

An appeal

- by -

Bijan Mousazadeh Kalaei  
(“Mr. Kalaei”)

- 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.:** 2012A/4

**DATE OF DECISION:** February 22, 2012

## DECISION

### SUBMISSIONS

Bijan Mousazadeh Kalaei	on his own behalf
George Psefteas	on behalf of Stephos Place Restaurant Ltd.
Tami L. Wilson	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Bijan Mousazadeh Kalaei (“Mr. Kalaei”) of a Determination that was issued on December 19, 2011, by a Delegate of the Director of Employment Standards (the “Director”). The Delegate, in the Determination, found that Mr. Kalaei’s former employer, Stephos Place Restaurant Ltd. (“Stephos”), did not contravene the *Act* and did not owe any wages to Mr. Kalaei for length of service. Accordingly, the Delegate dismissed Mr. Kalaei’s complaint.
2. Mr. Kalaei appeals the Determination on the sole basis that new evidence has become available that was not available at the time the Determination was made.
3. Mr. Kalaei is seeking the Tribunal to change or vary the Determination. While Mr. Kalaei does not explain how he wants the decision changed or varied, it would appear that he wants the Tribunal to order Stephos to pay him compensation for length of service.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated in the *Act* in section 103, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”), the Tribunal may hold any combination of written, electronic and oral hearings. I note that Mr. Kalaei is not seeking an oral hearing and in my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

### ISSUE

5. The sole issue in this appeal is whether there is new evidence that has become available that was not available at the time the Determination was being made and, if so, does that evidence justify changing or varying the Determination in any manner?

### FACTS

6. Stephos operates a restaurant and employed Mr. Kalaei as a dishwasher from September 17, 2009, to February 13, 2011, at a rate of pay of \$10.50 per hour.
7. On March 9, 2011, Mr. Kalaei filed a complaint against Stephos for unpaid hours and overtime wages as well as compensation for length of service (the “Complaint”). During the investigation of the Complaint, Stephos voluntarily paid Mr. Kalaei for unpaid hours and overtime but Mr. Kalaei’s claim for compensation for length of service was unresolved. As a result, the Delegate investigated the later claim and obtained evidence from both parties which is summarized in the Reasons for the Determination (the “Reasons”) as follows:

The Complainant and the owner's son Peter, had an argument in the evening of February 13, 2011. The Complainant says that the son had accused him of attempting to damage his vehicle. According to both the Complainant and the Employer the argument was quite heated and voices were raised.

The Complainant completed his shift on February 13, 2011. His shift ended at 1:00 am.

The Complainant indicated that he received a telephone message on his voice mail the morning of February 14, 2011 from the kitchen manager, Masoud Falahati. Mr. Falahati's message advised the Complainant not to come into work for his shift that day, and that he would call him later.

The Complainant advised he did not hear back from the kitchen manager that afternoon, so he decided to report to the job site to find out what was happening. The Complainant advised that he tried to speak with Mr. Falahati about the incident from the previous night. He knew the Employer would be upset with him about the argument with the employer's son.

According to the Complainant, the kitchen manager indicated he did not want to hear about the incident or the details of what occurred in the argument. The Complainant advised that Masoud Falahati told him that he could return to work the next day on February 15, 2011. He also told him he could work for two weeks more and that he was being fired.

The Complainant says he did not return to work the following day for his shift, or for the two weeks of notice provided by the kitchen manager. He says he was very upset that he was told he was being fired.

The Complainant also says if the incident on the evening of February 13 had not occurred, he would still be employed by the Employer.

The kitchen manager says that he did not tell the Complainant he was being fired, or that he was being given two week's notice of termination. The kitchen manager says that on February 14, when the Complainant came into the restaurant, that he told him he had to wait for the owner to get back to the restaurant. The Complainant left the restaurant, and did not return the next day, or any other subsequent days to work.

The kitchen manager also says he did not call the Complainant in the morning of February 14, and leave a message for the Complainant.

The records provided by the Employer confirm that the Complainant's final day of employment was February 13, 2011. The Employer issued a Record of Employment indicating "E" – quit. This document was issued by the Employer's Accountant.

8. The Delegate then went on to summarize the positions of the parties. She noted that while Stephos says that Mr. Kalaei quit his employment on February 14, 2011, and therefore is not entitled to compensation for length of service, Mr. Kalaei claims he was fired from his employment and given two weeks verbal notice by Stephos' kitchen manager on February 14, 2011, and chose not to return to work the next day or thereafter as he was upset that he was being fired.
9. According to the Delegate, Stephos' version of the events was more believable and that under both Stephos' and Mr. Kalaei's versions of the events Mr. Kalaei voluntarily did not return to work and thus quit his employment. Therefore, he was not entitled to compensation for length of service under section 63 of the *Act*. In the result, the Delegate concluded that Stephos did not contravene the *Act* and no further action would be undertaken in respect of the Complaint.

### **SUBMISSIONS OF MR. KALAEI**

10. In his Appeal Form, Mr. Kalaei has checked of the "new evidence" ground of appeal and handwritten on the first page of the Appeal Form a single sentence in support of his appeal stating that the Delegate, in her

Determination or the Reasons, failed to “point to” or consider that he did not feel safe returning to work at Stephos after the argument in question.

11. I also note, for completeness, that he has attached to his Appeal Form an email he sent to the Tribunal after filing his Appeal advising that he is no longer seeking a suspension of the Determination. On the Appeal Form, he had previously sought suspension of the Determination but it would appear that he realized that a suspension request is not something that he required or applied in his case.

### **SUBMISSIONS OF THE DIRECTOR**

12. The Director submits that Mr. Kalaei did not mention to the Delegate, during her investigation of the Complaint, that he did not feel safe returning to work at Stephos during the notice period. He only said that he was upset that he was fired. The Director also submits that the purported “new evidence” would have been available during the investigation of the Complaint.

### **SUMMISSIONS OF STEPHOS**

13. On February 17, 2012, two days after the Final Reply submissions of the parties were due, Stephos, through its accountant, George Psefteas (“Mr. Psefteas”), emailed its submissions to the Tribunal. Mr. Psefteas states in the email that he only became aware of the deadline for responding on that very day - February 17, 2012. Although he claims it is his fault and not Stephos’, Mr. Psefteas does not explain why he only became aware of the deadline to respond two days after it had passed. He does not explain whether Stephos instructed him to respond on its behalf earlier or not. I would think not as he states he only became aware of the deadline when he sent the email submissions to the Tribunal. Having said this, while I do not see any real prejudice to Mr. Kalaei if I were to consider the late submissions of Mr. Psefteas on behalf of Stephos, I do not find the submissions particularly helpful nor do I need to rely upon them in my decision in this Appeal. Therefore, I have not requested a response to those submissions from Mr. Kalaei or the Director, but I do feel that it is necessary for me to summarize them below and comment.
14. In the late submissions of Stephos, Mr. Psefteas states (in response to Mr. Kalaei’s submission that he did not feel safe returning to work at Stephos after his argument) it is unclear “as to whom (*sic*) [Mr. Kalaei] had the argument with”. It would appear that Mr. Psefteas does not have the benefit of the Reasons or evidence of the parties during the investigation. In the Reasons, at page 3, the Delegate unequivocally delineates that Mr. Kalaei had an argument with Peter, the son of the owner of Stephos.
15. Mr. Psefteas then goes on to explain that “[t]o the best of [his] client’s knowledge Mr. Bijan Mousazadeh Kalaei was given a verbal warning in connection with the unsafe manner he was handling large empty plastic containers” and upon his return to Stephos at his next shift he was told to wait and speak with the owner but decided not to wait and left without talking to the owner. This information appears to reiterate the information provided during the investigation of the Complaint and does not add anything further.
16. Mr. Psefteas concludes by stating that Stephos has been in business for 20 years and employed “thousands of employees” and the owner of Stephos has “created a friendly and safe environment for his employees” and never had “a complain(t) about employee safety”. I find this information of marginal value at best in response to Mr. Kalaei’s new evidence ground of appeal and, as indicated previously, I do not need to rely upon it to make my decision and therefore, I have not requested a response from Mr. Kalaei or the Director.

## ANALYSIS

17. As indicated previously, Mr. Kalaei appeals the Determination on the sole ground that new evidence is available that was not available at the time the Determination was made, pursuant to section 112 (1)(c) of the *Act*.
18. It is important to note that this ground of appeal is not intended to allow a person dissatisfied with the result of a determination to simply seek out more evidence to supplement or buttress what was already provided to, or acquired by the Delegate during the investigation or hearing of the complaint if that evidence could have been provided to the Delegate before the determination was made. The main or essential aspect of this ground of appeal is that the fresh evidence was not available at the time the determination was made.
19. The oft quoted decision of the Tribunal delineating the test governing the new evidence ground of appeal is *Re: Merilus Technologies Inc.*, BC EST # D171/03. In this decision, the Tribunal, faced with the issue of whether or not to accept fresh evidence, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. This test is a four-fold test 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 other evidence, have led the Director to a different conclusion on the material issue.
20. The four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence must satisfy each of them before the Tribunal will accept the purported new evidence and consider it on appeal.
21. In this case, the purported new evidence Mr. Kalaei adduces is that he did not feel safe to return to work after his argument with the son of the owner of Stephos. While Mr. Kalaei states that the Delegate did not consider this “point” in making the Determination, he does not say he presented this evidence to the Delegate during the Delegate’s investigation of the Complaint and before the Determination was made. The Director, on the other hand, states that Mr. Kalaei did not present this evidence during the investigation of the Complaint. When afforded the opportunity to explain why he did not return to work during the two-week notice period (although it was a verbal notice and not written as required under the *Act*), the Director states that Mr. Kalaei informed the Delegate that he was upset that he was fired and did not mention he was feeling unsafe to return to work.
22. I find myself persuaded with the submissions of the Director that Mr. Kalaei did not inform the Delegate during the investigation of the Complaint that he felt unsafe to return to work at Stephos after the argument in question. I find that Mr. Kalaei adduces the evidence of his fear to return to work at Stephos for the first time during this Appeal. Having concluded this, I am also in agreement with the Director that the evidence Mr. Kalaei wishes to adduce is not new evidence as it is the sort of evidence that existed during the investigation of the Complaint and could have been presented to the Delegate before the Determination was made. In the result, Mr Kalaei fails to satisfy the first of the four-part test in *Re: Merilus Technologies Inc.* and I therefore reject his new evidence ground of appeal.

23. I also wish to observe that section 2(d) of the *Act* delineates one of the purposes of the *Act* is to provide “fair and efficient procedures for resolving disputes over the application and interpretation of this Act”. In my view, it would be inconsistent with this very important purpose of the *Act* if parties, like Mr. Kalaei, were allowed to present piecemeal their evidence and then attempt to get the proverbial “second kick at the can” by adducing more evidence when the Determination is unfavourable.

### **ORDER**

24. Pursuant to Section 115 of the *Act*, I order that the Determination dated December 19, 2011, is confirmed as issued.

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