Employment Standards TRIBUNAL

An appeal

- by -

Glacier Park Lodge Ltd.
("GPL")

- 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: David B. Stevenson

FILE No.: 2009A/037

DATE OF DECISION: June 10, 2009

DECISION

SUBMISSIONS

Bruce F. Farley	on behalf of Glacier Park Lodge Ltd.
Aurora C. Chavez	on her own behalf
Maricar B. Medrano	on her own behalf
Concepcion R. Mondragon	on her own behalf
Cristeta S. Vicmudo	on her own behalf
Ed Wall	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Glacier Park Lodge Ltd. ("GPL") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 18, 2009.

2. The Determination was made on complaints filed by Aurora C. Chavez ("Ms. Chavez"), Maricar B. Medrano ("Ms. Medrano"), Concepcion R. Mondragon ("Ms. Mondragon") and Cristeta S. Vicmudo ("Ms. Vicmudo"), collectively "the complainants", who alleged GPL had contravened the *Act* by failing to pay regular and overtime wages, statutory vacation pay, length of service compensation and by requiring each of the complainants to pay air fare from the Philippines to Canada. The Determination found that GPL had contravened Part 3, sections 18 and 21 of the *Act* and ordered GPL to pay the complainants an amount of $12,339.25 an amount which included wages and interest.

3. The Director also imposed administrative penalties on GPL under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $1000.00.

4. The total amount of the Determination is $13,339.25.

5. In this appeal, GPL submits the Director committed errors of fact, errors of law and errors of mixed fact and law in making the Determination. The appeal also includes new evidence which, on the submission made in the appeal, was not provided because:

> The principals of the employer had sold all their shares in the corporate employer, but under an agreement whereby the principals would be responsible for concluding this matter. However, the principals then experienced significant difficulty in obtaining documents from the new owners, who did not cooperate in the process.

6. GPL seeks to have the Determination set aside and the complaints dismissed.

7. GPL has not requested an oral or electronic hearing on the appeal. The Tribunal has decided this appeal can be decided from the written submissions and the material included in the appeal file.

ISSUE

8. This appeal raises several issues:

1. whether GPL has shown the Director committed errors of fact in making the Determination; and if so, what is the authority of the Tribunal to address those errors under section 112 of the *Act*;

2. whether GPL has shown the Director committed errors of law;

3. whether GPL has shown the Director committed errors of mixed fact and law and if so, what is the authority of the Tribunal to address those errors under section 112 of the *Act*; and

4. whether the Tribunal should accept the new evidence provided by GPL with the appeal.

THE FACTS

9. The nature of this appeal requires a review of the findings of fact made in the Determination. The Determination provides the following background. Typically, the background facts are matters that are not in dispute.

> GPL operates a hotel at the summit of Rogers Pass, BC. Aurora C. Chavez, Maricar B. Medrano, Concepcion R. Mondragon and Cristeta S. Vicmudo are temporary foreign workers who were employed as housekeepers and restaurant workers during the winter and spring of 2007-2008. Each of the complainants signed identical 24-month contracts following a positive Labour Market Opinion issued by Service Canada on September 21, 2007. The Labour Market Opinion advised GPL president Aaron Fu that the employment of these temporary workers was subject to the Act and provided him with the website address of the Employment Standards Branch.
>
> Mr. Fu had initially requested six temporary foreign workers, but in the event received only four, and as we shall see, even that was too many.
>
> The complainants all filed their complaints within the time period specified in the Act, and have now moved on to other employers in the area.

10. The Determination indicates GPL was notified of the complaints in a letter dated June 24, 2008 and at the same time was requested to provide hourly and payroll records for each of the complainants. In response to the request, the Director was provided with a copy of the work schedule for the time period relating to the complaints and a letter from GPL's Accommodation Service Manager, Eva He ("Ms. He"), explaining her scheduling practices. On August 14, 2008, the Director issued a formal Demand for Employer Records and received payroll records, daily hourly records for April and May 2008 and another copy of the work schedule.

11. The complainants provided originals of their daily hourly records and copies of air fare receipts and pay statements.

12. On October 15, 2008, the Director provided GPL, who was represented by Mr. Fu, with a letter summarizing the findings to that date. The letter contains the following statement:

> Each of the complainants has provided me with a copy of their own daily hourly records. I have used these only where the daily hourly records you provided were not sufficient.

13. The letter invited Mr. Fu to provide any further evidence which he had that might call the summary provided into dispute. The letter allowed Mr. Fu 15 days to provide such evidence.

14. It appears from the material that Mr. Fu requested additional time to provide further evidence. In a letter dated January 20, 2009, the Director advised Mr. Fu:

> Please be advised this is your *final opportunity* to provide evidence on this matter. Please provide me with a detailed written submission regarding the matters we discussed this morning. If you wish to include statements from other people, please feel free to do so.
>
> I have enclosed the complaint form and a copy of the airline ticket you requested.

15. Mr. Fu was also provided copies of the documents which formed the basis for the basis for the findings in the summary.

16. The record which the Director has provided under subsection 112(5) also includes correspondence relating to making an appointment for access to records, which it seems, were not readily accessible to Mr. Fu. There is correspondence, sent to Mr. Fu on January 29, 2009, advising him that he could make an appointment to review some of GPL's records, but the deadline for any evidence was February 9, 2009. This correspondence may reflect what the appeal refers to as the difficulty encountered by the former principals of GPL, presumably including Mr. Fu, in obtaining documents from the new owners of GPL. In any event, the Determination indicates no additional evidence or information was provided by GPL prior to its issuance on February 18, 2009.

17. The Determination contains the following statements of fact relating to the complainants:

- Mr. Fu, on behalf of GPL, signed a form of contract of employment that applied to each of the complainants;
- Ms. Chavez and Ms. Mondragon started working for GPL in the latter part of November 2007; Ms. Medrano started work just before Christmas 2007; and Ms. Vicmudo arrived and started work in May 2008;
- There was a drop in business for GPL during the winter months that resulted in a reduction from the full time hours of Ms. Chavez, Ms. Mondragon and Ms. Medrano;
- The above complainants were all told in March they would be working part-time and there was an agreement at that time between those complainants and GPL that they would work less than 40 hours a week, would still be paid wages as though they were working full time and, in return, would work longer hours in the summer and be paid wages as though they were working 40 hours a week;
- Although no new employees were needed at the time Ms. Vicmudo arrived, she was allowed to stay and start work because GPL anticipated a busy summer season;
- On May 8, 2008, all of the complainants signed a document, entitled "Conditions of Employment" which, among other things, prohibited the complainants from working more than eight hours in a day or 48 in a week unless approved in advance in writing by GPL management;
- All of the complainants quit their employment with GPL shortly after signing this document; Ms. Medrano left on May 15, 2008; Ms. Chavez, Ms. Mondragon and Ms. Vicmudo left on May 27, 2008;

- The employment contract for each of the complainants contained provisions relating to the nature of the work to be performed, the work schedule and wage rate, travel expenses, accommodation, insurance coverage and resignation:
    - The complainants would work 40 hours a week, have two days a week off and have a thirty minute eating break;
    - Wages would be $12.25 and hour and overtime – described as hours worked in excess of 40 in week – would be paid at 1.5 times the hourly rate;
    - Required EI, CPP and income tax remittances and medical and WCB coverage would be paid by GPL;
    - GPL would not recoup any of the costs involved in recruiting and training the complainants;
    - GPL would assume the cost of two-way air transportation for each complainant following 24 months of employment;
    - $390.00 a month would be deducted from each complainant for rent;
    - The complainants would provide two weeks' written notice of terminating their employment; and
    - GPL agreed to follow the standards set out in the *Act*.
- In deciding the wage claims, the Director looked at the records of the hours worked by each complainant on each day;
- The Director had three sets of documents, each purporting to be an accurate reflection of the hours worked by each complainant:
    - A work schedule provided by GPL, with an explanatory letter describing Ms. He's usual practice of assigning an amount of work to each complainant that could be completed in eight hours and adjusting, or lessening, the work assignment for the following day to "balance the working hours" if more than eight hours were needed to complete the assignment;
    - A record of hours from each of the complainants, which were neither reported to GPL nor consistent with the work schedule; and
    - A record of hours provided by GPL setting out the start and finish times for each complainant for the months of April and May;
- The complainants took lunch and supper breaks on various occasions, but recorded these breaks infrequently;
- The complainants said their breaks were usually less than 30 minutes; GPL said they always took 30 minutes;
- Each of the complainants provided photocopies of receipts for one way air fare; and
- The complainants quit their employment.

18. Based on an analysis of those facts, the Director made the following findings:

- The agreement to "bank" overtime hours and work those hours at straight time at a later date contravened the *Act* and was, applying section 4, "null and void";
- There was evidence the complainants had worked overtime since agreeing to the modified conditions of employment on May 8, 2008 and no evidence it was not authorized by GPL;
- There was evidence suggesting GPL was aware the complainants were working overtime and no evidence GPL was attempting to enforce the requirement for written authorization before working overtime;
- The overtime provisions of the conditions of employment document did not comply with the requirements of the *Act* for paying overtime as it did not contemplate daily overtime and did not recognize weekly overtime except after 48 hours worked in a week;
- Both parties had breached the employment contract, although GPL was first to breach it by failing to provide 40 hours of work a week;
- The complainants breached the employment contract by failing to provide the requisite two weeks written notice of terminating the employment;
- Aspects of the contract did not conform to the requirements of the *Act*;
- GPL failed to comply with its obligation under section 18 of the *Act* to keep a daily record of hours worked by the complainants;
- The two months of daily hourly records provided by GPL were created by the complainants and were accepted by the Director as being accurate for the period which they covered;
- The Director accepted the complainants private hourly records and, for any period not covered by those records and accepted the statement of GPL's Ms. He that she scheduled the complainants to provide eight hours of work;
- The Director accepted the complainants were given meal breaks and on those days where a complainant recorded more than five hours worked, deducted thirty minutes from the hours recorded and where more than 10½ hours were recorded, deducted another thirty minutes;
- The Director found the cost of air transportation from the Philippines to Canada was a cost of doing business to GPL which could not, applying section 21 of the *Act*, be imposed on the complainants;
- The Director accepted the airline receipts provided by each complainant as being evidence of the actual cost of the airfare to each complainant;
- Mr. Fu alleged during the investigation process that the receipts were either for a return ticket or had been altered, but these allegations were denied by the complainants;
- The complainants were not entitled to length of service compensation as they terminated their employment; and
- GPL had contravened section 46 of the *Employment Standards Regulation* by failing to produce a record of hours worked by each complainant on each day and had contravened section 18 of the *Act* by failing to pay all wages owing within six days of the complainants terminating their employment.

ARGUMENT

19. The Appeal Form sets out the grounds for appeal and is accompanied by a detailing of the grounds of appeal and supporting documents, some of which are new, in the sense that they were not submitted to the Director in the complaint process.

20. The grounds of appeal are identified on the Appeal Form as being error of law and evidence becoming available which was not available at the time the Determination was being made. The accompanying submission details the grounds of appeal under four headings:

A. Errors of Fact

1. providing no calculation for hours worked for any of the complainants;

2. miscalculating the hours actually worked by each of the complainants;

3. determining GPL would "assume the costs of two-way air transportation" for the complainants under the employment contract; and

4. finding the complainants worked overtime.

B. Errors of Law

1. failing to make a reasonable determination of the credibility of the time records of each complainant;

2. failing to make any determination of the integrity of the written evidence of hours worked provided by each complainant;

3. accepting the authenticity or integrity of the evidence of the complainants purporting to document the cost of air fare;

4. finding the agreements made between GPL and the complainants were contrary to the *Act*;

5. placing the onus on GPL to prove the complainants did not work overtime;

6. placing the onus on GPL to prove they sought "to enforce" the contract with the complainants;

7. placing no weight on the contractual arrangements;

8. finding the contract between GPL and the complainants was of no effect for the purposes of determining issues of fact and law, other than as "an indication of the intention of the parties"; and

9. failing to consider the stated purpose of the *Act*, specifically fairness to the employer.

C. Errors of Mixed Fact and Law

1. finding the "intention of the "banking" agreement . . . was to have the complainants work overtime without paying overtime wages";

2. determining GPL was required to pay airfare as "as a cost of doing business"; and

3. unreasonably imposing penalties in the circumstances.

D. New Evidence

Under this ground of appeal, GPL says additional evidence should be accepted because the former principals of GPL experienced some difficulty acquiring documents from the new owners of GPL. The documents included with the appeal, but not found in the material provided to the Director in the investigation are:

- an unsigned employment agreement for Ms. Vicmudo[1];
- what appears to be the first page of an undated letter from Taitekton Agency Ltd. to the Nelson Employment Standards Branch office;
- a letter dated January 22, 2009 from Toby Chen, also addressed to the Nelson Employment Standards Branch office;
- airfare ticketing information for Mr. Jui Tse Chen;
- what appears to be the body of an e-mail and other documents relating to the possible booking of airline travel for Ms. Grace Graciou in late December (the year is not shown);
- work schedules of the complainants for a period from November 25, 2007 to May 03, 2008;
- a set of documents identified as "hours written by each employee" and which appears to be a summary of the above work schedules;
- employee timesheets for Ms. Chavez for the months of November and December 2007 and January, February and March 2008;
- employee timesheets for Ms. Medrano for the months of December 2007 and January, February and March 2008;
- a handwritten summary of hours for an unidentified employee for the period December 21 to May 13; and
- employee timesheets for Ms. Mondragon for the months of November and December 2007 and January, February and March 2008

[1] There is a copy of a signed employment contract in the section 112 record

21. In response to the appeal, the Director and each of the complainants have filed a submission. The Director has provided the subsection 112(5) record. Many of the documents in the subsection 112(5) record have been included with the appeal.

22. The Director makes the following points in the response:

- GPL simply disagrees with the use of the complainants personal record of daily hours worked, which in the absence of employer records was relied on;
- there was no reason for not accepting the complainants' records as a reasonably accurate representation of the hours each worked;
- the *Act* imposes an obligation on an employer to maintain a daily record of hours and to provide that record on demand; GPL was unable to meet its statutory obligation and the information relating to the overtime hours worked was found elsewhere;
- there was no reason for not accepting the receipts provided by each of the complainants as authentic and as evidence of the actual cost of airfare;
- the provisions of the *Act* were applied in deciding that some parts of the employment contract between GPL and the complainants were of no effect;
- section 98 of the *Act* requires an administrative penalty to be imposed where a requirement is placed on an employer under section 79;
- section 112(1) (c) only allows new evidence on an appeal where such evidence *"was not available at the time the determination was being made"*;
- the Tribunal has addressed this ground of appeal and has set out a test that identifies four conditions such evidence must meet before it is accepted;
- in respect of the material which GPL has sought to introduce for the first time with the appeal, none of it meets the test:
    - the information provided in the January 22, 2009 letter from Mr. Chen was available and could have been provided during the investigation;
    - the documents relating to the cost of airfare for Mr. Chen is of questionable relevance and does not negate a finding of fact that the complainants paid different rates for airfare;
    - the work schedules of the complainants for a period from November 25, 2007 to May 03, 2008 differ greatly from those provided by GPL during the investigation and in response to the August 2008 Demand as a record of the hours worked by the complainants and appear to have been altered from those earlier documents;
    - the comparison of the records as calculated by Ms. He, by GPL, by the complainants and by GPL's interpretation of the Director's calculations has no probative value as it provides no logic for the basis on which the records are used; and
    - employee timesheets stated to be for Ms. Chavez, Ms. Medrano and Ms. Mondragon contain handwriting that is different from the time sheets on which those complainants entered information in other months and which were provided during the investigation.

- GPL does not outline the attempts it made to provide the new material to the Director during the investigation; such an explanation is necessary from the perspective of both the delay in providing information that should have been delivered under the Demand issued in August 2008 and the opportunity provided by the Director to GPL to submit any relevant material;

- GPL has provided no evidence that would justify rejecting the findings made in the Determination or would show the complainants provided fraudulent claims under the *Act*.

23. Each of the complainants has filed a response, which I will attempt to summarize.

24. Ms. Chavez says she was bought her own air ticket and was told it would be reimbursed to her later.

25. Ms. Medrano seems to express her disagreement with the Director's conclusion that she was not "fired".

26. Ms. Mondragon's submission seeks to correct some of the allegations made by Taitekton Agencies Ltd., Mr. Chen and Ms. Eva Ho that are contained in the appeal. Like Ms. Chavez, she says she bought her own air ticket on the promise she would be paid back. She disagrees with much of what Mr. Chen says in his letter and points out that she signed her employment agreement with GPL in April 2007 and it included a provision for GPL paying the airfare. She says Mr. Chen has no right to calculate how much money she earned working in Taiwan. She says she did not get a thirty minute break as it was written in the contract and she was told by Ms. He she was not entitled to one; she says she took a 30 minute lunch break, but did not include it her 8 hrs. She did not take a fifteen minute break. She substantially agrees with the calculations done by the Director in the Determination in respect of her claim. She says she did not sign any agreement to work for GPL as part-time. She says the only record of the time she worked was what she kept herself – GPL kept no record of her time. She reiterates that she is owed wages and provides a brief outline of her claim.

27. Ms. Vicmudo also disputes a number of the allegations made in the appeal. She says she accepted what was in the employment contract that she would be reimbursed for her airfare. She says Mr. Chen is wrong saying she didn't have an agreement with GPL before she came to work. She says it was Mr. Fu who picked her up from the Vancouver airport when she arrived in April 2008. She says she worked for GPL for a month and needs to be paid for that. She strongly disputes the information provided to the Director by GPL indicating she was paid wages in the amount of $1569.60.

28. On April 22, 2009, and possibly in response to Ms. Vicmudo's submissions about not being paid any wages by GPL for her work, the Director advised the Tribunal the initial conclusion in the Determination that Ms. Vicmudo had been paid $1569.00 for her services was in error and that she had not been paid for her services at all. Presumably, the Tribunal was being advised that the Director had now concluded Ms. Vicmudo was owed an additional wages in the amount of $1569.00.

29. GPL has filed a final reply to the submissions made by the Director on the appeal. GPL alleges the Director has lost objectivity and assumed the role of advocate. In support of that allegation, GPL makes the following submissions:

- the director made a finding of fact there was not enough work available at the lodge for four employees;

- notwithstanding, the Director has awarded overtime wages to the complainants;

- once the former finding was made, it was "inconsistent and absurd" for the Director to consider the claims for overtime;

- the manager of GPL has said the complainants were specifically told to do the work assigned and to work only 40 hours a week;

- the Determination does not say why this evidence was not found to be credible and was not accepted;

- the Director makes no analysis of the daily hours claimed by the complainants; they are just accepted, even though they are not compatible with the finding there was not enough work at the hotel and it is clear the complainants did not keep accurate records;

- the overtime claims have arisen because the complainants, contrary to the terms of their employment agreement, wanted to be paid for break times;

- the employer's records show the complainants did not work overtime and that the employees were provided with only eight hours work a day, although it is conceded there was some "modest averaging of hours over a work week";

- it is not credible that all of the complainants worked overtime given there was insufficient work at the lodge for all of them and given that GPL "forcefully instructed them to work only forty hours a week";

- the Director makes no finding that Ms. Vicmudo's arrival was a troubling circumstance that exacerbated the fact there was insufficient work for three, or four, employees;

- the Director failed to recognize there were many difficulties with the complainants' records of hours worked;

- the record of Ms. Medrano consistently starts at 7:00 and 7:30 am, which does not accord with the job requirements of a housekeeper; her records for the December to February period are all on one sheet and give the appearance of having been prepared in one sitting; no documents indicating where those hours came from has been provided; it is alleged the documents were created for the purposes of the complaint;

- there are two different time sheets covering the same period for Ms. Mondragon, but this fact is not mentioned in the Determination;

- there are two different time sheets for Ms. Vicmudo for May 2008, which appear to be incompatible with each other, but this is not addressed in the Determination;

- Ms. Chavez' timesheets appear to have been prepared by "two or three" different hands and show incompatibilities;

- the Director cannot view the employment contract as creating obligations for GPL, requiring GPL to meet its contractual obligation to pay airfare, but creating none for the complainants, allowing them to ignore their contractual obligation to work 24 months;

- the amount awarded to some of the complainants for airfare is unreasonable;

- the Director should have, at least, adjusted the cost of airfare based on the amount of time worked by each complainant relative to their obligation to work 24 months calculated on the lowest airfare paid by any of the complainants;

- the Director has compromised his impartiality by undertaking an internet search for evidence of airfare prices from the Philippines to Canada, providing that information in the appeal and making submissions in support of the findings in the Determination based on that evidence;

- the test applied by the Tribunal for allowing new evidence on an appeal is not on point, as the new owner of GPL would not cooperate with the former owners of GPL to permit access to the needed records; there is no evidence of a failure to exercise due diligence;

- GPL was frustrated in its efforts to acquire the needed records; and

- any delay must consider the tardiness of the Director in not pursuing the complaints until after the business was sold in June 2008.

ANALYSIS

30. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *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 made.*

31. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

32. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03.

33. In this appeal, GPL has identified several errors of fact and errors of mixed fact and law in its grounds of appeal. In order to succeed on these alleged errors, GPL is required to establish that such errors amount to an error of law. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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. adopting a method of assessment which is wrong in principle.

34. The weight of evidence is a matter for the Director and is a question of fact, not law.

35. The *Britco Structures Ltd.* decision also considered the scope of appeal under the *Act* based on alleged errors of mixed fact and law:

> As noted, the Supreme Court of Canada has said in *Southam*, *supra*, that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (paragraph 35). Since the Employer does not allege that the Delegate erred in interpreting the law or in determining what legal principles are applicable, it cannot allege that the Delegate erred in applying the incorrect legal test to the facts. Nor can it allege that the Delegate erred in applying the correct legal test to the facts the Employer accepts. I can only conclude that it alleges that the Delegate erred in applying the correct legal test to facts that the Employer disputes. Therefore, the question, in reality, is whether or not the Delegate erred in respect to the facts that the Employer disputes. This is a question of fact over which the Tribunal has no jurisdiction. The application of the law, correctly found, to allegedly erroneous errors of fact does not convert the issue into an error of law. I am unable to extricate a question of law from the question the Employer seeks to have answered.

36. The appeal will be decided according to how it conforms to the principles which can be drawn from the above statement, but first I shall deal with the new evidence submitted with the appeal.

37. The Tribunal has stated in many decisions that while the Tribunal has discretion to allow new or additional evidence, a relatively strict approach will be taken to this ground of appeal, indicating it is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence was reasonably available and could have been provided to the Director before the Determination was issued. As well as considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05.

38. I am not inclined to accept any of the purported new evidence provided by GPL with the appeal. Most of this evidence was, on its face, reasonably available to GPL at the time the Determination was being made. The unsigned employment agreement for Ms. Vicmudo, the information in the partial letter from Taitekton Agency Ltd., the information in the letter from Mr. Chen and the airline ticketing information were available to GPL and, with some diligence, could have been acquired and provided to the Director prior to the issuance of the Determination. I agree as well that GPL has failed to show the relevance of the airline ticketing information, since the issue is not the cost some other person at some other time was able to acquire

an airline ticket for, but the cost to each of the complainants. The new evidence submitted does not establish the amount of airfare claimed by some of the complainants is not credible.

39. The information filed in support of the challenge to the Director's conclusions on hours worked by the complainants – the work schedules, time sheets and summaries created by GPL – also suffers from the failure of GPL to have provided this information, and the documents on which it is based, during the investigation. GPL has not adequately explained why the work schedules and time sheets in the form submitted with the appeal were not provided to the Director during the investigation. There is no explanation how the work schedules came to be altered from what was provided to the Director in the investigation to the form submitted with the appeal nor is there any indication of the source of the new information on the work schedules or the source of the schedules themselves. As well, those documents lack credibility. It is troubling that the work schedules submitted with the appeal, for example, are inconsistent with the position stated by Ms. He in the investigation. There is no indication what person or persons created the additional time sheets, when they were created or on what information they were based. The factual foundation for the summaries worked up by GPL is absent. There is no basis for accepting those summaries as anything more than a reworking of the hours which GPL says the complainants worked, which was not accepted by the Director, based on GPL's understanding of the scope of their obligations under the *Act*, which the facts already demonstrate is incorrect.

40. Turning to the other grounds of appeal, I will deal with each in the order found in the appeal.

41. A. Errors of Fact

As indicated above, the Tribunal has no authority to consider appeals based on disagreements with findings of fact made in the Determination unless those findings are shown to amount to an error of law. The burden is on the appellant, in this case GPL, to show the alleged errors of fact amount to errors of law.

GPL has not met that burden in this appeal.

The facts do not support the assertion that the Director failed to provide a calculation of hours worked. The Director has provided a calculation for hours worked for each of the complainants, which is found in the subsection 112(5) record, and has identified in the Determination the source of the hours used for those calculations. The findings made by the Director on the regular and overtime hours worked by the complainants are reasonably grounded in the facts provided during the investigation and supported by the subsection 112(5) record. Whether I agree or disagree with the findings is irrelevant. The findings have not been shown by GPL to be unfounded, unreasonable or absurd.

In respect of the employment contract, it speaks for itself. In particular, the contract says GPL will "assume the cost of two-way air transportation" for each complainant. The difficulty for GPL in speaking of the employment contract at all in the context of this cost is that the Director did not base the entitlement of the complainants to airfare on the contractual obligation, but rather on the conclusion that such cost was "a cost of doing business" which under section 21 of the *Act* could not be passed on to the complainants.

42. B. Errors of Law

Many of the alleged errors of law are in reality challenges to findings of fact.

The allegations relating to the "credibility" of the complainants' records, the "integrity" of their supporting written evidence and the "authenticity and integrity" of the documents supporting the claims for airfare only restate GPL's disagreement with the Director's findings of fact and the conclusions in the Determination based on those facts.

The Determination sets out the basis for the finding on the hours of work. The Director did not rely only on the information provided by the complainants nor did the Director uncritically accept the records provided by the complainants. The Director accepted GPL's records for those periods where records were kept by them; accepted the statement of Ms. He that she generally assigned the complainants to eight hours of work a day; and accepted the complainants' records for periods not covered by GPL's records in a way that was consistent with Ms. He's statement. The Director made adjustments to the complainants' records to account for meal breaks. In the circumstances, the Director was entitled to rely on the personal records provided by the complainants. The Director has referred to the Tribunal's decision, *Gordon Hofer*, BC EST #D538/97 (Reconsideration denied, BC EST #D120/98). In that decision, the Tribunal considered the propriety of using employees' personal records to fill gaps in the hours of work caused by the failure of the employer to maintain proper records:

> In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's Delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

In this case, GPL has not met the burden of showing it was unreasonable for the Director to rely on the complainant's personal records. I will return to this aspect of the appeal when I address the final reply filed by GPL later in this decision.

The Director accepted the complainants' airfare receipts as accurately reflecting the amount paid by each complainant for one way airfare. GPL alleged during the investigation that the receipts were altered and the complainants denied that allegation. There is nothing in the subsection 112(5) record supporting the allegation made by GPL or to indicate the conclusion of the Director was absurd or unreasonable. The Director was entitled to accept the evidence of the complainants and reach the finding that was made. This appeal adds nothing to the position taken by GPL during the investigation. It is incumbent on GPL in this appeal to show an error of law in the finding made and that has not been done.

I will add a final comment on this aspect of the appeal. It was both unnecessary and inappropriate for the Director to make any reference to internet sources to support the response to the appeal. The Determination must speak for itself and its conclusions must be supported by the subsection 112(5) record. The Director may not seek to supplement reasoning and findings set out in the Determination or found in the material comprising that record. The comment made by the Director in response to the appeal was unnecessary because the finding relating to the validity of the receipts had already been made in the Determination. However, if GPL were able to show the receipts were intentionally altered, that is not something against which the Director should be advocating. I agree with the

submission made on behalf of GPL that such conduct smacks of improper advocacy by the Director, is unfair and generally calls into question the credibility of the appeal process. I have not given any consideration to the reference made by the Director to an internet search. This aspect of the appeal is decided on the failure of GPL to satisfy the burden of showing an error of law under section 112 of the *Act*.

GPL argues the Director erred in law by placing an onus on them to show the complainants did not work overtime. With respect, no such burden was imposed on GPL. The Determination recognises the statutory obligation on GPL, as an employer, to ensure an accurate daily record of hours are maintained for each employee and the entitlement of the Director, when faced with a failure by an employer to comply with that statutory obligation, to look to other sources for evidence of hours worked: see *Gordon Hofer*, *supra*. In this case, the complainants established overtime was worked. That was a reasonable result based on the available evidence, including evidence provided by GPL. I see nothing in the Determination that places any particular onus on GPL to "prove" overtime was not worked by the complainants or imposes an onus on GPL to prove it sought to enforce the contract. In my view, the result in the Determination is a correct legal conclusion flowing from the requirements of the *Act*, which is described in the following statement from *Director of Employment Standards (Re Small Town Press Ltd.)*, BC EST #RD016/04, at page 6:

> Section 35 imposes responsibility on the employer to control an employee's hours of work, if the employer wants to avoid liability to pay overtime. Regardless whether there is an overtime policy in the workplace, if an employer "directly or indirectly" allows an employee to work more than 8 hours a day or 40 hours a week, that employer is liable to pay overtime wages.

In the face of the available evidence, it was open to GPL, if it wished to avoid its statutory liability for the overtime, to show it had *in fact* made efforts to control the hours of work to avoid an overtime liability and, unknown to them, the complainants had ignored those efforts and against instruction had worked overtime. However, the Director found the evidence showed GPL was aware overtime was being worked and had allowed it. The result, as indicated above, does not arise out of the contract, but out of the *Act*.

The Director did not err in law in the approach taken to the employment contract between GPL and each of the complainants. The Director found there were provisions in the contract that did not meet the requirements of the *Act* and, as a result, were of no effect in deciding the statutory liabilities of GPL. The Director did not find the employment contract, as a whole, was void and unenforceable. The Director found only those provisions which did not comply with the minimum requirements of the *Act* were of no effect. The only provisions of the employment agreement affected by the Determination were the hours of work (overtime) and travel expense provisions. Indeed, in the face of the wording in section 4 of the *Act*, it would be impossible to argue the contractual provisions should have been given effect over the requirements of the *Act*.

I confess to some confusion about the suggestion the Director erred in law in finding the employment contract "was of no effect for the purposes of determining the issues of fact and law, other than as an indication of the "intention of the parties"." If it is intended to suggest the Director erred in law in reaching conclusions in the Determination based on a consideration and application of section 4 and other provisions of the *Act* rather than on provisions of the employment contract that do not comply with the *Act*, then I respectfully disagree with that suggestion and, accordingly, dismiss it.

The submissions alleging the Director erred in law by failing to consider the purpose of the *Act* directed at fair treatment and by fettering his discretion by viewing the case only from the perspective

of the complainants are broadly stated, but not fleshed out. I can find no substance to those allegations in the Determination or the in the subsection 112(5) record. The findings of fact made in the Determination are not demonstrably unfair to GPL. They are grounded in evidence provided by both GPL and the complainants. The Determination itself is consistent with an application of those findings against provisions of the *Act* and well established principles on which decisions under the *Act* are made. An appeal is not the appropriate forum for arguing it is an error of law to view complaints under the *Act* from a recognition that the *Act* is remedial legislation which exists predominantly for the protection of employees: see *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.).

43. C. Errors of Mixed Fact and Law

GPL says it was an error for the Director to have concluded the "intention of the banking agreement ... was to have the complainants work overtime hours without paying overtime wages". To the extent that conclusion is necessary to the Determination, it was a finding which was reasonably justified on the material. On the evidence recited in the Determination, including the evidence of Mr. Fu, I don't know what other conclusion was available to the Director. However, such a finding was not necessary to the Determination, since the relationship between GPL and the complainants never got to the point where the complainants were "working back" the difference between hours actually worked and hours paid. Even if I accepted the submission of GPL on this point, it would not change the Determination. The banking agreement was an arrangement that would not have survived section 4 if GPL had required those banked hours to be worked at straight time and could well have resulted in a fairly substantial overtime liability for GPL.

There is no error in the Director's conclusion that the airfare paid by the employees was "a cost of doing business". Simply put, the airfare was a cost the Director, quite correctly, found GPL was prepared to assume in order to fill a need for employees for the business. The Determination states: "paying the travel cost is part of the employer's cost of doing business when hiring temporary foreign workers." The Tribunal has taken a relatively broad view of what are *"employer's business costs"*.

In this case, GPL needed employees and accepted there was a cost associated with getting them to the lodge. That cost clearly falls within the notion of *"employer's business costs"* in section 21.

GPL argues it was unreasonable to impose administrative penalties. It is unnecessary to consider that argument or to review the administrative penalty provisions in the *Act* and *Regulation*. There have been many decisions of the Tribunal that have done that, including *Royal Star Plumbing, Heating & Sprinklers Ltd.*, BC EST #D168/98 and *Director of Employment Standards (Re Summit Security Group Ltd.*, BC EST #RD133/04. It suffices to say the legislative scheme provides for mandatory administrative penalties without any exceptions where a contravention is found by the Director in a Determination issued under the *Act*: see *Actton Super-Save Gas Stations Ltd.*, BC EST #D067/04. The Tribunal has no ability to ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgement about what is reasonable: see *Douglas Mattson*, BC EST #RD647/01.

44. In reply to the responses of the Director and the complainants to the appeal, GPL filed further submissions, which are summarized above. It is unnecessary to provide a detailed analysis and commentary on those submissions; it will suffice to make only a few points about them.

45. First, the submissions strongly suggest the appeal is, at its core, an attempt to have the Tribunal revisit, reweigh and alter findings of fact made in the Determination.

46. In respect of the submission that asserts inconsistency in the Director recognizing there was not enough full time work at the lodge for four employees and finding the complainants worked overtime, I find nothing inconsistent or absurd with that result. There were not four employees until the beginning of May 2008. On May 15 2008, one of the complainants terminated her employment. The evidence, including GPL's evidence, does not indicate there was any reduction from full time hours for any of the complainants until the end of March 2008. The evidence, including GPL's evidence, was that the complainants did work overtime – the more contentious issue was how much overtime. On that issue the Director chose to use both GPL's records and the personal records of the complainants. On the facts, that choice was neither unreasonable nor absurd. In deciding to use that information, there was no question of weighing the respective credibility of GPL's representatives against the complainants. The Director used the personal records of the complainants to fill the gaps left by the absence of employer records.

47. GPL points to those periods where the complainants provided two different records for the same period. I do not accept there are any glaring inconsistencies in those records, as asserted by GPL. In fact, they are substantially consistent with one another. The differences, and they are few, are not sufficient to say the Director's reliance on the complainants' personal records falls into the category of "egregious error" as suggested by GPL.

48. GPL also raises questions about the complainants' personal records that can best be characterized as aimless speculation. Some of this speculation could have been avoided by a closer inspection by GPL before challenging the records in this appeal. For example, part of the submission on behalf of GPL refers to two different timesheets for Ms. Vicmudo in May 2008. GPL says the timesheets appear to be in different writing and the "second curious one appears to be incompatible with the first with respect of its two entries." That assertion is never fully developed, but an examination of the two timesheets being analyzed, it is simply wrong. The two timesheets are clearly identified as being for different departments in the lodge: one for HSKP, which I think it is fair to say is shorthand for "housekeeping"; the other is for the cafe. There are two entries for the cafe. Neither of those entries conflict with any entry for housekeeping. The indication by GPL that the handwriting on the two timesheets is different simply invites speculation that I am not persuaded can properly be made.

49. GPL's reply submission relating to the airfare continues their conceptual error that in requiring GPL to reimburse the complainants for airfare, the Director is only enforcing the employment contract. To reiterate, the decision to require repayment of the airfare does not arise from the contract, but arises from section 21 of the *Act*, which prohibits an employer from requiring an employee to pay the employer's business costs. There is nothing in the Determination to suggest the Director is enforcing the travel expenses term in the contract. I would have thought that was clear enough at page 6 of the Determination, where the Director states:

> Therefore I find that GPL has contravened section 21 of the Act and must pay the cost of one-way air fare from the complainant's [sic] country to the place of work.

50. GPL says that requiring them to pay the cost of airfare is unfair and unreasonable. I disagree. Requiring GPL to comply with the *Act* is neither unfair nor unreasonable.

51. In sum, I am not convinced there is any error in the Determination and the appeal is dismissed.

52. There is one final matter to consider. In a submission to the Tribunal dated April 22, 2009, the Director indicated the initial conclusion regarding wages owing to Ms. Vicmudo was incorrect, that she had not been paid any wages for her period of employment with GPL and is owed additional wages in the amount of $1569.00.

53. GPL and Ms. Vicmudo were asked by the Tribunal to respond to that submission. Both agree Ms. Vicmudo was not paid wages for her employment with GPL and that wages in the amount of $1569.00 are owed.

54. Subsection 86(2) of the *Act* allows the Director to vary or cancel a Determination which has been appealed, provided such variance or cancellation is made within 30 days of the date the appeal was received by the Director. The April 22, 2009 submission was made within the 30 day period. Accordingly, the Tribunal accepts the variance is timely, and is effective as varying the Determination to increase the wage entitlement to Ms. Vicmudo by the amount stated. Section 88 of the *Act* requires interest be paid on that amount and a variance of the Determination must reflect that requirement.

ORDER

55. Pursuant to section 115 of the *Act*, I order the Determination dated February 18, 2009 be varied to include the additional amount owed to Ms. Vicmudo and confirmed in the amount of $14,908.25, comprising $13,339.25 and $1569.00, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal