Employment Standards TRIBUNAL

Citation: 1050135 B.C. Ltd. (Re)
2019 BCEST 6

An appeal

- by -

1050135 B.C. Ltd. carrying on business as Kranq Courier
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Richard Grounds

FILE NO.: 2018A/83

DATE OF DECISION: January 9, 2019

DECISION

SUBMISSIONS

Shawn Farion	on behalf of 1050135 B.C. Ltd. carrying on business as Kranq Courier
Shannon Romanyshyn	on her own behalf
Rodney J. Strandberg	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), 1050135 B.C. Ltd. carrying on business as Kranq Courier (the "Appellant") has filed an appeal of a Determination issued on June 22, 2018, (the "Determination") by Rodney J. Strandberg, a delegate (the "Delegate") of the Director of Employment Standards (the "Director").

2. The Complainant filed a complaint under section 74 of the *ESA* alleging that the Appellant contravened the *ESA* by failing to pay all wages owed to her including commission, overtime, and statutory holiday pay. The Complainant claimed that she worked at least 8.5 hours each day with no guaranteed break, but she was paid as if she had taken a 1 hour break each day for lunch.

3. The Delegate concluded in his Determination that the Complainant worked nine hours per day except for two days, one day when she did not work and one day when she worked only five hours. Based on this, the Delegate concluded that the Complainant was owed regular wages, overtime, statutory holiday pay, commission, and vacation pay. The hearing was originally scheduled for May 1, 2018, but was adjourned to May 10, 2018, when the Appellant's representative, Mr. Shawn Farion, was unable to attend due to medical reasons. Mr. Johannes Greyling attended the rescheduled hearing on Mr. Farion's behalf.

4. The Appellant appealed the Determination on the basis that the Delegate erred in law and / or failed to observe the principles of natural justice. In addition, the Appellant appealed the Determination on the basis that evidence had become available that was not available at the time the Determination was made.

5. For the reasons that follow, the Determination is varied to reflect the Complainant's evidence about the hours that she worked.

ISSUE

6. The issues are whether or not the Delegate erred in law or failed to observe the principles of natural justice when he determined that the Appellant owed wages and reimbursement of transit fares to the Complainant and whether or not the Appellant may rely on evidence that was not before the Delegate.

ARGUMENT

7. The Appellant submitted that Mr. Farion, who is the owner of Kranq Courier, was the person who was to be present at the hearing but he was unable to attend. The Appellant explained that Mr. Farion missed the first scheduled hearing for a medical issue and was in Nicaragua for the rescheduled hearing.

8. The Appellant submitted that the Complainant made false claims and that the Appellant's witnesses were not called. The Appellant submits that the hearing was adjourned and it was waiting to call its witnesses. The Appellant submitted new evidence from different witnesses including from Mr. Farion, from Mr. Greyling who appeared for the Appellant at the hearing, from Catherine Diep who is an administrator for the Appellant and from Kyra Escanan who is an assistant administrator for the Appellant.

9. The Appellant submitted that an expense for transit claimed by the Complainant had never been submitted to its office. The Appellant submitted that the only time that the Complainant used transit to meet with Mr. Farion was related to a discussion about a matter outside of work for Kranq Courier. The Appellant submitted that the transit receipts were required to have GST numbers on them.

10. Submissions were requested from the parties on the merits of the appeal. The Tribunal also requested that the Delegate confirm how the amounts found owing to the Complainant were calculated and to provide any investigative notes.

11. The Complainant submitted that the Appellant was required to submit all of its evidence by April 10, 2018, before the hearing, but did not do so. The Complainant responded to the additional evidence submitted by the Appellant with its appeal. The Complainant submitted that the Appellant used "inconsistent record keeping" and made contradictory statements on how a courier's hours were determined by the Appellant. The Complainant confirmed again the hours that she had worked for the Appellant.

12. The Delegate submitted that it had made an error in the calculation of the amount that the Appellant owes the Complainant. The Delegate submitted that due to a mathematical error, the Determination incorrectly added unpaid commission in the amount of $449.79 instead of $41.09. The Delegate recalculated the amount owing to the Complainant based on the corrected amount for commission. The Delegate confirmed that there were no investigation notes and that the Determination was "based solely on the documents the parties provided, contained in the Record, and the evidence at the hearing".

13. In regards to natural justice, the Delegate submitted that the Appellant expressed no concerns about the Director's Record and did not suggest that anything was missing. The Delegate submitted that after the first hearing was adjourned, he "ordered Mr. Farion to produce a doctor's note or hospital/emergency record of his attendance at hospital that day", but this was not done. The Delegate submitted that the Appellant did not object to the date set for the rescheduled hearing and that its representative at the hearing did not request a further adjournment or suggest that the Appellant's ability to participate was compromised by Mr. Farion's absence.

14. The Delegate submitted that after the hearing, the Appellant was sent an email advising that it would be notified if there was a requirement for the hearing to be reconvened and the Appellant did not express any surprise or misunderstanding with the email, "which clearly [stated] that the hearing was concluded".

The Delegate submitted that the only communication received from the Appellant after the hearing was an email on June 7, 2018, when the Appellant asked if the Determination had been made.

15. The Delegate noted that the Appellant included in its appeal a lengthy email dated May 11, 2018, from Mr. Greyling. The Delegate submitted that the Tribunal may wish to consider the email because it was dated May 11, 2018, before the June 22, 2018, Determination, but also questioned if the email was created after the date of the Determination because the email requested an explanation about the lunch breaks when this decision had not yet been made. The Delegate submitted that the Director committed no breach of natural justice.

16. In regards to the Tribunal receiving and considering new evidence, the Delegate submitted that the Appellant provided no evidence to allow the Tribunal to consider whether the new evidence was not discoverable or available for presentation to the Director. The Delegate submitted that the Appellant had not met its onus to satisfy the test for the introduction of new evidence.

17. The Delegate submitted that the Appellant is simply taking issue with the Delegate's findings of fact which were based on the Record and testimony at the hearing. The Delegate submitted that the Tribunal should confirm the Determination as varied by the mathematical correction in the Delegate's submissions.

18. The Appellant did not make any further submissions.

THE FACTS AND ANALYSIS

FACTUAL ANALYSIS

Background Facts

19. The Appellant, 1050135 B.C. Ltd., carrying on business as Kranq Courier, was incorporated in British Columbia on September 25, 2015. Mr. Farion is listed as the sole director. The Complainant was employed as a bicycle courier by the Appellant from September 5, 2017, to October 20, 2017. The Complainant worked in Vancouver, British Columbia, and was paid a monthly salary of $2,500 per month plus 20% commission for deliveries. The amount of commission for a delivered package was based on a number of variables including the rates for each customer and how many couriers were involved in delivering the package.

20. The Complainant was not given a specific time to take a meal break each work day. The Appellant expected all of its workers to take a one hour meal break each work day and maintained that this was communicated to the Complainant. According to the Complainant, this was never communicated to her and she was never able to take a one hour meal break. The issue relating to a meal break was the primary dispute between the parties relating to the wages owed to the Complainant. The Complainant quit her employment with the Appellant on October 20, 2017.

21. On October 31, 2017, the Complainant wrote in an email to Mr. Farion the following:

> You stipulated our hours to be 8am-5pm, which is 9 hours, or 8.5hrs with a 1/2hr break. Since I rarely got more than a half hour break, I typically worked 8.5hrs most days, which means I'm entitled to overtime pay any days I worked more than 8 hours.

(Pages 33 – 34 of the Director's Record)

22. On November 2, 2017, Mr. Farion responded that the Appellant's office was open from 8:00 am to 5:00 pm, and its employees all have one hour for lunch. The Complainant reiterated to him that she never took a full one hour break on any of her days worked and was never informed by Mr. Farion that she could do so. The Complainant sent the Appellant a spreadsheet that detailed all of her hours worked for the Appellant (found at page 37 of the Director's Record). The Complainant claimed in the spreadsheet that she was owed an additional 15.75 hours of regular wages and 13.5 hours of overtime.

23. On November 28, 2017, the Complainant made a complaint to the Director for wages owed to her. The Complainant complained that she was owed wages including unpaid commission from September 25 to October 20, 2017, overtime based on working 8.5 hours per day with no guaranteed break, and 4 hours for her last day worked on October 20, 2017. The Director's Record includes the above email correspondence between the Complainant and the Appellant relating to the wages owed.

The Determination

24. The hearing was originally scheduled for May 1, 2018, but the Appellant's representative, Mr. Farion, was not able to attend due to a medical issue, and the hearing was rescheduled for May 10, 2018. Mr. Greyling attended the hearing on May 10, 2018, while Mr. Farion was out of the country with family in Nicaragua during some civil unrest. The Complainant and a co-worker, Harrison Rampp, testified at the hearing on behalf of the Complainant, and Mr. Greyling testified on behalf of the Appellant.

25. The Delegate summarized the evidence of the Complainant and witnesses in the Determination. The Complainant testified that: she usually arrived at work each day at 7:45 am and had to be available until 5:00 pm; she would log in to the employer's system with an application on her phone which showed the deliveries for the day; there were some tasks which were required to be completed at the end of the day; she worked from 8:00 am to 5:00 pm each day except for September 20, 2017, when she did not work and September 22, 2017, when she worked reduced hours; she kept track of her hours worked and provided them for the hearing; she resigned on October 20, 2017, after working approximately one hour; on one occasion she took rapid transit to Surrey to deliver a package and on another occasion she took rapid transit to North Vancouver to assist Mr. Farion with a grant application, she was told by Ms. Diep that the employer would reimburse her the cost of the transit fares which was $6.50; she did not receive an explanation about how her commission was calculated and had commission owing to her; and she did not receive statutory holiday pay for Thanksgiving on October 9, 2017.

26. Mr. Rampp testified that: he and the Complainant had the same job; couriers had some work duties at the end of the work day; the Complainant was often at the Employer's office prior to 8:00 am; couriers did not have scheduled breaks during the day and took time for breaks when they could fit it into their day; and on one occasion, the Complainant delivered a package after 5:00 pm.

27. Mr. Greyling testified that: overtime had to be approved by management, but he was not sure if this was communicated to the Complainant when she was hired; he did not know if the Complainant was approved for or worked overtime; couriers were compensated for working 8.5 hours each day commencing at 8:00 am and concluding at 5:00 pm with a 30-minute break; he did not know if the Complainant was advised of this when she was hired; the Complainant's hours were calculated commencing when she signed into

a telephone app at the start of the work day and ending at the time shown on her delivery sheets for her last delivery each day; he had no knowledge of any training provided to the Complainant; commissions were paid based on a percentage of revenue for deliveries; calculating commission is complicated because of various factors including discounts, the number of couriers involved in the delivery, and surcharges; commissions are paid one month in arrears; the Complainant was overpaid 16 hours for the pay period ending October 8, 2017, and was not paid for Thanksgiving to offset the overpayment; the Complainant should have been reimbursed for the transit expenses; and it appeared that the Complainant had not been paid for all of her commissions.

28. The Delegate noted that there was a discrepancy between the materials submitted by Mr. Farion that the Complainant was expected to take a one hour break for lunch and Mr. Greyling's evidence that employees received a 30-minute lunch break. The Delegate accepted the Complainant's evidence that her salary was paid for 40 hours of work. Although the Complainant's $2,500 per month salary would be equal to $14.42 per hour (($2,500 per month x 12 months) / (40 hours per week x 52 weeks)), the Delegate found that the Complainant's regular wage was $14.88 based on the Employer's wage statements for the Complainant.

29. The Delegate noted that the Appellant provided no credible evidence to support that it provided the Complainant with one-hour meal breaks each day. The Delegate rejected the Appellant's evidence and accepted the Complainant's evidence that she worked Monday through Friday from 8:00 am to 5:00 pm with the exception of September 20, 2017, when she did not work, and September 22, 2017, when she worked five hours. The Delegate accepted the evidence of the Complainant that she was not provided with meal breaks and found that on each day worked, except for September 20 and 22, 2017, the Complainant worked nine hours.

30. The Delegate concluded that the Appellant must pay the Complainant eight hours each day at her regular wage and one hour each day at one and a half times her regular wage. The Delegate concluded that the Complainant qualified for statutory holiday pay and that the Complainant's average day's pay was $116.69. The Delegate concluded that the Appellant owed the Complainant $41.09 in unpaid commissions. The Delegate summarized the wages earned by the Complainant as follows:

Category	Amount
Regular Wages	$3,660.48
Overtime (1.5 times regular wage)	$669.60
Statutory Holiday Pay	$116.69
Commissions	$449.79
Subtotal	**$4,896.56**
Vacation Pay, 4% of Subtotal	$195.86
TOTAL	**$5,092.42**

31. The Delegate concluded that the Appellant owed the Complainant $1,583.28 in wages because it had only paid her $3,509.14 ($5,092.42 - $3,509.14). The Delegate concluded that the Appellant also owed the Complainant $6.50 for reimbursement of the transit expenses for a total owing of $1,589.78 ($1,583.28 + $6.50). The Delegate concluded that the Complainant was owed interest on the amount of wages owed. Finally, the Delegate concluded that the Appellant was liable for administrative penalties for failing to pay the Complainant commissions within the required time, for failing to pay the Complainant wages owed

within the required time after termination of her employment and for failing to pay overtime within the required time. The Delegate imposed mandatory penalties of $500 for each contravention of the *ESA* for a total of $1,500 in administrative penalties.

32. The Delegate clarified in submissions on the merits of the appeal that the amount of $449.79 for Commissions should have been $41.09. The Delegate also clarified that the Appellant should not have been credited with paying the Complainant wages in the amount of $3,509.14 because this included commission. The Delegate stated that the Complainant had been paid wages, excluding commission, in the amount of $3,100.26.

33. The Delegate confirmed that the correct calculation of wages owed by the Appellant to the Complainant is as follows:

Regular Wages Earned	$3,660.48
Overtime earned	$669.60
Statutory Holiday Pay	$116.69
Subtotal	**$4,446.77**
Deduct wages paid	$3,100.26
Subtotal, amount unpaid	**$1,346.51**
Add unpaid commission	$41.09
Subtotal	**$1,387.60**
Add 4% vacation pay	$55.50
TOTAL WAGES DUE	**$1,443.10**
Add business expense paid	$6.50
Determination amount due	**$1,449.60**

34. The Delegate did not explain in any detail how the regular wages earned, overtime earned, or statutory holiday pay were calculated.

ANALYSIS

35. Section 112 of the *ESA* sets out the Tribunal's jurisdiction to consider appeals of the Director's determinations:

> 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.

36. The Appellant appealed the Determination on the basis that the Delegate erred in law and failed to observe the principles of natural justice. In addition, the Appellant appealed the Determination on the

basis that evidence had become available that was not available at the time the Determination was being made.

Failure to Observe the Principles of Natural Justice in making the Determination

37. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker.

38. The appeal does not specifically state how the Delegate failed to observe the principles of natural justice but it appears that this ground of appeal relates to the following:

- Mr. Farion was not able to attend the rescheduled hearing date.
- The Appellant's witness was not called during the hearing.
- The hearing was adjourned and the Appellant was waiting to continue the hearing to call its witness.

39. These individual points, if proven, could support a finding that the Delegate failed to observe the principles of natural justice by not giving the Appellant the opportunity to respond to the case against it.

40. The parties were sent a letter dated March 23, 2018, from the Delegate informing them that the hearing was scheduled for May 1, 2018 (found at pages 6 – 8 of the Director's Record). The letter informed the parties that they were required to submit documentary evidence and a witness list of the people they intended to call as witnesses at the hearing as well as a brief summary of the evidence the witnesses were expected to give. The letter informed the parties that a request for an adjournment must be made in writing seven days before the scheduled hearing date and that the parties should remain prepared to attend on the scheduled hearing date until advised in writing that the adjournment has been granted. The letter informed the parties that if a party does not appear, the hearing may proceed in their absence.

41. Mr. Farion was not able to attend the first scheduled hearing date on May 1, 2018, and was then out of the country for the rescheduled hearing date on May 10, 2018. According to the Appellant's Appeal submissions, Mr. Farion ended up having to see a doctor for chest and arm pain on the date of the first scheduled hearing. According to the Delegate's submission on the merits, Mr. Farion was asked to produce a doctor's note or hospital/emergency record of his attendance at hospital on the date of the first hearing, but he did not do so.

42. The request for an adjournment and order to produce documentary evidence of Mr. Farion's medical condition is reflected in an email from the Delegate to Mr. Greyling dated May 1, 2018 (found at page 18 of the Director's Record). The Delegate granted the adjournment request to postpone the hearing to May 10, 2018. The Delegate noted that he "made it clear to Mr. Greyling that it is unlikely a further adjournment will be granted to the employer and it should be prepared to proceed on May 10, 2018".

43. The Appellant's appeal submissions state that Mr. Farion was unable to attend the rescheduled hearing date on May 10, 2018, because he had previously scheduled a trip to Nicaragua to ensure his family's safety due to the civil unrest there. In addition, the Appellant submitted that Mr. Farion was not able to

secure a consistent phone line, presumably to call in to the hearing on May 10, 2018. The Appellant submits that Mr. Farion was the one who hired the Complainant and did the majority of the training.

44. The Appellant's appeal submissions include a statement from Mr. Greyling that he requested the May 10, 2018, hearing be delayed a second time because "there were challenges for Mr. Farion to phone in and have a stable phone line due to the unrest", but this request was denied. Mr. Greyling also stated that "[t]he hearing was adjourned with the expectation of a continuation of the hearing" where further testimony would be heard, for example from Ms. Escanan. The Delegate in submissions on the merits of the appeal stated that Mr. Greyling appeared at the May 10, 2018, hearing and "did not request a further adjournment and did not suggest that the Appellant's ability to participate was compromised by Mr. Farion's absence or that it wished to call any witnesses when provided the opportunity to do so at the hearing".

45. It is not possible to definitively reconcile this discrepancy about whether or not a further adjournment was requested or whether there was an expectation that the hearing was to be continued because there is no independent evidence to corroborate what was said during the May 10, 2018, hearing. The Delegate has confirmed that he has "no investigation notes, written summaries of information provided by witnesses, memoranda following telephone or other communications with whom the Director communicated". It would be helpful if there was some record of what was said at the May 10, 2018, hearing other than the Determination that is dated June 22, 2018. Such contemporaneous evidence could help resolve such discrepancies.

46. This issue can be dealt with by examining the communications in the Director's Record and the Appellant's appeal submissions following the first hearing. These communication can be summarized as follows:

- May 1, 2018, email from the Delegate to Mr. Greyling and Mr. Farion confirming that the request to adjourn the hearing was being granted due to Mr. Farion's attendance to hospital but that documentary evidence of the medical condition would be required and that the hearing would proceed on May 10, 2018 and it would be unlikely that a further adjournment would be granted. (Page 18 of the Director's Record)
- May 10, 2018, email from the Delegate to Mr. Farion directing that the Appellant provide information about the Complainant's commission and that "[o]nce the officer reviews the requested information, the Branch will advise you if there is a requirement for the hearing to be reconvened". (Page 25 of the Director's Record)
- May 11, 2018, email from Mr. Greyling to the Delegate including an explanation about how commission is calculated. (Page 13 of 188 of the Appellant's appeal submissions)
- May 17, 2018, email from Mr. Greyling to the Delegate with "shipment records" for the Complainant and confirmation that the amount of commission owed to the Complainant was $8.22. (Page 24 of the Director's Record)
- June 7, 2018, email from Mr. Greyling to the Delegate "to enquire if a determination has been made regarding this matter". (Page 24 of the Director's Record)

47. The Appellant did not make any submissions on appeal in response to the requirement that Mr. Farion produce medical documentation for missing the first hearing scheduled for May 1, 2018. Aside from the

submissions on appeal, the Appellant did not provide any documentary evidence to confirm that Mr. Greyling requested that the May 10, 2018, hearing be adjourned or that the hearing be reconvened to call further witnesses.

48. The Appellant communicated with the Delegate multiple times after the hearing and did not raise any issues regarding adjournment of the May 10, 2018, hearing or that the hearing be reconvened to call further witnesses. The May 1, 2018, email communication clearly directs that the hearing would proceed on May 10, 2018, and that no further adjournments would likely be granted. This advice was generally consistent with the March 23, 2018, letter informing the parties of the originally scheduled hearing date. It is clear that the Appellant was informed of the importance of being prepared for the hearing, which was rescheduled for May 10, 2018. Unfortunately for the Appellant, it does not appear that it adequately prepared for the hearing.

49. Mr. Farion was not able to attend the originally scheduled hearing date on May 1, 2018, because he had to attend the hospital. Although required to submit medical documentation of his hospital attendance, he did not do so. The Appellant was informed of the case it had to meet and was given a reasonable opportunity to participate in the May 10, 2018, hearing. The Appellant should have arranged to call all of its evidence on that day but did not take sufficient steps in order to do so.

50. The evidence does not support on a balance of probabilities that the Delegate failed to observe the principles of natural justice when he directed that the hearing proceed as scheduled on May 10, 2018, and by not reconvening the hearing to hear additional evidence from the Appellant. This ground of appeal is dismissed.

New Evidence

51. The Appellant submitted on appeal new evidence from: Mr. Farion who is the owner of Kranq Courier; Mr. Greyling who is a general manager for the Appellant in its Calgary office and who appeared for the Appellant at the hearing; Catherine Diep who is an administrator for the Appellant; and Kyra Escanan who is an assistant administrator for the Appellant.

52. The Appellant provided "new evidence" from Mr. Farion with its appeal including relating to: being the owner of Kranq Courier; the policy for bike couriers to work from 8:00 am to 5:00 pm with one hour lunch break and two 15 minute breaks; the average number and time for deliveries; hiring of the Complainant and verbal communication of the company policies related to breaks and overtime; and various details related to the Complainant's work history with the Appellant.

53. The Appellant provided "new evidence" from Mr. Greyling with its appeal including relating to: a request for a new hearing date which was denied by the Delegate and the expectation that the hearing would be continued; Mr. Greyling's testimony at the hearing about breaks, overtime, and the Complainant's work hours and days worked; and calculation of the commission owing to the Complainant in the amount of $8.22 and not $41.09.

54. The Appellant provided "new evidence" from Ms. Diep with its appeal including relating to: hiring of the Complainant; and training the Complainant on HR policies including breaks. The Appellant provided "new

evidence" from Ms. Escanan with its appeal including relating to: informing the Complainant of the policies and procedures for breaks and hours of work; and the work hours of the Complainant.

55. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.* BC EST # D171/03 where it stated (at page 3):

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
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> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

56. The first stage of the test for admitting new evidence on appeal requires that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. All of the "new evidence" submitted by the Appellant with its appeal pre-existed the hearing date and could have been provided by the Appellant as part of the hearing process with the exercise of due diligence. The evidence was available at the time of the hearing and prior to the time that the Determination was made.

57. Given the "new evidence" submitted by the Appellant with its appeal was available at the time of the hearing and prior to the time that the Determination was made, the first stage of the test to admit the new evidence on appeal has not been met. Accordingly, the "new evidence" submitted with the appeal will not be considered on the merits as part of the appeal.

Error of Law

58. The Appellant submits that the Delegate erred in law by making findings related to the Complainant's work hours. In addition, the Appellant alleges that the Delegate erred in law by making findings related to the commission owed to the Complainant and reimbursement of transit expenses. Although not specifically articulated, the Appellant essentially alleges that the Delegate's findings are not supported by

the evidence. The Appellant has not specifically challenged the requirement to pay statutory holiday pay for Thanksgiving or the payment of vacation pay on the wages owing.

59. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp*. v. *British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.

60. For example, see *Britco Structures Ltd*., BC EST # D260/03. *Britco Structures Ltd* confirms that the Tribunal does not have jurisdiction over a question of fact alone but does have jurisdiction over questions of mixed fact and law. This includes where a trier of fact applies a legal standard to a set of facts, as was considered by the Supreme Court of Canada in *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235.

61. The court in *Housen* considered what constitutes a palpable and overriding error in regards to factual findings and held that an appellate court should not interfere with the findings of fact reached by a trial judge, and only where a palpable and overriding error exists on the record, should a finding of fact be overturned. The Justices of the majority decision in *Housen*, at paragraph 23, stated:

> ... that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

62. The majority of the court in *Housen*, at paragraph 6, determined that a palpable error is one that is "plainly seen."

63. In *Waxman* v. *Waxman*, 2004 CanLII 39040 (On CA) the Ontario Court of Appeal reiterated that the palpable and overriding standard demands strong deference to findings of fact made at trial and stated as follows (at paragraphs 296 and 297):

> [296] The palpable and overriding standard addresses both the nature of the factual error and its impact on the result. A palpable error is one that is obvious, plain to see or clear...Examples of palpable factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> [297] An overriding error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a palpable error does not automatically mean that the error is also overriding. The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz* v. *Canada*, 1996 CanLII 217 (S.C.C.), [1996]1 S.C.R. 254 at 281.

64. The Delegate acknowledged that an error of law was committed in the Determination because there was an error in calculating the wages that the Appellant owes to the Complainant. The basis for this was that the Determination found that the Appellant owed the Complainant $449.79 in commission when it should have been $41.09. I agree that the Delegate committed an error of law when calculating the amount of commission owed by the Appellant to the Complainant but do not agree that the amount of commission owed is $41.09.

65. On May 10, 2018, the Delegate requested by email that the Appellant provide information to determine the amount of commission owing to the Complainant (page 25 of the Director's Record). On May 17, 2018, Mr. Greyling, on behalf of the Appellant, responded (page 24 of the Director's Record) and confirmed that the total billed amount for the period in question was $41.09 and, based on the Complainant's commission rate of 20%, the amount of commission owed to the Complainant was $8.22 ($41.09 x 20%). The Delegate appears to have misapprehended the evidence provided to him that confirmed the amount of commission owing to the Complainant.

66. The Delegate committed an error or law when he determined that the commission owed to the Complainant was equal to the total billed amount and not 20% of this amount. The correct amount of the commission owed to the Complainant is $8.22.

67. In addition to the Delegate's calculation of the commission owed to the Complainant, the Delegate also calculated the regular wages, overtime wages, statutory holiday pay, vacation pay, and transit expenses owed to the Complainant. The Delegate's calculations for these amounts was dependent on the following findings of fact:

- The Complainant was hired to work 40 hours per week.
- The Complainant's regular hourly rate is $14.88 per hour.
- The Complainant worked Monday to Friday from 8:00 am to 5:00 pm except for September 20, 2017, when she did not work and September 22, 2017, when she worked five hours.
- The Complainant worked nine hours each day worked with no meal break.

- The Complainant was entitled to statutory holiday pay for the Thanksgiving holiday on October 9, 2017.
- The Complainant was entitled to vacation pay of 4% on all wages owed.
- The Complainant was entitled to reimbursement of the transit expenses of $6.50.

68. The evidence regarding the number of hours per week the Complainant was hired to work and the Complainant's hourly rate are confirmed by the Complainant's wage statements. No issue was taken with these findings by either of the parties. The Appellant did not dispute that the Complainant was entitled to statutory holiday pay for Thanksgiving or that the Complainant was entitled to 4% vacation pay. Given the evidence, there is no basis to conclude that the Delegate committed an error of law when he made these findings.

69. The Appellant did not agree on appeal that the Complainant was entitled to reimbursement of the transit fares but no evidence was tendered at the hearing to refute the Complainant's evidence that one transit fare was to deliver a package and the other was to assist Mr. Farion with a grant application and that she was told that the Employer would reimburse her. Mr. Greyling, on behalf of the Appellant, acknowledged at the hearing that the Complainant should have been reimbursed for the transit fares. Given the evidence, there is no basis to interfere with the Delegate's finding that the Complainant is owed reimbursement of $6.50 for transit fares. Accordingly, the Delegate did not commit an error of law when he found that the Complainant was entitled to reimbursement of the transit fares.

70. The primary disagreement by the parties relates to the hours worked by the Complainant including whether or not the Appellant provided breaks to the Complainant. Accordingly, the two findings of fact of the Delegate that are at issue are as follows:

- The Complainant worked Monday to Friday from 8:00 am to 5:00 pm except for September 20, 2017, when she did not work and September 22, 2017, when she worked five hours.
- The Complainant worked nine hours each day worked with no meal break.

71. The Delegate rejected the evidence from Mr. Greyling (and preliminary evidence from Mr. Farion) that the Complainant was provided with a meal break each day. According to the Determination, Mr. Greyling testified that the Complainant was provided with a one-half hour break each day and Mr. Farion submitted documentation that the Complainant was provided with a one hour break each day. The Delegate stated that the Appellant "asserted that it provided the Complainant with one-hour meal breaks each day, but offered no credible evidence supporting this". Given the complete lack of documentation by the Appellant relating to its purported policy that requires its bicycle couriers to take a one-hour meal break each day, it was reasonable for the Delegate to reject the Appellant's assertion.

72. The Delegate then accepted the evidence of the Complainant that she worked Monday through Friday from 8:00 am to 5:00 pm, except for September 20, 2017, when she did not work and September 22, 2017, when she only worked five hours, and that the Appellant did not provide the Complainant with any meal breaks. The Delegate found that the Complainant worked nine hours each day. In reaching this conclusion, the Delegate appears to have ignored the evidence of the Complainant in her October 31, 2017, email where she stated that she "rarely got more than a half hour break" and the breakdown of

hours worked that was produced by the Complainant at that time which confirmed that she took a half-hour break each work day.

73. The Delegate did not address the Complainant's evidence from October 31, 2017, which included a spreadsheet of all of the hours she worked for the Appellant. In her spreadsheet (found at page 37 of the Director's Record), the Complainant confirmed that she did not work on September 19, 25, and 26, 2017, or on October 16-18, 2017, and that she only worked 6.25 hours on September 22, 2017. The days not worked and number of hours worked on September 22, 2017, matches a document provided by the Appellant (found at page 176 of the Director's Record). It is not possible to reconcile this evidence with the findings of the Delegate that the Complainant did not work on only one day on September 20, 2017, and that she only worked five hours on September 22, 2017. The Delegate's findings on these points are not reasonably supported by the evidence and amount to an error of law.

74. It is important to note that the Complainant's spreadsheet of her hours worked, which she provided to the Appellant on October 31, 2017, was created soon after she left her employment with the Appellant and before she made her complaint to the Director for wages owed to her. From an evidentiary standpoint, this evidence should have carried the most weight, and reliability, in regards to determining the Complainant's hours of work. Although the Appellant provided a summary of the Complainant's work hours, this was not done until just before the hearing in May 2018 and there are no directly supporting documents. The Appellant did provide some delivery sheets showing the time of deliveries made by the Complainant but this is not direct evidence of the Complainant's starting and end time. It is apparent that the Appellant does not have a reliable way of documenting the hours worked by its employees.

75. Given the lack of supporting evidence, it was not unreasonable for the Delegate to reject the Appellant's assertion about the hours worked by the Complainant. However, given the evidence in the Complainant's October 31, 2017, email and spreadsheet of days/hours that she worked, it was not reasonable for the Delegate to simply conclude that the Complainant worked nine hours each day without a break without addressing the Complainant's earlier evidence that she did get a one-half hour break each day. The Delegate's failure to consider the Complainant's evidence that she took a one-half hour break each day amounts to an error of law.

76. The Delegate calculated the regular wages earned by the Complainant as $3,660.48 and the overtime earned by the Complainant as $669.90. For the reasons discussed above, the Delegate erred in law in making the findings that support that calculation of the wages owed to the Complainant. Accordingly, the wages earned by the Complainant must be recalculated based on corrected findings about the number of hours worked by the Complainant. Given the lack of directly supporting evidence about the hours worked by the Complainant, I am satisfied on a balance of probabilities that the most reliable evidence about the hours worked by the Complainant is contained in the Complainant's spreadsheet which she provided to the Appellant on October 31, 2017.

77. Based on the hours reported in the Complainant's spreadsheet, the regular wages earned by the Complainant are calculated as $3,128.52 (210.25 hours x $14.88 per hour) and the overtime wages earned are calculated as $295.74 (13.25 hours x $22.32 per hour). A breakdown of the regular and overtime hours worked by the Complainant taken from her spreadsheet can be found in Appendix "A". The regular and overtime hours calculated in appendix "A" are based on the starting and ending times in the "Hours worked/notes" column in the Complainant's spreadsheet.

78. The Complainant was also entitled to statutory holiday pay for Thanksgiving on October 9, 2017. According to section 45 of the ESA, statutory holiday pay is calculated according to the following formula: amount paid ÷ days worked. The amount paid is defined as the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period preceding the statutory holiday, including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime, and days worked is the number of days the employee worked or earned wages within that 30 calendar day period.

79. The 30 calendar day period preceding October 9, 2017, includes the period September 9, 2017, to October 8, 2017. The complainant worked a total of 17 days for the period September 9, 2017, to October 8, 2017, and earned a total of $1,997.64 ($134.25 regular hours x $14.88 per hour) during this time period. Accordingly, statutory holiday pay earned by the Complainant for October 9, 2017, is calculated as $117.51 ($1,997.64 / 17 days).

80. The total wages paid by the Appellant to the Complainant are calculated as $3,100.26. This is based on the sum of the "Monthly Salary" paid in the amounts of $1,502.97 (for September 5, 2017, to September 24, 2017), $1,153.85 (for September 25, 2017, to October 8, 2017) and $443.44 (for October 9, 2017, to October 20, 2017) as shown on the Complainant's wage statements (found at pages 121 to 124 of the Director's Record).

81. The total wages owed to the Complainant (using the same table format as the Delegate) can be summarized as follows:

Regular Wages Earned	$3,128.52
Overtime earned	$295.74
Statutory Holiday Pay	$117.51
Subtotal	**$3,541.77**
Deduct wages paid	$3,100.26
Subtotal, amount unpaid	**$441.51**
Add unpaid commission	$41.09
Subtotal	$482.60
Add 4% vacation pay	$19.30
TOTAL WAGES DUE	**$501.90**
Add business expense paid	$6.50
Determination amount due	**$508.40**

82. The Delegate also concluded that the Appellant was liable for administrative penalties in the total amount of $1,500 for failing to pay the Complainant commissions within the required time, for failing to pay the Complainant wages owed within the required time after termination of her employment, and failing to pay overtime within the required time. Although the Delegate erred in law in determining the amount of wages owed to the Complainant, the Appellant still contravened the *ESA* for failing to pay the Complainant commissions within the required time, for failing to pay the Complainant wages owed within the required time after termination of her employment and for failing to pay overtime within the required time. Accordingly, there is no basis to interfere with the administrative penalties imposed by the Delegate.

Remedy

83. The Delegate committed an error of law when he calculated the amount of wages owing to the Complainant based on findings that the Complainant worked nine hours each day without a meal break. Section 115(1)(a) of the *ESA* provides that the Tribunal may confirm, vary or cancel the determination under appeal. Section 115(1)(b) provides that the Tribunal may refer the matter back to the director.

84. Although the Appellant requested in the appeal form that the Determination be cancelled, this would only be an appropriate remedy if the Appellant's evidence about the Complainant's work hours was accepted. For the reasons outlined above, the Appellant's evidence has not been accepted and the most reliable evidence about the Complainant's work hours is based on the hours contained in the Complainant's spreadsheet provided to the Appellant on October 31, 2017. Based on this accepted evidence, the Appellant owes the Complainant $508.40 for wages owed and reimbursement of transit fares.

85. The appropriate remedy is to vary the Determination to correct the amount of wages owed to the Complainant from $1,589.78 to $508.40. The Complainant is entitled to interest on this amount pursuant to section 88 of the *ESA*. The administrative penalties in the total of $1,500 are confirmed.

ORDER

86. I allow the appeal and vary the determination under section 115(1)(a) of the *ESA* to correct the amount of wages owed to the Complainant from $1,589.78 to $508.40.

Richard Grounds
Member
Employment Standards Tribunal

APPENDIX "A"
Regular and Overtime Hours Worked

Date	Work Times	Hours	Break	Regular	Overtime
05-Sep-17	8:00 am - 4:30 pm	8.5	0.5	8	0
06-Sep-17	8:00 am - 5:00 pm	9	0.5	8	0.5
07-Sep-17	7:45 am - 5:00 pm	9.25	0.5	8	0.75
08-Sep-17	8:00 am - 5:15 pm	9.25	0.5	8	0.75
11-Sep-17	8:00 am - 5:00 pm	9	0.5	8	0.5
12-Sep-17	8:00 am - 5:00 pm	9	0.5	8	0.5
13-Sep-17	8:00 am - 5:30 pm	9.5	0.5	8	1
14-Sep-17	8:00 am - 5:30 pm	9.5	0.5	8	1
15-Sep-17	8:00 am - 5:00 pm	9	0.5	8	0.5
18-Sep-17	8:00 am - 5:00 pm	9	0.5	8	0.5
19-Sep-17	OFF to look after sick son				
20-Sep-17	8:00 am - 5:00 pm	9	0.5	8	0.5
21-Sep-17	8:00 am - 5:15 pm	9.25	0.5	8	0.75
22-Sep-17	8:00 am - 2:15 pm	6.25	0	6.25	0
25-Sep-17	OFF SICK				
26-Sep-17	OFF SICK				
27-Sep-17	8:00 am - 5:15 pm	9.25	0.5	8	0.75
28-Sep-17	8:00 am - 4:30 pm	8.5	0.5	8	0
29-Sep-17	8:00 am - 5:30 pm	9.5	0.5	8	1
02-Oct-17	8:00 am - 5:15 pm	9.25	0.5	8	0.75
03-Oct-17	8:15 am - 5:15 pm	9	0.5	8	0.5
04-Oct-17	8:00 am - 4:45 pm	8.75	0.5	8	0.25
05-Oct-17	8:15 am - 5:15 pm	9	0.5	8	0.5
06-Oct-17	8:00 am - 5:30 pm	9.5	0.5	8	1
09-Oct-17	STATUTORY HOLIDAY				
10-Oct-17	8:15 am - 5:00 pm	8.75	0.5	8	0.25
11-Oct-17	8:00 am - 4:30 pm	8.5	0.5	8	0
12-Oct-17	8:15 am - 5:00 pm	8.75	0.5	8	0.25
13-Oct-17	8:15 am - 5:15 pm	9	0.5	8	0.5
16-Oct-17	OFF SICK				
17-Oct-17	OFF SICK				
18-Oct-17	OFF SICK				
19-Oct-17	8:30 am - 5:15 pm	8.75	0.5	8	0.25
20-Oct-17	8:30 am - 9:30 am	4	0	4	0
	Total Hours:	**236**	**12.5**	**210.25**	**13.25**