

Applications for Reconsideration

- by -

The Director of Employment Standards

- and by -

Old Dutch Foods 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 MEMBERS: Carol L. Roberts (Panel Chair)
Robert E. Groves
Shafik Bhalloo

FILE No.: 2009A/093 & 2009A/094

DATE OF DECISION: November 10, 2009

DECISION

SUBMISSIONS

Sheila Tucker / Maggie Campbell	Counsel for Old Dutch Foods
Simon Kent	Counsel for Tim Kellahan
Michelle Alman	Counsel for the Director of Employment Standards

OVERVIEW

1. This decision deals with two applications for reconsideration under section 116 of the *Employment Standards Act* (the "*Act*"). The applications are from a decision of the Tribunal dated June 4, 2009 (BC EST # D057/09), with a *corrigendum* issued July 10, 2009 (BC EST # D057/09b) (collectively, the "Original Decision").
2. In a Determination dated February 11, 2009, a delegate of the Director of Employment Standards (the "Director") determined that Old Dutch Foods Ltd. ("Old Dutch") had contravened section 21 of the *Act* when it deducted business costs from the complainant Mr. Kellahan's remuneration without his written consent. The delegate ordered that Old Dutch pay \$17,048.62 in wages, together with interest in the amount of \$733.68. The delegate also imposed two administrative penalties of \$500.00 for failing to pay wages under section 21 and to keep proper employee records pursuant to section 28 of the *Act*.
3. Old Dutch appealed the Determination. The Tribunal cancelled the Determination on natural justice grounds, and referred the matter back to the Director for rehearing.
4. Both the Director and Old Dutch seek reconsideration of the Original Decision. The Tribunal has received comprehensive submissions from counsel for both parties on appeal. Mr. Kellahan takes no substantive position regarding the applications, save to say that he supports the application of the Director, but not the application of Old Dutch.
5. The Director also contends that Old Dutch's application is not timely. Old Dutch submits that it initially sent its application to the wrong address, but upon discovery it immediately advised the Tribunal of its error and delivered a second copy of its application to the correct address. In the circumstances, the delay, if any, has been explained to the satisfaction of the panel. We say "if any" because Old Dutch's application appears to have been filed within 30 days from the date of the corrigendum which forms part of the Original Decision. In any event, the panel is aware of no evidence suggesting that a party has suffered prejudice resulting from the timing of Old Dutch's delivery of its application for reconsideration.
6. 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*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Neither party has requested an oral hearing regarding its application. Both the Director and Old Dutch have filed detailed written submissions. The panel has concluded that this application shall be decided on the written materials, without an oral hearing.

FACTS

7. Old Dutch operates a snack food production and distribution business. Mr. Kellahan was a delivery driver for Old Dutch, having commenced his working relationship with the company in 1991.
8. Mr. Kellahan claimed that he was an employee while Old Dutch insisted that Mr. Kellahan was an independent contractor. The Delegate concluded that Mr. Kellahan was an employee and entitled to wages as set out above.
9. Although Old Dutch appealed the Determination on several discrete grounds, the only issue relevant to the reconsideration applications is the Delegate's handling of two pre-Determination preliminary applications by Old Dutch for the production of Mr. Kellahan's documents.
10. In its first application, Old Dutch sought Mr. Kellahan's personal income tax returns, the tax returns for any other legal entity operated by Mr. Kellahan, and the tax returns for any members of Mr. Kellahan's family employed or paid by Mr. Kellahan, or any legal entity operated by him. The rationale for this request was that if the evidence revealed that Mr. Kellahan was operating other businesses, the existence of those businesses and the manner in which he operated them might lead to an inference that he was, in fact, in business for himself, and therefore an independent contractor and not an employee.
11. The delegate denied Old Dutch's application on the basis that the production sought was unnecessary given that Mr. Kellahan acknowledged he had filed income tax returns "as a business," and Old Dutch would have full opportunity to elicit the information it sought during cross-examination of Mr. Kellahan at the intended hearing.
12. Following the receipt of additional information regarding Mr. Kellahan's business activities from his legal counsel, Old Dutch made a second application to the delegate for production of the documents identified on its previous attempt. It also sought any employment contracts, bookkeeping records, financial statements, and insurance documents relating to another business entity with which he appeared to have a business association, and documents relating to any employment relationships involving Mr. Kellahan and third party individuals which, Old Dutch submitted, would also be relevant for the purposes of determining whether Mr. Kellahan was an employee or a contractor.
13. The second application for document production was also denied but without any reasons from the delegate.
14. On appeal, Old Dutch argued that the denial of its requests for documents was a denial of natural justice because it deprived Old Dutch of a meaningful opportunity to challenge, in cross-examination, the statements Mr. Kellahan made at the hearing relating to his other business activities. In the result, Old Dutch submitted, the delegate accepted at face value Mr. Kellahan's statements about his activities that were designed to support the conclusion the Delegate ultimately drew, namely, that Mr. Kellahan was an employee of Old Dutch, and not a contractor.
15. While the Member in the Original Decision adverted to other aspects of the Determination and the several challenges to it launched by Old Dutch, it is his decision relating to the natural justice issue that formed the basis for his disposition of the appeal. The Member decided that the documents were clearly relevant and ought to have been produced.

16. Accordingly, the Member cancelled the Determination and referred the matter back to the Director for rehearing. In making this order, the Member declined to give effect to Old Dutch's submission that the circumstances warranted a direction from the Member that the rehearing occur before a new delegate.
17. The relevant portions of the Original Decision appear at paragraphs 26, 27 and 30:
26. ...While I do not think that the Tribunal should be creating a form of pre-hearing discovery as is embodied in the B.C. Supreme Court rules, I do say that when a party asks for production of clearly relevant documents that relate to an important issue in an (sic.) complaint hearing the usual response (especially when the complaint is being determined based on an adjudication rather than an investigation) should be to order production. Different considerations may apply if the delegate chooses to conduct an investigation. In this case, the production order could have, and in my view should have, been made under one or both of sections 84 and 85 of the *ESA*.
27. ...Counsel for Old Dutch asserts that I should cancel the Determination and refer the matter back to the Director for re-hearing by an entirely new delegate (see *Baum Publications Ltd.* BC EST Decision #D090/05); however, I am not prepared to make that order since I am not convinced that essential findings of credibility or other adverse inferences have been drawn by the delegate against Old Dutch. Indeed, in light of the fact that the delegate suggested her calculations regarding Mr. Kellahan's wage claim regarding adjustments for "returned products" should be significantly reduced, it would seem that the delegate is open to reviewing and reconsidering her conclusions based on new evidence and argument. Accordingly, while I do propose to cancel the Determination and refer the matter back to the Director, I do not intend to make a direction that the matter be considered afresh before an entirely new delegate.
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30. Since I am not ordering that the matter be reheard before a new delegate, it may be that the most efficient manner to proceed would be for the original hearing to be reconvened so that, among other things, counsel for Old Dutch can cross-examine Mr. Kellahan with respect to the documents that will be produced and then the parties can be given a further opportunity to make submissions with respect to the "employee versus contractor" issue. I do not think it necessary that an entirely new hearing be conducted. However, I will leave those procedural matters for the Director to determine.
18. In its application for reconsideration, the Director submits that the Member erred in law by giving directions on the referral back because it constituted an attempt to fetter the Director's statutory discretion to choose the appropriate procedure for determining the validity of a complaint. The Director further submits that the Member acted in excess of his jurisdiction in cancelling the Determination and referring it back to the Director for rehearing, thereby committing a second error of law.
19. Old Dutch, in its application for reconsideration, asserts that the Member erred in law in failing to refer the matter back to a different delegate. It argues that it is entirely inappropriate for the Member to send the matter back to the original delegate after that delegate made findings of credibility in favour of Mr. Kellahan. Old Dutch also argues that the Member's remittal order will result in a further denial of natural justice because the manner in which the Delegate conducted herself in the appeal process creates a reasonable apprehension of bias.

ISSUES

20. Does either or both of the applications for reconsideration meet the threshold requirements that have been established by the Tribunal? If so, should the Original Decision be confirmed, cancelled, varied, or referred back to the Member who made it or to a different panel of the Tribunal?

ANALYSIS

1. The section 116 reconsideration power

21. Section 116 of the *Act* sets out the Tribunal's reconsideration power:
- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
 - (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.
22. Since its decision in *Milan Holdings*, BC EST # D313/98, the Tribunal has consistently held that the reconsideration power is discretionary and must be exercised with restraint. This approach to the reconsideration power 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 grounded in the principle that the Tribunal should respect the appeal process. This means that the Tribunal will be reluctant to permit a party who is simply unhappy with a Tribunal decision to avoid its consequences by resorting to a further appeal under the guise of reconsideration. It also means that the Tribunal will be ill-disposed to allow applications for reconsideration where the party bringing them merely seeks to re-argue a case that failed to persuade the Tribunal at first instance. It follows 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.
23. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters referred to in the application warrant reconsideration at all. Where the Tribunal is persuaded that they do, the applicant will have raised questions of fact, law, principle or procedure flowing from the original decision which are sufficiently important that they demand intervention. If the applicant satisfies this requirement the Tribunal will proceed 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 reconsideration panel will employ a correctness standard.
- ### 2. The stage one analysis
24. The applications for reconsideration raise significant questions of law going to the root of the Tribunal's jurisdiction to make orders in appeals under section 115 of the *Act* generally, and more specifically regarding its jurisdiction to give directions when a complaint is referred back to the Director pursuant to section 115(1)(b), especially in circumstances where the Tribunal has cancelled a determination on the ground that there has been a failure to observe the principles of natural justice. The resolution of the issues raised in these applications will clarify the Tribunal's views relating to the roles of the Director and the Tribunal, and how some of their statutory functions interact. It is clear that the outcome will affect not only the parties now before us, but also parties in future cases.
25. Having weighed these factors, the panel has concluded that the threshold test for reconsideration has been met by each of the applications.

3. The analysis at stage two – the merits of the applications

The positions of the parties

26. The applications of the Director and Old Dutch intersect on the issue of the jurisdiction of the Tribunal to give directions when it refers a complaint back to the Director pursuant to section 115(1)(b). The Director takes the position that the *Act* gives the Tribunal no such power. Old Dutch argues that not only does the Tribunal possess this power, but also that in the circumstances of this case the Member should have exercised it in a specific manner.
27. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
28. Section 115(1) of the *Act* says:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

The Director's Application

29. The Director argues that it is to him and not the Tribunal that the *Act* confers discretion to determine the method by which a complaint is processed. That discretion is granted in section 76(3), which provides that it is the Director who may "accept, review, mediate, investigate or adjudicate" a complaint.
30. The Director asserts that the Member had no authority to usurp the Director's power to decide how to handle a complaint. The Director says that the Member erred in law when he ordered the matter to be referred back with the implicit direction that an order for the production of the documents be made, and explicitly, that the original hearing be re-convened so that counsel for Old Dutch could cross-examine Mr. Kellahan on those documents.
31. The Director says that the Tribunal has no power to refer the matter back with these directions because the Tribunal is not a superior court and has no jurisdiction to exercise the supervisory role of such a court on applications for judicial review. Rather, it says, the Tribunal is a statutory body possessing only those powers conferred upon it in the *Act*, either expressly or by necessary implication. The Director argues that there is nothing in section 115 that gives the Tribunal power to direct the steps that the Director must take when an appeal is allowed and a matter is referred back.
32. In addition, the Director submits that the imposition of directions of the sort that appear in the Original Decision will lead to greater numbers of similar demands being made in future cases, thereby creating more formal and therefore more costly adjudications for normally unrepresented complainants, contrary to section 2(d) of the *Act*.

33. The Director further submits that the Member erred in suggesting that an order for production of documents could have been made by the Delegate under the authority of either or both of sections 84 and 85 of the *Act*. Those sections read as follows:

- 84 (1) For the purposes of this Act, the director may make an order requiring a person to do either or both of the following:
- a) attend, in person or by electronic means, before the director to answer questions on oath or affirmation, or in any other manner;
 - b) produce for the director a record or thing in the person's possession or control.
- (2) The director may apply to the Supreme Court for an order
- a) directing a person to comply with an order made under subsection (1), or
 - b) directing any officers and governing members of a person to cause a person to comply with an order made under subsection (1).
- 85 (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:
- a) enter during regular working hours any place, including any means of conveyance or transport, where
 - i) work is or has been done or started by employees,
 - ii) an employer carries on business or stores assets relating to that business,
 - iii) a record required for the purposes of this Act is kept,
 - iv) anything to which this Act applies is taking place or has taken place;
 - b) inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;
 - c) inspect any records that may be relevant to an investigation under this Part;
 - d) on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;
 - e) require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;
 - f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).
- (2) Despite subsection (1), the director may enter a place occupied as a private residence only with the consent of the occupant or under the authority of a warrant issued under section 120.

34. The Director submits that section 84 powers are the Director's to employ when conducting adjudication hearings, while the exercise of the Director's powers in section 85 are restricted to situations where he is engaged in "ensuring compliance with the *Act*." With regard to the latter assertion, the Director submits that the powers to inspect "records" in section 85(1)(c) and to require disclosure of "a matter required under this *Act*" in section 85(1)(e), cannot be utilized to compel discovery from complainants claiming to be employees rather than contractors, but may only be enlisted by the Director against employers, because "ensuring compliance" is a task that is directed at employers, and not at employees. The Director submits further that at least with respect to the power to inspect records under section 85(1)(c), the *Act* restricts its application to situations where the Director is conducting an "investigation," not an adjudication.

35. The Director says that he may draw an adverse inference against an employee who is a complainant if the complainant fails to produce relevant records during the Director's processing of a complaint.
36. Old Dutch says that while the Director possesses the authority to exercise discretion under the *Act*, the discretion must at all times be exercised in compliance with the principles of natural justice. The *Act* has confirmed this, expressly, Old Dutch argues, because it empowers the Tribunal to hear appeals under section 112(1)(b) in cases where the Director has failed to observe natural justice principles. Old Dutch says that, put simply, the Director has no discretion, let alone a fettered discretion, to act unlawfully.
37. Old Dutch also challenges the concern of the Director that efficiency of process in future cases would be compromised because of the precedential value of an order for disclosure of documents in this case would result in an increase in document production requests by parties in future cases. Old Dutch argues that such concern on the part of the Director should not trump or be allowed, on the balance, to supersede the natural justice rights of a party. What an observance of the principles of natural justice may require in a given case will depend on the circumstances presented. However, in situations where natural justice and a policy goal of the *Act* such as efficiency come into conflict, Old Dutch says the requirements of natural justice must prevail.
38. Moreover, since the *Act* contemplates that the Tribunal will be the final arbiter of whether a particular exercise of a discretion by the Director complies with the principles of natural justice, Old Dutch asserts that if the Tribunal decides in a given case that the Director's exercise has fallen short and the failure cannot be cured on appeal, it is axiomatic that the Director will have to re-determine the matter in a way that does comply with natural justice. Old Dutch argues that it is to be implied from the statutory scheme as it relates to appeals that the Tribunal may give directions to the Director concerning the manner in which the principles of natural justice are to be respected in a particular case.
39. Old Dutch submits that it is untenable for the Director to assert that he lacks jurisdiction to order disclosure of otherwise relevant documents under sections 84 and 85. Old Dutch says that the Member's conclusion that disclosure could have been ordered under either section is not material because even if section 84 were inapplicable to the circumstances of Old Dutch's applications for disclosure in this case, section 85 clearly conferred the requisite power.
40. Also untenable, Old Dutch says, is the Director's argument that he could draw an adverse inference and perhaps dismiss a complaint if a complainant declined to disclose relevant documents. Old Dutch submits that this argument has the effect of confounding two substantively very different matters, namely, a breach of natural justice and the inferences as to relevant facts a delegate might be entitled to draw having regard to the evidence presented at an adjudication hearing. Whether Old Dutch is afforded natural justice has nothing to do, it says, with Mr. Kellahan's decision to tender a certain type of evidence and withhold another as part of his litigation strategy. A failure to provide natural justice renders the entire proceeding void regardless of the type of evidence the delegate may have received, or not, at the hearing. Further, and in any event, the delegate here did not draw an adverse inference, or by all appearances even considered drawing one, so it submits that the point is entirely moot.
41. In final reply, the Director acknowledges that he must observe the principles of natural justice when exercising his discretion. However, he says that once the Tribunal has cancelled a determination based on a breach of natural justice, the *Act* does not empower the Tribunal to then give directions requiring the Director to exercise his discretion in a particular manner. The Director's position is that while it would not be open to the Director to exercise his discretion after a determination has been cancelled so as to repeat the breach of natural justice identified by the Tribunal, the Tribunal has no jurisdiction to otherwise direct how the Director should proceed to manage the complaint thereafter.

42. In his application, the Director also raises a related but discrete issue. The Director submits that the Member's order combining the cancellation of the Determination under section 115(1)(a) with a referral back under section 115(1)(b) constitutes an error of law because it fails to consider the impact of such a disposition on the mandatory penalty scheme contained in section 98 of the *Act*, the relevant portions of which read as follows:
- 98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
- (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.
- (1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.
43. The concern raised by the Director is that a mandatory penalty for a contravention of the *Act* may only be imposed in a determination. When the Tribunal cancels a determination and refers the matter back to the Director, it is unclear whether the Tribunal has made a final order. The Director says that this causes confusion because it fails to clarify whether the Director's re-visiting of the complaint thereafter must result in a disposition in the form of a new determination, which triggers an opportunity to impose a new penalty and the right to commence a new appeal, or in the preparation of a referral back report, which does not.
44. An added complication alluded to by the Director is that if the disposition is in the form of a referral back report and the Director has determined on the referral back that a new contravention has been identified, the Director has no power under the *Act* to impose a penalty in respect of it because the referral back report is not a new determination. This is problematic because it is only upon the issuance of a determination by the Director that section 98 permits a penalty to be imposed. The Tribunal has no authority under the *Act* to impose a penalty.
45. Old Dutch says that the spectre of confusion when the Tribunal exercises its right to combine remedial orders in sections 115(1)(a) and (b) is illusory. When the Tribunal cancels a determination in whole or in part, it has declared the determination, or the part of it, a nullity. Old Dutch says that the Director can only re-visit the complaint if the Tribunal refers the matter back. Otherwise, the proceedings relating to the complaint are at an end. It is for this reason, Old Dutch says, that the remedial powers of the Tribunal when deciding appeals and making orders under section 115 must be viewed so as to permit the Tribunal to utilize one or more of them, should circumstances warrant.
46. Old Dutch argues that when a determination is cancelled and referred back, the Director is empowered to consider the complaint afresh. If in the process the Director decides that a new contravention has been identified, the Director may issue a new determination and a new penalty. The integrity of section 98 is in no way compromised. When the Director reconsiders a complaint on a referral back, and makes a new decision regarding the complaint, that decision is a determination for the purposes of section 98. It follows, Old Dutch submits, that when a new determination is made, it engages the rights of parties to commence new appeal proceedings under the *Act* in respect of it.
47. In final reply, the Director submits that a cancellation of a determination, or a declaration of its being a nullity, ends the Tribunal's jurisdiction over the matter until a new Determination is issued.

Old Dutch's Application

48. Old Dutch submits that the Member erred in law when he declined to refer the matter back to a different delegate. It says that it was inappropriate for the Member to have declined to refer the matter back for rehearing by a different delegate particularly because a re-examination of the complaint would of necessity require a review of the delegate's own findings of fact supporting her conclusion that Mr. Kellahan was a credible witness. Given that the delegate made those findings in the face of evidence that was unavailable because the delegate refused Old Dutch's requests that it be produced further compounded the Member's error. Moreover, the Original Decision is flawed, Old Dutch says, because it concluded that the delegate could re-visit the matter where she made no *negative* findings of credibility against Old Dutch. This rationale, Old Dutch submits, ignores the fact that the delegate made *positive* findings of credibility in *favour of* Mr. Kellahan, which led the delegate to reject Old Dutch's case.
49. Old Dutch also asserts that permitting the delegate to act as the Director's representative on the appeal created a reasonable apprehension of bias, supporting the disqualification of the delegate from further participation in the complaint. Old Dutch's argument is that a determining delegate's participation in an appeal, especially one that raises natural justice concerns, subverts the delegate's appearance of neutrality, and turns him or her into an advocate for a Tribunal order vindicating her conclusions. Old Dutch asserts that when this happens, the determining delegate's partiality is fatally compromised, and the Tribunal must address this point when considering a referral back.
50. Old Dutch says this is the case here because not only did the delegate participate in the proceedings before the Tribunal, which Old Dutch says was objectionable *per se*, she did so in a way that crossed the line from explanation to advocacy. Old Dutch relies on the following comments of the Member in support of its argument:
- ...I do not consider it appropriate for the delegate to have made submissions in support of her reasons for refusing the disclosure order. The delegate's reasons for refusal should be set out in the Determination itself and should not be "bootstrapped" by an *ex post facto* rationalization that involves additional reasons.(para 19)
51. Old Dutch says that the delegate's appeal submissions to the effect that the documents sought in Old Dutch's applications for disclosure would not, in any event, alter the conclusions she had drawn in the Determination demonstrate that the delegate would not approach an analysis of the documents disclosed by Mr. Kellahan with an open mind. It contends that the delegate would be disposed to simply repeat her findings and analysis contained in the Determination if she were permitted to re-visit them, regardless of what the documents might contain. Old Dutch states that although it drew this to the attention of the Member in its submissions on appeal, he failed to address it. Old Dutch argues that this constitutes a failure to give reasons on the part of the Member, and therefore a denial of natural justice.
52. Old Dutch also takes issue with the Member's reluctance to view the delegate's further participation as tainted on the basis that she acknowledged that she had miscalculated Mr. Kellahan's wages. The Member concluded that the delegate was "open to reviewing and reconsidering her conclusions based on new evidence and argument." For Old Dutch, the weight to be attributed to the delegate's acknowledgement was minimal, because the miscalculation had been admitted by Mr. Kellahan, and was obvious. Accordingly, the Member should have drawn no inference from it on the issue of the Delegate's perceived impartiality.
53. Old Dutch also says that the delegate's adversarial submissions are particularly egregious in this case because Mr. Kellahan was represented by counsel throughout. It says the Director should not have felt necessary to

advocate on Mr. Kellahan's behalf in these circumstances, unlike parties who are, as so often happens, are unrepresented.

54. In reply to the Old Dutch application, the Director submits that the Member decided that credibility assessment was not crucial to the outcome. The Director also says that the Member's observation that the delegate was prepared to re-calculate the wages owed on appeal in favour of Old Dutch constituted a basis on which the Member could rightly conclude that a referral back to the Delegate was feasible. The Director further asserts that the challenge to the Original Decision mounted by Old Dutch is but a disguised attempt to have this panel re-weigh the evidence that was before the Member in the appeal proceeding.
55. On a related note, the Director states that the delegate's submissions on appeal were considered by the Member as evidenced by the fact that he described them as inappropriate. The foundations for the Member's conclusions are discernible if one reads the Original Decision as a whole. It was unnecessary for the Member to set out in detail every aspect of the matters considered in order for him to reach a decision. In summary, the Director again submits that Old Dutch is merely asking the panel to re-weigh matters that were properly considered, and disposed of, by the Member in the Original Decision.
56. The Director asserts it is incorrect for Old Dutch to suggest that the delegate's participation in the appeal process *per se* disqualifies her from participating in the referral back proceedings. This is so because the Director is properly a protagonist in appeals brought pursuant to the *Act*, a fact that has been recognized by the Tribunal. If the Director's representative participating in an appeal overreaches beyond the proper role of the Director acting in that capacity, the proper response for the Tribunal is to disregard the offending submissions.
57. In final reply, Old Dutch submits, *inter alia*, that the panel is not being asked to re-weigh anything. Rather, it is being asked to decide whether the Original Decision is correct in law in the sense that it provides a remedy that complies with the principles of natural justice. Given the importance of natural justice, Old Dutch says that it was necessary for the Member to specifically deal with the concerns about the delegate's participation in the appeal proceedings in the Original Decision. Old Dutch does not quibble with the proposition that the Director may be a protagonist on appeals, but argues that in the circumstances of this case the delegate's participation crossed the line from submissions to improper advocacy.

4. Disposition

Director's Application

58. As a creature of statute, the Tribunal exercises only the powers bestowed upon it in the *Act*, expressly or by necessary implication. The Director's application raises questions as to the extent of the Tribunal's powers under s. 115(1) of the *Act*. These questions require the Tribunal to interpret this provision of its "home" or constating statute.
59. When acting within its statutory jurisdiction, the *Act* vests the Tribunal with broad powers that are protected by a privative clause:
- 110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.
 - (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

60. Nothing in the *Act* either expressly, or by necessary implication, protects the determinations of the Director from scrutiny by the Tribunal. There is nothing in the *Act* that requires the Tribunal to extend deference to the decisions of the Director if it decides that the Director has committed an error.
61. In its supervisory role over the Director's exercise of his jurisdiction, the Tribunal may employ principles of administrative law in appropriate cases. The Tribunal may look for guidance to court decisions on judicial review where the language of the *Act* supports it.
62. In deciding the questions of statutory interpretation raised by the Director's application, we apply the purposive approach mandated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27 at para 21:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
63. The Court, in the above decision, also relied on the Ontario equivalent of section 8 of the *Interpretation Act*, RSBC 1996 c.238, which says:

8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
64. In taking a purposive approach to the interpretive issues before us, we note that the purposes of the *Act* include the fair treatment of both employees and employers (section 2(b)) and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.(s. 2 (d)).
65. We further note that, under s. 112(1)(b) of the *Act*, one of the grounds on which the Tribunal is given express jurisdiction to review appealed determinations of the Director is failure to observe the principles of natural justice. Under s. 115(1) the Tribunal has express jurisdiction to order, after considering whether the ground or grounds for appeal have been met, that the determination under appeal be (a) confirmed, varied or cancelled, or to (b) refer the matter back to the director.
66. In our view, section 115 permits the Tribunal to employ its remedial powers cumulatively as well as exclusively, so as to enable it to fashion a remedy which best suits the circumstances presented in the particular case. The legislation nowhere expressly prohibits such an approach and such an interpretation is more apt to permit a result that is fair and efficient.
67. It follows that it was not improper for the Member to cancel the Determination under section 115(1)(a) and refer the matter back under section 115(1)(b).
68. Both the Director and Old Dutch acknowledge that when a determination, or a part of it, is cancelled by the Tribunal pursuant to its jurisdiction under section 115(1)(a), the determination, or the part of it that is cancelled, is a nullity.
69. If the Tribunal orders that a determination be cancelled and that the matter be referred back, the Director must consider the complaint afresh in light of the errors identified by the Tribunal. If the Director makes a new determination, that determination attracts the same rights of appeal under the *Act* as the original determination.

70. The Director may impose new penalties if contraventions of the *Act* are identified in the new determination. It cannot be said, therefore, that a referral back in conjunction with a cancellation, which is what occurred in this case, compromises the Director's ability to impose penalties under section 98 of the *Act*.
71. Where the Tribunal makes an order referring the matter back to the Director to consider it afresh, it is open to the Tribunal to also give directions to the Director on how the matter is to be dealt with thereafter. Although section 115(1)(b) does not expressly say that directions may be given, a power to give directions need not be express. If such a power is exercised in a manner that assists in the realization of the goals supporting the enactment of the legislation, it may be implied. Section 27(2) of the *Interpretation Act* provides:
- 27 (2) If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given.
72. There are also decisions of our courts which support an inference that the power to give directions is implied, notwithstanding that there is no express power to do so set out in the language of the relevant statute (see *Johnston v. Langley School District No.35* (1979) 12 BCLR 1; *B.C. (Minister of Health) v. B.C. (Environmental Review Board)* [1996] BCJ No.1531; *B.C. (Liquor Control and Licensing Branch, General Manager) v. Smillie* [1992] BCJ No.2883).
73. The Tribunal has regularly referred matters back to the Director with directions (see, for example, *Zhang*, BC EST # RD635/01). A proper exercise of the power to give directions allows the Tribunal to ensure that the errors it has identified will not be repeated or will be addressed by the referral back process.
74. Thus, the Tribunal has the power to give directions to ensure that the Director conducts hearings of matters remitted back in accordance with the principles of natural justice.
75. Accordingly, we do not accept the argument that the Tribunal has no power to give directions to the Director as to the re-hearing of matters remitted back. At the same time, we accept that the Tribunal generally should not give more direction than is necessary to ensure that the error for which the matter is being remitted is not repeated or is cured.
76. In the present case, in cancelling the Determination and remitting the matter back to the Director, the Member expressly declined to make a direction that the matter be considered afresh before an entirely new delegate (see para. 27 of the Original Decision). The Member went on (in para. 30) to make a number of suggestions as to how the matter could proceed in a way which would be both efficient (in accordance with the purposes of the *Act*) and would cure the breach, while still complying with natural justice requirements. The Member concluded by stating: "However, I will leave those procedural matters for the Director to determine".
77. In our view it is clear that the Member was keenly aware of the need to respect the discretion of the Director as to how to proceed under the *Act*. Other than the direction that there need not be an entirely new hearing conducted, the Member merely made suggestions as to how the matter could proceed. These cannot be considered mandatory "directions" in light of the final sentence of paragraph 30 of the Original Decision. Accordingly, we find the Member in no way exceeded jurisdiction or improperly fettered the discretion of the Director to decide how to proceed with the re-hearing.
78. The Director further submits that he has no power under sections 84 or 85 of the *Act* to order production of documents and that any form of direction to that effect from the Tribunal is inappropriate.

79. There is nothing in section 84 which limits the Director's power to order the production of a "record or thing" during the conduct of an actual hearing, but not during the period leading up to a hearing. Section 84 allows the Director to order production "(f) or the purposes of this *Act*..." not merely for the purposes of conducting a hearing.
80. Moreover, it is not just employers who may be required to produce records or things. Section 84 says that the power to order production may be exercised against any "person," including, one must assume, employees like Mr. Kellahan. Such an interpretation is also consistent with the purpose of the *Act* in section 2(b), namely, the promotion of fair treatment of employees *and* employers.
81. Nor can it be said that section 85 is unavailable to the Director in these circumstances. The Director says that because section 85(1) powers are "(f) or the purposes of ensuring compliance with this *Act*..." and since ensuring compliance does not relate to employees, but only to employers, the Director has no power to inspect, or to require the production and delivery of records, by Mr. Kellahan pursuant to section 85(1)(c) and (d), or to disclose a matter required under the *Act* pursuant to section 85(1)(e). The Director also submits that he has no power to require production and delivery under section 85(1)(c) and (d) because section 85(1)(c) is restricted to records that may be relevant to an "investigation," and not, as was the case here, to an adjudication.
82. The panel disagrees that section 85 must be read in such a restrictive manner. In order to ensure that an employer complies with the *Act*, one must first determine that compliance is required. In this case, the Member decided that the documents in respect of which Old Dutch sought disclosure from Mr. Kellahan were relevant to the very issue the Delegate was required to resolve, namely, whether Mr. Kellahan was an employee or a contractor.
83. The panel is not persuaded that the Director lacks the jurisdiction to require Mr. Kellahan to disclose documents under section 85(1)(c) in an adjudication. The Director's powers to "review, mediate, investigate or adjudicate a complaint" referred to in section 76 should not be viewed exclusively, in the sense that one avenue only for the handling of a complaint may be selected at the outset, with all others permanently removed from the Director's arsenal thereafter.
84. The handling of a complaint is a multi-faceted process, and the approach the Director may take in bringing the process to a conclusion may change as circumstances warrant, and as information is gathered. In our view the word "investigation" in section 85(1)(c) is broad enough to encompass the process of gathering information, and as here, the disclosure of documents, which must inevitably occur before the Director exhausts his jurisdiction under section 76, and decides whether, if a determination is to be issued, it will be issued as a result of an investigation, or an adjudication.
85. For these reasons, we see no error in the Member's conclusion that the Director should employ the powers available to him under the *Act* to ensure that the documents sought by Old Dutch are disclosed to avoid a repetition of the failure to observe the principles of natural justice.
86. We are therefore of the view that the Member did not exceed his jurisdiction or otherwise err in ordering a rehearing in this instance and in giving the directions and suggestions in the Original Decision. Accordingly, the Director's application is dismissed.

Old Dutch's Application

87. Old Dutch submits that the Member erred in failing to order that the referral back be made together with a direction that the matter be re-visited by a different delegate. In the circumstances, we agree. The delegate made findings of fact based on an assessment of Mr. Kellahan's veracity, which we believe renders it inappropriate for the delegate to re-visit the matter on the referral back. In addition, we have decided that the manner in which the delegate conducted herself on appeal will result in a reasonable apprehension of bias if she participates in the referral back. It is the combination of these two concerns that has convinced us that the Member should have ordered that the complaint be re-visited by a different delegate.
88. The panel accepts that a direction requiring the Director to appoint a different delegate to conduct a referral back proceeding encroaches significantly on the Director's ability to exercise his discretion to manage complaints. Since the determining delegate will be entirely familiar with the file, it is logical to assume that the matter would be remitted to him or to her, for efficiency reasons, at a minimum. For these reasons, at least, the panel also accepts that a direction of this sort should only be made but rarely, and where a referral back to the determining delegate is simply not appropriate for reasons of natural justice.
89. Here, the Member declined to refer the matter back to a different delegate for two reasons. First, the Member stated that he was "not convinced that essential findings of credibility or other adverse inferences have been drawn by the delegate against Old Dutch." Second, the Member concluded that since the delegate was prepared to revise downward her calculations of wages she felt were owed to Mr. Kellahan as a result of an error it was obvious she had made for the purposes of setting the amounts appearing in the Determination, the delegate seemed to be "open to reviewing and reconsidering her conclusions based on new evidence and argument."
90. With respect, the panel cannot accept the Member's conclusion that the delegate made no essential findings adverse to Old Dutch. Because Old Dutch was deprived of the opportunity to examine the documents relating to Mr. Kellahan's outside business activities, which the Member decided was sufficient to constitute a failure of natural justice, the delegate accepted that Mr. Kellahan's outside activities were unconnected to his duties for Old Dutch, and of no relevance to the issue of whether or not he was an employee under the *Act*.
91. The delegate also made findings of fact relating to Mr. Kellahan's other business activities based on a favourable assessment of Mr. Kellahan's evidence. For example, the delegate said this:
- ...Finally, based on the clarity, consistency and overall credibility of his testimony, and as corroborated by insurance documentation of a separate transport vehicle used for his independent water distribution business, I accept Mr. Kellahan did not use his truck for any purpose outside of performing distribution duties for Old Dutch.
92. In *Jennifer Oster*, BC EST # D120/08, the Tribunal found that a complainant had been denied natural justice when the Director declined to issue summonses to compel certain witnesses to attend a complaint hearing and to bring certain documents with them. The Tribunal cancelled portions of the determination and directed that the matter be referred back to another delegate:
- The Determination was made by way of a quasi-judicial adjudication. While the delegate conducting the complaint hearing made no specific findings on credibility, he made several findings of fact against Oster, rejecting her evidence in the process. Many elements of Oster's claims depend on findings of fact based on a careful review of the evidence. It is not realistic to expect the delegate who conducted the complaint hearing to divorce his mind from all of the perceptions and findings of fact already made, return to a new body of evidence and reach a balanced decision based on that evidence. (para 121)

93. There is little of substance to distinguish *Oster*, supra, from the case that confronts us here. It stretches credulity to conclude that the delegate would be able to set aside her perceptions developed, and findings made, for the purposes of the Determination, and consider the matter anew as if the proceedings leading to it had never occurred.
94. A further concern relates to the delegate's perceived partiality, which arises from the manner in which she participated in the appeal on behalf of the Director. We have decided that some of her actions are sufficient to raise a reasonable apprehension of bias were she to have conduct of the proceedings on the referral back.
95. The Director may act as a protagonist in appeals, especially where the issue relates to a question of pure statutory interpretation, and where, as so often occurs, the parties involved in an appeal are unrepresented (see *B.C. Securities Commission v. Burke* 2008 BCSC 1244). The Director's active participation in such cases ensures that all issues of importance are scrutinized comprehensively. This is important, because the Tribunal's orders are protected by strong privative clause. Thus, in *Burke*, the court declined to set aside, on natural justice grounds, a reconsideration decision of the Tribunal, notwithstanding a finding that the delegate involved in the original appeal made submissions to the Tribunal that were "in part inappropriate and tinged with undue advocacy..." (*Burke*, supra, at paragraph 63).
96. It follows, in our view, that there is nothing *per se* improper in the Director's making submissions on appeal. Nor do we consider it to be inappropriate, *per se*, that it is the very delegate who issued the determination, and who is therefore in the best position to explain it, who acts as the Director's representative for the purpose of making submissions on his behalf on appeal.
97. Having said this, there is clearly a line beyond which the Director should not step when participating in appeals. The Director's submissions should not take on the character of advocacy, because it creates a perception that the Director has a personal investment in the outcome of the appeal which may, as here, raise the concern that if a matter is referred back, it will not be re-visited with an open mind. Instead, the Director should limit himself to explaining the determination, and the path of reasoning employed in reaching the conclusions contained within it.
98. The Director's decisions to deny Old Dutch's applications and the Member's decision that the denials amounted to a denial of natural justice do not raise questions of pure statutory interpretation. In addition, Mr. Kellahan has been represented by counsel throughout. In these circumstances, the delegate needed to be circumspect in exercising her right to participate in the appeal proceedings as the Director's representative, so as to avoid perceptions of bias, precisely because some of the factors which in other cases might support the Director's taking a more aggressive role were absent. That the delegate needed to take care is particularly important here, where the Director chose the determining delegate to make submissions on behalf of the Director on the appeal. By choosing the determining delegate to represent him, the Director must accept, and guard against, the perhaps inevitable charge that a determining delegate will have a personal investment in the vindication of the determination that is challenged on appeal, especially where the challenge relates to a charge that the Determination was tainted by a failure to observe the principles of natural justice.
99. In his Original Decision, the Member admonished the delegate regarding her submissions on appeal. The Member thought it inappropriate for the delegate to have presented additional reasons for her refusal to accede to the applications of Old Dutch for disclosure of documents, which the Member stated should have been set out in the Determination, and not "bootstrapped" in the form of a new submission delivered for the first time on appeal. One may infer from the fact that the Member declined to direct that the delegate not participate in the referral back that, while troubled by the delegate's actions, the Member did not feel them to be sufficiently egregious on their own to warrant such a direction.

100. While the panel agrees that the delegate should not have made new arguments on the appeal, the more serious problem relates to the content of the delegate's comments in her submissions relating to the importance of the documents sought. This was an aspect of the delegate's conduct which the Member does not appear to address in the Original Decision. Old Dutch argues it goes to the heart of its assertion that a reasonable apprehension of bias would arise if the delegate were permitted to re-visit the complaint on the referral back. The part of the delegate's submissions on appeal to which Old Dutch refers on this point is this:

Most significantly, it is the Director [sic.] humble opinion that the documents requested (and the appellant's speculation around information that perchance, was included in them) would not alter or transform the actual nature of the relationship between the parties, nor change the findings and analysis included in the Determination. In sum, the issue to be decided was the relationship between the appellant and Mr. Kellahan as defined in application of the Act. The Director contends the documents requested do not alter the factual circumstances that existed between the parties and hence would not change the related findings included in the Determination.

101. Old Dutch asserts forcefully that this passage supports a conclusion that nothing about the documents the Member thought should have been disclosed would change the delegate's mind concerning Mr. Kellahan's status as an employee. Put differently, Old Dutch says the delegate's comments display an entirely closed mind on the matter.

102. We are unprepared to go that far. The delegate's statements express an opinion as to the potential value of the documents, and offer the suggestion that the other evidence the delegate considered regarding the relationship between Old Dutch and Mr. Kellahan is likely to remain the most useful resource in resolving the issue of his status. We therefore conclude that the delegate's comments do not conclusively show that she has a closed mind regarding the documents. At the same time, we are of the opinion that a reasonable person, viewing the matter realistically and practically, and considering the other factors we have alluded to above, might conclude that the delegate could not re-visit the matter with an open mind. It follows that we concur with the position of Old Dutch that unless the matter is referred back for consideration by a different delegate, a reasonable apprehension of bias in the referral back proceedings will be created, thereby tainting that process before it even commences.

103. We agree, too, with Old Dutch that the factors pointing to a disqualification of the delegate from taking part in the referral back proceedings are not mitigated by the fact that the delegate was prepared to correct her calculations of wages owed to Mr. Kellahan in Old Dutch's favour when her error was revealed to her. The error was obvious. Mr. Kellahan did not dispute that an error had been made. There was no option but to correct it. The probative value of the delegate's concession regarding her calculations on the issue of there being a reasonable apprehension of bias is at best minimal.

104. We have concluded, therefore, that the Member erred in law in the Original Decision. That error in law arises from his declining to adequately correct a failure to observe the principles of natural justice in the making of the Determination when he refused to direct that the complaint be referred back for a rehearing before a different delegate.

105. Accordingly, Old Dutch's application is granted.

ORDER

^{106.} Pursuant to section 116(1)(b) of the *Act*, the panel orders that the Original Decision of the Tribunal issued under BC EST # D057/09 is varied to include a direction that the complaint be referred back to the Director for a rehearing before a different delegate.

_____ Carol L. Roberts Panel Chair Employment Standards Tribunal	_____ Shafik Bhalloo Member Employment Standards Tribunal	_____ Robert Groves Member Employment Standards Tribunal
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