Employment Standards TRIBUNAL

Citation: Palmero Innovative Group Ltd. (Re)
2018 BCEST 4

An appeal

- by -

Palmero Innovative Group Ltd. carrying on business as Oxygen Yoga & Fitness Squamish
("Oxygen Yoga" or the "Company")

- 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/134

DATE OF DECISION: January 17, 2018

DECISION

SUBMISSIONS

Luis Palmero	on behalf of Palmero Innovative Group Ltd. carrying on business as Oxygen Yoga & Fitness Squamish

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Palmero Innovative Group Ltd. carrying on business as Oxygen Yoga & Fitness Squamish ("Oxygen Yoga" or the "Company") has filed an appeal of a determination issued by Rodney Strandberg, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on September 12, 2017 (the "Determination").

2. The deadline for filing an appeal of the Determination was 4:30 p.m. on October 20, 2017. The Tribunal received Oxygen Yoga's Appeal Form on November 16, 2017, over three weeks after the expiry of the appeal period. The appeal included written submissions of one of Oxygen Yoga's directors, Luis Ramon Palmero Lopez ("Mr. Palmero" "), on the merits of the appeal and a request for an extension of time to file the appeal. The appeal did not include a copy of the Director's written reasons for the Determination, which is a statutory requirement for inclusion with an appeal (see section 112(2)(a)(i.1)) of the *ESA*).

3. The Determination concluded that Oxygen Yoga contravened Part 3, section 18 (wages) and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Jessey L. Meisner ("Ms. Meisner"), and ordered Oxygen Yoga to pay Ms. Meisner wages in the amount of $866.93 including accrued interest. The Determination also levied administrative penalties under section 29 of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $2,000.00 for breaches of sections 16, 17, 18 and 27 of the *ESA.* The total amount of the Determination is $2,866.93.

4. In its Appeal Form, Oxygen Yoga has checked off all three grounds of appeal in section 112(1) of the *ESA*, namely, the director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made. The main thrust of Oxygen Yoga's argument on appeal is that the parties entered into a settlement agreement which it wants to honour. Oxygen Yoga is seeking the Tribunal to cancel the Determination or vary it consistent with the parties' settlement agreement.

5. In correspondence dated November 21, 2017, the Tribunal sent Oxygen Yoga's appeal and request to extend the appeal period to Ms. Meisner and to the Director for informational purposes only. The Tribunal informed Ms. Meisner and the Director that no submissions were being requested from them at this time. In the same letter, the Tribunal requested the Director to provide the section 112(5) "record" (the "Record") to the Tribunal.

6. On November 29, 2017, the Delegate sent the Record to the Tribunal.

7. On December 1, 2017, the Tribunal disclosed the Record to Oxygen Yoga and Ms. Meisner and afforded both parties an opportunity to object to its completeness. No objections were received from either party by the deadline of December 15, 2017. However, on December 20, 2017, Mr. Palmero telephoned the Tribunal's office and suggested that the Record was incomplete as it was missing a copy of the Settlement Agreement signed by him which he included in Oxygen Yoga's appeal. For the reasons set out under the heading "COMPLETENESS OF THE RECORD" below, I do not find the signed Settlement Agreement of Mr. Palmero formed part of the Record. In the result, I find the Record, as produced by the Director, to be complete.

8. On December 19, 2017, the Tribunal informed the parties that the appeal would be decided by a Tribunal Member. I have decided this appeal is an appropriate case for consideration under section 114 of the *ESA*. Therefore, at this stage, I will assess the appeal based on the Appeal Form, written submissions of Mr. Palmero and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal without a hearing of any kind for any of the reasons listed in that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite Ms. Meisner 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. Oxygen Yoga will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *ESA*.

THE FACTS

10. As Oxygen Yoga failed to submit the reasons for the Determination with its appeal and the Director has rejected Oxygen Yoga's request for the reasons as being out of time, I am left to rely upon the Record to determine the facts and the steps leading to the Determination.

11. Oxygen Yoga appears to operate a yoga fitness studio in Squamish, British Columbia.

12. On September 8, 2017, a delegate of the Director conducted a B.C. Online: Registrar of Companies – Corporation Search of Palmero Innovative Group Ltd. which indicates that the Company was incorporated on June 26, 2013, and has three directors with one of the directors also serving as an officer. More particularly, while Mr. Palmero is both a director and an officer of the Company, Luis Ramon Palmero Zurutuza ("Mr. Zurutuza") and Alejandra Lopez Baquedano are directors only.

13. Pursuant to section 74 of the *ESA*, Ms. Meisner filed her complaint on April 4, 2017, alleging that she worked for Oxygen Yoga as a Receptionist and Desk Manager from August 22, 2016, to November 30, 2016, at an hourly rate of $12 to $15 per hour. She states she quit her employment because she was "constantly hounding" Mr. Palmero for payment of wages and never received wages "in a timely manner". In November 2016, she states that she "had enough and started looking for a reliable, paid work". She claims that the

Company owed her $476.25 in regular wages for the period November 1, 2016, to November 30, 2016 (the "Complaint").

14. The Record contains an email dated May 31, 2017, from a delegate of the Director to Mr. Palermo at his Oxygen Yoga gmail address attaching a Demand for Employment Records and Notice of Complaint Hearing. The text of the email informs Mr. Palmero that the Hearing of the Complaint is scheduled at 9:00 a.m. on June 29, 2017. However, before that date, the Employment Standards Branch (the "Branch") assigned a mediator and settlement discussions ensued between the parties.

15. The Record shows an email dated May 19, 2017, from the mediator to Mr. Palmero informing the latter that Ms. Meisner has offered to settle her original claim for wages of $476.25 for $126.00. The email also informed Mr. Palmero that if the Complaint were to proceed to a formal hearing and a formal ruling were made, mandatory administrative penalties of $500 would be meted out for each contravention of the *ESA*.

16. There is a further email from the mediator, dated May 29, 2017, to Mr. Palmero asking if he was interested in "discuss[ing] resolution" of the Complaint. Mr. Palmero responds by email on May 30, 2017, advising the mediator that he would call him later in the day or the next.

17. On May 31, 2017, Mr. Palmero sent another email to the mediator advising that "we are settling for 126 [sic]". In the same email he also states "[p]lease prepare the paperwork", presumably referring to the terms of settlement.

18. On June 7, 2017, the mediator sent an email to Mr. Palmero attaching a Settlement Agreement signed by both the mediator and Ms. Meisner. He asks Mr. Palmero to send the payment of $126.00 to Ms. Meisner's address on Bailey Street and then to send him a note once he has "put this in the mail". He also advises Mr. Palmero that "[o]nce [Ms. Meisner] confirms receipt of payment … we will then cancel the Demand for Payroll Records (records due on June 19) and the Complaint Hearing."

19. On June 12, 2017, Mr. Palmero responds by email to the mediator stating "I will send all this documentation by [T]hursday".

20. On June 15, 2017, a delegate of the Director sent Mr. Palermo an email advising, among other things, that until the file is officially resolved, the Branch continues its standards practices which in this case includes a reminder that Complaint Hearing documents and Demand for Employer Records are both due by 4:00 p.m. on Monday, June 19, 2017.

21. On June 16, 2017, Mr. Palermo responds by email to the delegate and includes the mediator in his response. He states: "Yes, and everything has been sent. Final check was on the mail Yesterday [sic]". He also asks: "So do we still have that complaint hearing on Monday?" The mediator responds by email on the same date stating: "There will not be a complaint hearing next week. Once I have confirmation from Jessey that she has the payment we will close the file."

22. On June 29, 2017, the mediator sent a further email to Mr. Palmero informing him that Ms. Meisner had not yet received the payment. He states:"If it was mailed to her on June 15 it should have been delivered by now". The mediator asks Mr. Palmero to send him a note with the mailing address for Ms. Meisner he sent

the payment to in order to determine whether the payment was sent to the wrong address. The mediator requests Mr. Palmero to get back to him as soon as possible and no later than July 4, 2017.

23. After not hearing from Mr. Palmero, the mediator sent him an email on July 6, 2017. In the email he says to Mr. Palmero that he has not heard back from him. He also says "[y]ou did not sign and return the Settlement Agreement to me. We will be scheduling a new adjudication hearing on this matter. You will receive this notice shortly".

24. On July 10, 2017, the mediator sends another email to Mr. Palermo informing him that there are now two ways to pay Ms. Meisner $126.00, namely, by e-transfer to Ms. Meisner's email address or to go to his bank and get the bank to wire transfer to the Branch's trust account. He states that this needs to be done by July 11, 2017, failing which "we will proceed and all applicable $500 per contravention penalties will be applied."

25. On July 11, 2017, Mr. Palermo sent an email to the mediator stating: "The e-transfer done [sic]". In response to this email, the delegate, on the same date, emails him back asking if he did an interact transfer to Ms. Meisner's email. There appears to be no response from Mr. Palmero to that email.

26. On July 12, 2017, the mediator again emails Mr. Palmero at 8:15 a.m. and asks him to send him by noon that day a copy of the e-transfer from his bank as Ms. Meisner had not yet received the funds. Again, there is no response from Mr. Palmero to this email either.

27. On August 17, 2017, a delegate of the Director sent to Mr. Palermo an email attaching an Amended Notice of Hearing with a rescheduled date for the hearing on Thursday, September 7, 2017, at 9:00 a.m. (the "Hearing" or the "Hearing Date"). The email informed Mr. Palmero that the Hearing would be held by a conference call for a full day and provided a call-in number.

28. The Amended Notice of Hearing was also sent to Mr. Palmero and the other directors of the company by registered mail at the addresses provided for them in the Company search. It is noteworthy that Mr. Palmero's address at Granada Crescent, North Vancouver, is also the Company's Registered and Records office address.

29. On September 7, 2017, at 9:21 a.m., a delegate of the Director emailed Mr. Palmero informing him that he is "supposed to be on a conference call right now for the Complaint Hearing set for Sept 7/17 at 9:00 a.m." She asked him to dial in immediately and advises that if the officer does not hear from him by 9:30 a.m. then he will commence the Hearing in his absence.

30. At 9:41 a.m. on September 7, Mr. Palmero responds that he is at work and "won't be able to answer till 1 pm." He also adds that "[t]his is the first email I get from you".

31. The Hearing of the Complaint proceeded on September 7, 2017, absent Mr. Palmero.

32. On September 12, 2017, the delegate who conducted the Hearing issued the Determination in favour of Ms. Meisner as delineated in the Overview section above.

33. The Determination was sent to Oxygen Yoga's business address in Squamish, British Columbia, by registered mail. The Determination was also sent to Mr. Palmero's and the Company's registered and records office address at Granada Crescent, in North Vancouver. It was also sent to the other two directors of the Company at their addresses provided in the Company search.

SUBMISSIONS OF OXYGEN YOGA

34. Attached to Oxygen Yoga's late appeal are written submissions of Mr. Palmero and about 90 pages of documents.

35. All but about 4 documents adduced by Oxygen Yoga are contained in the Director's Record. The first is the version of the Settlement Agreement that is purportedly signed by Mr. Palmero on June 7, 2017. Based on this version of the Settlement Agreement, Mr. Palmero contends that he entered into a settlement agreement with Ms. Meisner to pay her $126.00 in full and final settlement of all matters. The version of the Settlement agreement in the Record is one that is only signed by the mediator and Ms. Meisner which the mediator sent to Mr. Palmero by email on June 7, 2017.

36. Mr. Palmero also provides a single page photocopy of two cheques dated June 7 and 21, 2017, for $126.00 each, signed by him on the Company's cheques, payable to Ms. Meisner. Both are marked void with a pen or pencil with two lines drawn across the middle of the cheques. Neither copy of these cheques form part of the Record. They appear to be produced for the first time in the appeal. Mr. Palermo states that the Company "arranged" for Ms. Meisner to get "not one but 2 cheques" in mail at the Bailey Street address provided by the mediator. He further states in the submissions "please find copies of the return mail and cheques send [sic] on June 15th 2017 to the address provided". However, there is no "return mail" except bare copies of the two cheques. That is, there are no envelopes showing any mail was sent by him to Ms. Meisner at the Bailey Street address or returned.

37. The third document, understandably not forming part of the Record, is a letter dated November 9, 2017, from the delegate who presided over the Hearing. In this letter, the delegate acknowledges receipt of Oxygen Yoga's request, on Novembers 2, 2017, for written reasons for the Determination and declines that request for two reasons, namely, the request was out of time and made after the expiry of the appeal period. The request should have been made by September 27, 2017, as provided in the Determination.

38. The fourth document that is not part of the Director's Record is a "final request" correspondence from a delegate on October 31, 2017, reminding Oxygen Yoga and Mr. Palmero that $2,866.93 is owed pursuant to the Determination which needs to be paid by November 14, 2017, otherwise collection proceedings will be commenced. This document was addressed to Oxygen Yoga at its business address but emailed to Mr. Palmero.

39. The balance of the documents submitted by Mr. Palmero includes emails and texts between Mr. Palmero and Ms. Meisner; emails between a delegate of the Director and Mr. Palmero; emails between Mr. Palmero and the mediator; and a copy of the Determination. All these documents form part of the Record.

40. Mr. Palmero states he was not aware of the Hearing date of September 7, 2017. He states that the Branch had "the wrong mailing address" and that "the communication between us via email was not precise". He states he emailed the delegate "that I was unable to answer as I was in an emergency matter" (presumably referring to the date of the Hearing when he was sent an email by a delegate reminding him that he was required to be on a conference call participating in the Hearing).

41. He further submits that "[t]ill Oct 30th, I was still waiting for an answer from the officer as for what was going on [sic]. Nothing was provided". He states that he subsequently received a letter from the Branch - the "final request for payment" by the Director dated October 31, 2017 – and wishes to appeal the Determination and honour the "first settlement signed by the 3 parties".

42. He also submits that the Branch "knew about our mailing address, and in October 31st [sic] they send a new letter" informing that the deadline for appealing was October 20. He states, by the time he received the letter on October 31, it was past the deadline for appealing.

43. He also submits that the delegate who presided over the Hearing "has denied any of my request [sic] to engage in a conversation after Sept 7th, 2017". He states the Determination only takes into consideration Ms. Meisner's evidence and not the theft she committed at the studio.

COMPLETENESS OF THE RECORD

44. As previously indicated, after the time expired for objecting to the completeness of the Record, Mr. Palmero contacted the Tribunal's office to indicate that the Record is incomplete because it is missing the Settlement Agreement he signed. I am not convinced that the version of the Settlement Agreement Mr. Palmero signed which was submitted by Oxygen Yoga as part of its appeal formed part of the Record or existed at the time the Determination was being made. My reasons for this conclusion follow.

45. In the Record, there is an email from the mediator to Mr. Palmero dated May 19, 2017, informing the latter that Ms. Meisner is willing to compromise her original claim of $476.25 for wages in exchange for a payment of $126 to her by Oxygen Yoga. The mediator further advises in the same email that if Mr. Palermo is interested in settling then he "will do up a written Settlement Agreement".

46. On May 29, 2017, the mediator followed up with a further email to Mr. Palmero asking the latter to contact him if he is interested in discussing a resolution.

47. Two days later, on May 30, 2017, Mr. Palermo emailed the mediator that he will contact him later that day or the next.

48. On May 31, 2017, Mr. Palermo followed up with a further email to the mediator advising that he is agreeable to paying Ms. Meisner $126 in settlement. In the same email, directs the mediator to "prepare the paperwork" which I take to mean the terms of settlement or settlement agreement.

49. On June 7, 2017, the mediator emailed Mr. Palermo the "paperwork" – that is, the Settlement Agreement signed by both the mediator and Ms. Meisner on May 31 and June 6, 2017, respectively.

50. In response to the June 7 email of the mediator, on June 12, 2017, Mr. Palmero emails the mediator and advises that he "will send this documentation by [T]hursday", which is June 15, 2017.

51. There is nothing in the Record or in the documents provided by Oxygen Yoga in the appeal evidencing any "documentation" or signed Settlement Agreement sent by Mr. Palmero to the mediator, whether on Thursday, June 15, 2017, or at any other time.

52. On July 6, 2017, the mediator again emails Mr. Palermo advising the latter that he has not heard from him nor received a signed copy of the Settlement Agreement. In the same email, the delegate warns Mr. Palermo that a new adjudication hearing would be scheduled in the matter and he (Mr. Palmero) would receive notice shortly.

53. On August 17, 2017, a delegate of the Director sent an email to Mr. Palmero with an amended Notice of Complaint Hearing scheduling the Hearing on September 7, 2017.

54. Based on the above evidence, I find it more probable that Mr. Palmero did not sign and send the Settlement Agreement to the mediator before the Determination was made. If he had signed the Settlement Agreement on June 7, 2017 (as indicated in the version Mr. Palmero has produced in the Appeal) then it stands to reason that Mr. Palmero would have sent it to the mediator shortly after June 7, 2017, or, at the latest, very shortly after the mediator asked about it in his July 6, 2017, email to Mr. Palmero. However, this did not happen. In the circumstances, I find it more likely that the signed Settlement Agreement produced by Mr. Palmero in the appeal, only came to existence after the Determination was made and likely for the purpose of the Appeal. Therefore, I find the Record, as adduced by the Director in the Appeal, complete as presented.

ANALYSIS

55. Oxygen Yoga appeals the Determination on all three grounds set out in section 112(1)(a),(b) and (c) of the *ESA,* namely, the delegate erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made.

56. Section 112(2) of the *ESA* sets out the requirements for filing an appeal:

> 112 (2) A person who wishes to appeal a determination to the tribunal under subsection (1) *must*, within the appeal period established under subsection (3),
>
> (a) deliver to the office of the tribunal
>
> (i) a written request specifying the grounds on which the appeal is based under subsection (1),
>
> (i.1) *a copy of the director's written reasons for the determination,* and
>
> (ii) payment of the appeal fee, if any, prescribed by regulation, and
>
> (b) deliver a copy of the request under paragraph (a)(i) to the director [emphasis added].

57. The requirements in subsection (2)(a) are mandatory as the legislature prefaces them with the word "must", therefore, the appellant is required to both specify the grounds upon which the appeal is based *and* include a copy of the director's reasons for the determination. These materials *have* to be delivered to the Tribunal before the end of the appeal period - "30 days after the date of service of the determination if the person was served by registered mail" (s. 112(3)).

58. In this case, as previously indicated, Oxygen Yoga's appeal was received by the Tribunal on November 16, 2016, twenty-seven (27) days after the expiry of the appeal period. While Oxygen Yoga has requested an extension of time to appeal (an application I need not decide here), it has failed to include in its appeal a copy of the reasons for the Determination. Oxygen Yoga has included in the appeal the Director's letter of November 9, 2017, in which the Director denied Oxygen Yoga's request because it was made out of time and after expiry of the appeal period.

59. I note, at page 2 of the Determination, it states **"[a] person named in a Determination may make a written request for the reasons for the Determination"** and that request must be delivered to an office of the Employment Standards Branch "**by September 27, 2017**". Therefore, at the time Oxygen Yoga filed its late appeal on November 16, 2017, it was already out of time for requesting the reasons by almost one and a half months. Therefore, I find that it was within the Director's authority to refuse Oxygen Yoga's request for the written reasons.

60. Having said this, while the issue of Oxygen Yoga's late appeal is pending, Oxygen Yoga's failure to provide the reasons with its appeal means that Oxygen Yoga's appeal has not been perfected. Section 114(1)(h) of the *ESA* affords the Tribunal the discretion to dismiss an appeal where the appellant has failed to meet one or more requirements of section 112(2) of the *ESA*. In failing to provide the reasons for the Determination with its appeal, I find that Oxygen Yoga has failed to meet the requirements of section 112(2)(a)(i.1) of the *ESA*. For this reason, I dismiss Oxygen Yoga's appeal.

61. In the alternative, I also find that Oxygen Yoga's appeal has no reasonable prospect of succeeding pursuant to section 114(1)(f) of the *ESA* for the reasons set out below.

62. Oxygen Yoga, as indicated previously, has checked off all three grounds of appeal available under section 112(1) of the *ESA* in its Appeal Form but Mr. Palmero's submissions do very little to advance, in a coherent fashion, cogent evidence in support of these grounds of appeal. I find it more efficient and to simply address every argument that he has advanced in the order in which they appear in his submissions.

63. First, Mr. Palmero contends that the parties made a settlement on May 31, 2017, pursuant to which he agreed to pay Ms. Meisner $126 in full and final settlement of all matters. In support of this contention he produces the version of the Settlement Agreement that shows his signature dated June 7, 2017, and the signatures of Ms. Meisner and the mediator. I have already decided, in the section entitled "COMPLETENESS OF THE RECORD" above, the signed Settlement Agreement Mr. Palmero is relying upon was not sent to the mediator or the Director at any time before the Determination was made. There is also no cogent evidence showing that the said document was sent by Mr. Palmero to the mediator or the Director at any time after the Determination was made.

64. I note, however, that Mr. Palmero did send an email to the mediator on May 31, 2017, in which he instructed the mediator that he was agreeable to paying Ms. Meisner $126 to settle her Complaint and asked the mediator to "prepare the paperwork". That "paperwork" - the Settlement Agreement - was then prepared by the mediator who, after signing it himself and getting Ms. Meisner to sign it, sent it to Mr. Palmero for signing on June 7, 2017. However, as previously noted, Mr. Palmero has failed to adduce any evidence that he signed and delivered back to the mediator the Settlement Agreement before or after the Determination was made. I am convinced that he did not sign the Settlement Agreement before the Determination was made because the mediator inquired about a signed Settlement Agreement in his July 6, 2017, email to Mr. Palmero. Mr. Palmero appears not to have responded to the mediator's query. If Mr. Palmero had already signed the Settlement Agreement on June 7, 2017, there is no reason for him to not send it to the mediator shortly thereafter or at the latest after he received the mediator's email inquiring about the signed Settlement Agreement.

65. I also note that the Settlement Agreement the mediator sent to Mr. Palmero on June 7, 2017, (although it contains some incorrect dates), in paragraph 6 unequivocally states that "[t]he parties agree that this *Settlement Agreement is binding once it is signed* (emphasis added), and may be enforced by the Director of Employment Standards." Having determined that Mr. Palmero did not sign and send the Settlement Agreement to the mediator at any time before (and after) the Determination, I find there was not an enforceable settlement agreement between the parties and Ms. Meisner was free to proceed to a Hearing of her Complaint as she did.

66. In face of my finding that there was not a binding or enforceable settlement agreement between the parties, I do not find that section 78 and particularly subsections (3) and (4) governing settlement agreements and enforcement of settlement agreements by the Director apply in this case.

67. The next argument Mr. Palmero advances is that he sent Ms. Meisner the settlement payment of $126 by cheques, not once but twice, at her Bailey Street address. As indicated previously, he provides a single page photocopy of two cheques in the amount of $126.00 each, dated June 7, 2017, and June 21, 2017, signed by him and payable to Ms. Meisner. Both are marked void with a pen or pencil with two lines drawn across the middle of the cheques. Neither of these cheques or copies of these cheques form part of the Record and appear to be produced for the first time in the appeal without an explanation from Mr. Palmero why they were not previously produced. This does raise an issue of admissibility of this evidence in the appeal.

68. Having considered the issue of admissibility, I do not find the two photocopied cheques qualify as "new evidence" under the fourfold criteria for admitting new evidence on appeal set out in *Re: Merilus Technologies Inc.* (BC EST # D171/03) because they do not pass the first of the four conjunctive criteria set out in the case. That is, the cheques do not constitute evidence that could not, without the exercise of due diligence, have been discovered and presented to the Director during the adjudication of the complaint and prior to the Determination being made. Therefore, the photocopied cheques are inadmissible as new evidence on appeal.

69. Having said this, even if the photocopied cheques were allowed into evidence, I am not convinced that Mr. Palmero ever sent either of them to Ms. Meisner by mail. In his submissions he states that the Company "arranged" for Ms. Meisner to get "not one but 2 cheques" in mail at her Bailey Street address. He also states: "please find copies of the return mail and cheques send [sic] on June 15th 2017 to the address provided". However, there is no "return mail" except bare copies of the two cheques provided. That is, there are no

envelopes showing the mail to Ms. Meisner at the Bailey Street address was sent or returned. I am not convinced any mail enclosing any cheques was ever sent by Mr. Palmero and I can say the same of any purported e-transfers he says he made to Ms. Meisner.

70. Mr. Palmero also contends that he was not aware of the Hearing date of September 7, 2017. He states that the Branch had "the wrong mailing address" and that "the communication between us via email was not precise". I find this contention incredulous at the very least. Mr. Palmero seemed to receive all other emails that were sent to the same Oxygen Yoga gmail address that he appears to exclusively use when communicating with the mediator or any delegate of the Director. It is also the same email address he has provided on Oxygen Yoga's Appeal Form. However, for some reason, he did not get the delegate's email of August 17, 2017, enclosing the amended Notice of Complaint Hearing. I also note that the amended Notice of Complaint Hearing was also sent on August 17, by registered mail, to Oxygen Yoga's business address in Squamish and to all three directors of the Company including Mr. Palmero whose address at Granada Crescent, in North Vancouver is also the registered and records office address of the Company as previously noted. In the circumstances, I am not persuaded at all that Mr. Palmero was not aware of the Hearing date of September 7, 2017.

71. He also submits, when he was sent an email by a delegate on the morning of September 7, 2017, and told that he was supposed to be participating in the Hearing, he sent a return email to the delegate stating: "I was unable to answer as I was in an emergency matter." I find this response somewhat inconsistent with the actual email he sent to the delegate wherein he stated "I'm at work and won't be able to answer till 1 pm". There is no indication of any "emergency matter" he was involved in, unless Mr. Palermo thinks working is an "emergency matter". In any event, I do not find anything turns on this.

72. With respect to his submission that "[t]ill Oct 30th, I was still waiting for an answer from the officer as for what was going on [sic]", I find this equally incredulous. In his email exchange with the delegate on the morning of the Hearing, the delegate informed him that "if the Officer does not hear from [him] by 9:30 a.m. he will commence the Hearing without [him]". Surely he knew "what was going on". He was also sent the Determination, by registered mail, at the business address of Oxygen Yoga on September 12, 2017. The Determination was also sent by registered mail to him at the Granada Crescent address and to the other two directors of the Company at their addresses provided in the Company search. It was also sent to a new address for Oxygen Yoga in Squamish. Therefore, I am not at all persuaded that Mr. Palmero was waiting for any answer from any delegate or officer about "what was going on" as at October 30, 2017. I find he knew that there was a Determination against Oxygen Yoga.

73. I also find it probable that Mr. Palermo was only moved to file a late appeal of the Determination after he received the "final request for payment" letter of October 31, 2017, reminding him and Oxygen Yoga that the latter owed $2,866.93 pursuant to the Determination and if not paid by November 14, 2017, collection proceedings would ensue. Incidentally, this letter was sent to the same gmail address of Oxygen Yoga that the Amended Notice of Complaint Hearing was sent and seems to have been successfully received by Mr. Palmero. While Mr. Palmero complains that by the time he received this letter it was past the deadline for appealing, I find that he was aware of the Determination well before the appeal deadline expired. It is noteworthy that Mr. Palmero has never suggested in any of his written submissions that his Granada

Crescent, North Vancouver address which is also the Company's registered and records office address where the Determination was also sent is inaccurate or wrong.

74. In summary, I do not find there is any legal basis to interfere with the Determination and I dismiss the Company's appeal pursuant to section 114(1) (h) and, in the alternative, under section 114(1)(f).

ORDER

75. Pursuant to section 115 of the *ESA*, I confirm the Determination, made on September 12, 2017, together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal