

An appeal

- by -

627017 B.C. Ltd. carrying on business as Golden Crown Hotel  
(“Golden Crown”)

- 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.:** 2008A/139

**DATE OF DECISION:** January 15, 2009

## DECISION

### SUBMISSIONS

Kenneth B. Friesen	counsel for Golden Crown
Dean Davison	counsel for Stan Biggs
Emily K. Yao	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Dan Jun (“Mr. Jun”), a director of 627017 B.C. Ltd. carrying on business as Golden Crown Hotel (“Golden Crown”) of a Determination that was issued against Golden Crown on October 10, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Golden Crown contravened Section 18 of the *Act* in respect of the employment of Stan Biggs (“Mr. Biggs”) and ordered Golden Crown to pay Mr. Biggs \$4,158.74, an amount which included wages, annual vacation pay and interest.
2. The Director also imposed two administrative penalties of \$500 each on Golden Crown under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contraventions of Section 18 of the *Act* and Section 46 of the *Regulation* (failure to respond to demand for records).
3. The total amount of the Determination is \$5,158.74.
4. Mr. Jun has filed an appeal of the Determination through counsel, Ken Friesen, (“Mr. Friesen”). The Appeal form, in paragraph 1, shows Mr. Jun as the “person making the appeal”. I point this out as the Director has taken issue with the standing of Mr. Jun to file an appeal of the Determination because the Determination is not against Mr. Jun; it is against Golden Crown.
5. The grounds of appeal delineated in the Appeal form are two, namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination. Mr. Friesen, in paragraph 3 of the Appeal, seeks a suspension of the Determination pending the outcome of the Appeal.
6. In paragraph 5, Mr. Friesen is asking the Tribunal to change or vary the Determination “(t)o find that the complainant was not an employee, rather was subject to a contractual relationship with consideration”.
7. In his email of same date as the Appeal, Mr. Friesen asks the Tribunal to explain to him the process governing suspension of the determination. In particular, he states:

[I] am curious about item 3 – suspension of determination in whole or in part as found under Section 31 of the Rules. I cannot tell what the process is for a suspension of payment until the hearing of the appeal generally. Can you advise – thank-you.
8. The Tribunal responded to Mr. Friesen’s email on the same date by way of a telephone call wherein an officer of the Tribunal explained to Mr. Friesen the process involved in a suspension request and further

advised that if he wanted to proceed with the suspension application then he should put his request in writing and delineate why the suspension should be granted. He was also told by the Tribunal's officer to explain if any deposit would be offered to the Director in respect of the award in the Determination and if not, why not. The Tribunal also informed Mr. Friesen that if he did not provide the Tribunal with a written request for a suspension of the Determination with his appeal, then the Tribunal would not consider his suspension request.

9. Subsequently, on November 18, 2008, Mr. Friesen, by email, forwarded his submissions pertaining to the substantive grounds of appeal in the Appeal form but did not provide any submissions with respect to the suspension request, although he acknowledged, in passing, the Tribunal's communication with him the day before. Since the submissions of Mr. Friesen are very brief, I propose to set them out verbatim under the heading "Appellant's submissions" below.
10. Pursuant to Section 36 of the *Administrative Tribunals Act*, which is incorporated in the *Act* (Section 103), and Rule 17 of the *Tribunal's Rule of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal may be adjudicated on the basis of the written submissions of the parties without resorting to an oral hearing. Accordingly, I will decide the appeal based on the Section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

## FACTS

11. Golden Crown is a British Columbia incorporated company and operates a hotel.
12. On March 27, 2008, Mr. Biggs filed a complaint against Golden Crown under Section 74 of the *Act* alleging that the latter contravened the *Act* by failing to pay him regular wages and compensation for length of service.
13. The delegate of the Director held a telephone hearing of the Complaint on September 12, 2008 (the "Hearing"). The Hearing was attended by Mr. Biggs and his counsel, Dean Davison ("Mr. Davison"). On behalf of Golden Crown, Mr. Jun, Golden Crown's director, attended at the Hearing together with another representative of Golden Crown, George Horner ("Mr. Horner").
14. The primary issue for the delegate's determination at the Hearing was the status of Mr. Biggs – that is, whether or not he was an employee of Golden Crown. The secondary issues at the Hearing, if a finding of employment relationship was made between Mr. Biggs and Golden Crown, were two, namely: (i) Did Golden Crown owe Mr. Biggs any wages? (ii) Did Mr. Biggs' employment get terminated pursuant to Section 66 of the *Act* entitling him to compensation for length of service?
15. The Director notes in the Determination that, at the Hearing, Mr. Biggs testified that he was previously living at Golden Crown hotel and when Mr. Jun bought the hotel some time in early January 2001, he began working as a front-desk clerk at the hotel during the night shift from 12:00 a.m. to 8:00 a.m., five days a week. When he was unavailable to work his shift, Mr. Biggs stated that he would have a friend, Sharif Karim ("Mr. Karim"), cover his shifts.
16. Mr. Biggs also indicated at the Hearing that he was never given any money for the desk clerk position but Mr. Jun told him that he would benefit when the hotel was sold and furthermore, he would not have to pay rent for his accommodation at the hotel, which he did not.

17. With respect to his duties at the hotel, Mr. Biggs indicated that he sat behind a glass wall at the front desk of the hotel and buzzed in guests, collected guest fees and gave the money he collected to the manager of the hotel, John Kim (“Mr. Kim”). Mr. Biggs also testified that his duties included answering telephone calls and taking messages as well as assisting with maintenance issues such as plugged toilets and power outages in rooms. According to Mr. Biggs, an essential responsibility of his position at the front desk was to make sure that guests could access the hotel. He also confirmed that he was required to ensure that the backdoor of the hotel was not left propped open allowing access to people who had not paid guest fees to enter the hotel.
18. Mr. Biggs also indicated at the Hearing that he would stay at the front desk of the hotel during his shifts until Mr. Kim came in the morning to relieve him and that he had no other reason to be at the front desk during the night shift but to work. Mr. Biggs also admitted at the Hearing that he was running his own “side-line” business, selling alcohol, out of the hotel at the same time that he was living and working as a desk at the hotel.
19. Mr. Biggs also testified at the Hearing that during his employment he was asked by Mr. Kim to loan Golden Crown some monies to cover a mortgage payment and he obliged, but when he asked for repayment of the monies from Golden Crown, he was told that the money was applied to his outstanding rent. He further testified that on January 8, 2008 he quit his employment because Golden Crown did not pay him wages.
20. Mr. Biggs called Mr. Karim as a witness to confirm that he worked in the position of desk clerk at the hotel. Mr. Karim, *inter alia*, testified that he covered Mr. Biggs’ night shifts a couple of times a month, and the shifts he covered started at 11:00 p.m. and ended at 7:00 a.m. Mr. Karim also testified that when he worked Mr. Biggs’ shifts at the hotel he checked guest identification, rented hotel rooms and made sure the back door of the hotel was locked. He also testified that he would stay at the front desk area at the hotel for the duration of the shift.
21. Mr. Karim also testified that he visited Mr. Biggs a couple of times a week before Mr. Biggs shift ended and there was always someone at the front desk of the hotel. He also testified that he saw Mr. Jun with Mr. Biggs three to four times a week at the hotel and occasionally when Mr. Biggs was working his shift. Mr. Karim also admitted that he worked for Mr. Biggs in his “side-line” business of selling alcohol in the evenings.
22. Mr. Jun testified on behalf of Golden Crown at the Hearing. He stated that his company bought the hotel in October 2001 and Mr. Biggs was already at the hotel operating his alcohol business at the time.
23. Mr. Jun testified that he felt sorry for Mr. Biggs having to carry cases of beer and whiskey so he allowed Mr. Biggs to operate his alcohol business from the downstairs office at the hotel. According to Mr. Jun Mr. Biggs would come down to the hotel office at night and worked some shifts as a desk clerk although there was not much activity at night at the hotel. According to Mr. Jun, Mr. Biggs was primarily conducting his alcohol business when he attended at the hotel office.
24. With respect to the duties Mr. Biggs performed as a desk clerk at the hotel, Mr. Jun testified at the Hearing that Mr. Biggs sat at the desk; made sure that people got buzzed into the hotel; collected fees from guests; and made certain the hotel door was secured so that only people who paid guest fees were allowed entry into the hotel. Mr. Jun also confirmed that others who work as front-desk clerks perform the same duties as Mr. Biggs and get paid for their work. More specifically, Mr. Jun stated that that there

are currently three employees of the hotel who work the front desk and they cover a 24-hour period divided over three shifts of eight hours each, with one working on a part-time basis covering the night from midnight to 8:00 a.m.

25. As to why Mr. Jun did not charge Mr. Biggs rent for accommodation at the hotel, Mr. Jun testified that he liked Mr. Biggs and considered him family. Mr. Jun also stated that while he allowed Mr. Biggs at the front desk during the night shifts, Mr. Biggs did not work five days a week. According to Mr. Jun, Mr. Biggs was at the front desk on the weekends and “welfare Wednesdays” primarily to run his liquor sale business. Mr. Jun also testified that while Mr. Biggs was buzzing in people at the hotel, he was not doing the same duties as the day clerk, Mr. Kim.
26. With respect to Mr. Biggs claim that he lent monies to Golden Crown, Mr. Jun indicated that there was never a loan to Golden Crown but instead the loan was made to Mr. Kim personally.
27. With respect to the termination of employment of Mr. Biggs, Mr. Jun indicated that Mr. Biggs chose to leave the hotel because the police served him with a notice to stop selling alcohol illegally out of the hotel. However, Mr. Jun never produced the alleged notice. Mr. Jun further stated that after the police attended at the hotel, Mr. Biggs told him that he was going to leave the hotel because he could no longer carry on his business. Mr. Jun testified that Mr. Biggs never asked him for payment of wages.
28. The delegate in determining that Mr. Biggs was an employee of Golden Crown, referred to the definitions of “employee” and “employer” as well as “work” in the *Act*. According to the delegate, Golden Crown allowed Mr. Biggs to perform work normally performed by an employee and therefore Mr. Biggs came within the definition of “employee” under the *Act*. The delegate also considered the decision of the British Columbia Court of Appeal in *Fenton v. British Columbia (Forensic Psychiatric Services Commission)*, 1991 CanLII 610 and applied the economic benefit test delineated by the Court of Appeal to determine whether there was an employment relationship between Mr. Biggs and Golden Crown. In particular, the delegate stated:
- The working relationship between Mr. Biggs and Mr. Jun was one of mutual economic benefit. The Complainant could conduct his liquor sales out of the main floor office .... The Employer was able to save on the cost of paying wages, which would have been required with a conventional employee. I find based on the application of the Act and the above cases to the fact that Mr. Biggs was allowed to perform services for the Employer that are normally provided by an employee. I further find that this employment relationship began in January 2001 when the Complainant began to cover the front desk. Therefore, the Complainant is entitled to the benefits related to wages as provided by the Act.
29. The delegate, after concluding that Mr. Biggs was an employee of Golden Crown, went on to determine that Mr. Biggs primarily worked 8 hour shifts, two days a week and one Wednesday a month for a total of 59 days between July 8, 2007 to January 8, 2008, the claim allowable under the *Act*. On the basis of a rate of \$8.00 per hour, the delegate determined that Mr. Biggs was owed \$3,776.00 in back wages and a further \$226.56 in vacation pay and interest on these amounts.
30. With respect to Mr. Biggs’ claim for compensation for length of service based on the termination of his employment under Section 66 of the *Act*, the delegate concluded:

I find that the Complainant’s employment was not terminated by the Employer’s failure to pay wages. The Complainant did not disagree with the terms of the employment agreement between

himself and the Employer, and he made no request for payment until his last year of employment. I further find that it is more likely than not the Complainant chose to terminate his employment in order to avoid any problems with the police, and not because he had not been paid wages. Therefore I find that there is no compensation for length of service owing as the Complainant's employment was not terminated by the Employer.

31. Finally, the delegate notes in the Determination that a demand for records was issued to Golden Crown requiring all payroll records related to Mr. Biggs, which Golden Crown failed to comply. As a result, the delegate imposed an administrative penalty of \$500.00 on Golden Crown for contravention of Section 46 of the *Regulation*.

## ISSUES

32. The issues in this Appeal are five-fold, including two preliminary issues:

1. Does Mr. Jun have standing to file an appeal?

If the answer to the first question is in the affirmative, then there is one more preliminary and three substantive issues, namely:

2. Should the Tribunal suspend the effect of the Determination pending a decision on the merits of the appeal?
3. Did the Director err in law in determining that Mr. Biggs was an employee?
4. Did the Director fail to observe the principles of the natural justice in making the Determination?
5. Is there new evidence available that was not available at the time the determination was being made?

## APPELLANT'S SUBMISSIONS

33. The appellant, through counsel, Mr. Friesen, makes the following very brief submissions that I have set out verbatim:

Further to our conversation of yesterday's date:

The grounds of appeal are

1. that there was an error in a finding of fact and/or law that the Stan Biggs was an employee. In particular although there was a finding that the "Complainant's agreement to work for a period of six years without being paid amounted to an affirmation and acceptance of the terms of the employment agreement", while clearly there was an agreement it was not an employment agreement.
2. The agreement between the parties was one proposed by the applicant Stan Biggs and accepted by 6727017 B.C. Ltd., wherein Stan Biggs carried out a business on the premises selling alcohol. It was not a "sideline" for the applicant as it was the sole basis of the applicant's income and he had no other sources of income. That Stan Biggs was entitled to operate his business on the property of 6727017 B.C. Ltd. (which was the basis of the Stan Biggs contractual proposal to 672017 B.C. Ltd.) was offset (or the

recompense to 627017 B.C. Ltd.) by the service that Stan Biggs provided to 627017 B.C. Ltd. If there was payment for “wages” for Stan Biggs then there would not have been any consideration for the proposal and the contract entered into between 627017 B.C. Ltd. and Biggs. The ending of the relationship arose when the police shut down the sale of alcohol and the contract came to an end. (the director accepted this on the balance of probabilities, but further evidence could be led of the police report)

3. The finding of an employee/employer relationship on an agreement, which is clear and uncontroverted and evidenced by the behaviour of the parties over the previous years, places the finding directly at odds with contractual relationship and undermines it. In the result the finding is perverse and the decision overturned.

### **MR. BIGGS’ SUBMISSIONS**

34. Counsel for Mr. Biggs, Mr. Davison, submits that Mr. Biggs agrees with the delegate’s “determinations other than the amount of time that Mr. Biggs worked and should be compensated for same”. In Mr. Davison’s submissions, Mr. Biggs should be compensated for 120 days at eight hours per day “in light of the fact that there was no evidence of another person working the midnight to 8:00 a.m. shift until Mr. Biggs left” his employment with Golden Crown.

35. With respect to Mr. Friesen’s submission that “further evidence could be led of the police report” in context of how the relationship between Mr. Biggs and Golden Crown ended “when the police shut down the sale of alcohol”, Mr. Davison admits:

There was no evidence given to substantiate the employer’s contention of police activity at the hearing. The employer initially had counsel involved in the process and could have easily obtained proof about the policing [*sic*] attending his hotel. To now suggest that more evidence is available is improper and only seeks to delay payment to the employee.

36. The balance of Mr. Davison’s submissions relate to and support the Director’s finding of fact that Mr. Biggs was an employee of Golden Crown and I do not find it necessary to reiterate those submissions here.

### **THE DIRECTOR’S SUBMISSIONS**

37. The Director raises a preliminary issue of standing of Mr. Jun in this appeal. The Director states that there has been no determination issued against Mr. Jun but the latter has appealed, in his personal name, the Determination against Golden Crown.

38. The Director further submits that in the event the Tribunal proceeds with the appeal despite the preliminary objection of the Director, then the Tribunal should dismiss the Appeal as the substantive grounds of appeal are without merit. In particular, with respect to the natural justice ground of appeal, the Director states that the appellant has failed to discharge the burden to demonstrate “by way of argument or evidence to support this allegation”.

39. With respect to the error of law ground of appeal, the Director states that the evidence submitted by the appellant at the Hearing showed that Mr. Biggs was performing “labour or services normally performed by an employee” and therefore Mr. Biggs satisfies the definition of “employee” in Section 1 of the *Act*. Furthermore, the Director states “there are no other provisions under the Act which state if an employee is

conducting other work while also performing labour or services for an employer that such other work negates a finding of an employment relationship”.

40. The Director also submits “that the appellant’s argument that the relationship [between Mr. Biggs and Golden Crown] was one of a contractual nature ... is true of all employment relationships and that this fact in itself is not determinative of whether or not such a relationship is governed by the Act”. According to the Director, the appellant is simply disagreeing with the Director’s findings in the Determination but has not “made any argument on why the delegate’s findings resulted in an error of law”. Accordingly, the Director submits that the error of law ground of appeal should fail as well.
41. With respect to Mr. Friesen’s submissions on behalf of the Appellant that further evidence could be led of a police report, which was never adduced during the Hearing of the Complaint, the Director states that “(t)his evidence was referred to in the hearing but was not submitted into evidence for consideration in the Determination.” Therefore, the Director submits that this purported police report is not “new evidence” as it was available and could have been presented at the Hearing but was not. Therefore, the new evidence ground of appeal should also fail.
42. Finally, with respect to the Appellant’s request for a suspension of the Determination pending the outcome on appeal, the Director states that the Appellant has not provided adequate reasons to support a suspension nor deposited any monies with the Director pursuant to Rule 32 of the *Rules* and Section 113 of the *Act* and therefore the suspension request should be denied.

## ANALYSIS

### Preliminary Issues

#### *(i) Standing of Mr. Jun*

43. Section 112 of the *Act* states that “ ... a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds ....” The Director served the Determination against Golden Crown on its director, Mr. Jun, at his address in Burnaby, British Columbia, in addition to serving Golden Crown a copy by registered mail at its business address at West Hastings Street, Vancouver. In my view, since the Director recognized Mr. Jun as a director of Golden Crown and there is no issue with the currency or status of his directorship at the time of the appeal of the Determination, Mr. Jun has standing under Section 112 “as a person served with a determination” to appeal it.
44. I also note that while Section 96 of the *Act* provides that a director can be liable for two months’ unpaid wages for each employee and that the interest of Mr. Jun may be affected potentially by the Determination against Golden Crown if the latter did not appeal it, my decision that Mr. Jun has standing to appeal the Determination is not based on his potential liability under Section 96 but rather the clear language of Section 112 of the *Act* that, in my view, makes him qualified to appeal since he is “a person served with a determination”.
45. In the alternative, in the event that I am incorrect in my interpretation of Section 112 of the *Act* on the issue of standing of Mr. Jun to appeal, my review of the substance of Mr. Friesen’s submissions on behalf of the appellant leads me to conclude that, notwithstanding Mr. Friesen’s decision to insert Mr. Jun’s name as the “person making the appeal” in paragraph 1 of the Appeal form, the appeal is Golden



Crown's. It appears to me that Mr. Friesen may have through inadvertence or failure to understand the appeal process named Mr. Jun who he was receiving instructions from and not the company, Golden Crown. I say this because Mr. Friesen sought the advice of the Tribunal when he was not familiar with the suspension process and therefore, I am assuming that he was also not familiar with the niceties of identifying correctly the true party appealing in this case when he inserted Mr. Jun's name. I note that Mr. Friesen's or Golden Crown's submissions on this issue are noticeably absent but my decision not to dismiss the appeal on the preliminary issue is also based on my rejection of the overly legalistic and technical approach in reading appeal forms in favour of the common sense approach that takes into consideration the nature and purposes of the employment standards legislation (see *J.C. Creations Ltd.* (re) BC EST #D317/03; re *Flour Child Bakeries Corp.* BC EST #D094/06); *Triple S Transmission Inc.* (c.o.b. *Superior Transmissions*), BC EST #D141/03).

46. Moreover, I also feel that this case comes within the scope of Rule 3(2) of the *Tribunal's Rules of Practice and Procedure*. That is, the naming of Mr. Jun as the person appealing the Determination instead of Golden Crown is a "technical defect or irregularity" and the Tribunal has jurisdiction to waive the technicality and I choose to do so since it meets the purposes of the *Act* and particularly Section 2(d) – to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*.

**(ii) Request for Suspension**

47. Section 113 of the *Act* states:

(1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.

(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either

- (a) the total amount, if any, required to be paid under the determination, or
- (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

48. The Tribunal has indicated time and again that it will not suspend a determination pending an appeal as a matter of course. Where the Tribunal suspends a determination, it should be noted that the entire amount of the determination would be ordered to be deposited with the director as security unless the Tribunal considers a smaller amount to be adequate in the circumstances of the appeal.

49. In this case, while the appellant has asked for a suspension of the Determination in the Appeal form pending the appeal, the appellant has made no submissions in support of its request nor indicated any desire to deposit any amount of the Determination with the Director.

50. It is also important to note that counsel for the Appellant, Mr. Friesen, sought clarification from the Tribunal pertaining to the suspension process and the Tribunal informed him precisely what was required of the appellant in making the suspension request. However, the appellant did not comply with that process and make any written submissions on the matter whatsoever. In the circumstances, it appears that the Appellant has abandoned the suspension request and if I am incorrect in this conclusion, then I deny

the Appellant's request for suspension as I find that the appellant has not discharged the burden placed upon it to show me any basis to grant its request for a suspension of the Determination pending the appeal.

### **Error of Law**

51. Golden Crown's submissions (which I have previously set out) dispute the delegate's finding of fact pertaining to the status of Mr. Biggs as an employee of Golden Crown. It should be noted that a finding relating to the status of an individual as an employee is a question of mixed law and fact. If Golden Crown is to successfully challenge the delegate's determination of Mr. Biggs' status, Golden Crown must, on a balance of probabilities, discharge the onus placed on it to show either that there was no evidence to support the findings of fact made by the delegate, or that the delegate took a view of the facts that could not reasonably be entertained based on the evidence before the Director or, alternatively, the delegate committed an error in the legal analysis applied to the facts as found. I find that Golden Crown has not satisfied any basis to successfully challenge the delegate's finding relating to Mr. Biggs' status as an employee.
52. Further, I agree with the delegate that Mr. Biggs satisfies the definition of "employee" in Section 1(b) of the *Act* as the work Mr. Biggs was performing as a desk clerk at Golden Crown's hotel was work normally performed by an employee of Golden Crown as is evidenced by the latter's employment of others in the desk clerk position. I also agree with the delegate that the sale of alcohol that Mr. Biggs was carrying on while working as a desk clerk, did not detract from his status as an employee of Golden Crown. In conclusion, I find that the delegate's finding that Mr. Biggs was an employee of Golden Crown was reasonably based on the evidence before her. Therefore, I dismiss the error of law ground of appeal of Golden Crown.

### **Natural Justice**

53. With respect to the natural justice ground of appeal, it should be noted that the delegate, during the entire Complaint process-from the investigation to the Hearing and ultimately the determination of the Complaint- is duty bound to observe the principles of natural justice. The principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (see *Re 607730 B.C. Ltd. (c.o.b. English Inn and Resort)*, BC EST #D055/05). In this case, while Golden Crown has checked off the box in the Appeal form invoking the natural justice ground of appeal, Golden Crown has not adduced any evidence or arguments in support of the said ground of appeal. I am satisfied, based on my review of the Section 112(5) record as well as the Reasons for the Determination, Golden Crown was apprised of the Complaint and participated through its representatives at the pre-hearing and at the Hearing of the Complaint. Further, Golden Crown, as indicated by the Director in the Determination, also had the "benefit of counsel for a large part of the complaint process and was well advised of the hearing procedure in advance of the hearing date". I find there is no basis for Golden Crown to argue that the Director failed to observe the principles of natural justice in making the Determination. Accordingly, I dismiss the natural justice ground of appeal of Golden Crown.

### New Evidence

54. While Golden Crown has not checked off the “new evidence” ground of appeal in the Appeal form, Mr. Friesen, counsel for Golden Crown, has indicated that “further evidence could be led of the police report” in paragraph 2 of his written submissions. This prompted the Director to respond that the purported police report was referred to at the Hearing, but not submitted by Golden Crown for consideration in the Determination. The Director argues that the purported police report should not be considered as new evidence.
55. In *Re Merilus Technologies Inc.*, BC EST #D171/03, the Tribunal sets out four conjunctive requirements that must be met before new evidence will be considered. The Appellant must establish that:
- 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 on the 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.
56. In this case, Golden Crown at the Hearing referred to the purported police report Mr. Friesen refers to and therefore it stands to reason that the report predates the Determination. However, Golden Crown and Mr. Friesen have not offered any explanation why the purported police report was not produced earlier during the investigation of the Complaint or at least prior to the Determination being made. I am not satisfied that the purported police report could not, with the exercise of due diligence on the part of Golden Crown, have been discovered and presented to the delegate during the investigation or adjudication of the Complaint and prior to the Determination being made.
57. As Golden Crown fails to satisfy the first of the four-part test in *Re Merilus Technologies, supra*, I am not required to consider the balance of the tests. Moreover, even if I wanted to consider the balance of the tests, Golden Crown has not produced the purported police report to allow me to consider meaningfully the balance of the tests. Golden Crown simply suggests that the report could be produced. In my view, the purported police report would not qualify as new evidence and I dismiss the new evidence ground of appeal of Golden Crown, assuming Golden Crown is invoking this ground of appeal in the first place.

### Additional issue

58. In his reply to Golden Crown’s appeal, Counsel for Mr. Biggs submits that the Tribunal should vary the Director’s determination in respect of the amount of time Mr. Biggs should be compensated for. As previously indicated, the Director calculated Mr. Biggs’ award of wages in the Determination on the basis of 59 days of eight-hour shifts. Counsel for Mr. Biggs states that since there was no evidence of another person working the midnight to 8:00 a.m. shift until Mr. Biggs’ employment terminated, the Tribunal

should vary the Director's determination and make a finding of fact that Mr. Biggs worked on a full-time basis and thus he should be paid eight hours a day for a total of for 120 days.

59. In my view, the Director correctly objects to counsel's submissions as Mr. Biggs failed to file his own appeal within the time permitted for appealing the Determination (i.e. by November 17, 2008). In my view, Mr. Biggs is out of time to appeal and he cannot therefore sneak in his out of time appeal in context of his defence of Golden Crown's appeal. Therefore, I reject Mr. Biggs' request to vary the Determination as to the amount of the award.

## **ORDER**

60. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

---

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