Employment Standards TRIBUNAL

An appeal

\- by -

Joseph Paul Stephen Klymkiw
carrying on business as Joi Productions
(“Mr. Klymkiw”)

\- 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.:** 2014A/131

**DATE OF DECISION:** January 15, 2015

# DECISION

## SUBMISSIONS

Joseph Paul Stephen Klymkiw — on his own behalf, carrying on business as Joi Productions

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Joseph Paul Stephen Klymkiw, carrying on business as Joi Productions ("Mr. Klymkiw"), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on August 20, 2014 (the "Determination").

2. The Determination found that Mr. Klymkiw had contravened sections 18 (wages) and 40 (overtime) of the *Act* in respect of the employment of Seran Karalikli ("Ms. Karalikli").

3. The Determination ordered Mr. Klymkiw to pay wages and interest in the total amount of $231.44 to Ms. Karalikli.

4. The Determination also levied an administrative penalty of $500.00 against Mr. Klymkiw for breach of section 18 of the *Act*. The total amount of the Determination is $731.44.

5. The Determination was sent by registered mail to Mr. Klymkiw on August 20, 2014.

6. The expiry of the appeal period for the Determination was on September 29, 2014. Mr. Klymkiw filed his incomplete appeal on the said date. He submitted his Appeal Form without specifically setting out the grounds of appeal but included a separate written submission requesting an extension of one-month to enable him to collect "new evidence … from different sources" and to review the delegate's "report" and "recount of events".

7. As the appeal was incomplete, a staff member of the Employment Standards Tribunal (the "Tribunal"), on the same date the appeal was received, left a voice-mail message for Mr. Klymkiw (at the telephone number provided on his Appeal Form) to contact the Tribunal and provide the Tribunal with a complete copy of the Determination he was appealing.

8. As at October 3, 2014, the Tribunal had not received a complete copy of the Determination, nor a return call from Mr. Klymkiw to discuss the matter. As a result, the Tribunal sent Mr. Klymkiw a letter on the same date informing him of its attempt to contact him earlier. The Tribunal also notified him that his appeal was incomplete and drew his attention to the requirements of Rule 18(3) of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") which set out mandatory requirements for appealing a determination. The Tribunal also requested Mr. Klymkiw to provide "a complete copy of the Determination and a complete copy of the written Reasons for the Determination (including all calculation sheets and any attachments)" no later than 4:30 p.m. on October 14, 2014.

9. As at October 21, 2014, the Tribunal did not receive a response from Mr. Klymkiw to any of its earlier attempts to contact him. As a result, the Tribunal sent him a letter on the same date advising that, in these circumstances, it would be unable to proceed with his appeal and the file in the matter would be closed.

10. Subsequently, by way of a letter dated October 29, 2014, to Mr. Klymkiw, the Tribunal acknowledged that due to its "clerical error", all previous correspondence to Mr. Klymkiw was sent to an incorrect mailing address. In the circumstances, the Tribunal provided Mr. Klymkiw a deadline of 4:00 p.m. on November 13, 2014, to provide it with the outstanding documents. The Tribunal unequivocally noted in the same correspondence that this deadline was not an extension of the appeal deadline, but a deadline for him to provide the requested documents, as the Tribunal was unable to proceed with an incomplete application.

11. Subsequently, on November 13 and 17, 2014, respectively, the Tribunal received some written submissions from Mr. Klymkiw, together with documents in support of his appeal. These submissions expressly indicate that Mr. Klymkiw is appealing the Determination on the grounds that the Director erred in law in making the Determination and that new evidence has become available that was not available at the time the Determination was made. It is also noteworthy that the written submissions appear to indirectly invoke the natural justice ground of appeal.

12. On November 19, 2014, the Tribunal sent a letter to all of the parties explaining the appeal process and requesting the Director to provide the record pursuant to section 112(5) of the *Act* (the "Record").

13. On November 25, 2014, the Director complied with the Tribunal's request and produced the Record. The Tribunal then sent the Record to Mr. Klymkiw on December 8, 2014, and provided him an opportunity to register any objections to the completeness of the Record by December 22, 2014. In the meanwhile, on December 3, 2014, Mr. Klymkiw forwarded additional documents to the Tribunal in support of his appeal, which the Tribunal forwarded to Ms. Karalikli and to the Director for information purposes only.

14. On January 5, 2015, the Tribunal sent a letter to all parties advising that no objections to the completeness of the Record were received and therefore the Tribunal would now review the appeal. The Tribunal also informed the parties that it may, without seeking submissions from the parties, dismiss all or part of the appeal, and/or confirm all or part of the Determination. If the Tribunal does not dismiss all of the appeal or does not confirm all of the Determination, the Tribunal will invite Ms. Karalikli and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and provide Mr. Klymkiw an opportunity to make a final reply to these submissions, if any.

15. Having reviewed the appeal materials, including the reasons for the appeal submitted by Mr. Klymkiw, and the Record, I find this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Reasons for the Determination (the "Reasons"), the appeal, and my review of the Record that was before the Director 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(1) of the *Act*, Ms. Karalikli and the Director will be invited to file a reply to the question of whether to extend the deadline to file the appeal. On the other hand, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

## ISSUE

16. The issue at this stage of the appeal is whether there is any reasonable prospect the appeal will succeed.

## THE FACTS

17. Mr. Klymkiw operates a motion picture and video production business, as a sole proprietorship, under the business name Joi Productions in Burnaby, British Columbia, and hired Ms. Karalikli as a producer assistant through his posting on an internet website called Craig's List in or about October 2013.

18. It is not disputed that Ms. Karalikli worked for Mr. Klymkiw for a single day on October 6, 2013.

19. On January 21, 2014, Ms. Karalikli filed a complaint under section 74 of the *Act* alleging that Mr. Klymkiw contravened the *Act* by failing to pay her wages under the *Act* (the "Complaint").

20. The delegate investigated the Complaint. During her investigation, Ms. Karalikli stated to the delegate that she worked as a production assistant from 7:30 a.m. to 11:30 p.m. on October 6, 2013, but was not paid for these hours by Mr. Klymkiw. She states that she is owed regular and overtime wages totalling $231.00.

21. In an email message Ms. Karalikli sent to Mr. Klymkiw on November 19, 2013, she inquired about when she would receive payment for the work she performed for him on October 6, 2013, with respect to a music video.

22. In his reply email of December 5, 2013, Mr. Klymkiw stated that he thought that she had "worked on music videos before". He stated that the video was not yet done and when it was done, he would get paid, and he would then pay his "crew". He stated that he expected the video to be finished in a couple of weeks.

23. Ms. Karalikli also produced to the delegate a call sheet for the music video on which she worked on October 6, 2013, which showed Mr. Klymkiw's Joi Productions as the Production Company and set out positions of various individuals, including Ms. Karalikli, who was shown as a producer assistant.

24. On his part, Mr. Klymkiw informed the delegate during the investigation of the Complaint that he did not have timesheets or schedules for the work Ms. Karalikli performed on a music video on October 6, 2013. However, he provided a copy of Ms. Karalikli's employment contract which was signed on October 6, 2013, and indicated a pay rate of $100.00 per day, with a tentative start date of October 6, 2013.

25. Mr. Klymkiw submitted to the delegate that he hired Ms. Karalikli as an "intern", and she did not work hard. He also stated that he offered Ms. Karalikli $100.00 to settle, but she rejected the offer.

26. With respect to the overtime pay Ms. Karalikli claimed in her Complaint for the single day she worked, Mr. Klymkiw stated "He would love to pay everyone overtime, but as my budget is razor thin and if I were to pay everyone overtime on limited budget there is no way I would be able to make anything as my camera guys pay at [*sic*] union rate and overtime included would be my entire budget".

27. The delegate also notes, in the Reasons, that Mr. Klymkiw advised her the grip hands or lighting technicians work hard in the morning setting up for production, then wait around most of the day, and then again work hard at the end of the night. He did not make any comments on Ms. Karalikli or production assistants, according to the delegate.

28. The delegate also notes in the Reasons that Mr. Klymkiw asked her to speak with Jackie Nguyen ("Ms. Nguyen") who worked for Mr. Klymkiw or Joi Productions as a Production Coordinator on a music video during the summer of 2013. The delegate was able to successfully reach Ms. Nguyen by phone. While Ms. Nguyen acknowledged to the delegate that she worked on a music video with Mr. Klymkiw in the summer of 2013, she had some difficulty recalling the specifics of the production and was unable to recall whether it was a single day or a two-day shoot, or if it was during daytime or nighttime. She also could not recall precisely what time she started to work. She did say that it was standard to work a 12-hour day, and that she worked alongside other members of the crew, and commented that it was a large crew. She also said she could not remember everyone who worked on the production.

29. Ms. Nguyen's specific recollection of Ms. Karalikli was also vague. She stated to the delegate that there was an assistant with a unique name who completed some office work and helped Mr. Klymkiw with production. When the delegate identified the position in question as Producer Assistant, Ms. Nguyen thought that the individual she remembered in the position could have been Ms. Karalikli. She also thought that this person would have started and finished at the same time as other employees on the set. When the delegate informed Ms. Nguyen that Ms. Karalikli said she started at 7:30 a.m. and finished at 11:30 p.m., Ms. Nguyen stated that that would have been a long day, but she too had worked long days in the industry and it was not unusual for a music video shoot to take that long.

30. After considering the evidence of both parties, including the witness, Ms. Nguyen, and in finding in favour of Ms. Karalikli the delegate reasoned as follows:

> Mr. Klymkiw argued that Ms. Karalikli was an intern. He has provided no evidence to support a finding that she was excluded from the Act or that the labour or services she performed would be considered part of a practicum. Furthermore, the contract supports a finding that the definition of 'employee' under the Act applies to her.
>
> It has gone undisputed that Ms. Karalikli worked on October 6, 2103 [*sic*] and that she has not been paid for this work. The call sheet, correspondence and Mr. Klymkiw's evidence support that work was performed on October 6, 2013.
>
> The hours Ms. Karalikli claimed to work have gone uncontested. Although Ms. Nguyen could not recall specifics relating to Ms. Karalikli, she provided evidence that it would not be unusual to work a 16 hour day. Mr. Klymkiw argued that Ms. Karalikli did not work 'hard' but did not challenge the number of hours she reported working. I will use the hours Ms. Karalikli provided as the best available evidence before me to calculate the wages owed to her.
>
> Section 40 of the Act requires hours worked over eight in one day to be paid at one and one half the wage rate. Hours worked over 12 hours in one day must be paid at twice the regular wage rate. The contract indicates that Ms. Karalikli and Mr. Klymkiw agreed to a day rate of $100.00. Based on the number of hours Ms. Karalikli worked, as accepted above, the day rate of $100.00 does not meet the minimum wage rate requirements set by the Act. Section 4 of the Act prohibits employers and employees from waiving the minimum standards of the Act. Consequently, I will apply the minimum wage rate to the hours Ms. Karalikli worked.

31. The delegate then went on to award Ms. Karalikli $231.44, consisting of $82.00 for regular wages (based on 8 hours at $10.25 per hour) and $143.52 for overtime wages (based on 4 hours at $10.25 x 1.5 and 4 hours x $10.25 x 2). In addition, the delegate awarded interest of $5.92 on both these amounts pursuant to section 88 of the *Act*, for a total amount of $231.44.

32. The delegate also levied a $500.00 penalty against Mr. Klymkiw pursuant to section 98 of the *Employment Standards Regulation* for breach of section 18 of the *Act*.

## SUBMISSIONS OF MR. KLYMKIW

33. In Mr. Klymkiw's written submissions, dated November 13, 2014, he indicates that he is "waiting on written testimony from other crew members that saw Seran Karalikli for certain hours and that her request for overtime would be void as she was not present on set to obtain those hours". He states that the said crew members are involved in a shoot in India and therefore it is "hard for [him] to ascertain this written and signed testimony at this time".

34. He further submits that during the "determination process", the delegate was "unprofessional in how she handled" the matter. He complains that the delegate raised "her voice" at him on a number of occasions and when he asked for "a new person on the case", the Employment Standards Branch (the "Branch") told him "this was not possible".

35. Mr. Klymkiw also submits that the delegate's "report" (presumably referring to the Determination) "is very one sided" as concerns the matter of overtime. He suggests that she did not include all the information on the subject she was provided. More particularly, he states that the delegate "did not include [evidence relating to] the other person who made a claim as he was paid but his cheque did not reach him [*sic*]" and he withdrew his claim against Mr. Klymkiw after he received his cheque.

36. He also submits that the delegate erred on a numerous occasions by including vacation pay to Ms. Karalikli when Ms. Karalikli did not work more than five (5) days for him.

37. Mr. Klymkiw also submits that he has found the entire Employment Standards process traumatic and burdensome, having spent over 36 hours on the Complaint. He states he does not have the money to pay the administrative levy or fine meted out in the Determination, but he is agreeable to paying Ms. Karalikli $150.00.

38. In his subsequent written submissions received by the Tribunal on November 17, 2014, Mr. Klymkiw advances the error of law and new evidence grounds of appeal. Under the error of law ground of appeal, he specifies four (4) abbreviated points as follows:

A) [The delegate] made mistakes on the payment by putting vacation pay

B) [The delegate] yelled at me on numerous occasions

C) To work overtime you had to be there

D) [The delegate] did not include the other case against me that I quickly sent their cheque right away as it was a miscommunication of someone's address

39. With respect to the new evidence ground of appeal, Mr. Klymkiw, similarly, delineates the following abbreviated points:

A) There is numerous people who worked on the shoot that I am waiting on written testimony on. They are working out of country right now

B) Research of what other Production Assistants make on music videos

C) The music video was never released as the reason Seran Karalikli's payment was delayed. The reason is that music videos get payment once they are finished. As this video is not being released the grant from MuchFACT was not given and the music label had to pay my company directly.

40. For these reasons, Mr. Klymkiw submits that the administrative penalty levied against him should be cancelled and he should be allowed to pay Ms. Karalikli $150.00.

41. Subsequently, on December 3, 2014, the Tribunal received further written submissions from Mr. Klymkiw. He asks the Tribunal to ignore the previous submissions and accept his new submissions. In his new submissions, I note he provides a similar letter to the one he sent the Tribunal on November 17, 2014, delineating in abbreviated or point form under the headings of error of law and new evidence grounds of appeal. The new or changed submission under the error of law ground of appeal includes the following:

> E) I wanted to have a meeting with [the delegate] about this matter as I felt her yelling and me being unable to switch from having her being the person on the case [*sic*]. The only times she gave me to meet was the same week and she is in Nanaimo. Which I don't understand as this is a Vancouver matter.

42. Under the new evidence ground of appeal, the following addition to his submissions appears:

> A) The actual account from witness of Jacqueline Nguyen which wasn't correctly done the first time by [the delegate]. Also the account of my other witness.
>
> …
>
> The Research shows what prices are in regards to Production Assistants. I feel like the price that was chosen is on the high end. Music Videos have fixed budgets, by either grant or from a music label. As I hired Seran from craigslist, didn't do a proper interview, her interview is supposed to be her day of work [*sic*]. Which she was not present for the whole day and with her inexperience she should only be paid $10 an hour [*sic*].

43. I also note that Mr. Klymkiw submits two (2) similarly written statements, addressed to the Tribunal; one from Mike Kroestch ("Mr. Kroestch") and another from Ms. Nguyen. Mr. Kroestch suggests in his statement that he was working on the same video as Ms. Karalikli and that he saw her in the morning when she gave him the "deal memo" and he knows that "at the end of the day" when Mr. Klymkiw was trying to find her "[Mr. Klymkiw] didn't know where she was".

44. Ms. Nguyen, in her statement, says that when the delegate telephoned her during the investigation she was at work and she was being asked "questions about a shoot that was over 6 months ago". She states that her memory of that day is that Ms. Karalikli was present in the morning when Mr. Klymkiw needed her to sign the deal memos but, later in the day, she recalls that Mr. Klymkiw was "asking where she was", and that he was still looking for her when she left the shoot at 8:00 p.m.

## ANALYSIS

45. Section 112(1) of the *Act* delineates the grounds upon which an appeal may be made to the Tribunal from a determination by the director.

> **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. In this case, Mr. Klymkiw, based on his written submissions, expressly appeals on the "error of law" and new evidence" grounds of appeal. However, the written submissions also suggest that Mr. Klymkiw may be challenging the Determination on the natural justice ground of appeal as well.

47. It is noteworthy that the Tribunal, in *Triple S Transmission Inc.* (BC EST # D141/03), stated:

> When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, involves one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

48. Having reviewed Mr. Klymkiw's submissions in their entirety and based on the instructive comments of the Tribunal in *Triple S Transmission Inc.* above, I find it appropriate to also review Mr. Klymkiw's challenge of the Determination in context of the natural justice ground of appeal. Therefore, under descriptive subheadings below, I will review all three available grounds of appeal under section 112 of the *Act*.

### *(a) Error of Law*

49. With respect to the error of law ground of appeal, it should be noted that in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] BCJ No. 2275, the British Columbia Court of Appeal set out the following elements as constituting an error of law:

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

50. In this case, I do not find that any of the evidence advanced under the error of law ground of appeal, whether in the written submissions of Mr. Klymkiw received by the Tribunal on November 17, 2014, or subsequently on December 3, 2014, support his contention that the delegate erred in law in making the Determination. I will deal with each of the submissions below.

51. First, I do not find any merit in Mr. Klymkiw's contention that the delegate made a mistake in "putting vacation pay" or awarding vacation pay to Ms. Karalikli. I note in the July 18, 2014, email exchange between the delegate and Mr. Klymkiw, the delegate agreed with Mr. Klymkiw that annual vacation is an entitlement earned after five (5) days of employment with an employer; therefore, vacation pay would not be found outstanding in the case of Ms. Karalikli. I also note that in the Determination, no vacation is awarded to Ms. Karalikli for a single day of work with Mr. Klymkiw. As a result, no error of law has been established by Mr. Klymkiw in this regard.

52. With respect to Mr. Klymkiw's claim that the delegate yelled at him on numerous occasions, I find this to be a bare assertion that is unsubstantiated by any corroborative evidence. I do not find this assertion persuasive under the error of law ground of appeal, and dismiss it.

53. With respect to Mr. Klymkiw's assertion that "to work overtime you had to be there", I note that, in the Reasons, the delegate correctly points out that during the investigation the overtime was not challenged by Mr. Klymkiw. However, I note that Mr. Klymkiw, in the appeal, has adduced what he purports to call new evidence in the form of statements by Mr. Kroestch and Ms. Nguyen (both of which I will deal with under the new evidence ground of appeal later). Based on the evidence that was adduced during the investigation, I

do not find the delegate erred in law in reaching the conclusion that Ms. Karalikli worked overtime and was entitled to the overtime awarded in the Determination. To the contrary, I find the delegate's conclusion in this regard rationally and reasonably anchored in evidence produced during the investigation.

54. With respect to Mr. Klymkiw's contention that the delegate did not refer, in the Determination, to another claim against Mr. Klymkiw which he settled after he discovered the claimant's correct address and sent a paycheque to that address, I do not find this to be relevant in the case at hand. How a claim by another employee against Mr. Klymkiw is resolved is irrelevant to the determination of Ms. Karalikli's Complaint, and the delegate's decision not to refer to it in the Reasons is not an error of law.

55. Finally, with respect to the contention of Mr. Klymkiw that he wanted to have a meeting with the delegate and "the only time she gave [him] to meet was the same week" when she was in Nanaimo, I propose to deal with this submission under the natural justice ground of appeal below.

### *(b) Natural Justice*

56. As indicated, while Mr. Klymkiw has not specifically invoked the natural justice ground of appeal, some of his submissions under the error of law ground of appeal may touch upon the natural justice ground of appeal, and I will, therefore, examine those submissions here.

57. At the outset, it should be noted that natural justice is an administrative law concept referring to procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent decision-maker (see *Re: 607730 B.C. Ltd. c.o.b. English Inn and Resort*, BC EST # D055/05).

58. In *Imperial Limousine Services Ltd.* (BC EST # D014/05), the Tribunal elaborated on the principles of natural justice stating:

> 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 *BWI Business World Incorporated*, BC EST #D050/96)

59. The burden of proof is on the appellant, Mr. Klymkiw, in this case, to show that the Director breached the principles of natural justice in making the Determination.

60. Having said this, as noted earlier, in his written submissions on appeal Mr. Klymkiw complains that the delegate "yelled at [him] on numerous occasions" and he tried to "switch" delegates but the Branch did not accede to his request. I find his assertion that the delegate yelled at him to be a bare assertion that is not substantiated or corroborated with any other evidence. I also do not find that there is any legitimate basis for him to have requested a different delegate during the investigation and the refusal of the Branch to change delegates in the matter is not a breach of natural justice.

61. I also note that Mr. Klymkiw complains that he wanted to have a meeting with the delegate during the investigation but the delegate only provided available times within a single week when she was in Nanaimo. Mr. Klymkiw states that he does not understand this because the matter has its origin in Vancouver. I note,

from my review of the Record, there is an email from the delegate to Mr. Klymkiw on July 23, 2014, wherein she confirms that Mr. Klymkiw had communicated with another colleague of hers at the Branch and relayed to her his wish to come to Nanaimo to meet in person and that he would contact her (the delegate) to arrange this meeting. In the same email, the delegate requests Mr. Klymkiw to contact her as soon as possible and no later than noon on Friday to schedule a meeting and delineated her specific availability in Nanaimo for that week for him to pick from a suitable time for a meeting. However, there appears to be no response to that email from Mr. Klymkiw.

62. As a result, the delegate sent a further email on July 24 to Mr. Klymkiw. In this email she advised Mr. Klymkiw that she had not received a confirmation of receipt of her July 23 email, and cut and pasted her message from her previous email into the July 24 email. I did not see any response from Mr. Klymkiw to that email and there was no further discussion in the Record between the two about having a meeting. However, I do see that there was much in the way of email exchanges between the delegate and Mr. Klymkiw during the investigation period. I note as well that Mr. Klymkiw appears to have participated fully in the investigation and communicated his position to the extent he wanted to the delegate.

63. Based on my review of the Record, I do not find there is any persuasive evidence that Mr. Klymkiw was denied any procedural rights during the investigation and subsequent determination of the Complaint. The principles of natural justice do not require the Director, or the delegate of the Director, to meet face-to-face during the investigation of a complaint. The delegates involved in investigations of complaints do not always have the luxury in each case to meet face-to-face with the parties to a complaint, and, in many cases, the Branch may conveniently assign complaints to delegates who may be located in a different geographic region than where the complaint originated with a view to dealing with the complaint in a timely and convenient manner. Provided the delegate assigned to investigate a complaint affords procedural fairness to the concerned parties – the right to know the case against them, the right to present their evidence and the right to be heard by an independent decision-maker – the principles of natural justice will be satisfied. In this case, I see no basis to conclude that the delegate violated any of these principles of natural justice during the investigation of the Complaint and its determination.

### *(c) New Evidence*

64. The governing test for allowing new evidence on appeal is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). The Tribunal, in *Re: Merilus Technologies*, delineated four (4) conjunctive requirements the appellant must satisfy before the purported "new evidence" will be considered, namely:

> (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.

65. As noted previously, under the new evidence ground of appeal, Mr. Klymkiw has presented two (2) witness statements, one of Mr. Kroestch's recollections, and another of Ms. Nguyen's. In the case of the latter, I note she previously gave evidence during the investigation of the Complaint and now provides further evidence in a written statement that, from her perspective, contains a better recollection of the evidence than she

previously had when she spoke to the delegate during the investigation. I find this rather curious as Ms. Nguyen appears to complain in her statement that when she first spoke to the delegate over the phone, at work, it was about "a shoot that was over 6 months ago". There appears to be a suggestion in her statement that her memory was therefore not as clear then. One would think that with the lapse of more time since that first contact with the delegate, her memory would only deteriorate more but to the contrary, it appears to have gotten better. I find this difficult to comprehend.

66. Having said this, I find that neither one of the statements amount to new evidence under the first part of the *Re: Merilus Technologies* test. In the case of Mr. Kroestch's statement, Mr. Klymkiw does not indicate what efforts, if any, he made to obtain or discover and present the evidence of Mr. Kroestch during the investigation. I note that he did ask for an extension of time to appeal the Determination because he wanted to obtain, for his Appeal, the evidence of some crew members who were shooting in India during or at the time the appeal period was expiring, but there is no evidence of the availability (or lack thereof) of any crew member, including Mr. Kroestch, during the investigation of the Complaint. In these circumstances, I do not find that Mr. Klymkiw has discharged the onus placed upon him under the first part of the *Re: Merilus Technologies* test for new evidence above.

67. With respect to Ms. Nguyen's statement, which substantively is similar to that of Mr. Kroestch, I find it difficult to believe that her recollection is now better than several months before during the investigation of the Complaint when she spoke with the delegate. Notwithstanding, I find her evidence is not "new evidence" as it could have been, with due diligence, discovered or provided to the delegate during the investigation or even during the adjudication of the Complaint, and prior to the Determination being made, but was not. Therefore, as indicated previously, it, too, fails the new evidence test in *Re: Merilus Technologies*.

68. With respect to the research of what other Production Assistants are paid on music videos that Mr. Klymkiw presents as "new evidence", I find that this evidence, too, fails under the first part of the test for new evidence in *Re: Merilus Technologies*. This evidence is the sort of evidence that existed during the investigation of the Complaint and could have been, with the exercise of due diligence, produced and presented to the delegate during the investigation or adjudication of the Complaint, but was not.

69. Finally, the evidence that the video Ms. Karalikli worked on was never released and, thus, the payment of her wages delayed, is also evidence that existed during the investigation and does not constitute new evidence.

70. In these circumstances, I do not find that there is any "new evidence" adduced by Mr. Klymkiw in the appeal. Instead, I find that this is a case of the appellant, Mr. Klymkiw, being dissatisfied with the conclusions of fact made by the delegate in the investigation of the Complaint and the corresponding Determination. Mr. Klymkiw now wants to "dig up" more evidence (that previously existed) to support his position and change evidence that was earlier provided by his own witness (Ms. Nguyen) to accord with his earlier failed position with a view to obtaining a more favourable outcome this time around before the Appeal panel. This Tribunal has indicated time and time again that an appeal is not an opportunity for a party dissatisfied with the Director's determination to take the proverbial "second kick at the can" before a different panel with a view to having a more favourable outcome. This Tribunal will not countenance such an attempt by an appellant, as it is both inappropriate and unfair and contrary to the stated objective of the *Act* in section 2(d), namely, a fair and efficient procedure for resolving disputes.

71. I find, pursuant to section 114(1)(f) of the *Act*, that this appeal has no reasonable prospect of succeeding, and I dismiss it.

**ORDER**

72. Pursuant to section 115 of the *Act*, I order the Determination, dated August 20, 2014, be confirmed.

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