

An appeal

- by -

Victoria Floor Essence Incorporated
(“Victoria Floor”)

- 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.: 2009A/026

DATE OF DECISION: May 13, 2009

DECISION

SUBMISSIONS

Beverly Kovic	on behalf of Victoria Floor Essence Incorporated
John Heaney	on behalf of Victoria Floor Essence Incorporated
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), brought by Beverly Kovic (“Kovic”) of a Determination issued against Victoria Floor Essence Incorporated (“Victoria Floor”) on January 28, 2009 by a delegate of the Director of Employment Standards (the “Director”).
2. In the Determination, the delegate found that Victoria Floor had contravened the *Act* as it had failed to pay regular wages and vacation pay to its former employee, Mr. Steve Boulay (“Boulay”). The Director made an order against Victoria Floor for payment of the outstanding amounts plus accrued interest totalling \$2,765.39.
3. The delegate also ordered Victoria Floor to pay two administrative penalties of \$500.00 each. The first administrative penalty was in respect of Victoria Floor’s breach of Section 18 of the *Act* for its failure to pay Boulay all wages owing to him within 48 hours of termination of employment and the second was with respect to Victoria Floor’s contravention of Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) for its failure to produce payroll records relevant to Boulay’s complaints when requested by the delegate.
4. The total amount of the Determination is \$3,765.39.
5. I note that in paragraph one of the Appeal form Kovic is shown as the “person making the appeal” of the Determination and not Victoria Floor. My purpose in pointing this out is because the Determination is not against Kovic; it is against Victoria Floor. However, I note that Section 112 of the *Act* provides:

... a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds ...
6. The Section 112(5) “record” produced in this Appeal contains a company search for Victoria Floor showing Kovic as its sole director. I also note that the Determination was sent to Kovic and acknowledged received by the latter. In light of these findings and there being no issue taken by the Director or Boulay with the standing of Kovic as the Director of Victoria Floor at the time of this Appeal, I find that Kovic indeed has standing to file an appeal on behalf of Victoria Floor under Section 112 of the *Act* “as a person served with a determination”.
7. In the Appeal form, Kovic challenges the Determination on the basis of error in law on the part of the Director. However, in subsequently filed submissions of Victoria Floor after the latter retained counsel, it appears that two further grounds of appeal are raised or added to the first, namely, the new evidence and the natural justice grounds of appeal.
8. Victoria Floor is seeking the Tribunal to change or vary the Determination by amending the amounts ordered for wages, annual vacation pay, and accrued interest to be paid to Boulay to \$598.59, \$391.28, and \$10.67

respectively. Victoria Floor is also seeking the Tribunal to set aside the two administrative penalties of \$500 each.

9. Pursuant to Section 36 of the *Administrative Tribunals Act* (the “ATA”), which is incorporated in the *Act* (s.103), and Rule 17 of the *Tribunals Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of the Section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

10. As indicated earlier, in the separate submissions of Kovic and counsel for Victoria Floor, it appears that all three grounds of appeal available in Section 112 of the *Act* are invoked in this Appeal. Therefore, the issues in this appeal are whether the director erred in law or failed to observe the principles of natural justice in making the Determination and whether there is new evidence available that was not available at the time the Determination was made.

FACTS

11. Victoria Floor operated a floor business and employed Boulay in the capacity of a manager from August 14, 2008 to October 27, 2008.
12. Boulay filed a complaint under Section 74 of the *Act* on November 24, 2008, alleging that Victoria Floor contravened the *Act* by failing to pay him wages and vacation pay (the “Complaint”).
13. The delegate of the Director conducted an investigation of the Complaint and spoke with both Boulay and Kovic.
14. With respect to Boulay’s evidence during the investigation of the Complaint, the delegate states that Boulay presented that he worked his normal days and hours through to October 27, 2008 and he was paid his regular bi-monthly wages up to October 15, 2008 only. Therefore, Boulay claimed that, at the time of the termination of his employment on October 27, 2008, he was owed wages for nine days of work based on his regular hours of work of eight hours per day for a total of 72 hours at his regular rate of \$28.85 per hour.
15. Boulay also claimed that he did not receive vacation pay and that he had not taken any paid vacation while working for Victoria Floor.
16. With respect to the evidence of Kovic, the delegate notes that during her investigation of the Complaint she spoke with Kovic by telephone and the latter advised “she was bankrupt and that there was no money available from either Victoria [Floor] or her to pay any wages to Mr. Boulay.” The delegate also noted that Kovic attributed her and Victoria Floor’s financial state to her ex-husband who she said was a drug addict and stole money from the company causing her to “close the business and file for personal bankruptcy”.
17. The delegate also notes that Kovic said that Boulay was informed that his hourly wage included vacation pay and she did not think that he was owed any further wages, as the company computer in Boulay’s possession should cover his final wages.
18. The delegate also notes in the Determination that she spoke with a Ms. Charlene Pears (“Pears”), a Trustee in Bankruptcy of Kovic, who confirmed that Kovic had indeed filed for bankruptcy and provided her with the current mailing address for Kovic along with some bankruptcy documents (which form part of the

Section 112(5) record in this Appeal). In the bankruptcy documents, the document entitled “Information Relating to the Affairs of the bankrupt” purportedly executed by Kovic on November 6, 2008, shows Kovich’s address at #104 – 1375 Bear Mountain Pkwy., Victoria, British Columbia (the “Bear Mountain Parkway Address”). However, in the company search for Victoria Floor dated November 25, 2008 Kovic’s address is shown as 406 – 1913 Sooke Road, Victoria, BC, (the “Sooke Road Address”), the same as the registered and records office address of Victoria Floor.

19. On December 22, 2008, the delegate sent both a letter delineating particulars of Boulay’s claims and requesting Victoria Floor’s response (the “Letter”) and a Demand for Employer Records (the “Demand”) seeking payroll records of Victoria Floor pertaining to Boulay by registered mail and regular mail to both Victoria Floor and Kovic at the Bear Mountain Parkway Address and the Sooke Road Address. The deadline the delegate imposed on Victoria Floor and Kovic to provide payroll records pertaining to Boulay in the Letter and Demand was 4:00 p.m. January 9, 2009.
20. Neither Kovic nor Victoria Floor responded to the Letter or the Demand for payroll records of the delegate by the January 9, 2009 deadline or at any time thereafter. My review of the record in this Appeal shows a mail trace sheet of the Director showing the Letter and the Demand sent to the Bear Mountain Parkway Address as “unclaimed” and the one sent to the Sooke Road Address as “returned ‘moved’” on December 23, 2008.
21. The delegate, based on Boulay’s evidence during her investigation which she found to be both “credible and compelling” and the telephone conference with Kovic but without the benefit of any payroll records of Victoria Floor, proceeded to make her determination finding Boulay was owed regular wages for the nine days between October 16 to October 27, 2008 inclusive, at eight hours per day at the rate of \$28.85 per hour for a total of \$2,077.20. The delegate also found that Kovic was entitled to vacation pay of \$657.00 for a total of \$2,734.56.

SUBMISSIONS OF VICTORIA FLOOR

22. Victoria Floor’s submissions comprise of Kovic’s submissions as well as submissions of counsel. I propose to deal with Kovic’s submissions here and counsel’s under a separate heading below.
23. Kovic, in her submissions, indicates that Boulay was hired to “oversee project installations and act as the sales representative for the company”. Boulay commenced employment with Victoria Floor on August 14, 2008 and worked until October 15, 2008, according to Kovic. She also indicates that Boulay was hired with a variable salary comprising of commissions, bonuses and vacation pay with the latter component included in Boulay’s salary.
24. Kovic also indicates Boulay’s first three months of employment were on a probationary basis and Boulay agreed to be paid “incentives while he was looking for new contracts and building customer relationships and that commissions on his contracts would be paid into his salary” [sic]. However, during the first month, Kovic states Boulay did not earn any commissions and in the second month she states she had a meeting with Boulay to review his performance, customer contacts and sales. She states she discovered that Boulay “was not showing any results and he had no sales” in the second month. As a result, Kovic says that she attempted to motivate Boulay to get contracts by advising him that she would pay him an incentive.
25. With respect to the third month of his probationary period commencing October 15, 2008, Kovic states that she noticed unusual behaviour on Boulay’s part. She states that he attended at work late on October 13th and 14th. When she called him at his home, Kovic states that Boulay explained that he had slept in two days in a row.

26. On October 15, Kovic states Boulay received his paycheque and left the office without again contacting the office for the rest of the day or advising of his whereabouts. Customers were looking for him but he had disconnected his cell phone, according to Kovic. As a result of Boulay's said behaviour, Kovic indicates that she decided he was not suitable for continued employment with Victoria Floor.
27. Kovich then states that Boulay did not return to work on October 16 to 18 inclusive. During this time, she attempted to contact him by telephoning his home and cellular phone numbers without any success. She then resorted to calling his ex-wife's uncle, Mr. Randy Douglas ("Douglas"), to see if he had been in contact with Boulay. She states that Douglas went to Boulay's home but did not tell her what problem Boulay was experiencing. She also points out that several people from Boulay's meetings for drug and alcohol counselling had been at the store looking for him.
28. On October 18, 2008, Kovic states that Boulay attended work for 15 minutes. He was crying at the time and explained to Kovic that he was absent from work due to his drug use and personal problems. Apparently, his girlfriend had left him, according to Kovic.
29. Kovic further states that on October 20 and 21, 2008, Boulay continued dealing with his personal problems and "was not able to attend to any work issues". On October 22, 2008, she states that he came back to work and she had several meetings with him and advised him "that this was not the job for him and that the next four days were for transitioning his projects to [Kovic]". She indicates that he was "to provide project updates, customer names, and clarify commissions earned" to her. She also states that he "accepted he did not earn any commissions on any contract".
30. Kovic then indicates that on October 27, 2008, she asked Boulay to return the office computer, as that was the property of Victoria Floor "and that would release his final pay cheque". She further states that Boulay insisted on returning to the office the next day but never did. As a result, the computer remains in Boulay's possession and he never collected his final pay which "discount(s) the purchase price [of the computer] of \$789.00 from his incentive based salary".
31. Kovic concludes her submissions by indicating that she did not receive the delegate's Letter and Demand if it was sent to her business address since she closed her business in early November. However, she indicates that she received the delegate's registered letter of January 28, 2009, which contains the Determination and the Reasons for the Determination. Kovic does not explain which of the two addresses she received the Determination at, although the Determination as well as the earlier Letter and the Demand were sent to Victoria Floor and Kovic at the same addresses, namely the Sooke Road Address and the Bear Mountain Parkway Address.
32. Kovic has also attached, as part of Victoria Floor's submissions, a letter from Victoria Floor's bookkeeper, Rocio Soler ("Soler"), dated February 15, 2009 addressed to the delegate. Soler states in his letter that he met Boulay "as the sales and project manager" of Victoria Floor and prepared, *inter alia*, the last payroll for Boulay on October 27 pursuant to the advice of Kovic that Boulay would no longer be working with Victoria Floor. He stated that it was his belief that Boulay did not want to work with Victoria Floor after his last pay cheque on October 15th because he was absent from work the three following days. He further states that he was not aware that Boulay had a drug problem but he noticed that Boulay was absent for work two days before October 15th and the week following. According to Soler, Boulay had abandoned his position without resigning because of his sudden absence.
33. Soler further states that in the absence of Boulay, he helped Kovic attend the floor, answering phone calls, helping customers and decorating the store, as these were Boulay's job responsibilities.

34. Soler also states that Kovic told him that Boulay would no longer be working with Victoria Floor and that she was attempting to contact him to “retrieve her property, keys, and to finalize the paperwork”.
35. Soler concludes his letter by stating that Kovic asked him to prepare Boulay’s last payroll for October 27th, which he did. Soler also states that he understood Victoria Floor’s justification for terminating Boulay’s employment was the latter’s “poor performance, no sales, and several missed days from work within the probation period”. Soler also states that he witnessed Boulay’s absence from work for at least seven days and his late attendance at work on many other occasions before and after October 15.
36. In addition to Soler’s letter, Kovic also includes a copy of the October 28, 2008 letter of termination addressed to Boulay and some records of Boulay’s payroll. With respect to the payroll records, I have reviewed them and do not find it necessary to delineate the records here except to say that the payroll records predate the Determination.
37. With respect to the termination letter, it is brief and I have decided to set it out verbatim below:

Floorescence
LEEDing Design

406, 1913 Sooke Road
Victoria, BC V9B 0C9
250.474.2435 phone
250.294.8517 fax

October 28, 2008

Steve Boulay
1297 Boulderpath Road
Victoria, BC V9C 3X5

Dear Steve,

Re: Termination of Employment

Further to our meeting of October 27, 2008 I regretfully confirm that your employment with Floor Essence is terminated with immediate effect and is within your probationary period.

As stated at our meeting the reason for terminating your employment with us is due to performance.

Your final pay will be mailed to your home address and calculated as follows:

October 16th – absent
October 17th – absent
October 18th – absent
October 20th – ½ day
October 21st – ½ day
October 22 – attended
October 23 – attended
October 24 – attended
October 27 – attended

5 days @ \$166.67 per day less deductions
Less cost of computer of \$589.59 (original purchase price \$789.59)

I wish you much success in your future endeavours.

Yours truly,

Beverly Kovic
President

SUBMISSIONS OF THE DIRECTOR

38. The Director notes that the employer did not provide the delegate with any payroll records during the investigation and therefore the Determination was based largely on the information provided by Boulay.
39. The Director also submits that the delegate sent the Letter and Demand to Kovic's Bear Mountain Parkway address which was provided to her by the Bankruptcy Trustee, Pears, on December 9, 2008 and it was represented to her that the said address was Kovic's current mailing address. The Director also notes that the Bear Mountain Parkway address is also delineated in the bankruptcy notice filed by Kovic in November 2008.
40. While the December 22nd letter that was sent by the delegate by registered mail and returned "unclaimed", the Letter and the Demand were sent by regular mail and the envelope was "never returned as undelivered".
41. Moreover, the Director notes that the delegate also used the same Bear Mountain Parkway address to send the Determination on January 28, 2009 and the Determination was acknowledged by Kovic as received.
42. The Director also submits that when Kovic was telephoned during the investigation of the Complaint on December 8, 2008, Kovic indicated to the delegate that Boulay's salary included vacation pay and that he was not owed any wages as the company computer he retained in his possession was sufficient final pay. The Director states that when the delegate, in that same telephone conference with Kovic, asked her to provide payroll records, she indicated that they were in storage and that she would not be providing them and "terminated the phone call" when the delegate asked her to forward them to her for her investigation.
43. The Director submits that Victoria Floor is now attempting to adduce records and information that should have been provided during the investigation of the Complaint and, therefore, the Tribunal should not consider this information now.
44. In the alternative, the Director states that if the Tribunal allows the evidence including payroll evidence now adduced by Victoria Floor in the Appeal then there is still wages owing to Boulay as Victoria Floor has acknowledged a total of five days Boulay worked between October 16 and 27, 2008 and the payroll records provided do not indicate any wages were paid to Boulay after the pay period ending October 15, 2008, nor do they indicate a payment of vacation pay.
45. The Director concludes that neither the inclusion of "vacation pay in a monthly salary or wage" nor offsetting of any wages due to Boulay "in the form of a computer" Boulay allegedly retained in his possession is allowable under the *Act*.

REPLY SUBMISSIONS OF VICTORIA FLOOR

46. Victoria Floor submitted a reply to the Director's submissions through its counsel. Counsel submits that Victoria Floor should be allowed to adduce evidence in support of its appeal as the delegate sent the Letter and Demand by registered mail to Kovic's Bear Mountain Parkway Address and it was returned as "unclaimed" as Kovic had moved out of that address earlier in the same month.
47. Counsel also points to the "Registered Mail Trace Sheet of the Ministry of Labour" contained in the Section 112(5) record produced by the Director in this Appeal to argue that the delegate should have known that Kovic was unaware of or did not receive the Letter or the Demand and could not be expected to respond to either. In the circumstances, counsel submits that the delegate's "process was a breach of the Appellant's rights to procedural fairness, particularly but not solely, the principal of *audi alterum partem*."

48. Counsel further submits that the Tribunal should not “compound the prejudice done to the Appellants [referring to Victoria Floor as well as Kovic as there is a Section 96 determination against her which I will deal with under a separate decision] by the earlier breach and should accept into evidence those exhibits tendered today by the Appellants so that the Tribunal may determine this matter on its merits having before it all the relevant evidence”.
49. Counsel then proceeds to argue the merits of Boulay’s claim on the basis of the evidence adduced by Victoria Floor for the first time in the Appeal. I have reviewed and considered counsel’s submissions carefully and do not intend to set them out here in light of my decision herein on the preliminary issue of the admissibility of Victoria Floor’s evidence in this appeal.
50. Counsel also makes submissions on the administrative penalties imposed on Victoria Floor. With respect to the administrative penalty in respect of the violation of Section 46 of the *Regulation* for failure to produce payroll records, counsel notes that in the December 8, 2008 telephone conversation of the delegate with Kovic, the former did not tell Kovic the January 9, 2009 deadline for production of employment records. Counsel also notes that in that telephone conversation, Kovic “did not refuse to provide the delegate with employment records, but explained the records were difficult for her to access as they were in a storage locker ...”. Counsel reiterates that the delegate was also aware, as at January 9, 2009, the deadline date imposed by the delegate in the Demand, that Kovic had not received the Letter and the Demand based on the trace sheet referred to earlier. According to counsel, the administrative penalty levied for violation of Section 46 against Victoria Floor was in error or, alternatively, was not based on a reasonable exercise of the delegate’s discretion and should be set aside.
51. With respect to the administrative penalty for violation of Section 18 of the *Act*, counsel submits that Victoria Floor and Kovic calculated the salary owed to Boulay for his final four full days and two half-days of work in good faith and on the basis of the terms and conditions of Boulay’s employment. While Counsel acknowledges that Victoria Floor and Kovic erred in withholding monies from Boulay’s termination pay on account of Boulay having kept or “stolen” the laptop from Victoria Floor and Kovic, Counsel denies any bad faith motivation on the part of Kovic or Victoria Floor.
52. Counsel also submits that Boulay’s claim for quantum for his termination pay is not supported on the balance of the evidence. For all these reasons, counsel submits that the administrative penalty against Victoria Floor for violation of Section 18 of the *Act* should also be set aside.

ANALYSIS

53. As indicated in my decision earlier, Victoria Floor, through submissions of Kovic and its counsel, has appealed the Determination on the basis of all three permissible grounds under Section 112 of the *Act*, namely, the “error of law”, the “natural justice” and the “new evidence” grounds of appeal.
54. I find that the error of law ground of appeal is based on no more than a bare assertion unsupported by any evidence and I, therefore, dismiss that ground of appeal.
55. In my view, this Appeal falls to be decided on the natural justice and the new evidence grounds of appeal, which, in this case, are very closely related.

56. With respect to the natural justice ground of appeal, I note Section 77 of the *Act* states:

Opportunity to respond

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

57. In my view, a denial to a party of the opportunity to respond to an investigation by the Director would constitute a breach of the principles of natural justice. However, in this case, I am not convinced such took place. The delegate contacted Kovic, a director of Victoria Floor, by telephone on December 8, 2008 and discussed with her Boulay's Complaint and Kovic responded that he was not owed any wages and that the company computer he had retained satisfied his final wages. Kovic sought to offset the wages owed to Boulay against the company computer he allegedly retained possession of after the termination of his employment on October 27, 2008. Kovic also admitted in that telephone discussion that the salary Boulay received included vacation pay.

58. I also note that there is no dispute that the delegate asked Kovic in the December 8, 2008 telephone call to provide payroll records pertaining to Boulay and she responded that they were in storage. While the delegate indicates that Kovic refused to provide the records and terminated the phone call when asked to forward the records to the delegate to assist her with her investigation of the Complaint, counsel for Victoria Floor in his submissions indicates that Kovic did not refuse to provide the payroll records to the delegate. He states that Kovic indicated to the delegate that the "records were difficult for her to access as they were in a storage locker underneath the fixtures and supplies of her former business". Clearly Kovic has managed to obtain the "difficult to get" records to adduce in this appeal. There is, however, no evidence before me to show how difficult the records were for Kovic to obtain or access and how much time she needed to access them. Surely she was able to access them when she needed them for this appeal. I am left with the sense, from counsel's submission, that the delegate, upon hearing from Kovic that the records were difficult to access during the investigation stage, simply left the matter alone and did not stress the importance of obtaining them further. Frankly, I do not find the evidence of Kovic on this matter persuasive and prefer the Director's evidence that Kovic was asked to produce the payroll records and she refused to do so and terminated the phone call with the delegate when the delegate asked her to forward the payroll records to her. This act of Kovic, in my view, shows her disinterest in participating in further investigation of Boulay's Complaint of which she had sufficient notice.

59. With respect to the delegate's Letter containing particulars of Boulay's claim and the Demand of same date, both these documents were sent to Victoria Floor and Kovic by registered mail and regular mail at the Bear Mountain Parkway Address and the Sooke Road Address. While counsel and Kovic both state in their submissions that Kovic moved from the Bear Mountain Parkway Address earlier in November 2008 and the registered mail was unclaimed and the mailed letter at the Sooke Road Address returned with the notation "moved", I am not persuaded that Kovic was unaware of the Letter and the Demand. I say this because the delegate, after making the Determination on January 28, 2009, sent it together with the reasons for the Determination by registered mail to Kovic at the Bear Mountain Parkway address and there is in the record a Canada Post tracking document evidencing that Kovic signed for it on February 2, 2009. Neither Kovic nor counsel for Victoria Floor provide an explanation of why or how Kovic ended up knowing about the registered mail containing the Determination and the reasons for the Determination when they were both sent to the same Bear Mountain Parkway address Kovic had moved out of in November. Incidentally, the Bear Mountain Parkway address is also the same address that appears in the bankruptcy documents provided to the delegate by the Bankruptcy Trustee, Pears, who advised the delegate that the said address was the current mailing address for Kovic at the material time.

60. I also note that the corporate search for Victoria Floor performed by the Director on November 25, 2008, shows the Sooke Road Address for the registered and records office of Victoria Floor as well as the mailing address for Kovic. There is no evidence of any efforts on the part of Kovic or Victoria Floor to change or correct that information, if it required correcting at all. I would be prepared to give benefit of the doubt to Kovic and Victoria Floor if their addresses changed and they tried to correct them with the corporate registry but the latter was slow in updating the changes. However, there is no such evidence before me to consider.
61. In my view, this is a case of Kovic and Victoria Floor not wanting to participate in the investigation of the Complaint and deciding to turn a blind eye to the investigation. Where an employer, as Victoria Floor has in this case, declined to cooperate in the investigation of a complaint such as by failing to respond to the Demand or refusing to produce employer's payroll records or terminating a telephone call with the delegate when asked to produce payroll records, the employer will not succeed in alleging breach of natural justice rules against the Director when the delegate proceeds to make a determination on the evidence provided by the party who participated in the investigation. In my view, Victoria Floor and Kovic were offered a reasonable opportunity to respond but failed or refused to do so without good reason. I do not believe that Kovic did not know of the delegate's Letter or the Demand, particularly when both were sent to her home address, the Bear Mountain Parkway Address, the same address where the Determination and the Reasons for the Determination were sent by registered mail and picked up by her. In the circumstances, I reject the natural justice ground of appeal of Victoria Floor.
62. With respect to the new evidence ground of appeal, the oft quoted authority on the admissibility of new evidence is the decision of the Tribunal in *Re: Merilus Technologies Inc.*, B.C. EST #D131/03. In this case, the Tribunal set out four conjunctive requirements that must be met before new evidence will be considered. The appellant must establish that:
- 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;
 - The evidence must be relevant to a material issue arising from the complaint;
 - The evidence must be credible in the sense that it is reasonably capable of belief; and
 - The evidence must have high potential of 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.
63. The four-fold criteria above are conjunctive and not alternative requirements.
64. In this case, the evidence adduced by Kovic as well as counsel for Victoria Floor was available to Victoria Floor well in advance of the Determination being made. In particular, the payroll records, the copy of the termination letter, the evidence of Kovich and the evidence of the bookkeeper, Soler, were all available during the investigation of the Complaint and could have been provided by Victoria Floor or Kovic to the delegate before the latter made the Determination. Both Victoria Floor and Kovic, in my view, were aware that the Complaint was proceeding when Kovic spoke with the delegate on December 8, 2008 and refused to produce payroll records pertaining to Boulay and terminated the phone call with the delegate. I also believe, on the balance, that Kovic and Victoria Floor were aware of the Letter and the Demand from the delegate since Kovic acknowledged receipt of the Determination and the reasons for the Determination sent about a month later at the same address.

65. As this Tribunal has indicated previously, new evidence cannot arise as a result of a party turning a blind eye to contact or correspondence from the delegate during the investigation stage of the complaint and failing to participate in the investigation and taking the opportunity to adduce evidence that was otherwise available to it. In this case, I find that Victoria Floor fails with respect to the first of the conjunctive requirements' in *Re: Merilus* decision and therefore, I am not required to consider the balance of the requirements delineated in that case. Accordingly, the evidence and materials adduced by Victoria Floor in this appeal for the first time do not constitute "new evidence" within the meaning of Section 112(1)(c) and I need not consider them.
66. I also note that Section 2(d) of the *Act* provides that one of the purposes of the *Act* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*". To allow Victoria Floor, at the appeal of the Determination, to provide afresh evidence otherwise available to it during the investigation stage would run counter to and frustrate this very important objective of the *Act*.
67. Accordingly, I dismiss Victoria Floor's appeal of the Determination.

ORDER

68. The appeal is dismissed and the Determination dated January 28, 2009, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal