An appeal

- by -

Thomas Charles Moore
("Mr. Moore")

- 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.: 2015A/170

DATE OF DECISION: February 16, 2016

DECISION

SUBMISSIONS

Thomas Charles Moore — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Thomas Charles Moore ("Mr. Moore") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on December 1, 2015 (the "Determination").

2. The Determination concluded that Skinner Bros. Transport Ltd. ("Skinner") contravened Part 3, section 18 (payment of wages on termination of employment); Part 4, section 40 (overtime wages); Part 5, section 45 (statutory holiday pay); and Part 7, section 58 (vacation pay) of the *Act* in respect of the employment of Mr. Moore, and ordered Skinner to pay Mr. Moore wages and interest in the amount of $7,009.32.

3. The Determination also levied three (3) administrative penalties of $500.00 each against Skinner for its contraventions of section 17, 40 and 46 of the *Act*.

4. The total amount of the Determination is $8,509.32.

5. Mr. Moore has appealed the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Mr. Moore is seeking the Employment Standards Tribunal (the "Tribunal") to change or vary the Determination or, alternatively, to refer it back to the Director.

6. By way of a letter, dated December 11, 2015, the Tribunal informed Skinner and the Director that it had received an appeal by Mr. Moore, dated December 6, 2015, and enclosed the same for informational purposes only. In the same letter, the Tribunal also requested the Director to provide the section 112(5) "record" (the "Record") by December 30, 2015.

7. On January 5, 2016, the Tribunal disclosed the Record to Mr. Moore, and provided him an opportunity to object to its completeness, and Mr. Moore did so object. Mr. Moore's submissions challenging the Record and the Director's response to those submissions will be dealt with separately in this decision under the heading "Submissions regarding completeness of the Record" below.

8. Having reviewed the appeal materials, I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, I will assess the appeal based on the Reasons for the Determination (the "Reasons"), the written submissions of Mr. Moore and my review of the Record that was before the Director when the Determination was being made. If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Skinner and the Director to file reply submissions on the appeal. Mr. Moore will then be given the opportunity to make a final reply to these submissions, if any. Conversely, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

9. The issue in this appeal is whether there is a reasonable prospect that Mr. Moore's appeal will succeed.

THE FACTS

10. Skinner is a company incorporated under the laws of British Columbia, and operates a transportation and logistics company with bulk propane sales.

11. A BC Online: Registrar of Companies – Corporation Search, conducted on February 19, 2015, indicates that Skinner was incorporated on February 18, 2004. Glenn John Skinner ("Glenn Skinner") and Dean Peter Skinner ("Dean Skinner") are listed as its directors and officers.

12. Mr. Moore commenced employment with Skinner on August 29, 2011, at the rate of pay of $3,307.65 biweekly. He resigned from his employment on February 28, 2015.

13. On February 19, 2015, while still employed with Skinner, Mr. Moore filed a complaint under section 74 of the *Act* alleging that Skinner contravened the *Act* by failing to pay him overtime wages (the "Complaint").

14. The delegate conducted a hearing of the Complaint over two (2) days on May 21 and 29, 2015 (the "Hearing"). Mr. Moore attended at the Hearing with two (2) witnesses: Tammy Fellers ("Ms. Fellers"), the Office Administrator for Skinner; and Karly Horvath ("Mr. Horvath"), a local delivery driver for Skinner. Glenn Skinner appeared on behalf of Skinner who was also represented by counsel.

15. At the Hearing, the Director's delegate considered the evidence of the parties on the following questions:

    (i) Was Mr. Moore a Manager during his employment with Skinner?

    (ii) Is Mr. Moore owed overtime wages? If so in what amount?

16. With respect to the first question, whether Mr. Moore was a Manager during his employment with Skinner, the delegate notes, in the Reasons, that both parties agreed that Mr. Moore was paid wages in the form of a salary. However, Mr. Moore contended that he was a dispatcher and not a Manager and Skinner argued that he was a Manager at least up to November 1, 2014, when his primary duties became those of a short-haul truck driver.

17. The Reasons indicate that the delegate analysed the evidence of the parties in context of the definition of "manager" in section 1 of the *Employment Standards Regulation* (the "*Regulation*"). She noted that the *Regulation* defines manager as a person whose principal employment duties consist of supervising or directing, or both supervising and directing, human and other resources, or a person employed in an executive capacity. She added that an individual's job title and remuneration are not determinative of whether he or she is a manager; the duties performed by the individual must be assessed in relation to the nature of the business to determine whether the individual exercises a managerial level of authority and responsibility.

18. In concluding that Mr. Moore was a manager for part of his employment until October 28, 2014, the delegate reasoned as follows:

> Skinner is a trucking company that has truck drivers as employees who require direction as to what jobs they are to attend. Both parties agree and I find that Mr. Moore did perform dispatch duties. In relation to the nature of the business that Skinner operates, dispatching employees in itself is not an indication

> that Mr. Moore was a manager. However, Mr. Moore also decided which drivers would be receiving overtime hours. Mr. Moore approved holiday requests as in the February 22, 2012, approval for Dari Mack. He signed a record of verbal warning that he gave on November 23, 2013, to Eric Belleau. Glenn Skinner testified that Mr. Moore dealt with safety incidents without his involvement on several occasions, which is supported by signed documents provided by Skinner. While Glenn Skinner may have had final authority as principal of Skinner, it is clear from Glenn Skinner's testimony and the documents that Mr. Moore had decision-making power, and that he made decisions regarding employee disciplinary actions. I find that Mr. Moore had managerial decision-making authority and the tasks completed by Mr. Moore involved directing human resources.
>
> Skinner has confirmed they have a safety program. Mr. Moore testified that he chaired the safety meetings and gave new employee orientation sessions but stated he was not providing training or in the role of a manager. Many organizations have employees who are designated to chair meetings and give orientations and I do not find that this evidence in its self [*sic*] is evidence of managerial responsibility. However, Mr. Moore signed as supervisor on a work place hazard target card on November 3, 2011, and an accident report form on November 25, 2013. Mr. Moore also was a contact for Skinner with WorkSafe BC and had an email conversation with Glenn Skinner on June 12, 2013, updating him that Mr. Moore had been in contact with WorkSafe BC on behalf of Skinner. On June 18, 2014, Mr. Moore also signed a WorkSafe BC Notice to participate as the HSE Coordinator on behalf of Skinner. I find that these are examples of Mr. Moore exercising a significant level of responsibility at Skinner.
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> Mr. Moore testified that after October 28, 2014, all non-driving responsibilities ceased. I am satisfied that Mr. Moore's principal employment duties up to October 28, 2014, [*sic*] consisted of supervising and directing Skinner employees and that Mr. Moore was a manager as defined by section 1 of the Regulation. Mr. Moore was excluded from parts 4 and 5 of the Act up to and including October 28, 2014. I find that Mr. Moore became a short haul truck driver for Skinner as of October 29, 2014, for the remainder of his employment with Skinner.

19. With respect to the question of what wages Mr. Moore was owed, if any, the delegate defined the parameter of Mr. Moore's claim by referring to section 80 of the *Act*. The delegate noted that section 80 limits the amount of wages required to be paid in the case of a complaint to a period of six (6) months before the earlier of the date of the complaint or the termination of the employment, plus interest on those wages. In the case of Mr. Moore, the delegate noted that the Complaint was filed on February 19, 2015, and that Mr. Moore was a Manager until October 28, 2014. For the period preceding October 28, 2014, Mr. Moore was paid a salary, and not entitled to overtime wages and statutory holiday pay. He was entitled to be paid his agreed rate of pay. In that regard, the delegate noted that Mr. Moore received a salary of $3,307.69 biweekly, and the parties agreed that he was hired to work 40 hours per week which translated to a rate of pay of $41.35 per hour (that is, $3,307.69 divided by 80 hours per pay period).

20. Having so concluded, the delegate then went on to consider what regular and overtime wages Mr. Moore was entitled to, but not paid, in accordance with sections 17 and 18 of the *Act*. Here, the delegate considered the evidence of the parties that Mr. Moore was hired to work for 40 hours per week from Monday to Friday from 8:00 a.m. to 5:00 p.m. and noted that his salary was intended to compensate him for those hours only. He also worked an additional four (4) hours on Saturdays at Glenn Skinner's request outside of his original employment agreement. While managers are excluded from the overtime provisions of the *Act*, the delegate noted that they are entitled to pay for all hours worked pursuant to the terms of their employment. Therefore, Mr. Moore was entitled to be paid his regular wage for the additional hours worked.

21. The delegate then went on to review Skinner's payroll report and Mr. Moore's driver logs between August 23, 2014, to October 28, 2014, and concluded that Mr. Moore worked an additional 116 hours and should be compensated for same at $41.35 per hour, for a total of $4,796.60 in regular wages. By failing to pay Mr. Moore all wages owed within eight (8) days of the end of the pay period in which they were earned, the

delegate found that Skinner contravened section 17 of the *Act* for which she assessed Skinner an administrative penalty of $500.00.

22. The delegate also noted, in the Reasons, that by August 15, 2014, Mr. Moore stopped coming in 30 minutes early to cover shipments for contracts Skinner had with a company named Manitoulin. Mr. Moore's daily log sheets from August 20, 2014, to February 24, 2015, showed that he began to drive more during this time period and as of October 29, 2014, his duties changed from manager to short-haul truck driver.

23. In determining what hours Mr. Moore worked when he started working as a short-haul truck as of October 29, 2014, the delegate observed there were differences in the time recorded in Mr. Moore's driver logbooks and Skinner's payroll report and dispatch sheets. The delegate preferred Mr. Moore's logbooks as more credible as they were kept contemporaneously with the work he performed, while Skinner acknowledged that its records had been "cleaned up". However, Mr. Moore's logbooks only covered those dates when he was driving for Skinner and not other times. Therefore, the delegate used Mr. Moore's logbooks for the dates Mr. Moore recorded his hours worked and relied on Skinner's payroll report and dispatch sheets for the dates for which there were no records in Mr. Moore's logbooks, to determine what hours Mr. Moore worked.

24. The delegate also noted that the dispatch records showed Mr. Moore filled propane on Saturday, November 8, 2014. Since the parties both agreed that Mr. Moore worked Saturdays for four (4) hours, the delegate awarded Mr. Moore four (4) regular hours of work for November 8, 2014.

25. The delegate also noted that the dispatch records showed that Mr. Moore drove hotshot; that is, he performed specialized express deliveries, which are less than a typical load, on November 11, December 19 and December 23, 2014, which were weekdays. In the absence of employer records for these dates, the delegate awarded Mr. Moore eight (8) hours for each of these dates because he was regularly scheduled for eight (8) hours of work per day during the week.

26. Based on the above records and information, the delegate concluded that Mr. Moore earned $24,241.44 in regular wages between October 29, 2014, and February 28, 2015 (being 586.2 hours X $41.35).

27. With respect to overtime, the delegate noted that section 37.3 of the *Regulation* states that an employer who requires or allows a short-haul truck driver to work more than nine (9) hours in a day or 45 hours in a week must pay an employee at least one and one-half times the employee's regular wage for the hours worked in excess of nine (9) hours in a day, and one and one-half times the employee's regular wage for the hours worked in excess of 45 hours in a week. Based on the delegate's calculations, Mr. Moore earned 35.75 hours of overtime between October 29, 2014, and February 28, 2015, for a total of $2,217.39 in overtime wages.

28. The delegate calculated the total regular and overtime wages Mr. Moore earned after October 29, 2014, was $26,458.83, but the payroll records of Skinner indicated that he was only paid $25,153.83. Therefore, the delegate concluded that Mr. Moore was entitled to $1,305.00 in overtime wages. The delegate also assessed an administrative penalty of $500.00 against Skinner for contravening section 40 of the *Act* for failing to pay Mr. Moore all overtime wages to which he was entitled.

29. The delegate next considered whether Mr. Moore was entitled to receive statutory holiday pay as of October 29, 2014, when he was no longer a manager. Based on Skinner's dispatch sheets, the delegate noted that Mr. Moore worked on Remembrance Day for eight (8) hours. Section 46 of the *Act* states that an employee who works on a statutory holiday must be paid one and one-half times the employee's regular wage for the first twelve (12) hours worked ("premium pay"), as well as an average day's pay. The delegate noted that while Mr. Moore already received an average day's pay for working on Remembrance Day, he was entitled to

$496.24 as premium pay for working on this said day (8 hours x $62.03). As Skinner failed to pay him premium pay, it contravened section 46 of the *Act*, and the delegate assessed an administrative penalty of $500.00 against Skinner for the said contravention.

30. The delegate next considered the question of compensation for length of service ("CLOS"), although neither party raised the subject. The evidence that prompted the delegate to consider the question of CLOS is contained in the correspondence, dated November 28, 2014, and February 3, 2015, from Glenn Skinner to Mr. Moore, and the latter's letter to Skinner, dated February 13, 2015. The delegate reviewed this correspondence in context of section 66 of the *Act*, which provides that if a condition of employment is substantially altered, the Director may determine that the employment of an employee has been terminated.

31. In the letter of November 28, 2014, Glenn Skinner informed Mr. Moore that effective March 1, 2015, he would be paid an hourly wage rate of $27.50. The delegate found that this change from a salary to an hourly rate was substantially below Mr. Moore's existing hourly rate of pay of $41.35 and "would have been a significant change and therefore [Mr. Moore's] position would have been terminated as of March 1, 2015". However, the delegate noted that before any changes could be effected to the terms of Mr. Moore's employment, on February 3, 2015, Glenn Skinner sent another letter to Mr. Moore advising him that Skinner was now terminating his position effective April 3, 2015, due to the downturn in the economy. Mr. Moore, however, chose not to accept the working notice Skinner provided, and tendered his written resignation to Skinner on February 13, 2015, with an effective date of February 27, 2015.

32. In concluding that Skinner did not owe CLOS to Mr. Moore, the delegate reasoned as follows:

> Mr. Moore was advised that his wage would be reduced on November 28, 2014 [effective March 1, 2015], just under three months before he resigned his position. There is no evidence to indicate that Mr. Moore discussed the proposed wage reduction with Skinner at any time. I therefore find that Mr. Moore chose to end his employment of his own accord and that Skinner has no liability to provide CLOS to Mr. Moore.

33. It should be noted that Mr. Moore provided a late submission titled "Record of Decision from Service Canada" (the "Service Canada Decision"). The Service Canada Decision appears to have been made in context of Mr. Moore's employment insurance claim. It sets out certain conclusions of Service Canada relating to Mr. Moore's resignation from his employment. Mr. Moore appears to have submitted the document in support of his claim that Skinner, by virtue of its actions, effectively terminated his employment; that he did not voluntarily resign.

34. While Skinner objected to the late introduction of the Service Canada Decision, the delegate refused to allow its introduction into evidence because it was "based on Federal policy and legislation and not relevant to the issues in the hearing".

35. Finally, with respect to vacation pay, the delegate concluded that, pursuant to section 58 of the *Act*, Mr. Moore was entitled to at least 4% annual vacation pay on all outstanding wages, being $263.91 ($6,597.84 x 4%).

SUBMISSIONS OF MR. MOORE ON THE MERITS

(a) Submissions dated December 6, 2015

36. As indicated previously, Mr. Moore appeals the Determination on the "natural justice" and "error of law" grounds of appeal.

37. Under the natural justice ground, Mr. Moore contends that the delegate erred in calculating an additional 116 hours of work he performed between August 23, 2014, and October 28, 2014. He states that it is his "belief" that he worked "157.5 hrs from the period August 28, 2014 to October 28, 2014". He believes the delegate might have failed to include in her calculation four (4) hours each he worked on Saturday, September 20 and October 18, 2014, at Skinner's request, as well as the "additional hours each week" he worked when he came in early and worked through his breaks. He states he was the only person qualified to cover Ms. Fellers and Mr. Horvath when they were absent or on their breaks. In the circumstances, Mr. Moore requests that the Tribunal vary the Determination to include the additional hours claimed. He attaches a two-page worksheet, dated January 31, 2015, to his submissions. The worksheet appears to summarize the hours he worked from August 7, 2014, to November 1, 2014, with handwritten notations showing a total of 157.5 hours.

38. Also, under the natural justice ground of appeal, Mr. Moore argues that the delegate erred in failing to consider the Service Canada Decision, particularly when the delegate found that "there was a significant change as per Section 66" in the terms of his employment. He adds that the delegate, by disallowing the Service Canada Record and concluding that he had quit his employment on his own accord, effectively denied him the opportunity to "prove that an objective, reasonable person in the way of a Service Canada Investigator did indeed agree that the employer's fundamental changes placed [him] in a position that the Investigator herself deemed unfair, unreasonable and unacceptable in each and every part of Section 66 requirements". In the circumstances, he submits that the Tribunal should accept the Service Canada Decision, and conclude that there was "a contravention of Section 66", and order CLOS.

39. Under the error of law ground of appeal, Mr. Moore submits that the delegate erred in calculating his vacation pay based on a 4% rate, as opposed to the 6% rate. He states that historically he was provided "3 weeks paid vacation per annum and was also given 6% Vacation pay on [his] final pay". Therefore, he wants the Tribunal to vary the Determination and calculate his vacation pay based on the 6% rate.

(b) Amended Submissions received by the Tribunal on January 11, 2016

40. On January 11, 2016, the Tribunal received amended submissions from Mr. Moore, after the expiry of the appeal period, being January 8, 2016.

41. By way of an explanation for his late amended appeal submissions, Mr. Moore states that after his "extensive review" of the Determination and his original submissions, he realized that "there were more questions than answers in the [D]etermination that [he] should have included in [his] submission[s]". He further states that "in the process of review, [he] lost track of the allowed time for submitting amendments".

42. I have carefully reviewed Mr. Moore's amended submissions which appear in the form of the original submissions he made on December 6, 2015, with some few additional amendments. While I do not find it necessary to set out the specific amendments here, I find they are primarily intended to bolster his original submissions. Having said this, I note that Mr. Moore's failure to perform an "extensive review" of the Determination in the first instance to be able to submit all his appeal submissions in a timely fashion before the expiry of the appeal period is not a justification for allowing his late amended submissions. The deadline in the *Act* for appealing a determination is there to allow concerned parties fairness and efficiency in the appeal process. Allowing Mr. Moore to submit his late amendments is also inconsistent with the stated purpose of the *Act* in section 2(d) "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". Therefore, I find that Mr. Moore's appeal amended submissions are inadmissible in this appeal.

SUBMISSIONS REGARDING COMPLETENESS OF THE RECORD

43. On January 5, 2016, the Tribunal disclosed the Record to Mr. Moore, and provided him with the opportunity to provide objections, if any, to the completeness of the Record by January 19, 2016.

44. On January 19, 2016, Mr. Moore submitted his objections which consisted of the following very short submission on the fax cover sheet attaching 24 pages of documents:

> These pages were given to the delegate for the adjudication but were not present in the documentation given to the Tribunal.

45. On January 20, 2016, the Tribunal disclosed Mr. Moore's objections to the Director, and requested a written response to the objections no later than February 3, 2016.

46. On January 28, 2016, the Director responded to Mr. Moore's objections to the completeness of the Record, stating that the following documents Mr. Moore submitted with his objections are already included in the Record submitted to the Tribunal:

- Letter dated October 29, 2014, from Glenn Skinner to Mr. Moore (page 17 of the [R]ecord)
- Letter dated November 28, 2014, from Glenn Skinner to Mr. Moore (page 18 of the Record)
- Letter dated February 3, 2015, from Glenn Skinner to Mr. Moore (page 16 of the Record)
- Letter dated February 13, 2015, from Mr. Moore to Glenn Skinner (page 248 of the Record)
- Dispatch sheets presented as evidence of Mr. Moore (page 161-164 of the Record)

47. As for the balance of the documents in Mr. Moore's submission - which include various email exchanges between Mr. Moore and Glenn Skinner; a few advertisements by Skinner for Class 1 and 3 Drivers for daily hauling of equipment; and a Certificate of Training Mr. Moore received for his accident/incident investigations training - the Director states that none of these documents were submitted or disclosed by either party prior to the Determination being made.

48. Pursuant to section 112(5) of the *Act:*

> (5) On receiving a copy of the request under subsection (2)(b)… the director must provide the tribunal with the record that was before the director at the time the determination…was made, including any witness statement and document considered by the director.

49. Based on section 112(5), I am in agreement with the Director that those documents that were not before the Director at the time the Determination was made need not be included in the Record. If Mr. Moore wanted these documents, which existed prior to the Determination being made, to be included in the Record, then he should have presented them to the delegate in a timely fashion before the Hearing and before the Determination was made.

50. Therefore, I find Mr. Moore's objections to the completeness of the Record without merit and I find the Record, as presented by the Director, to be complete.

ANALYSIS

51. The grounds upon which an appeal may be advanced are found in subsection 112(1) of the *Act*, which states:

> **Appeal of director's determination**
>
> **112** (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

52. The burden is on the appellant to establish the grounds of appeal. 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 the findings of fact unless the findings raise an error of law. (See *Britco Structures Ltd.*, BC EST # D260/03)

53. In this case, Mr. Moore has framed his appeal as an error of law and a failure to comply with the principles of natural justice. However, based on my review of his arguments in support of both grounds of appeal, I find that his appeal, in substance, is about findings of fact and his disagreement with those findings.

54. I will discuss both of Mr. Moore's grounds of appeal under the headings below.

(a) Natural Justice

55. 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 that 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 investigations 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 the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

56. The first argument Mr. Moore advances under the natural justice ground of appeal is that the delegate erred in calculating his unpaid hours of work at 116 hours and believes that his actual hours worked during the period August 28, 2014 to October 28, 2014 is 157.5. He states the delegate might not have included the hours he worked on Saturday, September 20 and October 18, 2014, and those hours he "normally worked [as] additional hours each week by coming in early and working through [his] breaks". He attaches two (2) pages of worksheets, dated January 31, 2015, to his written submissions. These sheets summarize his hours of work, commencing August 7, 2014 to November 1, 2014, and contain handwritten notes tabulating a total of 157.5 hours worked. However, these worksheets were not produced at the Hearing and do not form part of the Record. They are produced for the first time in this appeal. The worksheets also do not appear to have been created contemporaneously, as they are dated January 31, 2015.

57. Having said this, in the Reasons, the delegate relied upon the best evidence available to her in calculating the unpaid hours at 116. She reviewed Skinner's payroll report (which Ms. Feller testified contained accurate records of Mr. Moore's hours worked) and Mr. Moore's own driver logs that he contemporaneously prepared from August 23, 2014, to October 28, 2014. While Mr. Moore challenges the delegate's conclusions of fact in terms of the calculation of the hours he worked, the Tribunal has no authority to consider appeals based on alleged errors in the findings of fact unless such findings raise an error of law. Having reviewed the payroll records of Skinner and Mr. Moore's driver logs for the period in question - August 23, 2014 to October 28, 2014 - I am persuaded that the delegate's calculation of additional hours worked by Mr. Moore, based on these records, is accurate.

58. With respect to the second argument under the natural justice ground of appeal, Mr. Moore contends that the delegate, by disallowing the Service Canada Decision, effectively denied him the opportunity to prove that he did not quit his employment, but rather Skinner terminated it within the meaning of section 66 of the *Act*. I have read the Service Canada Decision, which was made in context of Mr. Moore's claim under the Federal employment insurance legislation. I find the Director properly disallowed the Service Canada Decision, as the opinion or decision of Service Canada is not determinative in any proceeding under the *Act*, or binding on the Director. I also add that the purpose of the Federal employment insurance legislation is not the same as the purposes of the *Act* (section 2 of the *Act*). For example, one (1) of the purposes of the *Act* set out in section 2(a) is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. This is not the purpose of the Federal employment insurance legislation administered by Service Canada.

59. Finally, while the delegate concluded that the November 28, 2014, letter of Glenn Skinner to Mr. Moore, advising the latter of the change in his compensation to an hourly rate of $27.50 effective March 1, 2015, constituted a significant change to Mr. Moore's employment terms and would have amounted to a termination of his employment when it took effect, the change did not take effect at any time. Instead, by way of a letter dated February 3, 2015, Glenn Skinner gave Mr. Moore two (2)-months' working notice of the termination of his employment, effective April 3, 2015. Mr. Moore declined to work the notice period and, on February 13, 2015, resigned from his employment with Skinner, effective February 27, 2016. I find the delegate's conclusion that Mr. Moore resigned from his employment on his own accord, in the circumstances, persuasive, as I do the delegate's conclusion that Skinner has no liability to provide CLOS to Mr. Moore in the circumstances.

60. In the result, I do not find Mr. Moore has established the natural justice ground of appeal.

(b) Error of Law

61. The British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] B.C.J. No. 2275 (BCCA), defined 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.

62. In *Britco Structures Ltd.* (BC EST # D260/03), the Tribunal stated that the definition of error of law in *Gemex, supra*, should not be applied so broadly as to include errors which are not, in fact, errors of law, such as errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law. The Tribunal also added that unless there is an allegation that the delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the delegate erred by applying the incorrect legal test to the facts.

63. In this case, Mr. Moore contends that the delegate erred in law in calculating his vacation pay in the Determination based on the rate of 4% and not 6%, to which he states he was entitled and also paid in his final paycheque. I have reviewed the Record, as well as the Reasons summarizing the evidence of the parties, and do not find any evidence that Mr. Moore was entitled to 6% annual vacation pay. I note that Mr. Moore commenced his employment with Skinner on August 29, 2011, and resigned his employment on February 28, 2015, less than four (4) years later. Pursuant to section 58 of the *Act*, an employer must pay an employee at least 4% vacation pay after five (5) calendar days of employment and at least 6% vacation pay after five (5) consecutive years of employment. Mr. Moore's employment with Skinner was less than four (4) years in length. Therefore, I do not see any error in fact or in legal principle in the delegate's calculation of Mr. Moore's vacation pay at the rate of 4%.

64. I find that Mr. Moore's appeal has no presumptive merit and has no prospect of succeeding and, therefore, I dismiss it.

ORDER

65. Pursuant to section 115 of the *Act*, I order the Determination, dated December 1, 2015, be confirmed in the amount of $8,509.32, 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