



Citation: Golden Feet Reflexology Ltd. (Re)
2018 BCEST 1

An appeal

- by -

Golden Feet Reflexology Ltd.
("Golden Feet")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Marnee Pearce

FILE NO.: 2017A/84

DATE OF DECISION: January 10, 2018

DECISION

SUBMISSIONS

Brahm Dorst

counsel for Golden Feet Reflexology Ltd.

Janko Predovic

on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Golden Feet Reflexology Ltd. (“Golden Feet”) has filed an appeal of a Determination issued by Janko Predovic, delegate (the “Delegate”) of the Director of the Employment Standards (the “Director”), on May 10, 2017.
2. The Determination concluded that Golden Feet had contravened section 21 (business costs), section 40 (overtime), section 45 (statutory holiday pay), and section 58 (annual vacation pay) of the *ESA* when Jennifer Jing Yi Feng’s employment ended, and ordered Golden Feet to pay Ms. Feng business costs of \$93.82, overtime in the amount of \$117.72, statutory holiday pay in the amount of \$358.02, annual vacation pay in the amount of \$1,771.86, accrued interest pursuant to section 88 of the *ESA* equalling \$75.68, and to pay five administrative penalties of \$500.00 each. The total amount of the Determination is \$4,917.10.
3. This appeal alleges the Director erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was made. The appellant requests the Determination be cancelled.
4. On June 26, 2017, the Tribunal acknowledged to the parties that an appeal had been received from Golden Feet and requested production of the section 112(5) record (the “record”) from the Director.
5. On August 31, 2017, the Tribunal requested submissions from the parties regarding the completeness of the record, and requested submissions from Ms. Feng and the Director on the merits of the appeal.
6. On September 15, 2017, submissions were received from the Delegate, and a responding submission was received from Golden Feet on October 3, 2017.
7. On October 16, 2017, the Tribunal issued a decision (*Golden Feet Reflexology Ltd.*, BC EST # D108/17) ordering the resubmission of the entire record. On November 2, 2017, the Tribunal disclosed the record submitted by the Delegate on October 26, 2017, and on November 17, 2017, the appellant confirmed that all documents the appellant submitted to the Director were in the resubmitted material.
8. The Tribunal accepts that the record is now a complete record of the material that was before the Director when the Determination was made.

ISSUE

9. The issues in this appeal are whether Golden Feet has shown the Director made any of the alleged errors of law or failed to observe principles of natural justice in making the Determination. The appeal submission also raises an issue concerning Golden Feet's request to add new evidence to the appeal and if it ought to be allowed.

THE FACTS

10. My view of the facts is based on the findings made in the Determination.
11. Golden Feet operates a massage, acupuncture and reflexology clinic; the company was incorporated on December 7, 2007, and Cynthia Cai Hong Hu is listed as the company's sole director and president.
12. Ms. Feng filed a complaint alleging that Golden Feet "pushed her out" or laid her off in her role as a massage technician on or around February 29, 2016, when the company hired new employees, resulting in fewer hours of work available to her. She wrote that her hours decreased to "often 2-3 hours during a 9-hour shift." Ms. Feng requested overtime, annual vacation pay, and statutory holiday pay.
13. Golden Feet's response was that Ms. Feng was an independent contractor to whom the *ESA* did not apply.
14. A hearing was conducted on May 25, 2016, which continued on June 29, 2016, however the delegate of the Director who was assigned to the file at that time commenced an extended leave prior to issuing a Determination.
15. A new delegate, the Delegate who ultimately issued the Determination currently under appeal, took conduct of the file.
16. On February 9, 2017, Golden Feet requested an adjournment of a scheduled re-hearing, and requested production of Ms. Feng's phone records from January 2015 through March 2016 for the purpose of uncovering evidence of contact with Golden Feet's clients outside of Golden Feet's business location. It was argued that this could lead to the drawing of an inference that Ms. Feng was self-employed. The request for the production order was denied, as the probative value of the records was low. Golden Feet's adjournment request was denied.
17. On February 21, 2017, Ms. Feng requested an adjournment of the scheduled hearing as she was without an interpreter for the scheduled date. This adjournment was granted, and the hearing rescheduled to March 1, 2017.
18. A mediation occurred prior to the complaint hearing commencing, and the parties signed an Agreed Statement of Facts dated March 1, 2017. This confirmed the amounts payable for statutory holiday pay - \$358.02 - and for unauthorized deductions of business costs respecting customer tips - \$93.82 - should Ms. Feng be found to be an employee of Golden Feet. The parties also agreed on two weeks compensation for length of service should Ms. Feng be found to have been terminated without notice.

19. At the March 1, 2017, rehearing, and with the assistance of an interpreter, sworn evidence was heard from Ms. Feng, and her witness, a technician who had worked at Golden Feet between 2009 and 2013.
20. Ms. Feng adamantly denied owning any massage or reflexology equipment, did not service her clients at her home or elsewhere, and had no other jobs. She said that she did not have any role in selecting her clients, and that scheduling of clients was undertaken by the receptionist of Golden Feet.
21. At the complaint hearing, the Delegate heard evidence from Golden Feet, with Ms. Hu providing evidence in affidavit form and by way of testimony, through an interpreter. Ms. Hu's affidavit included evidence of Ms. Feng's total gross income, and this was accepted by the Director as the best record of actual days and hours worked by Ms. Feng.
22. Two witnesses were sworn in and testified on behalf of Golden Feet, both of whom worked as receptionists and technicians while Ms. Feng worked there. Their evidence was provided in affidavit form and by way of sworn testimony, and each corroborated that technicians were free to come and go during the work day, set their own days and hours of work, were free to decline certain clients or services, were free to work at other locations or on their own, were free to wear their own clothing, and were not required to stay the full length of any scheduled shift. The Director accepted this evidence as largely reliable.
23. Golden Feet submitted evidence in the form of a copy of an advertisement to support that Ms. Feng owned a massage table that she was trying to sell. The Director found the probative value of this evidence to be "quite low" as even if Ms. Feng owned and was selling a massage table, this does not necessarily result in the conclusion she was running a massage business from home.
24. The Director found that there was no other credible and reliable evidence to support a finding that Ms. Feng had clients outside Golden Feet.
25. Ms. Feng worked for the periods November 1, 2013 – October 31, 2014, and November 1, 2014 – February 29, 2016, in the capacity of massage technician.
26. The parties agreed that Ms. Feng was paid 100% commission in her role as a massage technician, depending on the services provided, although they disagreed on her employment status.
27. A contract, interpreted into English for the purposes of the hearing and entitled "Self-Employment Agreement" was signed by Ms. Feng on November 1, 2015. The Director found the contract was not consistent with the parties' understanding of their relationship, and the intentions of the contract, including that Ms. Feng was to be an independent contractor, were rejected.
28. On February 27, 2016, Ms. Feng requested time off from Golden Feet to visit family and travel. Ms. Hu replied by way of text message that two months might be acceptable, but if any more time off was required, it might be best for Ms. Feng to quit with the consequence that when she returned to work, she would lose her seniority. Ms. Feng's text response expressed dissatisfaction with this suggestion.
29. Some days after expressing her dissatisfaction with Ms. Hu's response to her request for time off, Ms. Feng returned her tip box and locker key to Golden Feet, and never returned to work.

30. The Director concluded that Ms. Feng was an employee, not an independent contractor, and that Ms. Feng had quit her employment.

ARGUMENT

Error of Law

31. Golden Feet makes three main arguments under this heading.
32. Golden Feet argues that the Director misapplied the ‘integration test’ by considering this from the employer’s perspective, rather than the perspective of the employee. If the Delegate had applied the integration/operation test from the persona of the Complainant’s business, it would have led to the conclusion that the Complainant was not an employee.
33. Golden Feet says that the Delegate framed the integration test as: Could the company function as a business without the workers? That was an unfair approach. The proper question is: “*Could the workers function as a business without the company?*”
34. The Director argued that common law tests remain subordinate to the interrelated definitions of “employee”, “employer”, and “work” found in section 1 of the *ESA*. Further, there is no single conclusive test that determines whether a person is an employee, but the central question is “whether the person who has been engaged to perform services is performing them as a person in business on his or his own account”.
35. Golden Feet suggested in response that there would be more evidence on this issue if the Director had phoned the Appellant’s remaining two witnesses.
36. Golden Feet argues that the Director erred in law by failing to give proper weight to the importance of the ‘control test’ writing that it was an error for the Director to subordinate the “direction and control” factor by giving it less weight than other common law factors. Golden Feet argued that the definition of employer refers to “direction and control”, and that it is also the most important of the common law tests. As it is the only common law factor expressly identified in the statutory definition of ‘employer’, it therefore must remain the most important consideration, and given more weight than common law tests that have not been incorporated into the *ESA*.
37. The Director’s submissions concerning the ‘control test’ rebut the position that “direction and control” is the paramount factor in an analysis of employee vs. independent contractor, arguing that there may be circumstances where other considerations are more important than control or direction. The list of factors relevant to the employment status inquiry is non-exhaustive and there is no set formula on the application of the factors, and each factor’s relative weight will depend on the particular facts of each case.
38. Golden Feet argues that the *ESA* does not abolish the concept of independent contractors, and the possibility that “there is not just one business, but two, should have been considered.”
39. Golden Feet argues that the Director misapprehended counsel’s argument and erred in law with respect to ‘ownership of clients’. Golden Feet argued that the question “Whose business is it?” is related to the question

“Whose clients are they?” The Director incorrectly addressed the client ownership issue by using ownership as a verb (“she owns the clients”) rather than as a possessive adjective (“she had her own clients”).

40. The Director submitted that there was no misapprehension of Golden Feet’s argument of client ownership, but rather the argument was duly considered and rejected on the facts. The question of “whose clients are they?” was interpreted to mean a form of client exclusivity, or in other words, the power to deal with clients to the exclusion of others.

Breach of Natural Justice

41. Golden Feet argues the Director breached principles of natural justice by not permitting the Appellant an opportunity to finish calling its witnesses. One witness, Ms. Hu, was heard informally and through her affidavit, but two witnesses who were on Golden Feet’s witness list were not heard at all due to alleged time constraints, which Golden Feet argues were artificial.
42. Golden Feet says its two witnesses would have confirmed that it was common for technicians to meet clients outside of Golden Feet for business purposes.
43. The Director says that the evidence of the remaining witnesses, based on the summary statements, bore similarities to evidence already adduced by the witnesses called. The Appellant when asked if it was necessary to hear from the remaining witnesses in the interest of efficiency, “replied with indifference” and did not voice any objection to the remaining witnesses not being called at any point during the hearing.
44. In response to the Director’s submission, Golden Feet’s counsel wrote that an argument was made at the hearing regarding the necessity of calling the final witnesses. Counsel says that the final two witnesses, although speaking to the same general issues, would provide different specifics, as they would speak to different time periods. The witnesses would speak to their own reasons for believing the Complainant had her own clients, and provide some new information that would be helpful in assessing the credibility of the Complainant and the Appellant.

New Evidence

45. Golden Feet says it has new evidence that was not available at the time of the rehearing and attaches an affidavit from Ms. Hu. Ms. Hu deposes that Ms. Feng provided services to clients from her home and attached an email from a former client to this effect.
46. Golden Feet requested that a letter from one witnesses and an affidavit from another witness who were not called by telephone at the hearing be treated as new evidence.
47. The Director submitted that the new evidence must be rejected because the evidence did not meet the four-part legal test set out in *Davies et. al.*, BC EST # D171/03. The evidence, with the exercise of due diligence, could have been discovered and presented to the Director prior to the Determination being made, the evidence repeats evidence adduced at the hearing and already duly considered as set out in the Determination, and nothing now produced has sufficient probative value that it could have led the Delegate to a different conclusion.

ANALYSIS

48. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

- 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.

49. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

Error of Law

50. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

51. The burden of establishing that the Determination is incorrect rests with the Appellant, Golden Feet.

52. The *ESA* does not allow for an appeal based on alleged findings of fact unless such findings raise an error of law, if they were based on no evidence, or on a view of facts that could not reasonably be entertained based on the evidence before the Director (*Britco Structures Ltd.*, BC EST # D260/03).

53. It should also be noted that where there is no evidence that the Director acted without any evidence or a view of evidence that could not be reasonably entertained, or committed a ‘palpable, overriding error’ or arrived at ‘clearly wrong conclusion of fact’, the Tribunal is reluctant to substitute a Delegate’s findings of fact even if it is inclined to reach a different conclusion on the evidence (*Re: United Specialty Products Ltd.*, BC EST # D075/12).

54. In support of the argument that the Director erred in law by finding Ms. Feng to be an employee rather than an independent contractor, Golden Feet argued that the Director misapplied the common law tests of integration, control, and client ‘ownership’.

55. The law relating to a person's status under the *ESA* is not determined by common law principles, but by an application of the provisions of the *ESA*. *Project Headstart Marketing Ltd.*, BC EST # D164/98, reads, in part:
- ...I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".
56. In order to decide the employment status of Ms. Feng, the Director must focus on the definitions of "employee", "employer", and "work" found in section 1 of the *ESA*. The definition of "employee" includes a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee". An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee". The term "work" is defined as "the labour or services an employee performs for an employer..."
57. In *Ajay Chahal carrying on business as Zip Cartage*, BC EST # D109/14, the Member wrote:
- In a very real sense it is counter-productive to spend a significant amount of time analyzing the relationship from the perspective of common law tests. It unnecessarily complicates the issue and invites appeals such as this one. The Tribunal has repeatedly said the question of the status of a person under the *Act* is determined in the context of the definitions of "employee", "employer" and "work". The only appropriate "test" is whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *Act*.
58. In the Determination, the Director considered the statutory definitions of "employee", "employer", and "work", noted that the common law tests remain subordinate to these definitions, and was satisfied that Ms. Feng was an employee who performed work for her employer, Golden Feet.
59. The Director also referred to the traditional common law tests applied by courts to determine whether a person is an employee or an independent contractor. The Director considered *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, wherein the Supreme Court of Canada noted that there is no one conclusive test, but a multitude of factors that need to be evaluated and weighed depending on the particular circumstances and facts of each case. The Director then delineated the factors he considered, stating:
- The central question is whether the person who has been engaged to perform services is performing them as a person in business on his or her own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors may include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of tasks. The list is non-exhaustive and there is no formula for the application of factors. Each factor's relative weight will depend on the particular facts of each case.
60. Golden Feet submits that the statutory definitions are not clear enough to lead to "inescapable conclusions" without considering common law tests, and cited *Windy Willow Farms*, BC EST# D161/05. As noted in *Windy Willow Farms*, *supra*, common law tests may remain useful in focusing attention on relevant factors,

although they must be applied bearing in mind the broad statutory definitions which in turn are interpreted in light of the policy objectives of the *ESA*.

61. I will turn now to the specific errors of general law identified by Golden Feet.
62. Golden Feet has argued that the Director erred in law by failing to give proper weight to the ‘control test’, and that the Director should not give it less weight than other common law factors, particularly as it is the only common law factor expressly identified in the statutory definition of ‘employer’.
63. The Director, in the Determination, explained that Ms. Feng had substantial flexibility with respect to working hours and clients, which was in keeping with the nature of her work – a job that was physically demanding and requiring close client contact. The flexibility or ‘freedom’ however did not extend to other areas such as setting her own rates, and the Director wrote that accordingly he gave the “freedom factor less weight in this case than I might in others”.
64. The Director responded to Golden Feet’s argument that the control test should not be given less weight than other common-law tests, by pointing to the Supreme Court of Canada decision in *Sagaz, supra*, which found that the list of factors relevant to the employment status is non-exhaustive and there is no set formula on how these should be applied or the weight that should be given to each factor.
65. As there is some evidence on the basis of which the Director could conclude that Golden Feet exercised the type of control the authorities suggest will imply a relationship of employment, I cannot conclude that the Director erred in law in the sense of acting without any evidence. Nor can I say that the Director acted on a view of the facts which could not reasonably be entertained.
66. The integration test deals with the individual’s degree of involvement in the organization. This test presupposes that if the services provided by an individual are integral to the organization, then their involvement is one of an employee. If the services can be viewed as part of a separate business of the individual who provides the services, the individual may then be viewed as an independent contractor, or on the basis that the businesses are mutually dependent on each other.
67. Golden Feet’s argued that the integration test should have been considered from the perspective of the employee, not the employer, and that the Director erred in law by considering the integration test from the perspective of the employer – could the company function as a business without the workers.
68. The Director responded to this argument, noting that in considering whether the Complainant could function as a business without the Appellant, the circumstantial evidence regarding whether Ms. Feng worked outside of Golden Feet was duly considered within the Determination and the probative value of this evidence was deemed to be “quite low”. There was insufficient evidence to support a finding that Ms. Feng worked for herself or anyone else other than Golden Feet during the period in question.
69. As there is some evidence on the basis of which the Director could conclude that Golden Feet considered the integration test including the lack of credible evidence to suggest the Ms. Feng worked outside of Golden Feet, I cannot find that the Director erred in law in the sense of acting without any evidence. Nor can I say that the Director acted on a view of facts that could not be reasonably entertained.

70. Golden Feet argued that the Director misunderstood the argument made at the hearing concerning the issue of “Whose clients are they?” Golden Feet had argued that because the evidence showed that Ms. Feng rarely treated walk-in clients at Golden Feet, but had her own book of regular clients, this suggested she was in business or herself.
71. The Director responded that he understood the argument to mean that a form of client exclusivity existed, or that Ms. Feng had the power to deal with clients, to the exclusion of others. The Director found that Golden Feet had the ability to offer Ms. Feng’s clients to other technicians should she be unavailable, and that the clients belonged to Golden Feet.
72. I am unable to identify an error of law in the argument concerning “client ownership”. The Director considered the question, weighed the evidence, and found differently than the Appellant’s argument at the hearing. I am unable to say that the Director acted on a view of the facts which could not reasonably be entertained.
73. A conclusion on the above factors – control, integration, and client ownership – was determined on findings of fact, a question over which the Tribunal has no jurisdiction. I am not persuaded that there is any error of law regarding the findings made by the Director, as there was evidence available and considered on which the Director could reasonably arrive at the decisions made.
74. The Director considered and based his determination on the definition of “employee”, “employer” and “work” in the *ESA* as well as various common law tests, while acknowledging the Supreme Court of Canada’s decision in *Sagaz, supra*, that there is not one conclusive test, but rather a multitude of factors dependant on the facts of each case. I find the decision of the Director to be both rationally and reasonably supported in the law and in the evidence.
75. For the reasons set out above, I am not persuaded the Director has made any error of law and these arguments are dismissed.

Failure to observe the principles of natural justice

76. Natural justice requires that the parties be given notice of the case, be told the case against them, and be afforded a fair opportunity of answering it: *Kaloti (c.o.b. National Courier Service)*, BC EST# D232/99.
77. The issue in this case is whether the Appellant was denied a fair opportunity of answering the Respondent’s complaint that she was entitled to wages and benefits after her employment ended, as two witnesses were not called to provide their testimony although they were included on the Employer’s witness list.
78. A refusal to admit relevant evidence can be a breach of natural justice, but this is not the invariable result of such a ruling; see *Universite de Quebec a Trois-Rivieres v. Larocque* [1993] 1 S.C.R. 471. Whether a refusal to admit relevant evidence denies a party a fair hearing will depend on circumstances of each case.

79. Golden Feet states:

We note that our submission lists three witnesses that were not able to be called because of time constraints, but confirm that the breach of justice relates mostly to the two phone-in witnesses...

and also concerning Ms Hu:

...much of her evidence was elicited by the Director through questions that were asked of her throughout the proceeding.

80. The Director considered Ms. Hu's testimony as well as her affidavit evidence, which was found to be the best evidence of the extent of wages that may be owing to the Complainant. Whether formally sworn in and providing testimony with the assistance of an interpreter, as indicated in the Determination, or whether providing evidence informally at the hearing, Ms. Hu had the opportunity to be heard, and her evidence considered.

81. I find, given the opportunity to be heard, there is no breach of natural justice regarding Ms. Hu.

82. As Ms. Hu provided evidence at the hearing both in person and by way of affidavit, and given the submission of Golden Feet, the issue of breach of natural justice will be considered as it concerns the two witnesses who would have provided telephone evidence.

83. There is conflicting evidence concerning whether the additional two witnesses were not called at the hearing by agreement or if Golden Feet was denied, with reasons, the opportunity to introduce their telephone evidence. The Determination makes no reference to the Employer's desire to call these witnesses, or explain why they were not.

84. Counsel for Golden Feet and the Director agree that the Director questioned the necessity of the Appellant phoning the two witnesses given that the information provided concerning their evidence was similar to that of the Appellant's other witnesses.

85. While the Director recalls that Golden Feet elected to not call the two additional witnesses, counsel for Golden Feet writes that he argued it was necessary to call these witnesses, as they would speak to the same general issues, but during different time periods. They would speak to instances where the Complainant refused clients and they could speak to their own reasons for believing the Complainant had her own client. There would be parts of their evidence that would repeat earlier evidence, but this was necessary for "assessing credibility given the wildly different version of events offered by the Complainant and the Appellant".

86. Counsel for Golden Feet writes that the Director responded by saying he had no concerns about the credibility of the Appellant's witnesses, and therefore it was not necessary to phone the remaining two witnesses.

87. The 4th Amended List of Witnesses provided to the Director by the Appellant in preparation for the hearing lists five witnesses. In addition to the principal of Golden Feet, two employees attended in person and their evidence, as summarized in the witness list, was intended to show that technicians are free to come and go, set their own hours, and choose and refuse customers. The two remaining witnesses were prepared to attend by

telephone, and the summary of their evidence was intended to show that technicians were free to come and go, choose their own hours and clients; one of the witnesses has not been employed by Golden Feet since 2014.

88. If the Director did deny Golden Feet the opportunity to call its additional two witnesses for the reasons outlined in the Appellant's submission, namely that they would cover the same material and their evidence was not necessary to establish credibility, this does not necessarily mean that a breach of natural justice occurred.
89. The Director has broad discretion when deciding the method(s) that may be employed in order to address complaints. The handling of a complaint is a multi-faceted process, and the approach the Director may take in bringing the process to a conclusion may change as circumstances warrant, and as information is gathered. What the legislation appears to have intended is that the process be flexible.
90. The Director has discretion in whether he chooses to hear all witnesses put forward by a party. Whether a breach of natural justice occurred as a result of the exclusion of witnesses will depend on the facts of each case.
91. Even if the decision to deny the introduction of evidence from these two telephone witnesses was a decision made solely by the Delegate, I find the information before the Delegate regarding their evidence and his conclusion on the credibility of the earlier witnesses to be in support of this decision. He listened to the Complainant's counsel's argument on this point, confirmed with Complainant's counsel that the evidence to be presented was as outlined in the 4th Amended List of Witnesses, and found the additional evidence to be similar to evidence already adduced by the witnesses called by the Appellant.
92. Indeed, the Determination found that Golden Feet's witnesses were more reliable than Ms. Feng's witnesses, and their evidence was preferred. As the additional witnesses would have reiterated this accepted testimony, even if for a different time period, a decision to exclude them was not unfair in all the circumstances.
93. I find that Golden Feet was not denied natural justice. The Director considered the Appellant's evidence; Golden Feet had a full opportunity to respond to Ms. Feng's complaint.
94. I conclude that the Director did not fail to observe the principles of natural justice, and I dismiss this ground for appeal.

New Evidence

95. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

- ^{96.} An affidavit of Ms. Hu dated June 19, 2017, includes an attached, completed questionnaire that was emailed from a former client of Ms. Feng, who stated she received massage treatments at Ms. Feng's residence.
- ^{97.} An unsworn letter from Xiao Hong Huang ("Jenny") dated June 19, 2017, provides hearsay evidence concerning the Complainant working elsewhere than Golden Feet. Jenny was one of the telephone witnesses who was not heard at the March 2017 hearing.
- ^{98.} An affidavit from Ellen Pratt, legal assistant to counsel for Golden Feet, outlined part of a telephone conversation she heard between Golden Feet's counsel, Mr. Dorst, and Sarah Peng, on June 19, 2017. Ms. Peng said that the Complainant told her she meets clients for massage at her home. Ms. Peng has not worked at Golden Feet since 2014, and it is unknown when the Complainant allegedly made this statement to Ms. Peng.
- ^{99.} The Appellant argues that the evidence of the two uncalled witnesses could not have been adduced at the hearing because the Delegate declined to hear their telephone testimony.
- ^{100.} None of the submitted documents meet the required threshold for consideration as new evidence.
- ^{101.} The unsworn letter from Jenny is based on hearsay. It repeats a conversation between Lillian and the Complainant, which was subsequently repeated by Lillian to Angela, and then told to Jenny by Angela. It has little or no probative value, and would not have reasonably led the Delegate to a different conclusion on the material issue, that is, did Ms. Feng provide massage services from her home.
- ^{102.} The affidavit of Ellen Pratt is similarly based on hearsay. Ms. Pratt overheard Ms. Peng tell Mr. Dorst on June 19, 2017, that the Complainant told her that she met clients at home. However, Ms. Peng has not worked at Golden Feet as a receptionist since 2014, and there is no indication when the Complainant made this statement. There is little of probative value contained within this affidavit, and the evidence would not reasonably have led the Delegate to a different conclusion on the issue of whether Ms. Feng provided massage services from her home.
- ^{103.} As for Ms. Hu's affidavit of June 19, 2017, containing a completed questionnaire obtained after the March 1, 2017, hearing, this evidence does not meet the Tribunal's test for new evidence because with the exercise of due diligence, it could have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. Accordingly, the evidence will not be accepted, and I dismiss this ground for appeal.
- ^{104.} I am not persuaded there has been an error of law, a breach of natural justice, or that there is new evidence that should be admitted on appeal. Accordingly, the appeal is dismissed.

ORDER

- ^{105.} Pursuant to section 115 of the *ESA*, I order the Determination dated May 10, 2017, be confirmed in the amount of \$4,917.10, together with any interest that has accrued under section 88 of the *ESA*.

Marnee Pearce
Member
Employment Standards Tribunal