An Application for Reconsideration

- by -

Zack Anthony
("Anthony")

- 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 PANEL: Robert E. Groves
David B. Stevenson
Rajiv K. Gandhi

FILE No.: 2017A/11

DATE OF DECISION: December 12, 2017

DECISION

SUBMISSIONS

Derek G. Knoechel	counsel for Zack Anthony
Ian Kennedy	counsel for Suncoast Health Corp.
Laurel Courtenay	counsel for the Director of Employment Standards

OVERVIEW AND FACTS

1. This is a decision on an application for reconsideration filed by Zack Anthony ("Anthony") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. These proceedings commenced when Anthony and another individual named Michael Hug ("Hug") filed complaints with the Director of Employment Standards alleging that they were owed wages as a result of their work performed over a period of months in 2013 at a medical marijuana production facility constructed and operated in Sechelt, British Columbia, by Suncoast Health Corp., formerly known as 0955323 BC Ltd. ("Suncoast").

3. Having conducted an investigation, the Director issued a single determination incorporating both complaints (the "Determination") dated September 30, 2015. The Determination ordered Suncoast to pay regular wages, overtime wages, statutory holiday pay, annual vacation pay, and interest. The total found to be owed was $47,759.97. The Determination also imposed $3,000.00 in administrative penalties.

4. Suncoast appealed the Determination pursuant to section 112 of the *Act*. Its appeal was filed late.

5. On March 23, 2016, the Tribunal issued decision #D058/16 (the "First Appeal Decision"). In addition to extending the time for the filing of the appeal, the Tribunal referred the complaints back to the Director so that pertinent questions identified in the appeal proceedings, which had not been answered in the Determination, could be investigated and decided. More specifically, the Tribunal was of the view that the Director should consider whether the employment relations between Suncoast and the complainants were governed by the *Act*, or whether they fell within federal jurisdiction under the *Canada Labour Code*.

6. In addition, the Tribunal decided that the Director should address whether the complainants were farm workers pursuant to the *Employment Standards Regulation* (the "*Regulation*") and, if so, how such a designation might affect the calculation of the amounts of wages and penalties Suncoast should be ordered to pay.

7. A "farm worker" is defined in subsection 1(1) of the *Regulation* as follows:

> **"farm worker"** means a person employed in a farming, ranching, orchard or agricultural operation and whose principal employment responsibilities consist of

(a) growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation,

(b) clearing, draining, irrigating or cultivating land,

(c) operating or using farm machinery, equipment or materials for the purposes of paragraph (a) or (b), or

(d) direct selling of a product referred to in paragraph (a) if the sales are done at the operation and are only done during the normal harvest cycle for that product,

but does not include any of the following:

(e) a person employed to process the products of a farming, ranching, orchard or agricultural operation other than to do the initial washing, cleaning, sorting, grading or packing of

(i) an unprocessed product of the operation during the normal harvest cycle for that product, or

(ii) during the same harvest cycle referred to in subparagraph (i), the same or a similar unprocessed product purchased by the operation from another farming, ranching, orchard or agricultural operation;

(f) a landscape gardener or a person employed in a retail nursery;

(g) a person employed in aquaculture;

8. On July 21, 2016, the Tribunal received the Director's report on the referral back (the "Report"). Thereafter, the Tribunal sought, and received, further submissions from the parties, including a submission from the Attorney General of British Columbia on the jurisdictional question whether the complaints were properly determinable under the *ESA*.

9. On December 21, 2016, the Tribunal issued its final decision BC EST # D164/16 in the appeal proceedings (the "Final Appeal Decision"). The Final Appeal Decision determined that Suncoast's business operations fell within provincial, rather than federal, jurisdiction, and so the complaints were properly brought pursuant to the relevant provisions of the *ESA*.

10. The Final Appeal Decision also varied the Determination to reflect a finding made in the Final Appeal Decision that Anthony was a farm worker for a part of the period he was employed at the Suncoast facility, and Hug was a farm worker throughout his tenure there. It also referred the complaints back to the Director for the purpose of a recalculation of the complainants' wage entitlements, as section 34.1 of the *Regulation* meant that their status as farm workers exempted Suncoast from an obligation to adhere to the requirements relating to hours of work, overtime, and statutory holiday pay in Parts 4 and 5 of the *ESA*.

11. Anthony's application for reconsideration of the Final Appeal Decision was filed with the Tribunal on January 20, 2017.

12. In his submission delivered in support of his application, Anthony asserted, as a preliminary matter, that the record in the proceedings was incomplete. On August 23, 2017, the Tribunal issued its decision BC EST #

RD092/17 regarding Anthony's preliminary objection. That decision clarified the contents of the record, and the other documentary materials on which the parties might rely, for the purposes of the application for reconsideration.

13. This decision deals with the application for reconsideration on its merits.

14. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *ESA*, and Rule 8 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. Having reviewed the materials before us, we find we can decide this application based on the written materials filed, without an oral or electronic hearing.

THE GROUNDS FOR RECONSIDERATION

15. Anthony submits that the Final Appeal Decision reveals errors of law and a failure to observe the principles of natural justice. More specifically, Anthony states that the Tribunal erred when it:

- Disregarded the Director's findings of fact concerning his "principal employment responsibilities" at the Suncoast facility, and substituted findings of its own, when the Director's findings were not clearly wrong, and were supported by the evidence;
- Treated an affidavit of Suncoast's principal, Thomas Brown (the "Brown Affidavit"), as "not contested" when the evidence showed that this characterization of Anthony's position was incorrect;
- Failed to request from the Director the supplementary materials delivered by the parties on the referral back following the First Appeal Decision (the "Supplementary Materials") which did not, therefore, form part of the record that was considered by the Tribunal when the Final Appeal Decision was issued;
- Failed to provide to him the materials in the record relating to the complaint delivered by Hug (the "Hug Materials").

16. Anthony also submits that the Tribunal erred in law when it decided he was a farm worker for a part of the time he was employed at the Suncoast facility. He states that the Tribunal:

- Applied an incorrect legal test when deciding whether Anthony was a farm worker, by failing to give effect to the correct statutory definition, and focusing exclusively on the question whether Suncoast's business was a "farming...or agricultural operation" with which Anthony's employment was connected in a way that engaged the exemption set out in section 34.1 of the *Regulation*;
- Adopted legal reasoning in the decision of the Ontario Labour Relations Board in *UFCW and MedReleaf* 2015 CanLII 85534that was generated to answer a different legal question, and which involved a different statutory definition;

- Failed to consider whether Anthony's principal employment responsibilities consisted of construction and security tasks rather than the actual cultivating of marijuana, thereby precluding a finding that Anthony was a farm worker for the purposes of section 34.1 of the *Regulation*;
- Found, incorrectly, that subsection (e) of the definition of "farm worker" in subsection 1(1) of the *Regulation* did not apply so as to preclude Anthony from acquiring that status for the purposes of his complaint.

ISSUES

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

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

DISCUSSION

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

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

19. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

20. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, 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 *ESA*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *ESA*.

21. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

22. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the

answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

23. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton* BC EST # RD126/06).

24. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

25. In our view, Anthony application raises issues of law which are sufficient to persuade us that the Final Appeal Decision should be reconsidered.

26. We are of the opinion that when the several grounds for reconsideration are distilled, there are two broad areas of concern that have been identified by Anthony. The first is whether the Tribunal acted properly in determining that Anthony was a farm worker for the purposes of the *Regulation* for at least a part of the time that he was employed by Suncoast. The second requires us to consider whether there was a failure to observe the principles of natural justice because the Supplementary Materials were not before the Tribunal when it considered the substantive issues in the appeal, and the Hug Materials were not provided to Anthony prior to the Tribunal's issuing the Final Appeal Decision.

The farm worker issue

27. The Determination states the following regarding the proper characterization of the work performed by Anthony and Hug at the Suncoast facility:

> Both complainants state they were involved in the building of the plant warehouse and setting up the operation, transplanting and maintaining the initial crop and preparing it for future harvest. (R8)
>
> Mr. Brown...states he did not keep track of all hours worked by the Complainants but they only performed basic jobs such as letting the trades on to the site, unloading tools and assisting with the construction of the building. He confirmed he was in Vancouver and not on site to witness the hours worked.... (R8)
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> Mr. Anthony states he was hired on March 7, 2013 as a skilled labourer/construction site manager. He quit on September 20, 2013. His job duties included: opening and closing the construction site each day, assisting the construction trades with related activities and purchasing supplies from the local hardware store. He was also required to maintain the marijuana crop which included: picking up plant supplies, watering, fertilizing, spraying insect repellent, picking leaves, trimming buds, rotating, transplant, caging and potting plants. He also performed hourly checks of the light, temperature, humidity, CO2 levels in all 19 rooms and the grow site. In addition he performed overnight security, which required him to monitor the site every two hours and called Mr. Brown daily to update him on the progress and status of the construction site and the plants. (R15)

> Mr. Anthony argues he worked excessive hours because of the extensive amount of daily work he was required to perform and because he could not leave the site for security reasons. He states Mr. Brown required him to be onsite and inform him of his whereabouts at all times and he had to ask permission to return to Vancouver. Mr. Anthony states when his employment began he worked tirelessly during the construction of the warehouse providing assistance to the trades and overseeing all aspects of the site. Once the construction was completed he became the principal maintenance person for the multi room warehouse. He was then required to provide all facets of continuous care required for the plants. He stated he was able to work long hours and practically 24 hour care because for the purposes on the work he lived at the warehouse, despite the fact there were no shower or washroom facilities. He confirmed when he did leave the site to perform tasks such as picking up supplies he was required to have another employee replace him due to the high security required for business. He states he did some sporadic breaks but the majority of the time he ate on the run or did not have a lunch break. (R15, R16)
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> Mr. Brown states he met Mr. Anthony through a contact who installed his stereo. He hired Mr. Anthony and another worker ("Mr. Tippet") as unskilled labourers.... Neither had trade tickets and he had to show them how to assist the skilled trades on the site and move materials around. (R16)
>
> Mr. Anthony's evidence indicates that during the construction phase he began his day by opening the gate for the trade workers and worked continuously through the day assisting them, cleaning up after they left and ensuring the site was secure. He also provided numerous invoices showing trips to the hardware store located in town to pick up operational supplies. In addition he provides his August 12, 2013 licence to grow 497 medical marijuana plants and states once the plants were potted he was required to provide individual care for them and perform other essential time consuming tasks on a daily basis. In addition he was also responsible to ensure a consistent climatic environment within the multiple grow rooms, which I accept had to be performed regularly throughout the day and night, adding to the long hours Mr. Anthony worked. With the multitude of the duties and responsibilities given to Mr. Anthony it appears reasonable that Mr. Anthony would work well beyond 4:00pm. Furthermore, there is no dispute that Mr. Anthony stayed on site. I accept that due to the nature of the operation such was to the advantage of the Employer, especially considering Mr. Brown's access to the site was restricted by geographical location. I therefore find Mr. Anthony's claim that he provided security while on site to be believable, especially considering the nature of the operation, the value of its inventory and the disappearance of the plants after his departure. (R18)

28. The issue whether Anthony was a farm worker as defined in the *Regulation* was raised for the first time during the appeal. The investigation of that issue was one of the tasks the Tribunal assigned to the Director on the referral back. In the Report, the Director said this:

> With respect to the issue of whether the Complainants fall within the definition of "farm worker" under the Employment Standards Regulation ('Regulation'); definitions under the Regulation are interpreted narrowly because they take away benefits and protection conferred by the Act. All employment conditions, as described in the definition, must be met in order to qualify as a "farm worker".

> In this case, Suncoast claims the Complainants' primary responsibilities were to grow, cultivate and harvest marihuana and thus they are "farm workers" pursuant to the Regulation. The Complainants contest this assertion and claim the majority of their work involved construction-related tasks.
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> The licenses cited by Suncoast consist of the License and the Authorization. Both of these documents reference 'Dried Marihuana' and this was the invariable product of production and sale. Suncoast states in its submission: the Complainants trimmed and dried the buds. This process alters the agricultural product from its original state. The definition of "farm worker", specifically subsection E, states a person employed to process the products of a farming, ranching, orchard or agricultural operation is **not** a farm worker. In other words, a person employed to process agricultural products to an altered or different state is **not** a farm worker. An example of this would be a person employed to do things such as drying herbs. The Regulation does not require the function of 'processing' be a principal duty, only that the function be performed in order not to be deemed a farm worker.
>
> In the alternative, examining the issue specifically from the definition of "farm worker" as outlined in subsection A of the Regulation requires an analysis of 'principal employment responsibilities'. ***It is clear from the evidence the Complainants performed a wide array of duties ranging from construction, growing, harvesting and even security. The Employer did not keep payroll records or track how much time was spent by the Complainants performing the various duties. Without this information, I cannot analyze what proportion of time was allocated to any specific task in order to determine principal employment responsibilities. Accordingly, I cannot conclude all employment conditions, as described in the definition, have been met in order to qualify as a "farm worker".***
>
> ***...[T]he Employer has not met the burden of proof required to satisfy me the Complainants principal duties were consistent with the definition of "farm worker". I respectfully request the Tribunal to confirm the original decision in whole....*** (emphasis added)

29. The Final Appeal Decision held that Anthony was a farm worker for a part of the time he was employed by Suncoast. The Tribunal arrived at this conclusion having regard, in part, to the decision of the Ontario Labour Relations Board in *MedReleaf*, noted above. There, the Board was asked whether the employment relations of the non-exempt employees of a medical marijuana production facility were governed by the Ontario *Labour Relations Act* or the *Agricultural Employees Protection Act* (the "*AEPA*"). The Board determined that it was the *AEPA* which should govern, as the employees in question were "agricultural workers" to whom the statute was designed to apply. The reasons supporting this decision were that "agriculture" was defined in the *AEPA* as including "the production, cultivation, growing and harvesting of agricultural commodities", marijuana was an "agricultural commodity" because it was a plant that was grown, and it was MedReleaf's business to cultivate, grow, and harvest marijuana plants. Significantly, the Board also observed, at paragraph 30 of its decision, that "the interpretation of agriculture does not in any way exclude purpose built indoor facilities that more resemble a factory than anyone's picturesque view of a farm...."

30. The Tribunal was of the view that MedReleaf's operations were "remarkably similar" to those of Suncoast. The Tribunal then said this, at paragraph 72 of the Final Appeal Decision:

> ...I consider the production of medical marijuana to be an agricultural endeavour rather than an industrial operation similar to pharmaceutical manufacturing....Although it appears to be the case that one or both

> of the complainants undertook some duties not directly related to marijuana cultivation, on balance, the evidence before me demonstrates that from May 2013 until the end of his employment in September 2013, Mr. Anthony's "principal employment responsibilities" related to marijuana cultivation.... I am of the view that Mr. Anthony, at least as and from May 1, 2013,...met the subsection (a) definition of a "farm worker".

31. The Tribunal also addressed the issue of the application of subsection (e) of the definition of "farm worker", and decided that it should have no effect on the result. At paragraph 73, the Tribunal observed:

> The Director submits that neither complainant was a "farm worker" because they fell within the subsection (e) exception because they "were actively involved in altering the state of marihuana to medical grade dried marihuana". However, the "drying" of the marijuana was but one minor aspect of the complainants' overall employment duties. They were not hired to "process" marijuana; rather they were hired principally to "grow" marijuana and, as such, the subsection (e) exception is inapplicable here. The subsection (e) exception is designed to address the employment of a person who, for example, is hired by a fruit or processing facility that converts raw agricultural products into canned goods that are subsequently sold in that state to the ultimate consumers, or a person employed in a brewery or a distillery.

32. We are of the opinion that the portion of the Final Appeal Decision which addresses whether Anthony was a farm worker cannot stand.

33. As we have noted, the Director accepted the evidence of Anthony that while his duties included tasks related to the cultivation of marijuana plants his principal employment responsibilities throughout the course of his tenure at Suncoast consisted of construction work and security. The Director was disposed to accept this characterization, at least in part, because Brown was not present at the site, kept no payroll records as required, and therefore had no reliable way of knowing how much time Anthony was spending in the performance of his various employment duties. In the circumstances, the Director concluded that Suncoast had failed to establish all the elements necessary to support a finding that Anthony was a "farm worker" as defined in the *Regulation*. More specifically, while one might agree that the Suncoast facility was an "agricultural operation" for the purposes of the *Regulation*, it had not been proven that Anthony's "principal employment responsibilities" at the operation consisted of the agricultural duties specified in the definition.

34. In our view, it was appropriate for the Director to exercise caution when applying the farm worker provisions in the *Regulation* to the facts presented in this case. The reason for this is that the farm worker provisions operate in a way that precludes employees who are captured by them from access to basic entitlements that other employees enjoy as a matter of normal course under the regime of benefits established by the *ESA*.

35. The Tribunal has developed principles which have been consistently applied in many of its decisions regarding the interpretation and application of such regulatory exclusions.

36. First, the *ESA* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects (see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491, and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336). We agree with the following comment, taken from the decision of the Supreme Court of Canada in *Machtinger*:

> ...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 favoured over one that does not.

37. We take heed, too, of the comments in *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 where the court said this:

> Finally, with regard to the scheme of the legislation, since the [*Act*] is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of a claimant.

38. What this means, in a case such as this, is that regulatory definitions that exclude persons from entitlements in the *ESA* must be narrowly construed.

39. Second, if a person is to be denied statutory benefits, it should be clear and obvious that the individual meets the regulatory definition (see *JP Metal Masters 2000 Inc.*, BC EST # RD137/05; *Northland Properties Limited operating as Sandman Hotels and Inns Vernon and Sandman Inn (Blue River)*, BC EST # D004/98, affirmed on reconsideration BC EST # D423/98). The scope of an exclusion from the *ESA* is presumed to be limited, and so there must be clear evidence justifying the application of the exclusion.

40. Third, the burden of establishing the factual and legal basis for the exclusion lies with the person asserting it (see *Northland Properties Limited*, BC EST # D004/98).

41. Fourth, any conclusion about whether an employee meets the definition in a regulatory exclusion depends upon a total characterization of that person's duties. As stated in *Director of Employment Standards (Re Amelia Street Bistro)* BC EST # D479/97 (Reconsideration of BC EST # D170/97), in the context of the definition of "manager", another exclusionary provision: "it is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a 'manager'. That would be putting form over substance." The evidence must show the person sought to be excluded from statutory entitlements clearly falls within the exclusion. In this case, the definition "farm worker" requires the evidence to show a person's principal employment responsibilities consist of those matters listed in paragraphs (a) to (d). It is insufficient, therefore, that the person happens to perform work at a facility that can be characterized as an agricultural operation. Whether a person has such responsibilities to a degree that brings that person within the definition is predominantly a question of fact.

42. Questions of fact determined by the Director are not reviewable by the Tribunal on appeal, absent evidence of palpable and overriding error resulting in findings that are irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned findings of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This is so even in circumstances where the evidence before the Director might have led the Tribunal to make different findings of fact than those appearing in a

determination (see *Britco Structures Ltd.*, BC EST # D260/03; *Carestation Health Centres (Seymour) Ltd.*, BC EST # RD106/10).

43. In our view, the Director's conclusions regarding Anthony's principal employment responsibilities were findings of fact that should not have been disturbed in the Final Appeal Decision. This is so because the Director's findings on this issue do not appear to have been irrational, perverse, or inexplicable. There was at least some evidence, offered primarily by Anthony, on the basis of which the Director, acting reasonably, could have concluded that Anthony's principal employment responsibilities did not include the agricultural tasks referred to in the definition of "farm worker". As stated by the Director, Brown was not present at the Suncoast facility, and so he could not plausibly offer a convincing account that might contradict the tenor of the other evidence supporting this conclusion. It follows that even if we were to decide, as the Tribunal issuing the Final Appeal Decision appears to have done, that we disagree with the Director's findings, it is not open to us, and so it was not open to the Tribunal in the appeal, to exercise the Tribunal's jurisdiction in a manner that is inconsistent with them.

44. The Final Appeal Decision does not state with precision the reasons why the Tribunal concluded that Anthony was to be characterized as a "farm worker" for a part of the time he spent working for Suncoast. Instead, the Tribunal states that "on balance, the evidence before me demonstrates that from May 2013 until the end of his employment in September 2013, Mr. Anthony's 'principal employment responsibilities' related to marijuana cultivation ...[and so] ...Mr. Anthony, at least as and from May 1, 2013, ... met the subsection (a) definition of 'farm worker'."

45. In our view, the Tribunal simply re-weighed what it considered to be the relevant evidence before the Director, and came to a different conclusion as to Anthony's principal employment responsibilities, without analyzing how the Director's findings might be irrational, perverse, or inexplicable. This is not an authority that it is open to the Tribunal to exercise. As stated by the Tribunal in *Premier Auto Transmission Ltd.* BC EST #D373/99:

> ...In this case it appears to me that the adjudicator has simply substituted his view of the evidence for that of the delegate and has not applied the principles set-out above in terms of the onus being on the appellant to establish conclusively that the determination was wrong. The Tribunal must be cognizant of the fact that the investigation in the first instance had access to, and considers, much information that is not necessarily recorded in full detail in the determination. We must be cautious that the Tribunal does not become an avenue for simply re-investigating every complaint. The Tribunal has attempted to establish the principle that the appellant must bring to the appeal substantial evidence that the determination is wrong and the Tribunal should not simply substitute our opinion for that of the Director's delegate unless there is clear and persuasive evidence that an error has been made. Based on the Adjudicator's analysis and reasons, as discussed above, for disagreeing with the determination there is no clear and persuasive evidence that could establish conclusively that the determination was wrong. In such circumstances the original determination should be confirmed....

46. We agree.

47. In our opinion, this is sufficient to dispose of the application for reconsideration in favour of Anthony. That being so, it is, we believe, unnecessary to examine the other grounds for reconsideration advanced by Anthony, apart from the natural justice concern, to which we now turn.

The natural justice issue

48. Anthony's application for reconsideration identifies two separate procedural fairness concerns.

49. Anthony submits, first, that when the complaints were referred back to the Director as a result of the First Appeal Decision, the Director engaged in a further investigation and fact-finding. In doing so, the Director relied on the existing record, but also the Supplementary Materials delivered by the parties on the referral back. Anthony states that unbeknownst to him, the Supplementary Materials were not delivered to the Tribunal along with the Director's Report, and so they did not form part of the record that was before the Tribunal when it rendered the Final Appeal Decision.

50. Anthony asserts that he reasonably expected the record would include all materials delivered by all the parties to the Director, including the materials delivered on the referral back. He argues that this expectation was reasonable because communications issued by the Director to the parties throughout the process leading to the Determination stated that all records or documents submitted by the parties would be deemed to be part of the record, and so he could not be expected to appreciate that this policy might not apply to materials delivered on the referral back.

51. Anthony argues that the Tribunal failed to act in a manner that was procedurally fair when it did not request the Supplementary Materials from the Director, and disclose them to Anthony, after it received the Director's Report and before the Tribunal issued the Final Appeal Decision.

52. Second, Anthony submits that throughout the complaint proceedings leading to the issuance of the Determination, and in the proceedings on appeal, the record produced to him did not include the Hug Materials made available to Suncoast. The Director chose to investigate Hug's complaint in conjunction with Anthony's, and the Determination renders a decision in respect of both their complaints. Notwithstanding this, Anthony states that while Suncoast had the benefit of access to the entire investigatory record relating to both complaints, he was never provided with the materials in the record, or the Reasons for the Determination, which related to Hug's complaint.

53. Anthony argues that this lack of access to the Hug Materials precluded him from assessing whether any of the evidence or findings relating to Hug, or statements made on behalf of Suncoast concerning Hug, might have assisted him in pursuing his own complaint. It is to be inferred from Anthony's submission that since he and Hug worked at the facility during the same period, and their complaints were governed, in large part, by the same legal considerations, he should have been provided with the elements of the record generated in respect of the complaint filed by Hug. Since this did not occur until after the delivery of his application for reconsideration, Anthony contends that there has been a breach of procedural fairness.

54. In our opinion, Anthony's submission lacks merit and should be rejected. There is no indication in the record that Anthony was misled by the Tribunal, that he was not informed about the case being presented by Suncoast in answer to his complaint, or that he was denied an opportunity to be heard.

55. Regarding the Supplementary Materials, Anthony may have been mistaken in assuming they would be forwarded to the Tribunal along with the Director's Report. However, the Tribunal communicated nothing which would have represented to Anthony that the Supplementary Materials had, in fact, been delivered, and there is no evidence demonstrating that the Tribunal was alive to Anthony's misapprehension as to the contents of the materials before it prior to the issuance of the Final Appeal Decision. In addition, the Tribunal invited submissions from the parties in response to the Director's Report, and so it was entirely open to Anthony to deliver to the Tribunal, or refer to, whatever parts of the Supplementary Materials that were in his possession he felt were necessary in order to support his final submissions in the appeal.

56. While we are of the opinion that these comments are sufficient to dispose of Anthony's application challenging the Final Appeal Decision on procedural grounds, as it relates to the Supplementary Materials, we think it appropriate to make some further observations regarding the practice in appeals when the Tribunal makes an order referring matters back to the Director for further investigation and a report.

57. We note, first, that there was nothing unusual or unique in the Tribunal's making such an order; it was entirely consistent with a long-standing practice, described as follows in *Hub City Boatyard Ltd.*, BC EST # D027/04, at page 4:

> The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST # D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

58. Later decisions of the Tribunal have also commented on the Tribunal's practice of ordering reports (see *Deborah Simpson*, BC EST # D043/06, at paragraphs 9 – 10 and the discussion in *Jordan Enterprises Ltd.*, BC EST # RD038/17, at paragraphs 17 – 21). In the *Simpson* case the Tribunal noted the practice was not perfect, nor was it without its problems, particularly when the Director's further investigation results in something quite different from the original determination under appeal. That concern has been addressed by ensuring the parties are provided with a full and fair opportunity to present evidence and otherwise challenge the result of the referral back process.

59. In most cases, a perceived error in a determination or a deficiency in the information necessary to complete an appeal will result in an order by the appeal panel referring some aspect of the appeal back to the Director, sometimes with instructions but without a concomitant cancellation of the entire determination. Such orders

will invariably require the Director to report back to the Tribunal the result of further investigation or work on the complaint.

60. In some, thankfully rare, cases, where the complaint process or the determination is so flawed that a referral back and report order is inappropriate, the Tribunal will cancel the Determination entirely, generating the requirement for a new investigation, a new determination and, potentially, another appeal along with the attendant inefficiency and cost that accompanies restarting the complaint process.

61. In cases where a referral back and report order is made, the complaint and appeal processes preceding the referral back order are not rendered inoperative. The further investigation, or work reflected in the report resulting from a referral back, is an extension of the complaint process generated by the Tribunal exercising its authority in section 115 of the *ESA* to order that a determination be varied, cancelled or a matter arising from it be referred back to the Director. It "suspends" final disposition of the appeal until the report is processed and submitted to the Tribunal. It does not affect the provisions of the *ESA* governing appeals.

62. In our view, for the referral back and report process to work effectively, the referral back process must be considered to be part of the appeal process and the same obligations and constraints that apply to appeals must continue to apply to a referral back. In particular, the process does not extend the authority of the Tribunal under section 112(1) of the *ESA* or diminish the obligation of the Director under section 112(5) of the *ESA*; the Director continues to be obliged to produce the complete record. If that were not so, in cases where the matter is referred back to the Director for further investigation – as it was in this case – the Tribunal might – as it also was in this case – be deprived of information that is critical to deciding the appeal. The following comment found in *The Director of Employment Standards*, BC EST # RD100/15, at paragraph 10, is noteworthy and relevant:

> The record is essential to adjudicating appeals since the Tribunal generally adjudicates appeals without holding an oral hearing (see section 103 of the *Act* that incorporates by reference section 36 of the *Administrative Tribunals Act*) and therefore it is critically important that the Tribunal know what information and documentation was, or was not, before the delegate when the Determination was being made.

63. Section 112(5) of the *ESA* refers not only to the record that was before the director when the determination was made, but also when a *variation of it* was made. As well, the obligation under section 112(5) is a continuing one. A referral back will often result in a variation of the determination under appeal; that is, in reality, the objective of a referral back. It may be a variation occasioned simply by applying facts already found to a corrected legal framework or it may be a variation requiring, as in this case, further investigation and findings – factual and legal – on issues not addressed in the determination under appeal.

64. Regardless of the nature of the work generated by a referral back, section 112(5) applies to any additional evidence and material added to what was in the record when the determination under appeal was initially made and the Director is required to provide it to the Tribunal.

65. Coincidentally, the findings of fact made by the Director on a referral back, and in a subsequent report, are entitled to the same deference as those made in the initial determination, and the authority of the Tribunal to review findings of fact under section 112 of the *ESA* remains unaltered.

66. What we have said here illustrates the necessity of maintaining the referral back power as part of the initial complaint and appeal processes. A referral back and report is done to obtain fairness and efficiency, but neither is achieved if the evidentiary basis for the report that the Director subsequently delivers to the Tribunal is absent.

67. It follows that the Director erred by not delivering the Supplementary Materials to the Tribunal along with the Report.

68. That being said, and while it may have led the Tribunal Member deciding the appeal to a wrong conclusion about what was, or was not, in the record, it did not deny Anthony a full and fair opportunity to provide evidence and make submissions on the issues being investigated during the referral back.

69. Regarding the Hug Materials, as was noted in the Tribunal's decision BC EST # RD092/17 on the preliminary issue raised in this application, the Tribunal wrote to the parties on December 31, 2015, concerning the information and documents that would be made available to them for the purposes of the appeal. The letter said this, in part:

> To protect privacy rights under the *Freedom of Information and Protection of Privacy Act* ("*FOIPPA*"), the Tribunal's practice is that it may sever information from documents it discloses to parties while ensuring fulfilment of natural justice and the processes under the *Employment Standards Act* (the "*Act*") as determined by the Tribunal.
>
> In this case, the Tribunal has only provided each employee with the information that pertains to that employee.

70. This decision on the part of the Tribunal was in accord with the process implemented by the Director in the proceedings leading to the Determination. In the Reasons for the Determination, the Director stated that in order to protect the complainants' privacy the body of the Reasons would only contain general information relating to both of them, while the information and calculations specific to each of them would be set out on separate summary sheets. The Director said that each complainant would receive the summary sheet referable to his own complaint, while Suncoast would receive the summary sheets generated in respect of both complaints.

71. Prior to Anthony's making this application for reconsideration of the Final Appeal Decision, no one asserted a claim that the record was incomplete, or that any party should have received other parts of the record delivered to the Tribunal by the Director which the Tribunal did not disclose to that party for the purposes of the appeal.

72. In the circumstances, we do not agree that there was a failure on the part of the Tribunal to observe the principles of natural justice, or that the appeal proceedings were procedurally unfair.

ORDER

73. Pursuant to section 116 of the *ESA*, the portion of the Final Appeal Decision which addresses whether Anthony was a farm worker is cancelled. The Final Appeal Decision of the Tribunal, BC EST # D164/16, is varied to provide that:

- Anthony is entitled to the wages and interest found to be owed to him in the Determination;
- The administrative penalties found to be payable in the Determination are confirmed.

74. In all other respects, the Final Appeal Decision is confirmed.

Robert E. Groves Member and Panel Chair Employment Standards Tribunal	David B. Stevenson Member Employment Standards Tribunal	Rajiv K. Gandhi Member Employment Standards Tribunal