions on which an alleged error of fact amounts to an error of law are few. In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an 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 (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

42. Having regard to this formula, the Member concluded, in effect, that the Employer had failed to adduce material supporting an inference that the Delegate had made errors of fact that amounted to errors of law. Given that the Employer's argument rested on a criticism that the Delegate accepted some, but not all, of the evidence tendered, I do not believe the Member could have come to any other conclusion.

43. The Employer argues that the fact it did not tick the box on the Appeal Form which would raise as an issue a failure to observe the principles of natural justice should not preclude it from arguing such a failure before the Tribunal. I agree. There are several decisions of the Tribunal which acknowledge that

an appeal should be concerned primarily with the substance of the issues presented by appellants, and not so much the manner in which they fill out prescribed forms (see, for example, *Triple S Transmission Inc.* BC EST #D141/03).

44. Having said that, it is clear from the Original Decision that the Member was alive to the question whether the proceedings involving the Delegate demonstrated a failure to observe the principles of natural justice. The Member analyzed the Employer's allegations of bias at length, and found them to be untenable, a result the Employer does not specifically challenge on this application for reconsideration. I see no basis for concluding that the Member ignored the issues relating to natural justice that were properly raised by the Employer in its appeal. It follows that a reconsideration of the Original Decision on this basis is unwarranted.

45. The Employer submits that Ms. Giffin's motivation for commencing these proceedings under the *Act* is open to question in light of her alleged statement to the effect that she wanted to "teach Mr. Renshaw a lesson". In essence, the Employer is suggesting that the Tribunal should be disposed to view Ms. Giffin's interests on this application with disfavour, because she may not come to this forum with "clean hands". I cannot give effect to this argument. The Tribunal's jurisdiction is derived from statute. While I would be loath to say that principles of the law of equity would never inform a consideration of issues arising under the *Act*, principally because they often overlap with the policies embedded in the legislation, I do say that in the circumstances of this application the question whether Ms. Giffin has "clean hands" should not be considered when evaluating the merits of the arguments presented by the Employer (see *British Columbia (Director of Employment Standards)* BC EST #RD635/01).

46. This brings me to what I consider to be the most important element of the Employer's case in support of its application for reconsideration. The Employer disputes the Member's decision not to consider that part of its reply submission delivered to the Tribunal on April 21, 2008, a date some weeks after the appeal period had expired, which challenged the Delegate's finding that Ms. Giffin was an employee, and not an independent contractor. The Employer says the Member's decision was especially mischievous in light of the fact that the Employer did not receive complete document production, and in particular a copy of Ms. Giffin's complaint form, from the Director until the latter complied with the statutory direction in section 112(5) of the *Act* requiring the Director to produce for the purposes of the appeal the record of proceedings before the Delegate which had resulted in the Determination. The Employer asserts that if the Member had considered its submission relating to Ms. Giffin's employment status, the result of the appeal would have been different.

47. In substance, the Employer is saying that the Member hearing the appeal failed to observe the principles of natural justice when he declined to consider the Employer's submissions concerning Ms. Giffin's employment status.

48. Few would doubt that a refusal to consider a ground of appeal put forward by an appellant may result in a conclusion that the appellant has been denied natural justice. Such a refusal would appear to deny to an appellant its fundamental right to be heard. For this reason, I have decided that the Employer has satisfied the first stage of the analysis the Tribunal employs to determine applications of this sort. The Employer has shown that reconsideration is warranted on this point, because it has raised a point of principle that is important.

49. When considering the Member's decision on the merits, however, I have decided that he was correct in declining to consider the Employer's belated submission concerning Ms. Giffin's employment status.

50. My reasons for drawing this conclusion are based in part on the attitude of the Tribunal regarding its obligation to preserve the integrity of the statutory time limits within which a party may appeal a determination under the *Act*. In general, the Tribunal has taken the view that an appellant must perfect its appeal within the statutory time limits. Normally, an extension will only be granted where there are compelling reasons justifying the exercise of the discretion. This posture is based in part on the language of section 2 of the *Act*, and in particular sections 2(b) and (c), to which I have referred earlier, and which establish, respectively, that purposes of the legislation are to promote the fair treatment of employees and employers, and to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. Fair treatment may be compromised if a party who has succeeded in obtaining a favourable determination from the Director is exposed to the spectre of an appeal argued on grounds that are advanced for the first time some time after the statutory time limit for filing an appeal has passed. So too may be the statutory admonition that disputes be resolved in an efficient manner.

51. I have referred earlier to the fact that the Tribunal will strive to discern the true basis for an appeal, regardless of the particular box an appellant has ticked on an appeal form. A reason for this, I believe, is that the parties to an appeal are frequently lay persons who do not have the benefit of legal counsel. The grounds for appeal set out in section 112 of the *Act*, which have been reproduced next to the boxes on the appeal form, contain legal terms of art, and are likely to be unintelligible to all but trained legal professionals. To that extent at least, therefore, the appeal process contemplated by the *Act* is flexible.

52. This does not mean, however, that an appellant can raise new grounds of appeal at any time in the appeal process. Rather, it means that absent special circumstances the grounds of appeal must be discernible in the materials filed by the appellant in order for it to perfect its appeal, notwithstanding they may be characterized incorrectly for the purposes of identifying on which ground of appeal under section 112(1) the appellant relies. It also means that the Tribunal can expect an appellant to perfect its grounds of appeal in a timely manner, and in any event at a point prior to a response being required from the potential respondents to the appeal, including the Director. That expectation, I suggest, is based in part on the provisions in section 112(4) of the *Act*, and Rule 10 of the Tribunal's Rules of Practice and Procedure, which arguably limit the right of an appellant to amend an appeal to situations where the Director has varied a determination.

53. In the ordinary course, then, an appellant's raising a new issue on appeal for the first time in its submission in reply must tend to operate in contravention of the appeal provisions of the *Act*, the Tribunal's Rules of Practice and Procedure, as well as the twin goals of fair treatment of all parties involved in the process, and the efficient resolution of disputes. A reply submission is meant to address arguments raised in the submissions of respondents delivered in response to the materials filed by an appellant in support of its appeal. It is not meant to raise new issues which the respondents have not had an opportunity to address in their submissions, and which were not identified as issues on appeal in the material an appellant has filed with the Tribunal in order to perfect its appeal.

54. Applying these principles to the case before me, I am not persuaded that the Employer has shown any special circumstances why, during the appeal process, it should have been permitted to raise the issue of Ms. Giffin's employment status for the first time in its reply submission. I see no reason why the Employer could not have raised the issue when it filed its appeal with the Tribunal. It is obvious from the Reasons for the Determination that much of the proceedings involving the Delegate were devoted to an examination of this issue and that it was a major component of the Employer's case at the hearing. If the Employer doubted the validity of the Delegate's Determination on that point, it is inexplicable that the Employer would not have identified the matter as an issue when it filed its Appeal Form. The Form itself

asks that an appellant provide a detailed submission on why its appeal should be allowed. Nowhere in its submissions delivered with its Appeal Form does the Employer raise the issue of Ms. Giffin's employment status as an issue on the appeal.

55. The Employer says, however, that it is entitled to raise the issue of Ms. Giffin's employment status in its reply submission in the appeal because it did not receive Ms. Giffin's complaint form until it was disclosed in the record produced by the Director for the purposes of the appeal, which did not occur until after the Employer had perfected its appeal. I see no merit in this argument on the facts revealed here. I have discussed the issue of the complaint form earlier in this decision. The Employer knew the form existed during the complaint process, and appears to have requested it. The fact that the Employer may not have received a copy of it should have been addressed before the Delegate issued her Determination. It could also have been addressed by the Employer at the time it filed its appeal with the Tribunal. There is nothing discernible on the face of the complaint form that can be said to constitute a "smoking gun" in the sense that its production earlier would necessarily have led the Delegate to a different conclusion. The Employer does not articulate clearly how his receipt of the complaint form might have assisted it in convincing the Delegate that Ms. Giffin was an independent contractor. In my opinion, the delivery of the complaint form is a red herring. Accordingly, I find that there is no real issue of procedural fairness and integrity at stake in these proceedings. In my view, the circumstances of this case are distinguishable from those considered in *Taiga Works Wilderness Equipment Ltd.* BC EST #RD066/08, where the Tribunal came to a different conclusion.

56. It follows that like the Member who issued the Original Decision, I need not address the Employer's lengthy arguments asserting that the Delegate was wrong in concluding that Ms. Giffin was an employee and not an independent contractor.

ORDER

57. Pursuant to section 116(1)(b) of the *Act*, I order that the decision of the Tribunal dated May 9, 2008 under #D050/08 be confirmed.

Robert Groves
Member
Employment Standards Tribunal