An Application for Reconsideration

- by -

Robert Krausz
("Krausz")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2017A/102

DATE OF DECISION: October 23, 2017

DECISION

SUBMISSIONS

Robert Krausz	on his own behalf
Jennifer M. Fantini	counsel for Yorkville Education Company ULC
Dan Armstrong	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application filed by Robert Krausz ("Krausz"), pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), for reconsideration of BC EST # D073/17, an appeal decision issued on July 5, 2017 (the "Appeal Decision"). By way of the Appeal Decision, Tribunal Member Stevenson (the "Member") confirmed a Determination issued by Dan Armstrong, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on May 11, 2017.

2. The Delegate levied a $500 monetary penalty against Yorkville Education Company ULC ("Yorkville") for having contravened section 83 of the *ESA* (the "wrongful retaliation" provision). Although the Delegate held that "Yorkville refused to hire Mr. Krausz as a result of his insistence on compensation for training" (delegate's "Reasons for the Determination" – the "delegate's reasons" – at page R7), and thereby contravened the *ESA*, the Delegate also held that "Mr. Krausz did not experience a loss of wages as a result of the lost employment opportunity" (page R10) nor did he have any recoverable out-of-pocket expenses (page R11).

3. Yorkville did not appeal the Delegate's finding that it contravened section 83 of the *ESA* and thus the Delegate's determination in that regard stands as a final order. However, and notwithstanding that finding, the Delegate also determined that Mr. Krausz did not suffer any concomitant compensable loss, and that finding was upheld on appeal to the Tribunal.

4. In my view, this application raises an important question regarding the proper approach to fashioning a subsection 79(2) "make whole" remedy and, in addition, it appears that the Determination was predicated, at least to a degree, on an evidentiary oversight. That being the case, I am of the view that this application passes the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and, in addition, that the application is ultimately meritorious. Accordingly, I am referring the matter of Mr. Krausz's entitlement to a subsection 79(2) "make whole" remedy back to the Director to be reheard.

PRIOR PROCEEDINGS

5. On January 19, 2017, Mr. Krausz filed an unpaid wage complaint against Yorkville alleging the following:

> I had applied as a candidate to a posting at Yorkville University (YU), for an online faculty instruction position. After successfully completing the interview and reference-checking process, I was informed in writing that as a new faculty member, the next step was for me to complete a mandatory Faculty Training Workshop, which is done online, and which requires a commitment of 21-30 hours to complete…I asked what the remuneration was for this training [and] the reply I received in writing was that this training was unpaid…My complaint is that YU has unfairly required me to take mandatory training of significant time commitment (21-30 hours, by their written description), without any pay for this work, and after I have

> requested that this be compensated, they have reneged on their previous statement to me that I was a successful candidate, and new member of their faculty. I am asking that YU reinstate my successful candidacy, recognize my being a newly-appointed faculty member, and allow me to do this training – with fair remuneration for it.

The Determination

6. Mr. Krausz's complaint was the subject of a complaint hearing, conducted by teleconference, on April 10, 2017. The Delegate issued the Determination and his written reasons on May 11, 2017. As previously noted, the Delegate determined that Yorkville contravened section 83 of the *ESA*:

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

7. The Delegate's findings in this regard were as follows (at page R7):

> Having concluded that the training required by Yorkville was work, I also find that those required to complete such training had a right under the Act to be paid wages for their participation. Consequently, I find that in requesting compensation for his participation in Yorkville's training, Mr. Krausz was pursuing wages for work performed.
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> I have determined that Yorkville refused to hire Mr. Krausz as a result of his insistence on compensation for training, and that his assertion that training should be compensated was grounded in a valid entitlement under the Act.

8. As previously noted, Yorkville did not appeal the delegate's section 83 finding and it now stands as a final order.

9. The delegate's remedial authority with respect to a section 83 contravention is set out in subsection 79(2) of the *ESA*:

> 79 (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:
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> (a) hire a person and pay the person any wages lost because of the contravention;
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> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
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> (c) pay a person compensation instead of reinstating the person in employment;
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> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

10. The Delegate's findings regarding the appropriate remedy were, firstly, that "hiring or reinstatement" would not be appropriate because Yorkville "did not convey an interest in hiring him" and because the decision not to hire him "involved a number of senior members of this organization" (page R8). The Delegate then turned his mind to the matter of "lost wages" stating that "it is appropriate to consider several factors such as the time needed to find alternative employment, mitigation efforts undertaken, as well as other earnings during the period" (page R8). The Delegate held that the wage recovery period would begin or, as the delegated stated, "it is appropriate to start the clock" as of January 24, 2017 "[when Yorkville indicated to Mr. Krausz by e-mail] that an opportunity with this organization was no longer being offered" (page R8).

11. With respect to what the Delegate termed "stopping the clock", he stated (pages R8 – R9):

> …soon after the loss of opportunity with Yorkville, [Mr. Krausz] engaged in self-employment in the form of tutoring services provided online, working approximately 30 hours per week. As Mr. Krausz has acknowledged that he was engaged in regular employment following the loss of this opportunity, I must determine whether he obtained "suitable" employment, thereby stopping the clock.

12. The Delegate, while acknowledging that there is no mention of "suitable employment" in the *ESA*, nonetheless "determined that it is appropriate to examine Mr. Krausz's earning potential as a member of Yorkville's faculty and through self-employment in order to evaluate whether he obtained suitable employment" (page R9). The Delegate's analysis continued: "As he commenced self-employment prior to when he would have begun with Yorkville, I have included the period commencing January 24, 2017, through the end of December so as to better assess the financial impact of the lost opportunity" (page R9).

13. The uncontested evidence before the Delegate was that Mr. Krausz would have taught no more than one course during his first teaching term, for which he would have been paid $3,750, and that his likely first teaching term would have commenced in April 2017. The Delegate further determined that, subject to student demand and satisfactory performance, "he may have been offered as many as three courses per quarter" in ensuing terms (page R9). The Delegate found that "it is more probable than not that he would have been offered an opportunity to instruct the maximum number of courses in subsequent quarters" and concluded (page R9):

> Had he joined Yorkville, I find that Mr. Krausz would have earned $3,750.00 in the quarter commencing April 2017, and $11,250 in the quarter commencing July 2017. I find that Mr. Krausz would have earned an additional $11,250 in the quarter commencing October 2017, and that he would have earned $26,250.00 in total during this period.

14. However, the Delegate also found "Mr. Krausz earned approximately $12,000.00 between the date that Yorkville made clear its refusal to hire him and the date of the complaint adjudication [based on 30 hours per week at $40 per hour for a 10-week period]. The Delegate then concluded: "I find that Mr. Krausz will earn approximately $32,000 through self-employment during this period [ending December 2017], approximately $6,000 more than his anticipated earnings with Yorkville, and have determined that Mr. Krausz obtained suitable alternative employment". With respect to any compensation that would have been paid to him for the training period, the Delegate held "that it undoubtedly would have been less than the $6,000 difference between his earnings as a tutor and his earnings as a faculty member" (all quotations at page R10).

15. The Delegate's ultimate conclusion was as follows (pages R10 – R11):

> …I find that Mr. Krausz's self-employment stopped the clock prior to the date upon which he would have commenced work with Yorkville. I find that Mr. Krausz did not experience a loss of wages as a result of the lost employment opportunity. In reaching this conclusion, I also note that he did not suggest

> that he abandoned any other employment opportunities to pursue work with Yorkville. At the time of his application to join Yorkville, Mr. Krausz was also employed with the University of New Brunswick providing online instruction as a member of its faculty. He stated that he had planned to continue this work concurrently with any work he was to perform for Yorkville.

16. As previously noted, the Delegate noted that Mr. Krausz did not identify any out-of-pocket expenses he incurred as a result of being denied employment with Yorkville. Thus, notwithstanding Yorkville's section 83 contravention (which resulted in a $500 monetary penalty), the delegate determined that Mr. Krausz did not suffer any compensable economic loss.

The Appeal Decision

17. Mr. Krausz appealed the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice (see subsections 112(1)(a) and (b) of the *ESA*). Mr. Krausz's fundamental objection was that the Delegate did not appreciate that he intended to work for Yorkville in addition to continuing with his other tutoring and working for the University of New Brunswick. He also maintained that the Delegate overestimated his earnings since the Delegate calculated his earnings at $40 per hour, which was a gross amount, rather than his net rate (after expenses) of approximately $30 per hour. Finally, Mr. Krausz also objected to the time frame the Delegate used to calculate his potential income loss. Mr. Krausz claimed that the delegate's calculations were based on a 9-month wage recovery period; however, it appears that the actual recovery period was based on approximately 11 months (from January 14, 2017, to the end of December 2017; see delegate's reasons, page R10).

18. Member Stevenson rejected Mr. Krausz's position, and quite rightly so, in my view, that there had been a breach of the principles of natural justice (see Appeal Decision, para. 33):

> …it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. In this case, a complaint hearing was conducted by the Director. The Determination sets out that both parties were given the opportunity to present their evidence and make submissions. Reasons for the decision reached in the Determination were given. Mr. Krausz was afforded the procedural rights captured within the above statement. Mr. Krausz does not agree with the final result, there is nothing in the appeal or the appeal submissions that identifies where the natural justice issue arises or establishes any of his natural justice protections were denied.

19. With respect to the "error of law" ground of appeal, the essence of Mr. Krausz's argument was accurately set out in the Appeal Decision (at paras. 16 – 17):

> Mr. Krausz submits the Director "misunderstood" his evidence of his self-employment tutoring work, apparently not appreciating this was work he had been doing before he applied to join the faculty of [Yorkville] and that he would continue to do in addition to whatever work he received from [Yorkville]. He says the Director was wrong to set off potential self-employment tutoring income against potential wage loss from the [Yorkville] position, when one did not replace the other.
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> Mr. Krausz also disagrees with the time frame used by the Director when calculating his wage loss from the contravention. He submits there is no explanation given by the Director for not considering a longer time- frame for calculating his wage loss.

20. However, this ground of appeal was ultimately rejected (see Appeal Decision, paras. 27 – 30):

> On the compensation calculation, the only possible basis for arguing error of law is that the Director acted on a view of the facts that could not reasonably be entertained. The "facts" referred to in this part of the definition are those presented to the Director during the complaint process and appear in the

> Determination, as part of the record or, in some circumstances, are allowed to be included in the appeal under section 112(1) (c). This appeal does not seek to rely on this ground to introduce new, or additional evidence. In any event, it would be doubtful that the assertions upon which this appeal is based would meet the conditions for allowing new evidence.
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> There is nothing in the Determination or in the record indicating Mr. Krausz gave evidence that he intended to do his tutoring work in addition to any work he received from [Yorkville]. Mr. Krausz has included some new material with the appeal, but it does not relate to his tutoring work. There is no relevant new evidence on this point. It cannot be said the Director "misunderstood" evidence that was not presented during the complaint process.
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> It is not a function of the Tribunal to receive evidence on matters that an appellant feels, after reading and reflecting on the Determination, were not adequately presented to the Director. It may seem unfair to Mr. Krausz that he must bear the consequences of the case he presented, but this conclusion conforms to the statutory objectives of efficiency and finality in resolving disputes that are reflected in section 2 and to the scope of the authority of the Tribunal reflected in section 112(1) of the *Act*.
>
> In respect of the time frame used by the Director when calculating potential wage loss, Mr. Krausz has not shown this choice was an error law. Based on the circumstances, I am unable to accept the decision of the Director to consider a period of more than 11 months in assessing the financial impact of the opportunity lost by the contravention of [Yorkville] as unreasonable and, as a matter of law, unacceptable.

THE APPLICATION FOR RECONSIDERTION

21. Mr. Krausz filed a timely application for reconsideration. While he does not challenge the Determination as it concerns Yorkville's section 83 contravention, he maintains that the Delegate should not have "offset" his tutoring income (which the Delegate estimated at $32,000 – see page R10) against the income he would have otherwise earned as an online instructor with Yorkville (which the Delegate estimated at $26,250 – see page R9). He further says that his appeal should not have been dismissed as having no reasonable prospect of succeeding.

22. Contrary to the Delegate's finding, Mr. Krausz says that his tutoring work *preceded* Yorkville's job offer and that this work would have continued:

> …this work was ***not*** work that I commenced subsequent to my being denied work with [Yorkville]. Rather, this is work I had commenced several months prior to applying for the [Yorkville] job, and is work I would have continued to do ***alongside*** the part-time work I would have done for [Yorkville]. [***emphasis*** in original text]
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> Since the tutoring work was work I had always intended to do alongside the [Yorkville] work, it is incorrect therefore to deduct this from the lost wages resulting from [Yorkville's] contravention of the Act.

23. Mr. Krausz says that the Delegate's approach to his compensation claim was misconceived and that "the more correct basis for calculation of lost wages, therefore, should be whether or not my other pre-existing work would allow me to do the lost [Yorkville] work – and if so, how much available time I have left to do this work". Finally, in this latter regard he maintains "I would have been able to do *all* of the [Yorkville] work that the Delegate calculated I had lost during all of the time between April 2017 to present" [*italics* in original text].

THE RESPONDENTS' POSITIONS

24. Yorkville says that this application does not pass the first stage of the *Milan Holdings* test inasmuch as Mr. Krausz is asking the Tribunal to consider the very same argument that he advanced – and that was rejected – on appeal. With respect to the merits of the appeal, Yorkville says that even if Mr. Krausz had commenced his instructor duties, he would have initially been offered one course to teach and then only on a trial basis. Yorkville's counsel submits:

> It is difficult to predict how long Mr. Krausz might have worked for Yorkville, if he had successfully passed the faculty training workshop, and the first term. However, his employment could have been terminated at any time without cause, and Yorkville submits that, in such case, his entitlements would have been limited to either section 63 termination notice or alternatively, common law reasonable notice (depending upon the contractual terms between the parties), both of which would have been shorter that the eleven month recovery period.

25. It should be noted that this argument, while on its face seemingly meritorious, is essentially an attack on the Delegate's findings of fact. The Delegate concluded, at page R9 of his reasons, that Mr. Krausz would have earned $26,250 as a Yorkville instructor during the period from April 2017 through to the end of December 2017. This finding of fact can only be set aside if it were made without a proper evidentiary foundation (i.e., if the delegate's finding constituted a "palpable and overriding error" – see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. I do not believe it would be appropriate to make such a finding in this case (the Delegate, in my view, adequately explained the basis for his finding in the penultimate paragraph of page R9).

26. As noted above, although Mr. Krausz maintains that at all times it was his intention to continue his tutoring work in addition to teaching for Yorkville, Member Stevenson concluded "There is nothing in the Determination or in the record indicating Mr. Krausz gave evidence that he intended to do his tutoring work in addition to any work he received from [Yorkville] [and]…it cannot be said the Director 'misunderstood' evidence that was not presented during the complaint process".

27. Similarly, counsel for Yorkville (who also represented the firm at the complaint hearing) says "Mr. Krausz did not lead evidence or otherwise adequately argue that any earnings from his private tutoring business should not be set off against his wage loss claim because such earnings preceded his Yorkville application". Further, counsel also notes that if such evidence or argument had been presented, she would have cross-examined Mr. Krausz on the point and that "Yorkville would be disadvantaged if the Tribunal decides that such earnings should not be set off against any wage loss". Finally, "Yorkville submits that while Mr. Krausz may have engaged in private tutoring before applying to be an instructor at Yorkville, it is likely that he sought out and secured additional private tutoring work once it became clear to him that the Yorkville opportunity would not materialize [and] accordingly, these earnings were properly set off against any wage loss claim against Yorkville".

28. The Delegate, in his submission, noted that the central thrust of Mr. Krausz's reconsideration application was essentially the same argument advanced on appeal, namely, that he (the delegate) "misunderstood certain aspect[s] of his evidence regarding his tutoring work". In his reasons, the delegate noted that Mr. Krausz was already employed with the University of New Brunswick as an online instructor when he applied to Yorkville (page R4). However, he summarized Mr. Krausz's evidence regarding his private tutoring as follows (at page R4):

> Mr. Krausz stated that following the loss of opportunity with Yorkville, he engaged in self-employment in [the] form of tutoring services provided online, working approximately 30 hours per week at $40 per hour. At the hearing he said that he had been working these hours for approximately the last two and half

> months, but that he expected the number of hours worked to dip dramatically in the last half of April. He anticipated this reduction to continue throughout the summer but expected peak demand for his services to return in October through December.

29. Mr. Krausz, as noted above, maintains that he "explained both during the Hearing, and in my subsequent appeal…[that his tutoring work] commenced several months prior to applying for the [Yorkville] job, and is work I would have continued to do ***alongside*** the part-time work I would have done for [Yorkville]". However, the delegate disagrees with Mr. Krausz's assertion in this regard, stating:

> I would submit that this is not an accurate representation of Mr. Krausz's testimony on this issue. *The documentary evidence submitted by Mr. Krausz for the complaint hearing did not include any reference to tutoring work being performed.* I only became aware of Mr. Krausz's tutoring work by way of his response to a question I posed during the course of the hearing, in which I asked him to describe what efforts, if any, he had made to "obtain suitable alternative employment as a result of the loss of his opportunity with [Yorkville]". In response to my query, Mr. Krausz explained that he engaged in self-employment in the form of tutoring services provided online, as described in the Determination. At no time did Mr. Krausz state that his work preceded his application to [Yorkville], nor did he state that he would have continued to do this work alongside the work he intended to do for [Yorkville]. (my *italics*)

30. The Delegate's submission continues:

> *If Mr. Krausz had presented me with any evidence that his tutoring work had preceded his application to [Yorkville], or that he would have continued to do this work while working for [Yorkville], this may have affected my consideration of whether he had obtained suitable alternative employment.* However, as previously indicated, Mr. Krausz did not provide evidence to indicate that the tutoring work was ongoing and preceded the lost opportunity. (my *italics*)

31. The Delegate concedes "that in most instances it would not be appropriate to deduct wages pertaining to ongoing work which preceded the lost opportunity from a calculation of lost earnings" but also says "in situations involving self-employment where the individual has a significant degree of control over the amount of work available to him or her, such as Mr. Krausz's tutoring work, I am not convinced that it would be appropriate to discount these earnings entirely from a calculation of wage loss". The Delegate says his "analysis of loss of earnings pertained solely to a consideration of whether Mr. Krausz obtained suitable alternative employment". The Delegate says Mr. Krausz's "argument…is premised upon a consideration of evidence which, though available to him, was not before me [but] *had this evidence been presented, it is conceivable that it may have affected my analysis, though not necessarily the outcome*" (my italics). Finally, the Delegate says: "For these reasons, the Director takes no position with respect to Mr. Krausz's reconsideration request".

FINDINGS AND ANALYSIS

32. Obviously, there is a fundamental disagreement regarding what is now a central point in this reconsideration application, namely, whether Mr. Krausz testified that, as a way of mitigating his loss of the Yorkville employment opportunity, he commenced a private tutoring business. I do not have a transcript of the hearing before me (and, I fully expect, one is not available) and thus cannot affirmatively conclude that one or the other person's recollection is the most accurate. However, in his submission the Delegate stated: "The documentary evidence submitted by Mr. Krausz for the complaint hearing did not include any reference to tutoring work being performed" (I italicized this assertion, above). That statement is not quite accurate. The record before the delegate included (at pages 2 – 6) a copy of Mr. Krausz's curriculum vitae and on the third page of that document is the following information under the heading "Adult/Post-Secondary Instruction and Curriculum Development Experience":

> **Private Tutor**
> Canada, France, New Zealand
> *1986 to Present*
> Individual and group tutoring, in-person and via distance, in Mathematics and Sciences subjects, at all levels from high school to university postgraduate
> (my *italics*)

33. While it does not inevitably follow from this document that Mr. Krausz actually testified at the complaint hearing, as he maintains he did, that his tutoring work was on-going even before he applied for the Yorkville position, it stands as some corroboration for his present statement that he told the Delegate that he earned some income as a private tutor and that he had been working as a tutor for several years.

34. Insofar as the Appeal Decision is concerned, the Member stated (at para. 28): "There is nothing in the Determination or in the record indicating Mr. Krausz gave evidence that he intended to do his tutoring work in addition to any work he received from [Yorkville]". However, as noted above, the record included information that Mr. Krausz had been tutoring for several years, dating from 1986, prior to applying for the Yorkville position. Further, and in any event, given Mr. Krausz's tutoring workload – 30 hours per week as recounted by the delegate at page R10 his reasons – there is no reason to conclude that Mr. Krausz would not have been able to take on the Yorkville work (which, at least initially, would have been relatively modest in terms of his weekly work load) in addition to continuing with the tutoring work he was already doing. It follows that I am unable to accept the Member's conclusion (Appeal Decision, para. 28) that "it cannot be said the Director 'misunderstood' evidence that was not presented during the complaint process" – this statement stands in contrast to Mr. Krausz's evidence contained in the record.

35. In my view, the evidence before the delegate was such that Mr. Krausz could have relatively easily taken on the Yorkville work in addition to whatever other work he already had in his pipeline (at least initially). And it was the loss of that supplementary work with Yorkville that was the basis for his compensation claim. His additional ongoing work should not have been treated an "offset".

36. I might also add that the crux of Mr. Krausz's claim was that he was denied the Yorkville position because he insisted on being paid for the mandated training (this, despite, the subsection 1(1) definition of "employee" that includes "a person being trained by an employer for the employer's business") and, accordingly, he was entitled to an award that reflected the compensable training period. He specifically sought payment in his complaint but the delegate rejected that claim, wrongly in my view, solely because the amount payable for the training "undoubtedly would have been less that the $6,000 difference between his earnings as a tutor and his earnings as a faculty member" (page R10). The proper approach would have been to compare what Mr. Krausz could reasonably have earned during the training period (which would have likely been completed sometime in January 2017 – along with any other income he might have additionally generated during the same time frame – and then determine if he, in fact, suffered any loss as a result of the loss of the training income. The other aspect of his income loss should have been calculated as and from April 2017 when he likely would have commenced his duties as a Yorkville faculty member.

37. In my view, there is one further complication with the Delegate's analysis. The Yorkville employment opportunity, at least initially, was to teach one course over a 12-week term (known as a quarter) commencing in April 2017. Mr. Krausz would have been paid $3,750 for teaching this course which, at a $40 hourly rate, is equivalent to about 94 hours in total or slightly less than 8 hours per week (*i.e.*, about one day per week). In my view, the question delegate should have addressed is not what other work Mr. Krausz may have undertaken during the "wage recovery period" but, rather, what was the value of the lost employment opportunity? If Mr. Krausz could have reasonably slotted in the Yorkville work into his weekly schedule, there is no logical reason to discount his Yorkville earnings on account of other work he was also

undertaking. In this latter regard, I note that the delegate proceeded on the assumption that Mr. Krausz's tutoring work consumed about 30 hours per week and thus, on the face of things, he had the available slack within his weekly schedule to undertake tutoring work and also fulfill his Yorkville obligations (at least for one term). The record is unclear as to how many hours Mr. Krausz might have been devoting to his work for the University of New Brunswick during this period although Mr. Krausz now claims it would have been about 10 per week and, on that basis, it appears that he would have been able to take on additional work from Yorkville without unduly straining his workload.

38. While I accept that the common law notion of "mitigation" of loss may be taken into account when fashioning a subsection 79(2) "make whole" remedy, the Delegate appears to have proceeded on the basis of simply comparing Mr. Krausz's actual earnings against his potential earnings for an 11-month period and, having concluded that Mr. Krausz earned more through self-employment than he might have earned as a Yorkville instructor, he determined that there was no compensable loss. In my view, the preferable approach would have been to calculate Mr. Krausz's probable income throughout the relevant wage recovery period taking into account *both* his likely Yorkville earnings and any additional other income he might have earned and then determine if, in fact, he had suffered a loss as a result of Yorkville having rescinded its employment offer. The proper approach to a "make whole remedy" is to, as far as is reasonably possible, return the employee – at least in an economic sense – to the position the employee would have been in had the contravention not occurred (see *W.G. McMahon Canada Ltd.*, BC EST # D386/99, at page 6; see also: *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*, BC EST # D534/02, *Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.*, BC EST # D105/05 (confirmed on reconsideration: RD170/05), and *Miller*, BC EST # D062/07).

39. In my view, this application, and apart from the matter of the overlooked evidence in the record concerning a central point in dispute, raises an important interpretive question dealing with the proper approach to be followed when making a subsection 79(2) award. As such, in my view, this application passes the first stage of the *Milan Holdings* test. Turning to the merits, in my judgment, the delegate overlooked important evidence in the record and otherwise erred in his approach to fashioning a subsection 79(2) remedy in this case.

40. I am of the view that the most appropriate order would be to refer this matter back to the Director for purposes of rehearing Mr. Krausz's claim for a "make whole" remedy. In that regard, I am not making any finding regarding Mr. Krausz's probable earnings with Yorkville (he now claims nearly $140,000 in foregone earnings) or the proper duration of the compensable loss period (Mr. Krausz says that it should span over three years whereas Yorkville maintains that a period much longer than one quarter is legally problematic). Further, I am not necessarily endorsing the Delegate's finding that reinstatement was not an available remedy simply because Yorkville "did not convey an interest in hiring him" (page R8). Given the fundamentally independent nature of the work (online instruction) where close managerial supervision is not involved, reinstatement may well have been appropriate (a remedy Mr. Krausz still seeks). Finally, I am not necessarily endorsing the Delegate's approach regarding the appropriate wage recovery period. These are matters that may be argued before the Director.

ORDER

41. Pursuant to subsection 116(1) of the *ESA*, the Appeal Decision is varied so that the final order reads as follows:

> Pursuant to section 115(1)(a) and (b) of the *ESA*, the Determination is confirmed regarding the Director's finding that Yorkville contravened section 83 of the *ESA* and is thus required to pay a $500 monetary penalty. The balance of the Determination is cancelled. Mr. Krausz's claim for subsection 79(2) compensation is referred back to the Director to be reheard.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal