

An appeal

- by -

Amanda Duong carrying on business as Elegant Nails  
("Ms. Duong" or "Elegant")

- 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)

**PANEL:** Shafik Bhalloo

**FILE NO.:** 2019/143

**DATE OF DECISION:** October 2, 2019

## DECISION

### SUBMISSIONS

Amanda Duong on her own behalf carrying on business as Elegant Nails

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Amanda Duong carrying on business as Elegant Nails (“Ms. Duong” or “Elegant”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 11, 2019 (the “Determination”).
2. The Determination found that Elegant contravened Part 3, section 17 and 18 (wages), Part 4, section 40 (overtime), and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Bich Kim Ngan Nguyen (“Ms. Nguyen”). The Determination ordered Elegant to pay Ms. Nguyen wages in the total amount of \$1,830.77 inclusive of accrued interest. The Determination also levied three administrative penalties against Elegant of \$500 each under the *Employment Standards Regulation* (the “*ESR*”) for breach of sections 17, 18, and 28 of the *ESA*. The total amount of the Determination is \$3,330.77.
3. Ms. Duong appeals the Determination on the “natural justice” and “new evidence” grounds of appeal under section 112(1)(b) and (c) of the *ESA*. Ms. Duong seeks the Tribunal to cancel the Determination.
4. While Ms. Duong has made written submissions in support of the appeal and filed same with her Appeal Form which the Tribunal received on July 19, 2019 (the final day for filing the appeal), Ms. Duong is also seeking an extension of time to file all her submissions until March 19, 2020. Ms. Duong states that she needs the extension because she “may need to engage a lawyer to represent [her]”. She states she has “consulted with one or two law firms, but ... not decided whether or not [she] should ask for help of a lawyer.” At present, she states she does not need anyone to represent her “but in the future, if it’s necessary”, she may need a representative.
5. On July 30, 2019, the Tribunal corresponded with the parties advising them that it had received Ms. Duong’s appeal. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) “record” (the “Record”) and notified the Director and Ms. Nguyen that no submissions were being sought from them on the merits of the appeal or the extension application at this time. The Tribunal also requested the Employer to provide any additional reasons and argument as well as any additional documents in support of its appeal by August 30, 2019.
6. The Tribunal received the Record from the Director on August 13, 2019. On August 19, a copy of the same was sent by the Tribunal to Ms. Duong and Ms. Nguyen and both parties were provided an opportunity to object to its completeness. Neither Ms. Duong nor Ms. Nguyen objected to the completeness of the Record and the Tribunal accepts it as complete.

7. On August 30, 2019, the Tribunal received additional submissions from Ms. Duong. The Tribunal forwarded a copy of the submissions to Ms. Nguyen and the Director and they were informed that, at this time, no submissions were being sought from them.
8. On September 5, 2019, 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. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from Ms. Nguyen and the Director 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. Based on my review of the Employer's submissions, the section 112(5) Record, and the Reasons for the Determination (the "Reasons"), I will decide whether there is any reasonable prospect that the appeal will succeed.

### **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**

#### ***Background***

11. Based on the B.C. Online Corporate Registry "Sole Proprietorship Summary" (the "Summary") obtained by the delegate of the Director on January 8, 2019, Elegant Nails is a sole proprietorship involved in the business of "Beauty Salons". It was registered on March 3, 2014, and Ms. Duong is the sole proprietor of the business. The business is situated in Delta, British Columbia.
12. Ms. Nguyen was employed in the business as a nail technician until September 10, 2018. The start and end dates of her employment are disputed by the parties.
13. The parties agree that the rate of pay of Ms. Nguyen was 50 percent commission on services provided plus any gratuities she receives.
14. On September 19, 2018, Ms. Nguyen filed a complaint under section 74 of the *ESA* alleging that Ms. Duong or Elegant contravened the *ESA* by failing to pay regular wages, minimum wage, overtime, statutory holiday pay, and vacation pay.
15. On January 30, 2019, the delegate conducted a hearing of the Complaint (the "Hearing"). The Hearing was attended by both Ms. Nguyen and Ms. Duong and they each gave evidence on their own behalf which the delegate summarizes in the Reasons. I will refer to the relevant parts of the parties' evidence below including the questions the delegate considered in the Hearing and her analysis of the same in making the Determination

### ***The Reasons for the Determination***

#### ***(i) Issues***

16. The delegate considered the following two questions at the Hearing of the Complaint:

- a. Is Ms. Nguyen entitled to outstanding wages?
- b. If so, in what amount?

#### ***(ii) Preliminary matter at the Hearing***

17. The delegate notes that, at the Hearing, Ms. Nguyen requested to submit new documentary evidence that included the following:

- a. a record of hours she worked from August 21 - September 10, 2018;
- b. some translated Facebook messages between her and Ms. Duong during the period August 13 to September 15, 2018;
- c. a translated job advertisement posted in a Vietnamese Facebook group; and
- d. some resubmitted screenshots of bus fares from Ms. Nguyen's Compass card.

18. While Ms. Duong objected to the admissibility of the new evidence of Ms. Nguyen, the delegate accepted the evidence because it was "not voluminous" and "appeared relevant to the matters [in] issue" in the Complaint. To address Ms. Duong's concerns regarding the timing of delivery of the new evidence by Ms. Nguyen, the delegate gave Ms. Duong a half an hour break at the Hearing to review the new evidence and an opportunity to respond to it. However, Ms. Duong refused to review translations of the new evidence and only reviewed the translations submitted by Ms. Nguyen for Facebook messages that had been cross-exchanged prior to the Hearing.

19. After the Hearing, the delegate also permitted Ms. Duong an opportunity to submit any additional evidence she had pertaining to Ms. Nguyen's hours of work. Ms. Duong took up the opportunity and, on January 30, 2019, submitted a work schedule of her employees from September 1 to September 30, 2018. The delegate sent a copy of the said work schedule to Ms. Nguyen and afforded the latter an opportunity to respond, which she did on January 31, 2019.

#### ***(iii) Evidence of Ms. Nguyen***

20. In the reasons, before setting out Ms. Nguyen's evidence at the Hearing, the delegate notes that Ms. Nguyen, after filing the Complaint form, corrected the dates she claimed she worked at Elegant in her subsequent submissions.

21. At the Hearing, the delegate notes that Ms. Nguyen testified that she found an advertisement placed by Ms. Duong in a Vietnamese Facebook group for a full-time position for a nail technician with Elegant. Ms. Nguyen presented Facebook messages she exchanged with Ms. Duong dated August 13, 2018, showing a conversation with the latter for a full-time position, from Monday through Friday, from 10:00 a.m. to 7:00 p.m., and wages based on a revenue sharing arrangement.

22. Subsequently, on August 20, 2018, according to Ms. Nguyen, she had an interview with Ms. Duong and they agreed that she would work at Elegant's salon five days a week, Monday to Friday from 10:00 a.m. to 7:00 p.m. If she needed to take a day off during the week, the parties agreed that she would need to make up for it by working on either a Saturday or a Sunday. Her remuneration would be based on 50 percent commission on any salon service she provided plus tips. There was no written employment contract.
23. She said she commenced her employment with Elegant on August 21, 2018, and ended her employment on September 10, 2018. She explained that she did not remember the exact dates she worked when she filled out the Complaint form, but the record of hours she submitted at the Hearing on January 30, 2019, represented an accurate account of the hours she worked at the salon.
24. Ms. Nguyen also said that Ms. Duong informed her she would not be paid wages during her training period which occurred over 5 days on August 21, 22, 23, 25, and 26, 2018. During this period, she attended at the salon at 10:00 a.m. and other employees would show her the daily duties which included cleaning the shop, cleaning massage chairs, washing towels, sorting nail polish according to colours, and observing other employees while they helped customers.
25. Ms. Nguyen contended that during her training period and subsequently, when she worked, it was full days. She said that everyone at the nail salon worked from 10:00 a.m. to 7:00 p.m., which were the hours the salon was open each day. She also worked those hours with the exception of two days only where she worked slightly reduced hours. The two days in question were August 21, 2018, when she worked 8.5 hours, from 10:00 a.m. to 6:30 p.m. and September 4, when she worked 7 hours from 10:00 a.m. to 5:00 p.m. The total hours she claimed to work during her period of employment with Elegant is 132.5 hours.
26. To corroborate her testimony that she generally worked between 10:00 a.m. to 7:00 p.m., she referred to her transit Compass card record she submitted for September 3, 4, 5, 6, and 10 to show what time she left work. It took her approximately five minutes to walk to the bus stop from the salon after work and she usually went straight home after work. The only exception to this routine was when she went grocery shopping at Superstore, which occurred approximately once a week. Also, on September 10, 2018, she noted the bus route she took was different.
27. During her shifts at Elegant, Ms. Nguyen states she did not receive set lunch breaks. While she was allowed to take a break and leave the salon when there were no customers, her breaks ranged from 15 to 30 minutes and, if a customer came in, she would be required to return to work and greet the customer. She states she usually stayed at the salon during her breaks and so did other employees.
28. She testified that on September 3, 2018, she noticed that other employees, whom she knew as An and Linh, received their wages but she did not. When she asked her colleagues why she was not receiving any wages, they told her because she was a new employee. They also informed her that Elegant had a policy that new workers needed to pay a \$300.00 deposit to Ms. Duong which would be returned to the worker at the end of six months' employment. In Ms. Nguyen's case, she would not have to pay the \$300.00 deposit, but Ms. Duong would keep her earned wages instead. At the time of the Hearing, Ms. Nguyen testified that she had not been paid any wages.

29. Ms. Nguyen submitted Facebook messages sent by Ms. Duong at 8:30 p.m. on September 15, 2018. As noted by the delegate, the messages, which Ms. Nguyen translated, stated:

[T]he international students working at the salon would be forced to leave Canada as a result if there are issues with the Labour / employment department; in the worst case scenario Elegant could be fined “\$10-20K” which did not matter to Ms. Duong. Ms. Duong currently still holds the salaries of Linh and Thu (\$300.00 each); if Ms. Nguyen continued to work at Elegant, she would be treated the same; and it is up to Ms. Nguyen how she would like to proceed.

30. On September 10, 2018, when she arrived at home after work, Ms. Nguyen sent Ms. Duong a Facebook message to inform her that she was resigning. In the message, she thanked Ms. Duong for taking the time to train her. Ms. Duong responded by saying that she would not pay Ms. Nguyen her wages.

***(iv) Evidence of Ms. Duong***

31. In her testimony at the Hearing, Ms. Duong stated that her interview with Ms. Nguyen was initially scheduled on August 20, 2018, but Ms. Nguyen called her to cancel it. The interview was rescheduled to the following day on August 22, 2018.

32. Ms. Duong also testified that Ms. Nguyen’s first day of work was August 23, 2018, and her last day was September 6, 2018. She said Ms. Nguyen was hired for part-time work for three days a week from Tuesday to Thursday and she worked a total of seven days on August 23, 28, 29, 30, and September 4, 5 and 6. While she did not keep a record of Ms. Nguyen’s exact hours of work each day, she said Ms. Nguyen worked 10:00 a.m. to 3:00 p.m.

33. According to Ms. Duong, Ms. Nguyen sold salon services of \$634 during her period of employment with Elegant. Based on their agreement of 50% commission rate on salon services plus gratuities, Ms. Nguyen is owed only \$317 in wages.

34. Ms. Duong also stated that she had employees who were paid a flat rate depending on their experience and whether they worked full-time or part-time. Elegant’s payroll was usually done twice a month. The pay periods consisted of the 1<sup>st</sup> to the 15<sup>th</sup> and 16<sup>th</sup> to 30<sup>th</sup>/31<sup>st</sup>. Employees who were paid a flat rate received payment once, at the end of the month. In terms of process, she would email payroll information to her accountant a day or two after the pay period, and her accountant would issue cheques to the employees a couple days later.

35. Ms. Duong stated that she did not pay Ms. Nguyen any wages she earned in August 2018 because Ms. Nguyen only worked for four days in August and earned little commission. Therefore, she decided to pay Ms. Nguyen all of her wages in the following pay period, in September 2018.

36. Contrary to Ms. Nguyen’s evidence, Ms. Duong argued that Ms. Nguyen did not work on September 10, 2018, and her last day worked was on September 6, 2018. She said, on September 10, 2018, Ms. Nguyen called her and informed her that she wanted to quit. She asked Ms. Nguyen to stay, but approximately half an hour later, she received a text from Ms. Nguyen confirming that she quit her employment

37. Ms. Duong testified that Ms. Nguyen requested to be paid in cash but she did not accede to her request because Ms. Nguyen failed to give her any notice.

38. Ms. Duong also disputed Ms. Nguyen's assertion that the salon is open from 10:00 a.m. to 7:00 p.m. every day. She submitted Elegant's business brochure which shows that the salon is open from 10:00 a.m. to 7:00 p.m. from Monday to Saturday and 11:00 a.m. to 5:00 p.m. on Sunday and holidays.
39. With respect to Sunday, August 26, 2018, and Labour Day, September 3, 2018, Ms. Duong testified that the business or salon was only open from 11:00 a.m. to 5:00 p.m. Therefore, she argued that Ms. Nguyen could not have worked from 10:00 a.m. to 7:00 p.m. as claimed. She also submitted that the last appointment on weekdays would be at 6:30 p.m. and on Sundays or holidays at 4:30 p.m. Unless employees had appointments, they would leave around 4:15 p.m. or 4:30 p.m. She also contented that her employees do not always start at 10:00 a.m. Their start time depended on their schedule and appointments.
40. Ms. Duong emphasized not everyone worked from 10:00 a.m. to 7:00 p.m. Only Ms. Duong and another employee also named "Kim" (like Ms. Nguyen) worked from the opening of the salon until closing. The last staff usually worked until 6:45 p.m. or 4:45 p.m. She said that "Kim" is an employee who is paid a flat rate of \$4,000.00 each month and worked six to seven days a week depending on the season. During the summer, "Kim" would work for 7 days a week, and in the winter, she worked 6 days a week. Ms. Duong testified that the other staff are hired on a part-time basis and would work shifts from 10:00 a.m. to 3:00 p.m., 1:00 p.m. to 5:00 p.m., or 2:00 p.m. to 6:00 p.m. When there are no clients, employees would go to Superstore to buy groceries or do each other's nails. Sometimes, employees would be at Tim Hortons having coffee. If employees were out when clients arrived, Ms. Duong would send them a text message asking them to return to the salon.
41. Ms. Duong also disputed Ms. Nguyen's contention that she did all cleaning duties. According to Ms. Duong, cleaning duties were divided amongst staff.
42. Ms. Duong also argued that the Compass record Ms. Nguyen submitted did not prove when she left the salon or that it was her at the bus stop.
43. Ms. Duong also disputed Ms. Nguyen's evidence that she held back \$300 from her employees. She said that she recognizes that employees might not be making as much money in the first couple of months and, if anything, she would pay an additional \$300.00 as a bonus to an employee if they worked more than six or eight months.
44. Ms. Duong submitted that the Facebook message of August 23, 2018 at 10:15 a.m. Ms. Nguyen submitted in evidence shows that she is inquiring about bus routes which suggest that she did not start work on August 21, 2018.
45. With respect to the Facebook messages she sent to Ms. Nguyen on August 21, 2018, Ms. Duong argued that the "Kim" noted in the group chat was referring to another employee "Kim" and not Ms. Nguyen. In response, Ms. Nguyen stated that the staff chat group only consisted of four members and therefore, there could not have been another "Kim". According to the delegate's observations, Ms. Duong "became very agitated and upset and was unable to provide a further response".
46. The delegate also noted that when Ms. Duong was questioned about the Facebook message of Ms. Nguyen of 4:48 p.m. on September 4, 2018, wherein the latter asked Ms. Duong if she could leave earlier

to pick up her child, Ms. Duong failed to explain why Ms. Nguyen was at the salon at that time (if Ms. Nguyen was supposed to be a part time employee who was required to work until 3:00 p.m.).

47. After the Hearing, when invited by the delegate to submit any additional evidence, Ms. Duong provided a work schedule of her employees who worked from September 1 to September 30, 2018. The schedule shows that Ms. Nguyen's shifts were from 10:00 a.m. to 3:00 p.m. and she had four days off during the week - Monday, and Friday to Sunday inclusive.

**(v) Ms. Nguyen's response to Ms. Duong's evidence**

48. Ms. Nguyen disputed Ms. Duong's evidence that she cancelled the interview on August 20, 2018. She contended that she indeed attended at the salon at 10:00 a.m. on August 20. In support of her position, Ms. Nguyen referred to the Facebook message she sent to Ms. Duong at 7:41 a.m. on August 20, 2018, wherein she confirmed with Ms. Duong that she will be at the salon at 10:00 a.m.
49. Ms. Nguyen also submitted that she was added to Elegant's Facebook staff chat group after her interview with Ms. Duong on August 20, 2018, and that she went by the name "Kim" in the group chat.
50. With respect to Ms. Duong's contention that Ms. Nguyen's first day at work was August 23, 2018, and not August 21, Ms. Nguyen referred to the Facebook message dated August 21, 2018, from Ms. Duong to a four member Facebook staff chat group which instructed Ms. Nguyen to leave at 6:30 p.m. on August 21, 2018, if she had nothing else to do at the salon.
51. With respect to Ms. Duong's evidence that the salon was not always open between 10:00 a.m. and 7:00 p.m. and that the business brochure set out the hours of operation of the salon, Ms. Nguyen testified that she had never seen the business brochure before. In her experience, the salon always opened at 10:00 a.m. and closed at 7:00 p.m. and she always worked until 7:00 p.m. She further stated that if she was working with a customer, she would need to stay until after the customer was finished, even if it was after closing hours. However, she did not document occasions when she left the salon after 7:00 p.m.
52. With respect to Ms. Duong's contention that there was another "Kim" at the workplace who worked full-time and was responsible for opening and closing the salon six to seven days a week, Ms. Nguyen stated that she never met the other "Kim" during her employment at Elegant.
53. With respect to Ms. Duong's argument that Ms. Nguyen's Facebook message on August 23 to the staff chat group asking for the bus route at work showed that Ms. Nguyen did not start work until August 23, Ms. Nguyen responded that her husband previously dropped her off at work and she was inquiring only because she was still unfamiliar with how to get to the salon on her own.
54. Lastly, with respect to the employee work schedule Ms. Duong submitted after the Hearing concluded, Ms. Nguyen commented she did not recognize any other names on the document except the three she worked with, namely, "Jay, An and Linh". Ms. Nguyen contended that the schedule is not the notebook or worksheet where employees would record details of the services they provided, commissions, and tips.



**(vi) Director's findings and analysis**

55. In determining what wages were owed to Ms. Nguyen, the delegate noted that the parties disagreed about the days and hours Ms. Nguyen worked and Ms. Duong admitted that Elegant did not keep track of Ms. Nguyen's hours and thus failed to submit any documentary evidence of Ms. Nguyen's daily hours of work during the hearing. The delegate did note that Ms. Duong submitted, as post Hearing submissions, an employee work schedule for September 2018, which was not created contemporaneously during Ms. Nguyen's employment. Absent a proper record of hours Ms. Nguyen worked, the delegate sought to analyze and weighed all the evidence of the parties to determine what hours Ms. Nguyen worked.
56. In preferring the evidence of Ms. Nguyen, and concluding that she commenced employment with Elegant on August 21, 2018, the delegate reasoned as follows:
- While I acknowledge Ms. Nguyen's recollection of her exact dates and hours of work to be imprecise and she inconsistently reported her first and last day worked at Elegant during her communications with the Branch, the Facebook messages support Ms. Nguyen started her employment on August 21, 2018.
- I have taken into consideration that Ms. Nguyen confirmed that she would be at the interview on August 20, 2018. I have also reviewed the Facebook messages Ms. Duong sent to Ms. Nguyen on August 21, 2018 at 11:54 a.m. inquiring where was the "shellac and normal nail polish" and another message also sent by Ms. Duong to a staff chat group the same day delegating duties, and specifically instructed "Kim" to leave the salon at 6:30 p.m. While Ms. Duong explained that the "Kim" referenced in the group message was not Ms. Nguyen, it is clear that the group chat only consisted of four members. Given that there was only one "Kim" listed in the chat group, and that Ms. Nguyen was evidently included in the chat as she provided the printouts of the chat, I do not accept Ms. Duong's explanation that the message did not refer to Ms. Nguyen. If Ms. Nguyen truly cancelled her interview on August 20, 2018 and did not have her interview until August 22, 2018, I find it unreasonable and unlikely that Ms. Duong would be sending any work related Facebook messages to Ms. Nguyen on August 21, 2018. The Facebook messages corroborate Ms. Nguyen's testimony that she started work on August 21, 2018. I therefore prefer Ms. Nguyen's evidence that her first day worked was on August 21, 2018.
57. The delegate also relied on the Facebook messages exchanged between Ms. Nguyen and Ms. Duong on September 10, 2018 at 8:24 p.m. in which Ms. Nguyen communicated her resignation and thanked Ms. Duong for providing her with training and the latter responded that she would not pay Ms. Nguyen. The delegate found this exchange was consistent with Ms. Nguyen's testimony that she was informed by Ms. Duong that she would not be paid for the training period. The delegate then reviewed the definitions of "wages" and "work" in section 1 of the *ESA* and concluded that training in relation to performance of one's employment duties is considered "work" for which one is entitled to "wages" and, therefore, Ms. Nguyen was entitled to wages for her training at the salon from August 21 to August 26, 2018.
58. In determining what hours of work Ms. Nguyen worked and her last day of employment, the delegate observed that Elegant failed in its responsibility to maintain a daily record of hours Ms. Nguyen worked. The delegate also observed that there were inexplicable inconsistencies in the evidence of Ms. Duong with respect to the hours Ms. Nguyen worked. She noted that during the Hearing, Ms. Duong testified that no other staff worked until 7:00 p.m. with the exception of herself and an employee named "Kim"

(not Ms. Nguyen). She said that all other staff were hired on a part-time basis and worked varying shifts from 10:00 a.m. to 3:00 p.m., 1:00 p.m. to 5:00 p.m., or 2:00 p.m. to 6:00 p.m. However, in the post-hearing submissions, the delegate noted that Ms. Duong submitted an employee work schedule for September 1 to 30, 2018, which showed different shifts for Elegant’s employees, from Monday to Sunday, than those described at the Hearing and concluded that she was *not* convinced that “the schedule was drafted contemporaneously during Ms. Nguyen’s employment” and thus, not reliable.

59. The delegate also noted that there were “inexplicable discrepancies” in Ms. Duong’s Facebook messages to Ms. Nguyen that appeared to contradict her claim that Ms. Nguyen worked part time, three days a week, from 10:00 a.m. to 3:00 p.m. More particularly, the delegate noted:

Ms. Duong also alleged Ms. Nguyen was hired for part-time employment and that Ms. Nguyen worked 10:00 a.m. to 3:00 p.m. for three days a week. However the rest of the evidence contradicts this claim. I have considered that the Facebook advertisement posted by Ms. Duong and the corresponding Facebook messages on August 13, 2018 were discussions for full-time work. In addition, Facebook messages on several occasion[s] indicated that Ms. Nguyen worked at the salon past 3:00 p.m.

As referenced above, on August 21, 2018 Ms. Duong sent a message to four staff members to delegate work duties, the message specifically instructed Ms. Nguyen to leave the salon at 6:30 p.m. if she did not have anything else to do.

Furthermore, the Facebook message on September 4, 2018 4:48 p.m. showed that Ms. Nguyen contacted Ms. Duong and requested to leave early to pick up her child. Ms. Duong was unable to explain the text message sent by Ms. Nguyen at 4:48 p.m. The message again demonstrates that Ms. Nguyen was at work past 3:00 p.m.

...

There are inexplicable discrepancies with respect to the Facebook messages sent by Ms. Duong to Ms. Nguyen, and Ms. Duong’s testimony.

60. In the result, the delegate rejected the evidence of Ms. Duong and preferred the evidence of Ms. Nguyen – that she worked from August 21 to September 10, 2018, and her hours of work during weekdays were from 10:00 a.m. to 7:00 p.m. - calling the latter’s evidence “more internally consistent, and supported by the documentary evidence”.

61. With respect to Ms. Nguyen’s hours of work on Sunday and Holidays, the delegate found the evidence of Ms. Nguyen unreliable as her Compass card record did not factor in her walking pace or her activities after work like grocery shopping. Instead, the delegate preferred the evidence of Ms. Duong as corroborated by the business brochure of Elegant and concluded that the salon was open between 11:00 a.m. and 5:00 p.m. on Sunday and Holidays.

62. As for work breaks, the delegate noted that Ms. Nguyen said she took a break each day for 15 to 30 minutes, but these breaks were not uninterrupted. Based on Ms. Duong’s own evidence, employees were allowed to leave the salon on their breaks when there were no customers, but she would text them to return to the salon if customers came during employee breaks because employees were expected to work. In the circumstance, the delegate concluded that Ms. Nguyen is entitled to be paid during her breaks.

63. Based on the above findings or conclusions of fact, the delegate calculated Ms. Nguyen worked a total of 109 regular hours, 10.5 daily overtime hours, and 7 weekly overtime hours during her employment with Elegant from August 21, 2018, to September 10, 2018. The delegate then considered the minimum wage requirement in section 16 of the *ESA*, which she noted applies even when the agreed rate of pay is based on commission, and applied the minimum hourly rate of \$12.65 then in effect to calculate a total amount owing to Ms. Nguyen of \$1,378.85 ( $\$12.65 \times 109$  hours) for her regular hours worked at the salon.
64. The delegate also calculated Ms. Nguyen's overtime wages at 1 ½ times her regular wage and determined that Ms. Nguyen was owed overtime wages in the total amount of \$332.15 calculated as follows:
- Daily overtime: \$199.29 (10.5 overtime hours x \$18.98/hour)
- Weekly overtime: \$132.86 (7 hours over 40/week x \$18.98/hour)
65. As for statutory holiday pay, the delegate determined that since Ms. Nguyen was not an employee of Elegant for 30 days prior to the Labour Day holiday, she was not eligible for statutory holiday pay.
66. With respect to vacation pay, the delegate noted section 58 of the *ESA* which states that after five days of employment, an employer must pay an employee at least four percent of the employee's total wages during the year of employment, and went on to calculate Ms. Nguyen's vacation pay of \$68.44 (4% x (\$1,378.85 + \$332.15)).
67. The delegate also calculated accrued interest of \$51.33 on all the amounts owing, pursuant to section 88 of the *ESA*, for a total amount owing to Ms. Nguyen of \$1,830.77.
68. The delegate also levied three administrative penalties of \$500 each pursuant to section 98(1) of the *ESA* and section 29(1) of the *ESR* against Elegant for contraventions of sections 17, 18 and 28 of the *ESA*.

## **SUBMISSIONS OF THE EMPLOYER**

69. As indicated previously, Ms. Duong has raised the "natural justice" and "new evidence" grounds of appeal in section 112(1)(b) and (c) of the *ESA*. I intend to summarize Ms. Duong's submissions under each of these grounds separately below.

### ***(i) Natural justice***

70. With respect to the "natural justice" ground of appeal, Ms. Duong makes the following submissions:
- Ms. Nguyen's Facebook message in the group chat at 10:15 a.m. on August 23, 2018, asking about bus routes suggests that Ms. Nguyen "was still somewhere on the road at 10:15 AM" and not at the salon and therefore, the delegate mistakenly determined that Ms. Nguyen worked 8 "regular" hours and 1 overtime hour.
  - While the delegate determined that Ms. Nguyen should be paid for the 15 and 30 minutes break Ms. Nguyen took each day, "'LUNCHES' AND 'BREAKS' are different" and the delegate "made a mistake of not deducting the time Ms. Nguyen took for LUNCHES every day" [*sic*].
  - The delegate failed to provide her sufficient time to respond to Ms. Nguyen's new evidence.

Half an hour to respond was not enough without having access to a “computer or a laptop” and having only “a cellphone with [her]”.

- The delegate also did not give her sufficient time to submit a work schedule of employees for September 2018 by requiring it be submitted by 4:30 p.m. on the Hearing day. Ms. Duong submitted it to the delegate by email at about 3:30 p.m.
- The delegate’s determination in the Reasons that the work schedule she (Ms. Duong) provided was “not reliable” and that it was submitted late made her feel like she was treated “UNFAIR[LY], DISCRIMINATED, BULLIED and ABUSED” by the delegate.
- The employee “Kim” in the group chat was a different employee than Ms. Nguyen who has been working at the salon “for a while” and is paid a monthly salary of \$4,000 at the end of the month. The delegate did not allow her (Ms. Duong), at the Hearing, to forward to the Employment Standards Branch this employee’s payroll information for August and September 2018 from her phone and, instead, required her to pay Ms. Nguyen (presumably for days the other “Kim worked”). This is “RIDICULOUS, STUPID AND UNFAIR” and serves as another example of her being “BULLIED and ABUSED” by the delegate.
- Group chat does not prove that there were only four employees working at the salon on any particular day, and when in the group chat Ms. Nguyen replied “‘yes’ just because she was new at my salon, and she tried to please me although the ‘Kim’ in the group chat wasn’t her. ... There was a possibility that Ms. Nguyen was at home when she responded to my message”.
- If Ms. Nguyen’s first day of work was August 21, then how could it be that “on August 23, she still didn’t know how to go to work by bus[?]” It stands to reason that “Ms. Nguyen’s first day of work was August 23, and her interview was on August 21.”
- On August 21, because she knew Ms. Nguyen was waiting for her at the salon for her interview, she “texted her [Ms. Nguyen] to tell her to ask other staff to show her ‘where were regular polish and where were gel polish’ to kill time when she was waiting for [Ms. Duong]”.
- She may not remember “exactly the day of Ms. Nguyen’s interview, but [she does] keep the records of [her] employees’ work from their first day to their last day.”

**(ii) New evidence**

71. With respect to the “new evidence” ground of appeal, Ms. Duong raises the following points:

- Ms. Nguyen could not have seen the salon’s employees – An and Linh – get paid on Monday, September 3, 2018, as it was Labour Day and she (Ms. Duong) only emailed her accountant at 12:47 p.m. on that day the salaries of her employees for the accountant to prepare payroll (email to accountant adduced as new evidence) and it usually takes her accountant “a few hours or a day” to prepare payroll for her employees and the accountant’s office would have

been closed on Labour Day. Therefore, Ms. Nguyen “never ever worked on September 03” and if she “LIED about Monday, September 3, it means she did LIED about working at [the] salon on Monday, September 10, her last day.”

- If according to Ms. Nguyen, she worked 5 days a week from Monday to Friday, from 10:00 a.m. to 7:00 p.m., and she worked the days the delegate found she worked, then she would have known all the other employees and she would have worked with them all, but she only claimed to have worked with three – Jay, An, and Linh. She (Ms. Duong) submits payroll documents for various periods in August purportedly of the other “Kim”, Linh, Jay, and Stella, who was not part of the group chat. She states that Ms. Nguyen did not know other employees only because “Ms. Nguyen HAD NEVER EVER WORKED FULL-TIME at [her] salon. MS. NGUYEN IS A SCAMMER.”
- Ms. Nguyen worked on one or two occasions past 3:00 p.m. but that would be because she arrived or started work at the salon late. She states that on August 23, when Ms. Nguyen sent a Facebook message in the group chat asking about bus routes, she would have been “somewhere on the roads [sic]” and not at the salon. On the assumption that Ms. Nguyen arrived at the salon at 11:15 a.m. on that day, then she would have to finish her work at 4:15 p.m. to make up for starting work late.
- Similar to August 23, on September 4, 2018 Ms. Nguyen started work late at 12:30 or 1:30 p.m. “because she had to wait for her babysitter to come back from the babysitter’s appointment, and then she could drop off her son before going to work at [the] salon.” Ms. Duong states this explains why Ms. Nguyen called her at 4:48 p.m. “asking to go home early to pick up her son.”
- She was not able to explain at the Hearing why Ms. Nguyen was at the salon late because “as the owner of a salon”, she is “a busy person” and her “mind is always packed” and she just was not able to “remember those small details at those moments. It would take time for people like [her] to recall things.” Just as she had to sit back and go through her “email history, and find out the evidence of Ms. Nguyen lying about seeing [her] staffs (An and Linh) receiving their wages on September 3” [sic].
- If Ms. Nguyen worked at her salon full-time, how could it be that she had never seen the salon’s brochures?
- Ms. Nguyen only recalled taking 15 to 30 minutes breaks but does not recall taking 45 minutes to one-hour breaks for lunch because she has never worked more than 5 hours a day at the salon.
- “[T]here was no contract between Ms. Nguyen and my company”, and therefore, Ms. Nguyen “wasn’t fully hired as a fulltime staff”.

<sup>72.</sup> Ms. Duong further submits that at the conclusion of the Hearing she asked the delegate to send a single representative of the Director to her salon, without any forewarning, to observe when her staff at the salon come and go and then to make the decision whether Ms. Nguyen is telling the truth or not. She reiterates this request on the appeal.

73. Ms. Duong also argues that the administrative penalties of \$500 each for breach of sections 18 and 28 of the *ESA* were wrongly levied against her by the Director and they should be cancelled.
74. With respect to the finding that she violated section 18, she states that she received a notice of Ms. Nguyen's resignation at night on September 10, 2018, and therefore, the notice should be "counted on the next day, September 11". She states her accountant's office hours are 9:00 a.m. to 5:00 p.m., and if Ms. Nguyen had provided her the notice of resignation before 4:30 p.m., she would have been able to call her accountant to prepare Ms. Nguyen's payroll on the same day. In any event, she argues that only 6 days lapsed between September 11 to 17 when Ms. Nguyen received her wages and, therefore, the administrative penalty should be cancelled.
75. With respect to violation of section 28, she states that she "completely" disagrees with the delegate's decision as she keeps the records of her employees' hours worked. She states "[t]he hours and commissions of Ms. Nguyen were submitted to the Employment Standards in [her] very first email". She is referring to her post Hearing submission of the employee work schedule for the period September 1 to 30 which the delegate concluded was not drafted contemporaneously during Ms. Nguyen's employment. Ms. Duong also attaches a newly created worksheet for August and September 2018 in the appeal and states that:
- [Y]ou may find it's a bit different then the one I submitted to the Employment Standards [post Hearing] because the one I submitted to the Employment Standards \*was quick-drawn when I reached my salon after the Hearing on January 30 under the pressure of Ms. May Lee-only gave me not even 2 hours. [sic]
76. In her conclusory paragraph, Ms. Duong repeats her earlier submissions stating that Ms. Nguyen "lied" about working on Sunday, August 26 and Monday, September 3 from 10: a.m. to 7:00 p.m. She states "[a]s I declared at the hearing ... Ms. Nguyen ... never worked those two days." She goes on to reiterate also that Ms. Nguyen lied about seeing other employees – An and Linh – receive their wages on Monday, September 3, which was Labour Day. She states that if Ms. Nguyen can lie about this then "she could lie about working at my salon on September 10 as well." As at the hearing, she reiterates that Ms. Nguyen, therefore, "NEVER EVER WORKED FULL-TIME at my salon .... SHE WAS ONLY A PART-TIME EMPLOYEE [who] WORKED ONLY 5 HOURS/A DAY." She states that Ms. Nguyen's credibility is "ZERO" and that she is "A SCAMMER".

## ANALYSIS

77. The grounds of appeal under the *ESA* are set out 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.

78. The Tribunal has consistently held 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, and the burden is 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).
79. It is also important to note that section 112(1) does 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.
80. Having delineated some of the relevant principles applicable to appeals, as previously noted, Ms. Duong has framed her appeal on the "natural justice" and "new evidence" grounds. I have reviewed all of the appeal documents, the Record, and the submissions of Ms. Duong, and I am not persuaded of the merits her appeal. I dismiss Ms. Duong's appeal and my reasons follow.

### **Natural Justice**

81. With respect to the natural justice ground of appeal, the often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explains that 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.
82. 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 to respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST # D050/96)
83. In her arguments in support of the natural justice ground of appeal, Ms. Duong submits that the delegate failed to provide her sufficient time to respond to Ms. Nguyen's new documentary evidence delineated in paragraph 17 above. She also argues that the delegate failed to provide her sufficient time to provide a work schedule of employees for the month of September 2018 because she was asked to provide it, on the same day, after the conclusion of the Hearing, by 4:30 p.m. Curiously, Ms. Duong did not need until 4:30 p.m. to produce the employee work schedule as she submitted it an hour earlier at 3:30 p.m. I do not see any procedural unfairness suffered by Ms. Duong in the circumstances. I can understand that if she was being asked to produce or create it afresh then she might be hurried to do so but I do not think the delegate was asking her to create new evidence. I think she was being asked to provide any relevant

additional evidence that was already in existence (and arguably responsive to the new evidence of Ms. Nguyen at the Hearing).

84. As for Ms. Duong's contention that she did not have sufficient time to respond to Ms. Nguyen's new evidence at the Hearing, the delegate noted that the evidence in question was "not voluminous" and she afforded Ms. Duong an opportunity to review it by calling a break at the Hearing for a half hour, but Ms. Duong refused to review the new evidence. The delegate also gave Ms. Duong a further opportunity, after the Hearing, to submit any additional evidence pertaining to Ms. Nguyen's hours of work and Ms. Duong did take up the opportunity and submitted the purported work schedule of the employees for September 2018. Again, I do not find Ms. Duong was denied any procedural fairness as that concept is defined by the Tribunal in *English Inn & Resort, supra*, and *Imperial Limousine Service Ltd., supra*.

85. The balance of Ms. Duong's submissions under the natural justice ground of appeal, as summarized in paragraph 70 above, only challenge the delegate's findings of fact. It is quite evident that Ms. Duong believes that the delegate is wrong, in several instances, and should have weighed, and interpreted, the evidence so as to arrive at different factual conclusions. However, the *ESA* does not provide the Tribunal an opportunity to correct a delegate's errors of fact unless those errors amount to errors of law. It is only in rare circumstances that errors of fact will amount to errors of law where they reveal "palpable and overriding error". As explained by the Tribunal in *Re Dean*, BC EST # D071/12, at para. 29:

A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's findings of fact if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 -- Richmond/Delta)* [2000] BCJ No.331).

86. In this case, I am *not* persuaded that the delegate's findings of fact were perverse or inexplicable because there was no evidence on the basis of which any reasonable person could have made them. To the contrary, I find that there was ample evidence on the basis of which a reasonable person could make the same findings of fact that were made by the delegate. While I do not see any basis to question the delegate's findings of fact in this case, it is important to note that if I did have some doubts with her findings of fact, the Tribunal has consistently ruled that the delegate is entitled to a degree of deference in such case because it is the delegate who conducted the hearing, heard the witnesses, and listened to the submissions of the parties, and not the Tribunal. It is also irrelevant that this Tribunal or another delegate might have interpreted the evidence differently (See *Re Dean, supra*).

87. For the reasons set out above, I find Ms. Duong has failed to show a breach of the principles of natural justice.

### ***New evidence***

88. As indicated, Ms. Duong also relies on the "new evidence" ground of appeal under section 112(1)(c) of the *ESA*. The Tribunal has consistently held that appeals based on "new evidence" require an appellant



to, at a minimum, demonstrate that the evidence sought to be admitted as “new evidence” in the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal furthermore requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination. All of the foregoing requirements are conjunctive requirements that the appellant must satisfy before “new evidence” will be admitted into an appeal (see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03).

89. The evidence Ms. Duong is seeking to admit into this appeal, which I have summarized in paragraph 71, does not remotely resemble the kind of evidence that would be considered as acceptable. It is largely, if not wholly, in the nature of a dispute with the delegate’s findings of fact. She is simply rearguing the case before this Tribunal with a view to having the Tribunal second-guess the delegate’s findings of fact. I find that the delegate had conflicting evidence of the parties before her and made her findings based on the relative credibility of the parties and the available corroborating documentary evidence which I have noted in paragraphs 55 to 68 above and do not find it necessary to reiterate the same here. It suffices to say that the delegate found Ms. Nguyen to be a more credible witness and whose evidence, particularly as concerns her daily hours of work, showed internal consistency. The delegate also determined that the work schedule Ms. Duong submitted post hearing was not reliable evidence; it was not prepared contemporaneously during Ms. Nguyen’s employment. This Tribunal is not in any position to second-guess the delegate’s disputed findings of fact. To the contrary, as previously indicated, the delegate’s findings of fact are amply supported in the evidence adduced at the Hearing and subsequently.
90. The one piece of evidence that did not exist or was not produced by Ms. Duong before the Determination was made is the new two-page work schedule for August and September 2018, which I have referenced in paragraph 75 above. It is apparent to me, based on Ms. Duong’s submissions (part of which I have delineated verbatim in paragraph 75 above), that this document was unavailable at the time the Determination was made because it was created by Ms. Duong later (not contemporaneously during Ms. Nguyen’s employment) to corroborate her version of the facts. I find the document inadmissible because the evidence contained therein, in my view, is not reasonably capable of belief.
91. Based on the foregoing, I find there is no merit in the “new evidence” ground of appeal.
92. In the result, I am satisfied that Ms. Duong’s appeal has no presumptive merit and has no prospect of succeeding and I dismiss it pursuant to section 114(1)(f) of the *ESA*. In the circumstances, I do not find it necessary to address Ms. Duong’s request for an extension of time to file all her submissions until March 9, 2020, because she “may need to engage a lawyer to represent [her]”.

**ORDER**

- <sup>93.</sup> Pursuant to section 115 of the *ESA*, I order the Determination dated June 11, 2019, be confirmed in the amount of \$3,330.77 together with any interest that has accrued under section 88 of the *ESA*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**