Reconsideration of BC EST #s D059/11, D060/11, D061/11
D062/11, D063/11, D064/11, D065/11, D066/11, D067/11
D084/11, D085/11, D086/11, D087/11, D091/11

Applications for Reconsideration

- by -

Khaira Enterprises Ltd.
("Khaira")

- of Decisions issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE Nos.: 2011A/127, 2011A/128, 2011A/129
2011A/130, 2011A/131, 2011A/132
2011A/133, 2011A/134, 2011A/135
2011A/136, 2011A/137, 2011A/138
2011A/139

DATE OF DECISION: November 30, 2011

DECISION

SUBMISSIONS

Pir Indar P.S. Sahota	counsel for Khaira Enterprises Ltd.
Ros Salvador	counsel for 25 former Khaira Enterprises Ltd. employees
Adele J. Adamic	counsel for the Director of Employment Standards

INTRODUCTION

1. I have before me applications to reconsider 14 decisions issued by the Tribunal. The background facts may be summarized as follows. On February 4, 2011, and following an investigation conducted under section 76 of the *Employment Standards Act* (the "*Act*"), a delegate of the Director of Employment Standards (the "delegate") issued a Determination (the "Determination") and accompanying "Reasons for the Determination" (the "delegate's reasons") relating to the unpaid wage claims of 58 former employees of Khaira Enterprises Ltd. ("Khaira"). The delegate's reasons were very detailed comprising some 54 single-spaced pages of what might be termed "general" reasons and a further 59 pages more particularly addressing each individual former employee's specific claim.

2. By way of the Determination, Khaira was ordered to pay $236,800.52 on account of unpaid wages and section 88 interest and a further $3,500 in administrative penalties levied under section 98 of the *Act*. Thus, Khaira was ordered to pay a total amount of $240,300.52. As matters now stand, following the decision issued by Tribunal Member Stevenson on August 22, 2011 (BC EST # D091/11), the total amount payable by Khaira has been revised to $245,204.77.

3. As I understand the situation, Khaira operates a silviculture business in various locations throughout the province primarily through contracts issued by the provincial Ministry of Forests. The former employees' unpaid wage claims related to regular wages, overtime pay, statutory holiday pay, vacation pay, unlawful wage deductions, and compensation for length of service although not every employee was awarded money under each of these wage categories.

4. Khaira appealed the Determination to the Tribunal pleading all three statutory grounds of appeal, namely, that the delegate erred in law (section 112(1)(a)); the delegate failed to observe the principles of natural justice in making the Determination (section 112(1)(b)); and on the ground that evidence had become available that was not available when the Determination was being made (section 112(1)(c)).

5. In addition, eight former Khaira employees also appealed the Determination principally on the ground that the delegate erred in calculating their unpaid wage entitlements. Khaira's appeal was unsuccessful while the eight employees had some success before the Tribunal. In the case of the former employees' appeals, the Tribunal either varied the original Determination or referred the matter back to the Director for further investigation. In the latter instance, and after giving the parties an opportunity to be heard on the matter, Tribunal Member Stevenson issued supplementary decisions.

6. I now have before me 14 separate applications under section 116 of the *Act* filed by legal counsel on Khaira's behalf. Khaira seeks reconsideration of every decision issued by Tribunal Member Stevenson in this matter. More specifically, the decisions in question are summarized in the following table:

BC EST No(s).	Date of Issuance	Appellant	BC EST Order(s) Issued
D059/11 D084/11	June 28, 2011 August 12, 2011	Gerare Biyaruwanga	Referral back to Director for recalculation of additional unpaid wages owed (see BC EST # D059/11); Original Determination in favour of Mr. Biyaruwanga varied from $12,467.67 to $13,053.04 (see BC EST # D084/11)
D060/11 D085/11	June 28, 2011 August 12, 2011	Joseph Mukunano	Referral back to Director for recalculation of additional unpaid wages owed (see BC EST # D060/11); Original Determination in favour of Mr. Mukunano varied from $5,692.67 to $6,083.07 (see BC EST # D085/11)
D061/11	June 28, 2011	Pasteur Nsekerabanyanka	Original Determination in favour of Mr. Nsekerabanyanka varied from $12,467.67 to $13,234.80 plus additional section 88 interest
D062/11	June 28, 2011	Ngerageze Heritier Guillaume	Original Determination in favour of Mr. Guillaume varied from $9,247.77 to $10,359.61 (per Corrigendum issued July 21, 2011) plus additional section 88 interest
D063/11	June 28, 2011	Jean Claude Nabulizi	Original Determination in favour of Mr. Nabulizi confirmed at $2,969.55 plus additional section 88 interest
D064/11 D086/11	June 28, 2011 August 12, 2011	Mitima Robert Migabo	Referral back to Director for recalculation of additional unpaid wages owed (see BC EST # D064/11); Original Determination in favour of Mr. Migabo varied from $6,364.48 to $6,556.04 (see BC EST # D086/11)

BC EST No(s).	Date of Issuance	Appellant	BC EST Order(s) Issued
D065/11 D087/11	June 28, 2011 August 12, 2011	Toms Mupenda Masumbuko	Referral back to Director for recalculation of additional unpaid wages owed (see BC EST # D065/11); Original Determination in favour of Mr. Masumbuko varied from $12,169.62 to $12,778.95 (see BC EST # D087/11)
D066/11	June 28, 2011	DeDieu Kibasi	Original Determination in favour of Mr. Kibasi varied from $9,504.02 to $9,698.27 (per Corrigendum issued July 21, 2011) plus additional section 88 interest
D067/11	June 28, 2011	Khaira Enterprises Ltd.	New evidence not admissible; delegate did not err in law nor did he fail to observe the principles of natural justice in making the Determination; Original Determination confirmed subject to the orders issued with respect to the eight former employees' appeals (see above)
D091/11	August 22, 2011	Khaira Enterprises Ltd.	EST final order: Original Determination varied to indicate total unpaid wages increased from $236,800.52 to $241,704.77 together with $3,500 in monetary penalties (total Determination = $245,204.77 plus additional section 88 interest)

THE DETERMINATION

7. As noted above, the Determination was issued following a section 76 investigation. As I understand the situation, the Director of Employment Standards became aware that Khaira was perhaps not paying its employees in full compliance with the provisions of the *Act* and, accordingly, launched an investigation. The investigation's scope included any and all unpaid wage claims relating to all Khaira employees spanning the 6-month period dating back from July 22, 2010 (see section 80). For the most part, Khaira hired employees to plant trees and/or to do what is known as "brushing" work (*i.e.*, using hand tools to clear areas surrounding newly planted trees). Some employees were hired on an "hourly wage" basis whereas others were paid on a "piecework" basis.

8. The employees worked in various areas around the province including Texada Island, Powell River, Salmon Arm, Kamloops, Revelstoke, and Golden. They often worked over 12 hours in a day although the typical day appears to have been in the range of 8 to 12 hours and usually included a significant amount of travel time (1.5 to 5 hours/day depending on the location of the work). The delegate ultimately concluded that average

daily travel time varied, by location, from about 1.5 to 4.0 hours each day and that this was compensable "working" time.

9. The employees regularly worked through their meal breaks (see section 32). During their tenure, the employees either lived in campsites (which I understand were not very suitable) or motels; meal and accommodation costs were deducted from their wages. The delegate determined that these deductions were not lawful and constituted a contravention of section 21 of the *Act*. The employees maintained that Khaira's payroll records were incomplete and otherwise largely inaccurate and the delegate ultimately reached the same conclusion.

10. During the course of his investigation, the delegate met with Khaira's principals on several occasions and there was also extensive communication between the delegate, Khaira's principals and their legal counsel. The extent of these various discussions and communications is detailed at pages R20 to R23 of the delegate's reasons.

11. Section 37.9 of the *Employment Standards Regulation* (the "*Regulation*") sets out certain *Act* exemptions and substitutes other minimum employment conditions for "silviculture workers" (the latter being defined in section 1 of the *Regulation*). For purposes of establishing the various employees' unpaid wage entitlements, the delegate categorized the employees into four "groups", namely, Group A, Group B, Group C, and Group D, depending on the nature of their work and their method of payment. The delegate concluded that only the employees in Group B met the regulatory definition of "silviculture worker" and were thus excluded from certain *Act* minimum standards; all other employees were entitled to be paid in accordance with the provisions of the *Act* (see delegate's reasons, pages R34 to R37).

12. The delegate determined that Khaira failed to pay regular wages, overtime pay, vacation pay, statutory holiday pay, and compensation for length of service in accordance with the provisions of the *Act* and he prepared separate unpaid wage schedules for each employee that appear at pages R55 to R113 of his reasons. As noted above, the total amount of the former employees' unpaid wage claims was fixed at $236,800.52 including section 88 interest. The delegate also levied seven separate $500 administrative penalties (see section 98) thus bringing the total amount of the Determination to $240,300.52.

THE APPEALS

13. Khaira, as well as eight of the 58 former employees, appealed the Determination and, in due course, Tribunal Member Stevenson issued final decisions with respect to all of these appeals. In essence, the former employees took the position that their unpaid wage claims had been incorrectly determined and they were ultimately largely successful. Khaira's appeal failed.

14. Khaira submitted "new evidence" in support of its appeal (see subsection 112(1)(c)) in the form of "a large number of documents…most of which were not provided to the Director before the Determination was made" (BC EST # D067/11 at para. 43). Tribunal Member Stevenson rejected the "new evidence" ground of appeal for several reasons:

- Much of the evidence was not "new" and was, in fact, part of the section 112(5) record that was before the delegate (para. 64);
- Even though some of the documents were not provided to the delegate – and in that limited sense could be characterized as "new evidence" – these documents were available at the time the Determination was being made and could have been provided to the delegate. Further, several of

> the documents were either wholly irrelevant or only marginally relevant and had little, if any, probative value (para. 65);
>
> - With respect to the balance of the documents tendered as "new evidence", Tribunal Member Stevenson found them to be either not new or irrelevant (para. 66), not responsive to the legal issue at hand (para. 67), "superfluous" and lacking probative value (para. 68), or generally not documents that fell within the ambit of the "new evidence" ground of appeal as established in *Davies et al.*, BC EST # D171/03.

15. Accordingly, Tribunal Member Stevenson adjudicated the other two grounds of appeal advanced by Khaira based solely on the parties' submissions and the section 112(5) record without any consideration of the additional documents that Khaira submitted as "new evidence" under subsection 112(1)(c).

16. Khaira alleged three separate matters under the rubric of "error of law". First, Khaira maintained that the delegate did not afford it the opportunity to cross-examine various third parties who supplied information to the delegate during the course of his investigation. Second, Khaira alleged that the delegate ignored written agreements that purportedly allowed it to deduct $25 per day from the employees' wages on account of camp, boarding and lodging costs. Third, the Determination "ignored standard practice in the silviculture industry and imposed a decision which suited the [Director] and employees" (para. 74).

17. During the course of his investigation, the delegate interviewed several "third parties" in order to obtain independent evidence regarding silviculture industry practices particularly concerning typical terms and conditions of employment (see delegate's reasons, pages R27 to R28). Khaira alleged that the delegate erred in law in that he did not provide it with an opportunity to cross-examine these individuals. Tribunal Member Stevenson was not satisfied that the delegate erred in law with respect to how he dealt with this information (see paras. 81 to 84).

18. Similarly, Tribunal Member Stevenson was not satisfied that the delegate erred in law with respect to the alleged agreements regarding wage deductions for camp, boarding and lodging costs. Section 37.9(7) of the *Regulation* authorizes the deduction of $25 per day for "camp costs" but only if the employee agrees, in writing, to the deduction. However, both the delegate and Tribunal Member Stevenson held that this provision did not apply to the case at hand. Tribunal Member Stevenson held as follows (para. 85):

> In respect of Khaira's argument relating to section 37.9(7) of the *Regulation,* I reject it completely. First, as noted in the submissions of the responding parties, only nine of the employees would have been covered by section 37.9. Second, the employee being charged $25.00 a day must agree in writing to that charge. For the other employees, Khaira would need to show a written assignment of wages to meet a credit obligation. Third, the Director rejected the document which was purported to represent the written authorization for the imposition of a camp charge. The reasons for rejecting that document are found in the Determination at pages R45 and R46. There is no basis for saying the Director ignored the document, although it is quite correct to say the Director gave it no effect because he found it not to be credible. Nothing in this appeal demonstrates the reasoning and the conclusion of the Director regarding that document was irrational, perverse or unreasonable.

19. Finally, Tribunal Member Stevenson rejected Khaira's assertion that the delegate erred in law insofar as his treatment of "standard industry practices" was concerned (see para. 86).

20. Compensation for length of service (section 63) is a form of deferred wages that is presumptively payable by an employer to an employee upon the latter's termination of employment provided the employee has worked for at least 3 consecutive months. It is not payable in a variety of circumstances; for example, if the employee

voluntarily quits (subsection 63(3(c)), was engaged under a fixed-term employment contract (subsection 65(1)(b)), or if the employer gave proper prior written notice of termination (subsection 63(3)(a)). Section 66 of the *Act* provides that the Director may determine that an employee has been terminated if the employer "substantially alters" a condition of employment. The delegate determined that "the employees refused to work on July 17, 2010, because Khaira did not pay them their wages" (see delegate's reasons, page R50). Khaira's position before the delegate was that it was unable to pay its employees their wages because of financial constraints flowing from the loss of a tree-planting contract. This particular finding did not apply to all of the former employees but only those who were still on Khaira's payroll as of July 17, 2010. The delegate concluded (page R51):

> I find that the primary reason employees stopped working on July 17, 2010 was due to Khaira's failure to pay employee wages in a timely fashion. Employees collectively decided that they would not work until Khaira paid them all the wages owing to them…Non payment of employee wages is a substantial breach of a condition of employment. Khaira's challenges of receiving payments for tree planning [sic, "planting"?] and brushing contracts is a business risk for Khaira and cannot be used as justification to deny employees their wages when they are due. Accordingly, pursuant to Section 66 of the Act, I find that their employment was terminated and employees who were employed for more than 3 months are entitled to compensation for length of service. Their last day of work was July 17, 2010.

21. Although Khaira pleaded its liability to pay compensation as a "natural justice" issue, Tribunal Member Stevenson dealt with it (correctly, in my view) as an alleged error of law. He concluded that the delegate correctly interpreted and applied section 66 of the *Act* with respect to those former employees who were awarded section 63 compensation for length of service (see paras. 87 to 94).

22. Khaira's "natural justice" arguments, for the most part, amounted to assertions that the delegate ignored and/or misinterpreted evidence in reaching certain conclusions. Tribunal Member Stevenson rejected all of Khaira's arguments on this score (see paras. 95 - 102 of his June 28, 2011, reasons for decision).

THE APPLICATIONS FOR RECONSIDERATION

23. Khaira seeks reconsideration of every decision issued by Tribunal Member Stevenson in this matter. The grounds for reconsideration are set out in a 3-page memorandum prepared by its legal counsel that is appended to the Tribunal's "Reconsideration Application Form". This memorandum consists of 19 separately numbered grounds although these 19 grounds may be grouped into several broad categories.

24. Legal counsel for the Director of Employment Standards and legal counsel for 25 of the former employees also filed submissions in response to Khaira's reconsideration applications. These submissions were provided to Khaira's legal counsel and, by way of reply in a letter to the Tribunal dated October 25, 2011, counsel advised "that we do not have any new information or evidence with respect to our application for reconsideration".

25. As I noted above, the 19 separate allegations can be grouped into five general categories. First, Khaira seeks an oral hearing of its reconsideration application and also says that the Tribunal should have held an oral appeal hearing (para. 6). Second, Khaira says that Tribunal Member Stevenson should have concluded that the delegate erred in law by not providing Khaira with an opportunity to cross-examine the various third parties who provided information to the delegate about industry practices and typical employment conditions (para. 1). Third, Khaira says that the delegate erred in several instances in making findings of fact and law relating to, for example, the wage deduction issue, travel time, industry practice and wage rates (paras. 2 - 3; 7 - 8; 10 - 11; 13 - 14 and 16 - 17). Khaira says that Tribunal Member Stevenson erred in confirming the

Determination with respect to these matters. Fourth, Khaira says that Tribunal Member Stevenson erred when he ruled that Khaira's "new evidence" was not admissible (paras. 4 - 5; 9; 15, and 19). Fifth, Khaira says that both the delegate and Tribunal Member Stevenson erred regarding whether certain employees were entitled to compensation for length of service given the combined effect of sections 63 and 66 of the *Act* (paras. 12 and 18).

26. Counsel for the Director says that Khaira's applications are not timely and, quite apart from that objection, the applications consist of "bones without flesh" and fail to meet the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98). Similarly, counsel for the 25 employees says that Khaira's applications should be summarily dismissed as untimely and because they represent a simple and undisguised attempt to re-argue points that have already been fully considered by both the delegate and the Tribunal and, as such, the applications do not pass the first stage of the *Milan Holdings* test.

FINDINGS AND ANALYSIS

27. The Tribunal evaluates reconsideration applications utilizing the two-stage analytical framework set out in *Milan Holdings*, *supra*. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

28. In my view, these applications are not timely and, in any event, do not pass the first stage of the *Milan Holdings* test.

Timeliness

29. In my view, the present applications are not timely. Rule 22(3) of the Tribunal's *Rules of Practice and Procedure* states that a reconsideration application must be filed within 30 days after the date of the Tribunal decision. Khaira's principal attack centers on the Tribunal's decisions issued on June 28, 2011, and, most particularly, the Tribunal's decision relating to Khaira's appeal (BC EST # D067/11). Khaira's 14 separate reconsideration applications (in truth, 14 forms but a single "omnibus" submission with respect to all of the Tribunal's decisions in this matter) were not filed until September 9, 2011, about 2 ½ months after the Tribunal's decisions were issued.

30. Although several decisions relating to the recalculation of some individual former employees' unpaid wage claims were not issued until August 12, 2011, and the Tribunal's final decision incorporating these final wage recalculations was not issued until August 22, 2011 (BC EST # D091/11), these latter decisions did not address the concerns that have been advanced in the reconsideration applications. Indeed, so far as I can tell, Khaira did not even make any submissions regarding the recalculation of the employees' unpaid wage claims. Khaira's objections concern the Tribunal's decisions issued on June 28, 2011, and as of this date (or very shortly thereafter) Khaira knew that: i) its own appeal had been dismissed, ii) the appeals of three former employees had been allowed (with some additional wages been awarded to them), and iii) the only remaining issue before the Tribunal concerned the additional unpaid wages that four former employees (out of a total of

58 former employees) might be owed as a result of the Tribunal's "referral back" orders in Decision Nos. D059/11, D060/11, D064/11 and D065/11. In my judgment, if Khaira wished to apply for reconsideration of Tribunal Member Stevenson's June 28, 2011, decision regarding Khaira's appeal, it should not have waited until September 9, 2011, to do so.

31. Khaira's legal counsel provided the following explanation regarding the untimely applications:

> In July 2011, the counsel for [Khaira] had gone on vacation and did not return until Aug 30, 2011, because of some personal reasons. As soon as the counsel reached the office and decision was taken by [Khaira] to response to apply for reconsideration [*sic*]. The deadline of 30 days has passed for only the reason that the Counsel, who has conduct of the file and who could apply for reconsideration was on vacation. The office of Tribunal was informed about this fact and request was made to provide more time to file response but that request was denied and decision was made. [*sic*]

32. As was noted in the former employees' legal counsel's submission, the above statement by Khaira's legal counsel is misleading. The tenor of Khaira's counsel's submission is that an application was made to the Tribunal for an extension of the time period to file a *reconsideration application*. In fact, the July 27, 2011, letter sent to the Tribunal from Khaira's counsel's law office was an application for an extension of time to file a response to the delegate's *revised unpaid wage calculations* that had been prepared as a result of the "referral back" orders. The Tribunal enclosed the delegate's revised unpaid wage calculations in a letter to Khaira's legal counsel dated and sent July 22, 2011. The July 27th letter from Khaira's legal counsel's office indicated that counsel was away on vacation from July 12 to August 19, 2011, and requested an extension to the "first week of September, 2011". This latter request was refused and the Tribunal confirmed that Khaira's submissions with respect to the revised unpaid wage calculations were to be filed by no later than August 8, 2011.

33. Even if Khaira's counsel was away on vacation from July 12 to August 19, 2011, he still had approximately two weeks from the date of Tribunal Member Stevenson's decision in Khaira's appeal (June 28, 2011) to seek instructions from his client about a possible reconsideration application. Given that counsel was apparently going to be away when the 30-day reconsideration application period expired, he should have obtained instructions regarding a possible reconsideration application prior to his departure.

Does the application meet the first stage of the Milan Holdings test?

34. As noted above, Khaira's reconsideration application sets out 19 separately numbered matters that it says justify reconsideration. Since several of these matters address, essentially, the same point, I have grouped the 19 items into five categories for purposes of analysis. In my view, none of Khaira's arguments raise a sufficient serious question of law, fact or principle to justify a fuller examination on the merits. Indeed, Khaira's application amounts to not much more than a bald statement of disagreement with the delegate's findings as confirmed by the Tribunal. I will address each of Khaira's five broad areas of disagreement in turn.

35. First, Khaira says that it should have been granted an oral appeal hearing. I might add that Khaira also seeks an oral hearing with respect to the instant application for reconsideration "in interest of Justice" [*sic*] but it has not provided any further particulars regarding why an oral reconsideration hearing would be appropriate in this case. Khaira's counsel submits the following with respect to the denial of an oral appeal hearing:

> At the very outset, [Khaira] requested Oral hearing. Though it is the discretion of Tribunal to give Oral hearing or not but for the best reasons known to the Tribunal, this request was totally denied only for the

> reason that if oral hearing will be granted then Tribunal has to make a decision on all the issues raised by [Khaira] at the time of the hearing.

36. The Tribunal is not obliged to hold an oral hearing (see *Act*, section 103) and virtually all appeals are adjudicated based on the parties' written submissions and the section 112(5) record. An appeal to the Tribunal is not a *de novo* appeal; an appeal to the Tribunal must be based on one or more of three specific statutory grounds. Tribunal Member Stevenson, at para. 6 of his decision in the Khaira appeal (BC EST # D067/11), set out his reasons for denying an oral appeal hearing in this instance and I do not see that he erred in that regard. Similarly, I am satisfied that the parties have been given a fair and reasonable opportunity to present their arguments on the reconsideration applications by way of written submissions and I fail to see how a supplementary oral hearing would assist me in adjudicating these applications. In my view, an oral hearing would only further delay matters and unnecessarily increase the parties' costs.

37. The second component of Khaira's reconsideration applications concerns the delegate's investigation and, more particularly, the fact that he obtained information from some independent witnesses about such things as standard travel times and typical industry wage rates (see delegate's reasons, pages R27 to R28). On appeal, Khaira maintained that the delegate erred in law in not affording Khaira the opportunity to cross-examine these four independent witnesses.

38. The former employees' complaints could have been streamed into one of two formats for purposes of adjudication, namely, an oral evidentiary hearing or an investigation (see *Act*, section 76). The delegate's role is quite different in each format (see *Whitaker Consulting Ltd.*, BC EST # D033/06). Where there is an oral evidentiary hearing, the delegate is a neutral arbiter and must render a decision based on the evidence and arguments presented at the hearing. As an investigator, the delegate has a dual role – the delegate is both a factfinder and an adjudicator although the delegate must still maintain absolute neutrality as between the parties (see *BWI Business World Inc.*, BC EST # D050/96).

39. In this instance, the delegate elected to proceed by way of an investigation. That latter decision, *per se*, is not reviewable by the Tribunal unless that decision amounted to a breach of the principles of natural justice. Certainly, the delegate did not err in law in proceeding to investigate the former employees' complaints when the *Act* specifically authorizes that adjudicative format. When a complaint is investigated, section 77 of the *Act* is triggered: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." Thus, the question is not whether the delegate should have ensured that Khaira was afforded an opportunity to cross-examine the "third party" witnesses but, rather, whether Khaira was given a reasonable opportunity to respond to the matters about which these third parties provided information to the delegate. Tribunal Member Stevenson, at paras. 76 to 84, sets out in some detail the various communications the delegate had with Khaira and its legal counsel in an effort to ensure that it was given a full and fair opportunity to present its own case and to respond to the matters raised by the former employees. Khaira's position was that the nature of the investigative process prevented it from being able to cross-examine the parties and other witnesses, however, there is no free-standing right to cross-examine parties and witnesses when the delegate proceeds by way of an investigation (see *Whitaker*, *supra* and *6307485 Canada Ltd.*, BC EST # D121/09). I am satisfied that there is absolutely no merit to Khaira's submission that it was denied a reasonable opportunity to respond to the case against it or to put forward its own position.

40. The third aspect of Khaira's reconsideration applications is that the delegate erred in making certain findings of fact, particularly in relation to such things as travel time, typical industry wages and that he otherwise ignored or misconstrued certain documents. These issues relating to travel time and wage rates were in

dispute before the delegate and there was conflicting evidence and argument regarding these matters. Clearly, Khaira disagrees with several findings of fact made by the delegate but, as is plain from a review of Member Stevenson's decision, in each and every instance the delegate had at least some evidence before him that supported his findings of fact and the suggestion that the delegate ignored evidence altogether is simply not tenable (see paras. 85 to 86; 95 to 102).

41. Khaira says that Tribunal Member Stevenson erred in refusing to admit the so-called "new evidence" it tendered on appeal. The evidence in question is identified at para. 43 of Tribunal Member Stevenson's June 28, 2011, decision and his analysis regarding whether this evidence was admissible is set out at paras. 60 to 72. I wholly endorse his view of the matter.

42. Finally, Khaira submits that both the delegate and Tribunal Member Stevenson erred in their treatment of the employees' compensation for length of service claims. This aspect of Khaira's reconsideration application is set out in the following paragraphs of its memorandum appended to the various reconsideration applications (Nos. 12 and 18):

> 12. The Tribunal itself recognises that few of the employees while they did not have any work with [Khaira] were employed by other employees [*sic*]. But for the purpose of length of service, their employment for consider as continuous employment with [Khaira] [*sic*].
>
> 18. The Tribunal further failed to look into another aspect wherein the workers/employees dumped trees and performed poor quality of work and contract of [Khaira] terminated and [Khaira] suffered considerable financial loss. But even then the Tribunal failed to consider any of these aspects and made a decision based on Director's decision. [*sic*]

43. With respect to Khaira's argument embodied in para. 12 of its submission, this issue was squarely addressed by Tribunal Member Stevenson at paras. 91 to 93 of his June 28, 2011, decision and I see no error whatsoever in his approach to the matter. The relevance of the argument set out at para. 18 of Khaira's submission is not immediately clear to me. Khaira did not argue before the delegate that it was relieved from having to pay compensation for length of service because it had just cause for dismissal. Thus, whether the employees did or did not perform their work competently or otherwise misconducted themselves was not in issue. Further, the Director of Employment Standards has no jurisdiction to award damages against an employee in favour of their employer based on losses that the employee has allegedly caused their employer. Such an action would have to be commenced in the civil courts. Finally, there is nothing in the *Act* authorizing a delegate to "set-off" such claims against the wages that are otherwise payable to employees.

44. To summarize, I do not consider this application to be timely and, in any event, the issues raised by Khaira in its reconsideration applications do not pass the first stage of the *Milan Holdings* test. Accordingly, the applications are refused.

ORDER

45. Khaira's applications to reconsider each of the fourteen Tribunal decisions identified in para. 6 of these reasons for decision are refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal