Citation: Unisus International Schools Ltd. and Sunstream Consulting Ltd. (Re)
2022 BCEST 77

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Unisus International Schools Ltd. carrying on business as Unisus School
("Unisus")

and

Sunstream Consulting Ltd.
("Sunstream")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo

FILE NO.: 2022/192

DATE OF DECISION: December 20, 2022

DECISION

SUBMISSIONS

Cindy Leung	on behalf of Unisus International Schools carrying on business as Unisus School and Sunstream Consulting Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Unisus International Schools carrying on business as Unisus School ("Unisus") and Sunstream Consulting Ltd. ("Sunstream") (collectively the "Appellants") appeal a determination issued by a delegate of the Director of Employment Standards (the "Director") on September 28, 2022 (the "Determination").

2. The Determination found that the Appellants violated Part 3, section 18 (wages) and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Nicola Shaw ("Ms. Shaw").

3. The Determination ordered the Appellants to pay Ms. Shaw wages in the total amount of $1,833.28 consisting of wages, vacation pay and accrued interest.

4. The Determination also levied four administrative penalties of $500 each against the Appellants for contraventions of sections 18, 27, 28 and 58 of the *ESA*.

5. On October 20, 2022, the Appellants appealed the Determination on the natural justice and error of law grounds of appeal under section 112(1)(a) and (b) of the *ESA.*

6. On October 26, 2022, the Tribunal corresponded with the parties advising them that it had received the Appellants' appeal. The Tribunal also informed Ms. Shaw and the Director that, at this time, no submissions were being sought from them on the merits of the appeal.

7. In the same correspondence, the Tribunal requested the Director to provide the section 112(5) "record" that was before the Director at the time the Determination was made.

8. On October 28, 2022, the Director delivered the record to the Tribunal. On November 21, 2022, the Tribunal sent a copy of the same to Ms. Shaw and the Appellants and afforded each an opportunity to object to its completeness by 4:00 p.m. on December 5, 2022.

9. On December 5, 2022, Ms. Shaw's counsel confirmed that the record is complete. The Tribunal did not receive any response from the Appellants. As none of the parties objected to the completeness of the record, on December 7, 2022, the Tribunal informed the parties that the appeal is assigned to a panel, 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 the other parties on the merits of the appeal.

10. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based solely on the written submissions of the Appellants, the record and the

Reasons for the Determination (the "Reasons"). Under section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any reasons listed in the subsection. If satisfied the appeal or part of it should not be dismissed, the Director and Ms. Shaw will be invited to file submissions. On the other hand, if the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed.

ISSUES

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

THE FACTS AND REASONS FOR THE DETERMINATION

Background

12. A BC Registry Services Search conducted online on September 15, 2022, with a currency date of August 4, 2022, indicates Unisus was incorporated in British Columbia on October 27, 2017. Peter Chu, Cindy Leung ("Ms. Leung") and Jiaqiang Yang are listed as the directors.

13. A BC Registry Services Search conducted online on September 15, 2022, with a currency date of August 4, 2022, indicates Sunstream was incorporated in British Columbia on March 31, 2016. Ms. Leung is listed as the sole director and officer.

14. Unisus operates a private school in Summerland.

15. Sunstream operates an education consulting company and provides educator recruitment and hiring services for schools.

16. In and during April 2020, Unisus offered Ms. Shaw, a foreign national, a position in its school. On April 25, 2020, Ms. Shaw signed an employment agreement with Unisus with a start date of her employment on September 1, 2020.

17. When the Appellants were made aware that Ms. Shaw did not have a permit to work in Canada, the Appellants purported to hire her as a "contractor" for the time being. Accordingly, Ms. Shaw entered Canada as a visitor and then began working part-time for Unisus as a counsellor and art teacher.

18. Ms. Shaw worked for the Appellants between September 1, 2020, to January 8, 2021. She was paid a yearly salary of $45,500.00 and $6,000 per year for a boarding contract.

19. On December 28, 2020, on behalf of the Appellants, Ms. Leung emailed Ms. Shaw to inform her that the "consulting arrangement" between the parties needed to end as she needed to clean up the Appellants' business records. She suggested that Ms. Shaw had two options in fiscal year 2021: (i) to incorporate a foreign consulting company and receive her wages by way of money sent to her foreign bank account or (ii) have her spouse set up a Canadian consulting company that the Appellants could send money to for her services.

20. On or about January 7, 2021, Ms. Shaw sent the Appellants an email in which she resigned from her position with the Appellants, stating "I cannot continue to work at Unisus until a time when my residency and visa status changes".

21. On July 7, 2021, Ms. Shaw filed a complaint under section 74 of the *ESA* alleging that she was constructively dismissed by the Appellants when the latter unilaterally changed how her remuneration was to be administered and failed to pay her compensation for length of service and other monies owed to her pursuant to the *ESA* (the "Complaint").

22. A delegate of the Director (the "investigating delegate") completed an investigation into the Complaint and prepared the "investigation report" dated August 12, 2022. Subsequently, another delegate (the "adjudicating delegate") conducted a review of all information in the file, including the investigation report, and issued the Determination.

23. In the Reasons for the Determination (the "Reasons"), the adjudicating delegate delineates the following questions she considered in making the Determination:

a) Was the Complaint filed within the time limit set out in section 74(3) of the *ESA*?

b) Was Ms. Shaw an employee or independent contractor?

c) Is Sunstream an associated employer of Unisus pursuant to section 95 of the *ESA*?

d) If she was an employee, is Ms. Shaw owed any outstanding wages?

e) If she was an employee, is Ms. Shaw owed compensation for length of service?

f) If she was an employee, is Ms. Shaw owed vacation pay?

24. Since the appeal submissions of the Appellants primarily focuses on whether Ms. Shaw could be considered an "employee" under the *ESA* and entitled to its protections when she did not have a permit to work in Canada and whether the adjudicating delegate properly calculated vacation pay owed to her, I will largely focus on the latter in my decision below and only cursorily summarize and discuss the adjudicating delegate's determinations on the other issues.

25. With respect to the timing of the Complaint, the adjudicating delegate found the Complaint was filed within the 6-month time limit on July 7, 2021, as Ms. Shaw's employment ended on January 8, 2021.

26. With respect to the question of her status in her relationship with the Appellants, the adjudicating delegate found Ms. Shaw was an employee of the Appellants after applying the definitions of "employee" and "employer" in the *ESA and* common law tests for direction and control to the facts in the case:

> While there are some factors present which would indicate an independent contractor relationship, I am satisfied the evidence provided of the Complainant being an employee outweighs that of her being a contractor. First, the Complainant only worked for the Respondent at the time she was teaching at Unisus. Had the Complainant been able to obtain a work permit, Ms. Leung confirmed the Respondent would have kept Ms. Shaw on for the upcoming school year and the relationship would have been on-going. It was the Respondent who determined what duties the Complainant did, and the Respondent had the ability to assign the Complainant work as necessary. While the Respondent may not have been privileged to information about all

components of the Complainant's work, Ms. Shaw did work under the supervision of Unisus staff, and she was not able to delegate her work to others. Finally, the Respondent set the Complainant's salary at $45,500.00 a year, consequently prohibiting Ms. Shaw from a chance of profit or risk of loss. Despite Ms. Shaw invoicing the Respondent for her wages, I am satisfied the factors laid out above point toward an employee/employer relationship over that of an independent contractor. Brought together, I find these factors indicate the Respondent exercised considerable control and direction over what the Complainant did, and the Complainant was not in the business for herself but, rather, performed work at the direction and for the benefit of the Respondent. For these reasons, I find the Complainant was an employee of the Respondent.

27. The adjudicating delegate also found that Sunstream is an associated employer of Unisus, and both entities ought to be deemed one employer pursuant to section 95 of the *ESA* for the following reasons:

a) the searches of the BC Registry Services confirmed that Unisus and Sunstream are separate legal entities;

b) both Appellants are actively carrying on a business, trade, or undertaking in the field of education with Unisus operating a private school in Summerland, while Sunstream operates an education consulting company and provides educator recruitment and hiring services for schools including Unisus;

c) there is common control or direction between the businesses of the Appellants with BC Registry Services Searches, as well as verification from the Appellants in the investigation confirming that Ms. Leung is one of the directors of Unisus, and is the sole director of Sunstream and she was also identified as the representative and person of contact for both corporate entities throughout the investigation of the Complaint; and

d) associating Unisus and Sunstream as a single employer is consistent with one of the primary purposes of the *ESA*, namely, to ensure employees in British Columbia receive at least basic standards of compensation and, and it provides a framework for collection of wages.

28. With respect to Ms. Shaw's claim for outstanding wages, based on the evidence of both parties and particularly the confirmatory email of September 3, 2020, of the Appellants' accounting supervisor, the adjudicating delegate found that although not explicitly agreed to in a written contract between the parties, Ms. Shaw earned an annual salary of $45,500.00 plus an annual boarding stipend of $6,000.00, which worked out to a monthly salary of $4,291.67. While the adjudicating delegate noted that there was no evidence laying out how many hours Ms. Shaw ought to have worked each month in order to be paid these wages, because her yearly salary was broken down into twelve equal payments of $4,291.67, she was satisfied that Ms. Shaw was entitled to these wages each of the twelve months regardless of the number of hours she worked or if she worked at all that month.

29. The adjudicating delegate also noted that Ms. Shaw was paid the full monthly salary of $4,291.67 for the month of December 2020, despite being on winter break for a portion of the month. Had she remained an employee during the full month of January 2021, Ms. Shaw would have been paid another $4,291.67 despite being on break and not working the first week of January, according to the adjudicating delegate. Accordingly, the adjudicating delegate concluded that Ms. Shaw was entitled to a proportionate payment of her monthly salary and boarding fees, totaling $1,107.53, for the 8 days in January she was still considered an employee.

30. With respect to Ms. Shaw's claim for compensation for length of service under section 63 of the *ESA*, the adjudicating delegate rejected her claim that she was constructively dismissed when the Appellants unilaterally changed how her remuneration was to be administered. The adjudicating delegate reviewed section 66 of the *ESA* which grants the Director the ability to deem the employee terminated, if it is found the employer made a fundamental change to the employee's terms and conditions of employment without providing them a *reasonable notice* of the change. In this case, the adjudicating delegate found that the Appellants did provide Ms. Shaw reasonable notice of the change in the manner of her payment. More particularly, the adjudicating delegate notes that in the exchanges between the parties, the Appellants informed Ms. Shaw in the email of December 28, 2020, that, by the end of January, she would be required to have made the change. According to the adjudicating delegate, Ms. Shaw was given one month's notice of the change the Appellants were seeking, and this was sufficient or reasonable advance notice according to her. In the result, the adjudicating delegate found that Ms. Shaw was not constructively dismissed. Instead, she resigned from her employment with the Appellants in her email of January 8, 2021, to Unisus.

31. Having earlier found that Ms. Shaw was an "employee" under the *ESA*, the adjudicating delegate commented in the Reasons that this would then entitle her "to all of the provisions granted to her by the [*ESA]"* including vacation pay pursuant to section 58. Based on the evidence of the parties, the adjudicating delegate notes in the Reasons that Ms. Shaw was never paid any vacation pay throughout her employment because the Appellants incorrectly classified her as a contractor. In determining then that Ms. Shaw was owed $645.81 in vacation pay, the adjudicating delegate explains as follows:

> The Complainant was paid a total of $17,166.68 for the months of September through December 2020. $2,000.00 of this amount was for the annual boarding stipend she was entitled to, as per a condition of her employment. Subtracting this amount from the total, as the annual boarding fee is not deemed wages and, therefore, not entitled to have vacation pay paid on top of it, in addition to adding the wage portion of the $1,107.53 I have found her to be owed above ($978.50), I find the Complainant earned a total of $16,145.18 in wages throughout her employment. Accordingly, I find the Complainant is owed $645.81 in vacation pay.

32. The adjudicating delegate also levied four administrative penalties of $500 each against the Appellants for breaches of:

a. Section 18 of the *ESA* for failing to pay Ms. Shaw all her remaining outstanding wages within six days after her employment was terminated on January 8, 2021;

b. Section 27 of the *ESA* for failing to provide Ms. Shaw with any wage statements with certain required information on each pay period;

c. Section 28 of the *ESA* for failing to keep required payroll records for Ms. Shaw; and

d. Section 58 of the *ESA* for failing to pay Ms. Shaw any vacation pay on any wages she earned during her employment.

33. The adjudicating delegate also awarded Ms. Shaw interest in the amount of $79.94 on the amounts owing to her pursuant to section 88 of the *ESA.*

SUBMISSIONS OF THE APPELLANTS

34. The Appellants appeal the Determination based on the "error of law" and "natural justice" grounds of appeal in section 112(1)(a) and (b) of the *ESA*.

35. In her written submissions on behalf of the Appellants, Ms. Leung states that the adjudicating delegate "has not used the principle of fairness". More particularly, she explains:

> [Ms. Shaw] was identified as a foreign national who is illegally working in Canada without a work permit. Whether Ms. Shaw is an employee or contractor, *a foreign national cannot work in Canada unless the individual has proper and valid work permit.* When such individual cannot work, he/she cannot be treated as an employee thus cannot be a paid worker.

36. In other words, Ms. Leung is contending that the protections and benefits of the *ESA* should not be afforded to someone who does not have a permit to work in Canada.

37. For the same reasons, Ms. Leung contends that the administrative penalties for contraventions of sections 18, 27, 28, and 58 of the *ESA* cannot stand because the Determination should not have been made. She states that for the Appellants to pay these penalties is tantamount to agreeing with the Determination "that Ms. Shaw is an employee" which the Appellants deny.

38. Ms. Leung also disputes the adjudicating delegate's finding of fact that Ms. Shaw was a yearly salaried employee. She says there is no proof that "such contract existed" or that Ms. Shaw was entitled to annual compensation. She contends that Ms. Shaw's contract was void from the beginning because she was unable to work in Canada. She says there is only evidence that Ms. Shaw was paid monthly and that the adjudicating delegate "cannot determine, without proof, that Ms. Shaw's contract had a term".

39. Ms. Leung also disputes the adjudicating delegate's determination that the Appellants owe Ms. Shaw $978.50 in vacation pay. She states that Unisus closed on December 18th and Ms. Shaw's "boarding duty ended then". She contends that Ms. Shaw was on vacation for 22 days from December 19, 2020, to January 10, 2021, during the entire winter break, when Unisus was closed. Therefore, there is no further vacation or vacation pay owing to Ms. Shaw at the time her employment ended.

40. Finally, Ms. Leung argues that the Determination creates a conflict between federal and provincial law. She states that the determination under the *ESA* that Ms. Shaw is an employee and entitled to wages conflicts with the law that requires foreign nationals like Ms. Shaw to have a permit to work in Canada. She states that in the event of a conflict between federal and provincial law, the federal law is paramount under the doctrine of paramountcy. In the circumstances, she argues "[i]t is illegal for the employer to accept such determination from Ms. MacCarron". She concludes asserting that it is "questionable" whether the Complaint should have been investigated by the Employment Standards Branch in the first place.

ANALYSIS

41. 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.

42. 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).

43. 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.

44. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.

45. The Appellants have checked off the "error of law" and the "natural justice" grounds of appeal in the Appeal Form.

46. I will discuss each ground of appeal under separate headings below starting with the natural justice ground of appeal, but first I must address what appears to be a constitutional question raised by Ms. Leung in her appeal submissions.

(a) Constitutional question and paramountcy argument

47. Ms. Leung argues that there is a conflict between the provincial law – *ESA* – and the federal law that requires foreign nationals like Ms. Shaw to have a permit to work in Canada. While Ms. Leung does not specifically mention the federal law in question, I presume she is referring to the *Immigration and Refugee Protection Act, S.C. 2001, c. 27* and *Immigration and Refugee Protection Regulations (SOR/2002-227)* (collectively referred to as the "*IRPA*"). Ms. Leung is effectively arguing that if Ms. Shaw does not have a work permit under the immigration laws or *IRPA* then she cannot be found to be an "employee" under the *ESA* and claim any wages or benefits provided under the *ESA*. Therefore, the Determination cannot stand because it is borne of a conflict between the provincial and federal laws that should be resolved in favour of the federal law (*IRPA*) by virtue of the doctrine of paramountcy - the rule that where a provincial law conflicts with a federal law, the provincial law will be inoperative to the extent of the conflict (the "paramountcy argument").

48. I do not find the constitutional question raised by Ms. Leung, including her paramountcy argument, is properly before me. More particularly, section 46 of the *Administrative Tribunals Act, [SBC 2004] c. 45* (the "*ATA*"), states:

> ***Notice to Attorney General if constitutional question raised in application***
>
> **46** If a constitutional question over which the tribunal has jurisdiction is raised in a tribunal proceeding, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act*.

49. Ms. Leung has not satisfied the requirement of section 46 of the *ATA* which refers to the requirement imposed by section 8 of British Columbia's *Constitutional Questions Act, [RSBC 1996] CHAPTER 68* ("*CQA*") on any party raising a constitutional question over which the tribunal has jurisdiction. Under section 8, the law that is the subject of a constitutional challenge cannot be held invalid or inapplicable, and a remedy cannot be meted out to the party making the challenge unless the latter has served a notice of the challenge or application on the Attorney General of Canada and the Attorney General of British Columbia in compliance with the section.

50. The Appellants have not served a notice in compliance with section 8 of the *CQA* on the Attorney General of Canada and the Attorney General of British Columbia and therefore, I need not consider the constitutional question and the related paramountcy argument of Ms. Leung.

51. Having said this, even if the proper notice was served by the Appellants on the Attorney General of Canada and the Attorney General of British Columbia, I do *not* find the argument that there is a conflict between the provincial *ESA* and federal law (*IRPA*) meritorious for the reasons delineated below.

52. The governing constitutional provisions in this case are sections 91(25) and 92(13) of the *Constitution Act, 1867* (respectively, "Property and Civil Rights in the Province" and "Naturalization and Aliens"). In *Montcalm Construction Inc. v. Minimum Wage Commission* [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641, Beetz, J. (writing for a seven-justice majority) said:

> The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider* (cite omitted). By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject...

53. In the case at hand, the *ESA,* which is enacted under the province's authority over property and civil rights in the province under section 92(13) of the *Constitution Act, 1867*, does not purport to regulate the circumstances under which a foreign national can work in Canada, nor does it interfere with the federal government's authority under section 92(13) to enact immigration law – the *IRPA* – that proscribes a foreign national from working in Canada unless authorized to do so by work permit. The Appellants have not shown how the operation of the *ESA* frustrates the purposes or scheme of the *IRPA* or any federal laws for that matter. I find there is no constitutional issue here; there is no operational conflict between the *ESA* and the *IRPA*. The provisions of both statutes can operate within their respective spheres and therefore, there is no basis to consider the paramountcy argument of Ms. Leung. In the result, in my view,

the *ESA* governs the employment relationship between Ms. Shaw and the Appellants and there is no basis to consider Ms. Leung's paramountcy argument.

(b) Natural justice

54. The often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd.*, 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.

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

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

56. There is nothing in the record nor in Mr. Leung's submissions that suggests an infringement of the Appellants' natural justice rights in the investigation or adjudication of the Complaint. The onus is on the party alleging a failure to comply with principles of natural justice to provide some evidence in support of that allegation and, in this case, the Appellants have failed to do so. A bare assertion in Ms. Leung's written appeal submissions that the adjudicating delegate "failed to observe the principal of natural law of justice", without more, does not breach of natural justice make.

57. It is evident from Ms. Leung's submissions that the Appellants do not share the adjudicating delegate's conclusions of fact that Ms. Shaw was in an employment relationship with the Appellants notwithstanding that she did not have a work permit. As previously indicated, 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*, *supra*. Here, I find the adjudicating delegate's analysis leading to her finding of an employment relationship between Ms. Shaw and the Appellants very persuasive (see para. 26 above and the discussion at paragraph 60 below). There is simply no evidentiary foundation for a claim of error of law on the part of the adjudicating delegate here.

58. In sum, I find there is no basis to interfere with the Determination under the natural justice ground of appeal.

(c) Error of law

59. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco, supra*, in which the Tribunal adopted the following definition of "error of law" set out by the British Columbia Court of

Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *ESA*;
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. While the Appellants, in their appeal submissions, focus largely on the "constitutional question" and the paramountcy argument (both of which I have already dealt with above), the Reasons indicate that the status of Ms. Shaw as an "employee" is something that the Appellants took issue with during the investigation of the Complaint. The Appellants had advanced the argument in the investigation that Ms. Shaw was a contractor if anything. Having reviewed the adjudicating delegate's analysis of the issue in the Reasons and particularly her application of the definitions of "employee" and "employer" under the *ESA* and the common law tests to the facts in the case (as set out in paragraph 26 above), I find the adjudicating delegate had sufficient evidence before her to support her finding that Ms. Shaw was an "employee" of the Appellants and the latter her "employer". I do not find any error of law within the meaning of *Gemex, supra,* shown by the Appellants in the decision of the adjudicating delegate.

61. The Appellants also contend that the adjudicating delegate erred in awarding Ms. Shaw vacation pay when none was owed to her. Indeed, if the adjudicating delegate, in awarding Ms. Shaw vacation pay, acted without any evidence or acted on a view of the facts which could not reasonably be entertained under the test in *Britco* above then it may be said that she erred in law. However, I find the adjudicating delegate did have sufficient and persuasive evidence to conclude that that Ms. Shaw did not receive vacation pay during the entire period of her employment with the Appellants because the latter incorrectly classified her as a contractor. I find the analysis of the adjudicating delegate at pages R9 and R10 of the Reasons very persuasive in this regard. I also do not find there is any credible basis for Ms. Leung to now claim that the winter break period, when Unisus was closed from December 18, 2021, to January 10, 2022, effectively constituted Ms. Shaw's vacation period and there is no more vacation or vacation pay owing to her.

62. Ms. Leung also disputes that Ms. Shaw was a yearly salaried employee and her yearly income was $45,500.00 plus an annual boarding stipend of $6,000.00 because there was no "proof" of a written contract with such terms. Again, it appears that Ms. Leung is contending that the adjudicating delegate either acted without any evidence or acted on a view of the facts that could not reasonably be entertained in finding that Ms. Shaw was a yearly salaried employee being paid the amounts above. I find Ms. Leung's contention without merit. At page R8 of the Reasons, the adjudicating delegate explains that the amounts in question – the annual salary, the boarding stipend and the monthly salary of Ms. Shaw – were all delineated in an email sent by the Appellants' accounting supervisor to Ms. Shaw on September 3, 2020 (which document is part of the record in this proceeding), and also supported by the amounts the Appellants paid Ms. Shaw for the months of September and December 2020. Therefore, it was open to the adjudicating delegate to conclude as she did. Again, there is no error of law on the part of the adjudicating delegate established by the Appellants.

63. Lastly, the administrative penalties levied in the Determination against the Appellants for contraventions of sections 18, 27, 28, and 58 of the *ESA* stands because the Director's findings of these contraventions remain undisturbed in the appeal.

64. In the result, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

65. Pursuant to section 115 of *ESA,* I confirm the Determination made on September 28, 2022, against Unisus International Schools Ltd. carrying on business as Unisus School and Sunstream Consulting Ltd. together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal