Employment Standards TRIBUNAL

Citation: The Piano Room Bistro & Lounge Ltd. (Re)
2018 BCEST 16

An appeal

- by -

The Piano Room Bistro & Lounge Ltd. carrying on business as Café Ca Va
("The Piano Room" or the "Employer")

- 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: Shafik Bhalloo

FILE NO.: 2017A/143

DATE OF DECISION: February 21, 2018

DECISION

SUBMISSIONS

Amin Leo Sabounchi	on behalf of The Piano Room Bistro & Lounge Ltd. carrying on business as Café Ca Va

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), The Piano Room Bistro & Lounge Ltd. carrying on business as Café Ca Va ("The Piano Room" or the "Employer") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on November 3, 2017 (the "Determination").

2. The Determination found that the Piano Room contravened Part 3, sections 18 (wages) and 21 ("Deductions"); and Part 7, section 58 (annual vacation pay) of the *ESA* in respect of the employment of Alain Rayé ("Mr. Rayé"). The Determination ordered The Piano Room to pay Mr. Rayé wages in the total amount of $770.72 inclusive of accrued interest. The Determination also levied two administrative penalties against the Employer totaling $1,000 for breaches of sections 18 and 21 of the *ESA*. The total amount of the Determination is $1,770.72.

3. The Employer appeals the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

4. The deadline to file the appeal of the Determination was 4:30 p.m. on December 11, 2017. On December 12, 2017, after the expiry of the appeal period, the Tribunal received the Employer's appeal together with written submissions on the merits of the appeal and the Employer's application for an extension of time to appeal. In the Employer's extension application, Amin Leo Sabounchi ("Mr. Sabounchi"), the sole director and officer of The Piano Room, provides reasons why the Employer was late in filing its appeal. As I am not dealing with the extension application here, I will not get into the reasons in any detail at this stage.

5. On December 18, 2017, the Tribunal corresponded with the parties advising them that it had received the Employer's appeal including its request for an extension of the deadline to file the appeal. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) "record" (the "Record") and notified the other parties that no submissions were being sought from them on the request to extend the appeal period or the merits of the appeal at this stage.

6. The Record was provided by the Director to the Tribunal on December 20, 2017. A copy of the same was sent by the Tribunal to the Employer and Mr. Rayé on January 8, 2018, and both parties were provided an opportunity to object to its completeness.

7. Neither the Employer nor Mr. Rayé objected to the completeness of the Record and the Tribunal accepts it as complete.

8. On January 30, 2018, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed under section 114(1). If all or part of the appeal is not dismissed, the Tribunal would seek submissions from Mr. Rayé and the Director on the merits of the appeal. Subsequently, the Tribunal sent a further letter to the parties on February 1, 2018, correcting an error in its earlier letter and informed the parties that if all or part of the appeal is not dismissed, the Tribunal will invite Mr. Rayé and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. The Employer will then be given an opportunity to make a final reply to those submissions, if any.

9. In this case I will make my decision whether there is any reasonable prospect that the appeal will succeed based on my review of the Employer's submissions, the section 112(5) Record and the Reasons for the Determination (the "Reasons").

ISSUE

10. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

11. The Employer, The Piano Room, is a company duly incorporated under the laws of British Columbia and operates a restaurant in West Vancouver, British Columbia, called Café Ca Va.

12. According to a BC Online: Registrar of Companies — Corporation Search conducted on April 13, 2017, The Piano Room was incorporated on May 26, 2009, and Mr. Sabounchi is listed as its sole director and officer.

13. Mr. Rayé commenced working with The Piano Room as an independent contractor in April 2016 providing the latter with consultation services and advice while the restaurant, Café Ca Va, underwent renovations.

14. On April 14, 2016, Mr. Rayé and The Piano Room executed a contract that provided that Mr. Rayé would become an employee (an executive chef) upon the re-opening of the restaurant after renovations. The contract also provided that he would receive $31.25 per hour.

15. On September 27, 2016, the restaurant had its "soft opening" followed by an official opening in early October 2016.

16. Effective October 9, 2016, Mr. Rayé negotiated a wage increase with the Employer to $2,500.00 "net of deductions" per biweekly pay period.

17. Mr. Rayé's last day of work was in late March, 2017. The Employer was dissatisfied with Mr. Rayé's conduct at work and his treatment of other employees which I need not get into here as the employment of Mr. Rayé was not terminated for cause.

18. The Employer provided Mr. Rayé a period of working notice of the termination of his employment as explained in paragraph 29 below.

19. On April 15, 2017, Mr. Rayé filed a complaint under section 74 of the *ESA* alleging that The Piano Room contravened the *ESA* by failing to pay him regular wages, overtime wages, vacation pay, statutory holiday pay, compensation for length of service, and by making unauthorized deductions from his wages (the "Complaint").

20. The Record does not contain any information about a mediation taking place between the parties before the Hearing but the Reasons note that a mediation session did take place at the Employment Standards Branch (the "Branch"). Evidently the mediation was unsuccessful and did not result in a full and final settlement of the Complaint. Notwithstanding the failed mediation, the Reasons note that the Employer paid Mr. Rayé, on a without prejudice basis, $345.31 in regular wages and $13.81 in vacation pay through the office of the Director of Employment Standards.

21. On July 25, 2017, a delegate of the Director conducted a hearing of the Complaint (the Hearing").

22. Mr. Sabounchi attended the Hearing on behalf of the Employer and Mr. Rayé on his own behalf.

23. The delegate considered the following questions at the Hearing:

1. Was Mr. Rayé a manager as defined by the Act? If so, did he work more hours than agreed?
2. Was Mr. Rayé given adequate written working notice and allowed to work the notice period?
3. Did the Employer make unauthorized deductions from Mr. Rayés wages?

24. While the Employer's appeal only challenges the delegate's determinations pertaining to questions 2 and 3 above, it is important to briefly note the delegate's conclusions of fact and determination of question 1 to the extent that it is relevant to question 3.

25. With respect to question 1, in concluding that Mr. Rayé was a manager and therefore excluded from the hours of work, overtime and statutory holiday provisions of the *ESA*, the delegate reasoned as follows:

> Mr. Rayé was hired as an executive chef. Although an individual's job title is not determinative of whether he is a manager, for the reasons that follow I find that Mr. Rayé was employed in an executive capacity and was therefore a manager under the Act.
>
> Mr. Rayé is an acclaimed chef. He did not challenge Mr. Sabounchi's evidence that he and Ms. Rayé were the faces of the restaurant. There was no manager above Mr. Rayé — he reported directly to the Employer's principals, Mr. Sabounchi and Ms. Mahinsa. He did not challenge Mr. Sabounchi's evidence that he handled the day-to-day operation of the kitchen while Mr. Sabounchi and Ms. Mahinsa remained mostly in the background.
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> Mr. Rayés written contract included a paragraph outlining the services he was expected to provide, which included cooking, menu designing, food costing (with the restriction that it should be under 30 percent), and kitchen management. It made clear he was responsible for hiring, training and firing as necessary all kitchen staff. The contract, which was executed in April, did not contemplate Mr. Rayé working full-time in the kitchen.

> There is no dispute that shortly after the restaurant opened opening in October he began working on the line on a regular basis. Mr. Rayé negotiated for a salary increase in exchange for expanded duties. I am satisfied that the parties reached a bona fide agreement despite their failure to reduce that agreement to writing. I find that that the terms and conditions of employment changed — Mr. Rayé spent more time cooking in exchange for a higher salary — but the executive aspects of his position did not change and, in my view, remained fundamental to his employment. Mr. Rayé may have peeled carrots and potatoes, but he was primarily employed for his menu-creating and kitchen-running expertise as an executive chef.
>
> The power to hire and fire is an indicator of management status. Mr. Rayé acknowledged that he decided how many cooks and dishwashers were to be employed. He had the power to hire and fire cooks and dishwashers and he exercised that power. The email evidence also demonstrates that he determined the wages of the employees he hired. When hiring employees, Mr. Rayé was not simply making recommendations, he was making final decisions. He did not need approval from Mr. Sabounchi or anyone else. He was the authority for all matters back-of-house.
>
> Mr. Rayé acknowledged he set the schedules for kitchen staff, telling the employees when to start and end work. I find he also determined his own schedule, subject to his promise to ensure the work that needed to be done was done. The evidence suggests if he had hired or retained more kitchen staff he would not have needed to work as often on the line. He did not suggest his ability to hire was restricted in any way.
>
> Determining what products a business sells and from whom supplies should be sourced are indicators of a person employed in an executive capacity. As the executive chef, Mr. Rayé alone determined what dishes the restaurant would serve and what the specials would be. He set the prices of the dishes and determined which suppliers from whom to source ingredients, which together meant he was determining the profit margins of the business. These were key decisions critical to the Employer's business. Although Mr. Sabounchi protested Mr. Rayés food costs as he considered them too high, there was no evidence that he was able to change Mr. Rayé's ways.

26. With respect to the related question of whether Mr. Rayé worked more hours than agreed to (and entitled to additional pay), the delegate responded in the negative reasoning as follows:

> Although managers are excluded from Parts 4 and 5 of the Act, they are entitled to be paid according to their terms of employment for all hours worked. The evidence does not support a finding that the Employer and Mr. Rayé agreed that he would work a specific number of hours of work in exchange for his salary. **The uncontested evidence of Mr. Sabounchi, corroborated by Ms. Mahinsa, was that Mr. Rayé negotiated to increase his salary to $2,500.00 net of expenses biweekly in exchange for working** *whatever hours it took to get the job done.* **His previous hourly wage no longer applied** (**bold** mine).
>
> As a chef of 23 years' experience, Mr. Rayé was well aware of what he was signing up for, and was able to hire more staff if he needed to. I find he was paid all the wages he earned according to the terms of his employment contract.
>
> Managers must also be paid at least minimum wage for all hours worked in each pay period. As the minimum wage was $10.85 per hour, and Mr. Rayé was paid at least $3,319.23 in each full pay period, even if I accepted Mr. Rayé's account of the hours he worked based on the electronic tracking

> system it is clear that Mr. Rayé received at least minimum wage for all hours worked in every pay period.

27. With respect to question 2, that is, whether Mr. Rayé was given adequate written working notice and allowed to work the notice period, the delegate noted the requirements of section 63 of the *ESA* where an employee is dismissed without cause as in the case of Mr. Rayé. He stated that the employee is entitled to notice tied to length of service where the employee has worked for more than three months and, furthermore, the employer may discharge this liability by giving either written working notice or a combination of notice and compensation.

28. Based on Mr. Rayé's length of employment, the delegate said that he was entitled to one week's notice of termination. He also added that if an employee does not work during the notice period, the employer does not have to pay.

29. Having said this, the delegate went on to note that there was no dispute that Mr. Rayé received written notice of termination at some time on March 25, 2017. The notice said that Mr. Rayé's last day would be "Friday, April 1, 2017," which was an error since April 1 was Saturday. A subsequent letter from the Employer to Mr. Rayé on March 30, 2017, corrected this error and confirmed that he was only permitted to work until Friday, March 31. In concluding that Mr. Rayé was entitled to be paid, during the notice period, for March 26, 27, 30, and April 1, but not for March 31, the delegate reasoned as follows:

> The day Mr. Rayé received the notice is excluded from the calculation of one week, so the notice period ran from Sunday March 26 to Saturday April 1, inclusive.
>
> The parties' presented conflicting accounts of the days Mr. Rayé worked after the Employer provided Mr. Rayé with written notice. They agreed that Mr. Rayé worked on March 26 and 27 and did not work on March 28 and 29. Mr. Rayé said he did not work after March 27. Mr. Sabounchi said Mr. Rayé worked on March 30 and was sent home. I prefer Mr. Sabounchi's account because it was supported by the email sent on March 30, and because it is more favourable to the Complainant. I find Mr. Rayé worked on March 26, 27 and 30.
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> The correspondence shows that on March 30, 2017, Mr. Sabounchi asked Mr. Rayé to work from home preparing the recipe book the rest of that day and on March 31. Mr. Rayé did not do that. I find Mr. Rayé had the opportunity to work on March 31 and chose not to. However, Mr.Rayé did not have the opportunity to work on April 1, as the Employer had indicated his final day was March 31. Accordingly, Mr. Rayé was entitled to be paid for March 26, 27, 30, and April 1, but not for March 31 when he could have worked but did not.

30. Having determined the dates, during the notice period, Mr. Rayé was entitled to be paid, the delegate went on to calculate wages owing to Mr. Raye's as follows:

> Mr. Rayé was paid a gross wage of $3,341.15 in each of the last four full pay periods. I find this is the best evidence of his wage for the purposes of calculating compensation during the notice period. The weekly wage is half that amount, or $1,670.58. As he normally worked five days per week but worked on four days during the notice period he would normally be entitled to 4/5 of his weekly

> wage. However, as March 26 fell in the previous pay period, for which Mr. Rayé was paid his normal salary, there are three days' wages owing.
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> Following a mediation session with the Employment Standards Branch, the Employer paid Mr. Rayé $345.31 representing 11.05 hours at $31.25 per hour. While I appreciate that this approach may have been put forward by the Branch, the approach is not correct as it does not reflect Mr. Rayé's wage rate. Mr. Rayé was paid a salary based on a five-day work week regardless of the hours worked each day. His wages were not tied to the electronic time Records, which the Employer argued, and I am inclined to agree, were unreliable. The Employer cannot change a fundamental term of Mr. Rayé employment in his final week. Thus Mr. Rayé is entitled to his salary for the three days he worked ($1,002.35). Deducting what the Employer paid leaves a balance of $657.04. Vacation pay of 4% ($26.28) is added.

31. The delegate also levied an administrative penalty of $500 pursuant to section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") against the Employer for contravening section 18 of the *ESA* for failing to pay Mr. Rayé all wages owed to him within 48 hours of March 31.

32. With respect to question 3 - whether the Employer made unauthorized deductions from Mr. Rayé's wages - the delegate noted in the Reasons that in the last 5 wage statements issued to Mr. Rayé there appeared a deduction for "jacket" in the amount of $15.00, in each wage statement, for a total of $75.00. While Mr. Sabounchi explained at the Hearing that it was not a deduction but an expense the Employer paid, the delegate found his explanation unsatisfactory and concluded the Employer contravened section 21 of the *ESA* by withholding these wages and levied an administrative penalty of $500 for the most recent instance of this contravention being March 31, 2017.

SUBMISSIONS OF EMPLOYER

33. Mr. Sabounchi submitted written appeal submissions on behalf of the Employer including submissions requesting an extension of time to file the appeal. As previously indicated, I am not deciding the application for an extension of the appeal period here. I will only consider the submissions relating to the merits of the appeal.

34. The first set of submissions on the merits relate to the finding of contravention of section 18 of the *ESA* against the Employer. Mr. Sabounchi states that the Employer is appealing the administrative penalty of $500 imposed for contravention of section 18 of the *ESA* because the Employer followed the "guidance and instruction" of the Branch and its representative in calculating the wages owed and making the payment they did to Mr. Rayé based on "an hourly rate". He adds, the payment the Employer made was "based on the fact that Mr. Raye was destructive and unproductive intentionally at the work place and resulting [sic] in 11 hours of work on 3 shifts, which normally would be 2.5-3 times this amount of hours" [sic]. He also adds that that "our original cheque [to Mr. Rayé] was for $600+ which Mr. Raye (sic) turned down". In the circumstances, he argues that it is unfair for the Employer "to be penalized". He also concludes by adding that "[w]e still do not agree with the wage calculation of the final week as Mr. Raye (sic) clearly was slandering the business and not performing on purpose and hense (sic) we offered him to leave (sic) and work from home and he was given the opportunity to work."

35. The second set of submissions of Mr. Sabounchi relate to the finding of contravention of section 21 of the *ESA* against the Employer. Mr. Sabounchi contends that the delegate erred in making this finding because the Employer never deducted Mr. Rayé's wages. He states, at the Hearing, the delegate determined that Mr. Rayé's wages were $2,500 net and he was paid this amount by the Employer each time. While the wage statements issued to Mr. Rayé showed a deduction of $15 for "jacket", this charge was "(f)or our own internal documentation" and never deducted from Mr. Rayé's wages, he contends. He adds that the Employer increased Mr. Rayé's gross wages to offset the jacket charge of $15.00 in each wage statement. Therefore, he submits the penalty of $500 and the award of $75 for deductions should be varied or cancelled.

ANALYSIS

36. The grounds of appeal under the *ESA* are statutorily limited to those found in section 112(1):

> **Appeal of director's determination**
>
> 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.

37. The Tribunal has repeatedly stated in decisions that 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 on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

38. The grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

39. Having delineated some broad principles applicable to appeals, in this case, the Employer appeals on two distinct grounds, namely, that the Director erred in law and breached the principles of natural justice in making the Determination. I will review each ground separately below starting with the natural justice ground of appeal.

40. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05).

41. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.

42. Having reviewed the Determination including particularly the Record and the written appeal submissions of Mr. Sabounchi, I do not find the Employer has discharged its burden to persuade the Tribunal that there is an error in the Determination on the natural justice ground of appeal. To the contrary, I find sufficient evidence in the Record and the Reasons that that the delegate of the Director afforded the Employer all of the procedural rights within the meaning of the decisions in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd. (c.o.b. English Inn & Resort), supra*. Therefore, I dismiss the natural justice ground of appeal.

43. With respect to the "error of law" ground of appeal, the Tribunal has adopted the following definition of error of law delineated in 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.

44. As previously noted the employer makes two sets of submissions challenging the Director's findings of contraventions of sections 18 and 21 of the *ESA*. I will consider each below in context of the "error of law" ground of appeal.

45. With respect to the submissions challenging the finding of contravention of section 18 of the *ESA*, I note that Mr. Sabounchi appears to be referring to "guidance and instruction" he or the Employer may have received in context of the mediation proceedings between the parties before the Hearing. It is important to note that mediation proceedings are without prejudice and confidential. There is nothing in the Record that is informative on what went on in the mediation between the parties. What is evident is that the parties did not reach a settlement agreement during the mediation process and the matter proceeded to the Hearing before an adjudicator. *If*, as contended by Mr. Sabounchi, the representative of the Director assisting the parties at mediation suggested how the Employer should "calculate [Mr. Rayé's] final wages", and the Employer relied upon any such direction from the mediator to calculate and send Mr. Rayé his wages after the parties failed to

reach a settlement agreement at the mediation, I do not find that the subsequent different determination of wages owing to Mr. Rayé at the Hearing gives rise to an error of law on the part of the Director.

46. In my view, the mediation process is a settlement process; it is not an adjudication process. It was, therefore, not part of the function of the mediator to adjudicate Mr. Rayé's complaint; nor is there any evidence he did so. It was also not the function of the mediator to assure or guarantee to the Employer the outcome of the Complaint if it proceeded to adjudication; nor is there any evidence that the mediator did so. It was entirely possible the parties might face a different outcome at the Hearing than the one mooted by the mediator for the purposes of encouraging settlement. While the Employer may be unhappy with the outcome at the Hearing, it is not an error of law on the part of the Director that the outcome in the Determination is not consistent with what the mediator *may* have mooted in the mediation or settlement process.

47. Having said this, I also note that Mr. Sabounchi, under his submissions challenging contravention of section 18 of the *ESA*, states that the Employer does not agree with "the wage calculation of the final week" because of the conduct of Mr. Rayé. I find this submission in the nature of re-argument as this argument was advanced at the Hearing without any success. The Tribunal has stated time and again that an appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced at the hearing and rejected in the determination. I also note that allowing re-argument on appeal is contrary to one of the stated objectives of the *ESA* in section 2(d), namely, the fair and efficient procedures for resolving disputes.

48. Therefore, pursuant to section 114(1)(f) of the *ESA*, I find that the appeal of the Determination as concerns the finding of contravention of section 18 of the *ESA* has no reasonable prospect of succeeding and I dismiss it.

49. With respect to the second set of appeal submissions of Mr. Sabounchi challenging the finding of contravention of section 21 of the *ESA*, I note that while Mr. Sabounchi is advancing the same argument he made at the Hearing, namely, that the Employer did not make any deduction for "jacket" from Mr. Rayé's wages, on a closer examination of the findings of the delegate in the Determination and my review of the wage statements in the Record, I am unable to dismiss Mr. Sabounchi's argument as having no reasonable prospect of succeeding. More particularly, the delegate made a finding of fact in the Determination that "Mr. Rayé negotiated a wage increase to $2,500 'net of deductions' per biweekly pay period". While the last 5 wage statements issued by the Employer to Mr. Rayé show a deduction of $15 each time for "jacket" for a total of $75, the same wage statements also show he was paid a net amount of $2,500 (except for the very last wage statement that also deducted an additional amount of $678.51 for "DEMAND NOTICE EXECUTION"). In the circumstances, I find the Director and Mr. Rayé should be afforded an opportunity to make submissions on the merits of the employer's appeal with respect to the matter of wage deductions.

50. Further, if the Director and Mr. Rayé wish to make submissions on the timeliness of the appeal they may do so when responding to the above.

ORDER

51. Pursuant to section 114(1)(f) of the *ESA,* I order the appeal of the Determination, as concerns the finding of contravention of section 18 of the *ESA*, be dismissed.

52. The Director and Mr. Rayé are invited to file submissions on the matter of the deduction from wages. The Piano Room shall be given an opportunity to reply to those submissions.

53. I continue to be seized of this appeal and following receipt and review of the submissions of the parties, if any, I shall finalize the appeal.

Shafik Bhalloo
Member
Employment Standards Tribunal