

An appeal

- by -

Michelle Porotti
(“Ms. Porotti”)

- 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)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2013A/92

DATE OF DECISION: February 13, 2014

DECISION

SUBMISSIONS

Michelle Porotti on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Michelle Porotti (“Ms. Porotti”) has filed an appeal of the determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 13, 2013 (the “Determination”).
2. The Determination concluded that Ms. Porotti did not meet the definition of employee under the *Act* and therefore the *Act* did not apply to her complaint against Royal Ascot Care Centre Ltd. (“Royal”). Accordingly, the Director would take no further action with respect to her complaint.
3. Ms. Porotti has appealed the Determination on the sole ground that evidence has become available that was not available at the time the Determination was being made. She is seeking this Tribunal to change or vary the Determination. More specifically, Ms. Porotti wants the Determination cancelled and concurrently the Tribunal to determine that an employment relationship exists between her and Royal.
4. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on my review of the Reasons for the Determination (the “Reasons”), the written submissions of Ms. Porotti, and the “record” that was before the delegate when the Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Royal will, and the Director may, be invited to file further submissions. Conversely, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

5. The sole issue of this appeal is whether there is new evidence available that was not available at the time the Determination was made and, if so, is this new evidence sufficient to justify the Tribunal to change or vary the Determination under appeal.

THE FACTS

6. Royal operates a long-term residential care facility in Metro Vancouver.
7. Royal engaged Ms. Porotti on April 7, 2007, to set up a computer-based assessment tool required to be used by long-term residential care facilities in British Columbia, called Point Click Care (“PCC”).
8. Ms. Porotti continued working at Royal until about August 8, 2012, when her engagement was terminated.
9. On November 16, 2012, Ms. Porotti filed the complaint against Royal with the Employment Standards Branch (the “Branch”) stating that Royal contravened the *Act* by failing to pay her annual vacation pay, statutory holiday pay and compensation for length of service (the “Complaint”).

10. On October 10, 2013, the delegate of the Director held a hearing into the Complaint (the “Hearing”). Ms. Porotti attended at the Hearing and testified on her own behalf. Cheryl Scarlett (“Ms. Scarlett”), Royal’s administrator, attended with counsel on behalf of Royal and Royal presented two other witnesses at the Hearing.
11. The delegate, after reviewing the evidence of both parties, issued the Determination on November 13, 2013.
12. I have very carefully read the Reasons and the materials contained in the “record”. While I do not find it necessary to reiterate all the evidence of the parties I think a review of the delegate’s analysis of the evidence presented by the parties is in order to comprehend the Determination.
13. As indicated previously, Royal operates a long-term residential care facility in Metro Vancouver and engaged Ms. Porotti, starting April 7, 2007, to set up the PCC program, which is a computer-based assessment tool required to be used by long-term residential care facilities in British Columbia. In addition to setting up the program, Ms. Porotti was involved in the training of Royal’s service providers on how to use it and input data into it.
14. The Complaint against Royal was that the latter failed to pay Ms. Porotti wages, vacation pay, statutory holiday pay and compensation for length of service. The penultimate issue at the Hearing of the Complaint was whether Ms. Porotti was an employee of Royal.
15. At the Hearing, both parties presented evidence on the threshold issue of whether Ms. Porotti was an employee of Royal. Ms. Porotti, of course, argued that her relationship with Royal was one of employee and employer. Royal, through its administrator, Ms. Scarlett, argued that Ms. Porotti was not an employee, but an independent contractor, and the *Act* did not apply to her. Royal, in addition to Ms. Scarlett, also presented two (2) other witnesses: namely, Doris McLeod (“Ms. McLeod”), Royal’s Director of Care (“DOC”) until November 2010, and Jacqueline Orina (“Ms. Orina”), Royal’s DOC since November 2010. I note Ms. Porotti had the opportunity to cross-examine all of Royal’s witnesses.
16. The delegate, in concluding that Ms. Porotti was not an employee under the *Act* and the *Act* did not apply to her, reviewed the evidence of both parties and applied the statutory definitions of “employee” and “employer”, together with the common law tests for determining whether an employer/employee relationship or an independent contractor relationship existed between Ms. Porotti and Royal. In the Reasons, I note the delegate, under descriptive headings -“Four-fold test”, “Integration test”, “Economic Reality tests” and “Control Test” - delineated the evidence she relied upon in arriving at her decision that Ms. Porotti did not meet the definition of employee in the *Act*.
17. With respect to the four-fold test, the delegate noted that while Royal provided Ms. Porotti with an office space, office supplies, telephone, computer access, company email address and office keys, Ms. Porotti had remote access to Royal’s servers and was able to use her own laptop and computer if she chose, and she did so when not working out of Royal’s office. The delegate also noted that Ms. Porotti was not reimbursed for expenses she incurred, but she did receive a ticket to Royal’s company Christmas party which was paid for by Royal.
18. The delegate also considered under the four-fold test that Ms. Porotti did not present any evidence of receiving orientation or training from Royal when she started her position. The delegate noted that Ms. Porotti, by her own admission, presented that there was no one at Royal who could do her job and it was she who brought her skills and expertise to Royal and trained Royal’s staff on the PCC system.

19. The delegate also noted that while Ms. Porotti attended free PCC training workshops put on by external service providers, these were directly related to the special skill set for which she had been hired. Further, while Royal paid for Ms. Porotti to attend a QuickBooks accounting software training session in April 2013, the delegate was not satisfied that Ms. Porotti performed any accounting responsibilities for Royal, or used QuickBooks in her role at Royal. The delegate preferred the evidence of Ms. Scarlett that Ms. Porotti participated in the QuickBooks training simply for the purpose of assessing the viability of integrating that software into the PCC program, and therefore the QuickBooks training was not with a view to asking her to perform accounting duties for Royal.
20. Also under the four-fold test, the delegate noted that Ms. Porotti was paid based on the number of hours she worked at Royal and by setting her own hours she was able to increase or decrease her income accordingly. The delegate also noted that Ms. Porotti was responsible for proposing the resident shopping and Point of Care initiatives to Royal which increased the scope of her services to Royal. The delegate noted that by Ms. Porotti's own account, no one else performed her role at Royal and, therefore, by adding or reducing her services, she directly controlled her profitability. The delegate also considered the evidence of Ms. Scarlett that Ms. Porotti was free to reduce her hours and sub-contract her work, and that the invoices she submitted to Royal contained evidence of unpaid days she opted to take off without providing any reasons to Royal. The delegate also noted that while no evidence was adduced that Ms. Porotti hired anyone else to perform the services she was providing to Royal, if she had chosen to do so, she could have hired another for such purpose. On the basis of the foregoing evidence, the delegate concluded, under the four-fold test, Ms. Porotti did bear a chance of profit and risk of loss in her engagement at Royal particularly because of the freedom she had in deciding the number of hours she would work and the types of services she would provide.
21. In reviewing the parties' evidence in context of the integration test, the delegate noted that there was no dispute between the parties that the implementation of PCC was required in order for Royal to operate in compliance with the regulatory requirements set by the Ministry of Health, and that Ms. Porotti was the person responsible for setting this system up at Royal and training Royal's staff on how to use it. However, the delegate noted while Ms. Porotti performed this task for over five (5) years, the length of her time at Royal did not "cement her permanency within the organization" because the PCC program had various phases and there were delays experienced in these different phases. Moreover, Ms. Porotti's extensive work on PCC and her success in proposing the Point of Care component to Royal extended her time with Royal beyond 2011, when the PCC implementation was contemplated to end.
22. With respect to certain shopping duties which Ms. Porotti stated she performed for Royal's residents and which she relied upon in her evidence at the Hearing to argue her broader scope of engagement by Royal beyond her engagement on the PCC project, the delegate observed that Ms. Porotti was not required to perform shopping duties. Shopping duties were previously performed by caregivers but Royal accepted Ms. Porotti's proposal and availability to shop for residents and paid her for such service.
23. Ms. Porotti also submitted in support of her assertion that she had a broader role at Royal that she took minutes in at least one (1) Occupational Health and Safety meeting at Royal, but the delegate found that Ms. Porotti failed to satisfy her that this was a regular responsibility or requirement Royal imposed on Ms. Porotti.
24. With respect to Ms. Porotti's evidence that she put up posters at the premises of Royal "during the flu scare" and assisted once in formatting a Royal manual during her term of engagement, these tasks, according to the delegate, were sporadic and incidental to her core role at Royal which was to set up the PCC program and train Royal's staff on its use.

25. On the totality of the evidence under the integration test, the delegate concluded that she was not satisfied Ms. Porotti's specialized duties as PCC practitioner were integral to Royal in their day-to-day operations and found that Ms. Porotti held an ancillary role within the organization which was limited to setting up and refining the PCC system used by Royal's staff.
26. With respect to the economic reality tests, the delegate reviewed the evidence in context of the question of whether Ms. Porotti was in business for herself. In concluding that Ms. Porotti was indeed in business for herself the delegate reasoned as follows:

In general, a contract of employment requires an individual to supply his or her services at the general discretion of the 'payer' on an ongoing basis. In this case, Ms. Porotti was hired by Royal to set up and 'roll out' a software program. By all accounts the work was ongoing, had several phases to it and also required her to train staff, review the system and reports and trouble shoot in order to ensure PCC operated effectively and was properly utilised. Again, this is not to say that while lengthy in duration, the project did not have an eventual and foreseeable end date. The project was forecast to end within 2 years of Ms. Porotti starting but was extended to 2011 due to implementation hitches. As a result, funding continued as did the need for Ms. Porotti's expertise and services to Royal. Ms. Porotti's time was then extended into 2012 through her development and implementation the [sic] Point of Care component as proposed by her.

The evidence provided satisfies me Ms. Porotti's services at Royal were limited to the implementation, development and maintenance of the PCC system at Royal. While she states she did payroll, when considering her testimony against that of Ms. Scarlett I am not satisfied that the January 14, 2011 email shows any such task was performed by her. Instead I prefer Ms. Scarlett's evidence that Ms. Porotti was sent the time cards so that they could be forwarded to Ms. Scarlett through her home email as Royal's network would not allow such. I find this because Ms. Porotti did not provide any other evidence to support that she was required or authorised to perform payroll on this or any other occasion or any convincing detail of what steps she took in order to complete such duties. Accordingly, I find it challenging to accept why Ms. Porotti would have been provided payroll authority despite her specialised role as an expert in the unrelated PCC system when even the DOC who directly supervised those employees on payroll could not perform such functions.

Ms. Porotti denies she operated her own business and states the entries suggesting such on her resume are untrue. She also states the resume submitted by Royal as evidence was not provided to them upon her hiring but after the fact. However, I find Ms. Porotti's contradictions on when she provided her resume to Royal – either the year after or the year before she left – problematic in accepting her overall testimony on the reasoning behind the content included in the resume. The resume shows she included temporary employment work under a separate category and the services she offered through being 'Self-employed' were 'secretarial, computer and graphic design'. Accordingly, I accept Royal's account of events that Ms. Porotti provided her resume to them at the time of her hiring, that it stated she had an active proprietorship – M POROTTI OFFICE SERVICES – and that through this her services were contracted.

Ms. Porotti agrees she created and passed out a brochure advertising her skills as a PCC practitioner at the Windemere meeting in February 2012. However, she states it was for the purpose of seeking alternate employment and not an indication that she was operating her own business in the field. In the colorized and professional looking brochure, Ms. Porotti identifies herself as a PCC 'Setup and Education Consultant' and "Your only Point Click Care Specialist in British Columbia". She describes the services she offers as including "In House initialization and setup of [PCC]", "In House RN Education" and 'Consultation and liaison with external organizations'. The brochure is absent of any reference to seeking employment or a resume. It indicates that as a "consultant" Ms. Porotti was able and available to provide specific services related to PCC. I note that the services described are similar if not identical to that which parties agree she provided for Royal. Ms. Porotti states that she filed her taxes as self-employed in 2011.

Ms. Porotti argues that the statements included in her email exchange with Ms. Martin were based on fear of reprisal from Ms. Scarlett. She states she learned Ms. Martin was upset about her helping participants and handing out brochures during the meeting. As a result, she sent initiated [sic] email contact with Ms. Martin advising she was “looking to expand her business” to surreptitiously dissuade her from contacting Ms. Scarlett. For a variety of reason [sic], I am unconvinced by Ms. Porotti’s testimony on this issue. Firstly, there is no evidence presented to satisfy me that Royal ever limited or reprimanded Ms. Porotti for looking for work elsewhere or seeking out other opportunities. Ms. Orina clearly states she observed Ms. Porotti handing out business cards and offering her services in PCC at a meeting in January 2011. Accordingly, I find it questionable that a year later when she handed out her brochure at Windemere, Ms. Porotti would have believed such would occur to the degree that she had to orchestrate such a deceptive communiqué with Ms. Martin. Furthermore, I am unclear on how creating an email chain wherein she declared herself as an independent contractor in order to hide her employment search from Royal would limit any reprisal from them or prevent communication between Ms. Martin and Ms. Scarlett. The email unequivocally states “I am self employed...As a PCC and IT specialist my services were retained by [Royal] initially for a contracted amount of time to assist with the implementation of the MDS RAI project...Ultimately, the facility chose to continue with other PCC services...My services continue to be retained by [Royal] to educate and assist staff with the use of [PCC]”. It further reads “I apologize if you felt that my mentioning to the group that if anyone was requiring any specialized assistance outside of what the PCC Helpdesk was able to offer that my company could be of assistance”. I find the statements included in the emails to be in direct contradiction with Ms. Porotti’s testimony on the initial agreement that she made with Royal and her denial that she operated a business or “company”. To believe her version of events with respect to the intent behind the email would be outside the parameters of reasonability and reliability. Instead, I find it more likely that she sent the brochure to Ms. Martin as a means by which to promote herself and related business as PCC consultant as she had in the meeting at Windemere. Accordingly I find Ms. Porotti was in business for herself as a PCC specialist and she provided those services to Royal.

27. With respect to the final test, the control test, the delegate took particular note that the nature of Ms. Porotti’s work with PCC program was specialized, and there was no one else at Royal who could fulfil her duties. Therefore, the delegate concluded that she was able to control the manner in which she performed the tasks and set the related timelines in accordance with her expertise and knowledge of the project. The delegate also noted that while Ms. Porotti participated in initiatives other than the PCC program, it was Ms. Porotti who presented Royal with the idea for those initiatives and independently set up a plan of action and provided her services in relation to these initiatives for which she received compensation from Royal.

28. In terms of supervision of Ms. Porotti, the delegate found that Ms. Porotti provided limited, if any, evidence to show the direction and control Royal had over her. According to the delegate, although Ms. Porotti’s access to Royal’s e-mail system was removed after August 8, 2012, it would have been reasonable for Ms. Porotti to have been able to obtain some corroborative evidence to show she received at least some direction from Royal on what to do and how to do it during the more than five-year term for which she performed work for Royal. The delegate further added, with respect to Ms. Porotti’s relationship with Ms. Scarlett:

When considered in the context of the personal relationship she states she had with Ms. Scarlett, I find it reasonable that a portion of their communication on work issues would have occurred through her telephone or personal email and would therefore have been available to her for evidentiary purposes. I note Ms. Porotti was able to provide text messages between herself and Royal where she texted in sick and communicated around telephone connectivity issues in the workplace. In that vein, a core piece of evidence relied upon by Ms. Porotti to show she received direction from Royal was in the form of a partial screen shot of a text exchange between herself and Royal’s maintenance contractor about their phone system. Her copy of the text appears to show she was contacted by Royal and directed to take certain actions to reset the system. However, when comparing the full text chain, as provided by Royal,

Ms. Porotti is actually the one who initiated contact with the maintenance contractor to resolve the telephone issue, a very different version of events than that described by her in her testimony and first presented when viewing her copy of the text exchange. I find this submission detrimental to the overall credibility of Ms. Porotti's evidence and account in that it clearly presented a version of events that did not occur.

29. Based on these facts, the delegate was not convinced that Royal had direction and control over Ms. Porotti, and found Ms. Porotti was not an employee within the definition of the *Act*, and accordingly decided that no further action would be taken with respect to her Complaint.

SUBMISSIONS OF MS. POROTTI

30. I have read Ms. Porotti's lengthy submissions, which primarily set out passages from the Reasons and dispute the delegate's conclusions of fact.

31. Ms. Porotti indicates, in response to the delegate's comment that it would have been reasonable for her to have been able to obtain some corroborative evidence to show she received some direction from Royal on what to do and how to do it in the more than five years she was there, that everything she did for Royal was "HOUSED on their computer, at their premises" and that she did not use her personal computer for work performed for Royal. She states that this explains why she was unable to provide corroborative evidence. Ms. Porotti states that she attempted to obtain help from Royal staff to get access to minutes she prepared at meetings she attended over the course of her five and one-half years at Royal, but she did not get any cooperation from staff. She attaches a copy of her e-mail and a response from one of Royal's employees in this regard.

32. Ms. Porotti further submits that at the time of the Hearing, she "did not have some evidence", and is "now submitting additional evidence as further proof to [her] claim that the employer DID direct [her], DID assign [her] numerous duties WELL OUTSIDE the scope of the job description for which they claim they hired [her]". She then goes on to present the following documents and explains these documents as corroborative of her assertion that she was an employee of Royal and her scope of work was far broader than the PCC project:

1. Text message from Ms. Scarlett, dated April 10, 2012, requesting Ms. Porotti to clear her calendar for two days to assist with reprocessing preparation;
2. Text message from Ms. Porotti, dated July 3, 2012, to Ms. Orina, advising she was at the lab to pick up tests required by nurses (this was submitted to support Ms. Porotti's contention that she was directed by Ms. Scarlett throughout her term at Royal to deliver residents' samples to the lab and pick up specific tests required by the nurses);
3. Letter of Ms. Porotti, dated November 22, 2013, to Dustin Cassar and Jon Vandermeer of Quicktech Corporate Solutions, requesting them to provide, in writing, details of an alleged meeting they attended with her and the owner of Royal, Mr. Larry Jaworsky, at Royal's facility to train her and attest as to what the nature of her relationship was with Quicktech including the number of times she worked with representatives of Quicktech troubleshooting computer problems for Royal;
4. E-mail, dated December 16, 2013, from Ms. Porotti to Mr. Vandermeer, enclosing a copy of the letter referred to in paragraph 3 above and requesting a response to that letter, as well as Mr. Vandermeer's e-mail response that he was unable to supply her any information without the consent of Royal because of Quicktech's commitment to the privacy of its clients;

5. Text message, dated December 16, 2011, from Ms. Scarlett to Ms. Porotti regarding a password reset required for an employee;
6. Undated text message from Ms. Scarlett to Ms. Porotti, asking her whether she had any spare batteries for a resident's watch;
7. E-mail, dated December 29, 2011, from Ms. Kathy Lam, a Manager at Royal, to Ms. Porotti, advising her about another employee helping a resident with his brother's rent payment (which Ms. Porotti presented to show that she was involved in "social work duties" and assisting the residents of Royal); and
8. Resident Information Handbook of Royal that Ms. Porotti claims she prepared in its draft form for Royal.

33. All of these documents listed above are proffered by Ms. Porotti to further buttress her argument at the Hearing that she was an employee of Royal and her role at Royal went beyond simply setting up the PCC program and training Royal's employees on it.

ANALYSIS

34. Section 112 of the *Act* delineates the grounds upon which an individual may appeal a determination. It provides:

- 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.

35. In the case at hand, as previously indicated, Ms. Porotti has appealed on the basis that evidence has become available that was not available at the time the Determination was made. The Tribunal, in *Re: Merilus Technologies Inc.* (BC EST # D171/03), delineated the following four conditions that must be met before new evidence will be considered on appeal:

- 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;
- The evidence must be relevant to a material issue arising from the complaint;
- The evidence must be credible in the sense that it is reasonably capable of belief; and
- 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.

36. The four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence, in this case, Ms. Porotti, has the onus to satisfy each of them before the Tribunal will admit any new evidence.

37. In this case, I am not satisfied that Ms. Porotti has met the first criterion for admitting new evidence set out in *Re: Merilus Technologies*. The documentary evidence which Ms. Porotti has adduced as new evidence in this appeal (which I have enumerated above) is not new evidence that could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the Complaint, and prior to the Determination being made. More specifically, all of the documentary materials adduced as new evidence, with the exception of the letter dated November 22, 2013, to Mr. Cassar and Mr. Vandermeer of Quicktech Corporate Solutions and the e-mail of Ms. Porotti, dated November 22, 2013, to Mr. Vandermeer seeking the information that she requested in the earlier letter, appear to have existed well in advance of the Hearing of the Complaint, and could have been produced by Ms. Porotti at the Hearing.
38. Ms. Porotti does not offer any explanation why those documents were not produced except to state that at the time of the Hearing, she “did not have some evidence” which she is “now submitting...as further proof [of her] claim” that Royal directed her and assigned her duties outside the original scope of work she was hired to do. I find that it is not appropriate for Ms. Porotti to tender such evidence in her appeal when the time to tender it was at the Hearing. In the circumstances, I find that the documents in question cannot be admitted as new evidence in this appeal. I also note that an appeal under section 112 is not a re-examination of a complaint, or an opportunity for an appellant to take a proverbial “second kick” at the can because the appellant is dissatisfied with the outcome of the complaint at the Employment Standards Branch level.
39. With respect to Ms. Porotti’s letter to Mr. Cassar and Mr. Vandermeer as well as her follow up e-mail to Mr. Vandermeer referred to in paragraphs 3 and 4 above, I note that while these documents did not exist at the time of the Hearing I am not persuaded that the content of these documents is of high potential probative value, in the sense that, if believed, it could have led the Director to a different conclusion on the material issue of the status of Ms. Porotti with Royal. Therefore, I would also not admit those documents as new evidence. In the circumstances, I find that there is no basis for Ms. Porotti to found her appeal on the new evidence ground of appeal.
40. I also note that throughout her submissions (which I have carefully read but have not reiterated in full), Ms. Porotti has challenged the delegate’s conclusions of fact, either with or without the use of the documents she presents as new evidence. I note that the Tribunal has indicated time and time again that it does not have jurisdiction over questions of fact unless, of course, the matter involves errors on findings of fact which may amount to an error of law (*Re: Pro-Serve Investigations Ltd.*, BC EST # D059/05). The Tribunal, in *Re: Funk* (BC EST # D195/04) expounded on the latter point stating that the appellant would have to show that the fact finder made a “palpable and overriding error” or that the finding of fact was “clearly wrong” to establish an error of law.
41. Having said this, I add that the Tribunal is generally reluctant to substitute the delegate’s findings of fact even if it is inclined to reach a different conclusion on the evidence. In this case, however, I have meticulously reviewed the Reasons which are very detailed with respect to the delegate’s analysis, and I note that the delegate has expressly referred to the factual circumstances she considered in concluding Ms. Porotti did not meet the definition of “employee” in the *Act*. I particularly note the delegate carefully considered the evidence of the parties both in context of the definition of “employee” and “employer” in the *Act* and in context of the common law tests for determining employment relationship before arriving at her decision that Ms. Porotti was not an employee under the *Act*. Having reviewed that analysis of the delegate, I am not at all persuaded that the delegate has made a palpable or overriding error or reached a clearly wrong conclusion of fact, or acted without any evidence or on a view of the evidence that could not reasonably be entertained. Instead, I find that the delegate’s findings of fact and conclusion that Ms. Porotti was not an employee is, indeed, based on a view of the evidence that could reasonably be entertained.

42. In the circumstances, I find that Ms. Porotti has failed to discharge the burden on her to establish that the delegate has made any error in making the Determination.

ORDER

43. Pursuant to section 114(1)(f) of the *Act*, I am dismissing this appeal on the ground that it has no reasonable prospect that it will succeed, and in accordance with subsection 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal