

An appeal

- by -

New California Restaurant Ltd.
(“New California”)

- 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.: 2013A/6

DATE OF DECISION: April 3, 2013

DECISION

SUBMISSIONS

David K. Georgetti

counsel for New California Restaurant Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), New California Restaurant Ltd. (“New California”) has filed an appeal of a determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on May 28, 2012 (the “Determination”).
2. The Determination found that New California contravened Part 3, section 18 and Part 7, section 58 of the *Act* in respect of the employment of Woon Cheung Cheng (“Mr. Woon Cheng”) and Yui Chi (Eugene) Cheng (“Mr. Eugene Cheng”) (collectively referred to as the “Complainants”), and ordered New California to pay them a total of \$7,037.37, an amount that included wages and interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on New California under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00 for contraventions of section 18 of the *Act* and section 46 of the *Regulation*.
4. The total amount of the Determination is \$8,037.37.
5. New California, through its legal counsel, has filed an appeal of the Determination invoking all three (3) grounds of appeal in section 112(1) of the *Act*. In particular, counsel is alleging that the Director erred in law and failed to observe the principles of natural justice in making the Determination, and there is new evidence that has become available that was not available at the time the Determination was made.
6. By way of remedies, Counsel has checked off all three (3) boxes on the Appeal Form seeking the Employment Standards Tribunal (the “Tribunal”) to change or vary the Determination or to cancel it or to refer it back to the Director.
7. I note that New California’s appeal was emailed by counsel to the Tribunal on February 1, 2013. This is approximately seven (7) months after the expiry of the July 5, 2012, deadline for filing the appeal set out in the Determination. Counsel has provided written submissions in support of New California’s request for an extension of time to file its appeal late, together with his submissions on the substantive merits of the appeal.
8. Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and section 114 of the *Act*, both of which are substantively similar in terms, set out the Tribunal’s discretionary power to dismiss all or part of an appeal without seeking submissions from the concerned parties. I have decided that this appeal can be decided under Rule 22 of the *Rules* and section 114 of the *Act*. Accordingly, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), counsel’s written submissions on behalf of New California, and my review of the section 112(5) “record” that was before the Director when the Determination was being made.
9. As indicated in the Tribunal’s correspondence to the parties dated March 14, 2013, if the Tribunal is satisfied that the appeal, or a part of it, has some presumptive merit, and should not be dismissed under section 114 of the *Act*, the Tribunal will invite Mr. Woon Cheng, Mr. Eugene Cheng, and the Director to file a Reply in

response to the question of whether the Tribunal should extend the deadline to file the appeal. In such case, New California will be afforded an opportunity to make a final reply to these submissions, if any.

BACKGROUND

10. The Complainants filed a complaint under section 74 of the *Act*, alleging their former employer, New California, which operated a restaurant in Lansdowne Mall in Richmond, British Columbia, failed to pay them all wages during their very brief period of employment with New California before it ceased operations (the “Complaints”). In the case of Mr. Woon Cheng, he states that he is owed \$1,200.00 in unpaid wages for the period April 1 to 15, 2011, when he was employed as a cook with New California. In the case of Mr. Eugene Cheng, he is claiming unpaid wages for the period April 15 to May 29, 2011, in the amount of \$5,280.00. He too states that he was employed as a cook with New California during the said period.
11. During her investigation of the Complaints, the delegate spoke with both Complainants as well as with Pik Sing William Cheung (“Mr. Cheung”), the sole Director of New California; Sam Chan (“Mr. Chan”), an investor or partner in both New California and the predecessor to New California, California Café Restaurant (“California Café”); Ling Tang (“Ms. Tang”), Mr. Chan’s wife and the sole Director of California Café; and Bill Lim (“Mr. Lim”), a former employee of California Café and New California.
12. In her Reasons, the delegate sets out the following facts which were not disputed by the parties:
 - California Café Restaurant Ltd. operated at the Lansdowne [sic] Mall, in Richmond BC.
 - Due to financial difficulties, it closed its doors on March 15, 2011.
 - On March 16, 2011, as a result of new investors, New California Restaurant Ltd. opened its doors at the same location.
 - New California Restaurant Ltd. operated from March 16 – May 29, 2011 and is no longer in business.
 - Both complainants were employed as cooks at this location and continued working throughout these transactions.
 - Mr. Woon Cheng was employed from March 15 – April 15, 2011.
 - Mr. Eugene Cheng ws [sic] employed from March 15 – May 29, 2011.
 - No official disposition of assets was recorded or transferred.
 - The only arrangement alluded to by both parties was that with new investors the operation of the restaurant at the Lansdowne location was allowed to continue.
13. The delegate also notes in the Reasons that, during her investigation, Mr. Eugene Cheng confirmed he was an investor in New California and a friend of Mr. Cheung. The latter asked him to work as a cook at New California’s restaurant and he agreed to work at a salary of \$3,000.00 for the first month and, thereafter, on reduced hours, at \$2,000.00 per month. The delegate also notes that Mr. Eugene Cheng stated he worked six (6) days per week and about nine (9) hours per day. He also admitted he was undergoing dialysis treatment three (3) days per week during his employment with New California.
14. According to the delegate, Mr. Woon Cheng stated that he was hired as a cook with New California by Mr. Eugene Cheng who is his uncle and a partner in the restaurant. Mr. Woon Cheng’s paycheque for the

period April 1 to 15, 2011, was withheld by New California because of a dispute between the investors over Mr. Eugene Cheng's hiring of his nephew, Mr. Woon Cheng.

15. In the Director's record adduced in this appeal, I note there is a letter dated August 26, 2011, from the delegate to both California Café and New California, sent by registered and regular mail to the restaurant's business address at Lansdowne Centre in Richmond. This letter is addressed to Mr. Cheung, as a Director of New California, and to Ms. Tang, a Director of California Café. The letter confirms the delegate's conversation of same date with both regarding complaints under the *Act* lodged by five (5) former employees, including Mr. Eugene Cheng, Mr. Woon Cheng, and Mr. Lim. The letter included a Demand for Employer Records pertaining to all five (5) employees. The letter also notified the addressees of the potential liability of a Director or Officer of a corporation at the time wages of an employee were earned under section 96 of the *Act*. The letter also invited both Mr. Cheung and Ms. Tang to consider resolving the complaints through the settlement provisions of the *Act* and asked both to call her by September 9, 2011, if they desired to discuss settlement of the claims.
16. The letter appears to have been successfully delivered to Mr. Cheung and Ms. Tang, but not to California Café as the letter addressed to the latter was returned. After the letter was sent, the delegate spoke to one of the other principals of California Café, Mr. Chan. It also appears that Mr. Chan arranged for three (3) employees of California Café to send the delegate emails or written statements which all appear to be in similar terms, stating that Mr. Chan introduced Mr. Eugene Cheng as the "new boss" and the latter gave them "commands".
17. I also note that the record includes a letter from the delegate to Mr. Eugene Cheng, dated September 30, 2011. In this letter, the delegate advises Mr. Eugene Cheng of her meeting with Mr. Chan on September 27, 2011. She states that Mr. Chan contended that Mr. Eugene Cheng was a Director and Owner of New California during the period when the wages were earned. She also states that Mr. Chan argued that since Mr. Eugene Cheng instructed his nephew, Mr. Woon Cheng, to work at the restaurant while he was away from the restaurant, he personally should be responsible to pay his nephew. In the same correspondence, the delegate informs Mr. Eugene Cheng that Mr. Chan is interested in a mediation meeting and asks Mr. Eugene Cheng to respond. Mr. Eugene Cheng appears to have agreed to the mediation meeting with Mr. Chan as there is an email to Mr. Chan from the delegate to this effect on October 7, 2011.
18. The record also includes an email dated November 3, 2011, from a David Lee ("Mr. Lee") to the delegate informing the delegate that Mr. Cheung is a part owner of another Restaurant in Richmond, Golden Sea City Restaurant, and his telephone contact there. It would appear that the delegate was then looking for the current contact information for Mr. Cheung, and Mr. Lee, who appears to be a friend of Mr. Eugene Cheng and attended a fact-finding meeting with him, knew of Mr. Cheung's whereabouts at the time.
19. On November 8, 2011, the delegate sent a letter to Mr. Cheung at the address of Golden Sea City Restaurant setting out her investigative findings. In that letter, she refers to her previous correspondence and telephone conference with him on August 26, 2011. More particularly, she notes in the letter that when she spoke with him on August 26, 2011, he advised her that he was not willing to meet with her regarding the Complaints or to provide his new contact address. She then goes on to review the details of both Mr. Eugene Cheng's and Mr. Woon Cheng's Complaints and requests that he respond to her preliminary investigation findings, failing which she would be left with no choice but to issue a determination against New California. I note that the delegate also sent the same letter to New California's registered and records office address at Sexsmith Road in Richmond, and Mr. Cheung's personal address at Georgia Street in Vancouver, both of which are set out in the corporate search of New California. On the same date, the delegate issued a Demand for Employer

Records (the “Demand”) to New California. Both the investigative findings letter and the Demand appear to have been delivered successfully according to a Canada Post Trace sheet provided in the Director’s record.

20. The record also contains a letter of the delegate, dated December 22, 2011, addressed to Mr. Cheung, Ms. Tang and Mr. Chan setting out more comprehensively the delegate’s preliminary findings with respect to the Complaints. In the letter, the delegate reviews the evidence from her fact-finding meetings on November 3, November 24, and December 13, 2011, and invites Mr. Cheung, Ms. Tang, and Mr. Chan to respond to her letter as their response “will determine whether or not a Determination will be issued”. Of particular import is the fact-finding meeting of November 24, 2011, which was attended by both Mr. Chan and Mr. Cheung. At that meeting, both Mr. Chan and Mr. Cheung contended that Mr. Eugene Cheng was an investor in New California similar to them and therefore, he could not also be an employee. They both refuted his claim that he worked at the restaurant as a cook. They also stated that Mr. Eugene Cheng was seen at the restaurant during the period he claims he worked as a cook, but he was not working. They said he was undergoing dialysis treatment three (3) times per week, and came and left the restaurant as he pleased. At the same meeting, Mr. Chan also contended that Mr. Eugene Cheng should be held responsible for wages owed to his nephew, Mr. Woon Cheng, because he did not terminate the latter’s employment on April 1, 2011, when he was asked, but allowed Mr. Woon Cheng to work until April 15, 2011.
21. In the same letter the delegate also noted that she received a telephone call from a former employee of New California, Mr. Lim, who confirmed he was employed as a cook during March 2011 at the same time when Mr. Eugene Cheng was working as a cook for New California. Mr. Lim stated that Mr. Eugene Cheng worked with him in the kitchen six (6) days per week, usually from 12:00 p.m. to 9:00 p.m. He also confirmed that Mr. Eugene Cheng was attending at a clinic, three (3) times per week, for dialysis.
22. The delegate also sets out in the letter the evidence relating to Mr. Woon Cheng’s claim. She notes that Mr. Woon Cheng said he was hired by his uncle, Mr. Eugene Cheng, to work as a cook at New California from March 16 to April 15, 2011, at the rate of \$12.00 per hour, and he was introduced to both Mr. Chan and Mr. Cheung as owners. He claimed that he is owed \$1,200.00 in wages for the period April 1 to April 15, 2011, and provided details of his hours of work during the said period.
23. Based on the evidence collected in her investigation, the delegate concluded in the preliminary findings letter that although Mr. Eugene Cheng was an investor in New California, Mr. Chan was the General Manager and provided direction to both Mr. Eugene Cheng and Mr. Woon Cheng. She concluded that Mr. Chan was the main contact for New California and its predecessor, California Café, and he appeared to act in the capacity of a director for both these companies which were strongly intertwined and carried on business at the same location at Lansdowne Centre in Richmond, and they were both in the restaurant industry with the same telephone and fax numbers. Accordingly, the delegate was satisfied that California Café and New California were associated corporations for the purposes of the *Act*.
24. The delegate then went on to conclude, notwithstanding Mr. Eugene Cheng’s investment with Mr. Chan and Mr. Cheung in New California, he was not listed as a Director of either California Café or New California and did not appear to have any financial authority regarding company resources or control of day-to-day operations. He was not the controlling mind of these two businesses. She further reasoned that there was nothing in the *Act* that precluded Mr. Eugene Cheng as an investor from also being an employee of New California. In finding Mr. Eugene Cheng was an employee under the *Act* and New California owed him wages, the delegate preferred the evidence of the latter and Mr. Lim, who worked alongside him, to the evidence and arguments of Mr. Cheung and Mr. Chan.

25. As for Mr. Woon Cheng's claim, the delegate went on to state in her preliminary findings that Mr. Cheng was permitted to continue working after Mr. Eugene Cheng was advised by Mr. Chan to terminate his employment. Therefore, Mr. Woon Cheng was entitled to wages for the period he worked for New California.
26. The preliminary findings letter, as indicated, was sent to Mr. Cheung at his Georgia Street address in Vancouver and to both Ms. Tang and Mr. Chan at Ms. Tang's personal mailing address in the corporate search of California Café. The letter was also sent to New California and California Café at their respective registered and records office addresses. However, none of the addressees, including Mr. Cheung, responded to the preliminary findings letter. As a result, the delegate, on January 10, 2012, sent a further registered letter to Mr. Cheung at the Golden Sea City Restaurant address and sent a copy of it by registered mail to his Georgia Street address and to the registered and records of New California. In the letter, the delegate indicated that she had not heard from him regarding her preliminary findings letter of December 22, 2011, and that she had since received additional information from both Mr. Lim and Mr. Chan that could possibly name New California as the sole entity liable for Mr. Eugene Cheng's wages. She indicated that according to Mr. Chan, California Café stopped operating as of March 15, 2011, and on March 16, 2011, Mr. Cheung became the new operator of New California. Mr. Eugene Cheng was employed by New California from March 16 to May 29, 2011, and, according to Mr. Lim, it was Mr. Eugene Cheng who hired him to work at New California as of March 16, 2011. As a cook, Mr. Lim was also terminated on May 29, 2011, the same date Mr. Eugene Cheng's employment was terminated. The delegate went on to state in the letter that, based on this information, Mr. Cheung, as the sole Director of New California, appeared to be responsible for Mr. Eugene Cheng's wages, and if he wished to further discuss these findings, he should contact her by January 17, 2012, failing which she would proceed to issue a determination naming New California as liable for wages and penalties under the *Act*. While the letter was sent to New California's registered and records office address, it appears not to have been received, while the other two (2) letters addressed to Mr. Cheung at the Golden Sea City Restaurant and his Georgia Street address appear to have been successfully delivered and, in any event, there does not seem to be a dispute regarding receipt of this letter by Mr. Cheung in New California's appeal.
27. Subsequently, on May 28, 2012, the delegate issued the Determination against New California and sent it by registered mail to New California at its last known business address at Lansdowne Mall in Richmond, and to its registered and records office address at Sexsmith Road in Richmond. She also sent the Determination to Mr. Cheung at his address on Georgia Street in Vancouver. While the deliveries to the registered and records office and business addresses of New California in Richmond were unsuccessful, there is a Canada Post Tracing sheet in the record which indicates that the delivery of the Determination to Mr. Cheung's personal address at Georgia Street in Vancouver was successfully made on June 12, 2012.
28. Subsequently, on June 28, 2012, a different delegate of the Director sent Mr. Cheung a letter of same date advising him of the Determination and informing Mr. Cheung that the period for appealing the Determination having expired (which is incorrect as the Determination notes the appeal period expires on July 5, 2012), the Determination would be filed with the Registrar of Supreme Court of British Columbia, if payment ordered in the Determination was not made by July 13, 2012. The letter also notified Mr. Cheung of potential execution proceedings once the Determination is filed in the Supreme Court of British Columbia. The letter was sent to Mr. Cheung at the Lansdowne Mall, Richmond address of New California; the registered and records office address of New California at Sexsmith Road in Richmond; and to Mr. Cheung's personal address on Georgia Street, Vancouver. While the delivery of the letter to New California at its business address at Lansdowne Mall and its registered and records office address at Sexsmith Road were unsuccessful, the delivery to Mr. Cheung at his personal address on Georgia Street, Vancouver appears to have been successful as I do not find counsel's submissions disputing delivery to Mr. Cheung.

29. I note that the record also contains another determination made by the Director on November 23, 2012. This determination is against Mr. Cheung in his capacity as a Director of New California (the “Section 96 Determination”) because New California failed to pay the Determination issued against it on May 28, 2012. The Section 96 Determination was sent to Mr. Cheung at his personal address on Georgia Street in Vancouver and, based on the Canada Post Tracing sheet in the record, it appears to have been successfully delivered to Mr. Cheung at that address on December 7, 2012.
30. Finally, the record contains an email dated September 26, 2012, from a Court Bailiff to the Employment Standards Branch (the “Branch”) indicating that Mr. Cheung was served. This email precedes the Section 96 Determination and presumably refers to documents relating to collections proceedings against New California arising from the unsatisfied Determination. In his email, the Bailiff reports that Mr. Cheung “said he is manager” and “he is going to talk to his lawyer and get back to me”.

SUBMISSIONS OF NEW CALIFORNIA AND ANALYSIS

31. New California, through its counsel, filed an appeal by email to the Tribunal on February 1, 2013. The Appeal Form indicates that the appeal has been filed on behalf of both New California and Mr. Cheung. I also note that the written submissions attached to the Appeal Form show that the submissions are on behalf of both, New California and Mr. Cheung. However, in his subsequent letter to the Tribunal dated February 4, 2013, counsel clarifies that the appeal and submissions filed on February 1 are in respect of the Determination against New California. However, I note that counsel has submitted identical submissions in the appeal of the Section 96 Determination, which appeal will be dealt with by the Tribunal in a separate decision.
32. Having said this, in his submissions, I note that counsel addresses first the matter of the late appeal and why the time for appealing the Determination against New California should be extended. He states that when Mr. Cheung learned about the Determination against New California, he attended at the Branch where the delegate worked in order to inquire about appealing the Determination. I note counsel does not set out the date when Mr. Cheung learned of the Determination or the date when Mr. Cheung attended at the Branch.
33. Counsel submits that the receptionist at the Branch told Mr. Cheung that he needed to attend at the Labour Relations Board and he complied. At the Labour Relations Board, he was informed that the Board only dealt with union members and, therefore, he returned to the Branch. Again, counsel does not indicate the date when Mr. Cheung attended at the Labour Relations Board and the date when he returned to the Branch. At the Branch, counsel states Mr. Cheung spoke to the same receptionist who now directed him to speak to the delegate who issued the Determination. Counsel states that the receptionist took Mr. Cheung’s contact information and informed him that the delegate would contact him. Counsel states that Mr. Cheung therefore assumed that the matter would be dealt with by the delegate, and did not take any further steps. However, the delegate never contacted him.
34. Counsel states the next time Mr. Cheung heard anything regarding the matter was when a Writ of Seizure and Sale (the “Writ”) obtained by the Director was served on him. Mr. Cheung then contacted counsel to contact the Branch and make arrangements to file the appeal. Again, counsel does not indicate when precisely Mr. Cheung was served with the Writ, although the email from the Court Bailiff to the Branch would indicate that this may have happened on or about September 26, 2012, before the Section 96 Determination.
35. However, before the Bailiff served the Writ on Mr. Cheung, the Branch sent Mr. Cheung a letter dated June 28, 2012, informing him of the wages owing pursuant to the Determination and setting out the collection process, if the payment ordered in the Determination was not made. The letter also indicated that

the time for appealing had expired although that is incorrect. One would think that threat of collections and the representation that the time for appealing the Determination had expired would have prompted Mr. Cheung to act immediately to contact counsel, if indeed he required counsel to file an appeal of the Determination. However, I note that counsel in his submissions does not make mention of the letter of June 28, 2012, or indicate what Mr. Cheung did when he received the letter. There is no suggestion in counsel's submissions that Mr. Cheung did not receive the said letter. It was indeed sent to Mr. Cheung at the Georgia Street address where he later received the Section 96 Determination, as confirmed by the Canada Post Tracing sheet. There is no indication that Mr. Cheung tried to contact the delegate after receiving the letter. Surely, at this point, he would not have continued belabouring under any misconception he may have had previously about the delegate contacting him about his intention to appeal the Determination.

36. As indicated previously, counsel in his submissions does not indicate when precisely he was contacted by Mr. Cheung to file an appeal of the Determination. I note that the Section 96 Determination against Mr. Cheung was issued on November 23, 2012, and sent to him by registered mail at his Georgia Street address, and the Canada Post Tracing sheet shows that he received the same on December 7, 2012. It is more probable that Mr. Cheung then contacted counsel as counsel filed appeals of both the Determination and the Section 96 Determination a couple of days apart in February 2013 using identical submissions. Counsel does not offer any, or any persuasive, explanation justifying the further delay of Mr. Cheung or New California in filing the appeal of the Determination after the June 28, 2012, letter of the Branch to Mr. Cheung or the subsequent delay after Mr. Cheung received the Writ in late September 2012, or the further delay after Mr. Cheung received the Section 96 Determination.

37. I note counsel contends that Mr. Cheung, who is a native of Hong Kong and speaks Cantonese, suffers a language barrier and did not comprehend the significance of the Employment Standards complaint process. Counsel states that New California and Mr. Cheung were unrepresented by counsel at the time the Determination and the Section 96 Determination were made. He states that Mr. Cheung was only able to appreciate the nature of the claims against him after he sought legal counsel in connection with the service of the Writ of Seizure and Sale. I find it curious that in none of Mr. Cheung's dealings with the delegate during the investigation of the Complaints, whether at the fact-finding meeting he attended with Mr. Chan or in his telephone conference with the delegate on August 26, 2011, or at any other time before the Determination was made, did Mr. Cheung feel compelled to raise the issue of a "language barrier" with the delegate or sought fit to obtain assistance of counsel or anyone else because of his purported "language barrier". It would appear that after the Writ and after the Section 96 Determination, he did find counsel to represent him in both appeals, but for some inexplicable reason he did not seek out counsel earlier, if indeed required one because of "language barrier", when he received the preliminary findings letter before the Determination, when he received the Determination, or when he received the letter describing the collections process a month after the Determination.

38. If indeed Mr. Cheung was experiencing a language barrier throughout the process (which I am not convinced he was), it is not for the delegate to divine whether or not Mr. Cheung understands the proceeding or not particularly when there is no apparent outward evidence of any disability on his part to comprehend the process in his dealings with the delegate. There is also no evidence that Mr. Cheung made any effort to indicate to the delegate any disability in comprehending the complaint process due to a language barrier. Mr. Cheung's participation, albeit limited, in the investigation process would indicate otherwise. From the record I have reviewed and the correspondence from the delegate documenting her dealings with Mr. Cheung when he participated in the investigation process together with Mr. Chan, it would appear that Mr. Cheung made his position clear to the delegate. In the circumstances, I am not persuaded there was any language barrier preventing Mr. Cheung from acting in a timely fashion to file an appeal. He seems to have done fine finding legal counsel to represent New California and himself in both appeals, albeit late. However, it seems

that the S.96 Determination and the threat of impending collections proceeding appeared to have given Mr. Cheung the requisite incentive to seek out counsel and appeal the Determination.

39. On a related note, principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; to present their evidence; and to be heard by an independent decision maker. Principles of natural justice do not require that a party must have legal representation, although a party is free to retain counsel if it desires to and has the resources. In this case, there is nothing in the evidence that would suggest that Mr. Cheung was denied natural justice. He was afforded ample opportunity to participate in the investigation process and when he wanted to participate he did so.
40. I also note that on the substantive appeal, under the heading “Facts” in his written submissions, starting at paragraph 25 and continuing on to paragraph 46 inclusive, counsel has delineated evidence describing the existence of a partnership agreement between Mr. Cheung, Mr. Chan, and Mr. Eugene Cheng relating to the operation of New California’s restaurant and proffered evidence relating to the respective roles of each. Counsel goes on to explain the reason why Mr. Eugene Cheng was not shown as a director in the corporate search of New California and Mr. Cheung was. Based on his submissions under the heading “Facts”, counsel then argues that the delegate erred in her finding that Mr. Eugene Cheng was a mere silent investor. Counsel provides affidavits of Mr. Cheung and Mr. Chan in support of the facts set out in his written submissions. I have read those affidavits carefully and, for the reasons I will discuss below, I do not find it necessary to set out the facts sworn in the affidavits or the facts set out in counsel’s submissions here. I do wish to note, however, that attached as Exhibit “A” to Mr. Cheung’s affidavit is purported to be a translation of a copy of the Minutes of the Shareholders’ Meeting of May 26, 2011, (the “Minutes”) between Mr. Eugene Cheng, Mr. Chan, and Mr. Cheung. While this meeting appears to have been held three (3) days before the termination of Mr. Eugene Cheng’s employment, what is more instructive is that the Minutes do not delineate any agreement or arrangement between Mr. Eugene Cheng and New California or its other investors pertaining to his role in the business venture, including his duties and responsibilities.
41. Having said this, I find that none of the facts pleaded in the written submissions of counsel and or sworn by Mr. Cheung or Mr. Chan in their affidavits in the Appeal, including the Minutes, all of which appear to only buttress and further elaborate on the positions taken by Mr. Cheung and Mr. Chan during the investigation of the Complaint, qualify as “new evidence” within the meaning of the *Act*. In this regard, I note that in *Re: Merilus Technologies Inc.* (BC EST # D171/03), the Tribunal, in deciding whether to accept fresh evidence on appeal of a determination, laid out the following four-part test for admitting fresh evidence on appeal:
- (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.
42. 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 of them before the Tribunal will admit the new evidence.
43. I also find very instructive the Tribunal’s decision in *Re: 607470 B.C. Ltd. c.o.b. Michael Allen Painting* (BC EST # D096/07), which provides that new evidence cannot arise as a result of a party turning a blind eye to

telephone calls and correspondence from the delegate during the investigation stage of a complaint and adducing evidence that was otherwise available to it.

44. I am not satisfied in this case that New California meets the first criterion in *Re: Merilus Technologies Inc., supra*, for adducing new evidence on appeal. The evidence counsel for New California wishes to adduce as new evidence in this appeal is not evidence that could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or during the adjudication of the Complaints and prior to the Determination against New California being made. The delegate, before the Determination was made, gave Mr. Cheung and New California ample opportunity to participate in the investigation of the Complaints including an opportunity to respond to the preliminary findings letter of the delegate dated December 22, 2011, before issuing the Determination five (5) months later on May 28, 2012. All of the evidence counsel is now adducing could have been presented to the delegate by way of a response to the preliminary findings correspondence from the delegate but Mr. Cheung and New California appear to have turned a blind eye to that correspondence, although they were well aware of the threat of the impending Determination.
45. Since New California fails on the first criterion in *Re: Merilus Technologies Ltd., supra*, I need not review the evidence in context of the balance of the criteria.
46. Having said this, it is evident to me that this is a case of an appellant disagreeing with the conclusions of fact made by the Director. There appears to be no evidence of error of law on the part of the Director and I find that the Director's Determination is firmly supported in the evidence that was before the Director at the time the Determination was made. I also find that it is more probable that the appeal of the Determination is prompted by the S.96 Determination and the potential threat collections proceedings personally against Mr. Cheung. In this regard, I feel compelled to echo the sentiments expressed by the Tribunal in *Tri-West Tractors Ltd.* (BC EST # D268/96) that while the Tribunal will not foreclose any party from bringing forward evidence in support of their case, it will not allow the appeal procedure to be used to make the case that should have, and could have, been made during the investigative process.
47. In summary, I find there is no evidence of error of law, breach of natural justice or new evidence in this appeal. In the circumstances, I find New California's appeal has no reasonable prospect of succeeding.

ORDER

48. Pursuant to subsection 114(1)(b) and (f) of the *Act* I dismiss this appeal on the grounds that the appeal was not filed within the applicable time limit and there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated May 28, 2012, is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal