

An appeal

- by -

Ayman Chami carrying on business as MJ Hair For Men
("Chami")

- 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.: 2007A/16

DATE OF DECISION: May 23, 2007

DECISION

OVERVIEW

1. This is an appeal by Ayman Chami carrying on business as MJ Hair for Men (“Chami”), pursuant to Section 112 of the Employment Standards Act (the “Act”), against a determination of the Director of Employment Standards (the “Director”) issued on January 23, 2007 (the “Determination”).
2. The Respondent Stephen Watts (“Watts”) filed a complaint pursuant to Section 74 of the Act alleging that his former employer, Chami, contravened the Act by failing to pay him vacation pay, statutory holiday pay and compensation for length of service (the “Complaint”).
3. The Director’s delegate (the “Delegate”) held a hearing into the Complaint on November 20, 2006 (the “Hearing”). Watts attended on his own behalf at the Hearing. Chami did not appear at the Hearing nor did have any one represent him at the Hearing.
4. The Delegate, after concluding on the threshold questions that Watts was an employee and Chami his employer, found Chami had contravened Sections 45, 58 and 63 of the Act in failing to pay Watts statutory holiday pay, annual vacation pay and compensation for length of service.
5. The Delegate awarded Watts \$7,208.27 for the three claims inclusive of interest pursuant Section 88 of the Act. The Delegate also ordered three administrative penalties of \$500 each against Chami for the three contraventions of the Act. The total of the amount awarded against Chami in the Determination is \$8,709.27.
6. Chami originally filed his appeal of the Determination on March 2, 2007 (the “Original Appeal”). The Appeal Form containing the Original Appeal, while filed in a timely fashion, did not specify the grounds of appeal nor the remedy sought by Chami. However, attached to the Appeal Form in the Original Appeal is a short handwritten note from Chami wherein he states that he did not own the business from 1998 to 2005 and he only “took over the shop...as a new owner” on April 1, 2006. He further states that he and the previous owner of the barbershop, Paul Madaire (“Madaire”), signed a “document agreeing that he is responsible for everything that happened during this time”. Chami also notes in the document “for further information my lawyer will contact you on Monday 5th, 2007”
7. On March 26, 2007, Chami’s legal counsel filed a revised appeal (the “Revised Appeal”). In the Revised Appeal, Chami checked off all three boxes in paragraph 2 of the Appeal Form advancing all three grounds of appeal under Section 112(1), namely:
 - (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.

8. In the Revised Appeal, Chami is requesting a suspension of the Determination because “(t)he Complainant misrepresented his relationship to the Appellant’s business when he obtained the decision being appealed”. Chami is also seeking the Tribunal to cancel the Determination or, alternatively, to refer it back to the Director because “neither (his) bookkeeper nor (Chami) counted on ...the Complainant...stray(ing) so far from the truth and that those unchallenged statements would be accepted on face value”.
9. Finally, Chami is seeking an oral hearing of his appeal so that “he can produce witnesses to confirm that the Claimant was not being truthful with his evidence”. While Section 36 of the *Administrative Tribunals Act* (“ATA”) (which is incorporated in Section 103 of the *Employment Standards Act*) and Rule 16 of the Tribunals Rules of Practice and Procedure provide that the Tribunal may, inter alia, hold an oral hearing in an appeal, I have, after carefully considering Chami’s grounds of appeal and related supporting evidence concluded that that this appeal can be adjudicated on the basis of the written submissions of the parties. Accordingly, this appeal is decided on the Section 112(5) “record”, the submissions of the parties and the Reasons for the Determination.

ISSUES

10. Did the Delegate err in law in making the Determination?
11. Did the Delegate fail to observe the principles of natural justice in making the Determination?
12. Has new and relevant evidence become available that was not available at the time the Determination was made that would lead the Delegate to a different conclusion on a material issue?

FACTS

13. Chami purchased a barbershop in Coquitlam, British Columbia (the “Location”) called MJ Hair for Men on April 1, 2006 from Paul Madaire (“Madaire”) and continued operating the barbershop at the Location thereafter.
14. Watts provided services as a barber at the Location from March 1, 1998 (well in advance of Chami purchasing the business) until June 13, 2006.
15. Watts’ rate of pay was based on the greater of a base rate of \$9.00 per hour or a commission structure of 55% of total gross sales from services he provided, calculated on a weekly basis. If the total gross sales of Watts exceeded \$800 per week, the commission he received was increased to 60% of gross sales.
16. A mediation of Watts’ Complaint was scheduled for October 2, 2006 and both Watts and Chami participated in the mediation session, but the parties did not resolve the Complaint.
17. The Hearing of the Complaint was subsequently scheduled for 9:00 a.m. on Monday, November 20, 2006.
18. A notice of the Hearing (the “Notice”) was mailed to the parties on October 6, 2006 by registered mail.

19. A Canada Post delivery confirmation receipt was generated for the delivery confirming that the Notice was received at Chami's principal business address on October 10, 2006.
20. Watts and his witness, Ugesh Ram ("Ram") attended at the Hearing but Chami did not, and no one represented him at the Hearing.
21. The Employment Standards Officer, Patricia Graham ("Graham"), who had conduct of the file during the mediation process, attempted to contact Chami at 9:10 a.m. on the morning of the Hearing by calling the business telephone number of Chami, but there was no response. As a result, Graham left a message for Chami informing him that the Hearing would be adjourned until 9:30 a.m. at which time it would commence, even if no one attended on behalf of the employer or Chami.
22. At the Hearing, the Director sought to first determine whether Chami was provided with an opportunity to respond to the Complaint by reviewing, among other things, Graham's file notes including the work flow sheet delineating the events that transpired in and during the time leading up to the Hearing.
23. The Delegate noted the following information in the file:
 - (a) October 31/06 – Graham received a letter dated October 26, 2006 (the "October 26 Letter" from James M. Lawes ("Lawes")) wherein Lawes introduced himself as a bookkeeper that had been requested by Chami to provide guidance (and not legal advice) with respect to the Complaint and confirms that he was in receipt of the Notice.
 - (b) November 2/06 – Graham contacted Chami with respect to the October 26 Letter and confirmed that Lawes had full authorization to act on his behalf.
 - (c) November 2/06 – Graham contacted Lawes and explained the dispute resolution process of the Employment Standards Branch (the "Branch") to him and discussed the outstanding issues in the Complaint. Lawes, in turn, advised Graham that he would contact Chami to discuss the Complaint.
 - (d) November 15/06 – Graham again contacted Lawes to inquire whether or not he had discussed the Complaint with Chami. Lawes replied that he had but was waiting to hear back from Chami. Lawes understood that if the Complaint were not resolved, the Hearing would proceed as scheduled.
 - (e) November 17/06 (12:20 p.m.) – Graham contacted Chami to advise that the Hearing would proceed on Monday, November 20, as the Complaint had not been resolved. Chami, however, insisted that Graham contact Lawes.
 - (f) November 17/06 (2:00 - 2:30 p.m.) – Graham attempted to contact Lawes; however, Lawes' telephone was busy.
 - (g) November 17/06 (3:00 p.m.) – Graham again contacted Chami and advised that she was unable to contact Lawes and again advised Chami that the Hearing was going ahead as scheduled. Chami stated that if Lawes said that he would have to attend at the Hearing then he would. Otherwise, only Lawes would attend.
 - (h) November 20/06 (8:05 a.m.) – Graham received a call from Lawes on the morning of the Hearing and advised that he would not be attending at the Hearing on behalf of Chami.

24. The Hearing commenced at 9:30 a.m. on November 20, 2006, in the absence of Chami or his representative.
25. Neither Chami nor any representative of his contacted the Branch after the Hearing.
26. In the pre-Hearing process, Chami provided a letter dated January 2, 2006 entitled “Chair Rental Agreement” and signed by the previous owner of the business, Madaire and Watts that stated “(t)his letter is to verify that Paul Madaire has agreed to rent a chair to Stephen Watts for the year 2006”.
27. According to the Delegate, while there is nothing specifically stated in any documentation received from Chami or Lawes in the pre-Hearing process, it appeared that Chami’s position was that Watts’ was hired as an independent contractor working under a chair rental agreement (the “Rental Agreement”).
28. Chami, in the pre-Hearing stage, took the position that the transfer of the business from Madaire to him did not have any impact on the nature of his relationship with Watts; and therefore, the Rental Agreement (from when Madaire owned the business) remained in effect after he took over the business.
29. Watts, on his part, argued that he was an employee of Chami and that his days and hours of work were fixed and determined by Chami. According to Watts, he never had any control over the prices of the services he was providing as Chami predetermined them. Watts also argued that he did not provide any of his own tools or equipment, but rather Chami provided the chair, towels, styling aids and equipment used to provide service to clients in Chami’s business.
30. Watts indicated at the Hearing that from the beginning of his employment, the previous owner, Madaire, had classified him as self-employed and after having worked six years under this arrangement he contacted Canada Revenue Agency (“CRA”) and requested a ruling on the insurability of his employment. CRA’s ruling, on November 30, 2005, determined that Watts was an employee.
31. Watts stated that from the date of the CRA’s ruling until January 2006 Madaire paid Canada Pension and Employment Insurance premiums on behalf of Watts. However, in the beginning of January 2006, Madaire insisted that Watts rent a chair, as Madaire no longer wanted an employment relationship or employees. Watts, fearing that he was going to lose his job, agreed to Madaire’s demand.
32. At the Hearing, Watts provided copies of the chair rental receipts, which Madaire issued to him on a weekly basis in the amount of \$150.00 commencing in January 2006. Watts indicated that these receipts were only for the purpose of CRA and that during the period when the receipts were issued, he did not make any payments towards the chair rental or pursuant to the Chair Rental Agreement. Watts argued that if he had entered into a true Chair Rental Agreement, he would have enjoyed the flexibility of having his own station and customers.
33. Watts also indicated that if there had been a true Chair Rental Agreement then he would have been able to come and go as he pleased and set his own prices and provide his own equipment and hair products, which was not the case.
34. According to Watts, he had been an employee at the Location continuously since March 1, 1998 to June 13, 2006 and when Chami took over the business in April 2006, there was no break in his service at the Location and his employment conditions remained the same.

35. In the pre-Hearing stage, Chami's position was that Watts' employment was not continuous throughout the period March 1, 1998 to June 13, 2006 and provided a letter of resignation dated December 10, 2005 from Watts which was executed by both Madaire and Watts (the "First Resignation Letter"). The First Resignation Letter states, the "(r)eason for resigning from my employment with MJ Hair For Men is that the business has become extremely slow. I would like to verify that Paul Madaire has generously paid me all the outstanding holiday pay along with a generous bonus".
36. Lawes, on behalf of Chami, in advance of the Hearing, in the October 26, 2006 Letter, referred to the First Resignation Letter to argue that Watts' "relationship with MJ Hair For Men was concluded as of December 10, 2005 with all required payments made" to Watts at that time. Lawes also asserted in the October 26 Letter that the only outstanding issues in the Complaint should be limited to the period January 1, 2006 to June 14, 2007.
37. Watts testified at the Hearing that he never resigned from his employment on December 10, 2005 as suggested in the First Resignation Letter. Watts indicated that Madaire required him to sign the First Resignation Letter in order to allow him to carry on working with the company. Watts further stated that he never received any holiday pay or a "generous bonus" as suggested in the First Resignation Letter. He noted that he signed the First Resignation Letter and thereafter continued working in the business, and there was no change in the conditions of his employment.
38. Watts produced a witness at the Hearing by the name of Ugesh Ram who testified that he was a customer of the business for the past 15 to 20 years and over the last 8 years, it was Watts who had been cutting his hair.
39. Watts testified that he was not paid any statutory holiday pay for the entire period of his employment at the Location. Watts provided a calendar record in which he recorded his days worked in 2006 and the total sales he generated during that period.
40. In the October 26 Letter, Lawes' stated on behalf of Chami:
- There may be an issue of Statutory Holiday payments payable to Mr. Watts for Good Friday and Victoria Day. We are prepared to accept your decision regarding the matter. It is sometimes difficult for someone new to business (Mr. Chami) to reconcile the differing interpretations afforded the employer/employee relationship by Canada Revenue Agency and Employment Standards.
41. Lawes also stated in the October 26 Letter:
- It would appear that Mr. Watts terminated his relationship with MJ Hair For Men for a second time on June 14, 2006. The first time concerned the previous business owner, happened December 10 in the year 2005 and was concluded without any issues remaining unresolved. The second resignation occurred on June 14, 2006.
- There does not seem to be a requirement for any form of severance. The *Employment Standard Act* is very clear in stating that no compensation is required when the individual has quit or resigned.
42. Chami's position in the pre-Hearing period was that he did not fire Watts but rather Watts quit his employment after opening his own barbershop across the street from Chami's Location.

43. In support, Chami submitted a letter dated June 14, 2006 purportedly written and signed by Watts and addressed to “Sam” stating:

Thank you for your offer regarding buying the shop, unfortunately I have to decline. I feel as it is in my best interests to move on, as of today, I will no longer be working here.

(The “Second Resignation Letter”)

44. Chami also submitted a letter dated August 10, 2006 written and signed by Shirley Gladstone (“Gladstone”), the on-site manager of Westwood Corporate Centre, Raphael Tower. In her letter, Gladstone states:

This letter is to verify that Mr. S. Watts set up his new business ‘Sir Caswell’s at 2973 Glenn Drive, #104 from approximately June 15, 2006 to June 29, 2006’.

45. Watts, in response, testified that he did not resign from his employment but rather Chami terminated his employment on June 13, 2006. He also indicated that he began encountering many problems once Chami took over the business in April 2006. He complained that he was constantly left on his own and was required to open and close the shop, which he was unhappy about.

46. Watts also testified that Chami wanted to change his hours and days of work in an attempt to steal his clientele.

47. Watts further stated that on June 13, 2006, he was again left on his own at the shop and there were customers waiting and he was concerned that he would not be able to close the shop on time. When he contacted Chami by telephone, a verbal argument ensued and thereafter, Chami told him to “get out and leave the keys by the door”. Watts testified that he viewed being told by Chami to leave his keys at the door as a sign that his employment was terminated because he would not have access to the shop which he was responsible for opening and closing.

48. In response to Gladstone’s letter, Watts testified that he considered opening his own shop but only after his employment had been terminated by Chami. However, he then decided not to proceed with opening his own shop due to financial concerns.

49. With respect to the Second Resignation Letter, Watts responded that he did indeed write it but only after his employment had been terminated by Chami. Further, the Second Resignation Letter was addressed to “Sam” who was Chami’s uncle who had helped finance the barbershop for Cham, according to Watts.

50. According to Watts, Sam contacted him after June 13, 2006 and asked Watts if he wanted to purchase the business from Chami for \$40,000 to \$45,000. Watts indicated that he initially agreed but after speaking with his wife he decided he could not afford to purchase the business and as a result wrote the letter in question to Sam and slipped it under the door of the business premises on June 14, 2006, a day after his employment had been terminated by Chami.

51. Watts indicated that he was not paid any vacation pay during the entire period of his employment at the Location and that when he was paid wages, it was always in cash. Watts provided T4 records for each year he worked at the Location until 2006. For the year 2006, he adduced his calendar record, which, with the exception of some few days in the beginning of 2006, contained a daily record of his sales.

52. Watts indicated at the Hearing that with respect to his vacation pay claim, the calculation should be based on his hourly rate of pay on the base rate for his wages earned, although he usually earned well above the base rate. Watts testified that he worked eight hours per day on Mondays, Wednesdays, Fridays and Saturdays each week.
53. In response to Watts' claim for vacation pay, the Delegate noted that the only response or evidence from Chami on this issue is the First Resignation Letter signed by Watts and Madaire which states that Watts had received all outstanding holiday pay.
54. At the Hearing, the Delegate considered the issue of whether or not Chami was provided with the opportunity to respond to the Complaint, as Chami did not attend at the Hearing.
55. The Delegate ruled that the Branch met its obligation and afforded Chami an opportunity to challenge the Complaint and to present his evidence after reviewing Graham's file including the notes in Graham's "work flow sheet" delineating the events leading up to the Hearing date.
56. On the subject whether or not Watts was an employee under the Act, the Delegate viewed the definitions of "employee", "employer" and "work" in the Act and concluded that Watts and Chami met the definitions of employee and employer and that Watts performed "work" within the meaning of the Act. In particular, the Delegate found that Watts was receiving wages in the form of commissions on gross sales for a base hourly rate of pay in exchange for performing work as a barber in a barber shop, which is work that would normally be performed by an "employee".
57. The Delegate also noted that Watts, as a barber, provided a service to clients of the barber shop which met the definition of "work" under the Act and that Chami met the definition of "employer" as he exercised control and direction over Watts and he was responsible for the employment of Watts.
58. According to the Delegate at the Hearing, Watts provided uncontested evidence that his days and hours of work were determined by Chami and that Chami had complete control over the prices of the services he was providing at the barber shop and that Chami provided the chair, towels, styling aids and equipment used by Watts in performing his work.
59. The Delegate also found that after Chami purchased the barbershop business on April 1, 2006, Chami continued to employ Watts without any changes to his employment conditions and personally compensated Watts for work performed, and as such, was directly responsible for the employment of Watts.
60. The Delegate also found that the Rental Agreement was in contravention of Section 4 of the Act, which prohibits parties from entering into an agreement that waives the minimum requirements of the Act.
61. The Delegate also found that the employment of Watts was continuous from March 1, 1998 until June 13, 2006 and rejected Chami's pre-Hearing position that Watts' employment was terminated when he allegedly quit his employment with Madaire on December 10, 2005 or that Watts' employment was again interrupted during the sale of the business by Madaire to Chami on April 1, 2006.
62. According to the Delegate's findings, Watts continued to work for Chami after Chami purchased the business from Madaire on April 1, 2006 and pursuant to Section 97 of the Act, Watts' employment is deemed continuous and uninterrupted by the sale of the business to Chami.

63. With respect to the First Resignation Letter, the Delegate preferred the evidence of Watts over Chami and concluded that the evidence supported that Watts did not resign but continued to work past the December 10, 2005 date and the signed chair rental receipts Watts received from early January 2006 were subsequent to the resignation date and effectively support that Watts had not resigned from his employment on December 10, 2005.
64. The Delegate also found that Watts' position that he was required to sign the First Resignation Letter in order to carry on working with Madaire to be in harmony with the preponderance of probabilities given the background of the CRA investigation and CRA's ruling on the insurability of Watts' employment (which ruling was issued on November 30, 2005, ten days before the alleged First Resignation Letter).
65. The Delegate concluded that Watts' claim for statutory holiday pay is restricted to any wages that became payable in the period beginning six months before the earlier of the date of the Complaint or the termination of Watts' employment-i.e. the period between December 14, 2005 and June 13, 2006. During this period, there were four statutory holidays, namely, Christmas Day, New Year's Day, Good Friday and Victoria Day. According to the Delegate Watts was eligible to receive statutory holiday pay for all four statutory holidays, and there was no evidence that Chami paid him an average day's pay for these holidays. Therefore, the Delegate found that Chami had contravened Section 45 of the Act by failing to pay Watts the statutory holiday pay in the amount of \$455 for the said holidays.
66. The Delegate also noted that pursuant to Section 97 of the Act, the purchaser is responsible for all outstanding wages, including those that fall due prior to the sale of the business. Accordingly, two of the holidays, namely, Christmas Day (December 25, 2005) and New Year's Day (January 1, 2006) were holidays that fell when the business was under the ownership of Chami's predecessor, Madaire, but Chami, under Section 97 of the Act is responsible for paying Watts for those two dates.
67. With respect to compensation for length of service, the Delegate found that Chami failed to discharge his burden of proof, on the balance of probabilities, that Watts quit his employment. The Delegate accepted the unchallenged evidence of Watts that his employment was terminated on June 13, 2006 by Chami and found Chami to have contravened Section 63 of the Act by failing to pay compensation for length of service to Watts. The Delegate determined the length of service of Watts to be continuous from March 1, 1998 to June 13, 2006 and ordered that Chami was liable to pay Watts compensation for length of service equalling eight weeks wages.
68. With respect to annual vacation pay, the Delegate noted that there was no evidence to show that Chami paid annual vacation pay on the regular wages Watts earned. The Delegate noted that the only evidence Chami provided on this issue was in the First Resignation Letter wherein Watts stated that he had received all outstanding holiday pay. However, the Delegate noted that he accepted Watts' evidence that he was required to sign the First Resignation Letter in order to secure his employment and that he had not been paid any holiday pay on the regular wages paid to him. Accordingly, the Delegate ruled that Chami is required to pay annual vacation pay on statutory holiday pay and compensation for length of service found owing to Watts and that Chami had contravened Section 58 of the Act by failing to make such payment to Watts.
69. The Delegate determined the annual vacation pay by taking into consideration Watts' employment with Chami's predecessor, Madaire. The totality of Watts' employment at the Location exceeded five consecutive years and therefore the Delegate calculated the annual vacation pay on the basis of six

percent of Watts' total wages owed. The total wages owed were limited by Section 80 of the Act to the six months before the termination of the employment.

70. The Delegate imposed three administrative penalties for contraventions of each of Sections 45, 58 and 63 of the Act against Chami.

ARGUMENT

Chami's submissions

71. With respect to the first issue, whether the Delegate erred in law in making the Determination, Chami's Revised Appeal does not clearly and separately set out Chami's argument relating to how or in what way the Delegate erred in law. If one reviews Chami's submission in Appendix "A" in the Revised Appeal in relation to the third ground of Appeal pertaining to New Evidence" (which I will address later) one can deduce that the error of law argument may relate to the Delegate's finding that Watt was an employee and not an independent contractor. In particular, Chami states in Schedule "A" "the former owner of the business confirmed that the Claimant was not an employee, and provided the Appellant with written confirmation of the Complainant to that fact.... After that, the Complainant worked for himself and simply rented space from the Appellant." Chami then goes on to state "(t)he Claimant rented a chair in the Appellant's shop for only 32 days" during the period April and June 2006. Chami further states "the Claimant did not report to the Appellant. He did not even notice he was leaving, which one would expect from an employee. He just left, and moved his separate barber business across the street."
72. With respect to the second ground of appeal, the breach of the principles of natural justice ground of appeal, Chami's Revised Appeal, again, does not clearly and separately set out Chami's submissions in support of this ground. One has to look at the submissions of Chami in context of his request for an oral hearing in the appeal, in Schedule "D" and his subsequent letter dated April 1, 2007 and described as a "FINAL REPLY" (the "Final Reply"), to obtain a sense of what Chami's basis may be for advancing the second ground of appeal. In Schedule "D", Chami states:

The Appellant knew of the hearing date. He did not, however, understand his personal attendance was required until after it had taken place. He had been provided a copy of (the) October 26, 2006 letter from his bookkeeper/accountant who assisted him through the unfamiliar proceedings setting out his position and concluding '...this matter can probably be resolved without the need for costly hearings and adjudication...' and stating that 'Chami works alone in his shop and would have difficulty closing his shop for November 20, 2006'.... The Appellant was not advised that the Director would be going ahead in spite of this request and did not receive the message on his answering machine until afterwards.

73. In the Final Reply, Chami (or his counsel) states:

Rightly or wrongly, the Appellant did not know that the hearing was proceeding absent any representation for his side of the dispute. In the result, he has not had the benefit of a fair hearing and the decision appealed from was not decide on the merit of all the evidence. Accordingly, this matter ought to be referred back to the Director for a proper hearing.

74. The argument of Chami appears to be that he had, through his bookkeeper/accountant, sought an adjournment of the Hearing in the October 26, 2006 letter from the bookkeeper/accountant to the

Delegate and was unaware that the Delegate had denied that request. In the premise, Chami “was not heard at the (H)earing” and did not have an opportunity to refute Watts’ evidence.

75. With respect to the third ground of appeal in the Revised Appeal, namely, there is new evidence that has become available that was not available at the time the Determination was being made, Chami’s submissions are contained in Schedule “A” of the Revised Appeal and partly in Schedules “B”, “C” and “D” as well as the Final Reply document. While I do not intend to set out each piece of “new evidence” in these documents in support of Chami’s appeal here, I have carefully reviewed Chami’s submissions and it is abundantly clear that Chami’s argument here is that the “new evidence” is all that evidence that Chami’s would have adduced at the Hearing to refute, dispute or contradict Watts’ evidence, had he been informed or made aware that the Delegate was “insisting (that the Hearing) was proceeding in spite of Mr. Lowe’s request”. As indicated in Schedule “D” of counsel’s submissions on behalf of Chami in support of the latter’s request for an oral hearing of the appeal:

There is no question that (Chami) should have attended the hearing in order to hear the Complainant’s evidence, which he could then have refuted. He would have done so had he known that the Director was insisting it was proceeding in spite of Mr. Lowe’s request. He would ask for an oral hearing in order that he can produce witnesses to confirm that the Claimant was not being truthful with his evidence.”

Director’s submissions

76. In the Director’s submissions dated March 22, 2006 in response to Chami’s Original Appeal, the Director points out that Chami has not delineated “on what grounds the determination is being appealed”. The Director, however states that in response to Chami’s short note submitted together with the Original Appeal, wherein Chami is arguing that he should not be responsible for compensation for length of service for the period of 1998 to 2005 before he purchased the barbershop business on April 1, 2006, the Director states that the issue of the sale of the business was considered and fully addressed in the determination and Chami is attempting to reargue the case.
77. In the Director’s subsequent submissions dated April 11, 2007, the Director responds to the submission of Chami’s counsel filed in the Revised Appeal. In particular, the Director states, in response to Chami’s submissions in Schedule “A” of the revised Appeal, that
- The issues of the sale of business, chair rental agreement and employment status of the complainant were all considered and fully addressed in the Determination. As such the appeal is simply an attempt to re-argue the case, which is not a proper ground for appeal.
78. In response to Chami’s request for a suspension of the Determination, the Director submits that it takes no issue with Chami’s request “as long as the Appellant deposits in trust with the Director the total amount required to be paid under the Determination”.
79. With respect to Chami’s submissions in Schedule “C” and “D” of the revised Appeal, the Director states that Chami’s reliance on the advice of his bookkeeper/accountant in not attending at the Hearing is not something within the Director’s control. In the case at hand, the Director states that:

(T)he appellant was fully aware that the (H)earing was going to proceed as scheduled. ...The appellant and his bookkeeper were contacted several times leading up to and including the

scheduled hearing date. Both the appellant and his bookkeeper were advised that as the complaint had not been resolved, the adjudication hearing would proceed as scheduled.

80. With respect to the letter from Chami's bookkeeper/accountant that Chami relies upon to suggest that he requested an adjournment of the Hearing, the Director submits that this letter is not "a formal request for an adjournment to the hearing". According to the Director, the letter "was an attempt to resolve the complaint without a need for costly hearings and adjudication. The parties were not able to reach a resolution to the complaint; therefore the hearing proceeded as scheduled."
81. In his final reply to Chami's written submission of April 11, 2007, the Director submits the Affidavit of Joyce Graham, the delegate of the Director who had conduct of the matter up to the Hearing date, supports the Director's position that Chami knew that the Hearing was proceeding as scheduled on November 20, 2006 (the "Affidavit"). In the Affidavit, Graham states, inter alia:
- She was appointed by the Director to meet with the parties to explore the possibility of settling the Complaint and met with both Chami and Watts in the mediation session at the Employment Standards Branch (the "Branch").
 - The parties were unable to reach a resolution at the mediation.
 - On October 6, 2006, she issued a Notice of Complaint Hearing and a Demand for Employer Records to Chami. The Hearing was scheduled for 9:00 a.m. on Monday, November 20, 2006.
 - On October 31, 2006, she received a letter dated October 26, 2006 from Chami's bookkeeper/accountant, James M. Lawes ("Lawes"), advising that he had been asked by Chami to provide guidance with the issues in the Complaint.
 - On November 2, 2006, she telephoned Chami and advised him she had received a letter from Lawes on his behalf and verified with Chami that Lawes had "full authorization to act on his behalf".
 - She telephoned Lawes on November 2, 2006 in response to his letter and explained to Lawes the mediation and adjudication process. In particular, she advised Lawes that if the Complaint were settled before the Hearing then the Hearing would not proceed but if it were not settled then the Hearing would proceed. She also went over the "outstanding complaint allegations" with Lawes and the latter advised that he would contact Chami and contact her again. Lawes did not "request or mention a request for an adjournment of the Complaint Hearing".
 - After the November 2, 2006 conversation with Lawes, she faxed him a copy of the Complaint and Information Form and Self-Help Kit filed by Watts with the Branch.
 - On November 15, 2006, she telephoned Lawes and he advised her that he had "gone over the complaint allegations with Mr. Chami but had not heard back from him on the Employment Standards issues... (but) ... he understood if the complaint was not settled the hearing would proceed."
 - She telephoned Chami on November 17, 2006 to advise him that the Hearing would proceed on Monday, November 20, 2006 as no settlement had been reached and Chami said she should contact Lawes. She told Chami to have Lawes call her.

- She called Lawes twice at 2:00 p.m. and 2:30 p.m. on November 17, 2006 but his telephone line was busy at both times.
- She then called Chami at 3:00 p.m. on November 17, 2006 and advised him that she was unsuccessful in contacting Lawes and advised him that the Hearing was going ahead as scheduled at 9:00 a.m., on November 20, 2006. Chami advised her that if Lawes advised him to attend then he would otherwise Lawes may attend on his behalf.
- She again telephone Lawes at 3:30 p.m. on November 17, 2006 but his telephone line continued to be busy.
- She received a telephone call from Lawes at 8:05 a.m. on Monday, November 20, 2006 wherein he stated to her that he would not be attending the Hearing on Chami's behalf.
- She then called Chami at 9:10 a.m. on Monday, November 20, 2006 and left a voicemail message that the Hearing would be proceeding at 9:30 a.m. that morning, whether or not he attended. She also left her name and telephone number in the voicemail.

82. Graham also attaches a workflow sheet to her affidavit, which appears to have been prepared contemporaneously with the events described in her affidavit, as the workflow sheet is specifically dated with respect to each event or action described therein.

83. The Director submits that the Notice of Complaint Hearing dated October 6, 2006, which was sent with a confirmation of delivery to Chami provided, in part:

The Branch Adjudicator may make a Determination based on information before them, even if you choose not to participate or be represented at the hearing.

84. The Director further submits that while Chami acknowledges in his submissions that he only received a telephone message from Graham advising that the Hearing was proceeding after it had completed, if Chami was not expecting the Hearing to proceed then he should have contacted the branch upon or after receiving Graham's message. Instead, Chami did not respond to Graham's message after the Hearing and during the two-month period thereafter, before the issuance of the Determination.

85. The Director also notes that while there was not a formal reply made to Lawes' letter of October 31, 2006, Graham's affidavit evidence shows that there was a telephone conference between her and Lawes on November 2, 2006 wherein she advised Lawes of the issues outstanding in the Complaint and faxed him a copy of the Complaint and the Self-Help Kit filed by Watts with the Branch. The Director further notes that Lawes did not request an adjournment then or raise it as an issue.

Watt's submissions

86. Watts, in his initial submissions dated April 7, 2007, in reply to the appeal, simply states that he "totally" agrees with the Delegate and that the appeal is an attempt on Chami's part to reargue the case and should, therefore, be dismissed.

87. In his additional submission dated April 24, 2007, in reply to the appeal, Watts states that Chami was present at the mediation of the Complaint and the mediator explained to him:

88. What would take place at an adjudication” ... (t)he responsibilities of showing up at the adjudication (and) what would happen if he would not show up for the adjudication. The mediator went into specific detail with Ayman Chami regarding all of the responsibilities he would be obligated to fulfill at an adjudication”.
89. Watts also submits, in respect to the submission in the letter of October 26, 2006 from Chami’s bookkeeper/accountant, Lawes, to the Delegate, that it would be difficult for Chami to close his shop on the date scheduled for the Hearing on November 20, 2006, that he has “witnessed on several occasions ... Chami’s non-caring attitude towards not opening the shop and having days off, leaving the shop closed”.

ANALYSIS

90. Chami has advanced his appeal on all three grounds set out in Section 112. I will deal with each ground under separate descriptive headings below.

Error of law

91. The error of law ground of appeal, as previously indicated, is not clearly argued by Chami, although Chami’s counsel in the Appeal Form submitted in the Revised Appeal checks it off. It may be that it relates to the Delegate’s determination that Watts was an employee and not an independent contractor, which Chami is challenging in his appeal. However, before considering this ground of appeal, it is important to note that many panels of this Tribunal have considered the standard of review for error of law as delineated in the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12-Coquitlam)* (1998), 62 B.C.L.R. (3d) 354. In particular, in *Gemex*, the Court of Appeal defined error of law as containing the following elements:
- (1) a misinterpretation or misapplication of a section of the 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) exercising discretion in a fashion that is wrong in principle.
92. In *Re Britco Structures Ltd.* [2003] B.C.E.S.T.D. No. 260 (QL), the Tribunal, after considering the *Gemex* decision, *supra*, noted 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.
93. In the case of the issue of one’s status as an employee or an independent contractor, the Tribunal in *Re Pro-Serv Investigations Ltd.*, [2005] B.C.E.S.T.D. No. 59 (QL), (25 April 2005) indicated that this is a question of mixed law and fact and for the appellant to succeed on this question he must show an error in the legal analysis applied to the facts as found.

94. In my review of Chami's submissions in the appeal, I find no allegation on the part of Chami that the Delegate misinterpreted the law or legal principles applicable in determining whether Watts is an employee or an independent contractor. Moreover, my review of the Determination shows that the Delegate not only carefully applied the relevant sections of the Act (the definition of "employee", "employer" and "work" in Section 1) but his conclusion or finding that Watts is an employee is supportable on the evidence presented at the Hearing as well as in the pre-Hearing process.
95. The Delegate also considered the Rental Agreement signed by Madaire and Watts which Chami or Lawes on behalf of Chami submitted to the Delegate before the Hearing, presumably in support of the position that the relationship Watts previously had with Madeira continued under Chami's new ownership of the business. The Delegate found the Rental Agreement to violate the minimum standards of the Act and therefore of no effect and not determinative of the parties' relationship. Further, the Delegate preferred the evidence of Watts that the Rental Agreement was simply an attempt by Madeira to circumvent CRA's previous ruling, which found an employment relationship between Madeira and Watts.
96. While Chami may argue that the Delegate did not have the benefit of all evidence or facts because the Delegate did not hear from him at the Hearing as he did not attend, this is not an issue that goes to the error of law ground of appeal but rather pertains to the next ground of appeal-i.e. The natural justice ground of appeal.
97. Accordingly, I reject Chami's ground of appeal based on error of law.

Principles of Natural Justice

98. With respect to the natural justice ground of appeal, it should be noted that principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker [*Re 607730 B.C. Ltd. (c.o.b. English Inn and Resort)*, [2005] B.C.E.S.T.D. No. 55 (QL)].
99. Chami's submission under this ground of appeal is that he was aware of the Hearing date but did not appreciate that his personal attendance was required until after it had taken place. Chami also appears to construe Lawes' letter of October 26, 2006 to the Delegate as a request for an adjournment and argues that he was not advised that the Director would be going ahead in spite of the adjournment request and only received the message (from Graham) on his answering machine after the Hearing. Accordingly he did not have the benefit of a fair hearing and the Determination is not based "on the merit of all the evidence".
100. Having reviewed Graham's affidavit, the parties written submissions, the Determination and the Section 112(5) "record", I have tremendous difficulty in finding any merit in Chami's submissions under this ground of appeal. There is no doubt in my mind that Chami as well as his bookkeeper/accountant, Lawes, knew of the case against Chami. Chami attended at the mediation of the matter on October 2, 2006, which was unsuccessful in resolving the Complaint. Graham subsequently issued a Notice of Complaint Hearing containing the hearing date of November 20, 2006 and a Demand for Employer Records to Chami. Graham also, on November 2, 2006, after receiving Lawes' October 31, 2006 letter and verifying with Chami that he was acting on Chami's behalf, informed Lawes, inter alia, that if the Complaint were settled before the Hearing then the Hearing would not proceed but if it were not settled then the Hearing would proceed. She also went over the "outstanding complaint allegations" with Lawes but the latter did not request an adjournment of the Hearing. Graham also notes that on November 2,

2006, after speaking with Lawes, she also faxed him a copy of the Complaint and Information Form and Self-Help Kit filed by Watts with the Branch. Accordingly, there is ample evidence that Chami and his representative, Lawes, both were apprised of the case against Chami.

101. With respect to those aspects of the natural justice rights that entitle Chami the right to present his evidence, and to be heard by an independent decision-maker, there is ample evidence in Graham's affidavit that supports the Director's position that Chami was afforded these elements of the principles of natural justice but he failed to avail himself of the same. In particular, in Graham's affidavit, she notes that on November 15, 2006, she telephoned Lawes and he advised her that he had "gone over the complaint allegations with Mr. Chami but had not heard back from him on the Employment Standards issues... (but) ... he understood if the complaint was not settled the Hearing would proceed." Graham subsequently telephoned Chami on November 17, 2006 to advise him that the Hearing would proceed on Monday, November 20, 2006 as no settlement had been reached and Chami said she should contact Lawes and she made two unsuccessful attempts on November 17, 2006 to contact Lawes. Thereafter, Graham called Chami on the same date, on November 17, 2006, and advised him that she was unsuccessful in contacting Lawes and that the Hearing was going ahead as scheduled at 9:00 a.m., on November 20, 2006. Chami advised her that if Lawes advised him to attend then he would, otherwise Lawes may attend on his behalf. After speaking with Chami, Graham again attempted to call Lawes on November 17, 2006 but without any success. However, she received a call from Lawes at 8:05 a.m. on Monday, November 20, 2006. In that telephone call Lawes stated to Graham that he would not be attending the Hearing on Chami's behalf. If Lawes believed that he had sought an adjournment of the Hearing date in his letter of October 31, 2006 and obtained an adjournment then it would make no sense for him to tell Graham that he would not attend the Hearing, which was scheduled slightly more than an hour away.
102. In my opinion, both Chami and Lawes were aware based on the forgoing evidence in Graham's affidavit that the Hearing was going ahead as scheduled on November 20, 2006 and Chami chose not to attend. Moreover, if Chami discovered only after the Hearing the voicemail from graham advising that the Hearing was proceeding at 9:30 a.m. on November 20, 2006 it is curious that Chami did not make any attempts to contact the delegate or Graham after the Hearing date. The Determination was issued in excess of two months after the Hearing and Chami had sufficient time to contact the Delegate or Graham to explain that he either misunderstood that he had to be present at the Hearing or that he misunderstood that the Hearing was adjourned. However, Chami made no such contact.
103. In my opinion, Chami cannot, with any credence, state that he was not aware that he had to be at the Hearing on November 20, 2006, particularly when Graham telephoned him on November 17, 2006 and advised him that the hearing was going ahead as scheduled at 9:00 a.m. on November 20. Moreover, Chami's representative, Lawes, also knew that the Hearing was proceeding as scheduled when he called Graham at 8:05 a.m. on November 20 and advised her that he was not attending at the Hearing. In the circumstances I have difficulty accepting that Chami interpreted Lawes' letter to the Delegate on October 26, 2006 as a request for an adjournment of the Hearing that was granted by the Delegate (assuming one accepts the letter as a request for an adjournment in the first place). Moreover, if the letter were a request for an adjournment one would think that Chami or Lawes would have requested an alternative date for the Hearing. Instead, the letter simply states that Chami "works alone in his shop and would have difficulty closing his shop for November 20, 2006". This does not suggest that any other date would be more convenient to Chami. If anything, one could interpret the phrase to mean that Chami would have difficulty closing his shop at any time during business hours as he works alone. Chami could not have

reasonably expected that Lawes letter meant that the Hearing was postponed indefinitely or would not take place because he is a one-man operation.

104. In my opinion, Chami was afforded an opportunity to present his evidence at the Hearing and to be heard by an independent decision-maker but did not avail himself of that opportunity and cannot, therefore, claim that he was denied an opportunity to refute the evidence of Watts. It is not a breach of natural justice for the Director to make a Determination on the evidence provided by Watts when Chami, in my view, was offered a reasonable opportunity to respond and failed to attend at the Hearing without a good reason. Accordingly, I deny Chami's ground of appeal based on the allegation that the Director failed to observe the principles of natural justice in making the Determination

New Evidence

105. With respect to the new evidence ground of appeal in Section 112(1)(c) advanced by Chami, it should be noted that the Tribunal, in *Re Merilus Technologies Inc.* [2003] B.C.E.S.T.D. No. 171 (QL), established a four-part test for admitting new evidence at an appeal requiring the appellant to establish all four of the following conditions:

1. 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;
2. the evidence must be relevant to an issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value, in the sense that, if believed, it could on its own or with other evidence, have led the Director to a different conclusion on the material issue.

106. While I have not set out in my Decision all the "new evidence" Chami wants admitted in his appeal, I have carefully reviewed it and considered it also in context of Chami's request for an oral hearing so that he could call his witnesses to refute the evidence of Watts. In my view, the evidence Chami wishes to adduce as "new evidence" is relevant to the issues arising in the Complaint, has high probative value in the sense that it is capable of belief (although likely to be contested by Watts) and has high probative value and would have provided the Delegate with conflicting information on critical or material issues in the Complaint. However, the "new evidence" Chami seeks to adduce in the appeal is nothing more than Chami's version of events from the past and was available at the time of the investigation and adjudication of the Complaint and should have been presented to the Delegate hearing the Complaint. Chami, additionally, had an opportunity to present the said evidence to the Delegate at any time during the two months after the Hearing and before the Determination was issued, if Chami only discovered Graham's voicemail that the Hearing was proceeding as scheduled on November 20th after the Hearing. However, neither Chami nor any representative of his contacted the Delegate or the Branch at any time after the Hearing.

107. In my view, Chami has failed to discharge the onus placed on him to show that the evidence he seeks to adduce at the appeal 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 particularly prior to the Determination being made. An appeal to the Tribunal is not an opportunity for the appellant to present

evidence that should have been presented to the delegate or the Director at the Hearing of the Complaint. As a result, I reject Chami's ground of appeal based on "new evidence".

108. As I have addressed and rejected all three grounds of appeal of Chami, I dismiss Chami's appeal. Further, in light of my conclusion on the appeal, it is unnecessary for me consider Chami's application for a suspension of the effect of the Determination. That application is moot and, on that basis, is denied.

ORDER

109. Pursuant to Section 115 of the Act, I order the Determination dated January 23, 2007 be confirmed as issued, together with any interest accrued pursuant to section 88 of the Act.
110. I also confirm the Determination relating to the three administrative penalties of \$500.00 each against Chami for contravening the Act.

Shafik Bhalloo
Member
Employment Standards Tribunal