

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/169

DATE OF DECISION: February 18, 2015

DECISION

SUBMISSIONS

Nathan A. 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 Prabhjot Singh (“Mr. Singh” or the “Complainant”), and ordered the Employer to pay Mr. Singh wages and interest in the amount of \$12,971.82, inclusive of accrued interest under section 88 of the *Act*.
3. The Determination also levied six (6) administrative penalties of \$500.00 each against the Employer for contraventions of sections 17, 18, 40, 45 and 46 of the *Act*, as well as section 46 of the *Employment Standards Regulation* (the “*Regulation*”).
4. The total amount of the Determination is \$15,971.82.
5. The Employer has appealed the Determination on all available grounds under section 112(1) of the *Act*, alleging 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. By way of remedy, 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 of the proceeding, 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*, Mr. Singh 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. The issue in this appeal is whether there is any reasonable prospect 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, Mr. Singh, was recruited from India as a Temporary Foreign Worker (“TFW”) to work as a bartender for CIP at its pub. He arrived in Canada on May 4, 2013, and began employment with CIP from May 7, 2013, to March 1, 2014, at the rate of pay of \$14.20. However, before he started working at CIP’s pub in June, 2013, Mr. Singh performed some short-term jobs for both Ms. Chahal and Mr. Chahal through the month of May 2013. In June 2013, he began working primarily as a cook for CIP until he quit his employment on March 1, 2014.
11. On May 15, 2014, Mr. Singh filed his complaint against CIP alleging that the latter contravened the *Act* by failing to pay him regular wages, overtime wages, statutory holiday pay and annual vacation pay, and made illegal deductions from his wages (the “Complaint”).
12. The hearing of the Complaint was scheduled for September 23, 2014 (the “Hearing”).
13. On August 13, 2014, the delegate sent a Demand for Employer Records to both CIP and PKC requesting that they produce any and all payroll records relating to wages, hours of work and conditions of employment relating to Mr. Singh and another employee, Pranzil Sharma (“Ms. Sharma”), by Thursday, September 4, 2014. Neither CIP nor PKC complied with the Demand and failed to produce the records demanded of them prior to the Hearing.
14. At the Hearing, Mr. Chahal submitted that he was CIP’s Manager and represented CIP throughout the Hearing. He stated that CIP kept a record of Mr. Singh’s daily hours of work and offered to fax the same to the delegate and to Mr. Singh.
15. Mr. Singh, who was represented at the Hearing, through his representative, objected to the last-minute introduction of new evidence but the delegate agreed to receive CIP’s documents, given their potential value. The delegate sought to review the documents to determine whether they should be admitted into evidence. Upon review of the documents, the delegate noted that the documents were “unsigned and mostly undated timecards” and “the cards which could be dated were for pay periods outside the six-month recovery period”, and, therefore, had “no evidentiary value” and, accordingly, the delegate did not enter them as evidence.
16. Having dealt with the preliminary issue of the documents of CIP at the start of the Hearing, the delegate went on to receive other evidence from the parties and their witnesses, particularly related to three (3) issues, namely: (i) whether CIP and PKC should be treated as one (1) employer for the purposes of the *Act* under section 95 and jointly be considered to be Mr. Singh’s employer; (ii) what were Mr. Singh’s hours of work and did he get paid for all hours worked; and (iii) was Mr. Singh required to pay a portion of his wages back to CIP.
17. With respect to the first issue, namely, whether CIP and PKC should be treated as one (1) employer for the purposes of the *Act* under section 95, the delegate reasoned as follows in determining that CIP and PKC were jointly Mr. Singh’s employer:

Section 95 of the *Act* allows the Director of Employment Standards to associate employers where it can be demonstrated firstly that there is more than one legal entity involved, secondly that each entity carries

on a business, thirdly that the entities are under common direction and control, and fourthly that there is a statutory purpose for associating the entities.

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

Copper Island operates the Pub where Mr. Singh primarily worked, while PK Chahal Holdings Ltd. operates the Traveller's Rest Motel (the "Motel") in Salmon Arm. Mr. Singh's unchallenged evidence was that he, an employee of Copper Island, performed work painting and cleaning at the Motel for PK Chahal Holdings Ltd. prior to working at the Pub. Ms. Sharma, an employee of PK Chahal Holdings Ltd., mostly worked at the Pub. I find that Copper Island and PK Chahal Holdings Ltd., while ostensibly operating separate businesses, jointly operate the Pub and the Motel.

Mr. Singh and Ms. Sharma testified that they received direction almost exclusively from Mr. Chahal, and Mr. Chahal stated that he spent a great deal of time operating the Pub. Mr. Chahal represented the Employer throughout the hearing. The Employment Contract which Copper Island provided to Mr. Singh notes Mr. Chahal as the Employer on the first page. For these reasons, I find that PK Chahal Holdings Ltd. and Copper Island are under the common direction and control of Mr. and Ms. Chahal, and that the third stage of the analysis is met.

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 PK Chahal Holdings Ltd. were closely intermingled, and it is likely that the corporations' assets are as well. In order to ensure payment of any wages owed to Mr. Singh, it is necessary that the two corporations be associated.

I find that, despite Mr. Chahal stating that he was only the Pub manager, the evidence indicates that PK Chahal Holdings Ltd. and Mr. Chahal were much more deeply involved with operating the Pub. Pursuant to section 95 of the Act, I find that Copper Island and PK Chahal Holdings Ltd. should be considered one employer.

18. With respect to the question of Mr. Singh's hours of work and whether he had been paid for all hours worked for the Employer, the delegate notes, in the Reasons, that section 80 of the *Act* limited recovery of wages, in cases where employment had ended, to those earned or payable in the last six (6) months of a complainant's employment. In the case of Mr. Singh, since his last day of work was March 1, 2014, his wage recovery period is September 2, 2013, to March 1, 2014.
19. The delegate also notes, in the Reasons, that Mr. Singh testified that the pub was open six (6) days per week, from noon to 9:00 p.m. daily, and that he was required to attend the pub at 11:00 a.m. to prepare lunch and often stayed later than closing time, which was 10:00 p.m., in order to clean up. He also submitted that he worked without breaks, cleaning and preparing the kitchen when not actively cooking. The only two (2) days he did not work were when the pub was closed on December 25 and 26, 2013.
20. The delegate also notes that Mr. Singh prepared a record of his daily hours worked for the Hearing, based upon his best recollection. He only recorded ten (10) hours per day worked because he could not recall on precisely which days he worked more than the ten (10) hours.
21. The delegate also notes that the testimony of Mr. Singh's witness, Ms. Sharma, who also worked at the pub, was consistent with Mr. Singh's evidence. Both said that Mr. and Ms. Chahal rarely attended at the pub and when they did attend, it was in the evenings.
22. The delegate also notes that Mr. Chahal acknowledged that Mr. Singh's shift ended ten (10) hours after it began but claimed that Mr. Singh was provided a two-hour break each day he worked and that he was present at the pub whenever it was open, and available to provide Mr. Singh his breaks.

23. While Mr. Chahal claimed that CIP maintained a daily record of Mr. Singh's hours of work, neither CIP nor PKC provided the records demanded in the Demand for Employer Records; namely, payroll records pertaining to Mr. Singh for the effective period of the claim from September 1, 2013, to March 15, 2014. In the circumstances, the delegate concluded in the Determination that the Employer contravened section 46 of the *Regulation* on September 4, 2014, when the payroll records demanded were due, but not produced by the Employer.
24. In the absence of Employer records, the delegate observed that he was required to assess the credibility of Mr. Singh's evidence. In preferring Mr. Singh's evidence over that of Mr. Chahal, the delegate stated:
- ... Mr. Singh's testimony as to his hours of work was detailed and consistent with Ms. Sharma's, and supported by the hours of the Pub's operation. Mr. Chahal, conversely, was prone to exaggeration and generality in his testimony. For example, at one point he claimed to be at the Pub '24/7'. While clearly not intended to be taken literally, the statement indicates the lack of detail and care in Mr. Chahal's testimony. I find that, where their evidence is in conflict, the evidence of Mr. Singh is more credible. I further find that Mr. Singh's record is the best evidence available as to the hours that he worked.
25. The delegate then went on to consider Mr. Singh's evidence that he was paid twice monthly and in each pay period, regardless of its length, he was paid for 80 hours of work. In the circumstances, the delegate concluded that Mr. Singh was paid for 880 hours of work at his regular wage rate during the recovery period. Based on Mr. Singh's evidence that he worked six (6) days per week (which evidence was not challenged by Mr. Chahal) and ten (10) hours per day, the delegate concluded that Mr. Singh worked a total of 1,478.5 hours during the recovery period. However, Mr. Singh was not paid for all hours worked within eight (8) days of the end of the pay period in which the hours were worked, as the Employer only paid him for 80 hours in each pay period, regardless of the actual number of hours he worked. Therefore, the delegate concluded that the Employer breached section 17 of the *Act*, with the most recent breach taking place on February 23, 2014.
26. The delegate also noted that Mr. Singh did not receive payment for work performed in his final two (2) pay periods, between February 16 and 28 inclusive, as well as the pay period commencing March 1, 2014. While Mr. Chahal produced cheques for Mr. Singh for these pay periods, it was well after his employment had ended and by the time Mr. Singh received those cheques, they were stale-dated and his bank would not cash them. While Mr. Chahal submitted that he did not have the forwarding address for Mr. Singh in order to re-send the cheques to him, the delegate noted that section 19(1.1) of the *Act* provides that in such a situation, the employer must send any unpaid wages to the Director within 60 days of the date the wages were due. In the circumstances, the delegate concluded that the Employer contravened section 18 the *Act* for failing to pay all wages due to Mr. Singh within six (6) days of the latter quitting his employment.
27. The delegate also noted that, pursuant to section 40 of the *Act*, the Employer was required to pay Mr. Singh one and one-half times his regular wage rate for all hours worked in excess of eight (8) in a day or forty (40) in a week. Based on the evidence Mr. Singh provided, he was entitled to be paid for 429 hours at his overtime rate. The delegate concluded that the Employer, by failing to pay Mr. Singh the overtime rate for the said hours, contravened section 40 of the *Act*, with the most recent contravention happening on February 15, 2014.
28. The delegate also noted that section 45 of the *Act* requires that, for eligible employees, an employer must pay an average day's pay for each statutory holiday. The wage statements provided by Mr. Singh showed that he did not receive any statutory holiday pay during his employment. With respect to Labour Day and Christmas Day, 2013, Mr. Singh did not work at the pub, but was entitled to an average day's pay for each of these days. The delegate found that the Employer's failure to pay Mr. Singh an average day's pay in this instance was a contravention of section 45 of the *Act*, with the most recent contravention occurring on December 31, 2013.

29. The delegate also noted that Mr. Singh worked ten (10) hours on each of Thanksgiving Day and Remembrance Day in 2013, and New Year's Day and Family Day in 2014. Pursuant to section 46 of the *Act*, Mr. Singh was an eligible employee entitled to an average day's pay plus premium pay of one and one-half times his regular wages for all hours worked on these statutory holidays. Therefore, the delegate concluded that Mr. Singh was entitled to premium pay for 40 hours of work performed on the statutory holidays, in addition to an average day's pay for these four (4) holidays. By failing to provide Mr. Singh premium pay, as well as average day's pay, for these holidays, the delegate determined that the Employer contravened section 46 of the *Act*, with the most recent contravention being on February 15, 2014.
30. The delegate did consider Mr. Chahal's testimony that a cheque for \$807.13, dated August 28, 2014, and drawn on CIP's account, was paid to Mr. Singh in respect of statutory holiday pay. However, since no wage statement accompanied the cheque, the delegate was unable to determine which holidays it was intended to cover and whether the cheque was for average day's pay or premium pay. Nevertheless, the delegate applied the amount in the cheque to reduce the Employer's total obligation for statutory holiday pay owing to Mr. Singh.
31. In summary, the delegate concluded that Mr. Singh, having worked 1,478.5 hours during the recovery period, only received 880 hours of pay at regular wage rate. With respect to the 598.5 unpaid hours worked by Mr. Singh, the delegate noted that 429 hours were payable as overtime, 40 payable as statutory holiday premium pay, and 129.5 at the regular wage rate.
32. Finally, with respect to Mr. Singh's claim for annual vacation pay, the delegate noted 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, but with an employee's written consent, it may be paid on each paycheque. In this case, there was no evidence that Mr. Singh provided such consent. As a result, the delegate considered the relevant period for calculating vacation pay for Mr. Singh and noted that the latter started working on May 7, 2013, and his annual vacation pay would have been payable after May 8, 2014. Since Mr. Singh quit his employment on March 1, 2014, all outstanding wages, including his annual vacation pay, were due to be paid no later than March 7, 2014. Therefore, the delegate determined that Mr. Singh was entitled to his annual vacation pay on wages he had earned, but was not paid, from May 7 to September 1, 2013. Based on the records Mr. Singh provided, he earned \$18,907.30 in total wages between May 7 and September 1, 2013, and was entitled to receive annual vacation pay of \$756.29. Based on the paystubs Mr. Singh submitted, he only received \$272.64 as annual vacation pay during the said period and, therefore, the delegate concluded that the Employer owed him a balance of \$483.65.
33. With respect to the final question of whether Mr. Singh was required to pay a portion of his wages back to CIP contrary to section 21 of the *Act*, the parties gave conflicting evidence, and the delegate, in rejecting Mr. Singh's claim, reasoned as follows:

While I was generally impressed with the detailed testimony provided by Mr. Singh, his testimony when it came to the repayment of wages was less convincing. Mr. Singh was unable to provide details of the conversation in which he was informed that he would be required to repay his wages, or of how, where and when he made the actual payments. I do not find his testimony in this regard as credible as his testimony regarding other aspects of his case. Ms. Sharma's testimony was similarly lacking in important details, such as how and when the alleged payments were made, simply stating that she saw Mr. Singh make the payments.

Mr. Singh's claim that he was required to repay earned wages to his employer is extraordinary and disturbing. He has the burden of proving his claim on the balance of probabilities. The bank account evidence has a plausible and innocent explanation; Mr. Singh had funds available after receiving his paycheque, and so withdrew cash for his own expenses. Mr. Singh's testimony was, at least in this regard,

vague and unconvincing. Mr. Chahal vigorously denied requiring any repayment of wages by Mr. Singh. Having carefully considered the evidence I cannot find that Mr. Singh has proven that he was required to make cash repayments to his Employer.

34. The delegate then summarized, in the Reasons, under separate headings, wages owed to Mr. Singh totalling \$12,971.82, and ordered the Employer to pay Mr. Singh the said amount.
35. The delegate also issued six (6) administrative penalties against the Employer for contraventions of sections 17, 18, 40, 45 and 46 of the *Act*, as well as section 46 of the *Regulation*.

SUBMISSIONS OF THE EMPLOYER

36. Counsel for the Employer has submitted written submissions in support of all three (3) grounds of appeal advanced by the Employer under section 112 of the *Act*.
37. With respect to the error of law ground of appeal, counsel submits that, in this case, the Director acted on a view of the facts that could not reasonably be entertained. He states that the Director preferred the evidence of Mr. Singh, notwithstanding the fact that Mr. Singh's evidence had been "created solely for the purpose of this proceeding". Counsel submits that the Director should not have relied upon the records provided by Mr. Singh because they were based on his memory after his employment had ended, and only to bolster the Complaint.
38. Counsel also submits that Mr. Singh did not have a clear recollection of the hours he worked while employed by the Employer, and that his recollection of hours of work was vague and uncertain. In these circumstances, the "Director unreasonably preferred the evidence of [Mr.] Singh over that of the Employer". He contends that the Employer presented "the only contemporaneous evidence of Mr. Singh's recorded hours in the form of paystubs and pay statements", but that evidence was "disregarded and largely ignored by the Director". In these circumstances, he also submits that "it was unreasonable for the Director to have found that [Mr.] Singh had met the burden of proof in these circumstances without any credible, contemporaneous evidence showing that [Mr.] Singh had in fact worked the excessive hours claimed".
39. Also under the error of law ground of appeal, I note counsel argues that the Director "ignored the fact that both [Mr.] Singh and Ms. Sharma were interested witnesses who likely corroborated each other's evidence prior to the [H]earing". Counsel submits that, in the circumstances, the delegate erred in law in failing to apply the basic test of credibility applicable to an interested witness set out in the Tribunal's decision in *Werachai Laoha* (BC EST # D370/01).
40. With respect to the natural justice ground of appeal, counsel submits that the Employer's noted failure, in the Reasons, to provide employer records prior to the Hearing reflected "the Employer's deficient English language skills".
41. Counsel further submits that when the Employer was afforded an opportunity to submit the records (at the Hearing), "the Director unreasonably made a decision to ignore those records in their entirety". He also submits that by "not reviewing, weighing and considering the records submitted by the Employer as evidence of [Mr.] Singh's hours worked", the Director failed to observe and apply the principles of natural justice. At a minimum, counsel states that the Director was obligated to review the information contained in the records and consider those records as part of the evidence in the case.

42. Counsel also states that it was additionally wrong for the Director, after declining to admit the Employer's records produced at the Hearing, to go on to rule that "no payroll records were submitted by the Employer" and to levy an administrative penalty against the Employer for breach of section 46 of the *Regulation*.
43. Finally, under the natural justice ground of appeal, counsel submits that Mr. Singh "lived at accommodations provided by the Employer, and was obligated to pay for those accommodations through payroll deductions" but the Director failed to take into consideration these "living expenses...that the Employer recouped...through payroll deductions" and thereby "failed to apply the principles of natural justice".
44. With respect to the new evidence ground of appeal, counsel states that the Employer contested Mr. Singh's evidence that the latter worked ten (10) hours per day consistently without any breaks. Counsel states that the Employer's testimony at the Hearing that Mr. Singh was provided two (2) hours break each day is now corroborated by the "new evidence" the Employer is seeking to introduce. The new evidence is "in the form of timecards, paystubs and other documents" purportedly showing that "other workers were available to cover for [Mr.] Singh at the Pub".
45. Counsel further submits that it was "clear to the Director at the commencement of the [H]earing that the Employer did not understand its disclosure obligations because of language barriers" and it was also "clear that the Employer had relevant evidence that had not been submitted, and that may have influenced or affected the Determination", and that the Director should have adjourned the Hearing to provide "the Employer sufficient time to properly prepare and submit its evidence". The evidence counsel is referring to is the paystubs, time records and additional documents the Employer now seeks to admit into evidence with a view to establishing that Mr. Singh lied about the availability of other workers at the pub to cover him for his two-hour break.
46. In conclusion, counsel submits that the Tribunal should order a re-hearing of the matter.

ANALYSIS

47. 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.
48. The Employer, as indicated previously, appeals 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**
49. 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 (B.C.C.A) is very instructive in terms of defining error of law. The Court of Appeal described error of law to include the following instances:
- 1. a misinterpretation or misapplication of a section of the Act; [in *Gemex*, the legislation was the *Assessment Act*];
 - 2. a misapplication of an applicable principle of general law;

3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

50. In the case at hand, counsel for the Employer has advanced a few submissions under this ground of appeal. The first submission is that the Director, by preferring the evidence of Mr. Singh that was “created solely for the purpose of this proceeding”, acted on a view of facts that could not reasonably be entertained and, therefore, erred in law. Counsel further adds that Mr. Singh did not have a clear recollection of the hours he worked while employed by the Employer, and his recollection of hours of work was vague and uncertain, and, therefore, it should not have been preferred over the evidence of the Employer who presented “the only contemporaneous evidence of Mr. Singh’s recorded hours in the form of paystubs and pay statements”.
51. I do not find counsel’s above submissions persuasive. First, the purported “contemporaneous evidence” of the Employer that Mr. Chahal introduced at the Hearing, as noted by the delegate in the Determination, “were unsigned and mostly undated timecards” and “[t]he cards which could be dated were for pay periods outside the six-month recovery period”. The Employer did not produce any “contemporaneous evidence” of Mr. Singh’s hours worked for the *recovery* period. In the absence of relevant Employer’s records, the delegate, in my view, correctly went on to assess the credibility of Mr. Singh’s evidence. The delegate did not simply rely upon the record of hours prepared by Mr. Singh for the purposes of the Hearing, but also relied on the testimony of Mr. Singh corroborated by Ms. Sharma, and further assessed independently the credibility of Mr. Chahal’s evidence.
52. In preferring Mr. Singh’s evidence on the whole as more credible than the Employer’s evidence, I do not find the delegate to have erred in law or otherwise. In my view, it was open for the delegate to come to that conclusion on the whole of the evidence, and I find the delegate’s following reasons at pages R7 - R8 of the Reasons sufficiently persuasive:
- ... Mr. Singh’s testimony as to his hours of work was detailed and consistent with Ms. Sharma’s, and supported by the hours of the Pub’s operation. Mr. Chahal, conversely, was prone to exaggeration and generality in his testimony. For example, at one point he claimed to be at the Pub ‘24/7’. While clearly not intended to be taken literally, this statement indicates the lack of detail and care in Mr. Chahal’s testimony. I find that, where their evidence is in conflict, the evidence of Mr. Singh is more credible. I further find that Mr. Singh’s record is the best evidence available as to the hours that he worked.
53. I also do not find persuasive counsel’s blanket submission that Mr. Singh’s recollection of hours worked was vague and uncertain. Mr. Singh may not have recalled the extra hours that he may have worked beyond the hours he normally or usually worked - between 11:00 a.m. to 9:00 p.m., six (6) days per week - but Mr. Singh did not claim any wages beyond the normal hours he worked, nor did the delegate assess any wages beyond the normal hours claimed by Mr. Singh. In my view, Mr. Singh’s inability to remember what extra hours he worked beyond the usual or normal hours does not taint or discredit his evidence of the usual hours he worked.
54. I am also not persuaded in the merits of counsel’s submissions that the Director failed to consider “the fact that both [Mr.] Singh and Ms. Sharma were interested witnesses who likely corroborated each other’s evidence prior to the [H]earing” and therefore the delegate erred in law in failing to apply the basic test of credibility set out in *Werachai Laoha, supra*. 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 conditions. 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 are practical and an informed person would readily recognize as reasonable in that place and in those conditions.

55. I fail to see, on the evidence presented by the parties at the Hearing, that the Director or her delegate erred in the credibility assessment of Mr. Singh's evidence based on the test set out in *Werachai Loaha, supra*.
56. I also find counsel's assertion that Mr. Singh and Ms. Sharma are interested witnesses "who likely corroborated each other's evidence prior to the [H]earing" is to be no more than a speculative assertion that is unsubstantiated by evidence. I do not find, in the circumstances, the delegate to have erred in law.

(b) Natural Justice

57. 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)

58. The first submission of counsel for the Employer under the natural justice ground of appeal is that the Employer's noted failure to provide employer records prior to the Hearing was due to "the Employer's deficient English language skills". However, when the Employer did provide some records at the Hearing, counsel submits that those records were ignored by the delegate or the Director in their entirety as the delegate did not review, weigh or consider them as evidence of Mr. Singh's hours worked. Therefore, counsel contends, the delegate breached the principles of natural justice.
59. Again, I do not find counsel's submission persuasive or meritorious. There is no evidence in the Record showing that the Employer or the latter's representative, Mr. Chahal, was prejudiced or hindered in producing employer records because of "deficient English language skills" or failure to comprehend the Demand for Employer Records served on the Employer well in advance of the Hearing. The matter of language deficiency of the Employer is raised for the first time in the appeal of the Determination. If Mr. Chahal did not understand the Employer's obligation to produce employer records, one would have thought that he would have tried to obtain clarification from the delegate before the Hearing. Certainly, by the time of the Hearing, he had some understanding of what was being requested in terms of employer records; however, he did not produce the pertinent employer records demanded, namely, records of Mr. Singh's hours worked during the six-month recovery period. In the circumstances, I do not find that the delegate "unreasonably made a decision to ignore" the Employer records (covering in part the period outside of the recovery period) produced by Mr. Chahal at the Hearing. To the contrary, the delegate considered the records produced by Mr. Chahal and, after reviewing them and determining that they were not relevant in terms of the material recovery period, properly excluded them.

60. Relatedly, I do not find any merit in counsel's submission that the delegate, after declining to admit the Employer's records at the Hearing, inappropriately concluded that the Employer failed to produce payroll records and levied an administrative penalty against the Employer for breach of section 46 of the *Regulation*. If counsel were to look at the Demand for Employer Records issued to the Employer on August 13, 2014, it clearly notes the Director's request for "any and all payroll records relating to wages, hours of work and conditions of employment ... [for Mr. Singh] for the period September 1, 2013, to March 15, 2014". The Employer failed to produce the records requested and, therefore, the delegate correctly levied an administrative penalty against the Employer for breach of section 46 of the *Regulation*.
61. Counsel also has submitted, under the natural justice ground of appeal, that the delegate failed to take into consideration, when calculating wages owed to Mr. Singh by the Employer, the "living expenses" for accommodations the Employer provided to Mr. Singh, which expenses "the Employer recouped...through payroll deductions". I note that this evidence was not presented by the Employer at the Hearing, nor do I find any trace of this evidence in the Record that was before the delegate when the Determination was being made. 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 Mr. Singh 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 "failed to apply the principles of natural justice", as asserted by counsel.

(c) *New Evidence*

62. The Employer has also advanced the new evidence ground of appeal, stating that new evidence has become available that was not available at the time the Determination was made. The evidence in question is "in the form of timecards, paystubs and other documents" purportedly showing that other employees and workers of the Employer were available to cover for Mr. Singh and the latter received two hours break each day he was at work.
63. The test this Tribunal is bound by in determining whether to accept new evidence or whether evidence qualifies as new evidence in an appeal is delineated in *Re: Merilus Technologies Inc.*, BC EST # D171/03, as follows:
- (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.
64. The four (4) criteria above are a conjunctive requirement and, therefore, the party requesting the Tribunal to admit new evidence has the onus to satisfy each criterion before the Tribunal will admit any new evidence.
65. In this case, the evidence produced by the Employer in the form of timecards, paystubs and other documents relating to Mr. Singh and two (2) other employees, appears to be evidence that existed before the Hearing and

before the Determination was made. I am not convinced, on the submissions of counsel, that the Employer could not have, with the exercise of due diligence, discovered and presented to the Director this evidence, whether during the investigation or the Hearing of the Complaint or prior to the Determination being made. Therefore, I find that the Employer has not satisfied the first criterion in the *Re: Merilus* test. Since all four (4) criteria are conjunctive, the failure to satisfy the first test, in my view, is sufficient to deny the “new evidence” the Employer is seeking to adduce on appeal.

66. Having said this, I wish to add that I have reviewed the Employer’s “new evidence” which appears to cover the recovery period in Mr. Singh’s claim and I am surprised that the Employer did not produce it before the Hearing or at the Hearing or before the Determination was made. I would have thought that when the Employer records produced at the Hearing were not admitted as they did not relate to the recovery period of Mr. Singh’s claim, the Employer would have made a searching effort to obtain the records covering the recovery period before the Determination was made, rather than wait to adduce them in the appeal.
67. I also find it curious that the schedules of hours worked by Mr. Singh and two others for the period September 2013 to March 2014 now produced by the Employer in the appeal are very different than the schedules produced at the Hearing covering some of pre-recovery period. The latter only contained information about Mr. Singh, but no other employees, whereas the schedules for the recovery period now produced show other employees too. It is more probable than not that the schedules now produced in this appeal were created just for the appeal by the Employer. However, I do not need to decide this question as I have already found that none of the Employer’s documents produced in the appeal satisfy the first criterion of the test in *Re: Merilus Technologies*.
68. Finally, I also do not find persuasive counsel’s submission that it “was clear to the Director at the commencement of the [H]earing that the Employer did not understand its disclosure obligations because of language barriers” and the Hearing should have been adjourned to afford “the Employer sufficient time to properly prepare and submit its evidence”. I do not find anything in the Record, or in the Reasons, to suggest that the Employer did not understand its disclosure obligations in the Demand for Employer Records. In the absence of Mr. Chahal or the Employer advising the delegate of the alleged “language barriers” preventing the Employer from fully comprehending its disclosure obligations or hindering the Employer’s ability “to properly prepare and submit its evidence”, it is not for the delegate or the Director to divine that an adjournment is necessary. I do not find any evidence in Mr. Chahal’s or the Employer’s pre-Hearing dealings with the delegate, or during the Hearing, that would lead me to conclude that Mr. Chahal or the Employer had language difficulties and were in some way prejudiced at the Hearing or at any time in the adjudication process. In the circumstances, I find counsel’s last submission lacking any evidentiary basis and without merit.

ORDER

- ^{69.} 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