Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

J.C. Creations Ltd. o/a Heavenly Bodies Sport

- and by -

The Director of Employment Standards

- 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

ADJUDICATORS: Frank A. V. Falzon, Panel Chair
Brent Mullin, Tribunal Chair
David B. Stevenson, Adjudicator

FILE No.: 2003A/151 and 2003A/156

DATE OF DECISION: November 17, 2003

DECISION

NATURE OF THE APPLICATIONS

There are two reconsideration applications in the present matter. Both arise from the April 17, 2003 decision of an Employment Standards Tribunal Adjudicator, who dismissed the Employer's appeal from a December 6, 2002 Determination by a Delegate of the Director of Employment Standards. The Determination found that the Employer had terminated the employment of an employee, the Complainant, without just cause. The Employer filed the first reconsideration application. The Director filed the second reconsideration application.

HISTORY OF THE MATTER

A. The Complaint

The Complainant worked for just over 12 years as a sewing machine operator for the Employer. The Employer is a Vancouver clothing company doing business under the name "Heavenly Bodies Sport".

On February 7, 2002, the Employer's president, Jane Cotter, wrote to the Complainant terminating her employment. The termination letter emphasized that the Complainant had taken unauthorized vacations twice in 2001 and again just prior to February 7, 2002. The letter states, "Twice now, within four months, you have taken unauthorized vacation. We feel this is just cause for termination".

The Complainant applied to the Employment Standards Branch. She complained that there was no just cause for her dismissal, as all her absences were either authorized by the Employer or otherwise legitimate. She argued that her firing without cause entitled her to compensation for length of service under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*"). There is no dispute in this case about the amount the Complainant was entitled to receive under the *Act* if she was terminated without cause.

B. The Investigation and Determination of the Director's Delegate

The complaint was referred to a Delegate of the Director (the "Delegate"). The Delegate investigated and approximately 10 months later (December 6, 2002) issued a Determination in favour of the Complainant. The Determination's essential findings are as follows:

1. To meet the test for just cause for dismissal without compensation in the case of unsatisfactory performance "…the Director expects the employer to meet" several criteria, the most important of which is that the employer specifically told the employee that continued failure to perform to acceptable standards of performance would result in dismissal;

2. The primary document relevant to this issue is the employer's "Policy and Procedures" document dated June 2001, which provides that failure to request a vacation two months in advance will result in a warning (three of which warnings may result in termination) and return from vacation beyond the proper date "will be considered abandonment of the position and will result in termination"; and

3. The employer's February 7, 2002 termination letter cites three separate incidents in support of just cause:

   (a) the first incident involved the Complainant's return from vacation in March 2001, nearly two months after the scheduled return date. The Delegate stated that this incident "…is not relevant…as it occurred prior to the Policy and Procedures Document which took effect on June 26, 2001";

   (b) the second incident involved the Complainant taking a vacation in November 2001 without giving the Employer two months advance notice. The Delegate stated that this incident does not justify dismissal as "…there is no evidence that Vuong [the Complainant] was clearly and unequivocally warned that similar action in future would lead to dismissal" and, in any event, this would only count as the first warning under the June 2001 Policy and Procedures document; and

   (c) the third incident was the Complainant's failure to return to work February 7, 2002 despite the Employer's refusal to grant vacation time for that day. The Delegate held:

> Vuong [the Complainant] states that she requested vacation for February 6, 7 and 8 because she did not have child care for her daughter….[She] states she had no other alternative….
>
> Section 52 of the Act provides that an employee is entitled to up to five days of unpaid leave during each employment year to meet responsibilities related to the care, health or education of a child in the employee's care….Vuong was entitled to take unpaid leave for the three days to meet her family responsibility needs.

The Determination was thus based on the following findings:

1. This was a case of unjust dismissal based on "unacceptable standards of performance" by the Complainant;

2. The key document was the June 21 Employer policy document, which was not relevant to the first incident allegedly in support of just cause because it came into effect after that first incident;

3. The Employer did not meet the onus of providing sufficient evidence to demonstrate a clear warning to the Complainant following the first relevant incident; and

4. The Complainant's version of events regarding the final incident should be accepted and therefore the Employer is entitled to the protection of Section 52 of the *Act*.

C. Intervening Legislation

During the period the complaint was before the Delegate, several amendments were made to the *Act* by the *Employment Standards Amendment Act,* S.B.C. 2002, c. 42 (the "*Amending Act*").

The *Amending Act* received Royal Assent on May 30, 2002, on which date several of its provisions were brought into effect. Amendments to Part 10 of the *Act* allow the Director to engage in alternate processes, including investigation and oral hearing, in reviewing, making findings of fact and determining a complaint.

On November 30, 2002 (one week before the Delegate's decision was issued), a second series of *Amending Act* provisions came into effect by virtue of B.C. Reg. 307/2002. These amendments relate primarily to appeals to the Employment Standards Tribunal. One of the changes was to Section 112(1) of the *Act*, which sets forth the grounds of appeal to the Tribunal:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

Another relevant change was the inclusion of Section 112(5) of the *Act*, which places a legal duty on the Director to provide the Tribunal with "the record" once the Director has been served with an appeal under this section:

> 112 (5) …the director must provide the tribunal with the record that was before the director at the time of the determination, or variation of it, was made, including any witness statement and document considered by the director.

For the purposes of this decision, it is important to note that Section 77 of the *Act* was not affected by the *Amending Act*. Section 77 of the *Act* states:

> 77. If an investigation is conducted, the director must make reasonable efforts to give the person under investigation an opportunity to respond.

The Determination was issued following an investigation. There was no oral hearing on the complaint.

It was in this statutory context that the Delegate issued the December 6, 2002 Determination, which the Employer appealed to the Tribunal on December 30, 2002.

D. The Employer's Appeal to the Employment Standards Tribunal

On December 30, 2002, the Employer appealed to the Employment Standards Tribunal. At that time, the Employer was not represented by counsel. The Employer ticked the "error of law" box on the appeal cover sheet, and enclosed a letter that made five points.

First, the Employer said that the Employment Standards Branch had specifically told the Employer that unauthorized vacation is an abandonment of position.

Second, as a factual matter, the Employer said that the Complainant's absence in February 2002 (the absence following which the Complainant was fired) was "in no way an emergency where she had to babysit children". The Employer said it was explained very differently to the Employer by the Complainant.

Third, again as a factual matter and contrary to the Delegate's Determination, the Employer said that the Complainant signed a Policies and Procedures form prior to the first incident described in the termination letter.

Fourth, the Employer said that "the past vacations are not the issue…[She] had adequate vacation time already this calendar year and had a record of insubordination by taking unauthorized vacation at a critical time".

Lastly, the Employer advanced an argument which addressed the procedural fairness of the investigation process leading to the Determination. The Employer said that the Delegate's decision "*is completely based on Vuong's termination letter from Heavenly Bodies and no facts from anyone employed here including myself and her supervisor*". The Employer's submission included a December 24, 2002 statement from the Complainant's supervisor, Mr. Sung, about the events of February 2002.

The substance of the Employer's appeal and objection to the Determination was thus that the Delegate did not meaningfully hear the Employer's side of the story and consequently made fundamental factual errors in determining what occurred, including misconceiving the basis for the termination.

E. Responses to the Appeal

On January 13, 2003 the Complainant responded to the appeal. She submitted that the statements and material the Employer filed in support of the appeal "lacked honesty". She went on to address why the Employer's statements were untrue.

On February 4, 2003, the Delegate filed a four paragraph submission. The Delegate did not attach to that submission any record of the investigation as required by Section 112(5) of the *Act*. The submission also does not address the Employer's objection to the fairness of the investigation process, and was silent in respect to the Employer's allegation that the Delegate did not consider the Employer's side of the story.

The Delegate submitted, in total:

> Thank you for the opportunity to respond to the employer's appeal in this matter. The employer alleges that the delegate of the Director erred in law because the determination was incorrect.
>
> The issues the appellant requests the Tribunal to consider is [sic] dealt with in the determination. The appellant has not shown that there is an error in the facts, an error in interpreting the law, a different explanation of the facts or facts that were not considered in the determination.
>
> The delegate acknowledges that there is a typographical error on page 6 of the determination. Under the sub-heading Determination, it should state, "I have determined that the Act has been contravened. Accordingly, Vuong is entitled to:" not "Ghaffari" as is presently stated.
>
> Based on the above and the reasons outlined in the determination, I respectfully request that the Tribunal issue a decision varying the determination to change the name on page 6 from Ghaffari to Vuong and in all other respects to dismiss the appeal based on the written submissions of the parties.

On February 11, 2003, the parties were given notice that they would have an opportunity to make a final reply. None of the parties exercised that opportunity. On February 28, 2003 the Tribunal advised the parties that the appeal would be decided by an Adjudicator based on the written submissions which had been filed.

F. The Adjudicator's Decision

The Adjudicator's decision was issued on April 17, 2003. The Adjudicator dismissed the Employer's appeal, subject to the correction of the typographical error in the Determination regarding the Complainant's name.

The Adjudicator's decision proceeded on the premise that the appeal was based on an asserted "error of law". The Adjudicator regarded the August 2000 Employer policy document and the Sung statement as "new evidence" with respect to that ground of appeal. She refused to consider the August 2000 Employer policy document on the basis that it "could reasonably have been before the delegate". However, she did admit and consider the Sung statement "since it is apparent that the Delegate had access to oral evidence that is not part of the record before the Tribunal".

The Adjudicator went on to consider whether the Determination was wrong in law on the just cause issue. She considered the Employer's argument that the Delegate had failed to consider the termination on the basis of fundamental breach, concluding, "Even if I accept [the Employer's] view of the evidence totally, I find that [the Employer] has not demonstrated that the director erred in law…."

The Adjudicator also concluded:

1. As to the most recent absence, the Director "*preferred the employee's evidence over that of the employer*" and there was some reasonable basis for accepting that evidence;
2. "*Based on the Delegate's finding of fact*", the Complainant's one day absence "does not constitute abandonment of position" or such misconduct as to constitute a fundamental breach; and
3. As to the Delegate's consideration of the three incidents, the Delegate "*made findings of fact in which she accepted Vuong's version of events over that of HBS* [the Employer]".

The Adjudicator's reasons do not expressly or directly address the procedural fairness issue raised in the Employer's appeal.

THE RECONSIDERATION APPLICATIONS

The *Amending Act* has retained the Tribunal's reconsideration power. As it is now framed, the reconsideration power reads as follows:

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

As already noted, the Tribunal has received two reconsideration applications in respect to the Adjudicator's decision, one from the Employer and one from the Director.

A. The Employer's Reconsideration Application

The Employer's reconsideration application was filed by legal counsel on May 23, 2003, together with a Statutory Declaration from Ms. Cotter. In its reconsideration application, the Employer submits that the Adjudicator did not recognize the lack of procedural fairness in the Determination process:

> The Applicant states that on several crucial points, its representative Jane Cotter was not informed by the Director's Delegate of the case the [sic] it had to meet, and was not afforded an opportunity to respond to the Complainant's allegations. As can be seen from the facts of this case set out in the Statutory Declaration, the Delegate did not make it clear to the Applicant what the allegations or issues raised by the Complainant actually were. At the Determination level, the Applicant did not know that the Delegate was under the mistaken apprehension that the Applicant's attendance policy, the basis upon which the Complainant's employment was terminated for just cause, only commenced in June of 2001. Second, the Applicant was unaware that the Delegate was under the mistaken apprehension that the Complainant had alleged (which is denied by the Applicant) that she had asked for time off for child care purposes. Clearly, the principles

> of natural justice require that the Applicant know the case it has to meet and be given adequate opportunity to meet that case. These failures were carried forward into the adjudication of the Appeal as the Adjudicator was under the mistaken apprehension that the applicant was trying to raise new issues or produce new documents.

In the accompanying Statutory Declaration, Ms. Cotter says that the only interaction she had with the Delegate was one phone call in which the Delegate asked for time and payroll records. Ms. Cotter referred that request to the Employer's bookkeeper. In her Statutory Declaration she states:

> The Delegate did not question me about the reasons for the Applicant terminating the employment of the Complainant. The Delegate did not inform me of the allegations made by the Complainant in relation to the termination of her employment, nor did she ask me to respond to any allegations which she may have made.
>
> The Delegate must have received a copy of the termination letter, which became Attachment A to the Determination, from the Complainant because the Delegate and I did not ask for it or discuss it, and I did not provide it to the Delegate. While I discussed with the Delegate the Company's attendance policy, I did not provide her with that copy of the attendance policy sign-off letter, which became Attachment B to the Determination. It must have been submitted by the Complainant. The Delegate did not discuss it with me or inform me as to what the Complainant was saying about the policy or its application. I told the Delegate that the Complainant was told that she could not have the vacation time she requested, that she was told by her supervisor Rod Sung that if she took the vacation time, her employment would be terminated. She took the vacation time, and her employment was terminated.
>
> After the telephone call with the Delegate, the Delegate met with our bookkeeper to work out the payment records. I never met with her. The next communication I received from the Delegate was the Determination, dated December 6, 2002.
>
> The Determination stated:
>
> (a) That the attendance policy "took effect" on June 26, 2001, the date the sample policy sign-off letter (Attachment B) was signed. This is incorrect, as the Complainant had been given these policy documents at least since 1999, and the policy in question had been in effect before that, a fact well known to the Complainant. I gave the policy document which became Attachment B to the Determination as an example, not to indicate that the policy had commenced at that time. The Delegate never asked me about the policy, when it took effect or how long the Complainant had been bound by the policy. I therefore did not have a full opportunity to respond in respect of the policy.
>
> (b) That the Complainant requested vacation for February 6, 7 and 8 because she did not have child care. The Delegate had never put this allegation to me for response. That allegation was not true. The Complainant had asked for vacation commencing on February 5 and including February 6, 7 and 8th. The Delegate also failed to discuss with me the facts of the vacation issue. I therefore did not have an opportunity to respond to the facts relating to the vacation issue. The request was made for 3.25 days, commencing on February 5, 2002. Further, the

> Complainant failed to attend work for 2 days, February 7 and 8. The Determination only indicates that the Complainant failed to attend work for 1 day and then attributes the non-attendance to child-care reasons, an allegation I was not aware of. I did not have an adequate opportunity to respond to these allegations.
>
> …
>
> The Tribunal Adjudicator took the items I sent as "new documents". However, these were not documents that I had had the opportunity to submit to the Delegate. The first opportunity I had to submit them was to the Tribunal. I submitted them at that stage because the first I'd learned that they were necessary or relevant was on reading the Determination.
>
> …
>
> The Company has never had a proper, fair or reasonable opportunity to respond to the allegations made by the Complainant. I make this Statutory Declaration in support of an application for the Tribunal to reconsider its decision and to allow the parties to put the matter before another tribunal adjudicator and to have the credibility of both parties measured and a proper decision made.

The Director, through counsel, opposes the Employer's reconsideration application. The Director says that the Employer failed to raise the natural justice ground in the Section 112 appeal. The Director also objects to the admissibility of the Statutory Declaration, saying that it constitutes "new evidence…that is of little relevance to a proper reconsideration request". The Director does not, however, challenge the contents of Ms. Cotter's Statutory Declaration regarding the process by which this matter was investigated or the employer's assertion that she was not given a meaningful opportunity to respond to the Complainant's key allegations

The Director says that the Employer's reconsideration application amounts to an attempt to reargue the facts of the case, submitting as follows:

> …it would be unfair at this stage to permit HBS [the Employer] to make an attack on the pre-Determination investigation by accepting HBS's allegations that the new evidence offered with HBS's appeal related to breaches of natural justice in the pre-investigation stage. HBS's principal was in communication with the Director's Delegate, as can be seen by the attached copy of a fax sent by the Delegate to HBS's principal on September 16, 2002; she could have provided this same information much earlier.

The September 16, 2002 fax referred to by the Director from the Delegate to the Employer (to the attention of Ms. Cotter) states:

> Dear Jane: Here are the overtime calculations for the above individuals. As I mentioned in our telephone conversation the other day, we entered in all hours worked by each person. The computer calculates the total amount owing for the period of the calculation, not just pay periods. Therefore, whether the periods are semi-monthly or bi-weekly is not relevant. The total wages paid are then deducted from the total amount owing, thus, leaving the balance owed. The cheques you sent in as a result of your own calculations

> have been included in this calculation so the amounts on these calculations are still outstanding.
>
> The issue of severance pay is still under investigation and I will let you know my findings as soon as possible. Feel free to call me if you have any questions.

B. The Director's Reconsideration Application

As noted, the Director also filed a reconsideration application. The Director has taken the surprising step of asking the Tribunal to reconsider the Adjudicator's decision, despite the fact that the Adjudicator upheld the Director's Determination. While the Director takes no issue with the result of the decision, the Director does not agree with the Adjudicator having admitted as evidence one of the two Employer documents submitted on appeal. As well, the Director does not agree with what counsel characterizes as the Adjudicator's overly broad description of the nature of an appeal to the Tribunal in which errors of fact may give rise to errors of law. The Director adds:

> The Decision has been described by the Tribunal on its website as a "leading decision." The Director seeks reconsideration of the Decision … in order to correct the impressions given in the Decision that a party may tender on an appeal evidence that was available at the time the Determination was being made, and that a party may contrive "error of law" arguments to appeal a Determination's reasonable factual findings.

In short, the Director seeks reconsideration based on her objection to certain reasons in the Adjudicator's decision, rather than the decision and order itself. Not surprisingly, the Employer takes issue with this, stating that it is "inconsistent and inappropriate in all the circumstances".

ISSUES

Given the way in which this matter was argued before us, it will be convenient to divide our analysis of these applications into a series of sub-issues as follows:

A. The Employer's Reconsideration Application

1. Does the Employer's application present an appropriate case for reconsideration by the Tribunal?
2. Is the Employer's selection of the "error of law" box in its Section 112 appeal application fatal to its ability to raise a procedural fairness ground on appeal or on this reconsideration application?
3. What is the "record" before us?
4. Is the Employer's Statutory Declaration "new evidence" and, if so, is it admissible?
5. Did the Delegate satisfy the basic requirement in Section 77 of the *Act* that "the director must make reasonable efforts to give a person under investigation an opportunity to respond"?
6. If not, what is the appropriate remedy in this case?

B. The Director's Reconsideration Application

1. Does the Director's application present an appropriate case for reconsideration by the Tribunal?

Given our disposition on this issue, we do not need to either set forth or answer the further issues raised by the Director's reconsideration application

ANALYSIS

A. The Employer's Reconsideration Application

We will deal with each issue in turn:

1. Does the Employer's application present an appropriate case for reconsideration by the Tribunal?

We find that the Employer, even though not represented by legal counsel at that point, clearly raised its natural justice objection as part of its Section 112 appeal to the Tribunal. As noted above, the substance of the Employer's appeal and objection to the Determination was that the Delegate did not meaningfully hear the Employer's side of the story and consequently made fundamental factual errors respecting what occurred, including misconceiving the basis for the termination.

That natural justice objection raises the Section 77 issue identified as Issue 5 in this decision. The issue raised is serious. It satisfies the first stage test for reconsideration outlined in *Milan Holdings Ltd.,* BC EST #313/98.

In reaching this Determination we do so cognizant of both the nature of employment standards issues and determinations and the fact the present matter is a reconsideration application, which should not be granted as a matter of course. Employment standards legislation has been described by the Supreme Court of Canada as providing "…a relatively quick and cheap means of resolving employment disputes": *Danyluk* v. *Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460, at p. 496. That approach is consistent with the report which led to the establishment of the Employment Standards Tribunal:

> 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, BCEST #RD165/02 (Reconsideration of BCEST #D596/01))

Having considered the employer's application in accordance with the purpose of the reconsideration power as described in *Milan Holdings*, we find that the Section 77 issue in this

reconsideration application is of significance both for these parties and for future cases. The legislative requirement in Section 77 "… is the manifestation of one of the statutory objectives of the *Act*, found in Section 2, to 'provide fair and efficient procedures for resolving disputes over the application and operation of this *Act*'": *Insulpro Industries Inc. (Re)*, [1998] B.C.E.S.T. No. 432, BCEST #D405/98, para. 36.

2. Is the Employer's selection of the "error of law" box in its Section 112 appeal application fatal to his ability to raise a procedural fairness ground on appeal or on this reconsideration application?

In its Section 112 appeal, the Employer, not then represented by legal counsel, ticked only the "error of law" box on the cover page of the Tribunal's appeal form. The Employer did not also tick the "natural justice" box. The questions are whether that was fatal below or is fatal to the present reconsideration application.

Given the purposes and provisions of the legislation, including Section 77 of the *Act* – which is a statutory requirement - it would in our view be inappropriate to take the overly legalistic and technical approach of refusing to consider a procedural fairness ground because the party ticked the "error of law" box instead of the "natural justice" box on the appeal form. The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned.

Lay parties do not always know what "natural justice" means, or whether or how it differs from "error of law". Indeed, the complexity of administrative law is such that there is no sharp distinction. The grounds for reviewable error in administrative law are not neatly divisible into watertight compartments. They often overlap. Procedural unfairness has, for example, been described as a species of jurisdictional legal error: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643. Jurisdictional error is by definition a serious form of error of law; when it exists, a court will quash a decision despite a privative clause: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220; *Canada* (*A.G.) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963. An unreasonable finding of fact has been characterized as either an error of law or a jurisdictional error: *Blanchard v. Control Data Canada Ltd.,* [1984] 2 S.C.R. 476. In administrative law, a failure of natural justice thus is a species of error of law. This is even more clearly the case when the procedural obligation is written into the statute itself, as is the case with section 77.

Consistent with the nature and purposes of the legislation, we should, as much as possible, approach these potential complexities with a common sense and plain language orientation. That includes addressing the substance of appeals which are filed, as opposed to the form. Of course, we must also thereby be true to the finite grounds of appeal now in Section 112(1) of the *Act* and be fair to all parties before the Tribunal.

In this context, the fact that the amended legislation lists "error of law" and "natural justice" separately as permissible grounds of appeal under Section 112(1), should be understood as

helping to define and clarify the new, finite grounds of appeal under the *Act*, rather than as a device to be used against unsuspecting applicants who fail to tick the "correct" box, or all of the "correct" boxes, on the Tribunal's appeal form.

We add that, in the facts of this case, we would have proceeded to consider the Employer's reconsideration application even if the breach of procedural fairness had not been raised at first instance (i.e., in the Section 112 appeal). As noted below, the breach of procedural fairness in this case is serious, engaging the basic, legislated, minimal requirement for an investigation under Section 77 of the *Act*.

3. What is the "record" before us?

As noted above, section 112(5) of the *Act* provides that "the director must provide the tribunal with the record that was before the director at the time of the determination, or variation of it, was made, including any witness statement and document considered by the director." This legal duty dovetails with one of the key elements in the Tribunal's traditional understanding of the Director's role and standing on a Tribunal appeal:

> … the Director's status and role at a section 112 appeal hearing should be governed by the following principles:
>
> 1. The Director is not the statutory agent for the employee(s) named in the determination.
> 2. The Director is entitled to attend, give evidence, cross-examine witnesses and make submissions at the appeal hearing.
> 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 that the determination was arrived at after a full and fair consideration of the evidence and submissions of both the employer and the employee(s).
> 4. The Director must appreciate that there is a fine line between explaining the basis for the determination and advocating in favour of a party, particularly when one party seeks to uphold the determination.
> 5. It will fall to the Employment Standards Tribunal 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 or other of the parties is not crossed.
> 6. It will also fall to the adjudicator to ensure that all relevant evidence is placed before the Tribunal for consideration.
>
> (*BWI Business World Inc. (Re),* [1996] B.C.E.S.T.D. No. 47, BCEST #D050/96)

Without commenting on whether this liberal right of standing and participation might further evolve under the new legislation and in light of other legal developments in this area, we note that the Director was given full scope to participate on this appeal.

We have had to decide this matter in light of the reality that despite the legal duty in s. 112(5) of the *Act* and the Director's standing as described in *BWI Business World*, the Director filed only the most minimal information regarding the process followed in the investigation and what efforts were made to give the Employer under investigation an opportunity to respond. Really the only particulars provided by the Director are in the September 16, 2002 fax sent by the Delegate to the Employer, which was submitted for the first time on reconsideration. We have set out the body of that fax above.

4. Is the Employer's Statutory Declaration "new evidence" and, if so, is it admissible?

Section 112(1)(c) of the *Amended Act* states that a person may appeal a Determination based on an error of law, a failure to comply with natural justice, or where "evidence has become available that was not available at the time the Determination was being made". Clearly, the intent of that provision is to support the finality of the Director's Determinations by not allowing a party to not present its whole case before the Director and then raise evidence, which could and should have been put before the Director, on Section 112 appeal before the Tribunal. The intended "relatively quick and cheap means of resolving employment disputes" (*Danyluk, supra*) under the *Act* would otherwise be undermined by needless appeals.

Equally clearly, however, it is essential to the purposes of the legislation that parties who have been denied a chance to be heard not be prevented from proving a breach of procedural fairness on appeal by not being able to submit the relevant evidence in support. To not allow a party to do so would put them in a "catch 22" situation, and would be inconsistent with the purpose of the *Act* to provide fair as well as efficient procedures: Section 2(d) of the *Act*. Adducing evidence to show a breach of procedural fairness is a very different matter from adducing evidence for the first time on appeal for the purpose of having the truth of the evidence accepted "on the merits".

This distinction, which reinforces the fairness requirement in the *Act*, is consistent with elementary administrative law principles. Even on judicial review, courts allow "new evidence" to be tendered to show jurisdictional error such as a breach of procedural fairness: *Evans Forest Products Ltd. v. British Columbia (Chief Forester),* [1995] B.C.J. No. 729 (S.C.). Brown and Evans, in *Judicial Review of Administrative Action in Canada* (2003) at pp. 6-56, 57, accurately summarize the law as follows:

> …any evidence that relates to an excess of jurisdiction is admissible, as is evidence in support of the allegation that there was "no evidence" in support of a material finding of fact made by an administrative tribunal, evidence establishing an insufficient basis for the administrative action taken, or evidence of a breach of a duty of fairness… .

Breaches of procedural fairness are often not apparent on the record. Courts have long recognized that the traditionally restrictive "fresh evidence" principles cannot apply to evidence adduced to demonstrate a breach of procedural fairness. Justice and necessity require that evidence concerning such alleged breaches can be received so that procedural fairness allegations can be meaningfully raised and addressed. That is, of course, even more true where, as in this case, the Tribunal does not have the Delegate's record of what transpired during the

investigation. Clearly, the materials tendered by the Employer in support of its Section 112 appeal were relevant and admissible for the purpose of demonstrating a breach of procedural fairness.

The same rationale supports the admissibility of Ms. Cotter's Statutory Declaration filed by the Employer in support of its reconsideration application. While it would have been preferable for Ms. Cotter (then unrepresented by counsel) to have provided the Statutory Declaration to the Adjudicator in the Section 112 appeal, the Section 77 procedural fairness issue was clearly and fairly raised by the submission she did file. As we have noted, unfortunately the Section 112 Adjudicator did not directly or expressly address that point in the Section 112 decision. In the circumstances, it is therefore understandable that the Employer would address the issue even more explicitly (this time through counsel) in its Section 116 reconsideration application and support it with a statutory declaration. In these circumstances it would be unfair and unjust to exclude the Statutory Declaration of Ms. Cotter. Excluding it would be contrary to basic principles of administrative law, and inconsistent with Sections 112(1)(c), 77, and 2(d) of the *Act*.

The actual contents of the Statutory Declaration make this point even more strongly. We will deal with them in respect to the merits of the Section 77 issue below.

5. Did the Delegate satisfy the basic requirement in Section 77 of the *Act* that "the director must make reasonable efforts to give a person under investigation an opportunity to respond"?

Section 77 of the *Act* requires that the Director "…make reasonable efforts to give a person under investigation an opportunity to respond". Section 77 is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the *Act* "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (Sections 2(b) and (d) of the *Act*). The issue here is whether the Director's Delegate made "reasonable efforts" to give the Employer an opportunity to respond to the investigation being conducted by the Delegate.

The requirement under Section 77 of the *Act* in no way requires that an oral hearing be held. That is recognized by the Tribunal in the already cited *BWI Business World* decision. It is also reflected in the following comments by the Tribunal in *Milan Holdings Ltd., supra,* at para. 30:

> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77, which requires only that "If an investigation is conducted, the director must make reasonable efforts to a give a person under investigation an opportunity to respond".

Having acknowledged the unique features of an investigation under the *Act*, and the fact that an opportunity to respond does not require a formal adjudicative hearing, it is nonetheless also true that basic to any conception of fair process or a reasonable effort to give an affected person a chance to respond is the notion that a person subject to an adverse finding must be given adequate notice of the case he or she has to meet and an opportunity to be heard. That is the minimum requirement set forth in the plain words of Section 77 of the *Act*. As rightly stated by Adjudicator Orr in *Cyberbc.Com AD & Host Services Inc. (c.o.b. 108 Temp and La Pizzaria) (Re),* BCEST #RD344/02:

> While the Tribunal has indicated that Section 77 does not necessarily require the production of the whole investigative file prior to issuing the determination and it is not intended to allow for a form of "discovery", there still must be meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective. (para. 36)

As noted above, the Determination in the present matter depended on several fundamental findings:

1. This was a case of unjust dismissal based on "unacceptable standards of performance" by the Complainant;

2. The key document was the Employer's policy document, which was not relevant to the first incident because it came into effect after the first incident;

3. The Employer did not meet the onus of providing sufficient evidence to demonstrate a clear warning following the first relevant infraction; and

4. The Complainant's version of events regarding the final incident should be accepted, and therefore the Complainant is entitled to the protections of s. 52 of the Act.

While it was not unfair for the Delegate, during an investigation, to make separate contact with the Complainant, to receive documents from her and get her side of the story in full without the Employer present, the Delegate was under a Section 77 duty of fairness to the Employer to put the key elements of the employee's complaint to the Employer so that the Employer could respond. There is no material before us that the Employer was, verbally or otherwise, made aware of the key points or representations that arose in the communications between the Delegate and the Complainant. The evidence is to the contrary.

One result was that the Delegate obtained the June 2001 policy document and proceeded to declare the first absence irrelevant, without realizing that there was an earlier document that would have been produced had this issue been put to the Employer. The Delegate then found that the Employer had not met the onus of providing "sufficient evidence to demonstrate a clear warning", without giving the Employer an opportunity to satisfy that onus. The Delegate also accepted the Complainant's version of events regarding the final incident, but did so without putting the facts to the Employer to determine whether there was a credibility issue, which of course is often the circumstance in just cause dismissal cases.

It is often said that the rationale for procedural fairness lies in both the procedural justice a person affected by an adverse decision is entitled to have and in its ability to ensure that a decision maker can get to the truth and thus make a sound decision. Both rationales are clearly implicated here.

In the Employer's Section 112 appeal materials, the March 2000 policy statement and the statement of Mr. Sung paint a different picture from the facts the Delegate recorded and obtained from the Complainant. The Delegate's brief submission on the original appeal was silent on the allegation that the Delegate failed to speak to Ms. Cotter or the supervisor about the substance of the complaint. As well, as noted above, the Delegate did not, despite the legal requirement of Section 112(5), provide a record that would refute the Employer's position. A breach of procedural fairness is clearly made out in the face of the lack of that record and on all information before us.

To further illustrate the procedural fairness concerns apparent here, we refer again to the information regarding the Employer's attendance policy document. In her Statutory Declaration, Ms. Cotter says that she did not provide to the Delegate the document which was relied upon by the Delegate. That contradicts the statement in the Delegate's Determination that Cotter had in fact provided the Delegate with that policy document. The Employer's view appears to be confirmed by the Complainant's submission (January 8, 2003) which suggests that it was the Complainant who gave the Delegate the policy. This inconsistency between the Determination and the parties' statements was not addressed in the Director's submission, and we were not given the investigation record to contradict the Employer's statement. It supports the Employer's submission that the Employer was not given notice of and an opportunity to respond to the Delegate's view of the date of the policy, which turned out to be a very material point.

Ms. Cotter's Statutory Declaration continues:

> The Delegate did not discuss it [the Company Policy] with me or inform me as to what the Complainant was saying about the policy or its application. I told the Delegate that the Complainant was told she could not have the vacation time she requested, that she was told by her supervisor Rod Sung that if she took the vacation time, her employment would be terminated. She took the vacation time, and her employment was terminated.
>
> After the telephone call with the Delegate, the Delegate met with our bookkeeper to work out the payment records. I never met with her. The next communication I received from the delegate was the Determination….

The remainder of the Statutory Declaration makes the uncontested point that none of the issues outlined in the Determination were put to the Employer for response.

While we were not provided with the investigation record in this matter, counsel for the Director did, as noted above, provide in response to the Employer's reconsideration application a one-page fax dated September 16, 2002 from the Delegate to the Employer. That fax dealt with overtime calculations. It concluded with the following statement:

> The issue of severance pay is still under investigation and I will let you know my findings as soon as possible. Feel free to call me if you have any questions.

This document is consistent with Ms. Cotter's Statutory Declaration. While the fax shows that the Delegate discussed overtime calculations with the Employer, it does not show that the Delegate made reasonable efforts to give the Employer an opportunity to respond to the Complainant's assertions on the just cause issue. A one line statement in a fax that says the matter is under investigation but "feel free to call me if you have any questions" is insufficient to discharge the Section 77 statutory duty in a case that is document dependent and credibility dependent.

As we have tried to be careful to note, neither section 77 of the *Act* nor procedural fairness in administrative law is intended to be formal and burdensome. That is particularly true in the employment standards context which, as has also been noted, is designed to be "a relatively quick and cheap means of resolving employment disputes" *Danyluk, supra.* However, even in investigations, there are minimal fairness requirements, in this case those set forth in Section 77 of the *Act.* Basic fairness requires those charged with the responsibility of making statutory decisions to ensure that a party who may be adversely affected by a decision is given notice of and a chance to respond to the essentials of the case they have to meet. The fact that the Director did not, beyond providing the September 16, 2002 fax, provide us with a record or tender any material contradicting the detailed, sworn statements made in the Employer's Statutory Declaration, confirms our conclusion that there is no material, evidence, or other reasonable basis before the Tribunal to conclude that the Delegate made reasonable efforts to give the Employer an opportunity to respond to the investigation.

6. Remedy

In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Supreme Court of Canada stated (para. 23):

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a hearing invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

In light of the breach of Section 77 of the *Act*, the Adjudicator's order will be varied to refer the matter back to the Director to be considered afresh.

B. The Director's Reconsideration Application

1. Does the Director's application present an appropriate case for reconsideration?

As noted above regarding the Employer's reconsideration application, the first issue before the Tribunal in respect to any reconsideration application is whether it warrants reconsideration: *Milan Holdings Ltd., supra,* p. 7. Another way of stating the test is "…whether the applicant has made out an arguable case of sufficient merit to warrant … reconsideration": *ibid.*

The first issue with respect to the Director's reconsideration application is thus whether it does in fact present "an arguable case of sufficient merit to warrant" reconsideration. In light of the arguments made, and the nature and purposes of the *Act*, we find it does not.

Counsel for the Director has appealed certain reasoning of the Section 112 Adjudicator, despite having won the case itself. To say the least, appealing reasons without an underlying adverse order is an unusual approach in terms of the law in general: see *Re Quintette Coal Ltd.,* [1991] B.C.J. No. 2794 (C.A.). We see nothing in the present circumstances which would make it less than novel or more appropriate than would otherwise normally be the case. While we appreciate that the Director is concerned with some of the reasoning in the Adjudicator's decision regarding the meaning of "error of law", her submissions on these issues should await a case in which the submissions will have a practical impact on the parties.

As we have referenced at several points in our decision, the nature of employment standards legislation is to provide "…a relatively quick and cheap means of resolving employment disputes": *Danyluk, supra.* This is reflected in the purposes of the legislation (see, for instance, Section 2(d)) and the ability of the Director to make determinations through less formal means. In light of this nature of the *Act* and its purposes, we see no good reason to subject the process, the parties, and the Tribunal to the further cost, delay and tribulations of litigation through seeking to revisit the reasons in a decision which upheld the Director's Determination.

We therefore dismiss the Director's reconsideration application on these bases under the first stage of analysis in *Milan Holdings, supra.*

CONCLUSION AND ORDER

The Employer's reconsideration application is granted. Pursuant to section 116(1) of the *Act*, we vary the Adjudicator's order as follows: The Determination is cancelled and Vuong's complaint is referred back to the Director for a fresh consideration in accordance with this decision.

The Director's application for reconsideration is dismissed.

Frank A. V. Falzon **Panel Chair** **Employment Standards Tribunal**	**Brent Mullin** **Tribunal Chair** **Employment Standards Tribunal**	**David B. Stevenson** **Adjudicator** **Employment Standards Tribunal**