Employment Standards TRIBUNAL

An appeal

- by -

Unique Holdings Ltd.,
carrying on business as 48North Restaurant and Concept Lounge
(Kelowna and Prince George)
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2015A/44

DATE OF DECISION: May 27, 2015

DECISION

SUBMISSIONS

Shounak Chakroborty	on behalf of Unique Holdings Ltd., carrying on business as 48North Restaurant and Concept Lounge (Kelowna and Prince George)

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Unique Holdings Ltd., carrying on business as 48North Restaurant and Concept Lounge (Kelowna and Prince George) (the "Employer"), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on February 17, 2015 (the "Determination").

2. The Determination found that the Employer had contravened Part 3, section 18; Part 4, section 40; Part 5, section 45; Part 7, section 58; and Part 8, section 63 of the *Act*; and Part 8, section 46 of the *Employment Standards Regulation* (the "*Regulation*") in respect of the employment of Vinod Pandey ("Mr. Pandey"), Kristopher Tanner ("Mr. Tanner"), Chandler Dokuchie ("Ms. Dokuchie"), Denton Kezar ("Mr. Kezar") and Krista Taylor ("Ms. Taylor") (collectively, the "Complainants"), and ordered the Employer to pay wages to the Complainants in the total amount of $4,443.77, including accrued interest pursuant to section 88 of the *Act*. The Employer was also ordered to pay administrative penalties in the amount of $4,000.00. The total amount of the Determination is $8,443.77.

3. The Employer has filed an appeal of the Determination on the sole ground set out in section 112(1)(c) of the *Act*: new evidence has become available that was not available when the Determination was being made.

4. On March 27, 2015, Shounak Chakroborty ("Mr. Chakroborty"), a director and officer of the Employer, submitted an incomplete appeal, on behalf of the Employer, to the Employment Standards Tribunal (the "Tribunal"). At the same time, Mr. Chakroborty requested an extension of time to submit a completed appeal by April 20, 2015, stating that the Employer required "paperwork" from its accountant who was busy at the time.

5. On March 31, 2015, the Tribunal acknowledged to the parties that an appeal had been received from the Employer, granted the Employer a time extension to provide additional documents in support of the appeal by April 20, 2015, requested production of the section 112(5) "record" from the Director (the "Record"), and notified the parties, among other things, that no submissions were being sought from them pending review of the appeal by the Tribunal and that following such a review, all, or part, of the appeal might be dismissed.

6. On April 16, 2015, the Record was provided by the Director to the Tribunal, and a copy was sent to the Employer. A deadline of May 5, 2015, was set for any objection by the Employer to the completeness of the Record. The Employer did not provide any objections by the appointed date.

7. On April 19, 2015, Mr. Chakroborty asked for a further extension of time to submit the Employer's documents in support of the appeal, reiterating the same reason for the request as before, namely, the Employer's accountant was busy. The Tribunal acceded to Mr. Chakroborty's request, and granted the Employer a further time extension to May 5, 2015.

8. On May 5, 2015, Mr. Chakroborty, on behalf of the Employer, provided written submissions with some documents in support of the Employer's appeal.

9. On May 12, 2015, the Tribunal sent a copy of the Employer's written submissions and documents to the delegate and to the Complainants, and again advised all the parties that no submissions were being sought from them pending review of the appeal by the Tribunal. Following such review, all, or part, of the appeal might be dismissed.

10. Having reviewed the appeal, including the reasons for appeal submitted by the Employer and the Record, I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Reasons for the Determination (the "Reasons"), the Appeal Form and written submissions of the Employer, and my review of the Record that was before the Director when the Determination was being made. Under section 114 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 114(1) of the *Act*. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Complainants will, and the Director may, be invited to file further submissions. Conversely, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

11. The issue at this stage of this appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

12. Based on the delegate's corporate search of the Employer conducted on July 12, 2014, the Employer is a company incorporated under the laws of British Columbia on November 3, 2009, with Mr. Chakroborty listed as its sole director, and both Mr. Chakroborty and Mohinder Singh Verma ("Mr. Verma") listed as its officers.

13. The Employer operates two (2) restaurants, namely, 48North Restaurant and Concept Lounge in Kelowna, British Columbia ("48North KE") and 48North Restaurant and Concept Lounge in Prince George, British Columbia ("48North PG").

14. The Complainants were employed as servers or cooks, and worked for the Employer at the latter's restaurants between February 2014 and December 2014.

15. The Complainants submitted their individual complaints between July 2014 and December 2014, within the time allowed under the *Act*, alleging the Employer contravened the *Act* by failing to pay them wages, overtime, vacation pay, statutory holiday pay and, in the case of one (1) of the Complainants, failing to reimburse her for costs of doing business.

16. In the Reasons, the delegate sets out, at great length, both his and his predecessor's efforts to communicate with the Employer during the investigation of the Complainants' allegations, which I think requires some review because it is relevant in terms of the ground of appeal the Employer is advancing - new evidence - and the Tribunal's ultimate decision in the appeal. More particularly, I note, in the Reasons, the delegate states that on September 15, 2014, another delegate of the Director contacted the Employer (I presume Mr. Chakroborty since the Record shows all contacts were with him) by telephone and advised him of the first complaint submitted by Mr. Pandey. The latter indicated he was out of the country but would discuss

the issue with his accountant, and would respond on September 22, 2014, but failed to do so. Subsequently, on September 24, 2014, the same delegate attempted to contact Mr. Chakroborty and left a call-back number.

17. On September 29, 2014, the delegate sent Mr. Chakroborty an email asking the latter to contact him by October 1, 2014. Mr. Chakroborty responded later the same day by telephone, and advised the delegate that he was still out of the country and would have his accountant send all the documents requested.

18. As no documents were received from the Employer, on October 6, 2014, the delegate again attempted to contact Mr. Chakroborty and left a call-back number. The following day, on October 7, 2014, Mr. Chakroborty returned the delegate's call, and informed him that all documentation would be sent within the hour. This representation proved to be false as the delegate did not receive any documents from Mr. Chakroborty on that day.

19. On October 8, 2014, the Employer sent a copy of Mr. Pandey's Record of Employment, and advised the delegate that all other documentation requested would be sent by October 10, 2014. Again, this representation proved to be false as no further documents were provided to the delegate on October 10, 2014.

20. On October 27, 2014, the second delegate (responsible for making the Determination) sent Mr. Chakroborty a letter advising him of a second complaint against the Employer from another former employee, Mr. Tanner, and requested the Employer to submit its evidence in response to the allegations made by both Mr. Pandey and Mr. Tanner. The delegate also sent a Demand for Employer Records for both these complainants with a deadline for production of 4:00 p.m. on November 10, 2014. The delegate's letter and the Demand for Employer Documents were both sent by registered mail and received at the registered and records office of the Employer on November 3, 2014.

21. On November 24, 2014, the delegate sent the Employer a second letter (to the attention of Mr. Chakroborty) advising him that a third complaint had been submitted by another former employee, Ms. Dokuchie, and asked the Employer to submit its evidence in response to the allegations made by all three (3) employees: Ms. Dokuchie, Mr. Pandey and Mr. Tanner. The delegate also sent a Demand for Employer Records for all three (3) complainants, by registered mail and by email, to the Employer with a deadline for production of 4:00 p.m. on December 12, 2014. The delegate's letter and Demand for Employer Records were received at the Employer's 48North PG location by the director, Mr. Chakroborty, on November 28, 2014, and at the registered and records office of the Employer on December 1, 2014.

22. On November 27, 2014, the delegate contacted the Employer who advised that the delegate's email of November 24, 2014, was the first notice he had received with respect to any Employment Standards complaints against the Employer. He advised the delegate that all records for the first three (3) complainants would be sent prior to the December 12, 2014, deadline. However, like Mr. Chakroborty's previous representations, this representation turned out to be false as no documents were provided to the delegate by December 12, 2014.

23. On December 10, 2014, the delegate sent the Employer a third letter (to the attention of Mr. Chakroborty), advising of the fourth and fifth complaints submitted by other former employees, Mr. Kezar and Samantha Halagaza ("Ms. Halagaza"), and asked the Employer to provide evidence in response to the allegations of all of the complainants as at that point. The delegate also sent a Demand for Employer Records for the last two (2) employees to the Employer with a deadline for production of 4:00 p.m. on December 24, 2014. The delegate's letter and the Demand for Employer Records were both sent by registered mail and received at the

registered and records office of the Employer on December 12, 2014. I should note at this point that the complaint of Ms. Halagaza did not proceed as there was insufficient evidence.

24. On January 7, 2015, the delegate sent a fourth letter to the Employer (to the attention of Mr. Chakroborty), advising of the sixth complaint submitted by another former employee of the Employer, Ms. Taylor, and asked the Employer to provide its evidence in response to the allegations made by Ms. Taylor. The delegate also sent the Employer a Demand for Employer Records for all Complainants with a deadline for production of 4:00 p.m. on January 14, 2015. The delegate's letter and the Demand for Employer Records were sent by registered mail and received at the Employer's registered and records office on January 12, 2015.

25. On January 14, 2015, Mr. Chakroborty, on behalf of the Employer, requested a 2-day extension to produce all records and make voluntary payments in response to some of the complainants. Based on the Record, the delegate appears to have acceded to Mr. Chakroborty's request and granted the Employer an extension of time to January 16, 2015. However, Mr. Chakroborty subsequently asked for two (2) further extensions and the delegate appears to have extended the final deadline for production of documents to January 27, 2015.

26. On January 26, 2015, Mr. Chakroborty provided a brief written submission in an email attaching incomplete payroll information in response to the allegations, and advised that he would provide additional information, including particularly the daily records of hours worked by the Complainants, and make some voluntary payments on January 27, 2015. However, as at the date of the Determination, February 17, 2015, no further documentation or payments were provided by the Employer to the delegate or the Employment Standards Branch.

27. With respect to the brief written submission of Mr. Chakroborty of January 26, 2015, the relevant portion of his email is reproduced verbatim below:

> Please review the following :
> 1) KRISTA TAYLOR IS NOT OWED A SINGLE PENNY AS PER OUR PAY ROLL RECORDS .PLEASE FIND THE ATTACHED
> 2)Vinod pandey [*sic*] is not owed any thing [*sic*] except 9 hrs at 10 .25 as thats [*sic*] the only time he worked in quesnal [*sic*] and the rest of the time he was sick or it was cold for him and i [*sic*] am willing to pay him for that 9 hrs .We have paid for the trip the food and the stay [*sic*].
> 3)Kristopher tanner [*sic*] is owed 34.5 hrs at 13 dollars and the cheque has been sitting with us at [*sic*] and it has been taken as per schedules as he has not signed in or out in our sign sheet and the chef who was responsible for the kitchen hours had repeatedly asked him so all we have the schedules and he may have worked less but not more .Also he was hired for 11 dollars and [*sic*] hour and the last two cheques we [*sic*] at 13dollars [*sic*] an hour.
> 4)Chandler [*sic*] last cheque is with us and we will submit it to the prince george [*sic*] branch by friday [*sic*] along with kristopher tanner [*sic*]. She lied on her sign in sheets and when asked was corrected ,within the next two days i [*sic*] will send you the fax copy of her sign in sheets ,also we have no records of the purchases and so we don't think that we owe the money apart from the fact that money went missing while she was the controller which we will proceed with a small claim court [*sic*].
> 5)Denton has a pay cheque of 35.5 hrs as per his sign out sheet and has a cheque waiting which we are forwarding [*sic*] the pg [*sic*] branch and also within the next two days i [*sic*] will be submitting the sign in sign out sheet for him. Please find the attached proof for most of them and once i [*sic*] am in kelowna [*sic*] i [*sic*] will forward you with the sign in sign out sheets . i [*sic*] have also attached pay stubs that shows [*sic*] we pay vacation pay per cheque. I would request you to kindly wait for the two days to see the sign in sign out sheet which will clear the air a lot.

28. The delegate, having received the evidence of the Employer, assessed it against the evidence of the individual Complainants, as set out in the individual summaries attached to the Reasons (which I have reviewed but do

not find necessary to set out in detail here). In preferring the evidence of the individual Complainants over the Employer's and finding in favour of the Complainants in regard to most, but not all, of the claims, the delegate states that the Employer provided minimal evidence to dispute the Complainants' allegations that they were owed wages, and admitted that four (4) of the Complainants (excepting Ms. Taylor) were owed final wages. The delegate also states that, while the Employer had an established business practice of maintaining a daily record of hours worked by its employees at each of its two restaurants and represented that those records would be provided as evidence and voluntary payments made in response to some of the Complainants, the Employer failed to do either. In the result, the delegate concluded that the Complainants' records constituted the best evidence available to determine the hours they each worked, and went on to determine wages the Employer owed to each, as set out in the individual summaries.

29. With respect to the eight (8) administrative penalties levied against the Employer for breaches of the *Act* and *Regulation* at both locations - Kelowna and Prince George - the delegate provides justification in the Reasons. With respect to the penalty levied against the Employer for breach of section 17 of the *Act*, the delegate explains that this section requires an employer to pay an employee all wages earned in a pay period at least semi-monthly and within eight (8) days after the end of the pay period. The limited payroll records provided by the Employer, according to the delegate, indicated on multiple occasions that cheques produced for Ms. Taylor were dated later than eight (8) days after the end of the pay period during which the wages were earned, and, therefore, the Employer contravened section 17 of the *Act*.

30. With respect to the two (2) administrative penalties levied against the Employer for breaches of section 18 of the *Act* at both business locations, the delegate explains that section 18 of the *Act* requires an employer to pay all wages, including vacation pay, within 48 hours of the employer terminating the employment relationship, or within six (6) days of the employee terminating the employment relationship. In the case at hand, at both locations of the Employer, the delegate found that the Employer failed to pay all wages, including vacation pay, owing to the Complainants within 48 hours, or six (6) days of the employee terminating the employment relationship, as applicable.

31. With respect to the two (2) administrative penalties levied against the Employer for breach of section 27 of the *Act*, the delegate explains this section requires an employer to provide a written wage statement to every employee for the pay period. Each of the Complainants alleged they did not receive wage statements throughout their employment relationship. While the Employer provided some wage statements as evidence during the investigation process, the delegate says the Employer failed to provide any response to dispute the Complainants' allegations that wage statements were not provided to them. In the circumstances, the delegate concluded that the Employer contravened section 27 of the *Act* at both of its locations.

32. With respect to the administrative penalty for breach of section 63 of the *Act*, the delegate notes that this section requires an employer to discharge the liability for compensation for length of service if an employee has worked for over three (3) months, provided the employment relationship is terminated by the employer without cause. Ms. Taylor was the only complainant to have worked for over three (3) months for the Employer at the Employer's 48North PG location. Based on the evidence adduced by both Ms. Taylor and the Employer, the delegate concluded that the Employer effectively terminated Ms. Taylor by failing to reliably pay her within the time lines prescribed in the *Act*. In the circumstances, Ms. Taylor was entitled to compensation for length of service under section 63 of the *Act,* which the delegate failed to pay her.

33. The final two (2) penalties issued by the delegate were in respect of the contravention of section 46 of the *Regulation* by the Employer at both its locations. The delegate notes that section 46 of the *Regulation* requires an employer to produce records as required by the Director. Four (4) separate Demands for Employer

Records were sent to the Employer as noted above, and the Employer failed to comply with those Demands, causing the delegate to issue two (2) separate penalties for each of the Employer's locations.

EMPLOYER'S SUBMISSIONS

34. On behalf of the Employer, Mr. Chakroborty provides written submissions with respect to each of the Complainants. In the preamble to those submissions, he states that he "would like to address…the complaints and facts that is needed to for [*sic*] the findings against Unique holdings [*sic*] regarding complaints from Vinod Pandey, Kristopher Tanner, Chandler Dokuchie, Dentan [*sic*] Kezar and Krista Taylor".

35. With respect to Mr. Pandey, Mr. Chakroborty states that the latter was hired as a server by the Employer, and worked with the Employer from February 2, 2014, until March 6, 2014, for a total of 87 hours. He states that Mr. Pandey was paid in full the sum of $1,872, and he was provided with a Record of Employment after he left the Employer.

36. Mr. Chakroborty also states that Mr. Pandey accompanied Mr. Verma, an officer of the Employer, to Quesnel "to grab a few things from a closed restaurant…where he worked 9 hrs in total with Mr [sic] Verma because he was sick". Mr. Chakroborty states that the Employer paid for Mr. Pandey's travel, food and stay in Quesnel. In support of these submissions, Mr. Chakroborty attaches a written statement purportedly signed by Mr. Verma. Curiously, the written statement of Mr. Verma appears to be in the same typewritten font and writing style as the written submissions of Mr. Chakroborty.

37. With respect to Mr. Tanner, Mr. Chakroborty submits that he was hired by the Employer's executive chef at the time. He states that Mr. Tanner "took numerous breaks for smokes and used to cook his meal and take it home with him every night". He also states that Mr. Tanner's paycheque "has been sitting at the store since September 8th 2014 but he never showed up to pick it up". He also adds that Mr. Tanner failed to sign the "sign in sign out sheet" and when confronted about this, Mr. Tanner said he "kept his records [at] his home". Mr. Chakroborty states that Mr. Tanner's pay was calculated based on the number of hours he worked based on the schedule provided to Mr. Chakroborty by the then-executive chef. He says it is not fair for the Employer to pay an administrative penalty when Mr. Tanner's "cheque was ready but he never felt the need to pick it up". In support of his submission, Mr. Chakroborty provides a statement, purportedly signed by the General Manager of 48North KE, Jason Poetschke ("Mr. Poetschke"). Curiously, this statement, too, is typewritten in the same font as Mr. Chakroborty's written submissions and the last name of Mr. Poetschke is spelled differently in the body of the statement when compared to the signature line (which is curious for Mr. Poetschke to have done). Mr. Chakroborty also submits a copy of a cheque, dated September 8, 2014, for $441.80 made payable to Mr. Tanner that Mr. Tanner, according to Mr. Chakroborty, failed to collect from the Employer since it was issued. The latter document was also produced by Mr. Chakroborty during the investigation of Mr. Tanner's complaint, and is part of the Record.

38. With respect to Ms. Dokuchie, Mr. Chakroborty states that the Employer agrees with the Director's decision in the Determination, but argues that the administrative penalty of $500, plus interest on the amount owing to Ms. Dokuchie is unfair because Ms. Dokuchie's "last paycheck has been siting [*sic*] around and she never stopped by to pick it up".

39. With respect to Mr. Kezar, Mr. Chakroborty submits that the latter worked 36.75 hours for the period November 1 to 12, 2014, and not 81 hours as claimed. Mr. Chakroborty attaches a copy of what he calls "signed in and out" document purportedly showing Mr. Kezar's worked hours during the relevant period, which was not previously produced during the investigation of the complaint. Mr. Chakroborty also disputes

any administrative penalty arising from Mr. Kezar's complaint, and states that Mr. Kezar quit for personal reasons and "never showed up to pick his cheque".

40. With respect to Ms. Taylor, Mr. Chakroborty submits that she was paid for the final pay period ending November 30, 2014, and he produces the same wage statement previously presented to the delegate in the investigation of Ms. Taylor's complaint. The wage statement indicates that a cheque was produced for Ms. Taylor on January 14, 2015, for a net amount of $324.43. However, Ms. Taylor, during the investigation of her complaint, indicated to the delegate that she did not receive the cheque. The Employer provided no evidence at that time to indicate the cheque was processed.

41. Mr. Chakroborty has now added to the above-mentioned wage statement, a copy of an Interac e-Transfer receipt, dated May 5, 2015, which he says shows Ms. Taylor was paid via e-transfer $323.70, an amount slightly different than the previously-produced wage statement. The receipt also indicates that the amount was "sent" on December 16, 2014, but the document is short in terms of explaining what it represents beyond what Mr. Chakroborty asserts.

42. Mr. Chakroborty also submits that Ms. Taylor owes the Employer $448.26 because she was doubly-compensated for the pay period November 1 to November 15, 2014. More particularly, he indicates that Ms. Taylor claimed that the Employer's paycheque for the said period did not clear at the bank and, as a result, the Employer immediately transferred, via e-Transfer, the full amount of the cheque, namely $448.26, to her account. He claims that Ms. Taylor never returned the cheque to the Employer and cashed the cheque on January 20, 2015. He attaches a copy of a cheque, with the front and back sides, in my view, unreadable. He also attaches a copy of an e-Transfer receipt, dated May 5, 2015, similar to the earlier mentioned receipt but for an amount of $448.26. Beyond the bare assertion of Mr. Chakroborty that an e-Transfer of this amount was made to Ms. Taylor and that she has been doubly compensated, the document is short in terms of explaining what it represents beyond what Mr. Chakroborty asserts. Mr. Chakroborty is seeking the Tribunal "to take a [*sic*] judgment against Miss Taylor to pay the company back" $448.26. He argues that, in the circumstances, the Employer should not be "liable for [Ms. Taylor] quitting her job", and it should not have to pay her compensation for length of service the Determination awarded.

ANALYSIS

43. The *Act* provides the following limited grounds of appeal in subsection 112(1):

> **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.

44. The Tribunal has consistently said that an appeal is an error-correction process with the burden on the appellant to persuade the Tribunal that there is an error in the determination under one of the above-mentioned statutory grounds.

45. In this case, the Employer relies on the "new evidence" ground of appeal in subsection 112(1)(c) of the *Act*. While the admission of "new evidence" is discretionary, the Tribunal, in *Re: Merilus Technologies Inc.* (BC EST # D171/03), has established the following stringent four-part test for admitting new evidence on appeal:

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

46. All of the listed criteria above are conjunctive in nature and must be satisfied before "new evidence" will be admitted into an appeal. Having said this, in my view, none of the "new evidence" the Employer seeks to introduce in the appeal satisfies the first criterion listed in *Merilus Technologies*. That is, I find that all of the "new evidence" the Employer seeks to introduce in the appeal was reasonably capable of being provided during the complaint process. It is noteworthy that during the investigation of the complaints, the delegate provided numerous opportunities to the Employer to provide its evidence in response to the allegations of the Complainants but the Employer, after obtaining numerous extensions, ultimately failed to provide all relevant information. The Employer is not entitled to sit idly or "in the weeds", failing or refusing to cooperate with the delegate during the investigation, only to awaken later, after the Determination is made against it, to present evidence in the appeal that was previously available to it during the investigation of the complaints. To admit the Employer's "new evidence" in the circumstances would be contrary to the purposes of the *Act* and particularly, the purpose set out in section 2(d) of the *Act*: "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*. In the circumstances, I am unable to admit or consider the Employer's "new evidence" in the appeal. In the balance of my decision, I will explain more particularly my decision to reject the "new evidence" of the Employer in relation to each of the Complainants individually and address other arguments of the Employer in the appeal.

47. First, with respect to Mr. Pandey, I find that Mr. Chakroborty's appeal submission largely reiterates his very brief written submission in his email of January 26, 2015, to the delegate. He effectively restates that Mr. Pandey is not owed any more than 9 hours pay at $10.25 per hour. The delegate did not find this submission persuasive during the investigation process and preferred the evidence of Mr. Pandey who provided a detailed personally-written record of hours worked over the course of his employment relationship. I note the delegate did credit the Employer for the gross amount of $1,872 it paid Mr. Pandey, but that amount did not cover all hours worked by Mr. Pandey. While Mr. Chakroborty disagrees with the delegate's findings of fact in this regard, the grounds of appeal listed in section 112(1) of the *Act* 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 made by the delegate, unless the delegate's findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). The test for establishing an error of law is a stringent test, and it requires the appellant to show that the findings of fact are perverse and inexplicable in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence, or that they are without any rational foundation. The Employer, or Mr. Chakroborty, has not shown such with respect to the delegate's decision regarding Mr. Pandey and, therefore, the Tribunal must defer to the delegate's findings or conclusions of fact.

48. I also note that Mr. Chakroborty has produced a written statement from Mr. Verma to corroborate his appeal submissions relating to Mr. Pandey. Mr. Verma is an officer of the Employer, and there is no explanation why Mr. Chakroborty, or the Employer, did not produce Mr. Verma's statement during the investigation of Mr. Pandey's complaint when the Employer had ample opportunity to provide such evidence. The written statement of Mr. Verma clearly does not qualify under the first criterion of the four-fold test in *Merilus Technologies* for admitting "new evidence".

49. With respect to Mr. Tanner, I have compared the written submissions of Mr. Chakroborty in his email of January 26, 2015, to the delegate with his written appeal submission, and find that Mr. Chakroborty is simply embellishing and elaborating further on his first submissions disputing the hours Mr. Tanner claimed he worked. In support of his submissions, Mr. Chakroborty has now tendered the statement of Mr. Poetschke, the General Manager of 48North KE, regarding breaks Mr. Tanner was allegedly taking during his employment. Neither the re-argument of Mr. Chakroborty, nor the statement of Mr. Poetschke, qualify as "new evidence" under the criteria for admitting "new evidence" in *Merilus Technologies* above. Mr. Poetschke's statement is evidence that should have, with the exercise of due diligence on the part of the Employer, been discovered and presented to the delegate during the investigation of Mr. Tanner's complaint and prior to the Determination being made.

50. With respect to Ms. Dokuchie, Mr. Chakroborty is not disputing the Determination except for the interest calculation of $10.55 on the amount awarded, as well as the administrative penalty of $500.00 for failing to pay all wages, including vacation pay, within 48 hours of the Employer terminating the employment relationship, or within six (6) days of the employee terminating the employment relationship. I find Mr. Chakroborty's submissions unpersuasive as he admitted, in his telephone interview with the delegate of November 27, 2014, that Ms. Dokuchie was owed her final wages, but disagreed with the amount of wages she was claiming. As no payment was made to Ms. Dokuchie for the full amount she was owed as at the date of the Determination, the delegate was correct in levying an administrative penalty for breach of section 18 of the *Act* and ordering accrued interest on the amount owing pursuant to section 88 of the *Act*.

51. With respect to Mr. Kezar, in the investigation, Mr. Chakroborty disputed the number of hours Mr. Kezar worked. Mr. Chakroborty stated that Mr. Kezar was owed wages of 35.5 hours for his final pay period, and claimed that he had records to corroborate his calculation of hours Mr. Kezar worked. However, Mr. Chakroborty failed to produce any records. In these circumstances, the delegate preferred the evidence of Mr. Kezar and ordered the Employer to pay Mr. Kezar a total of 81 hours, plus annual vacation pay and accrued interest. In the appeal, Mr. Chakroborty, effectively, reiterates his earlier submission contained in his email of January 26, 2015, to the delegate. He also produces, for the first time in the appeal, a "sign in sign out sheet", purportedly signed by Mr. Kezar, to support his argument that the latter did not work 81 hours in his final pay period. The timesheet Mr. Chakroborty now produces is clearly evidence that could have been produced, with the exercise of due diligence on the part of the Employer, during the investigation of Mr. Kezar's complaint. As a result, this does not qualify as "new evidence" under the first criterion of the test in *Merilus Technologies* and, therefore, it cannot be admitted as "new evidence" in this appeal.

52. With respect to Ms. Taylor, I also find Mr. Chakroborty reiterates the argument he submitted in his email of January 26, 2015, to the delegate. He restates in the appeal that the Employer does not owe Ms. Taylor any monies, and attaches same wage statement for the period November 15 to 30, 2014, that he previously produced during the investigation of Ms. Taylor's complaint. However, in the appeal, he produces, for the first time, a new document in the form of an Interac receipt, purportedly showing a transfer of $323.70 to Ms. Taylor for her last pay period. As indicated previously, the Interact receipt is short on clearly explaining what really occurred. However, what is certain is that the receipt which was generated on May 5, 2015, after the Determination was made, could have, with the exercise of due diligence on the part of the Employer,

been produced to the delegate earlier in the investigation of Ms. Taylor's complaint. In these circumstances, as with other "new evidence" adduced by the Employer in this appeal, the Interac receipt does not qualify as "new" evidence under the first criterion of the test for admitting new evidence on appeal set out in *Merilus Technologies*.

53. With respect to the second Interac receipt Mr. Chakroborty produces, claiming that it shows that Ms. Taylor was doubly paid for the period November 1 to 15, 2014, because she allegedly also negotiated at the bank a paycheque from the Employer for the same period, this is a new submission previously not raised in the investigation of the complaint. Mr. Chakroborty is asking the assistance of the Tribunal "to take a [*sic*] judgment against Ms. Taylor to pay the company back". The Tribunal, in this appeal, does not have jurisdiction to adjudicate this matter.

54. In these circumstances, I find that there is no basis for allowing the "new evidence" or disturbing the Determination based on the new evidence ground of appeal. I find that there is no possibility this appeal can succeed and, therefore, dismiss it under section 114(1)(f) of the *Act*.

ORDER

55. Pursuant to section 115 of the *Act*, I order the Determination, dated February 17, 2015, be confirmed in the amount of $8,443.77, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal