



An appeal

- by -

HAP Enterprises Ltd.  
(“HAP”)

- 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.:** 2016A/1

**DATE OF DECISION:** March 8, 2016

## DECISION

### SUBMISSIONS

Harcharan (Harry) Gill

on behalf of HAP Enterprises Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), HAP Enterprises Ltd. (“HAP”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 27, 2015 (the “Determination”).
2. The Determination found that HAP had contravened Part 3, section 18 (wages); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (vacation pay) of the *Act* and section 37.3 (overtime) of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Bakhtaur Singh Mokha (“Mr. Mokha”), and ordered HAP to pay Mr. Mokha wages in the amount of \$3,397.45 and to pay administrative penalties under section 29 of the *Regulation* in the amount of \$2,500.00. The total amount of the Determination is \$5,897.45.
3. HAP has appealed the Determination on the grounds that the Director breached the principles of natural justice in making the Determination and new evidence has become available that was not available when the Determination was being made.
4. HAP is seeking the Employment Standards Tribunal (the “Tribunal”) to change, cancel or refer back the Determination to the Director.
5. In correspondence, dated January 6, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that following such review, all, or part, of the appeal might be dismissed.
6. In correspondence, dated January 27, 2016, the Tribunal delivered to HAP the section 112(5) “record” (the “Record”) provided to the Tribunal by the Director, and gave HAP the opportunity to object to its completeness.
7. On February 18, 2016, HAP, delivered brief submissions asking the Tribunal to include in the Record the Annual Vacation factsheet of the Employment Standards Branch (the “Branch”), which HAP obtained from the Branch on January 7, 2016. This document was not before the Director at the time the Determination was made as it was obtained by HAP on January 7, 2016, three (3) days after HAP’s appeal was filed. Therefore, the document does not form part of the Record, and I find that the Record, as presented by the Director to the Tribunal, is complete.
8. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the appeal of HAP, the written submissions filed with the appeal by HAP, and my review of the material that was before the Director when the Determination was being made. Pursuant to section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal without a hearing of any kind, for any of the reasons listed in subsection (1). If satisfied the appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Mokha will, and the Director may, be invited to file

further submissions. 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 at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

## THE FACTS

10. HAP operates a trucking company in Delta, British Columbia.
11. A BC Online: Registrar of Companies – Corporation Search, conducted on January 16, 2014, indicates that HAP was incorporated on April 18, 2006. The corporate search also lists Amritpal S. Bagri (“Mr. A. Bagri”), Harpal S. Bagri (“Mr. H. Bagri”), Pritpal S. Brar (“Mr. Brar”) and Harcharan S. Gill (“Mr. Gill”) as its directors.
12. HAP employed Mr. Mokha as a truck driver from February 18, 2013, to November 1, 2013.
13. On January 7, 2014, Mr. Mokha filed a complaint under section 74 of the *Act* alleging that HAP contravened the *Act* by failing to pay him wages for work performed on November 1, 2013, overtime pay, statutory holiday pay and annual vacation pay. Mr. Mokha also claimed that HAP made an unauthorized deduction from his wages for an error he made when he dropped off a container at a wrong location (the “Complaint”).
14. The delegate of the Director conducted a hearing into the Complaint (the “Hearing”) over two (2) days, on July 2, 2014, and September 30, 2014.
15. The Hearing was attended by Mr. Mokha and his witness, Satwinder Sidhu (“Mr. Sidhu”). Mr. Sidhu was a driver for HAP, and part of the group of drivers who quit their employment with HAP on the same day as Mr. Mokha.
16. Mr. Gill attended at the Hearing on behalf of HAP. HAP did not call any other witnesses.
17. In the Reasons, the delegate sets out the following issues she considered at the Hearing:
  1. What was Mr. Mokha’s rate of pay?
  2. Is Mr. Mokha owed wages for work performed on November 1, 2013?
  3. Is Mr. Mokha owed overtime wages, if so, in what amount?
  4. Is statutory holiday pay owed to Mr. Mokha, if so, in what amount?
  5. Is annual vacation pay owed to Mr. Mokha, if so, in what amount?
  6. Did the Employer make an unauthorized deduction from Mr. Mokha’s wages?
18. With respect to the question of Mr. Mokha’s rate of pay, the delegate noted in the Reasons that Mr. Mokha said that he was hired on a piece-rate basis of \$40.00 for each container he delivered, and this rate never changed throughout his employment with HAP. Conversely, HAP presented that Mr. Mokha was hired on a piece-rate basis of \$30.00 per container, but as of March 1, 2013, his rate of pay changed to an hourly rate of \$12.00 per hour because he and other drivers were not making minimum wage based on the piece rate of pay.

19. In preferring the evidence of Mr. Mokha and his witness, Mr. Sidhu, over HAP's witness, Mr. Gill, the delegate reasoned as follows:

... I find Mr. Mokha's submissions and statements to be believable, consistent, coherent, detailed and reasonable in all of the above areas. I find his evidence was presented in a clear, consistent, forthright and convincing matter, and he did not waiver in his position at all at least in response to the wage that he was promised and how it was to be paid, and again it was consistent with the testimony of his witness. In addition, in comparing Mr. Mokha's record of the number of containers he hauled each day to the amount he was paid each pay period, they calculate exactly. His testimony regarding his remuneration was entirely consistent with the documentary evidence he produced.

Conversely, HAP's evidence appears to be contrived to demonstrate the position it is taking. The information on the Wage Summary Sheets and the wage statements is inconsistent, and Mr. Gill could not provide an explanation for this. The bonuses listed on the Wage Summary Sheet and do not appear on the wage statements [sic]. When Mr. Gill was asked how the bonuses were calculated he did not know how they were calculated as the accountant calculated them. I choose to draw a negative inference that HAP chose not to bring its accountant to the hearing to explain the calculation of these random bonus amounts as they appear to be amounts that 'make up' the difference on each cheque when HAP factors in everything they feel they need to in each pay period.

Consequently I find Mr. Mokha's testimony and records are credible and further I find that Mr. Mokha was being paid piece rate throughout his entire employment with HAP.

20. Having decided that Mr. Mokha was paid on the basis of piece rate, the delegate next considered the actual piece rate that applied to Mr. Mokha. The delegate noted that while Mr. Mokha said he was being paid a rate of \$40.00 per container, and this was supported by his witness, Mr. Sidhu, Mr. Gill argued that the piece rate amount was \$30.00 per container. However, the contract that HAP submitted, which was signed by Mr. Mokha, showed the piece rate was \$30.00 per container plus a \$10.00 bonus per container. Again, in preferring Mr. Mokha's evidence over HAP's, the delegate stated:

Once again, Mr. Mokha was consistent with his testimony and never waived. His witness testimony supported his position that he was paid \$40.00 per container, and in essence the evidence provided by HAP also supports Mr. Mokha's position of \$40.00 per container. Based on Mr. Mokha's records of the containers he moved the amounts paid to him also reflect an agreement to pay \$40.00 per container.

As a result, I find that Mr. Mokha was being paid \$40.00 per container, \$20.00 per half trip.

21. With respect to the question of what wages, if any, Mr. Mokha was owed for work performed on November 1, 2013, the delegate noted that while Mr. Mokha claimed that he was not paid for his final day of work on November 1, 2013, Mr. Gill contended that HAP paid him for the said day on his final cheque on November 16, 2013. The cheque Mr. Mokha received from HAP was for a net amount of \$1,542.65 which, according to the delegate, represented gross wages in the amount of \$1,960.00. According to the delegate, Mr. Mokha's records indicated that he moved a total of 49 containers for the period October 16 to October 31, 2013, and on November 1, 2013, he moved three (3) more containers. Based on a piece rate of \$40.00 per container, the delegate concluded that the 49 containers Mr. Mokha moved during October 16 to October 31, 2013 amounted to \$1,960.00 in gross wages. Therefore, the delegate concluded that that Mr. Mokha was not paid for the three (3) containers he moved on November 1, 2013, and HAP owed him wages in the amount of \$120.00 (3 X \$40) for November 1, 2013.
22. With respect to the question of whether Mr. Mokha was owed overtime wages and, if so, in what amount, the delegate noted that Mr. Mokha was employed as a short-haul truck driver for the purposes of the *Act* as he drove a truck for a distance within a 160 kilometer radius of his home terminal. The delegate also noted that, pursuant to section 37.3 of the *Regulation*, an employer must pay a short-haul truck driver at least one and

one-half times their regular wage for all hours worked in excess of nine (9) hours in a day; and 45 hours in a week. The delegate further noted that only the first nine (9) hours in a day count toward weekly overtime, with the remaining hours included in the daily overtime calculation. The delegate then examined the records adduced by Mr. Mokha, which she found credible, in determining what overtime hours Mr. Mokha worked during the recovery period between May 2, 2013, and November 1, 2013. Based on her review of the said records, the delegate concluded that HAP contravened section 37.3 of the *Regulation* for failing to pay Mr. Mokha for all of the hours he worked during recovery period:

In looking at the records, it is clear to see that Mr. Mokha has not been paid fully for all of the hours that he has worked, he has been paid for some of the overtime hours he worked. Clearly HAP saw this and that is why they attempted to submit records showing they had paid Mr. Mokha an hourly wage instead of a piece rate/per move basis. Consequently, I find...Mr. Mokha is owed overtime pay in the amount of **\$1,802.90**. [boldface in original text]

23. With respect to the question of what statutory holiday pay, if any, Mr. Mokha was owed, the delegate noted that Mr. Mokha claimed he was owed statutory holiday pay for Canada Day (July 1), BC Day (August 5), Labour Day (September 2) and Thanksgiving Day (October 14). The delegate also noted that Mr. Mokha worked fifteen (15) of the last thirty (30) days prior to each of the statutory holidays he claimed within his recovery period, and he admitted that he did not work on any of the statutory holidays. However, she noted that he was unsure if he was paid an average day's pay for statutory holidays. In contrast, the delegate noted that Mr. Gill testified that HAP had paid a flat rate of \$100.00 as an average day's pay for statutory holidays (that is, \$12.00 per hour x 8 hours = \$96.00, rounded up to \$100.00). While the statutory holiday pay was reflected on the Wage Summary Sheets, produced by HAP, the delegate noted that it was not reflected on the computer-generated wage statements produced by HAP's accountant, and Mr. Gill was unable to explain this discrepancy.

24. In concluding that Mr. Mokha was not paid statutory holiday pay by HAP, the delegate reasoned as follows:

Again I prefer Mr. Mokha's testimony and evidence over HAPS [*sic*]. Mr. Mokha was once again consistent and did not waiver in his position. HAP's evidence is again inconsistent and appears contrived to show what it needs to show. If one is to believe their testimony, in their pay scheme, HAP seems to 'round up' a lot which translates to giving away a large sum of company money over time which just does not seem reasonable or believable.

As a result, I find that HAP contravened section 45 of the Act, and consequently I find that Mr. Mokha is owed statutory holiday pay in the amount of **\$655.43**. [boldface in original text]

25. With respect to the question of what annual vacation pay, if any, was owed to Mr. Mokha, the delegate referred to section 58 of the *Act* which requires an employer to pay annual vacation pay of at least 4% to an employee who has been employed for at least five (5) days. The delegate noted that Mr. Mokha testified that he understood his wage was all-inclusive of vacation pay, and that the Wage Summary Sheets of HAP that he received did not show vacation pay being paid in each pay period. On HAP's part, the delegate noted that it submitted different, contradicting sets of records. More particularly, HAP submitted wage statements from the start of Mr. Mokha's employment until the October 16 to 31, 2013, pay period, which failed to show any vacation pay on any cheques issued by HAP, contrary to Mr. Gill's claim. However, the delegate noted that in the final three (3) pay periods of Mr. Mokha "an amount **not** equal to 4% vacation pay was paid and listed as vacation pay on the wage statement [supplied by HAP]". The delegate concluded that this amount was a randomly rounded amount that appeared to be close to what was actually owed to Mr. Mokha. The delegate also noted that the Wage Summary Sheets submitted by HAP show that vacation pay was paid every pay period with some pay periods showing accurate amounts and other pay periods not.

26. In preferring the records supplied by Mr. Mokha over those of HAP and concluding that Mr. Mokha was owed annual vacation pay in the amount of \$640.53, the delegate reasoned as follows:

Once again, I have already chosen to rely on Mr. Mokha's records as they are more credible and consistent. HAP's records appear to be contrived to show what they need to show again in the instance of vacation pay, and once again, they are inconsistent with each other.

That said, in the instance of vacation pay only, I will accept the wage statements from the final three pay periods...which show that some vacation pay amounts were paid (totalling \$167.00) even though paid in incorrect amounts. The wage statements are computer generated documents produced by HAP's accountant (as opposed to the handwritten Wage Summary Sheets produced by HAP), and provided to the Complainant. The first of these wage statements also shows that this was the first amount of vacation paid in the year to date amount column as well, which contradicts...the Wage Summary Sheets submitted by HAP, where they claim to have been paying vacation pay throughout Mr. Mokha's employment.

Again I prefer Mr. Mokha's testimony and evidence over HAP's as Mr. Mokha was consistent with the information he provided. HAPS [*sic*] evidence is inconsistent and is contrived to show what they need to show. The wage statements generated by HAPS [*sic*] own accountant; clearly indicate that HAP did not pay Mr. Mokha vacation pay until the last three pay periods of his employment.

As a result, I find that HAP contravened section 58 of the Act....

27. With respect to the final question, whether HAP made an unauthorized deduction from Mr. Mokha's wages, the delegate noted that Mr. Mokha claimed that HAP made an unauthorized deduction of \$850.00 from his wages after he delivered a container "to a client's business on a wrong booking" for which HAP was charged. While HAP never showed a deduction on Mr. Mokha's wage statement, it simply refused to pay Mr. Mokha for all the container moves he made during the September 16 to 30, 2013, pay period. HAP, however, provided Mr. Mokha with an invoice showing the charge it had incurred as a result of the delivery. While Mr. Gill claimed that HAP made no deductions from Mr. Mokha's wages for the latter's mistake, Mr. Mokha was convinced that he did not receive his bonus in September and, therefore, concluded that there was a deduction made from his wages. The delegate, in concluding that HAP made an unauthorized deduction from Mr. Mokha's wages, stated:

According to Mr. Mokha's records for the September 16 to 30, 2013 pay period, Mr. Mokha moved 49 containers and was only paid \$1,048.00 during this pay period, which is \$912.00 short of what it should have been during that pay period. Section 21 of the Act provides that an Employer not require an employee to cover any of their costs related to business. Consequently I find that HAP contravened section 21 of the Act and Mr. Mokha is owed **\$850.00**. [**boldface** in original text]

28. The Determination went on to award Mr. Mokha a total of \$3,397.45 in wages, inclusive of interest. The Determination also levied five (5) administrative penalties of \$500.00 each against HAP for contraventions of sections 18, 21, 45 and 58 of the *Act* and section 37.3 of the *Regulation*.

## SUBMISSIONS OF HAP

29. Mr. Gill, in his written submissions on behalf of HAP, states:

The Appellant was not aware in advance of the Date of Hearing that the Appellant could provide additional supporting materials and witnesses. Further, the primary language of the Appellant's directors is Punjabi. This made correspondence at the Date of Hearing difficult. The difficulty in communication was not addressed at the Date of Hearing making for the principals [*sic*] of nature [*sic*] justice to be violated.

30. Mr. Gill then goes on to state that new evidence has become available “which may assist the Director in making a determination of fact” and “negate the issues of communication that adversely affected the Appellant in the Determination”. This “new evidence” is in the form of affidavits of four (4) employees employed as truck drivers for HAP, namely: Manjit S. Dhaliwal (“Mr. Dhaliwal”), Puran S. Rai (“Mr. Rai”), Palwinder S. Chhokar (“Mr. Chhokar”) and Manpreet S. Toor (“Mr. Toor”). All four (4) affidavits are written in *almost* identical language, describing their understanding of the wage rate and compensation structure in place at HAP from when they started working for HAP as truck drivers.
31. Mr. Gill also attaches the affidavit of his fellow director in HAP, Pal Bagri. It is not clear whether Pal Bagri is Mr. A. Bagri or Mr. H. Bagri, as both Bagris’ first names end in “pal”. Pal Bagri’s affidavit explains why bonuses were not listed on the Wage Summary Sheet produced and relied upon by HAP at the Hearing. Pal Bagri’s affidavit also explains HAP’s practice relating to the recording of hours worked on the Wage Summary Sheet, the wage rate and compensation structure at different periods during Mr. Mokha’s employment.
32. I do not find it necessary to delineate in any greater detail the information contained in the affidavits of Pal Bagri and the four truck drivers for the reasons set out under the heading “Analysis” below. However, it should be noted that the evidence contained in these affidavits is largely supportive of the evidence Mr. Gill presented at the Hearing on behalf of HAP, or supplements the evidence of Mr. Gill.
33. Finally, Mr. Gill submits that the evidence of Mr. Sidhu on the question of the rate of pay should not have been accepted by the Director because “he has no knowledge” that the rate of pay was changed on March 2, 2013.

## ANALYSIS

34. The grounds of appeal are statutorily limited to those 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.

35. The Tribunal has consistently stated that an appeal is not simply a further opportunity for a dissatisfied party to re-argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds set out in section 112(1) of the *Act*. Having said this, as previously indicated, HAP’s appeal is based on the “natural justice” and the “new evidence” grounds of appeal.
36. I will deal with each below.

(a) *Natural Justice*

37. Natural justice is an administrative law concept referring to procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent decision-maker (see *Re: 607730 B.C. Ltd. operating as English Inn & Resort*, BC EST # D055/05).
38. The onus is on the party who invokes the natural justice ground of appeal to show that the Director breached the principles of natural justice in making the determination. The arguments of Mr. Gill under the natural justice ground of appeal are twofold; namely: (i) HAP was not aware in advance of the Hearing that it could provide additional supporting materials and present witnesses; and (ii) HAP's directors' "primary language" is Punjabi, which caused "difficulty in communication" at the Hearing, and the delegate failed to address this issue.
39. I find Mr. Gill's above submissions under the natural justice ground of appeal devoid of merit for the following reasons. First, if HAP's directors' primary language is Punjabi, it does not mean that HAP was prejudiced in any way in terms of an opportunity to know the case against it and the right to present its evidence. Based on the Record, I note that the Request for Payment submitted by Mr. Mokha to HAP and its directors is in English; the Notice of Complaint Hearing addressed to HAP Enterprises Ltd. (and to Mr. Mokha) is in English; the Demand for Employer Records, dated May 14, 2014, is in English; all correspondence between the Branch and HAP, or Mr. Gill, is in English, including Mr. Gill's email dated December 15, 2014, to a delegate of the Director. Furthermore, based on my review of the Reasons, Mr. Gill appears to have testified and made submissions on behalf of HAP at the Hearing in English. At no point prior to the Hearing or during the Hearing, did Mr. Gill or HAP raise any issue of limited comprehension or inability to comprehend the English language or to communicate in that language. I find the onus is on HAP to inform the delegate or the adjudicator, if HAP or its Directors encountered difficulty communicating or comprehending in English, at any time during the Complaint process, up to and including the Hearing. As indicated, throughout the entire Complaint process leading to the Hearing and including the Hearing, there is no indication or suggestion that HAP or its directors, including Mr. Gill (who presented submissions and evidence on behalf of HAP at the Hearing), had any English language difficulty.
40. Secondly, I note that the Notice of Complaint Hearing sent by the delegate to HAP on May 14, 2014, expressly states:

For additional information on the hearing process, please refer to the attached *Adjudication Hearings factsheet*. Please provide a copy of the attached *Being a Witness* factsheet to any witnesses you intend to call [Emphasis added].

**Production of Records**

The parties must do the following:

1. Send the Branch two hard copies or one electronic copy of any documents you intend to rely on by June 11, 2014 as per the following instructions:  
...
2. Provide a list of people you intend to call as witnesses using the attached *List of Witnesses* form, with a brief summary of the relevant evidence those witnesses are expected to give.
3. Provide all documents required in the *Demand for Employer Records*, if one was issued to you.



It is your responsibility to ensure that any records or evidence you intend to rely on at the hearing are submitted to the Branch by June 11, 2014 so the Branch has time to send them to the other party for their review prior to the hearing.

41. In the face of the notice above, I find Mr. Gill's submission that HAP was unaware in advance of the Hearing that it could provide additional supporting materials and witnesses not credible.

**(b) New Evidence**

42. The admission of "new evidence" in an appeal is discretionary. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* (BC EST # D171/03), the Tribunal set out four (4) conditions that must be met before new evidence will be considered. The appellant must establish that:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value in the sense that, if believed, it could, on its own or when considered with the other evidence, have led the Director to a different conclusion on the material issue.

43. In this case, the purported new evidence HAP is relying upon in the appeal is the affidavits of four (4) truck drivers, Mr. Dhaliwal, Mr. Rai, Mr. Chhokar and Mr. Toor, and the affidavit of Pal Bagri, a director of HAP. The evidence contained in these affidavits largely pertains to the wage rate and compensation structure HAP allegedly had during the period of Mr. Mokha's employment. I find that the evidence contained in these affidavits does not consist of "new evidence", as it fails one or more of the conditions set out in *Re: Merilus Technologies Inc., supra*. More particularly, I find that all of the evidence contained in the affidavits of the truckers and Pal Bagri is the sort of evidence that could have, with the exercise of due diligence, been discovered and presented to the Director during the adjudication of the Complaint and prior to the Determination being made, but was not. HAP has also not explained why it did not call Pal Bagri and the four (4) drivers as witnesses for HAP at the Hearing. HAP is not entitled to sit idly or "in the weeds" failing to provide *all* relevant information during the investigation or at the Hearing, only to awaken later, after the Determination has been made against it, to present evidence in the appeal that was previously available during the Complaint process and before the Determination was made. To admit the affidavits of Pal Bagri and the four (4) truck drivers of HAP at this stage would be inconsistent with the purposes of the *Act* and, particularly, section 2(d) of the *Act*, namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act".

44. I am also not convinced that the evidence contained in the affidavits is credible in the sense that it is reasonably capable of belief. The affidavits of the truck drivers, Mr. Dhaliwal, Mr. Rai, Mr. Chhokar and Mr. Toor, largely contain identical information presented in identical language. In the case of Mr. Rai, Mr. Toor and Mr. Dhaliwal, their affidavits are exactly the same with the exception of their names and their hire dates. In the case of Mr. Chhokar, a large part of his affidavit, too, has identical language to the first three (3). I am not convinced of the *bona fides* of the evidence presented in these affidavits. There is no reason why HAP could not have called these gentlemen as witnesses at the Hearing and afforded Mr. Mokha an opportunity to cross-examine them. As for Pal Bagri's affidavit, it both supplements and largely contains evidence that supports Mr. Gill's evidence on rate of pay and compensation structure of HAP that Mr. Gill presented at the Hearing, and which the delegate rejected as "contrived" and lacking credibility. As with the

truck drivers, HAP should have called Pal Bagri as a witness at the Hearing and allowed Mr. Mokha the opportunity to cross-examine him. In the circumstances, I find HAP's new evidence ground of appeal also fails.

45. Lastly, I note that Mr. Gill, in his written appeal submissions, disputes the delegate's decision to accept the evidence of Mr. Mokha's witness, Mr. Sidhu, on the question of the rate of pay, stating that Mr. Sidhu had no knowledge that the piecework rate of pay changed on March 2, 2013. I find that this is an instance of the appellant disputing the Director's findings of fact. The grounds of appeal listed in section 112(1) above do not provide for an appeal based on errors of fact, and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). I find it was open for the delegate to prefer the evidence of Mr. Sidhu (which supported Mr. Mokha's evidence on the subject) over the evidence of Mr. Gill or HAP. I do not find the delegate committed any error in so doing.
46. In these circumstances, I am satisfied that HAP's appeal has no presumptive merit and has no prospect of succeeding and, therefore, I dismiss it under section 114(1)(f) of the *Act*.

## **ORDER**

47. Pursuant to section 115 of the *Act*, I order the Determination, dated November 27, 2015, be confirmed in the amount of \$5,897.45, together with any interest that has accrued under section 88 of the *Act*.

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