

An appeal

- by -

North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta  
(“Bikram Yoga Delta”)

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2011A/189

**DATE OF DECISION:** March 12, 2012

## DECISION

### SUBMISSIONS

Fred Wynne	counsel for North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta
Sukhdev Pangalia	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta (“Bikram Yoga Delta”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 16, 2011.
2. The Determination was made in respect of a complaint filed by Sukhdev Pangalia (“Mr. Pangalia”), who alleged Bikram Yoga Delta had contravened the *Act* by failing to pay regular and overtime wages, statutory and annual holiday pay and length of service compensation.
3. The Director found Bikram Yoga Delta had contravened Part 3, sections 17 and 18, Part 4, section 40, Part 5, section 45, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of Mr. Pangalia and ordered Bikram Yoga Delta to pay an amount of \$13,112.36, an amount which included wages and interest.
4. The Director also imposed an administrative penalty on Bikram Yoga Delta under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
5. The total amount of the Determination is \$14,612.36.
6. In this appeal Bikram Yoga Delta says the Director erred in law in finding Mr. Pangalia was an employee under the *Act*, and not an independent contractor. Alternatively, Bikram Yoga Delta says if there was no error in that finding, the Director erred in law in finding Mr. Pangalia was not a manager for the purposes of the *Act* and in finding Mr. Pangalia was not given proper notice of termination.
7. Bikram Yoga Delta seeks an oral hearing on the appeal. Mr. Pangalia opposes an oral hearing.
8. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

## ISSUE

9. The issues in this appeal are whether the Director erred in law by finding Mr. Pangalia was an employee of Bikram Yoga Delta or, alternatively, whether the Director erred in finding Mr. Pangalia was not a manager and was entitled to length of service compensation.

## THE FACTS

10. Bikram Yoga Delta operates a yoga instructing business. Mr. Pangalia was employed, a term I use here in the generic sense, by Bikram Yoga Delta for a period from March, April or May 2010 – the actual commencement of the period was in dispute – until October 15, 2010. The rate of pay for Mr. Pangalia was also in dispute.
11. Following his termination, Mr. Pangalia filed a complaint with the Director alleging Bikram Yoga Delta had not paid all wages owed to him. The complaint, as filed, claimed regular wages, overtime wages, and statutory holiday pay. The Director opted to conduct a complaint hearing on the matter. On the day of the complaint hearing, Mr. Pangalia added claims for annual vacation pay and length of service compensation. It was agreed the former would be dealt with by written submissions following the complaint hearing and the latter would proceed on the basis that Mr. Pangalia confirmed he had received a September 6, 2010, e-mail containing written notice of termination from Bikram Yoga Delta. Mr. Pangalia agreed the issue on this claim was whether the e-mail notice received by him discharged Bikram Yoga Delta's liability for length of service compensation.
12. The Director received evidence from Mr. Pangalia, from three witnesses presented by him in support of certain aspects of his claims, from Mak Parhar, the owner/operator of Bikram Yoga Delta, and from five witnesses presented by Bikram Yoga Delta to support aspects of their case. An outline of the evidence provided by those persons is found in the Determination.
13. The Director identified the following issues arising from the complaint and the response of Bikram Yoga Delta to it: was Mr. Pangalia an employee or an independent contractor; was Mr. Pangalia a manager; what were Mr. Pangalia's hours of work and rate of pay; and was Mr. Pangalia entitled to additional regular and overtime wages, statutory holiday pay, and compensation for length of service?
14. The Director found Mr. Pangalia was an employee under the *Act*. In reaching that conclusion, the Director considered the definition of "employer" and "employee" in the *Act*, the remedial nature of the *Act*, and elements of several common law tests typically used in deciding whether a person was an employee or was self-employed.
15. The Director found Mr. Pangalia was directed and his work was controlled by Bikram Yoga Delta, he performed similar work as, and worked alongside, other front desk staff who were employees of Bikram Yoga Delta, he was assisting in the running of the yoga business and overseeing Bikram Yoga Delta's staff while working at the studio and was, like other employees, required to keep track of his time. The Director noted in the Determination that, while Mr. Pangalia was initially hired to perform marketing and managerial duties for Bikram Yoga Delta, he became more and more involved in the day to day operation of the business as the relationship evolved.
16. The Director found there was a level of control and direction exercised by Bikram Yoga Delta over the work performed by Mr. Pangalia that was consistent with the definition of "employee" and which supported a conclusion that he was an employee under the *Act*.

17. The Director found Mr. Pangalia had no financial interest in the yoga studio and, consequently, no chance of profit or risk of loss in the business. The Director accepted Mr. Pangalia was not free to perform marketing duties unless those were authorized by Mr. Parhar, who had final say on what marketing initiatives would be undertaken and at what cost.
18. The Director was not persuaded that not deducting taxes from amounts paid to Mr. Pangalia and paying him from invoices submitted was sufficient evidence that he was in business for himself.
19. The Director also found Mr. Pangalia was not working as a manager. The Director considered the definition of “manager” in the *Regulation*, finding he worked a significant portion of time performing “non-managerial” functions. The Director made the following findings:
  - performing the duties of a front desk clerk, which is what Mr. Pangalia did for much of his period of employment, cannot be viewed as performing a managerial function;
  - Mr. Pangalia’s hours of work were determined by Bikram Yoga Delta who prepared and distributed the work schedule to the front desk staff;
  - Mr. Pangalia had no authority to hire or fire and, although he was tasked with disciplining employees, this consisted only of providing a “warning” in person or by e-mail; and
  - Mr. Pangalia did not participate in the process of evaluating staff and, based on the evidence provided, that staff did not appear to be supervised or directed by Mr. Pangalia in their work.
20. The Director found that, considering the totality of the job performed, that Mr. Pangalia did not exercise functions typical of a manager – hiring, firing, scheduling, participating in disciplinary action and providing training, supervision and direction. Although the Director found Mr. Pangalia was employed to “manage” the yoga studio, the evidence showed he neither exercised authority typical of a manager nor spent a significant portion of his time performing managerial duties.
21. The Director made findings concerning the period of time and hours worked by Mr. Pangalia and his rate of pay. Based on those findings, the Director calculated Mr. Pangalia’s entitlement to regular and overtime wages. The Director also found Mr. Pangalia was entitled to statutory holiday for September 6, 2010, and October 11, 2010, and annual vacation pay on the wages he earned during his period of employment. There is no appeal particular to those findings or calculations.
22. Finally, the Director considered whether Bikram Yoga Delta had discharged its statutory obligation to pay Mr. Pangalia compensation for length of service on the termination of his employment. On September 6, 2010, Mr. Pangalia was sent an e-mail by Bikram Yoga Delta giving him one month’s notice of termination. The e-mail gave no specific termination date, indicating Mr. Pangalia could leave immediately or stay until “the end of the first week of October”. Mr. Pangalia’s last day was October 15, 2010. The Director found the e-mail did not comply with the requirements of section 63 and 67 of the *Act* and awarded Mr. Pangalia the equivalent of one week’s wages as compensation for length of service.

## **ARGUMENT**

23. Bikram Yoga Delta has appealed the Determination on the basis of alleged errors in law. The errors in law that are alleged have been summarized earlier in this decision. More particularly, counsel for Bikram Yoga Delta asserts the errors in law committed were the result of the Director misapplying the general principles of

law on the issues raised in the appeal and acting on a view of the facts that cannot reasonably be entertained. I shall now summarize the arguments made in the appeal submission on each of these alleged errors.

### **Contractor or Employee**

24. Counsel for Bikram Yoga Delta says the Director failed to apply the correct legal standards to the facts that were presented. Counsel says the Director, while providing an “accurate statement of the law”, apparently based the Determination almost exclusively on the fact of control, rather than on a consideration of the “multitude of factors” as indicated in the comments from the Court in *67122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983. Counsel says the Director ignored other factors that should have been considered in evaluating the relationship between Bikram Yoga Delta and Mr. Pangalia. He refers to the following facts as being relevant:
1. Mr. Pangalia admitted he conducted other businesses, including real estate and family counselling with social services, at the same time he provided services at Bikram Yoga Delta;
  2. Mr. Pangalia was away from the yoga studio performing errands 80% of the time; and
  3. Mr. Pangalia was hired to perform marketing and managerial duties, and did in fact perform those duties.
25. Counsel argues the Director made several “errors in the facts” in making the Determination which directly resulted in the error in law that Mr. Pangalia was an employee. Counsel points to the findings by the Director that Mr. Pangalia performed work similar to and worked alongside other front desk staff and that he assisted in the running of the business and overseeing staff. Counsel argues these two findings are logically inconsistent. He points out that it was accepted Mr. Pangalia was responsible for marketing and discipline which are not the same duties as the front staff performed. Counsel notes some of the evidence the Director was given and which was referred to in the Determination, but was apparently not considered in making the Determination.
26. Counsel for Bikram Yoga Delta asserts the Director made inconsistent findings about the level of control Bikram Yoga Delta had in scheduling Mr. Pangalia, finding on the one hand that Bikram Yoga Delta directed Mr. Pangalia’s work while accepting evidence that Mr. Pangalia was away from the yoga studio 80% of the time and that Mr. Pangalia admitted he was involved in personal business at the same time as his engagement to Bikram Yoga Delta.
27. Counsel contends the Director failed to consider the relationship between Bikram Yoga Delta and Mr. Pangalia in the context of his engagement as a “business consultant”. In that context, counsel submits the Director erred by restricting the analysis to the “four-fold test” and ought to have canvassed and accepted other common law tests, such as the organizational integration test, the permanency test, the specific result test and the economic reality test. He says the Director should have considered Mr. Pangalia’s right to work for more than one employer, the length of the relationship and the specific task for which the work was performed – the growth of the business.

### **Manager**

28. Counsel argues, in the alternative, that the Director made errors of law by generally misapplying the law and by making findings of fact that were not reasonably supported by the evidence on the issue of whether Mr. Pangalia was a manager for the purpose of the *Act*.

29. He refers to evidence which he says was before the Director and which was set out in the Determination. He argues this evidence strongly indicates Mr. Pangalia played a managerial role and was not simply another front desk worker.

### **Proper Notice of Termination**

30. Counsel for Bikram Yoga Delta says there is no dispute that Mr. Pangalia provided his services for more than three, but less than twelve, months. On September 6, 2010, Bikram Yoga Delta sent Mr. Pangalia an e-mail, effectively giving him one month's notice of termination. Counsel submits the Director erred in finding the notice was not effective because it did not conform to the requirements of the *Act*. Counsel relies on the Tribunal decisions *Lianna Elizabeth Gray and Others*, BC EST # D151/96, and *Sun Wah Supermarket Ltd.*, BC EST # D324/96, as supporting this part of the appeal.
31. Counsel also relies on elements of section 2 of the *Act* – the “fairness”, the “basic standards” and the “work and family responsibilities” purposes. He argues Mr. Pangalia was treated fairly, having been given significantly more notice than he was entitled to under the *Act*, and accorded the respect and dignity of participating in the termination date.
32. The Director and Mr. Pangalia have filed responses to the appeal.
33. The Director has provided a copy of the section 112(5) “record”. The Director suggests the appeal does not raise an argument relating to an error in law but rather represents a disagreement with and a challenge to findings of fact made in the Determination. The Director says all aspects of the relationship between Bikram Yoga Delta and Mr. Pangalia were considered, including the degree of control and direction, the absence of any financial investment by Mr. Pangalia in the business and the absence of any chance for profit or risk of loss. The Director says the finding made on Mr. Pangalia's status was supported by the evidence.
34. In respect of whether Mr. Pangalia was a manager for the purposes of the *Act*, the Director reiterates that while there was no dispute his title was that of “manager” and that he performed some managerial duties, looking at all aspects of his work responsibilities and applying the appropriate tests, the evidence did not support a finding that he was employed in a managerial capacity.
35. Regarding the matter of length of service compensation, the Director says the simple fact is that Mr. Pangalia was not provided with a clear statement of his last day of work and, in any event, Mr. Pangalia was allowed to work past the approximate termination date set out in the September 6, 2010, e-mail.
36. Mr. Pangalia says the appeal is just an undisguised attempt to have the Tribunal “re-weigh” evidence and “re-try” a case that has already been heard and decided by the Director. He says no clear adjudicative error has been demonstrated and, accordingly, Bikram Yoga Delta has not met its burden in this appeal.
37. Mr. Pangalia opposes an oral hearing.
38. He has responded to each aspect of the appeal made on behalf of Bikram Yoga Delta, not surprisingly, stating no error was made on any of those matters.

### **Contractor or Employee**

39. Mr. Pangalia submits the question of whether a person is an employee under the *Act* is a question of mixed fact and law; that is whether the facts as found satisfy the relevant legal tests. He says such questions do not

involve an error of law unless “an inextricable error on a question of law can be identified”. He refers to the Tribunal’s decision in *Britco Structures Ltd.*, BC EST # D260/03, for that proposition. He submits that Bikram Yoga Delta cannot succeed in challenging a finding of fact unless it can be shown such findings raise an error of law, as that term was defined in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.) and adopted and applied by the Tribunal.

40. Mr. Pangalia says the findings of the Director that he was not an independent contractor or a manager were largely fact driven, followed a review of the documents filed with and submissions made to the Director and are rationally grounded by the Director in the accepted evidence.
41. In response to specific points raised in the appeal submission, Mr. Pangalia disagrees that the decision of the Director was based solely on the fact of control. He says it is clear from an examination of the Determination and the material before the Director that other factors were presented and considered. He comments on the assertion made in the appeal submission that he conducted other businesses, saying there was no direct evidence to support this assertion and the Director correctly gave the stated belief of some witnesses on this point little weight. Similarly, there was no evidence led showing how/when he “was away from the office 80% of the time” or “conducting other business”. He says the Director was correct in finding he performed similar work to other front desk staff: he was on the schedule and performed the same duties as front desk staff. He says the Director did not ignore the fact he performed other duties and assessed the impact of those other duties on his status under the *Act*.

### **Manager**

42. Mr. Pangalia makes the same general points on this issue as with the above issue. In response to specific points raised in the appeal submission on this issue, he says there is nothing in the appeal submission which demonstrates the Director misapplied the language of the definition of “manager” in the *Regulation*. Mr. Pangalia makes reference to the “evidence” that was before the Director and opines it was all carefully considered.

### **Proper Notice of Termination**

43. Mr. Pangalia says the Director made no error on this issue. He disagrees with the suggestion from counsel for Bikram Yoga Delta that he “participated” in agreeing to the last date of his employment. He says there was no evidence submitted to the Director that would support this assertion.
44. In reply to the responses filed by the Director and Mr. Pangalia, counsel for Bikram Yoga Delta has submitted both the Director and Mr. Pangalia have “greatly simplified” the issues and are therefore incorrect in the basis for their submissions. He notes there are two aspects to the appeal: the first is that the Director erred in misapplying the applicable principles of general law on each of the three issues; the second is that the Director acted on a view of the facts that could not reasonably be entertained based on the record. Counsel contends the Determination was made contrary to a volume of evidence which, “if the law were interpreted correctly”, would have led to a different conclusion.
45. He says the standard of review on a question of law is correctness, which means the Director must be correct on each issue or the Determination cannot stand. Most of the reply is a reiteration and expansion of points made in the original appeal submission which does not need repeating. It should be noted that final reply is not an acceptable place to raise new arguments or introduce additional evidence.

## ANALYSIS

46. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*

47. The Tribunal has established certain overriding principles that apply to appeals under section 112 of the *Act*. An appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112.

48. An appeal to the Tribunal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

49. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

50. Bikram Yoga Delta has alleged the Director has committed an error in law.

51. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

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.

52. With the above principles in mind, I will address each of the issues raised by Bikram Yoga Delta in this appeal.

### Contractor or Employee

53. In my view, counsel for Bikram Yoga Delta has made a fundamental error by either failing to recognize or refusing to acknowledge that the “law” relating to an individual’s status under the *Act* is not determined by common law principles, but by an application of the provisions of the *Act*. In that respect, I confirm the following statement from *Project Headstart Marketing Ltd.*, BC EST # D164/98:



... I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an “employee”.

54. Counsel for Bikram Yoga Delta has not addressed his challenge to the Director’s decision concerning the status of Mr. Pangalia in the context of the definition of “employee” and “employer” in the section 1 of the *Act*, which broadly defines the term “employee” to include, *inter alia*, a person “receiving or entitled to wages for work performed for another” and a person “an employer allows, directly or indirectly, to perform work normally performed by an employee”. An “employer” is defined as including a person “who has or had control or direction of an employee”, or “who is or was responsible, directly or indirectly, for the employment of an employee”.
55. Many decisions of the Tribunal have considered the issue raised here and all have made it clear that the definition of “employee” is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the *Act*, see, for example, *Kelsey Trigg*, BC EST # D040/03, *Christopher Sin*, BC EST # D015/96, and *Jane Welch operating as Windy Willows Farms*, BC EST # D161/06.
56. The limitations of applying the common law tests have been expressed by the Tribunal in a number of decisions, including *C.A. Boom Engineering (1985) Ltd.*, BC EST # D129/04, where the Tribunal noted:
- The common law tests originated chiefly for the purpose of determining whether an employer could be held vicariously liable for wrongs done by its employee, and not for the purpose of determining whether an employee is entitled to the minimum protections of the Act. The inadequacies of the common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada*, 2002 F.C.A. 96.
57. That is not to say the common law tests have been ignored entirely. Common law tests are useful by reason of the fact that they delineate the factors which should be examined when considering whether, in the circumstances, an employment relationship has been created. In *Cove Yachts (1979) Ltd.*, BC EST # D421/99, the Tribunal listed a number of factors as being potentially relevant to determining whether a person is an employee or an independent contractor:
- the actual language of the contract;
  - control by the employer over the “what and how” of the work;
  - ownership of the means of performing the work (e.g. tools);
  - chance of profit/risk of loss;
  - remuneration of staff;
  - right to delegate;
  - the power to discipline, dismiss, and hire;
  - the parties’ perception of their relationship;
  - the intention of the parties;
  - the degree of integration between the parties; and
  - if the work is a specific task or term

58. Accordingly, while the common law tests remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the *Act*. The Supreme Court of Canada made the following statement in *Machtiger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the *Act*:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

59. The following excerpt from *Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05), succinctly and correctly summarizes the law of the *Act* when considering the issue of whether a person is an employee under the *Act*:

The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant “performed work normally performed by an employee” or “performed work for another” (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaç Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her own tasks.

It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

60. Applying the above, I find the Director did not “generally misapply the general principles of law on this issue”. The Director clearly and correctly explained that determining whether a person is an employee for the purposes of the *Act* is guided by the definitions of “employer” and “employee” found in section 1, that the *Act* is remedial legislation and that the substantive nature of the relationship must be examined. In the context of the provisions in the *Act*, the Director found Mr. Pangalia performed work similar to that performed by other front desk clerks and was directed and controlled in this work by Bikram Yoga Delta. The Director recognized the common law tests can be applied to “assist” in the determination of an individual’s status. The Determination indicates that several factors evolving from common law tests the Tribunal has identified as being potentially relevant were considered by the Director, including the language of the contract, the degree of control over the “what and how” of the work, the chance of profit, risk of loss, the degree of any financial interest in the business and the power to discipline, hire or fire. The Director approached the issue in the manner required by the *Act* and endorsed by the Tribunal.

61. The contention that the Director focused “almost exclusively” on control is not supported by a fair and reasonable reading of the Determination.
62. I find this aspect of the appeal is what the Director and Mr. Pangalia say it is: a disagreement on the facts and an attempt to have the Tribunal revisit the Determination and reach a different conclusion.
63. In respect of the facts, I am not persuaded the Director acted on a view of the available facts that could not reasonably be entertained. There was evidence on which the Director could reasonably arrive at the decision made. Accordingly, I find no error of law in how the Director approached the available facts. I am not persuaded the “evidence” which counsel for Bikram Yoga Delta says was ignored was either cogent or probative.
64. The question raised on this issue, in reality, is whether or not the Director erred in respect to the facts. This is a question over which the Tribunal has no jurisdiction. As noted in *Britco Structures Ltd.*, *supra*, the application of the law, correctly found, to allegedly erroneous errors of fact does not convert the issue into an error of law. I am unable to extricate a question of law from the question the Employer seeks to have answered.
65. The appeal on this issue is dismissed.

### **Manager**

66. I take the same view of the appeal of the decision of the Director on whether Mr. Pangalia was a manager for the purposes of the *Act*.
67. The Director did not misstate or misapply the law of the *Act* in respect of this issue. In *Howe Holdings Ltd.*, BC EST # D131/04, the Tribunal said the following about how the question of managerial status should be approached:

The issue of whether a person’s primary employment duties consisted of supervising and directing other employees was addressed by the Tribunal in *429485 B.C. Ltd. (c.o.b. Amelia Street Bistro)*, (see also *Northland Properties Ltd.*, BC EST #D423/98, in which sections 1(a) and (b) were comprehensively considered). In *Amelia Street*, the Tribunal said that a conclusion as to whether a person falls within s. 1(a) provisions:

. . . depends on a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a “manager”. That would be putting form over substance. The person’s status will be determined by law, not by the title chosen by the employer or understood by some third party.

The Tribunal has said that, in order to be employed in an executive capacity, the person must have duties that relate to active participation in control, supervision and management of the business.

68. The Director considered relevant statutory criteria in making the Determination. The Determination sets out the matters that were considered by the Director in deciding Mr. Pangalia was not a manager for the purpose of the *Act*. These matters are set out on pages R17 and R18 of the Determination. The Director accepted Mr. Pangalia was hired as a manager and performed some functions typically performed by a manager. However, the Director found a “significant portion” of his time was spent performing non-managerial duties;

he had no independent authority in terms of hiring and firing, evaluating employees, or implementing advertising and marketing initiatives; he did not schedule employees, train employees or spend a majority of his time supervising and directing other employees. The Director was aware of Mr. Pangalia's wage rate.

69. Counsel for Bikram Yoga Delta lists a number of considerations which he says should have been addressed by the Director in deciding whether Mr. Pangalia was a manager: that a person can be a manager even though they also perform non-managerial tasks or do not spend a large portion of their day supervising other employees; that a person does not need to be present at the work site at all times to be a manager; and that an employee's compensation package may be relevant to determining their status. Counsel also says there was evidence that weighed in favour of finding Mr. Pangalia was a manager that was not referred to by the Director: Mr. Pangalia admitted representing Bikram Yoga Delta in litigation; he stated the reason for the considerable number of overtime hours worked was related to covering Mr. Parhar's duties; Mr. Pangalia was responsible for staff discipline and did discipline some employees; and he chaired staff and teacher meetings. Counsel does not indicate how any of those matters would affect the statutory criteria identified in the *Howe Holdings, supra*, decision, which I have found were considered by the Director, demonstrate an error of law or alter the conclusion reached in the Determination.
70. The burden in this case is on Bikram Yoga Delta to persuade me a reviewable error was made, not simply identify other facts or factors that might have been looked at by the Director. One might also ask why, if all of these facts and factors were considered to be relevant and important by counsel for Bikram Yoga Delta, they were not raised with the Director at the complaint hearing. In a sense, that inquiry is rhetorical; it is clear all of these matters were before the Director. The decision of the Director was based on an analysis of relevant statutory criteria applied to the facts. I am not convinced that the absence of any reference to the matters referred to by counsel adversely affects the Determination. Provided the Determination shows relevant statutory criteria are satisfied, it is not necessary for the Director to examine and determine the minutiae of all potential facts and factors that might exist in the context of the issue being considered. I am satisfied the relevant critical factors were identified, considered and applied by the Director when addressing the question of whether Mr. Pangalia was a manager for the purposes of the *Act*. Viewed in context, the overall reasons and analysis of the Director support the finding made.
71. I do not accept the cases relied on by counsel for Bikram Yoga Delta show the Director made an error of law or would compel a different conclusion. All of the cases are fact specific. In *Nabar Sidhu and Parmjit Banghu operating as Earl's Woodroom*, BC EST # D257/03, the Member found the individual in question, Mr. Younge, while not spending a majority of his time exercising managerial functions, did exercise the following authorities – making final decisions regarding the business; disciplining employees; authorizing overtime; calling employees in to work or sending them home; altering work processes and training employees. Those are far from the facts here. In *Haida Glass Ltd.*, BC EST # D145/03, there was a substantial body of evidence showing the primary employment responsibilities of the individual at issue, Mr. Heuber, consisted of supervising and directing other employees. The Member deciding that case was not persuaded to decide against finding Mr. Heuber was a manager by the fact only a small part of his day was spent on a job site supervising employees directly. The Member was unimpressed that Mr. Heuber was attempting to claim that he was not a manager by suggesting that he did not exercise supervisory responsibilities when it was his duty to do so. The decision of *Common Ground Publishing Corp.*, BC EST # D433/00, does not stand for the proposition cited by counsel. The specific words of the Member in that case concerning the relevance of an individual's level of remuneration on his or her status under the *Act* are:

In my view, an executive's absolute level of remuneration is not a relevant factor although perhaps one's comparative compensation within the employer's organization might well be relevant.

72. In fact, the decision makes no reference to and places no reliance on the individual's level of compensation in reaching the conclusion that the individual in that case was a manager.
73. Bikram Yoga Delta has failed to show an error in law and the appeal on this issue is also dismissed.

### **Proper Notice of Termination**

74. This part of the appeal is easily disposed of. In the Determination, the Director finds the notice sent to Mr. Pangalia in an e-mail dated September 6, 2010, did not satisfy the requirements of section 63 or 67 of the *Act*. The Director found the notice was ambiguous about the date of termination and that Mr. Pangalia was terminated on October 15, 2010. Section 67(1) (b) of the *Act* states:

67 (1) *A notice given to an employee under this Part has no effect if*  
*(b) the employment continues after the notice period ends.*

75. It is notable perhaps that the appeal submission makes no reference to the obvious effect of the above provision on the notice provided by Bikram Yoga Delta to Mr. Pangalia in the September 6, 2010, e-mail. Even accepting the principal position of counsel for Bikram Yoga Delta, that the notice did comply with section 63 of the *Act*, and that Mr. Pangalia had notice his employment would end one month after the date of the e-mail (the end of the first week of October), there is simply no avoiding a finding that his employment continued for more than a week after that time. In such circumstances, the effect of section 67(1) (b) is to render the termination notice of "no effect". That result is a consequence of a specific statutory provision and cannot be overridden or altered by reference to the statement of statutory purposes set out in section 2.
76. The appeal on this issue fails. The appeal is dismissed.
77. On February 12, 2012, following application by Bikram Yoga Delta, the Tribunal allowed a suspension of the effect of the Determination: see BC EST # D014/12. As a result of this decision, that suspension is cancelled.

### **ORDER**

78. Pursuant to Section 115 of the *Act*, I order the Determination dated November 16, 2011, be confirmed in the total amount of \$14,612.36, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**