

An appeal

- by -

Copper Island Pub Ltd. and PK Chahal Holdings Ltd.
("CIP" and "PKC" or collectively the "Employer")

- 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/168

DATE OF DECISION: February 18, 2015

DECISION

SUBMISSIONS

Nathan Wahoski

counsel for Copper Island Pub Ltd. and PK Chahal Holdings Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Copper Island Pub Ltd. (“CIP”) and PK Chahal Holdings Ltd. (“PKC”), (collectively, the “Employer”), have filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 21, 2014 (the “Determination”).
2. The Determination concluded that CIP and PKC were “associated employers” under section 95 of the *Act*, and, accordingly, were jointly and separately (severally) liable for contraventions of Part 3, sections 17 and 18 (payday and payment of wages on termination); Part 4, section 40 (overtime); Part 5, sections 45 and 46 (statutory holiday pay and payment for work on statutory holiday); and Part 7, section 58 (vacation pay) of the *Act* in respect of the employment of Pranzil Sharma (“Ms. Sharma” or the “Complainant”), and ordered the Employer to pay Ms. Sharma wages and interest in the amount of \$20,853.53, inclusive of accrued interest under section 88 of the *Act*.
3. The Determination also levied four (4) administrative penalties of \$500.00 each against the Employer for contraventions of sections 17, 18, 40, and 46 of the *Act*.
4. The total amount of the Determination is \$22,853.53.
5. The Employer has appealed the Determination on all available grounds under section 112(1) of the *Act*, stating that the Director erred in law and 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 being made.
6. The Employer is seeking the Employment Standards Tribunal (the “Tribunal”) to refer the matter back to the Director.
7. Pursuant to section 114 of the *Act*, the Tribunal has discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. At this stage, I will assess the appeal based solely on a review of the Reasons for the Determination (the “Reasons”); the written submissions of counsel for the Employer; and the “record” that was before the delegate when the Determination was being made (the “Record”). If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Ms. Sharma and the Director will be invited to file further submissions. Alternatively, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

8. At issue in this appeal is whether there is any reasonable prospect that the appeal will succeed.

BACKGROUND AND FACTS

9. CIP and PKC are companies incorporated on March 7, 2012, and April 4, 2007, respectively under the laws of British Columbia with Kulwinder K. Chahal (“Ms. Chahal”) listed as CIP’s sole director and her spouse, Paramjit Singh Chahal (“Mr. Chahal”), listed as PKC’s sole director and officer.
10. The Complainant, Ms. Sharma, was recruited from India as a Temporary Foreign Worker (“TFW”) to work as a front-desk agent at PKC’s motel in Salmon Arm, the Traveller’s Rest Motel (the “Motel”), and signed an employment contract with PKC on November 10, 2012.
11. Thereafter, between December 3, 2012, and March 1, 2014, Ms. Sharma was employed in various capacities with the Employer and paid at the rate of \$13.25 per hour.
12. From December 26, 2012, however, Ms. Sharma seems to have been primarily employed as a server and bartender at CIP’s pub in Sorrento, British Columbia, until she quit her employment on March 1, 2014.
13. On June 16, 2013, Ms. Sharma filed her complaint against PKC, alleging that the latter contravened the *Act* by failing to pay her regular wages, overtime wages, statutory holiday pay and annual vacation pay, and made illegal deductions from her wages (the “Complaint”).
14. The hearing of the Complaint was scheduled on September 24, 2014 (the “Hearing”).
15. On August 13, 2014, the delegate sent a Demand for Employer Records (the “Demand”) to both PKC and CIP requesting that they produce any and all payroll records relating to wages, hours of work and conditions of employment with respect to Ms. Sharma and another employee, Prabhjot Singh (“Mr. Singh”), by Thursday, September 4, 2014. The Employer responded to the Demand by producing incomplete records of Ms. Sharma’s hours of work. More specifically, the Employer produced records that included timesheets for Ms. Sharma for the pay periods between December 15, 2012, and May 15, 2013, and for the pay periods ending February 28 and March 15, 2014. The Employer’s records, for the most part, were for a period outside the six-month recovery period set by section 80 of the *Act*, which is between September 2, 2013, and March 1, 2014, (the “Recovery Period”).
16. On August 14, 2014, the delegate sent the Notice of Complaint Hearing to PKC and CIP (the “Notice”). In the Notice, the parties were requested to provide, *inter alia*, a list of witnesses for the Hearing by September 4, 2014. The Employer did not provide a list of witnesses. Ms. Sharma, however, indicated she would call Mr. Singh, Kelly Little (“Ms. Little”), Jasleen Kaur (“Ms. Kaur”) and Barbara Ziegler (“Ms. Ziegler”).
17. Subsequently, on the Hearing date, Mr. Chahal advised that both he and Ms. Chahal would provide testimony. Ms. Sharma’s representative, Adriana Rietzler (“Ms. Rietzler”), objected to Ms. Chahal providing testimony because the Complainant had not received notice of the testimony and did not, in advance, prepare to cross-examine Ms. Chahal. The delegate, however, allowed Ms. Chahal to testify and agreed to provide Ms. Rietzler with time to prepare her cross-examination of Ms. Chahal.
18. The Hearing of the Complaint proceeded over two (2) days, with the first day on September 24, 2014, and the last on October 2, 2014. The Hearing was attended by Harpreet Chahal (“Harpreet”), Ms. Chahal’s daughter, who assisted in translating for Ms. Chahal.
19. Based on the Reasons, at the Hearing, the delegate received evidence from the parties and their witnesses pertaining to three (3) questions, or issues, namely: (i) whether PKC and CIP should be treated as one (1)

employer for the purposes of the *Act* under section 95 and jointly be considered to be Ms. Sharma's employer; (ii) what were Ms. Sharma's hours of work and was she paid for all hours worked; and (iii) was Ms. Sharma required to pay a portion of her wages back to the Employer.

20. With respect to the first issue, namely, whether PKC and CIP should be treated as one (1) employer for the purposes of the *Act*, the delegate delineated the applicable test under section 95 in the Reasons. He noted the following four (4) conjunctive requirements under section 95 of the *Act* that must be met before the Director may associate employers, namely:

- There is more than one (1) legal entity involved;
- Each entity carries on a business;
- The entities are under common direction and control; and
- There is a statutory purpose for associating the entities.

21. The delegate then applied the above test to the facts in this case and, in concluding that PKC and CIP should be treated as one employer, reasoned as follows:

PKCH and Copper Island are separately incorporated entities under the Business Corporations Act, and therefore satisfy the first stage of the analysis.

Ms. Sharma's offer of employment was made by PKCH, which operates the Motel in Salmon Arm where Ms. Sharma was originally hired to work. Ms. Sharma, although an employee of PKCH worked almost exclusively at the Pub, operated by Copper Island, from December 26, 2012 although she continued to be paid by PKCH. Ms. Chahal stated, and I find, that the Chahals operate the Pub and the Motel jointly, as family businesses. I find that PKCH and Copper Island each carry on business, and further that they operate under the common direction and control of the Chahals, therefore meeting the second and third stages in the analysis.

The fourth and final stage of the analysis requires that there be a valid statutory purpose for the association. The operations of Copper Island and PKCH are closely intermingled, and it is likely that the corporations' assets are as well. In order to ensure payment of any wages owed to Ms. Sharma, it is necessary that the two corporations be associated.

22. With respect to the second issue at the Hearing, namely, Ms. Sharma's hours of work and whether she had been paid for all hours worked for the Employer, the delegate noted that section 80 of the *Act* limited Ms. Sharma's recovery of wages claimed to those earned or payable in the last six (6) months of her employment. More specifically, the delegate defined the Recovery Period to span between September 2, 2013, and March 1, 2014, the date when Ms. Sharma quit her employment.

23. The delegate then went on to review the Employer's records pertaining to Ms. Sharma, and concluded that the Employer had provided incomplete records of Ms. Sharma's hours of work. The Employer's timesheets only covered pay periods between December 15, 2012, and May 15, 2013, and the pay periods ending February 28 and March 15, 2014. The delegate also noted that the timesheet produced by the Employer for the pay period ending February 28, 2014, showed Ms. Sharma to have worked eight (8) hours per day, Monday through Friday, for a total of 80 hours in the pay period and the final timesheet shows Ms. Sharma worked eight (8) hours on March 1, 2014, which was a Saturday.

24. The delegate also noted that while the other timesheets produced by the Employer were outside the Recovery Period, they were expositive of the hours Ms. Sharma worked. These timesheets, the delegate noted,

indicated that the pay periods ended on the 15th and final days of each month, while Mr. Chahal's testimony at the Hearing was that payments were made to Ms. Sharma five (5) days later, on the 5th and 20th days of each month. This arrangement, the delegate reasoned, would necessarily result in different pay periods with a different number of work days in each pay period. As a result, the delegate questioned the veracity of the timesheets of the Employer, stating that despite the varying patterns of work of Ms. Sharma, and regardless of the length and composition of the pay periods, she is always recorded as working an "invariable 80 hours...per period".

25. The delegate further questioned the veracity of the timesheets, pointing out that the timesheets appear to all be written in the same hand with the number "7" sharing the same stylized form on each sheet, but the writing was not Ms. Sharma's. Furthermore, the final timesheet of the Employer notes "March 1 was the last day she worked she has quit the job [sic]", which would suggest it was not Ms. Sharma's writing. For all of the reasons above, the delegate concluded the Employer's records were not credible.
26. The delegate next considered the credibility of the testimony of the Employer's witnesses, Mr. and Ms. Chahal. In the case of Mr. Chahal, the delegate found his testimony to be "vague and argumentative throughout". The delegate further described Mr. Chahal as non-responsive to questions under cross-examination. While Mr. Chahal claimed difficulties due to his English skills, the delegate noted that Mr. Chahal did not, at any point, indicate he had trouble understanding the proceedings, except when asked questions about Ms. Sharma's hours of work or the POS printout (a document that was generated from CIP's pub point-of-sale system that all employees were supposed to log into when they arrived for work and log out of when the pub closed or they ended their work shift). The delegate posited that Mr. Chahal's trouble understanding the proceedings manifested only when questions about the data contained in the POS printout pertaining to Ms. Sharma were posed to him, and appeared to contradict his affirmed testimony. Otherwise, Mr. Chahal had no difficulty following the testimony or understanding most questions, according to the delegate.
27. The delegate also noted that Mr. Chahal directly contradicted himself when providing testimony. Mr. Chahal testified that Ms. Chahal always worked at the pub, but later in the Hearing stated that Ms. Chahal worked at the front desk at the Motel. The delegate also noted that Mr. Chahal testified that Ms. Sharma worked five (5) days per week, but the timesheets supplied by the Employer indicated that Ms. Sharma worked six (6) days per week beginning February 23, 2014, from Monday through Saturday. In the result, the delegate found Mr. Chahal's testimony to be both vague and externally and internally inconsistent and, therefore, not credible.
28. With respect to Ms. Chahal's testimony, the delegate said that while Ms. Chahal was "less belligerent and more straightforward" than Mr. Chahal, her testimony was "similarly vague and internally inconsistent". According to the delegate, she provided little in the way of details regarding Ms. Sharma's work, stating that Ms. Sharma never worked more than eight (8) hours and always took a two-hour break each afternoon. She also contradicted herself when she stated that Ms. Sharma never worked at the Motel, but later stated that she did work at the Motel when the Chahals were out of town. In the result, the delegate found Ms. Chahal's testimony to be vague and internally inconsistent, and, therefore, also not credible.
29. With respect to Ms. Sharma, the delegate noted that her testimony was detailed and consistent with the other evidence at the Hearing. More particularly, the delegate noted that the POS printouts supported Ms. Sharma's assertion that she worked in excess of 40 hours per week, and so did the Employer's own timesheets. Her testimony was also supported by Mr. Singh's, who worked at CIP's pub during Ms. Sharma's hours of work.

30. With respect to the evidence of Ms. Sharma's other two (2) witnesses, Ms. Kaur and Ms. Ziegler, the delegate found both these witnesses credible, but their evidence was of little use as they did not have first-hand knowledge of Ms. Sharma's work schedule. Ms. Little, the other witness on Ms. Sharma's list, appears not to have appeared at the Hearing.
31. The delegate, having found the Employer's timesheets unhelpful and unreliable, preferred the evidence of Ms. Sharma and her witness, Mr. Singh, as the most reliable evidence. He noted that Ms. Sharma's evidence, which included a record of her hours that she prepared after she quit her employment and the POS printout from the pub (a more contemporaneously prepared document showing when Ms. Sharma logged in and logged out at the pub), would not have included the time Ms. Sharma spent cleaning up before and after closing. Therefore, Ms. Sharma's claim is less than the actual hours she worked at the pub. The delegate then concluded:
- Given the hours that the Pub was open, the hours recorded do not appear unreasonable. It seems likely that Ms. Sharma would arrive early to set up and leave late after cleaning. I find that the Chahals did not work at the Pub as regularly as they have claimed, and that Ms. Sharma was unable to take breaks in her shift, and that when she did take breaks, she was required to be available to work should customers arrive.
32. Having so concluded, the delegate then went on to consider the hours Ms. Sharma worked during the Recovery Period. He concluded, based on the evidence of Ms. Sharma, that between September 2, 2013, and March 1, 2014, she worked a total of 1,739 hours, not including time worked on statutory holidays. He further concluded that of the 1,739 hours worked, 985.5 hours were payable at her regular rate, 708.5 hours at one and one-half times her regular rate and 45 hours at double her regular rate, pursuant to section 40 of the *Act*.
33. The delegate also noted that the cheques the Employer provided to Ms. Sharma for her work on and after February 1, 2014, were stale-dated when they were provided to her, and, therefore, non-negotiable. However, other than the periods covered in the said cheques, Ms. Sharma received payment for 80 hours of regular wages in each pay period, up to the pay period ending January 31, 2014, totalling only 800 hours at her regular rate of pay. Therefore, the delegate concluded that the Employer, by failing to pay Ms. Sharma for all hours she worked within eight (8) days of the end of the pay period in which they were worked, contravened section 17 of the *Act*, with the most recent contravention being February 23, 2014.
34. The delegate also concluded that the Employer contravened section 18 of the *Act* in respect of Ms. Sharma's employment because she was not paid all outstanding wages within six (6) days of her final day of work when she quit. More particularly, the Employer was required to pay all outstanding wages to Ms. Sharma no later than March 7, 2014, including the regular and overtime wages earned in the last two pay periods ending February 28 and March 15, 2014, but failed to do so.
35. With respect to the overtime claim, the delegate found that the Employer failed to pay Ms. Sharma overtime as required in section 40 of the *Act* in each pay period, including the final pay period, with the most recent contravention occurring on March 8, 2014, when Ms. Sharma's final wages were due or owed.
36. The delegate also found that the Employer breached section 45 of the *Act* for failing to pay an average day's pay for a statutory holiday on which no work is performed. More particularly, the delegate explained that prior to the Hearing, the Employer provided two (2) cheques to Ms. Sharma for statutory holiday pay. The first cheque was for nine (9) holidays in 2013 and the second cheque was for two (2) holidays in 2014. The payments shown on both these cheques were for eight (8) hours' wages for each holiday in the Recovery Period, and six (6) outside the Recovery Period. In the case of Remembrance Day, Ms. Sharma's average day's pay (based on the wages she earned during the thirty (30) days prior to the statutory holiday) totalled

\$115.11, and not the \$106.00 paid to her by the Employer. Accordingly, the delegate concluded that the Employer breached section 45 of the *Act* and awarded Ms. Sharma an additional \$9.11 for an average day's pay for Remembrance Day.

37. The delegate also found the Employer contravened section 46 of the *Act* for failing to pay Ms. Sharma a premium rate to which she was entitled – one and one-half times her regular wage rate – for actual hours worked on Labour Day, Thanksgiving Day and Remembrance Day in 2013, and on New Year's Day and Family Day in 2014. She was only paid her regular wage rate for the work she performed on the said statutory holidays and, therefore, the delegate ordered the Employer to pay Ms. Sharma the difference between the regular wage rate paid and the premium wage rate required to be paid under section 46 of the *Act*.
38. With respect to Ms. Sharma's claim for annual vacation pay, the delegate noted, in the Reasons, that section 58 of the *Act* provides that annual vacation pay is payable in the calendar year following the year in which it is earned. However, if an employee consents in writing, it may be paid on each paycheque. In the case of Ms. Sharma, no such written consent was provided to the Employer. The delegate then noted that Ms. Sharma commenced work for the Employer on December 3, 2012, and, in the normal course of events, her annual vacation pay earned between December 3, 2012, and December 2, 2013, would have been payable no later than December 3, 2014. Since Ms. Sharma quit her employment on March 1, 2014, all outstanding wages, including annual vacation pay, were due to be paid no later than March 7, 2014. Therefore, the delegate concluded that Ms. Sharma is entitled to her annual vacation pay on wages that she earned but was not paid, from December 3, 2012, to September 1, 2013. The delegate also submitted that Ms. Sharma's testimony, which he preferred over that of the Employer, was that prior to November 2013, she worked thirteen (13) hours per day, six (6) days per week. Based on this testimony, the delegate concluded that Ms. Sharma earned \$52,311.00 in total wages between December 3, 2012, and September 1, 2013, and was entitled to receive annual vacation pay of \$2,092.44. For each pay period, the delegate noted that Ms. Sharma received the same payment regardless of her hours worked. Based on the pay statements of Ms. Sharma, the delegate found that she only received \$42.40 in annual vacation pay in each pay period, but did not receive any wages for her first two (2) weeks of work. In the seventeen (17) remaining pay periods after September 1, 2013, Ms. Sharma was paid \$720.80 in annual vacation pay, leaving a balance of \$1,371.64. In the circumstances, the delegate found the Employer to have contravened section 58 of the *Act* and ordered the Employer to pay Ms. Sharma the said outstanding amount on account of vacation pay.
39. With respect to the final issue or question of whether Ms. Sharma was required to pay a portion of her wages back to the Employer, contrary to section 21 of the *Act*, the delegate noted that the parties gave conflicting evidence. In rejecting Ms. Sharma's claim, the delegate reasoned as follows:

... Ms. Sharma bears the burden of demonstrating that she was required to make these impermissible payments to the Employer.

...

... Ms. Sharma's bank records indicate that she deposited wages on November 21 and 23, 2013, and on January 14 and February 5, 2014. She made large cash withdrawals totalling \$7,000.00 during the [R]ecover [P]eriod, on September 13, November 23, November 30 and December 25, 2013, and on January 14, January 29, and February 11, 2014. There was only one instance when Ms. Sharma made a cash withdrawal and withdrew funds on the same day. The evidence in the bank statements is at odds with the evidence provided by Ms. Kaur and Mr. Singh, at least as it relates to payments made by Ms. Sharma to the [E]mployer.

Ms. Sharma's claim that she was required to repay earned wages to her employer is extraordinary and disturbing. She has the burden of proving her claim on the balance of probabilities. The bank account

evidence has a plausible and innocent explanation; Ms. Sharma had funds available after receiving her paycheques, and so withdrew cash for her own expenses; indeed, Ms. Sharma withdrew amounts well in excess of the amounts she claims to have repaid to the Employer. Ms. Sharma's testimony was, at least in this regard, vague and unconvincing, and her witnesses provided evidence at odds with her bank statements. Having carefully considered the evidence I cannot find that Ms. Sharma has proven that she was required to make cash repayments to her Employer.

40. Accordingly, the delegate denied Ms. Sharma's claim for the impermissible repayments allegedly made by her to the Employer.

SUBMISSIONS OF THE EMPLOYER

41. Counsel for the Employer made written submissions in support of all three (3) grounds of appeal advanced by the Employer under section 112 of the *Act*.
42. With respect to the error of law ground of appeal, counsel submits that the Director relied on evidence presented by Ms. Sharma that was unreliable and should not have been given any weight. More particularly, counsel notes that Ms. Sharma provided "minimal evidence in support of her contention that she worked in excess of 12 hours per day" and relied upon "a printout from the Pub's point of sale system" which was unreliable because "the Employer had no control over how or when an employee logged into and out-of the POS logging system". Counsel also pointed out that the evidence presented at the Hearing disclosed that there were eleven or more employees listed on the POS printout, but most performed no work, according to Ms. Sharma. Therefore, counsel argues that the Director should have ignored the POS printout and not relied on it to resolve the differences, or contradictions, in the evidence of the parties. Counsel states that the failure of the Director to disregard the POS printout as evidence caused the Director to err in law. Counsel seeks the matter to be returned to the Director for a re-hearing "with the POS Printout excluded from the evidence".
43. Counsel further argues, under the error of law ground of appeal, that the Director failed to "apply the appropriate burden of proof" in assessing the evidence on the hours Ms. Sharma worked. In particular, counsel submits that Ms. Sharma "should have been required to present evidence from an independent witness to discharge the burden of proof" because of the "unreliability" of her other evidence. More specifically, counsel states that the Employer, at the Hearing, submitted several times that Ms. Sharma did not work in excess of eight (8) hours per day, and that the Employer was present while Ms. Sharma was working because Ms. Sharma would not have been able to run the pub without assistance, but the Director "unreasonably ignored this evidence". According to counsel, "the surrounding circumstances and simple common sense" would have led the Director to accept the Employer's evidence. In these circumstances, counsel argues that the Director erred in law because he "acted on a view of the facts which could not reasonably be entertained" and he "did not apply the appropriate standard of proof".
44. Counsel also submits, under the error of law ground of appeal, that the Director resolved the contradictions in the evidence between the Employer and Ms. Sharma by accepting the timesheets that Ms. Sharma had created after her employment ended. According to counsel, such evidence "was unreliable, given the timing of the creation of that evidence" and because Ms. Sharma was "an interested witness". Counsel concludes that the combination of the Director's reliance on the recorded hours prepared by Ms. Sharma, together with unreliable POS printouts and no independent witness to substantiate Ms. Sharma's claim that she worked in excess of twelve (12) hours a day when she worked, caused the Director to err in law because the Director acted "on a view of facts that could not reasonably be entertained".

45. Counsel also submits that the Director erred in law by not applying the test set out in *Werachai Laoha* (BC EST # D370/01) in relation to the credibility of an interested witness, namely, Ms. Sharma. Counsel states that the hours Ms. Sharma described she worked “were both improbable and unlikely given the seasonal and daily business cycle of the Pub”, and the Director in accepting or preferring her evidence, that she worked in excess of twelve (12) hours per day without a break and operated the pub herself without the assistance from the Employer, over that of the Employer’s, was unreasonable.
46. Counsel also submits that Ms. Sharma’s credibility is suspect in light of the delegate “having concluded that [Ms.] Sharma had falsely claimed to have paid back a portion of her wages to the Employer”. Counsel states that the Director “ought to have viewed [Ms.] Sharma’s other evidence with skepticism and scrutiny” as a result, but failed to do so.
47. Counsel also submits that Mr. Singh testified the pub was “only open 9 hours per day, from noon to 9:00 p.m.”. Therefore, “[i]t is highly improbable that Ms. Sharma would have worked 13 hours per day, if the Pub was open for only 9 hours each day”; for the Director to have reached a different conclusion was unreasonable, argues counsel.
48. With respect to the natural justice ground of appeal, counsel submits that the “Director failed to account for the arrangements made by the parties to cover [Ms.] Sharma’s living expenses”. Counsel states that Ms. Sharma’s employment contract provides that “the Employer was not to provide accommodations as part of the employment agreement” and, therefore, it is implicit that “[Ms.] Sharma was required to pay for all accommodations provided to her by the Employer”. Therefore, this explains any “set-off or reduction in [Ms.] Sharma’s wages” by the Employer. The failure by the Director to take into consideration the “living expenses” of Ms. Sharma in calculating the wages owed by the Employer to her constitutes a breach of the principles of natural justice by the Director, argues counsel.
49. Counsel further argues, under the natural justice ground of appeal, that “the Employer’s language barriers disadvantaged the Employer in the [H]earing”. Counsel states that the Employer “attempted to submit records of [Ms.] Sharma’s employment by fax” after explaining that “the Employer did not in fact understand the process”, but the Director failed to “offer the Employer an opportunity to adjourn the [H]earing to better prepare the Employer’s case”.
50. Under the new evidence ground of appeal, counsel submits that the Employer seeks to admit a copy of Ms. Sharma’s employment contract signed by the latter at the outset of her employment. Counsel argues that the Employer “was not asked for or given an opportunity to submit [Ms.] Sharma’s employment contract” at the Hearing or before the Determination was made. He states that the employment contract provides “living accommodations would not be provided by the Employer, and by implication that [Ms.] Sharma would be obligated to pay for any living accommodations provided by the Employer”. Therefore, argues counsel, the Director “did not have the benefit of evidence that demonstrated that [Ms.] Sharma’s living costs were factored into the wages and salary paid to [Ms.] Sharma” while she was working for the Employer.
51. Counsel argues that the employment contract between the Employer and Ms. Sharma “is highly relevant and probative” and if the Director had the opportunity to consider it, it would have led him “to a different conclusion on important issues in the case”, particularly relating to the wages and overtime payable by the Employer to Ms. Sharma.
52. Finally, counsel argues that the Employer explained to the Director “at the outset of the [H]earing...that the Employer did not understand the process” and in such case, the Director should have afforded “the Employer ...an opportunity to adjourn the [H]earing and submit all of the evidence in its possession that was

relevant to the complaint, including [Ms.] Sharma's employment contract and documents showing that other employees did in fact work at the Pub at the material time". In the circumstances, counsel argues that a re-hearing of the matter is required.

ANALYSIS

53. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.

54. The Employer has appealed the Determination on all three (3) available grounds of appeal under section 112(1) of the *Act*. I will review each ground of appeal under separate headings below.

(a) Error of Law

55. The British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) provides the following instructive definition of an error of law:

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

56. There are several submissions counsel has made under the error of law ground of appeal which are not unrelated. The gist of these submissions is that the Director erred in law in preferring the evidence of Ms. Sharma over the Employer's by relying upon the POS printout and the recorded hours of work of Ms. Sharma prepared by Ms. Sharma after the termination of her employment. According to counsel, neither of these documents should have been considered by the Director, and Ms. Sharma should have been required to produce "reliable independent evidence" in the form of "an independent witness to discharge the burden of proof" placed upon her to prove her hours of work.

57. I do not find counsel's submissions persuasive, nor do I find his representation of the delegate's decision-making leading to his preference of the evidence of Ms. Sharma over the Employer's completely accurate. The delegate reviewed the evidence presented by both the Employer and Ms. Sharma carefully in preferring the evidence of Ms. Sharma. In the case of the Employer's evidence, the delegate took into consideration the following:

- The Employer provided incomplete records of Ms. Sharma's hours of work that were mostly outside of the Recovery Period.

- The timesheets submitted by the Employer for the period outside of the Recovery Period indicate that the pay periods ended on the 15th and final days of each month, but Mr. Chahal testified at the Hearing that payments were then issued five (5) days later, on the 5th and 20th days of each month, which would necessarily result in pay periods of varying composition, with a different number of work days in each pay period but the timesheets submitted by the Employer recorded an invariable 80 hours worked by Ms. Sharma in each pay period.
- The timesheets produced by the Employer appear to all be written in the same hand with the number “7” sharing the same stylized form on each sheet, which was not in the hand of Ms. Sharma (which is inconsistent with the evidence of Mr. Chahal that Ms. Sharma completed her own timesheets and submitted to him).
- The final timesheet produced by the Employer shows a handwritten note “March 1 was the last day she worked she has quit the job” (this was not something Ms. Sharma would have written on her timesheet).
- Mr. Chahal’s testimony, according to the delegate, was “vague and argumentative throughout” and he directly contradicted himself while providing testimony when he initially testified that Ms. Chahal always worked at the CIP’s pub but later stated that Ms. Chahal worked at the front desk at PKC’s motel.
- Ms. Chahal’s testimony was “similarly vague and internally inconsistent”. She provided little in the way of details regarding Ms. Sharma’s work. She also contradicted herself when she stated that Ms. Sharma never worked at the Motel, but later stated that she did work at the Motel when the Chahals were out of town.

58. Against the above backdrop of the evidence of the Employer and credibility of the testimony of the Employer’s witnesses, the delegate considered the evidence of Ms. Sharma and her witnesses, and made the following observations:

- Ms. Sharma’s “testimony was detailed and, most importantly, consistent with the other evidence at the Hearing”.
- The POS printouts supported Ms. Sharma’s contention that she worked in excess of 40 hours per week, and the Employer’s own timesheets indicate that she worked more than five (5) days per week.
- Ms. Sharma’s testimony was also supported by Mr. Singh who was present during her working hours at the pub.

59. Therefore, I do not find that the delegate solely relied upon the POS printouts, nor simply the hours Ms. Sharma recorded after the termination of her employment. He considered all of the evidence of the parties, including the relative consistency of Ms. Sharma’s evidence against that produced by the Employer. This is evident in the following analysis of the delegate in the Reasons, which I find to be very persuasive:

Having found that the Employer’s timesheets are largely irrelevant to the period in question and unreliable regardless, I find that Ms. Sharma’s record of her daily hours is the best evidence available of her actual hours worked. Given the hours that the Pub was open, the hours recorded do not appear unreasonable. It seems likely that Ms. Sharma would arrive early to set up and leave late after cleaning. I find that the Chahals did not work at the Pub as regularly as they have claimed, and that Ms. Sharma was unable to take breaks in her shift, and that when she did take breaks, she was required to be available to work should customers arrive.

60. In the circumstances, it was open for the delegate to prefer the evidence of Ms. Sharma as the best evidence available for him to determine her hours of work and I do not find the delegate to have committed an error of law.

61. I am also not persuaded in the merits of counsel's submission that the Director erred in law by not applying the test set out *Werachai Laoha, supra*, in relation to the credibility of an interested witness when assessing the evidence of Ms. Sharma. In *Werachai Laoha*, the Tribunal stated:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing circumstances. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize in that place and in those conditions.

62. In my review of the Reasons, I find the delegate to have properly concluded Ms. Sharma's testimony had both internal and external consistency with both POS printouts and Mr. Singh's testimony who was present during her working hours at the pub. The delegate particularly observed that in light of the hours during which the pub was open, the hours recorded by Ms. Sharma do not appear to be unreasonable. Therefore, it was open for the delegate to prefer the evidence of Ms. Sharma as more credible than the Employer's and I do not find the Director's decision was inconsistent with the test for assessing credibility of an interested witness in *Werachai Laoha, supra*.

63. I also note that counsel, in his submissions, has failed to consider the whole of the relevant evidence of Mr. Singh. Counsel indicates that Mr. Singh testified that the pub was only open for 9 hours per day, from noon to 9:00 p.m. and therefore, it is "highly improbable" that Ms. Sharma would have worked 13 hours per day, if the pub was only open for 9 hours each day. Counsel disregards or fails to mention the testimony of Mr. Singh that he was always at the pub early and saw Ms. Sharma typically arrive one-half hour prior to the pub opening and stay late, sometimes until 1:00 a.m., and occasionally work seven (7) days per week. Counsel also fails to note Mr. Singh's evidence that both he and Ms. Sharma were unable to take breaks when they worked as they were required to be ready in case a customer arrived. Therefore, I do not find merit in counsel's submission that it was unreasonable, on the evidence of Mr. Singh, for the Director to have reached the conclusion he did with respect to Ms. Sharma's hours worked.

(b) Natural Justice

64. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigation into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given an opportunity to respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business Worlds Incorporated*, BC EST #D050/96)

65. The first submission of counsel under the natural justice ground of appeal is that the delegate should have taken into consideration the evidence of the Employer that the latter provided ongoing room and board to

Ms. Sharma, which was not included in her employment contract. Counsel stated that the failure of the Director to consider “[a]ny set-off or reduction in [Ms.] Sharma’s wages” by the Employer for her “living expenses” amounts to a breach of natural justice. I do not see any evidence in the Reasons or in the Record showing that the evidence of living expenses was presented or argued by the Employer either prior to or at the Hearing. In any event, section 21(1) of the *Act* prevents an employer to directly or indirectly withhold or deduct an employee’s wages for any purpose except when permitted by the *Act*. Section 22(4) provides that an employer may honour an employee’s written assignment of wages to meet a credit obligation. In the case at hand, there is no evidence of any written assignment of wages by Ms. Sharma in favour of the Employer in order to meet any credit obligations, such as the purported “living expenses”. In these circumstances, I do not find the delegate or the Director to have erred in any way or to have “failed to apply the principles of natural justice”, as argued by counsel.

66. Counsel has also submitted, under the natural justice ground of appeal, that the Employer suffered “language barriers [which] disadvantaged the Employer in the [H]earing”. More particularly, counsel submits that the Employer attempted to submit records of Ms. Sharma’s employment by fax after explaining to the delegate that the Employer did not understand “the process”, but the Director failed to “offer the Employer an opportunity to adjourn the [H]earing to better prepare the Employer’s case”. This submission, is repeated by counsel later in his written submissions in the context of counsel’s argument that the Director should have afforded the Employer an opportunity to adjourn the Hearing to “submit all of the evidence in [the Employer’s] possession that was relevant to the [C]omplaint, including [Ms.] Sharma’s employment contract”, but the Director failed to adjourn the Hearing.

67. I do not find that there is any evidence of “language barriers” that prevented the Employer or its representatives, the Chahals, from presenting relevant documents or records before the Hearing. The Demand was served on the Employer well in advance of the Hearing. If Mr. Chahal did not comprehend the Employer’s obligation to produce employer records, one would have thought that he would have expressly communicated so to the delegate well in advance of the Hearing, and certainly at the Hearing. Mr. Chahal did produce some employer records, but not all, and the timesheet records that he did produce pertaining to Ms. Sharma were, for the most part, outside of the Recovery Period. It would appear that he did understand what the Employer’s obligation was and produced some records, but he simply failed to produce all of the records. It is not for the Director, without good reason, to adjourn the Hearing. There is no real evidence the Employer was denied, for any reason, an opportunity “to submit all of the evidence in its possession that was relevant to the [C]omplaint, including Ms. Sharma’s employment contract”. What is evident is that the Employer, for whatever reason, did not produce the relevant information upon which it now wishes to rely. I do not find the delegate or Director breached any principles of natural justice, least of all deny the Employer the opportunity to present relevant evidence.

(c) *New Evidence*

68. The Employer seeks to introduce the employment contract Ms. Sharma entered into with the Employer, and also time records, paystubs and pay information for other employees who were working at the pub at the time Ms. Sharma was employed. The objective of the Employer to now introduce the employment contract is with a view to arguing that Ms. Sharma’s living accommodations with the Employer were not part of the employment agreement, and the Director should have taken into consideration the “living expenses” of Ms. Sharma in calculating any wages owed by the Employer to her, as there should have been some set-off or reduction made to her wages for living expenses.

69. In the case of the time records and paystubs for other employees the Employer wishes to adduce in this appeal, the purpose is to rely upon these records to argue that Ms. Sharma received breaks during her shifts as there were other employees at the pub during the material times she worked to relieve her from work.
70. The applicable test for accepting “new evidence” on appeal is set out by the Tribunal in *Re: Merilus Technologies Inc.*, BC EST # D171/03. In this case, the Tribunal set out the following four (4) conjunctive requirements any party requesting the Tribunal to admit new evidence must satisfy before the Tribunal will admit new evidence:
- (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.
71. Having reviewed all of the documents the Employer wishes to introduce in the appeal, namely, Ms. Sharma’s employment contract, including the time records, paystubs and pay information for other employees working at the pub, I find all these documents could have, with the exercise of due diligence, been discovered and presented to the Director during the investigation or adjudication of the Complaint, and prior to the Determination being made. However, the Employer failed to do so. Therefore, I find that the Employer has not satisfied the first criterion in the *Re: Merilus Technologies* test above. Since all four (4) criteria are conjunctive, the failure to satisfy the first criterion, in my view, is sufficient to exclude the purported “new evidence” of the Employer from the appeal.
72. I also note that counsel’s submission that the Employer did not understand the process or its disclosure obligations because of some “language barriers” is unfounded in evidence. I do not find any evidence of Mr. Chahal, or the Employer, advising the delegate of the alleged “language barrier” preventing the Employer from fully comprehending its disclosure obligations or hindering the Employer’s ability to properly prepare and submit its evidence in a timely fashion at the Hearing, or before the Determination was made. I believe that this is a case where the Employer did not produce all the relevant evidence that it should have produced at the Hearing, and now wants to adduce evidence that existed at the time of the Hearing in the appeal with a view to obtaining a different result. An appeal is not an opportunity for a party to obtain a re-hearing of its case by bringing more evidence that was available, and should have been produced, before or at the Hearing.
73. In these circumstances, I do not find the Employer to have satisfied any of the grounds of appeal.

ORDER

- ⁷⁴. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated November 21, 2014, is confirmed, together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal