

An appeal

- by -

Elizabeth Koh on behalf of James Koh, deceased
(“Ms. Koh”)

- 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.: 2011A/167

DATE OF DECISION: January 25, 2012

DECISION

SUBMISSIONS

Elizabeth Koh	on behalf of James Koh, deceased
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed under section 112(1)(b) and (c) of the *Employment Standards Act* (the “*Act*”) by Elizabeth Koh (“Ms. Koh”) on behalf of her ex-husband, James Koh (“Mr. Koh”), deceased, of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 14, 2011.
2. The Determination was made on a complaint filed by Ms. Koh on behalf of Mr. Koh on July 18, 2011, (the “Complaint”). Pursuant to Section 76(3)(a) of the *Act*, the Director refused to accept or investigate the Complaint because the Complaint was made outside the six-month time limit specified in section 74 of the *Act*.
3. Ms. Koh appeals the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made. Ms. Koh is seeking the Tribunal to vary or cancel the Determination with a view to having the Director accept and investigate the Complaint.
4. I note in the Determination, while the Delegate refers to Ms. Koh as acting on behalf of her “deceased husband” Mr. Koh, Ms. Koh’s appeal submissions indicate, at the time the Complaint was filed, she was Mr. Koh’s ex-wife. While the Determination does not address the matter of Ms. Koh’s standing to file the Complaint, I simply wish to observe that the matter of Ms. Koh’s standing could have been a potential issue because there is no evidence that she is the executrix of Mr. Koh’s estate or that she is authorized by Mr. Koh’s estate to file the Complaint, although in the Complaint Form she submits that both Mr. Koh’s son and daughter asked her to file the Complaint but it is not clear if they represent the estate of Mr. Koh. Having said this, I do not need to delve further into this matter as my decision disposes of this appeal strictly on the issue of the timeliness (or lack thereof) of the Complaint filed by Ms. Koh on behalf of Mr. Koh.
5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated in section 103 of the *Act* and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I note that Ms. Koh is not seeking an oral hearing. Further, in my view, the appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

6. The issues in this appeal are twofold and may be described as follows:
 - i. Did the Director fail to observe the principles of natural justice in refusing to accept and investigate the Complaint?

- ii. Has new evidence become available that was not available at the time the Determination was being made and, if so, does that evidence justify changing or varying the Determination in any manner?

THE FACTS

7. By way of background, on July 18, 2011, Ms. Koh filed the Complaint under section 74 of the *Act* on behalf of her late ex-husband, Mr. Koh, who passed away on January 19, 2011. In the Complaint, she stated that Mr. Koh was employed as a carpenter by Green Canyon Motor Inn Ltd. and 0774961 B.C. Ltd. carrying on business as Green Canyon Motor Inn (“Green Canyon”). She alleged that he was owed wages for work he performed for Green Canyon between March 9, 2010, and May 5, 2010, presumably his last day of work at Green Canyon.
8. The Delegate, pursuant to Section 76(1) of the *Act*, reviewed the Complaint and upon discovering that it had been filed outside the six-month time limit prescribed in Section 74 of the *Act*, raised as a preliminary issue the question of whether the Director should proceed with investigation of the Complaint. The Delegate then, on September 1, 2011, contacted Ms. Koh to discuss the Complaint and why it was filed out of time. The substance of the Delegate’s discussion with Ms. Koh is delineated in her subsequent letter of September 8, 2011, (the “Letter”) to Ms. Koh. The relevant portions of this letter are set out below:

The purpose of this letter is to set out the information we discussed on September 1, 2011 and provide you with a final opportunity to respond to the preliminary issue of whether the Director of Employment Standards should proceed with the investigation of this complaint given that it was filed outside of the six month time limit for filing a complaint under the *Employment Standards Act* (the “Act”).

You informed me that Mr. Koh worked for Green Canyon Motor Inn Ltd. between March 9, 2010 and May 5, 2010 as a carpenter doing construction work. Mr. Koh was supposed to be paid \$150.00 per day and worked a total of 30 days. He received only \$500.00 and you therefore believe he is owed \$4,000.00. You stated that your husband had made attempts to collect the wages owed to him but was repeatedly put off by the owner, Steven Park. On January 19, 2011 your husband was killed in an automobile accident. You explained that you subsequently contacted Mr. Park as well as his daughter, Connie Park, to attempt to collect the money owed to your husband but that despite their promises the funds were never paid.

Given that Mr. Kohl [sic] last worked on May 5, 2010 the time limit for filing a complaint ended six months later on November 5, 2010.

As I explained to you the Act provides that the director (or his delegate) may refuse to proceed with a complaint if it is not made within the time limit. Relevant sections of the Act are attached for your reference. Before I can proceed with investigating the merits of your complaint, I must make a decision as to whether to extend the time period for you to file your complaint. Extensions are not granted as a matter of course, but only where there are compelling reasons to do so.

...

Based on the information you provided to date there is no compelling reason why Mr. Koh could not have filed a complaint under the Act prior to **November 5, 2010**. If you have some additional information that may explain why Mr. Koh could not have filed a complaint within that time period please forward this to me in writing.

To ensure timely resolution of this matter, please provide your written response no later than September 22, 2011. If I do not hear from you by September 22, 2011, I will assume you do not wish to pursue this matter further under the Act and will close the file.

9. Ms. Koh responded to the Letter by way of her letter dated September 20, 2011. The relevant contents of this letter are summarized in the Delegate's Reasons for the Determination and set out below:

Mr. Koh was killed in an automobile accident along with one of the other men who had worked with him at Green Canyon, Kwang Soo Cha. Mrs. Koh explained that she did not know how to get in touch with the other man who worked with her husband, William Lee.

Mrs. Koh stated that the first time she became aware that her husband was owed money by Green Canyon was a few days prior to his death. Mr. Koh had told her that he had not received all of his wages from Green Canyon. She asked him why he had not gone to the labour board. He indicated that he did not know about such an agency and she suggested he talk to someone with better English skills in order to get assistance and more information. Two days later he was killed.

Mrs. Koh explained that part of the reason her husband did not file a complaint within the six month time limit was due to the fact her husband had difficulty with English. She also noted that he was disabled, having lost three fingers in an industrial accident.

Mrs. Koh stated that Steve Park attended her husband's funeral. Subsequently, in March 2011, she contacted Steve Park to attempt to collect the money owed to her husband. He said he would call her back but did not do so. In April 2011 she called him again several times. She then spoke to his daughter who said that she would pay the money in three months if her father had not taken care of the payment by that time. After three months elapsed and no funds had been paid Mrs. Koh contacted Steve Park's daughter again who said she was too busy to deal with the matter and hung up. This ultimately prompted Mrs. Koh to file a complaint.

Mrs. Koh believes Green Canyon used her husband and took advantage of him. Green Canyon has subsequently taken advantage of his death to avoid paying the wages he legitimately earned.

10. Subsequently, the Delegate issued her Determination in which she exercised her discretion under Section 76(3)(a) of the *Act* to refuse to investigate the Complaint. In her Reasons, the Delegate stated that section 74 of the *Act*, which sets out the time limit for filing a complaint under the *Act*, is a mandatory provision. It states that a complaint "must" be filed within six months after the last day of employment. The Delegate further reasons that the discretion she has, under the *Act*, to proceed with an investigation of a late filed complaint may only be exercised in "exceptional circumstances where there are compelling reasons to do so". In the case at hand, the Delegate notes that while Ms. Koh argued that Mr. Koh's failure to file a complaint against Green Canyon for his unpaid wages was due to his lack of knowledge about the *Act* and his limited English skills, Ms. Koh raised the matter of filing a complaint with Mr. Koh in January 2011, a few days before the accident that claimed his life. Although, at that time, the six-month time limit for filing his complaint had already lapsed, had Mr. Koh filed a complaint then, there may have been a compelling reason for the Delegate to proceed with an investigation based on Mr. Koh's limitations or lack of facility with the English language, if he was also able to show that he had taken some steps to resolve his claim with the employer. Since the Complaint was not filed at that time and no evidence exists to establish what steps, if any, Mr. Koh took to collect his wages, the Delegate states that a compelling reason is lacking to explain why Mr. Koh could not have filed a complaint prior to the expiry of the six-month deadline to file his complaint on November 5, 2010. The Delegate also submits that ignorance of the *Act* and its application is an insufficient basis for her to continue investigation of an otherwise out-of-time complaint.
11. In addition to the foregoing, in arriving at her decision not to continue to investigate the Complaint, the Delegate also considered the statutory purposes of the *Act* set out in section 2 and, particularly, the purpose delineated in subsection (d), namely "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*". According to the Delegate, it would be inconsistent with this stated purpose of the *Act* to continue investigation of the Complaint when there has been a passage of over one (1) year since Mr. Koh last worked for Green Canyon.

12. The Delegate also noted in the Reasons for the Determination that, while she understood that Mr. Koh's unexpected death created difficult circumstances for Ms. Koh and this may have delayed the filing of the Complaint for several months, this factor does not outweigh "the potential prejudice that the delay in filing the complaint has in these circumstances", particularly since "there is not sufficient evidence to substantiate a compelling reason why Mr. Koh did not file a complaint prior to November 5, 2010". In the circumstances, the Delegate thought it appropriate to exercise her discretion pursuant to section 76(3)(a) of the *Act* and to refuse to continue investigation of the Complaint.

SUBMISSIONS OF MS. KOH

13. While Ms. Koh has checked off the "natural justice" and the "new evidence" grounds of appeal in her written submissions, she admits that she does not understand "which box to check" as she herself has limited English language skills. What is clear is that she wishes the Tribunal to cancel the Determination and order the investigation of the Complaint to proceed.
14. Having said this, I have very carefully reviewed Ms. Koh's submissions, including her Reply submissions. I note that she has attached to her appeal submissions written submissions on the merits of the Complaint and some few documents she previously provided to the Delegate before the Determination was made. Those submissions on the merits and documents were considered by the Delegate and relevant portions summarized by the Delegate in the Determination and I do not find it necessary to reiterate them here.
15. With respect to the new appeal submissions, I note that to the extent that they deal with the merits of the claims in the Complaint, I do not find it necessary to set them out here. It is only those submissions pertaining to the matter of the timeliness (or lack thereof) of the Complaint, which I find relevant and I will refer to them below.
16. Having said this, I note that Ms. Koh has made no submissions in support of the "natural justice" ground of appeal. It appears that Ms. Koh is simply challenging the Delegate's exercise of her discretion to refuse to investigate the Complaint but she has not adduced any evidence to show any breach of natural justice principles on the part of the Delegate in exercising her discretion.
17. With respect to the new evidence ground of appeal, Ms. Koh indicates that she found a phone number of William Lee ("Mr. Lee"), who was a colleague of Mr. Koh and worked with him for Green Canyon and now lives in the United States. According to Ms. Koh, Mr. Lee has knowledge of the wages owed to Mr. Koh by Green Canyon. I also note that in her Final Reply submissions, Ms. Koh produces three (3) additional names of potential witnesses who were either neighbours of Mr. Koh and/or members in the Korean community (of which Mr. Koh was a part) who are purportedly privy to the circumstances relating to wages owed to Mr. Koh by Green Canyon or its principal, Mr. Park. I do not find it necessary to delve into those submissions here as none of the purported evidence of these witnesses pertains to the issue of the timeliness of the Complaint.
18. Ms. Koh also explains in her appeal submissions that she was late in filing the Complaint because Mr. Koh died suddenly "by car accident" and she was in a state of shock and "totally forgot" and did not "think about [the] six months [time] limit". However, when she found Mr. Koh's "memo" while she was going through his items after his death, she was reminded to file the Complaint. The memo she is referring to is, presumably, the single page document that was written in Korean and translated into English showing, *inter alia*, the amount of \$4,000 allegedly owing to Mr. Koh by Green Canyon. It is uncertain in whose handwriting this memo is.

19. Ms. Koh also submits that another reason for appealing is because her family resents Mr. Park's family because he victimized them. She wants to stop Mr. Park and Green Canyon from doing the same to other people.

SUBMISSIONS OF THE DIRECTOR

20. The Director, to a significant extent, reiterates the reasons of the Delegate in the Determination. That is, the Director points out that section 74 of the *Act* establishes a mandatory time limit for filing complaints. This mandatory time limit is consistent with the purposes set out in section 2 of the *Act* and, particularly, the stated purpose of "providing fair and efficient procedures for resolving disputes under the *Act*".
21. Under section 76(3)(a) of the *Act*, the Director states the Delegate has the ability to exercise discretion in dealing with complaints filed outside of the statutory time limit. The Director goes on to argue that for an appellant to successfully overturn a Delegate's discretionary decision under section 76(3), the onus is on the appellant to show any of the following: "there was a procedural irregularity or the decision was arbitrary, unreasonable or based on irrelevant considerations; the exercise of discretion was an abuse of power; or the Director erred in construing the limits of his/her authority". The Director refers to the Tribunal's decision in *Kreutzger*, BC EST # D068/08, in support of the proposition that the Tribunal is reluctant to interfere in the application of the Director's discretionary power absent one of the above findings.
22. The Director also submits that the Delegate's decision not to proceed with Ms. Koh's Complaint was based on relevant factors congruent with the statutory purposes of the *Act*. Moreover, Ms. Koh did not provide any evidence or argument to establish that the decision of the Delegate not to proceed with the investigation of the Complaint was made in contravention of the principles of natural justice or not in good faith. The Director also challenges Ms. Koh's contention that not proceeding with the investigation of the Complaint creates an unfair outcome and permits Green Canyon to breach the requirement to pay wages. More particularly, the Director, relying on the authority of *Kreutzger*, *supra*, submits that this is not a factor that is relevant in the Delegate's discretionary decision-making as to whether or not to proceed with an investigation of a late filed complaint, otherwise it would have the effect of nullifying the statutory time limit in all cases.
23. With respect to the new evidence ground of appeal, the Director submits that Ms. Koh failed the strict test for admitting new evidence on appeal; in this case, the evidence of a potential witness, Mr. Lee. The Director also notes that Ms. Koh has failed to explain how Mr. Lee "is relevant to overturning the decision to stop the investigation of the complaint". The Director submits there is no indication that Mr. Lee's evidence would have a high probative value and locating him "is not sufficient to overcome the fact that over one year has elapsed since the work was performed and the complaint was filed". In conclusion, the Director submits that the Delegate properly exercised her discretion not to proceed with the investigation of the Complaint, and Ms. Koh has not demonstrated sufficient grounds to persuade the Tribunal to cancel or vary that decision.

ANAYLSIS

24. The *Act*, in section 112(1), sets out limited grounds upon which an appeal may be made to the Tribunal from a determination of the Director. Section 112(1) reads as follows:
- 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.

25. This Tribunal has indicated in previous decisions that the onus is on the appellant to show that the appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1), failing which, the appellant's appeal may be dismissed. In this case, I note that Ms. Koh has limited English language skills and has expressly pointed out in her submissions that she does not understand "which box to check" on the Appeal Form relating to grounds for appeal. However, failure to check off or identifying the wrong grounds of appeal on the Appeal Form is not, in itself, fatal to an appellant's appeal. This Tribunal, in *Re: Flour Child Bakeries Corp.*, BC EST # D094/06, adopted the view of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, that it should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off". The Tribunal in *Triple S Transmission Inc.*, *supra*, 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 the challenge, *prima facie*, invokes 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.

26. Based on the above, I have reviewed Ms. Koh's full written submissions, including her Reply, with a view to determining the full scope of her challenge of the Determination and not simply the "natural justice" and the "new evidence" grounds of appeal she identified in the Appeal Form.

27. Starting with the error of law ground of appeal in section 112(1)(a) of the *Act*, I can safely conclude, based on my analysis below, I do not find any evidence of an error of law on the part of the Delegate in her decision not to proceed with the investigation of the Complaint. I note that the Tribunal has consistently adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA):

- (1) A misinterpretation or misapplication of a section of the Act;
- (2) A miscalculation 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.

28. The Delegate, in my view, properly considered and interpreted sections 74 and 76(3)(a) of the *Act*.

29. Section 74(3) provides:

Complaint and time limit

74(3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

30. Section 76(3)(a) provides:

Investigations

76(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(a) the complaint is not made within the time limit specified in section 74 (3) or (4),

31. I find that the Delegate correctly identified and interpreted section 74 as containing a mandatory provision with respect to the time limit - six months from the last day of employment - for filing a complaint. I also find that the Delegate correctly identified and interpreted section 76(3)(a) of the *Act* as a provision empowering or vesting the Director with the discretionary power to refuse to accept a complaint that is not made within the time limits specified in section 74(3).
32. I also note, in terms of the evidence she relied upon and the reasonableness of her view in deciding not to proceed with the investigation of the Complaint, the Delegate took into consideration the Complaint was filed over one year after Mr. Koh's last day of work when the time limit for filing the Complaint was November 5, 2010, (the "Expiry Date"). More specifically, Ms. Koh, in filing the Complaint on July 18, 2011, was eight (8) months past the Expiry Date. The Delegate reasoned, in my view correctly, that ignorance of the *Act* is not a sufficient reason to continue investigation of a complaint filed out of time as this Complaint was.
33. The Delegate also considered in her decision-making that Mr. Koh was informed or counselled by Ms. Koh in January 2011 (a few days in advance of the car accident that claimed his life) of the advisability of filing a complaint but Mr. Koh did nothing to initiate that process. The Delegate also considered that there lacked any evidence of efforts, if any, on Mr. Koh's part to collect his wages from the employer.
34. I also note that there was a lapse of another six (6) months after the conversation between Ms. Koh and Mr. Koh advising the latter of the complaint process before Ms. Koh decided to file the Complaint on Mr. Koh's behalf. In my view, based on the evidence, it was open to the Delegate, and the latter correctly reasoned, that absent a compelling reason, it would be incongruent with the purposes in section 2(e) of the *Act* – "to promote fair and efficient procedures for resolving disputes on the interpretation and application of the Act" – to proceed with the investigation of the Complaint filed outside the six month limitation period set out in the *Act*. In the result, I find the Delegate did not misinterpret or misapply any part of the *Act* and particularly sections 74 and 76(3)(a). I also find that the Delegate did not misapply any principles of general law, nor did she act without any evidence. To the contrary, I find the Delegate acted on a view of facts, which could reasonably be entertained, and her analysis was correct in principle. Therefore, I do not find that the Delegate made an error of law.
35. I also find persuasive the authority of the Supreme Court of Canada in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR 2 referred to in *Re: Coutts*, BC EST # D073/11, a decision relied upon by Director. In *Re Coutts*, the Tribunal, adopted the Supreme Court's instructive comments pertaining to the treatment, on appeal, of the exercise of a statutory discretion:

The thrust of Mr. Coutts' argument is that the delegate erred in law in failing to exercise his discretion power in favour of continuing to investigate the complaint on its merits. The Supreme Court of Canada in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR 2, made the following comments about the exercise of a statutory discretion:

It is, as well, a clearly-established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. When the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

36. In my view, the Delegate, in this case, exercised her statutory discretion pursuant to section 76(3)(a) of the *Act* in accordance with the principles delineated by the Supreme Court of Canada in *Maple Lodge Farms Limited v. Government of Canada, supra*, and I find no reason to disturb her discretionary decision, under any available ground of appeal in section 112 of the *Act* or otherwise.
37. I also note that the Supreme Court of Canada in *Maple Lodge Farms Limited v. Government of Canada, supra*, expressly sets out the requirement that statutory discretion be exercised in accordance with the principles of natural justice. In this case, while Ms. Koh has checked off the natural justice ground of appeal, as indicated previously, she has failed to adduce any evidence in support of that ground of appeal and I find there is no basis to disturb the Determination on this ground of appeal. To the contrary, I find that the Delegate amply complied with the principles of natural justice in making the Determination. More specifically, pursuant to section 76(1) of the *Act*, she accepted and reviewed the Complaint and then on September 1, 2011, contacted Ms. Koh to obtain from her further information, particularly relating to the late filing of the Complaint. In addition to speaking with Ms. Koh, she sent Ms. Koh the Letter and invited Ms. Koh or afforded her to make further submissions, which Ms. Koh did. The Delegate, based on the relevant submissions of Ms. Koh, issued the Determination. Therefore, I reiterate that there is no basis for cancelling or varying the Delegate's Determination on the natural justice ground of appeal.
38. With respect to the new evidence ground of appeal, I agree with the Director that there exists a strict test, which the Tribunal will employ in deciding whether to accept new evidence on appeal of a determination. The test is a conjunctive test consisting of four parts and it is set out in the Tribunal's decision *Re: Merilus Technologies Inc.*, BC EST # D171/03:
- (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.
39. In this case, the new evidence relates to the discovery by Ms. Koh of Mr. Lee's telephone number and his whereabouts. Mr. Lee, purportedly, was a former colleague of Mr. Koh and they worked together at Green Canyon. According to Ms. Koh, he would give evidence on the matter of the wages allegedly owed by Green Canyon to Mr. Koh.
40. I also note, in the Reply submissions of Ms. Koh, there are three (3) further potential witness names and their telephone numbers produced by Ms. Koh. These potential witnesses are colleagues, neighbours, and/or members of the Korean community who are directly or indirectly privy to Mr. Koh's employment with Green Canyon and the wages the latter purportedly owes him. In my view, the purported new evidence Ms. Koh is introducing at this stage - all proposed witnesses, including Mr. Lee - would not qualify under the test set out in *Re: Merilus Technologies Inc., supra*, on a number of bases. First, there is no indication whatsoever in Ms. Koh's submissions why this information could not, with the exercise of due diligence, have been discovered and presented to the Delegate during the preliminary investigation or adjudication of the Complaint, and prior to the Determination. I also note that the purported evidence of the proposed witnesses now presented by Ms. Koh relates to the merits of the Complaint and not the matter of the timeliness of the filing of the Complaint. Therefore, the evidence of the proposed witnesses is not potentially

probative, in the sense that, if believed, it could have led the Delegate to a different conclusion in the Determination - that is, to proceed to investigate the Complaint.

41. In summary, I do not find Ms. Koh has successfully established the new evidence ground of appeal, and I reject this ground of appeal.

ORDER

42. Pursuant to section 115 of the *Act*, I order that the Determination, dated October 14, 2011, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal