Employment Standards TRIBUNAL

Citation: Joyce J. Spier (Re)
2019 BCEST 97

An appeal

- by -

Joyce J. Spier carrying on business as QT's VIP Company
(the "Employer" or "Ms. Spier")

- 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: Shafik Bhalloo

FILE NO.: 2019/138

DATE OF DECISION: September 16, 2019

DECISION

SUBMISSIONS

Joyce J. Spier	on her own behalf carrying on business as QT's VIP Company

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Joyce J. Spier carrying on business as QT's VIP Company (the "Employer") has filed an appeal of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director") on June 6, 2019 (the "Determination").

2. The Determination found that the Employer 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 Madelaine Pebernat ("Ms. Pebernat"). The Determination ordered the Employer to pay Ms. Pebernat wages in the total amount of $2,223.52 inclusive of accrued interest. The Determination also levied three administrative penalty against the Employer 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 $3,723.52.

3. The Employer appeals the Determination on all three grounds under section 112(1) of the *ESA*, namely, that the Director erred in law and failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available when the Determination was being made. The Employer seeks the Tribunal to cancel the Determination.

4. On July 18, 2019, the Tribunal corresponded with the parties advising them that it had received the Employer'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. Pebernat that no submissions were being sought from them on the merits of the appeal at this stage.

5. The Tribunal received the Record from the Director on July 24, 2019. On July 29, a copy of the same was sent by the Tribunal to the Employer and Ms. Pebernat and both parties were provided an opportunity to object to its completeness. Neither the Employer nor Ms. Pebernat objected to the completeness of the Record and the Tribunal accepts it as complete.

6. On August 27, 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. Pebernat 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.

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

ISSUE

8. 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

9. Based on the B.C. Online Corporate Registry "Sole Proprietorship Summary" (the "Summary") obtained by the delegate of the Director on December 21, 2018, the Employer, QT's VIP Company, is a sole proprietorship involved in the business of "Mobile Caterers". It was registered on June 8, 2012, and Ms. Spier is the sole proprietor of the business.

10. Between November 14, 2018, and December 6, 2018, Ms. Pebernat worked at a food truck owned by Ms. Spier or the Employer. On December 19, 2018, Ms. Pebernat filed a complaint with the Employment Standards Branch alleging that the Employer failed to pay her regular wages, overtime, and vacation pay (the "Complaint").

11. Based on the notes of the delegate in the Record, mediation of the Complaint was scheduled and cancelled and then rescheduled. From the Employer's appeal submissions, it appears that mediation of the Complaint proceeded before a different delegate. However, no resolution was reached in the mediation as the parties subsequently proceeded to a hearing of the Complaint (the "Hearing") on May 27, 2019.

The Determination

12. The Hearing was attended by both Ms. Spier and Ms. Pebernat and they each gave evidence on their own behalf which the delegate summarizes in the Reasons. I propose to reiterate relevant parts of the evidence below including the questions the delegate considered and her analysis in making the Determination.

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

i. Whether Ms. Pebernat is an employee as defined in the *ESA*?

ii. If the answer to the first question is in the affirmative, is Ms. Pebernat a "manager" as defined in the *ESA*?

iii. If Ms. Pebernat is an employee, is she owed any wages and if so, how much?

14. The delegate notes in the Reasons that while the sequence of events is undisputed, the parties have a differing interpretation of what was agreed to and whether the *ESA* applies to their relationship.

15. More particularly, the delegate notes that according to Ms. Pebernat, she was an employee of Ms. Spier and therefore, entitled to wages. She explained that she came to know Ms. Spier when they both worked in the kitchen of Giraffe Restaurant where she was a cook and Ms. Spier a head chef. Subsequently, in September of 2018, when they were both working at another restaurant, Sandcastle Bar and Grill, they discussed setting up Ms. Spier's food truck to serve home-baked pastries and coffee. At the time the truck was not operational and was sitting in Ms. Spier's driveway. Ms. Pebernat testified that Ms. Spier asked her if she wanted to work on the food truck as she had hired someone previously and it hadn't worked out. She said that Ms. Spier offered to pay her $20.00 an hour but as she was making $15.00 an hour at the time, she told Ms. Spier she would be happy earning the same rate.

16. While Ms. Spier did not take issue with Ms. Pebernat's characterization of how they met, the delegate states that Ms. Spier contended that Ms. Pebernat was her business partner and the *ESA* did not apply to their relationship. Ms. Spier explained that she did not discuss wages with Ms. Pebernat because she could not have afforded to take on an employee and pay wages; she was proposing a partnership to Ms. Pebernat. She also submitted that she had an agreement with Ms. Pebernat that she would pay start-up costs and Ms. Pebernat would set up and run the food truck. Ms. Pebernat's responsibilities would include finding a location for the food truck, obtaining licensing from Fraser Health Authority, promoting the business on social media, and preparing and serving food and taking cash once the truck was up and running. According to Ms. Spier, the profits of the business would be shared between the two of them, and Ms. Pebernat would eventually reimburse her the start-up costs.

17. To corroborate her position that Ms. Pebernat was her partner, Ms. Spier provided emails in which Ms. Pebernat described herself to others as a business partner of Ms. Spier. However, Ms. Pebernat explained that she called herself a partner only to sound more professional given her age of 18. She turned 19 in February 2019, slightly over two (2) months after her employment with the Employer ended.

18. Ms. Pebernat also testified that she considered herself a manager in the business and took employment with the Employer because she could put management experience on her resume.

19. On November 14, 2018, Ms. Pebernat states she opened the food truck for business at the temporary space for the truck at Potter's Nursery in Surrey. Ms. Spier provided her with training on the Point of Sale System ("POS") and other procedures and then left the following day on a three-week vacation, leaving her (Ms. Pebernat) to work alone on the food truck.

20. According to Ms. Pebernat, over the next three weeks, she ran the food truck by herself. She kept a handwritten timesheet of her work hours from November 14 to December 2, 2018, which included working, on some occasions, more than eight (8) hours in a day. The delegate noted that both parties agreed that Ms. Pebernat's hours for the said period were correct, but they did not agree on the hours Ms. Pebernat says she worked on December 5 and 6, 2018.

21. While Ms. Spier did not keep her own records of Ms. Pebernat's hours worked, Ms. Pebernat provided a spreadsheet which indicated she worked seven (7) hours on December 5, 2018 (from 8 a.m. to 3 p.m.), and eleven (11) hours on December 6, 2018 (from 8 a.m. to 7 p.m.). At the Hearing, Ms. Pebernat acknowledged she logged these hours at a later date and she may have started work at 8:30 a.m. on December 5 and not 8:00 a.m. Text messages adduced by Ms. Pebernat indicate she arranged to be picked

up at 2:45 p.m. on December 5, 2018, but she claimed she was picked up later than the noted time. Ms. Spier, on the other hand, recollected that Ms. Pebernat left work around 2:45 p.m. on December 5.

22. With respect to December 6, Ms. Pebernat testified that she worked a full day on the food truck alongside Ms. Spier and thereafter, she went shopping for groceries for the food truck with Ms. Spier. After grocery shopping, Ms. Pebernat said that Ms. Spier picked up her dog from day care before dropping her home. While Ms. Spier did not take issue with the sequence of events on December 6, she noted that the dog day care closed at 6:30 p.m. which meant they could not have been engaged in work tasks until 7 p.m. as Ms. Pebernat claimed.

23. On December 2, 2018, Ms. Pebernat gave Ms. Spier a copy of her timesheet and on December 6 she asked Ms. Spier when she would be paid. Ms. Spier said she would "figure out the numbers."

24. On December 7, 2018, Ms. Pebernat sent Ms. Spier a text (the "December 7 text") expressing some concern that she would not be paid for work and therefore, she would only return to work if she was paid in full for November. The December 7 text to Ms. Spier read:

> Joyce, Regarding my pay we never agreed to any sort of profit sharing or delayed payment, let alone got anything in writing. With how spending is going I fear I am not going to be paid in full what I'm owed. Our last verbal agreement was $15/hr. You have my hours for when you were away and I request to be paid in full for November before I return to work. From now on I want everything in writing, paycheque will come with a payslip and all communications will be via text or email.

25. After receiving the December 7 text, Ms. Spier changed the password to the POS. She sent Ms. Pebernat a cheque for $282.12 in mid-December which, according to Ms. Spier, represented a share of profits. Ms. Pebernat acknowledged receiving the cheque but chose not to cash it.

26. In considering the question of whether or not Ms. Pebernat was an employee of Ms. Spier under the *ESA* or her partner in business, the delegate notes that the parties' intentions are not determinative. It may be for a variety of reasons that an employee may believe she is a business partner including being told so by their employer.

27. In rejecting Ms. Spier's contention that Ms. Pebernat was a partner of hers, the delegate made two observations. First, she noted that there was no corroborating evidence of a partnership contract to support Ms. Spier's bare assertion of a partnership. Secondly, Ms. Pebernat was a minor at the time she began working on the food truck. Therefore, even if the parties had a partnership contract, it would be unenforceable. As a result, the delegate turned her attention to the question of whether or not Ms. Pebernat was an employee of Ms. Spier under the *ESA*. In so doing, the delegate went on to observe that the test for determining whether a person is an employee for the purposes of the *ESA* is based on the definitions and objectives of the *ESA* and requires consideration that the *ESA* is intended to be a remedial legislation, that establishes certain minimum benefits and standards for the employees that cannot be waived or compromised by private agreements. The delegate also noted that as a remedial legislation, the *ESA* should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects.

28. Having delineated the general principles applicable in determining whether an individual is an employee, the delegate then went on to specifically consider and apply the statutory definitions of "work", "employer" and "employee" in section 1 of the *ESA* in context of the facts she found. In concluding that Ms. Pebernat was an employee under the *ESA*, the delegate reasoned as follows:

> Section 1 of the Act states that an employee includes a person entitled to wages for work performed for another, and a person an employer allows to perform work normally performed by an employee. An employer includes a person who has control or direction of an employee, or who is responsible for the employment of an employee.
>
> Work is defined as "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."
>
> The definition of employer provides that control and direction are important aspects of an employment relationship. Ms. Spier had the final say on decisions related to the running of the food truck. She provided Ms. Pebernat with instructions and guidelines as an employer would. This demonstrates Ms. Spier's control.

29. The delegate also went on to consider the question of "whose business is it?" She observed that:

> The food truck was part of Ms. Spier's mobile catering business. She controlled the finances. Ms. Pebernat submitted receipts to her for reimbursement. Ms. Spier operates a sole proprietorship. The business registration was not changed to include Ms. Pebernat. The business was Ms. Spier's alone.

30. In the result, the delegate concluded that Ms. Pebernat was an employee of Ms. Spier who performed work for Ms. Spier's business and, therefore entitled to wages under the *ESA*.

31. The delegate next considered whether Ms. Pebernat was a "manager" under the *ESA*, as managers are excluded from the overtime provisions of the *ESA*. She notes that Part 1 of the *ESR* defines a "manager" as a person whose main responsibilities are supervising and/or directing resources, or someone employed in an executive capacity. In finding that Ms. Pebernat did not meet the definition of "manager", the delegate reasoned as follows:

> Ms. Pebernat purchased supplies out of the daily cash but had to give receipts to Ms. Spier. She had no access to paperwork or financial records. She could not hire staff and did not have anyone to direct or supervise. Once the food truck was set up her primary duties were that of cook and cashier.

32. Finally, the delegate considered the question of what amount of wages Ms. Pebernat was owed. The delegate noted that Ms. Spier did not dispute the hours, including some overtime hours, Ms. Pebernat claimed she worked and recorded on a timesheet for the period November 14 to December 2, 2018.

33. The delegate also preferred the evidence of Ms. Pebernat with respect to the hours she claimed she worked on December 5, 2018, noting that Ms. Spier did not provide alternate evidence to challenge Ms. Pebernat's claim. More particularly, the delegate found that on December 5, Ms. Pebernat worked 6.25 hours, from 8:30 a.m. to 2:45 p.m. because she stated it was likely she began work at 8:30 a.m. and she provided a corroborating text message showing she had arranged a ride to pick her up at 2:45 p.m.

34. With respect to December 6, 2018, the delegate concluded that Ms. Pebernat worked 9.75 hours from 8:30 a.m. to 6:15 p.m. because there was unchallenged evidence that Ms. Spier had to be at her dog's daycare by 6:30 p.m. and therefore, she could not have worked until 7:00 p.m.

35. With respect to all the hours Ms. Pebernat worked during her employment with Ms. Spier, the delegate concluded, based on the December 7 text, that the applicable hourly wage rate the parties agreed to is $15.00. The delegate reasoned as follows:

> Ms. Spier says no specific figures were discussed regarding financial compensation. Ms. Pebernat's December 7, 2019 text is the only written evidence provided by either party referencing an agreement on quantum. I find it improbable that Ms. Pebernat would work for nearly a month without having any idea of much she would be paid. I accept Ms. Pebernat's evidence that the parties agreed to an hourly wage of $15.00.

36. Applying the wage rate of $15.00 per hour, the delegate calculated the regular and overtime wages and vacation pay owing to Ms. Pebernat and subtracted from this amount the payment of $282.12 Ms. Spier previously made to Ms. Pebernat to arrive at the total amount owing to Ms. Pebernat of $2,223.52 inclusive of interest.

37. The delegate also levied three administrative penalties against Ms. Spier for contravention of sections 17, 18 and 28 of the *ESA*. She concluded that contrary to section 17 of the *ESA,* Ms. Spier did not pay Ms. Pebernat all wages earned in a pay period within eight days after the end of the pay period. She also found that Ms. Spier terminated Ms. Pebernat's employment because Ms. Pebernat quit her employment when Ms. Spier did not pay her. In the circumstances, when Ms. Spier failed to pay Ms. Pebernat all final wages within 48 hours of terminating her employment, she also violated section 18 of the *ESA*. Finally, the delegate found that Ms. Spier also violated section 28 of the *ESA* because, as an employer, she failed to keep records of Ms. Pebernat's daily hours of work.

SUBMISSIONS OF THE EMPLOYER

38. As indicated previously, Ms. Spier has raised all of the statutory grounds of appeal found in section 112(1) of the *ESA*. While I intend to summarize the arguments made by Ms. Spier under each of the statutory grounds in this section, it is noteworthy that in the preamble to her appeal submissions, under the heading "Summary", Ms. Spier states that she is appealing the Determination because she was "not given fair or appropriate opportunities to give [her] evidence, or state any facts that supported [her] view of the complaint filed against [her]". She contends that after all of her "statements and evidence is seen" the "[C]omplaint should be dismissed" because she had a "verbal partnership agreement" with Ms. Pebernat. Therefore, the Director had no jurisdiction to make the Determination.

Error of law

39. Ms. Spier submits the Director "did not apply the law correctly or misinterpreted or misapplied the applicable law", "misapplied an applicable principle of general law" and "acted without any evidence" in determining that Ms. Pebernat was her Employee and not in a partnership agreement with her.

40. Under this ground of appeal Ms. Spier raises the following points:

- the Complaint should have been immediately dismissed when she sent to the mediator the email Ms. Pebernat wrote on November 29, 2018 to Mr. Randy Elliot, the market co-ordinator for the Farmers Market, wherein she describes Ms. Spier as her partner;
- the email (referred to above) contradicted Ms. Pebernat's contention at the mediation that "she had never discussed being a partner, nor used that title to describe herself, to any one for any reason";
- the evidence that Ms. Pebernat referred to herself as a partner in the email above and denied that she told anyone else she was her partner should have been "noted" and brought forward at the hearing (as communicated to her by the mediator), and the adjudicator should have had "access to the transcripts or the recorded proceeding [mediation] to understand all points of view, and or at least the statement of facts brought forth from the mediation before the [C]omplaint hearing was even started";
- the evidence adduced by the parties at the mediation should have been documented and "brought forward at the next hearing";
- the mediator refused to collect her evidence "at the appropriate time" at the mediation;
- at the Hearing, the delegate brought forth "[a]ll the new issues" from her "own point of view" and never asked her for her point of view on these issues such as whether "Ms. Pebernat … have access to the financials, if she was a manager, if she had direction and or final say on business issues, if she could hire people or if all the recipes were [hers]. Instead the adjudicator chose to make the [D]etermination from her own point of view";
- despite Ms. Pebernat calling herself a manager, the delegate decided she was not a "manager" as defined in the *ESA* because "she had no access to paperwork or financial records and or wasn't responsible for the supervision or direction of resources";
- the delegate failed to consider that Ms. Pebernat had access to financials because she said that the passwords to the POS system were changed, therefore, before the passwords were changed she had access to the POS system;
- Ms. Pebernat listed her boyfriend on her witness list for the hearing and noted that he "was there most days". "Why would her boyfriend be there most days or at all be involved in her job, if she was an employee? Who hires an employee and allows them to have their boyfriend there to work with them? For free?" The boyfriend is not coming after her for wages;
- the finding of the delegate in the reasons that Ms. Pebernat worked on her own at the food truck after she (Ms. Spier) left on a three weeks vacation at the start of the business "only strengthens the idea that Ms. Pebernat was employed in an executive capacity… [she] had full control and direction of all aspects of having to do with the running, filling, stocking and banking of the food truck for three weeks" which is one-half of the time the truck was at "[P]otter's for the six week Christmas season";
- Ms. Pebernat's December 7 text references the "idea of profit sharing or delayed payment" which "means that these terms must have been brought up or discussed at some point" with Ms. Pebernat";

- at the Hearing, Ms. Pebernat presented evidence of "actually starting [work] for [her] in September, 2018", and therefore she had been working with her (Ms. Spier) for almost three months at the time of the December 7 text and "nobody would go for three months without getting a pay cheque, unless delayed payment or possibly profit sharing was discussed, because all business partners know what has to be accomplished or sacrificed in order to get things going";
- the delegate "contradict[ed] herself" in finding that the wage rate agreed to between the parties was $15 per hour because only the "employer has a final say on a person's wages" and furthermore, "[i]t seems unreasonable that [she] would have offered such a high amount [$20 per hour] to Ms. Pebernat, who has under a year of experience in that same field".

Natural justice

41. Ms. Spier argues that in the mediation and subsequently at the Hearing she was denied an opportunity to produce her "business information" to support her contention that Ms. Pebernat was her business partner and goes on to state that "in this section I will be going through every assumption of fact done (sic) on the adjudicator's part, and supplying (sic) evidence to the contrary of her view point, or just speculation without evidence". I have reviewed all of Ms. Spier's submissions under this ground of appeal, and for the reasons under the Analysis heading below, I do not find it necessary to reiterate her submissions here.

New evidence

42. Ms. Spier has submitted, as new evidence, text messages and Whatsapp messages between Ms. Pebernat and herself and others including Ms. Pebernat's boyfriend, financial documents, emails including that submitted at the Hearing wherein Ms. Pebernat referred to herself as a partner. All of this evidence, she admits at page 7 of her submissions "was available at the time of the mediation and the… Hearing, [b]ut [she] was denied the opportunity to [present it] previously." While I have reviewed all the evidence she now adduces, I do not find it necessary to summarize the evidence here for the reasons set out under the heading Analysis below.

43. Ms. Spier has also attached letters from three different individuals in support of her appeal. She states that since the Hearing, she was approached by her "friends and acquaintances that jumped at the opportunity [to] show their support … to help her tell the truth behind all the accusations, and lies." While I have reviewed these letters, I do not find it necessary to summarize them here for the reasons below.

44. In her conclusory paragraph in her appeal submissions, Ms. Spier states that "most of the statements made by Ms. Pebernat about [their] employee/employer relationship can be disputed with her own evidence and the business partnership evidence when looked at as a whole." She states that the Employer was a "small start-up company" that she and Ms. Pebernat were only "testing the waters" with. She contends that it is unreasonable to think that an employee would be hired "to fully run the business, without training or guidance" while she would be away on vacation for half the time. She states that Ms. Pebernat broke away from this partnership because she did not want to "try new things to make more money" and she was concerned that she (Ms. Spier) was spending all the profits. She states that Ms. Pebernat failed to realize that "the money she was seeing coming in [from the business] still had [to] provide for the necessities of running the food truck". She states Ms. Pebernat failed to recognize that

she (Ms. Spier) "was still only spending money out of her own pocket to try to get the business off the ground" and none of the "gross sales were ever touched until after Ms. Pebernat gave her Notice". She states that as "Ms. Pebernat had sole control over the social media and procurement of the hot chocolate festival", the only option she had was "shutting the business down".

ANALYSIS

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

> **Appeal of director's determination**
>
> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

46. The Tribunal has repeatedly stated in its decisions that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, with the burden on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

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

48. Having delineated some broad principles applicable to appeals, in this case, as indicated, Ms. Spier has checked off all available grounds of appeal on in her Appeal Form. I do not find any of them are successful grounds of appeal for the reasons set out below.

Error of law

49. Ms. Spier argues error of law in this appeal. The Tribunal has adopted the following definition of "error of law' delineated by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor) of Area #12 – Coquitlam*, [1998] B.C.J. No. 2275:

1. a misinterpretation and 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.

50. It should also be noted that where there is an allegation that the delegate acted without evidence or acted on a view of facts which could not reasonably be entertained, the Tribunal, in *Britco*, *supra,* quoting from the decision of the British Columbia Supreme Court in *Delsom Estate Ltd. v. Assessor of Area 11 – Richmond/Delta*, [2000] B.C.J. No. 331, noted that error of law, in these circumstances, is only found where it is shown:

> …that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as the relevant law, could have come to the determination, the emphasis being on the word 'could'…

51. I find that the delegate, in this case, considered the statutory provisions defining "employer" and "employee" and properly assessed the relationship between Ms. Spier and Ms. Pebernat in context of those definitions. The delegate also set out the evidence that supported her findings of fact that Ms. Pebernat was a non-managerial employee of Ms. Spier and not in a partnership with her (see paragraphs 27 to 29 and 31 above). I do not find Ms. Spier has shown the delegate acted without any evidence, or acted on a view of facts that could not reasonably be entertained in concluding that Ms. Pebernat was a non-managerial "employee" of Ms. Spier under the *ESA*. More particularly, I am not persuaded that a reasonable person, acting judicially and properly instructed as to the relevant law, could not have come to the same determination as that made by this delegate. I also do not find the delegate erred in law in any other respect as defined in *Gemex, supra*.

52. I also note that the delegate considered the email Ms. Pebernat wrote on November 29, 2018, to Mr. Randy Elliot, the market co-ordinator for the Farmers Market, wherein she refers to herself as a partner of Ms. Spier. This email was adduced by Ms. Spier in the mediation to argue that Ms. Pebernat admitted she was a partner of hers. The email made its way into the Hearing and was considered by the delegate in making the Determination. It was open for the delegate to prefer the evidence of Ms. Pebernat that she only "called herself a partner in the email to sound more professional" and the delegate indeed preferred her evidence. While Ms. Spier may disagree with the delegate's decision in this regard, it's not an error of law on the delegate's part. It was open for the delegate to weigh the evidence of both parties and to prefer one party's evidence over the other which the delegate appears to have done in this case.

53. Before proceeding to the natural justice ground of appeal I also wish to observe that it was open, on the evidence (or lack of it) at the Hearing, for the delegate to conclude that there did not exist a partnership and, in any event, a partnership agreement with a minor would not be enforceable. With respect to the latter point, *Infants Act* [RSBC 1996], c. 223 (the "*Act*"), explains the legal position of children under 19 whom the *Act* refers to as "minor". Section 19 of the *Act* provides:

> **When infants' contract enforceable**
>
> **19** (1) Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is
>
> (a) a contract specified under another enactment to be enforceable against an infant,

(b) affirmed by the infant on his or her reaching the age of majority,

(c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or

(d) not repudiated by the infant within one year after his or her reaching the age of majority.

54. The alleged partnership agreement Ms. Spier contends she had with Ms. Pebernat would not come under any of the exceptions under subsection (1) above and therefore unenforceable, if the agreement were found to exist. Notwithstanding, I reiterate that the delegate's conclusions that Ms. Pebernat was a non-managerial employee of Ms. Spier and not her partner is supportable on the evidence and this Tribunal will defer to the said finding absent an error of law. In the result, I do not find Ms. Spier can succeed in this appeal on the error of law ground.

Natural Justice

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

56. 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.

57. Ms. Spier has alleged that the Director failed to comply with the principles of natural justice. She must provide some evidence in support of that allegation (see *Dusty Investments Inc. d.b.a. Honda North,* BC EST # D043/99). Having reviewed her written appeal submissions, I find that she has failed to provide objectively acceptable evidence showing she was denied the procedural protections described in the above cases. She has simply made a bare assertion that she was denied, at the Hearing (and earlier in the mediation), an opportunity to produce her "business information" to support her contention that Ms. Pebernat was her business partner. Having reviewed the Determination and the Record, I am not convinced that Ms. Spier was denied any opportunity to provide her evidence. It is apparent to me that she is using this assertion as a springboard to reargue that she was in a partnership agreement with Ms. Pebernat. An appeal is not an opportunity for a party dissatisfied with the Determination to take the proverbial "second kick at the can" and have this Tribunal take a different view of the facts and come to a different conclusion than the Director.

58. I also do not find any merit in Ms. Spier's argument that the adjudicator should have had "access to the transcripts or the recorded proceeding [mediation] to understand all points of view, and or at least the

statement of facts brought forth from mediation before the [C]omplaint hearing was even started". The mediation between the parties was on a "without prejudice" basis. Nothing in the *ESA* requires mediation to be recorded or transcribed and it is not the Director's practice to record mediations. However, documents provided at mediation that were not created expressly for the mediation will form part of the record and will remain in the file for the adjudicator to see. In this case, the email of Ms. Pebernat where she refers to herself as Ms. Spier's partner that the latter submitted at the mediation did make it into the Hearing and was considered by the delegate in making her Determination.

59. I find Ms. Spier has failed to show a breach of the principles of natural justice.

New evidence

60. Ms. Spier also advances the "new evidence" ground of appeal.

61. Admission of "new evidence" is discretionary under section 112(1)(c). In *Bruce Davies and others*, *Directors* or *Officers of Merilus Technologies Inc*., BC EST #D171/03, the Tribunal set out four (4) conjunctive requirements which must be met before new evidence will be considered on appeal. These requirements are as follows:

a. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

b. the evidence must be relevant to a material issue arising from the complaint;

c. the evidence must be credible in the sense that it is reasonably capable of belief; and

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

62. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the investigation stage or before the Determination is made (see *607470 B.C. Ltd. carrying on business as Michael Allen Painting*, BC EST # D096/07; Kaiser Stables Ltd., BC EST # D058/97).

63. None of the evidence Ms. Spier submits as "new evidence" – text and Whatsapp messages between Ms. Pebernat and Ms. Spier and others including Ms. Pebernat's boyfriend; financial documents; and emails including the one submitted at the mediation and considered at the Hearing wherein Ms. Pebernat referred to herself as a partner of Ms. Spier – satisfy the requirements for accepting "new evidence" in *Merilus Technologies, supra*. More particularly, all of the evidence Ms. Spier is adducing in the appeal as "new evidence" existed previously before the Determination was made and therefore, fails to meet the first of the four requirements for qualifying as new evidence in *Re Bruce Davis, supra*. Ms. Spier herself admits in her written submissions, at page 7, that all of this evidence "was available at the time of the mediation and the… Hearing, [b]ut [she] was denied the opportunity to [present it] previously." I have already ruled that I am not convinced that Ms. Spier was denied an opportunity to present her evidence at the Hearing (or earlier in the mediation). In the circumstances, I do not find that Ms. Spier has made out a case for an appeal under the new evidence ground of appeal.

64. With respect to the letters Ms. Spier has adduced in the appeal from three different individuals in support of her appeal, all three individuals could have been called as witnesses by her at the Hearing but for some reason she did not call them. I also do not find the letters have high potential probative value, in the sense that, if believed, they could, on their own or when considered with other evidence, have led the Director to a different conclusion on a material issue in this case.

65. In the result, I am satisfied that Ms. Spier'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*.

ORDER

66. Pursuant to section 115 of the *ESA*, I order the Determination dated June 6, 2019, be confirmed in the amount of $ 3,723.52, together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal