An Application for Reconsideration

- by -

British Columbia Securities Commission
(the "Commission")

- 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: Brent Mullin, Chair
John Savage, Member
David B. Stevenson, Member

FILE No.: 2007A/075

DATE OF DECISION: December 17, 2007

DECISION

SUBMISSIONS

Donald J. Jordan, Q.C.	on behalf of British Columbia Securities Commission
Adele J. Adamic	on behalf of the Director of Employment Standards

INTRODUCTION

1. Mathew Burke ("Burke") requested unpaid parental leave. His employer, the British Columbia Securities Commission (the "Commission") denied him the leave he requested. The Commission was of the view that Burke was required to take the entirety of leave within 52 weeks of the birth of his child. Burke disagreed so the matter proceeded to hearing. Burke was unrepresented although the Commission had counsel.

2. The Director found against the Commission, interpreting Section 51(1)(c) of the *Employment Standards Act* (the "*Act*") as only requiring that the leave *commence* within 52 weeks of the birth of the child. The Commission appealed the Director's decision to this Tribunal.

3. Burke did not participate in the appeal, so the parties before the Tribunal were the Commission and the Director. In BC EST # D033/07 the Tribunal upheld the Director's decision. The Commission now applies to the Tribunal for reconsideration of its decision.

4. On the reconsideration application the Commission and the Director are represented by counsel. Burke has not participated in this application.

5. The Tribunal applies a two stage process in the analysis of reconsideration applications. The first stage in the analysis considers whether the matters raised in the application warrant reconsideration. If the matter warrants reconsideration, the second stage in the analysis involves a reconsideration of the merits of the application: *Re Annable,* [1998], BC EST # D559/98.

6. The Tribunal finds that in this case the first stage in the analysis is met: the application for reconsideration raises important issues concerning the role of the Director before the Tribunal and the interpretation of the *Act*.

7. Although Burke did not participate in any of the proceedings before the Tribunal, the Tribunal is indebted to the full and able submissions of counsel for the Director and the Commission on this application.

ANALYSIS

1. The Proper Role of the Director before the Tribunal

8. The Commission says the Tribunal breached the rules of natural justice and procedural fairness in failing to find that the Delegate had exceeded her permissible participation in the appeal before the Tribunal; in allowing the Delegate to act as an advocate for Mr. Burke; and in failing to disregard the submissions of

the Delegate made in excess of her permissible participation and the bounds of neutrality in rendering the decision.

9. The Commission makes three arguments in that regard:

> 1. The Commission says the Delegate in her submissions to the Tribunal fully responded to the question of whether she had breached the principles of natural justice in her Determination. The Commission says the Delegate/Director should not make any submissions on natural justice, relying in particular on the comments of Mr. Justice Estey in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*") concerning the role of tribunals before courts on judicial review: "To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions": *Northwestern Utilities*, p. 710.
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> 2. The Commission further says the Delegate raised on her own the question of whether there was a reasonable apprehension of bias on her part in the Determination and then went on at length in making submissions on that point. The Commission submits that, "this is a circumstance unknown to the existing jurisprudence". It adds, paraphrasing the language in the Tribunal's decision in *D. Hall & Associates*, BC EST #D354/99. "This far oversteps the bounds of neutrality". The Commission submits it "…is not only patently adversarial, fervent and combative, it is gratuitously so on every count".
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> 3. Lastly, the Commission says that on appeal the Delegate argued new bases to support her Determination. The Commission submits this unfairly makes response to the Determination a "receding horizon" through the Director being allowed to add new explanations or justifications for the Determination in appeal proceedings.

10. In reply, the Director takes the position that the scope of the Director's participation in the appeal does not constitute a breach of natural justice. The Director says that his role as an interpreter of the *Act*, the experience which the Director and his delegates bring to matters relating to applying and administering the *Act* and the preponderance of unrepresented parties involved in the complaint and appeal processes in the *Act* makes the context of the Director's role as a party in appeal and reconsideration proceedings different than the statutory bodies being addressed in the judicial authorities cited by the Commission.

11. In approaching this issue, we find it is critical to appreciate the particular nature of the *Act*. Employment standards legislation is intended to provide "…a relatively quick and cheap means of resolving employment disputes": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 ("*Danyluk*"). The intention of such legislation is to provide broad access to minimum standards in employment matters where it would often be unaffordable or otherwise inaccessible and thus, from a practical perspective, unobtainable.

12. This core concern of the *Act* is reflected in its appeal process. As explained in *J.C. Creations Ltd.*, BC EST # D317/03 ("*J.C. Creations*") in respect to the report leading to the establishment of the Employment Standards Tribunal in 1995:

> The advice the Commission received from members of the community familiar with the appeal system, the staff of the Ministry and the Attorney General was almost unanimous. An appeal system should be relatively informal, with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. (O'Reilly (Re). [2002] B.C.E.S.T.D. No. 167, BC EST #RD165/02 (Reconsideration of BC EST #D596/01)) (*J.C. Creations*, para. 44)

13. The commonplace reality in employment standards matters is that complaints under the *Act* are often, if not most often, brought forward by laypersons ill equipped in a number of ways to pursue or defend the usual nature of appeal proceedings in law.

14. The Supreme Court of Canada has noted the unique nature of employment standards matters and legislation. In *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 ("*Rizzo & Rizzo Shoes*"), the Court explained that the Ontario Court of Appeal "…did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized": para. 23. The Court then went on to reference its earlier decision in *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986 ("*Machtinger*"), in which it held that "…an interpretation of the Act which encourages Commissions to comply with the minimum requirement of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not": *Rizzo & Rizzo Shoes*, para. 24, citing *Machtinger*, p. [1004].

15. Guided by these decisions in approaching the issues before us, we will now address each of the Commission's arguments in respect to the proper scope of participation by the Director on appeal before the Tribunal.

1. The Director should not be allowed to make submissions on natural justice

16. We of course do not take issue with the Court's statements of law in *Northwestern Utilities*. However, we find those statements must be applied contextually and with a view to the Court's specific comments on the particular nature of employment standards legislation and matters in *Danyluk*, *Rizzo & Rizzo Shoes*, and *Machtinger*, as noted above.

17. In regard to the latter, we note the *Act*'s overarching purpose. It includes providing fair and efficient procedures for resolving disputes over its interpretation and application. It must be read in light of the operational reality that most employers and employees involved in the appeal process are unrepresented and, without the Director's involvement, the Tribunal would be placed at a significant disadvantage in deciding many appeals.

18. That is in fact the case, as it so often is, in the present matter. The individual complainant, Matthew Burke, has not appeared or made submissions before the Tribunal on appeal and reconsideration. That is readily understandable. In his application under the *Act*, he was seeking a specific, practical outcome. He wanted his parental leave to run during a period of time he felt the *Act* provided, but with which his employer, the Commission, disagreed. In that regard, he needed a timely decision, the kind of "relatively quick and cheap means" of resolving the employment dispute the Court describes in *Danyluk*. Having obtained that under the Director's Determination, the appeal and reconsideration proceedings would presumably hold little attraction for him either in terms of what he was seeking, the further use of his personal time and resources these proceedings would require, or the potentially negative aspects and aggravation of continuing with a dispute with his employer. Nor, as an individual layperson under the *Act*, would he necessarily have the propensity or capabilities (training, etc.) characteristically required in legal appeals.

19. In this context, Section 81 of the *Act* is also relevant. In contrast to the common law trend requiring decision makers to give reasons for decisions, that Section only requires the Director to give reasons when asked for them. If reasons are not requested, or are deficient, the Tribunal appeal is the only realistic opportunity for the Director to explain and defend his thinking and position. The only other

alternative is to remit the matter back to the Director to provide reasons, a course that is contrary to the interests of finality and inconsistent with the statutory objective of efficiency in resolving disputes. It would make little sense, particularly where the issue relates to a question of law or jurisdiction, to refer the matter back when the Director is before the Tribunal in the appeal process and capable of providing reasons for the decision made.

20. In addition to the practical advantages of allowing the Director to make submissions before the Tribunal during the appeal process, we find the relevant provisions of the *Act* contemplate the Director playing such a role in the process. Section 112(2) of the *Act* requires the appellant to deliver the grounds of appeal not only to the Tribunal but also to the Director. It is difficult to see for what purpose, if not to allow the Director an opportunity to respond to the appeal. Section 116(2) confers a specific right on the Director to request reconsideration of a Tribunal appeal decision. This provision would have little meaning if the Director's meaningful participation in Tribunal appeal process were not intended. The absence of a meaningful role for the Director on appeal would also undermine the Tribunal reconsideration process, which discourages new arguments being raised for the first time on reconsideration.

21. Section 110 of the *Act* contains the Tribunal's privative clause. The purpose of the privative clause is to accord Tribunal decisions a level of finality. This finality engenders a special responsibility for the Tribunal to ensure it has the assistance it needs to make its decisions as sound as they can be. Part of this responsibility is ensuring its process is designed and functions to allow submissions from all parties which are as comprehensive and complete as they can be.

22. As a result, as a general statement, there are sound practical and policy reasons reflected in the *Act* for not unduly limiting the role of the Director in an appeal. The Tribunal has thus fashioned an approach to the role of the Director in proceedings before it in a way that is consistent with the statute. That was clearly expressed when the principles were originally developed in *BWI Business World*, BC EST #D050/96 ("*BWI Business World*"): "The role of the Director on an appeal hearing must be considered in the context of the overall investigative and adjudicative framework established by the Act" (p. 4).

23. In *BWI Business World*, the Tribunal set out guiding principles governing the status and role of the Director in appeal and reconsideration proceedings before the Tribunal:

> 1. The Director is not the statutory agent for the employee(s) named in the determination.
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> 2. The Director is entitled to attend, give evidence, cross examine witnesses and make submissions at the appeal hearing.
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> 3. The Director's attendance and participation at the appeal hearing must be confined, however, to giving evidence and calling and cross examining witnesses with a view to explaining the underlying basis for the determination and to show the determination was arrived at after a full and fair consideration of the evidence and submissions of both the Commission and the employee(s).
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> 4. The Director must appreciate that there is a fine line between explaining the basis for the decision and advocating in favour of a party, particularly where one party seeks to uphold the determination.
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> 5. It will fall to the adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the determination and advocating on behalf of one of the other parties is not crossed.

> 6. It will also fall to the adjudicator to ensure that all of the relevant evidence is placed before the Tribunal for consideration. [page 5]

24. *BWI Business World* has been cited with approval in many Tribunal decisions and, as noted in the original decision, has received judicial approval in *Lari Mitchell, and Others v. Director of Employment Standards, and Others*, [1998] B.C.J. No. 3005 (S.C.) at para. 16.

25. Amendments to the *Act* in November 2002 may warrant some minor modification of the above *BWI Business World* principles. The Legislature limited the grounds for appeal and removed the authority of the Tribunal to consider appeals based solely on errors of fact. The amendments allowed, or caused, the Director to change the complaint fact finding process from one which was predominantly investigative to one which was predominantly adjudicative. However, neither of these changes would affect the status and role of the Director in this case.

26. As well, none of the amendments have affected the underlying rationale, grounded in the purposes and objectives of the *Act*, for the role allowed for the Director in proceedings before the Tribunal on appeal and reconsideration. Those reasons include the matters identified above: the typical nature of the proceedings and litigants before both the Director and the Tribunal; the need to ensure that the Tribunal receives the perspective of the Director, who is primarily responsible for the administration of the *Act* and initially responsible for its interpretation, on the issue being addressed on appeal and reconsideration; and the objective of timely, efficient, and final resolution of complaints made under the *Act*.

27. The above rationale informs the Tribunal's policy to allow the Director to make complete submissions on all aspects of an appeal, including natural justice. Otherwise, as is the case in the present matter, the Tribunal would often be left without any further information or submissions beyond that provided by the appellant. In our view, that would be an untenable situation in terms of the provisions, context, and purposes of the legislation.

28. Consequently, we do not accept the Commission's position that the Director ought not to be allowed to make submissions on natural justice issues raised on appeal under the *Act*. As noted in *BWI Business World*, however, the Director's role is not to be the statutory agent or advocate of the employee, and the Director must appreciate that there can be a fine line between explaining the basis for a decision, or the process by which it was arrived at, and advocating on behalf of one of the parties.

29. Thus, we do not accept that the original decision breached principles of natural justice or procedural fairness in allowing the Delegate to make submissions responding to the natural justice issues raised in the Commission's appeal. However, we do accept that it is possible for the Delegate to "cross the line" in the course of making submissions.

30. In the present case, the original panel concluded that the Director's response submissions came "close to the line", but did not cross it. In general, we agree. We find the Director's response submissions generally to be appropriate and not to cross the line. However, we will now consider in greater detail the two aspects of the submissions specifically raised by the Commission: the Delegate's decision to raise and respond to the issue of a reasonable apprehension of bias, and the Delegate's submissions in support of the statutory interpretation given in her Determination.

2. The Delegate's reasonable apprehension of bias submission

31. As noted above, the Commission says that before the original panel of the Tribunal, the Delegate, acting on behalf of the Director, raised on her own the question of whether there was a reasonable apprehension of bias on her part in the Determination. It is argued that she then went on at length to make submissions in that regard. Among other points, the Commission says that this was gratuitously, aggressively adversarial and in terms of the Tribunal's decision in *D. Hall & Associates*, "…far oversteps the bounds of neutrality".

32. We have just concluded that given the nature of employment standards matters and the provisions and purposes of the *Act*, it is important that the Director be allowed to make submissions on natural justice issues before the Tribunal. However, consistent with the Tribunal's well established approach in *BWI Business World*, the Director must ensure that his submissions are limited to explaining the Determination reached, including the process used in respect to it, as opposed to advocating for a party. The latter requirement preserves the neutrality of the Director in respect to matters under the *Act*.

33. Applying this approach to the concerns raised by the Commission, we find it was inappropriate for the Delegate to characterize the Commission's challenges to her Determination as being permeated with a reasonable apprehension of bias allegation. An allegation of bias is a serious matter. Accordingly, the threshold for a finding of real or perceived bias is high and the onus of demonstrating bias lies with the person who is alleging its existence: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at paras. 113-114. See also *Dusty Investments Inc. dba Honda North*, BC EST #D043/99 (Reconsideration of BC EST #D101/98). At the end of the day, there must be a real likelihood or probability of bias demonstrated, a mere suspicion is not enough.

34. In our view, these requirements for establishing bias demonstrate the difficulty of the Delegate's submission, firstly in raising this concern and, secondly, doing so on the basis of an inference, i.e., that an allegation of bias "permeates" the Commission's appeal. As just noted, given the serious nature of such an allegation, it needs to be clearly asserted and convincingly established, not inferred.

35. In raising the bias point, the Delegate relied on the following submissions of the Commission on appeal:

> – "[T]he real reason for the Delegate's conclusions are those articulated in her discussions under the heading "purpose and intention" and "consequential analysis". In summary form, it is clear that the Delegate simply assumed that her own preference that the Legislature not treat biological and adoptive parents differently be attributed to the Legislature".
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> – "[I]t is clear that throughout her decision on the merits, the Delegate continued to have regard for the Branch's policy interpretation and indeed referred to it […]."
>
> – "Notwithstanding the Delegate's protestations to the contrary that she was not influenced at all in her interpretation by the "Director's Express Policy", the language of the Determination belies that insistence".[…] The Director's observations as to his or her own belief about the proper interpretation of the Act are worthy of no more credence than anyone else's. Given that the Delegate is the "Director's Delegate" this reference to the interpretative usefulness of the "Director's Express Policy" is extremely troubling".
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> – "[T]here is simply no avoiding the conclusion that consistency with the IGM was, from the outset, the preferred interpretation of the Delegate".

36. We do not find these submissions by the Commission to be either explicitly or implicitly bias allegations. In our view, whether right or wrong, they are simply submissions regarding the nature of the Determination and the asserted bases for appeal of it. As a result, it was inappropriate for the Delegate to raise the reasonable apprehension of bias point in respect to them.

37. Such a submission risks crossing the line from explanation to advocacy, personalizing the disputed interpretation issue, and thereby potentially undermining the objectivity and neutrality of the Delegate in the Determination. All of that is untoward in terms of the *BWI Business World* requirements with respect to the special status and role accorded to the Director under the *Act*.

38. On the other hand, in fairness it should also be noted that outside of raising the reasonable apprehension of bias concern, for the most part the Delegate restricts herself to answering the specific points upon which she felt, mistakenly in our view, that the reasonable apprehension of bias allegation had effectively been raised. In focussing on those points and answering them, the Delegate stayed on the proper side of the explanation/advocacy line.

39. We thus find that while raising the bias point was in error, it did not render the Director's submissions as a whole improper. We therefore reject the Commission's submission that the original panel of the Tribunal breached natural justice by considering the Director's submissions as a whole.

40. We accept the Commission's submission that the Tribunal should not give any weight to the reasonable apprehension of bias point which the Delegate herself raised. However, we find no evidence on the face of the original decision that the original panel gave that issue any weight. Further, we find it was appropriate for the original panel to consider the Delegate's response to the specific points the Delegate based her bias surmise upon. We find that those submissions are in proper explanation of the Determination and fall within the proper status and role of the Director in proceedings before the Tribunal, as set out above.

41. For all the above reasons, we find that while it was an error and improper for the Delegate to raise and respond to what she perceived to be an allegation of bias by the Commission, that error did not render the entirety of the Delegate's submissions improper. The error was an isolated one and the rest of the Delegate's submissions were proper. Accordingly, we find the original panel did not breach natural justice in considering those submissions.

42. We have focused on the issue of the proper role of the Director raised by the Commission not because we find that the Director's submissions in this case have caused a breach of natural justice by the original panel of the Tribunal, but rather because we recognize that the Commission has raised legitimate concerns about whether the Director "crossed the line" in making these submissions.

3. The "receding horizon" argument

43. We have accepted the need under the *Act* for the Director to play a significant role in respect to the appeal of a Determination to the Tribunal. As we have explained, that derives from the nature of employment standards matters and the structure, provisions, and policies in the *Act*. Those matters include the common context, as here, of an unrepresented lay litigant seeking timely and effective relief, concomitant specific attributes of proceedings before and involving the Director, including Section 116(2) of the *Act*, and the needs of the Tribunal in fulfilling its appeal and reconsideration roles under the *Act*.

44. These characteristics do give rise to some limitations, however. It is important, for instance, that the administrative justice structure and processes under the *Act* be seen as neutral and fair. Thus, it is explained in *BWI Business World* that while it is important to accord the Director status and a significant role on appeal and reconsideration, it is equally important that the Director not go beyond explanation of his Determination to advocacy for a party. Ultimately, it could undermine the perception of neutrality and fairness of the system, which would clearly be inconsistent with the concern for balance and fairness set out in the Section 2 purposes of the *Act*:

> Purposes of this Act
>
> 2 The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.

45. In our view, these points speak to the "receding horizon" argument of the Commission. For the reasons we have given, we have found that the Director should be given full status and scope to explain on appeal the Determination which has been rendered. That includes providing or even expanding upon reasons in support of the Determination. This is different from what occurs on judicial review or appeal of a decision in Court, but as we have explained, it is consistent with the context and needs of employment standards matters and the provisions and policies in the *Act*.

46. However, once these needs have been met by allowing the Director the status and scope on appeal we have described, other objectives in the *Act*, fairness, balance and finality, acquire greater weight and will affect the Director's role on reconsideration.

47. To allow the Director to continue to add reasons and explanation for the Determination at the reconsideration level, runs the risk of undermining the neutral, explanatory role provided to the Director under *BWI Business World.* Continually allowing further reasons or justifications for the Determination takes on the air or characteristic of advocacy (though, in fact, even advocates are often not allowed to add arguments or justifications for their position past the first level of appeal.)

48. Continually adding new reasons or justifications for the Determination would also undermine the timeliness and finality sought in the *Act*. As the Court said in *Danyluk*, employment standards legislation is intended to provide "…a relatively quick and cheap means of resolving employment disputes" (p. 496). The system cannot be "relatively quick" if one of the participants is entitled to continually come up with new arguments. That will require the process to be stretched out to further proceedings in order to deal with those arguments. As well, of course, that also undermines the cost efficiency of the system (what the

Court referred to as the "cheap means of resolving employment disputes"; see also Section 2(d) of the *Act*).

49. Lastly, this would also undermine the balance and fairness in the system, which are clearly established purposes under Section 2 of the *Act*. We believe that, in general, the unfairness of having the original adjudicative body continue to add reasons and justifications for its Determination at successive levels of appeal is obvious and does not require further explanation. As well, if a particular constituency, for instance, saw itself as continually being prejudiced by this practice, that could ultimately lead to issues of perceived fairness and balance in respect to the system under the *Act* as a whole. Obviously that would not be of assistance in fulfilling the intention of the Legislature in the *Act*.

50. As a result, we find that the nature of employment standards matters and the provisions and policies in the *Act* give rise effectively to the full right and ability of the Director to provide and explain his reasons for the Determination rendered at first instance. However, equally that nature of employment standards matters, and the provisions and policies in the *Act* generally, requires that those reasons and justifications be provided at the first, appeal level before the Tribunal. In order to have timely, efficient, and final decisions, which are perceived to be fair and balanced, the Director should generally not be adding further reasons or justifications for the Determination at the reconsideration level. Thus, beyond the first level of appeal to the Tribunal, we agree with the Commission that the Director generally should not be adding further reasons or justifications for the Determination at the reconsideration level.

51. In the present matter, the Commission's argument in respect to this "receding horizon" issue was directed at the submissions made to the original panel of the Tribunal on appeal. As set out above, we believe the *Act* requires that the Director be given status and broad scope of participation at that level. As a consequence, this part of the Commission's argument is dismissed. We find no breach of natural justice in the original panel's consideration of the Director's submissions explaining and expanding upon the reasons for the Determination.

52. We note that the Director has continued to give further reasons in support of his decision on the statutory interpretation issue in submissions to this panel. It is not appropriate to raise arguments that require an evidentiary foundation for the first time on appeal: *Baker v. British Columbia Insurance Company*, [1993] B.C.J. No. 487; *McEvoy v. Ford Motor Co.* (B.C.C.A.) [1991] B.C.J. No. 3608. While that is generally the case, the situation differs where the point requires no evidentiary foundation and the argument is simply a nuance of the statutory interpretation argument already raised. With such issues the "receding horizon" argument is less compelling than where the issue is one requiring a significant factual substratum, such as issues of procedural fairness. As a result, we find that most of the statutory interpretation arguments made by the Director before us on reconsideration are consistent with what we have set out here and are properly before us.

53. In summary, we find the original decision did not err in dismissing the Commission's complaint that the Director exceeded her role on appeal before the Tribunal. We find the Director erred only in raising and addressing the issue of reasonable apprehension of bias when that argument was not advanced by the Commission. We find the original panel correctly found that, while this error brought the Director's submissions "close to the line" of inappropriateness, overall they did not cross the line. The original panel did not deny the Commission a fair hearing when it considered the Director's submissions supporting its interpretation of the statute in the course of deciding the appeal.

2. The Statutory Interpretation Issue

The Test on an Appeal of Statutory Interpretation

54. The Commission argues that the substantive issue before the Tribunal and before the Delegate below is one of pure statutory interpretation. The Commission further submits that the original decision imposes a standard of reasonableness and thus errs in law.

55. We agree that when the substantive issue in an appeal is one of statutory interpretation, as it was here, the Tribunal, when addressing that issue under Section 112 of the *Act*, needs to analyze it from the perspective of whether the Director's interpretation is the correct one, not simply whether it is reasonable. Since the appeal to this Tribunal turns on a question of statutory interpretation, the panel in the original decision should have addressed that question from this perspective.

56. All the facts are agreed. The only issue is whether Section 51(1)(c) of the *Act* entitles an employee to 37 consecutive weeks of unpaid leave commencing at any time within the period described in the Section, or whether all of the unpaid leave must be taken and completed within 52 weeks of the child's birth.

57. As noted by the Commission, applying that standard requires that the Tribunal determine which of the competing interpretations is correct, not merely whether the interpretation applied by the Delegate is, in some sense, reasonable.

58. In this application, the Commission has presented its arguments on the proper interpretation of Section 51(1)(c), and the Director has replied to those arguments. As indicated above, we find that in the particular circumstances of this case, given that the issue was one of pure statutory interpretation, it was not improper for the Director to provide further submissions on this issue to the reconsideration panel.

History of the Act's Parental Leave Provision

59. Prior to 1995 there was no parental leave provision in the *Act*. It was enacted by British Columbia in response to benefits conferred on employees by the federal employment insurance scheme. Those benefits could not be accessed without complementary provincial legislation. There is not, therefore, a long history of statutory amendments to consider.

60. Section 51 was first introduced into the *Act* in 1995 by Bill 29 – *1995 Employment Standards Act*. At that time the Section read as follows:

> 51. (1) An employee who requests parental leave under this section is entitled to up to 12 consecutive weeks of unpaid leave beginning,
>
> (a) for a birth mother, immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,
>
> (b) for a birth father, after the child's birth and within 52 weeks after that event, and
>
> (c) for an adopting parent, within 52 weeks after the child is placed with the parent.

61. The structure of this provision is in the opening words to declare that an employee requesting parental leave is entitled to up to 12 weeks of unpaid leave that is to begin at a time to be specified in what follows. When the parental leave is to begin is not specified in the opening words. Subsections 51(1)(a), 51(1)(b), and 51(1)(c) then describe a period of time from whence parental leave is to commence.

62. Since Bill 29 this provision has been amended on two occasions.

63. Bill 24, the *Miscellaneous Statutes Amendment Act (No. 2), 2000* amended the provision to take its present structure. The provision was amended to read as follows:

> 51. (1) An employee who requests parental leave under this section is entitled to,
>
> (a) for a birth mother who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 35 consecutive weeks of unpaid leave beginning immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,
>
> (b) for a birth mother who does not take leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event,
>
> (c) for a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event, and
>
> (d) for an adopting parent, up to 37 consecutive weeks beginning within 52 weeks after the child is placed with the parent.

64. The new structure is in the opening words to say that an employee who requests parental leave is entitled to something, but leaves the entire description of that entitlement to the specific sub-sections. Subsections 51(1)(a), 51(1)(b) and 51(1)(c) all refer to the leave as "unpaid leave" but oddly Subsection 51(1)(d) did not. The provision also increases the unpaid leave from 12 consecutive weeks to 35 and then 37 weeks.

65. Bill 48, the *Employment Standards Amendment Act, 2002*, corrected the anomaly, and substituted "up to 37 consecutive weeks of unpaid leave" for "up to 37 consecutive weeks" in Subsection 51(1)(d).

66. Section 51(1) now reads as follows:

> 51. (1) An employee who requests parental leave under this section is entitled to,
>
> (a) for a birth mother who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 35 consecutive weeks of unpaid leave beginning immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,
>
> (b) for a birth mother who does not take leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event,

> (c) for a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event, and
>
> (d) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent.

67. The current structure of Section 51 is the same as that introduced in Bill 24, the *Miscellaneous Statutes Amendment Act (No. 2), 2000*.

The Meaning of Section 51(1)(c)

68. The Commission argues that Subsection 51(1)(c) means that a birth father must take his entire complement of unpaid leave within 52 weeks after the child's birth. The Director argues that Subsection 51(1)(c) only requires that a birth father commence his compliment of unpaid leave within 52 weeks of the child's birth.

69. Based solely on the language of Subsection 51(1)(c) both positions have initial plausibility.

70. Arguably, the phrase "and within 52 weeks" modifies the description of unpaid leave. To put the point another way, the phrase "and within 52 weeks of that event" describes a separate requirement of the entirety of the unpaid leave.

71. On the other hand, if one removes the language "and within 52 weeks after that event", the Subsection does not specify any commencement period and would leave entirely open the time of commencement after the child's birth. The phrase "and within 52 weeks after that event" qualifies the beginning of the unpaid leave.

72. Considered by itself, the Subsection is ambiguous. Accordingly, it is appropriate to apply recognized principles of statutory interpretation to assist in arriving at the proper interpretation of this provision.

The Interpretation Issues

73. The Commission refers to the "modern principle" for the interpretation of statutes enunciated in the decision of the Supreme Court of Canada in *Rizzo and Rizzo Shoes* that "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".

74. We agree with the submission of the Commission that the "modern principle" requires an adjudicator to address a series of questions, the first question being "what is the meaning of the legislative text". As we have noted, the meaning of the Subsection is ambiguous.

75. In considering the meaning of the legislative text the Commission notes that the Delegate determined that there was no difference in meaning between the wording of Sections 51(1)(c) and 51(1)(d). There is, however, a difference in the wording of these provisions. *Prima facie*, then, there is a presumption that there is a difference in meaning because if the Legislature had intended to convey the same meaning they would have used the same words and expressions.

76. While this was the position of the Commission before the Director and before the Tribunal, it is not reflected in the Commission's own leave application form. Exhibit 5 in the proceedings is the Commission's "Maternity, Parental, Adoption, Compassionate Leave and/or Allowance Application". It treats parental leave of both types the same way (item 7, page 2).

77. As Sullivan notes in *Sullivan and Driedger on the Construction of Statutes*, Ruth Sullivan, 4th Edition, Butterworths, 2002:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

78. The Director counters with Sullivan's later observation that the presumption of consistent expression varies in strength depending on a range of factors. For example, as noted by the Commission, it is unlikely that a term in a single subsection should have different meanings: *Barrie Public Utilities v. Canadian Cable Television Association*, [2001] 4 F.C. 237.

79. The realities of legislative drafting, however, may give rise to inadvertent variations within the same act: *I.R.C. v. Hinchy*, [1960] A.C. 748. Moreover, the presumption of consistent expression should be weighted against other competing considerations, such as contextual ones.

80. Accepting that each of these interpretive principles has some validity, how much weight should be given to the presumption of consistent expression in this case and what are the competing considerations?

The Statutory Context

81. While the meaning of Subsection 51(1)(c) is ambiguous, the rest of the Section and the other provisions of the *Act* should be considered in determining its meaning. This is part of the "scheme of the *Act*" described by Sullivan and Dreidger.

82. It is apparent that Subsection 51(1)(a) describes a period of parental leave that is to be consecutive for a birth mother with a period of pregnancy leave allowed under Section 50. Thus, the *Act* contemplates one period of leave with two components occasioned by the combination of Sections 50(1) and 51(1)(a).

83. The general period of pregnancy leave is described in Subsection 50(1) while the remainder of the subsections describe special circumstances, how to give notice, etc. Subsection 50(1) reads as follows:

> 50. (1) A pregnant employee who requests leave under this section is entitled to up to 17 consecutive weeks of unpaid leave
>
> (a) beginning
>
> (i) no earlier than 11 weeks before the expected birth date, and
>
> (ii) no later than the actual birth date, and
>
> (b) ending

(i) no earlier than 6 weeks after the actual birth date, unless the employee requests a shorter period, and

(ii) no later than 17 weeks after the actual birth date.

84. Subsection 50(1) specifically describes both a beginning period during which pregnancy leave must commence and an ending period during which time pregnancy leave must be completed. Thus, in this provision, the Legislature made clear both the beginning period for the commencement of pregnancy leave and the ending period for such leave. In describing the ending period for such leave the Legislature expressly used the term "ending".

85. Subsection 51(1)(b) after describing the circumstances of its application to a birth mother, uses the same language as Subsection 51 (1)(c). Subsection 51(1)(d) uses different language. Subsection 51(1)(d) reads as follows:

> 51. (1) An employee who requests parental leave under this section is entitled to, …
>
> (d) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent.

86. Subsection 51(1)(d) only specifies a beginning period for parental leave for an adopting parent. Such leave must commence within 52 weeks of child placement but such leave is not given an early termination date, so this leave of 37 consecutive weeks duration can commence in the first week of placement or at any time within 52 weeks of such placement.

87. While Subsections 51(1)(c) and 51(1)(b) use different language than Subsection 51(1)(d), unlike the immediately preceding Section 50, they do not expressly specify an early termination date or period, before which parental leave must be taken. Having made express provision for such in Section 50 it seems unlikely that the legislative draftsman or Legislature would seek to convey an early termination period through an ambiguous form of expression in Subsections 51(1)(c) and 51(1)(b).

88. This interpretation seems reinforced by a consideration of the historical context of Section 51(1)(c). In this analysis we differ from the position of the Director which is not supported by either the language of the Section, or by the legislative proceedings referred to us regarding the enactment of Bill 24, the *Miscellaneous Statutes Amendment Act (No. 2), 2000*.

89. While recognizing the frailties and limitations the Courts have expressed in the role such debates and speeches can play in the interpretation of statutes, the suggestion of a legislative change here bearing on the issue is simply unsupported: *Rizzo & Rizzo Shoes*, at paragraph [35].

90. As noted earlier, when parental leave was first provided for by Bill 29 – *1995 Employment Standards Act* the structure of the provision was somewhat different. At that time it read as follows:

> 51. (1) An employee who requests parental leave under this section is entitled to up to 12 consecutive weeks of unpaid leave beginning,
>
> (a) for a birth mother, immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,
>
> (b) for a birth father, after the child's birth and within 52 weeks after that event, and

> (c) for an adopting parent, within 52 weeks after the child is placed with the parent.

91. In this provision the section makes it clear that Subsections 51(1)(a), 51(1)(b) and 51(1)(c) are describing the beginning of unpaid leave. Unpaid leave begins for the specified persons at the times described. When the provision was amended by Bill 24, the *Miscellaneous Statutes Amendment Act (No. 2), 2000*, the subsections moved the term "beginning" from the opening words into the individual subsections. The relevant subsections now read as follows, using this structure:

> 51. (1) An employee who requests parental leave under this section is entitled to,
>
> …(b) for a birth mother…, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event,
>
> (c) for a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event, and
>
> (d) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent.

92. In our view the position of the Commission requires one to accept that the enactment of Bill 24, the *Miscellaneous Statutes Amendment Act (No. 2), 2000* signalled a change in the method of calculating parental leave. Is that plausible?

93. It seems unlikely that the legislative draftsman or the Legislature would enact a change by inserting an ambiguous form of expression, especially where in the previous section describing pregnancy leaves it expressly described when leaves are to end. It seems more likely, in our opinion, that the more complicated descriptions of the persons qualifying for the entitlements persuaded the draftsman to incorporate the term "beginning" into the descriptions contained in the individual subsections.

94. Of course, the Legislature, by a simple expedient, could have adopted the position of the Commission. It could have used the term "ending" in these provisions, such that Section 51(1)(c) reads "for a birth father, up to 37 weeks of unpaid leave beginning after the child's birth and ending within 52 weeks of that event…." Such a provision is unambiguous and inserts only one additional word, a word that is used in the previous section to accomplish the desired result. When circumscribing a period the use of both terms, "beginning" and "ending", is a common technique in both provincial and federal legislation.

Federal Legislation

95. In the course of his submissions the Director references federal legislation on parental leave and notes that there is a difference in our provincial legislation under the *Act*. The Commission in its reply submission says that "…there is no legislative consensus between the Province of British Columbia and the Government of Canada with regard to payments to adoptive and biological parents and there ought not to be any presumption in favour of interpreting the leave provision of the Act as requiring, because of some 'quasi-constitutional principle', that biological and adoptive parents receive the same leaves".

96. We agree that the provisions to which we have been referred in the federal legislation are different and do not assist in interpreting the provisions of the *Act*.

Consequential Analysis

97. It remains to consider whether either interpretation has results that make it more or less likely. The Director at the appeal level says that there is no reason why the *Act* should discriminate between adoptive parents and birth parents. The Commission says it "…has consistently refrained from presuming to speculate on the legislative intention which informs the difference between the two leaves without there being an evidentiary record to support such arguments".

98. On its face, the only consequence of either interpretation to the employer is the possibility of attenuating the period of leave where an employee does not request leave in a timely way. The period of entitlement is 37 weeks of unpaid leave. If the Commission is right then a late application for unpaid leave means the employee will not be entitled to the full 37 weeks. The employee must request a leave of absence and the employer may deny part of it. That is what the employer did in this case.

99. While any period of unpaid leave may be an inconvenience to an employer, this interpretation would allow the employer, in the case of applications made after 15 weeks following the birth of a child, to attenuate the period of unpaid leave.

100. With respect to an employee, the interpretation urged by the Commission means that a birth father who seeks to use all of his entitled unpaid leave must commence it within 15 weeks of a child's birth. On the other hand, an adoptive parent could commence a period of leave any time within 52 weeks of an adopted child being placed with the parent. So an adoptive parent would have a much longer period of time to start the commencement of unpaid parental leave.

101. While there are obvious differences between the circumstance of birth parents and the birth of a child and adoptive parents and the placement of a child, there is nothing so obvious about those differences, nor is there anything elsewhere in the *Act*, that suggests there should be greater flexibility in the taking of parental leave by an adoptive parent than by birth fathers. The Commission is quite right that there is simply no evidentiary basis for the position that the periods should be calculated in the same or different ways.

102. Accepting that the Legislature is supreme in its legislative prerogatives, within constitutional limits, the Commission offers no reason for the different and more generous treatment of adoptive parents, which is the consequence of its interpretation. The Director, as we understand his submissions, says there is none.

103. This does not imply that we agree that a legislated difference, if there is one, between leave provisions for birth parents and adoptive parents amounts to discrimination as suggested by the Director. In this case there is simply no evidentiary basis to suggest that one interpretation or another would give rise to a prohibited kind of discrimination. In our opinion, the failure to raise such an issue through evidence in the proceedings, precludes us from applying *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] S.C.J. No. 14, as the Court's reasons on this issue were confined to situations where "…a tribunal is properly seized of an issue pursuant to a statutory appeal, and especially where a vulnerable appellant is advancing arguments in defence of his or her human rights…" (para. 50). As we view the proceedings, the issue of prohibited discrimination simply did not arise, so we are left in the position of considering the plausibility of the Commission's position that the statute provides for an unexplained differentiation between adoptive and natural parents.

Residual Presumption

104. The Director argues that this Tribunal should not adopt a narrow interpretation of the provision at issue. In doing so he references the decision of the BC Supreme Court in *Daryl-Evans v. Employment Standards*, 2002 BCSC 48 ("*Daryl-Evans*"). In that case the Court, in reviewing a Tribunal decision interpreting a provision of the *Act*, referred to the Tribunal interpretation finding that it was neither "clearly irrational" or "patently unreasonable".

105. In our opinion, this part of the submission is misplaced. The question of statutory interpretation in this case requires that the Director's decision be correct. The standard of review relating to decisions of this Tribunal on judicial review to the Courts, given the privative clause in the *Act*, is a different matter, which is the basis of the language used by the Court in *Daryl-Evans*.

106. The submission of the Director, however, that a narrow interpretation of a provision of the *Act* extending rights is not one adopted by the Courts or this Tribunal, is apt. In *Machtinger* and *Rizzo & Rizzo Shoes* the Supreme Court of Canada discussed the interpretation of employment standards legislation. In *Rizzo & Rizzo Shoes* the Court noted:

> [22] I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c.219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".
>
> [23] Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of those issues.
>
> [24] In *Machtinger* … the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual….the majority concluded that, "…an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not".

107. The provision in question here is intended to entitle employees the opportunity to receive parental leave consequent upon the birth of or placement of their infant and/or adoptive children. To interpret the *Act* more narrowly in the case of birth fathers than adoptive parents would narrow the protection of the *Act* in a manner contrary to these principles.

108. The statutory provision in question is ambiguous. While the presumption of consistent expression tends to favour the interpretation of the Commission, we find that a consideration of the context of the *Act*, both historically, and with respect to the current provisions, favours the interpretation of the Director.

109. There is no suggestion in the evidence, or in the legislation, that there is a rational basis for making the differentiation advocated by the Commission. The residual presumption, that the *Act* is to be interpreted broadly, and not narrowly, where it confers rights, also favours the interpretation of the Director.

110. We conclude Section 51(1)(c) of the *Act* entitles an employee upon appropriate notice to commence unpaid parental leave at any time within 52 weeks of the birth of their child.

111. Accordingly, in our opinion, the original panel of the Tribunal did not err in upholding the Director's Determination that Matthew Burke was entitled to take parental leave, upon appropriate notice, for 37 consecutive weeks commencing at any time within 52 weeks of the birth of his child.

SUMMARY

112. The nature of employment standards matters and the provisions and policies in the *Act* give rise to the full right and ability of the Director to provide and explain his reasons for the Determination rendered at first instance.

113. It is an important policy under the *Act* to have timely, efficient and final decisions, which are fair and balanced, and fully address the issues before the Tribunal.

114. The Director should not be adding further reasons or justifications for the Determination at the reconsideration level, especially where those reasons or justifications arguably require an evidentiary foundation.

115. The instant case, however, turns entirely on the proper interpretation of the *Act*. The standard for review at the Tribunal level on questions of interpretation is correctness. The Delegate was correct in her interpretation of the *Act*.

116. In our opinion Matthew Burke was entitled to take parental leave, upon appropriate notice, for 37 consecutive weeks commencing at any time within 52 weeks of the birth of his child.

117. Pursuant to Section 116(1)(b) of the *Employment Standards Act*, we order the original decision , BC EST # D033/07, be confirmed.

Brent Mullin Chair Employment Standards Tribunal	John Savage Member Employment Standards Tribunal	David B. Stevenson Member Employment Standards Tribunal