



An appeal

- by -

Global Agriculture Trans-Loading Inc.
("Global")

- 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/165

DATE OF DECISION: January 27, 2015

DECISION

SUBMISSIONS

Amrik Sangha

on behalf of Global Agriculture Trans-Loading Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Global Agriculture Trans-Loading Inc. (“Global”) has filed an appeal of a determination issued by the Director of Employment Standards (the “Director”) on November 28, 2014 (the “Determination”). In that Determination, the Director ordered Global to pay its former employee, Emmanuel Lobo (“Mr. Lobo”), \$37,204.45 in wages and interest. The Director also imposed five (5) administrative penalties in the amount of \$500.00 each for Global’s contraventions of sections 17, 18, 40, 46 and 58 of the *Act*, for a total amount payable of \$39,704.45.
2. Global appeals the Determination, contending that the Director’s delegate erred in law and breached the principles of natural justice in making the Determination, and further submits that evidence has become available that was not available at the time the Determination was being made.
3. Section 114 of the *Act* and Rule 22 of the Employment Standards Tribunal’s *Rules of Practice and Procedure* provide that the Employment Standards Tribunal (the “Tribunal”) may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if the appeal does not meet certain criteria.
4. I have decided 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 Form, the written submissions Global, and my review of the material that was before the Director when the Determination was being made. If I am satisfied that the appeal has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Lobo will, and the Director may, be invited to file further submissions. Conversely, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

5. The substantive issue to be considered at this stage in the appeal is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

6. Global is a British Columbia company that was incorporated on December 20, 2006, and has two (2) directors and officers, namely, Mr. Amrik Sangha (“Mr. Sangha”) and Bikramajit Sangha.
7. Global operates a transportation business and employed Mr. Lobo as a mechanic at the rate of pay of \$26.00 per hour.
8. Mr. Lobo’s start and end dates of employment with Global are in dispute. According to Mr. Lobo, he commenced employment with Global on January 20, 2013, and quit his employment on October 3, 2013.

Global contends that Mr. Lobo commenced his employment on January 21, 2013, and ended his employment on September 12, 2013, or alternatively on September 20, 2013.

9. Mr. Lobo filed his complaint under section 74 of the *Act* on April 2, 2014, alleging that Global contravened the *Act* by failing to pay him regular and overtime wages, annual vacation pay and statutory holiday pay, and required him to repay wages (the “Complaint”).
10. The matter of the end date of Mr. Lobos’s employment is important as it goes to the material issue of the timeliness of the Complaint.
11. The delegate of the Director conducted a hearing of the Complaint on October 16, 2014 (the “Hearing”), after it had been previously adjourned to allow the parties to exchange specific documents. More particularly, at the previously-scheduled hearing date, on September 10, 2014, Mr. Lobo agreed to provide his original record of hours, confirmation that he attended a First Aid course for Global and his credit card statements for September and October, 2013. Global, on its part, agreed to produce the handwritten record of hours from which its computer records were generated and information regarding the First Aid course Mr. Lobo took.
12. After the first adjournment and before the Hearing on October 16, 2014, Mr. Lobo produced numerous documents including the original notebook in which he recorded his hours; credit card statements for July through October 12, 2013; and a receipt for the First Aid course he took at Global’s request during the period September 16 to 20, 2013. However, Mr. Sangha of Global, before the Hearing, by way of a letter dated September 30, 2014, to the Employment Standards Branch (the “Branch”), objected to certain redactions Mr. Lobo had made to his credit card statements, and requested an indefinite adjournment until Mr. Lobo produced his unredacted bank account statements; credit card statements; telephone statements for July 1 through October 12, 2013; driver’s abstract from ICBC; a copy of his work permit for his current employer; and the name and contact information of his current employer.
13. Mr. Sangha’s demand for these documents was based on his interest in showing that Mr. Lobo stopped working for Global and began working for another employer before October 3, 2013. However, the delegate was unconvinced with the merits of Global’s request for a second adjournment because the hearing had been adjourned once before and Mr. Lobo produced the documents he had agreed to produce. The delegate also felt that another adjournment, particularly an indefinite one, would be inconsistent with the purposes of the *Act* as set out in section 2. Notwithstanding the foregoing reasons, the delegate, through another colleague at the Branch, informed Mr. Sangha to provide written reasons in support of his request for another adjournment, delineating why the Hearing could not proceed without the further documents he was requesting before he would decide whether an adjournment was in order. However, Mr. Sangha did not make any submissions, and in the result, the delegate rejected his request for an adjournment and proceeded with the Hearing as scheduled on October 16, 2014.
14. Based on the Reasons, the delegate considered three (3) issues at the Hearing, namely: (i) whether Mr. Lobo’s Complaint was timely; (ii) if the Complaint was timely, whether Mr. Lobo received payment for all hours worked; and (iii) whether Global required Mr. Lobo to repay wages.
15. With respect to the first issue, that is, whether Mr. Lobo’s Complaint was timely, the delegate noted that the Complaint was submitted under section 74(2) on April 2, 2014. The delegate reasoned that if, as Mr. Lobo contended, his final day of work was October 3, 2013, then he was required to file the Complaint by April 3, 2014, and in such case his Complaint of April 2, 2014, was timely. However, if the final day worked by Mr.

Lobo was September 12 or September 20, 2013, as Global contends, then Mr. Lobo was required to file the Complaint no later than March 12 or March 20, 2014.

16. The delegate, in preferring the evidence of Mr. Lobo and concluding that the Complaint was lodged in a timely fashion, reasoned as follows:

Mr. Lobo testified that he worked until October 3, 2013. Mr. [Gurusevak Gill] Singh [Mr. Lobo's witness] stated that he was in regular contact with Mr. Lobo throughout this period, and that he understood Mr. Lobo to be working at [Global]. I find Mr. Singh's evidence to be of limited use regarding this issue; he readily admitted that he had no first-hand knowledge as to where Mr. Lobo was working, and relied on statements [made] to him by Mr. Lobo. Mr. Sangha testified that he did not see Mr. Lobo at [Global] after September 12, 2013, and that Mr. Lobo had quit at some point prior to September 12. The affidavits of [Global's witnesses] Inderjit Singh Dosange and Mandhir Singh support Mr. Sangha's testimony, in that neither saw Mr. Lobo working past September 12. I find the affidavit evidence to be of little weight; there was no indication that the employees could not have provided live evidence, which could then have been tested by Mr. Lobo. The affidavits are silent as to whether Inderjit Singh Dosange and Mandhir Singh worked every day after September 12, and were therefore in a position to definitively state that Mr. Lobo performed no work, or whether they had direct knowledge of Mr. Lobo quitting his job. I am left, then, with contradictory evidence from interested parties.

I prefer the evidence given by Mr. Lobo, as it is most capable of belief. It is not reasonable to imagine Mr. Lobo attending a week long course at [Global's] request if he had just quit his employment. I accept Mr. Lobo's contention that he was in a vulnerable position; as a foreign worker, he could not work where he willed, but was required to first obtain a work permit. It makes sense that he would wait until he had a work permit before he quit his employment. The evidence indicates that he did not leave BC until after October 2, 2013, the date of his last credit card purchase in BC. I do not think it likely that he would have made a purchase over the telephone from Alberta from Sanja's Punjab Sweetshop, a restaurant in Surrey.

17. The delegate also notes, in the Reasons, that Global invited him to draw an adverse inference from the fact that Mr. Lobo did not produce handwritten timesheets recording work he purported he did for Global for the period after September 12, 2013. Global's general manager, Gurirat Takhar ("Mr. Takhar"), submitted to the delegate that Mr. Lobo failed to provide timesheets for the said period because the timesheets would likely demonstrate that he was not working after that date. While the delegate acknowledged that the timesheets produced by Mr. Lobo covered only a brief period in August 2013, he was only able to obtain the timesheets he did produce through the involvement of an unnamed employee of Global, as the timesheets were not within Mr. Lobo's control but in Global's control and the latter failed to produce them during the adjournment period before the Hearing or at the Hearing. In these circumstances, the delegate chose to draw an adverse inference against Global and not Mr. Lobo.
18. The delegate concluded that the handwritten timesheets from September 13 to October 3, 2013, if produced by Global, would likely demonstrate that Mr. Lobo did in fact perform work during that period. It is for that reason Global decided not to produce them as they had previously agreed to. On the balance, the delegate concluded that Mr. Lobo's final day worked was October 3, 2013, and, therefore, the Complaint was filed within the time limit set by section 74 of the *Act*.
19. With respect to the question of whether Mr. Lobo received payment for all hours worked, the delegate noted that Global submitted a computer-generated record of Mr. Lobo's hours which were based on handwritten daily timesheets completed by Global's employees. These computer-generated records indicate Mr. Lobo worked Saturday through Wednesday, with Thursday and Friday as his off days. The same records also indicated that Mr. Lobo normally worked 8:00 a.m. to 4:30 p.m., and he left work early approximately ten (10) times during his employment. These records do not indicate any overtime worked by Mr. Lobo.

20. Conversely, the delegate noted that Mr. Lobo submitted his handwritten notebook as evidence of his hours worked, as he logged those hours contemporaneously with the work he was performing at Global. The notebook recorded Mr. Lobo worked six (6) days per week, with Saturday as his normal day off. His start times varied between approximately 6:00 a.m. and noon, and his end times varied between early afternoon and early morning the following day. His records also indicated that sometimes he worked more than 17 hours in a day.
21. At the Hearing, when he gave evidence, Mr. Lobo acknowledged that he had made two (2) changes to his notebook: he used white-out to erase the entry for January 19, 2013, which he realized he had recorded in error when he reviewed his documents prior to the Hearing; he also added numbers to the individual pages of his notebook.
22. Mr. Takhar, at the Hearing, unsuccessfully tried to cast a shadow on the credibility of Mr. Lobo's evidence in the notebook by arguing that in his black and white photocopy of Mr. Lobo's notebook, it appears to have been written in one pen, while the original notebook appears to have recorded entries using multiple pens. In the reasons, it appears the delegate did not find the argument persuasive.
23. The delegate further notes, in the Reasons, that the only handwritten timesheets produced at the Hearing were those for August 5 – 11 and August 20 – 29, 2013. The handwritten timesheets were normally recorded and signed by each employee of Global. Global suggested that the timesheets in evidence may have been tampered with, but failed to produce any evidence to contradict those timesheets. In the circumstances, the delegate concluded that for the period the timesheets covered, they are the best evidence of Mr. Lobo's hours worked. The Delegate noted that the timesheets record Mr. Lobo working on days that Global's computer records show he had off and record different start and finish times for each day. The delegate also found that the handwritten timesheets matched Global's computer records on one occasion only, namely, August 25. The delegate also noted that Mr. Lobo's notebook records times very closely with the available timesheets, with variations of less than 5 minutes in many cases where the two records did not match. In preferring Mr. Lobo's notebook as the best evidence available of his hours worked, the delegate rejected Global's computer-generated records as they failed to indicate the hours worked by Mr. Lobo and did not match the other evidence in the Hearing.
24. Having said this, the delegate then went on to note that when a complainant is not employed, section 80 of the *Act* limits wages that can be recovered to those earned or payable in the six (6) months prior to the termination of their employment. Since Mr. Lobo's final day of work was October 3, 2013, he is entitled to recover wages earned or payable from April 4, 2013. Based on Mr. Lobo's notebook, the delegate concluded that during the recovery period in question, Mr. Lobo worked 1,588.05 hours. This amounts to approximately 50 hours of work per week performed by Mr. Lobo for Global, but Global's records indicate that Mr. Lobo received wages for only 40 hours per week. Therefore, the delegate concluded that Global contravened section 17 of the *Act* in failing to pay Mr. Lobo for all wages earned in each pay period, and the most recent contravention was on October 8, 2013.
25. The delegate then went on to find that 965.99 hours worked by Mr. Lobo during the recovery period were payable at his regular wage. The delegate acknowledged and considered Mr. Lobo's evidence that he did not receive any wages for the second pay period in August or at all in September or October, 2013. However, Global provided cancelled cheques showing that Mr. Lobo's paycheques were negotiated through to the end of August. The cheques were deposited at the same bank branch, including the final cheque for the second pay period in August. In the result, the delegate concluded that Mr. Lobo had received his paycheques up to the final cheque in August, and that Mr. Lobo, in total, was paid for 674.81 hours during the recovery period, leaving a balance of 291.18 hours owing to him at his regular wage.

26. While Global argued that Mr. Lobo declined to pick up or otherwise accept his final wages, the delegate noted that section 19 of the *Act* provides that when an employer is unable to locate an employee, their wages must be paid to the Director within 60 days after the wages became payable. Global, by failing to pay Mr. Lobo his outstanding wages within six (6) days of his quitting his employment, or, alternatively, failing to submit to the Director Mr. Lobo's wages within 60 days after he terminated his employment, contravened section 18 of the *Act* on October 10, 2013.
27. With respect to overtime, the delegate referred to section 40 of the *Act* which requires that all hours worked in excess of eight (8) in a day or forty (40) in a week be paid at one and one-half times an employee's regular wage, and that all hours worked in excess of twelve (12) in a day be paid at double the regular wage. Based on Mr. Lobo's notebook, the delegate found that Mr. Lobo worked 501.95 hours payable at one and one-half times, and 82.15 hours at double his regular wage. However, the payroll records submitted by Global at the Hearing indicate that Mr. Lobo was not paid any overtime wages and, therefore, Global contravened section 40 of the *Act* with the most recent contravention being October 10, 2013.
28. Further, also based on Mr. Lobo's notebook records, the delegate noted that he worked 10.95 hours on Victoria Day, 4.55 hours on Canada Day, 11.05 hours on BC Day, and 11.42 hours on Labour Day. However, he was paid eight (8) hours at straight time on all these days. Global's payroll records indicated that Mr. Lobo received an average day's pay for Canada Day and BC Day when he was entitled to premium pay for all hours worked on these statutory holidays, as well as an average day's pay for Victoria Day and Labour Day. Accordingly, the delegate found that Global, by failing to pay premium pay for the hours Mr. Lobo worked on the said statutory days, contravened section 46 of the *Act* with the most recent contravention being September 23, 2013.
29. The delegate also found that Global contravened section 58 of the *Act* by failing to pay Mr. Lobo any annual vacation pay until the pay period ending June 30, 2013, after which he was paid annual vacation pay on each paycheque. In total, Mr. Lobo received \$373.38 in annual vacation pay but, according to the log of hours in his notebook, he had earned wages totaling \$77,800.11 during his employment with Global, and, therefore, should have been paid \$3,112.00 in annual vacation pay based on the minimum criteria in the *Act* of 4% of gross wages for an employee with Mr. Lobo's period of service. The delegate found that Global's final contravention of section 58 of the *Act* was on October 10, 2013.
30. With respect to the last issue the delegate considered, namely, whether Mr. Lobo was required to make cash payment to Global in order to receive his paycheques, the delegate noted that Mr. Lobo claimed that he was required to make cash payments to reimburse Global for remittances the latter made on his behalf to the Federal Government. Mr. Lobo provided his credit card statements which indicate cash advances of \$490.00 on August 7; \$400.00 on August 30; and \$50.00 on August 31, 2013. Mr. Lobo argued that he was required to repay approximately \$3,000.00 in total to Global, which Mr. Sangha denied.
31. Based on Mr. Lobo's credit card statements, the delegate noted that Mr. Lobo withdrew a further cash advance of \$300.00 on October 9, 2013, which was after he had quit his job. Mr. Lobo did not claim that this cash advance was paid to Global, but instead was for his own personal use.
32. In denying Mr. Lobo's claim that he was required to make payments to Global, the delegate noted that Mr. Lobo had the burden of demonstrating his claim, but failed to do so for the following reasons:

His testimony regarding the payments was imprecise as to when and how the payments occurred. His credit card statements do not indicate what the cash advances were used for, and it appears that Mr. Lobo made use of cash advances for purposes other than repayments to [Global]. I find that Mr. Lobo has not

proven on the balance of probabilities that he was required to make impermissible cash payments to [Global].

33. To summarize, the delegate ordered Global to pay Mr. Lobo regular wages, overtime wages, statutory holiday pay, annual vacation pay and interest totaling \$37,204.45.

SUBMISSIONS OF GLOBAL

34. On behalf of Global, Mr. Sangha presented written submissions in support of all three (3) grounds of appeal.
35. With respect to the error of law ground of appeal, Mr. Sangha contends that the delegate “did not apply the law correctly, and he acted without any evidence”. He states, notwithstanding Mr. Lobo attended a First Aid course from September 16, 2013, to September 20, 2013, his employment with Global terminated on September 12, 2013. He also relies on the affidavits of Mandhir Singh (“Mr. Singh”) and Inderjit Singh Dosange (“Mr. Dosange”), as well as his own evidence at the Hearing to reargue that Mr. Lobo’s last day of work was September 12, 2013, and that Mr. Lobo was not seen at Global after that date.
36. Mr. Sangha also states that it was inappropriate for the delegate to have relied on the record of the credit card purchase made by Mr. Lobo from Sanja’s Punjab Sweet Shop in Surrey on October 2, 2013, to conclude that Mr. Lobo’s final day of work at Global was October 3, 2013, and thereby conclude the Complaint was timely. Mr. Sangha contends that the credit card record only proves that Mr. Lobo was in British Columbia, but not that he worked for Global at the time.
37. Mr. Sangha concludes by stating that even if it is admitted that Mr. Lobo’s employment continued until the end of the First Aid course on September 20, 2013, he is out of time to file his Complaint, and, therefore, the Complaint should be rejected.
38. Also under the error of law ground of appeal, I note Mr. Sangha contends that the Director “misinterpreted the applicable law”. He then goes on to dispute the delegate’s conclusions of fact in the Reasons. In particular, he disputes the delegate’s conclusion that Mr. Lobo’s notebook “accords very closely with the times recorded on available time sheets” produced by Mr. Lobo. He then identifies some differences in time recordings between Mr. Lobo’s notebook evidence and the few timesheets of Global Mr. Lobo produced or had access to and argues that in some cases there is greater than 5-minute variations between the two, and, in one case, on August 7, 2013, Mr. Lobo did not work, but his notebook states that he worked 9.3 hours. Also, on August 6, 2013, while the timesheet is silent about the end time, Mr. Lobo’s notebook states 12.30 hours worked.
39. Furthermore under the error of law ground of appeal, Mr. Sangha argues that Global “contested” that the time sheets and the notebook presented by Mr. Lobo “were manipulated”, and that Mr. Surinder Sidhu (“Mr. Sidhu), a supervisor (foreman) at Global, recorded hours of all employees. Mr. Sidhu was on vacation, and Global requested an adjournment of the Hearing to allow Global to produce his handwritten sheets to contradict Mr. Lobo’s evidence, but the delegate did not afford Global that opportunity.
40. Mr. Sangha further argues that the delegate misinterpreted the applicable law and ignored the facts at the Hearing as concerns Mr. Takhar’s questioning of Mr. Lobo with respect to why the latter’s timesheets looked like they were written by one pen. Mr. Sangha says that Mr. Lobo admitted at the Hearing that he uses one pen, and Mr. Takhar asked him whether the pen lasted one (1) year. According to Mr. Sangha, the delegate appears to have misrepresented, in the Reasons, the tenor and nature of Mr. Takhar’s cross-examination on this point, and asks the Tribunal to “hear and see the recording of Mr. Lobo”.

41. With respect to the natural justice ground of appeal, Mr. Sangha argues that on September 30, 2014, Global submitted a letter to the delegate requesting that Mr. Lobo produce his bank account statements, credit card statements, and telephone bills from July to October 12, 2013, his driver's abstract, a copy of his work permit for his employer and the name and contact information for his employer. According to Mr. Sangha, these records would prove that Mr. Lobo was out of British Columbia and working for another employer in October, 2013. However, Mr. Sangha argues that the delegate did not accede to Global's request and refused to adjourn the Hearing. Instead, argues Mr. Sangha, the delegate accepted Mr. Lobo's handwritten notebook as the best evidence and made a determination against Global which he considers to be a breach of natural justice.
42. With respect to the new evidence ground of appeal, Mr. Sangha has now produced the handwritten timesheets of Global pertaining to Mr. Lobo for the period January 21 to September 12, 2013 ("New Time Sheets"), which he contends were in Mr. Sidhu's "possession" previously. Mr. Sidhu having returned from his vacation sometime after the Hearing, Mr. Sangha says he is now able to "testify and will bring the truth out". Mr. Sangha requests that the Tribunal to consider or allow Global to present the New Timesheets in the appeal.
43. I also note that at pages 6 and 7 of Mr. Sangha's written submissions, he challenges the veracity of Mr. Lobo's evidence generally and his credibility and, indirectly, the findings of fact made by the delegate throughout the Reasons. While I have read these submissions carefully, I do not find it necessary to set them out here.
44. I also note that at pages 7 and 8 of Mr. Sangha's written submissions, he challenges the evidence of Mr. Lobo's witness, Gurusevak Gill Singh, and contends that the latter tried to get a copy of the business license of Global and applied for a Provincial Nominee Program ("PNP") sponsorship, but could not get it, and because Mr. Sangha did not agree to assist him or Mr. Lobo in their PNP sponsorship application, they filed a complaint against Global. This argument was previously made at the Hearing and is now repeated by Mr. Sangha in the appeal.
45. Lastly, in his written submissions, Mr. Sangha also submits that the delegate has awarded Mr. Lobo a greater amount than what Mr. Lobo was seeking in his Complaint. In particular, he notes that Mr. Lobo claimed statutory holiday pay of \$1,000.00 from Global in his Complaint, but the delegate allowed \$1,840.16. He also notes that Mr. Lobo claimed annual vacation pay of \$1,400.00 in his Complaint, but the delegate allowed him \$2,736.62. He states that he has not seen "any judge in Canada who allowed more (extra) amount of claim than [claimed by the claimant]".

ANALYSIS

46. Section 112 of the *Act* sets out the following grounds upon which an individual may appeal a determination:

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.

47. The burden is always on the appellant to persuade the Tribunal that there is an error in the Determination on one of the above-noted statutory grounds.

48. In this case, as noted, Global appeals on all three (3) grounds of appeal. I will consider each ground under separate sub-headings below.

(a) Error of Law

49. The Tribunal has consistently adopted the definition of error of law in the British Columbia Court of Appeal decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] BC No. 2275:

1. a misinterpretation or misapplication of a section of the *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. The thrust of Mr. Sangha's submissions on the error of law ground of appeal is that the delegate acted without any evidence in concluding that Mr. Lobo worked for Global until October 3, 2013, and that the delegate "did not apply the law correctly" when he failed to conclude Mr. Lobo's Complaint "is not timely". In support of his arguments, Mr. Sangha refers to the affidavits of Mr. Singh and Mr. Dosange, as well as his own evidence that Mr. Lobo's last day of work was September 12, 2013. He also submits that it was inappropriate for the delegate to have concluded that Mr. Lobo's final day of work was October 3, 2013 based on Mr. Lobo's last credit card purchase on October 2, 2013 from Sanja's Punjab Sweet Shop in Surrey.

51. I do not find Mr. Sangha's submissions here persuasive. The delegate did not act without any evidence nor did he fail to apply the law correctly. The delegate considered the evidence of Mr. Sangha that he did not see Mr. Lobo at Global after September 12, 2013, as well as the affidavits of Mr. Singh and Mr. Dosange which appeared to corroborate the evidence of Mr. Sangha; however, the delegate found the affidavits of Mr. Singh and Mr. Dosange to be of little weight as Global did not indicate why they could not have attended at the Hearing to give oral evidence and thus afforded Mr. Lobo an opportunity to test their evidence.

52. Furthermore, I agree with the delegate that the affidavits of Mr. Singh and Mr. Dosange do not indicate whether the two men worked at Global every day after September 12 in order for them to be in a position to definitively state that Mr. Lobo did not perform any work after September 12, 2013, or that he quit his employment. In the face of contradictory evidence from Global and Mr. Lobo, it was open for the delegate to assess the evidence of the parties and decide which evidence was more consistent and credible. In this case, the delegate preferred the evidence of Mr. Lobo for several reasons, and not just because of the credit card purchase Mr. Lobo made at Sanja's Punjab Sweet Shop in Surrey on October 2, 2013, as contended by Mr. Sangha.

53. More particularly, the delegate found that it was not reasonable to conceive that Mr. Lobo attended a week-long First Aid course for Global (during the period September 16 to 20, 2013) after he had quit his employment on September 12, 2013.

54. The delegate preferred Mr. Lobo's assertion that he was in a vulnerable position as a foreign worker, and could not work where he willed because he was required to first obtain a work permit over Mr. Sangha's unsubstantiated assertion that Mr. Lobo was working for another employer after September 12, 2013.

55. In the circumstance, and on the balance of probabilities, it was open for the delegate to conclude, as he did, that Mr. Lobo's final day worked was October 3, 2013, and the Complaint was filed in a timely fashion under section 74 of the *Act*. Therefore, I do not find this to be a case of the delegate misinterpreting a statutory provision, namely, section 74 of the *Act*.
56. It is clear to me that Mr. Sangha, on behalf of Global, is challenging the weight the delegate attached to the evidence of Mr. Lobo relative to the evidence of Global. The weight of evidence is a matter for the delegate and is a question of fact, not law (see *Ahmed v. Assessor of Vancouver* (1992) BCSC 325; *Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada Ltd.* (1963) 42 WWR 449 at page 471). As such, it is not open to Global to raise questions of fact on appeal.
57. Having said this, I note the following very instructive passage in the decision of the Tribunal in *Takbar Electric Ltd.* (BC EST # D052/08):
- It is only if no reasonable person, acting judicially and properly instructed as to the law, could have come to the determination that a successful appeal lies on the basis that there has been an error of law: *Delsom Estates Ltd. v. Assessor of Area 11 – Richmond / Delta* (2000), SC 431 (B.C.S.C.), approved in *Britco Structures Ltd.*, BC EST #D260/03.
58. In my view, Global has not discharged the burden to show that this is such a case. To the contrary, I find that the conclusion of the delegate that Mr. Lobo worked for Global until October 3, 2013, is one that could reasonably be entertained by the delegate.
59. I also note that Mr. Sangha challenges, under the error of law ground of appeal, the delegate's conclusions of fact that Mr. Lobo's notebook closely accords with the times recorded on the available timesheets of Global he produced, with variations, in most cases, of less than five (5) minutes. Mr. Sangha attempted to show that there were more than 5-minute variations. Or that the time sheets produced in a couple of cases did not contain completed times or records when compared to Mr. Lobo's notebook records. The delegate weighed the evidence of the parties on the whole and I find that there was ample basis for the delegate to prefer the evidence of Mr. Lobo in respect of the hours he worked for Global and the incompleteness of the timesheets produced by Mr. Lobo when compared to his notebook is not such as to persuade me that the delegate committed any material breach amount to an error of law.

(b) Natural Justice

60. Mr. Sangha contends, under the natural justice ground of appeal, there was a breach of natural justice on the part of the delegate because he did not order Mr. Lobo to produce his "bank account statements, credit cards, telephone bills from July through October 12, 2013, and his driver's abstract, copy of work permit for his employer, name and contact information of his employer". Mr. Sangha contends that these records would definitively prove that Mr. Lobo was out of British Columbia and working for someone else in October 2013.
61. In the Reasons, the delegate explains that on the initial hearing date of Mr. Lobo's Complaint on September 10, 2014, the parties, by mutual agreement, agreed to adjourn the hearing to October 16, 2014, with the understanding that there would be further exchange of specific documents between them. In the case of Mr. Lobo, he was to provide his original record of hours; confirmation that he attended a First Aid course at Global's request; and his credit card statements for September and October, 2013. On Global's part, it was to produce the handwritten record of hours from which its computer records were generated as well as information regarding the First Aid course taken by Mr. Lobo.

62. I note that both the adjournment of the hearing to a new date and the obligations of the parties to produce specific documents were delineated in an email of another delegate on September 10, 2014, and sent to both parties.
63. Subsequently, Mr. Sangha sent a letter to the delegate on September 30, 2014, asking for an indefinite adjournment of the Hearing date until Mr. Lobo provided “original or certified copies of bank statements, Visa statements, debit card statements, phone bills, driving extract from ICBC, copy of work permit under his new employer and name and contact information of current employer to verify the employment date”. The delegate was not persuaded with Global’s request for a further adjournment as the hearing of the Complaint had been previously adjourned and Mr. Lobo complied with his obligations and produced the documents he was required to produce based on the mutual agreement of the parties when the initially-scheduled hearing on September 10, 2014, was adjourned. However, the delegate, through another delegate at the Branch, communicated to Mr. Sangha that he was prepared to consider written reasons from Mr. Sangha delineating why the Hearing scheduled on October 16, 2014, should not proceed without the documents he is now demanding before ruling on the question of whether a further adjournment of the Hearing was necessary. However, Mr. Sangha did not make any written submissions.
64. In the appeal, Mr. Sangha does not explain why he did not make any submissions in response to the delegate’s request.
65. In my view, there is nothing challengeable in the delegate’s decision to reject Global’s application for a further adjournment of the Hearing. I find the delegate’s decision here accords with the stated purpose of the *Act* in section 2(d), namely “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act”.
66. In these circumstances, I do not find that there has been a breach of natural justice on the part of the delegate.

(c) *New Evidence*

67. With respect to the new evidence ground of appeal, it should be noted that the test this Tribunal is bound by in determining whether material submitted on appeal qualifies as “new evidence” is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In this case, the Tribunal set out the following four (4) conditions that must be met before new evidence will be considered:
- (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 the other evidence, have led the Director to a different conclusion on the material issue.
68. The four (4) criteria set out above are a conjunctive requirement and, therefore, the appellant has the onus to satisfy each of the criterion before the Tribunal will admit the evidence on appeal.
69. As indicated, Global has now produced New Timesheets pertaining to Mr. Lobo, covering the period January 21 to September 12, 2013, upon which it purportedly relied in preparing its computerized records entered as

evidence in the Hearing. I note that the template of the New Timesheets is different than the few timesheets of Global which Mr. Lobo previously obtained and entered as evidence in the Hearing. The New Timesheets very neatly record, on each individual sheet, in what appears to be the same handwriting, all hours Mr. Lobo worked in each two-week periods. The New Timesheets consist of 16 pages in total representing two week periods for the entire employment period of Mr. Lobo with the exception of the period after September 12, 2013. The New Timesheets also contain 9 columns starting with the first column representing dates and each sheet allows for time entries for 15 or 16 days' worth of time records for a single employee only. On the other hand, the handful of timesheets Mr. Lobo was able to get his hands on and entered at the Hearing as evidence are very different. They have 5 differently arranged columns and each individual timesheet is for a single day and allows room for up to 21 employees to record their times. The second column is a name column and the first one is simple numbering that starts at 1 and ends at 21. The timesheets Mr. Lobo produces shows, in fact, several different employees' names and times they worked as incomplete as they may be.

70. At the Hearing, while Global argued that the timesheets of Global Mr. Lobo produced-for August 5 to 11 and 20 to 29- were tampered with, Global failed to produce any evidence in support of that contention. There is nothing in the Reasons or in the Appeal submissions of Global that provides any substantive evidence that the previously submitted timesheets of Global by Mr. Lobo are fake or not authentic time sheets of Global. Instead, Global has produced the New Timesheets that look very different in form and in substance (in terms of the information they contain). I find it curious also that for the period covered by the previously produced timesheets of Global there is also New Timesheets covering the same period but with only information about Mr. Lobo (unlike the previous time sheets which contain other employees' information as well). Why would there be a need for Global to have two different timesheets with some (not all) duplication in information? I find it is more likely than not that the New Timesheets were created after the Hearing or the Determination was made and for the purpose of Global lodging its appeal.
71. If I am wrong in challenging the authenticity or bona fides of the New Timesheets produced by Global, I would still reject them on appeal as they do not pass the first part of the "new evidence" test in *Re Merilus Technologies* decision.
72. In particular, I am not persuaded that the New Timesheets, if they existed at the time of the Hearing, could not have, with the exercise of due diligence, been discovered and presented to the delegate during the investigation or adjudication of the Complaint, and *prior to the Determination being made*. The Determination was made on November 28, 2014. Based on Mr. Sangha's letter of September 15, 2014 (which incidentally is not in the delegate's Record but produced in the Appeal by Global), Mr. Sidhu should have been back from vacation by mid-November, 2014, and Global should have produced these documents *at least before the Determination was made*.
73. I also find it rather suspect the New Timesheets were not available to Global because only Mr. Sidhu had access to them to the exclusion of anyone else at Global. On the first-scheduled hearing date, September 10, 2014, Global, or Mr. Sangha, agreed to produce these documents. Why would Mr. Sangha do this? If Mr. Sidhu was already away at that time and only he knew or had "possession" of these documents then why would Mr. Sangha agree to produce them before the Hearing date and why would he not ask for a different hearing date then to accommodate Mr. Sidhu's vacation schedule so that Mr. Sidhu could attend on behalf of Global to testify? I am simply not satisfied, based on the evidence and submissions of Global in the appeal that the New Timesheets (if they are authentic) could not have been discovered and presented to the delegate during the investigation or adjudication of the complaint and *definitely prior to the Determination being made*. I therefore dismiss Global's new evidence ground of appeal.

74. There are three (3) further points that I would like to address in conclusion. First, with respect to the written submissions of Mr. Sangha under the heading “Credibility of Mr. Lobo”, I find that these submissions are no more than a challenge to the findings of fact made by the delegate and the weight the delegate gave to Mr. Lobo’s evidence. I do not find those submissions meritorious.
75. I also note that Mr. Sangha challenges the evidence of Mr. Gurusevak Gill Singh, Mr. Lobo’s witness. More particularly, Mr. Sangha alleges that he and Mr. Lobo decided to file their complaints against Global because Mr. Sangha did not agree to help them apply for PNP. This submission was previously made at the Hearing and appears to have been rejected. It is now repeated in the appeal. An appeal is not an opportunity to reargue one’s case. I also note that substantive issues in the delegate’s Determination do not really turn on the evidence of Mr. Gurusevak Gill Singh.
76. Finally, Mr. Sangha expresses his disapproval with the delegate’s decision to award Mr. Lobo greater statutory holiday pay and annual vacation pay than Mr. Lobo claimed in his Complaint. Mr. Sangha believes that this is inappropriate. In my view, while Mr. Lobo may have set out specific amounts he was seeking under different claims in the Complaint, it is open to the delegate, provided there is supporting evidence, to make higher or lower awards than claimed.
77. In summary, I am not persuaded by Mr. Sangha’s submissions that the delegate erred in law or breached the principles of natural justice in making the Determination. I also do not find that there is “new evidence” that would persuade me to cancel the Determination. In the circumstances, I dismiss this appeal.

ORDER

78. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated November 28, 2014, is confirmed, together with any additional interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal