



An appeal

- by -

Robert LeRuyet
("Mr. LeRuyet")

- 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.: 2013A/30

DATE OF DECISION: August 8, 2013

DECISION

SUBMISSIONS

Robert LeRuyet

on his own behalf

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*Act*”) by Robert LeRuyet (“Mr. LeRuyet”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 16, 2013.
2. The Determination was made by the Director on a complaint filed by Mr. LeRuyet, who alleged that Woonkook W. Baek (“Mr. Baek”) and Younouk Y. Baek (“Ms. Baek”) carrying on business as Baek, S Taekwondo Academy (“BTA” or the “Academy”) contravened the *Act* by failing to pay him wages as required by the *Act*. The Determination found that Mr. LeRuyet was not an employee of BTA under the *Act* and therefore his complaint was not within the jurisdiction of the *Act*. As a result, the Director decided to take no further action with respect to Mr. LeRuyet’s complaint.
3. In this appeal, Mr. LeRuyet states that the Director erred in law and failed to observe principles of natural justice in making the Determination and wants the Determination changed or varied.
4. The Tribunal has decided that Mr. LeRuyet’s appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess Mr. LeRuyet’s appeal based solely on the Determination, the appeal and written submissions made by Mr. LeRuyet and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons delineated in subsection 114(1):
 - 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
5. If I am satisfied that the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), BTA will, and the Director may, be invited to file further submissions. However, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

6. The issue in this appeal is whether Mr. LeRuyet has shown the Director erred in law or failed to observe the principles of natural justice in making the Determination.

BACKGROUND AND THE REASONS FOR THE DETERMINATION

7. BTA operates a martial arts school in two locations, namely, Chilliwack and Abbotsford. In his complaint filed with the Employment Standards Branch (the “Branch”) on February 27, 2012, Mr. LeRuyet states that he worked a total of 60 hours per week in the capacity of “office manager/program director” during the period November 23, 2011, to June 28, 2012, at the Abbotsford location of BTA but the latter failed to pay him regular wages totalling \$4,816.50. I note in the Reasons for the Determination (the “Reasons”) the Director states that Mr. LeRuyet claimed he was employed as an office manager and an instructor. However, in the written submissions of Mr. LeRuyet produced in the Director’s record, at page 13 of 18, Mr. LeRuyet only claimed that Mr. Baek offered him a position of office manager at BTA. While nothing substantive turns on this, I simply point out this discrepancy for accuracy of facts because Mr. LeRuyet, in his appeal submissions, denies being an instructor for BTA and states that he was a manager. I note also that he states on the original complaint form as well as in his appeal submissions he was a program director for BTA as well.
8. Further, in the Reasons, the delegate states that Mr. LeRuyet’s complaint was filed on February 2, 2012, although the complaint is signed by Mr. LeRuyet on February 23, 2012, and the date stamp on the complaint indicates that the complaint was received by the Branch on February 27, 2012. I do not find anything substantive turns on this error in the Reasons and only refer to this inaccuracy to correctly set out the chronology in the case.
9. The delegate conducted a hearing (the “Hearing”) of Mr. LeRuyet’s complaint on January 14, 2013. The Hearing was attended by Mr. and Ms. Baek on behalf of BTA together with their witnesses and by Mr. LeRuyet. The delegate notes in the Reasons that Mr. LeRuyet left the Hearing prior to BTA’s witnesses providing their testimony because Mr. LeRuyet had to attend to a meeting. The delegate states that she informed him that she would be taking the witness testimony in his absence and that he was “relinquishing” his opportunity to cross examine the witnesses. According to the delegate Mr. LeRuyet said “he understood this and he did not ask for an adjournment (of the Hearing).”
10. In the Reasons the delegate then goes on to review her understanding of the evidence of the parties which includes evidence in the written submissions of the parties contained in the record as well as the evidence adduced at the Hearing. In particular, the delegate notes in the Reasons that Mr. LeRuyet stated that he was completing a work skills and employment upgrade course through the Gladwin Language Centre in Abbotsford at the end of November 2011. As part of his program, he was required to explore business and employment opportunities and the program had a wage subsidy option that allowed an employer to pay an employee one-half wages for one month and the other half would be subsidized by the Federal Government. Mr. LeRuyet decided that he would explore the possibility of working at the Taekwondo school of BTA in Abbotsford which he passed on a daily basis on his way to his course at Gladwin Language Centre. Therefore, he went to BTA’s school in Abbotsford and introduced himself to Mr. Baek. Mr. Baek told him that he was intending to close the location as he was only teaching three classes per week and could not afford to keep the Abbotsford location of BTA open. Mr. LeRuyet, however, encouraged Mr. Baek to keep the school open as it was in a good location with good space and low rent.

11. According to the Reasons Mr. LeRuyet told Mr. Baek that he himself would sublet the space and find another instructor in order to share the rent three ways. According to Mr. LeRuyet, Mr. Baek responded by asking him to complete a business plan which he would then consider in deciding whether or not to take him up on his offer. A few days later, Mr. LeRuyet claims that Mr. Baek called him and informed him that his students had begged him to stay open and he needed help. He states that Mr. Baek then offered him a position as on office manager at a salary of \$2,000 per month and also agreed to allow him to make 100% in commission for all classes he taught. According to Mr. LeRuyet, this arrangement was agreed to by Mr. Baek was for a three month period and Mr. Baek also agreed to enrol in the wage subsidy program starting February 2012.
12. On Mr. Baek's part, the delegate notes in the Reasons that Mr. Baek, while agreeing to keep BTA open, did not offer Mr. LeRuyet employment. He felt empathy for the latter and agreed to let him use the space at BTA on Mondays, Wednesdays, and Fridays and did not charge him rent at the outset because Mr. LeRuyet had no money. Mr. Baek planned to start charging him rent as soon as he had enough students. Mr. Baek contended that he simply rented space to Mr. LeRuyet. He also asked Mr. LeRuyet to charge his students the same rate he was charging his own students, namely, \$120 per month. According to the Reasons, Mr. Baek claimed his income from the school was \$6,000 to \$7,000 a year and he could not afford to hire any staff.
13. The delegate also notes in the Reasons that according to Mr. Baek after Mr. LeRuyet started renting space, he brought in a piece of paper and asked him to sign it, stating that he simply needed to fill it out to show that he was working at BTA for a certain number of hours and a wage and the government would send 50% of his wages. Mr. Baek refused to sign the paperwork because he was feeling uncomfortable with what Mr. LeRuyet was asking him to do.
14. The delegate also notes in the Reasons that Mr. LeRuyet claimed that he was not only at BTA on the days he instructed his classes, but on Tuesdays, Thursdays, and Saturdays when Mr. Baek had his classes. Mr. LeRuyet claimed that he signed up two students for classes in Chilliwack. In response, Mr. Baek argued that Mr. LeRuyet did not start showing up on Tuesdays, Thursdays, and Saturdays until December 2012. He further stated that Mr. LeRuyet told him that he was only there in case of walk in business and did not perform any work during this period. According to Mr. Baek he only showed up to talk to the parents of taekwondo students Mr. Baek was teaching with a view to convincing them to try jiu jitsu which Mr. LeRuyet was teaching.
15. The delegate also notes in the reasons that Mr. LeRuyet claimed that Mr. Baek gave him past client information in the form of client cards which he used to try to contact past students to get them to return to the school. He later tried to increase the client base by trying to get new signage to increase visibility of the school and made contact with a salesperson by the name of Misty Street ("Ms. Street") with a view to advertising the school. The Director's record discusses email correspondence between Mr. LeRuyet and Ms. Street with respect to the advertising mailers for the school which Mr. LeRuyet wanted Ms. Street to create. Mr. LeRuyet also claimed that he designed a sign and flyers but that Mr. Baek did not come up with the money for the advertising.
16. The delegate also notes in the Reasons that Mr. LeRuyet claimed that he communicated with Mr. Baek using a log during the first month of his employment but when he discovered that the latter was not reading the log, he started to record his activities in his own journal. He adduced copies of the log and journal to the delegate which delineated calls he made to students and meetings he had with various people. On Mr. Baek's part, the delegate notes that he refuted Mr. LeRuyet's claim that the latter was doing the work in the log or his journal for BTA. Mr. Baek indicates that Mr. LeRuyet was doing the work to increase his own client base for his jiu jitsu classes and that he did not ask Mr. LeRuyet to call any former students. He acknowledged that

Mr. LeRuyet had approached him to pay for advertising work done by Ms. Street, but he was not impressed with the draft materials prepared by Ms. Street and refused to participate in the proposed advertising.

17. The delegate also notes in the Reasons that Mr. LeRuyet claimed that he spent a week researching sandwich boards with a view to increasing the visibility of BTA and he sent emails and received prototypes of sandwich board advertising that had jiu jitsu on one side and taekwondo on the other. The correspondence relating to sandwich board advertising was adduced by Mr. LeRuyet in the investigation of his complaint and the delegate appears to have considered it and referred to it in the Reasons. However, I note the delegate in the Reasons states that Mr. Baek argued that he already had two sandwich board signs and Mr. LeRuyet wanted signs with his classes on it as well. Mr. Baek says that he told Mr. LeRuyet he wanted to see the design before providing his credit card for payment and when the design was not forthcoming he did not provide his credit card.
18. In her Reasons, the delegate also notes that Mr. LeRuyet provided an email dated November 23, 2011, he sent to one of his students to illustrate his working relationship with Mr. Baek. The delegate refers to the student as “Charn Gill”, although the email is to Charnjit Hayre. From the Reasons it would appear that the delegate is referring to the email in question but inadvertently calling Mr. Hayre by the wrong last name and abbreviating his first name. I simply point this out because Mr. LeRuyet accuses the delegate in the appeal submissions of mixing up files and citing someone else’s emails and drawing wrong inferences from the wrong file. However, I do not find that to be the case although it is more probable from my review of the Reasons that the delegate mistakenly referred to Mr. Hayre as Mr. Gill and abbreviated his first name, Charnjit, to Charn.
19. The delegate also notes in the Reasons that Mr. LeRuyet provided email correspondence between himself and Christina McDonald (“Ms. McDonald”) of Abbotsford Times newspaper discussing a press release for Baek’s TKD/Genesis Jiu-Jitsu Academy which would have an official grand opening near the end of January or in early February. According to the delegate, Mr. LeRuyet testified that Mr. Baek refused to pay for the ad space in the newspaper and he therefore decided to create small advertising cards advertising both jiu jitsu and taekwondo classes which could be left in the mail. However, when he informed Mr. Baek that the cost for these cards would be \$180, the latter did not respond.
20. Further in support of his claim that he was an employee of BTA, Mr. LeRuyet claimed that he signed up two students for classes at BTA and issued two gift certificates to them and engaged in a number of activities to advertise the Academy through newspapers, signs and flyers throughout his period of employment.
21. On her part, the delegate indicates in the Reasons that Mr. Baek stated that BTA was closed during Christmas between December 22 and January 5 and there was an intervening snow storm thereafter that required BTA to be closed for a further period. He states that he did not see Mr. LeRuyet again until January 24 or 26, 2013, when he was surprised to learn that Mr. LeRuyet had six people join his jiu jitsu class for a total of \$300 when he had previously agreed with Mr. LeRuyet that they would both charge their respective students \$120 per month. Mr. Baek indicates he did not say anything to Mr. LeRuyet at the time, but a few days later on January 28, he let Mr. LeRuyet know that he did not feel their business relationship was working out and asked for the keys back. However, Mr. LeRuyet refused to return the keys and left.
22. At the Hearing, according to the reasons, Mr. Baek presented two witnesses on behalf of BTA, namely, Karen Ann Urquhart (“Ms. Urquhart”) and Brenda Milligan (“Ms. Milligan”), who are parents of taekwondo students of Mr. Baek. These witnesses gave evidence that they had seen Mr. LeRuyet at the school but had not seen him perform any work. They both claimed that Mr. LeRuyet had tried to recruit their children to take jiu jitsu classes with him. Ms. Urquhart also claimed that Mr. LeRuyet had specifically told her that he

was renting space from Mr. Baek and he was not an employee of BTA. I also note in the Director's record there is a written statement from Ms. Urquhart dated May 1, 2012, wherein she states that she overheard Mr. LeRuyet asked to borrow Mr. Baek's vehicle to run an errand and she offered to and did drive him on that occasion to his home. During the drive, in her conversation with Mr. LeRuyet, she states that he told her that he met Mr. Baek when he was looking for space to start up his own jiu jitsu business. He also informed her that Mr. Baek permitted him "to use the space at no cost without expectation out of his kindness of heart" [*sic*].

23. The delegate, in determining that Mr. LeRuyet was not an employee of BTA, referred to the definitions of "employee", "employer", and "work" in the *Act* and reviewed the evidence of both parties reasoning as follows:

Mr. LeRuyet acknowledges he approached Mr. Baek with a business proposition of renting space at the Academy. Mr. Baek was planning on closing his school at the time and Mr. LeRuyet attempted to convince him to remain open saying he could get another instructor involved so they could split the rent 3 ways. Mr. LeRuyet claims Mr. Baek then approached him to work for him as an office manager and he would be compensated at a rate of \$2,000.00 per month plus 100% of the commissions he made from his classes.

Mr. LeRuyet himself acknowledged the Academy was only open three days a week and Mr. Baek did not have many students. Mr. Baek stated he only made between \$6,000.00 and \$7,000.00 [per] year at that location and charged his students \$120.00 per month. Given this, I find it unlikely that Mr. Baek would offer to compensate Mr. LeRuyet \$2,000.00 per month. This would result in a salary of \$24,000.00 per year which is far in excess of the Academy's revenues. Even if Mr. Baek had believed the school's revenues would increase significantly with the addition of jujitsu classes, this salary in addition to 100% commissions for jujitsu classes seems like an unlikely arrangement.

...

Having reviewed all of Mr. LeRuyet's submissions, I find Mr. LeRuyet was trying to promote his classes as well as Mr. Baek's taekwondo classes. On the signs and flyers, the two types of classes are advertised individually. There is usually a space for taekwondo classes and a space for jujitsu classes. There is a clear distinction between them. It appears that Mr. LeRuyet was relying on Mr. Baek to pay for the advertisements in order to increase enrolment in his jujitsu classes. It appears Mr. Baek did not need to advertise his classes further, so he refused to pay for them. It does not appear that Mr. Baek exerted any control in these marketing activities other than to decide whether he was going to pay for them. Mr. LeRuyet appears to have come up with all of these ideas on his own and then [presented] them to Mr. Baek to attempt to receive monies in order to proceed with the intention to increase his own client base.

24. Based on the foregoing reasoning, the delegate went on to conclude in the Reasons that the "original arrangement" of splitting rent three ways "was more likely to have occurred as Mr. Baek only ran 3 classes a week" and was rarely open and therefore it was unlikely that he would require the services of an office manager.
25. The delegate also concludes in the Reasons that there was no evidence to support Mr. LeRuyet's contention that there was an agreement to pay him a salary of \$2,000 per month and "little evidence to support Mr. Baek controlled any of the activities of Mr. LeRuyet or that BTA was directly or indirectly responsible for Mr. LeRuyet." She also notes that Mr. LeRuyet admitted that Mr. Baek did not read his log wherein he recorded his activities. The only control Mr. Baek appears to have exerted over Mr. LeRuyet, according to the delegate, is to request Mr. LeRuyet to charge his students the same rate, \$120.00, that he was charging his students, and even then, Mr. LeRuyet did not accede to his request as he went on to charge his students less. In the circumstances, the delegate concluded that Mr. LeRuyet appeared to be "operating as if he was in

business with Mr. Baek and was attempting to use Mr. Baek's space, location and access to funds to increase his client base for jujitsu classes" and therefore he is not an employee as defined in the *Act*.

26. Lastly, with respect to the email Mr. LeRuyet sent to his student, Charanjit Hayre, although the delegate mistakenly refers to the student as Charn Gill, she appears to be addressing the very email in question. The delegate indicates in her reasons that the email to the student which Mr. LeRuyet proffers as evidence that he had entered into an employment relationship with Mr. Baek does not support that claim, although it indicates some sort of a relationship.

SUBMISSIONS OF MR. LERUYET

27. Mr. LeRuyet has submitted 14 pages of typewritten submissions in support of his appeal. I have read those submissions carefully and while I do not find it necessary to reiterate all of these submissions here, a large part of the submissions consist of a diatribe against the delegate because the delegate did not share Mr. LeRuyet's view of the evidence.
28. With respect to the natural justice ground of the appeal, Mr. LeRuyet submits that his two witnesses, Mr. Hayre and Charles McPhee ("Mr. McPhee") "were forced to leave before being called" at the Hearing. Mr. LeRuyet claims that both these witnesses are "extremely busy professionals who attended in the interests of the truth and fairness but could certainly not spend an entire day there sitting in a waiting room". He claims that this is a violation of justice because his busy witnesses should have been allowed to testify at the Hearing earlier.
29. Mr. LeRuyet also appears to argue that he was denied natural justice because the Director did not inform him that he could ask for an adjournment. This submission is made by Mr. LeRuyet in response to the delegate's statement in the Reasons that she informed him she would be taking the witness testimony of BTA's witness in his absence when he chose to leave the Hearing early for another meeting.
30. He also claims that prior to the Hearing he had difficulty contacting a representative at the Branch and claims that some of his questions were never answered although he does not indicate precisely what those questions were except complain about not receiving any "notes" from the Branch mentioning information on adjournments.
31. I also note that midway at page 2 and continuing onto page 3 of his submissions, Mr. LeRuyet goes on to challenge the evidence of the two witnesses of BTA, Ms. Urquhart and Ms. Milligan, by presenting evidence that is intended to challenge their credibility. This is something he could have done at the Hearing, had he not left the Hearing early and opted to cross-examine the witnesses. This evidence does not qualify as new evidence under the *Re: Merilus Technologies Inc.*, BC EST # D171/03, as Mr. LeRuyet could have, with the exercise of due diligence, presented the evidence to the delegate during the investigation or adjudication of the complaint and prior to the Determination being made. I do not find it necessary to set out this evidence here except to point out that Mr. LeRuyet, as in the case of the delegate, launches into a diatribe against them.
32. With respect to the error of law ground of appeal, on pages 3 to 14 of his written submission, Mr. LeRuyet meticulously disputes the evidence adduced by BTA and Mr. Baek at the Hearing as well as the findings and conclusions of fact the delegate makes with respect to the evidence of the parties. While I do not intend to reiterate all of the evidence here, I note the significant part of his appeal challenge relates to the delegate's finding and reliance on Mr. Baek's evidence that he only made \$6,000 to \$7,000 per year at the Abbotsford location of BTA and charged his students \$120 per month. Mr. LeRuyet claims that this is an "obtuse mistake" on the part of the delegate. He states that Mr. Baek made \$6,000 to \$7,000 per month and not per

year and therefore the delegate's conclusion is based on "faulty notes". He further submits that the delegate compounded this error when she reasons that the \$2,000 per month salary which he claims he was offered by Mr. Baek would total \$24,000 per year, an amount far in excess of BTA's revenue at the Abbotsford location. He states that the delegate simply ignored the evidence and testimony that the agreement he was referring to with Mr. Baek was only for three months and one month of which would be covered by a government wage subsidy program.

33. Mr. LeRuyet also criticises the delegate in harsh terms for mistakenly referring to an email he sent on November 23, 2012, to one of his students, Charanjit Hayre, as Charn Gill. Mr. LeRuyet suggests that this is evidence of a mix-up of files on the part of the delegate, that the delegate is referring to "someone else's emails and drawing the wrong inferences from the wrong file and another person's email". In his view this should be grounds for a successful appeal.
34. I also note, as part of the error of law ground of appeal, Mr. LeRuyet challenges the delegate in "her handling and interpretation of a very detailed operational log that was kept" at BTA's Abbotsford location. He indicates that it clearly outlines his assigned duties that he "performed at the direction of Mr. Baek". He states that the delegate ignored "each separate assignment given to [him] by Mr. Baek". He contends that this is "a gross act of incompetence and a mistake of law" on the part of the delegate. He submits that the delegate has misinterpreted the log books and his testimony with respect to the log books at the Hearing. He claims that the delegate "appears to be making up her own facts" and contends that "the most glaring error of law" is that the delegate does not give proper consideration to the logs that show a record of his day-to-day, hour-to-hour, duties he was performing for Mr. Baek or BTA. He contends that it is an error of law for the delegate to have ignored each example of work in the log book which he was performing at the direction of Mr. Baek and the delegate's failure to cite the work in the Reasons is a "negligent omission" on her part. He then goes on to review the entries in the log book and why the delegate should have interpreted the log book as evidence of work assigned by Mr. Baek to him and goes on to challenge the credibility of Mr. Baek and the evidence he adduced at the Hearing and concludes by stating as follows:

It would appear that there was more than enough documented evidence in the form of the logs, e-mails and witnesses to originally find in my favour. In response to this Baek had no reasonable story or explanation for all the work I did on behalf of his Business only an inconsistent and nonsensical version of events, no documented "rental" agreement of any kind. The "delegate" clearly did not look at the documented evidence, makes a silly error which is given far too much weight in the decision about monthly vs. yearly income and even if it were true misses the nature and operating methods of this type of integrated business and time of year. The "delegate" further appears to jumble people and unrelated files and botches the conclusions probably do to having to rush to clear a back log. This is simply inexcusable in the context of the law, justice, government accountability and professional competency. This document is so sloppy that "delegate" may be open to a negligence suit if applicable. [sic]

35. Mr. LeRuyet asks the Tribunal to change the determination and find that he was an employee of BTA. Alternatively he is seeking the Tribunal to refer the matter back to the Director for a hearing by another delegate.

ANALYSIS

36. Section 112 of the *Act* delineates the Tribunal's jurisdiction to consider appeals of the Director's determinations:

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.

37. The burden is on the appellant, Mr. LeRuyet, to persuade the Tribunal that the Determination is wrong and that the Tribunal should intervene. In this case, as indicated previously, Mr. LeRuyet appeals on the first two grounds in section 112(1), namely error of law and failure to observe the principles of natural justice. I propose to address each ground of appeal under the descriptive subheadings below.

(I) Natural Justice

38. The principles of natural justice are essentially procedural rights that serve to ensure that all parties are afforded an opportunity to learn the case against them and have the opportunity to present their case and challenge the case of the opposing party before an independent decision-maker.

39. In this case I am not persuaded that there was a breach of natural justice. There is no evidence of any wrongdoing on the part of the delegate that would lend any credence to Mr. LeRuyet's bare assertion that his "witnesses were forced to leave before being called" to give evidence at the Hearing. Based on the record the Hearing was originally scheduled for Monday, September 17, 2012, and a Notice of Complaint Hearing was sent to both parties on June 8, 2012, well in advance of the hearing date. I also note in the record an email from Mr. LeRuyet to the Branch dated September 11, 2012, confirming a telephone conversation with a delegate in which Mr. LeRuyet advised that his witnesses were unavailable to attend at the originally scheduled date and requesting of a change in the hearing date. The Branch acceded to Mr. LeRuyet's request and issued an Amended Notice of Complaint Hearing rescheduling the Hearing to Monday, January 14, 2012 [*sic*]. The Branch then sent a notice of the new date to all parties on October 19, 2012, almost three months in advance of the Hearing. Clearly the Director accommodated Mr. LeRuyet in changing the Hearing date solely to accommodate his schedule and presumably also his witnesses' schedule. If Mr. LeRuyet's witnesses were still not available on that date or did not have good flexibility on that date, he could have advised the Branch to set the Hearing on another date when they would be available with greater flexibility. I do not find any breach of natural justice to have occurred simply because the delegate may have been involved a little longer with BTA's witnesses during the Hearing before being able to get to Mr. LeRuyet's.

40. I also do not find there to have been a breach of natural justice because the delegate may not have informed Mr. LeRuyet that he could have applied for an adjournment when he had to leave earlier on the date of the Hearing without hearing or cross-examining the witnesses of TBA. The rules of natural justice do not require that the delegate specifically advise Mr. LeRuyet that he may apply for an adjournment. I find it curious that the Hearing date was rescheduled at Mr. LeRuyet's request and one would think that he would have been able to arrange his schedule so that he would be present for the entire Hearing. He left the Hearing earlier without examining BTA's witnesses, knowing full well that the delegate would consider the witness testimony of BTA's witnesses in his absence and that he would be giving up an opportunity to cross-examine BTA's witnesses. Therefore, I do not think it is open to him now to complain that he was denied natural justice because he did not get an opportunity to cross-examine BTA's witnesses or give his evidence in response to the witnesses' evidence.

41. I also note with respect to the issue of not being advised by the delegate that he could apply for an adjournment, the Director has made available, in its publications and on its website, sufficient information on adjudication hearings which includes information on how to request an adjournment, should a party be

inclined to request one. This, in my view, fully satisfies the obligation of the Director to ensure that the parties understand the nature of the branch level hearing and adjudication process (see *Re: 9503 Investments Ltd. (c.o.b. Mountain View Service)*, BC EST # D126/05).

(II) Error of Law

42. With respect to the error of law ground of appeal Mr. LeRuyet advances in his appeal, the often-quoted decision of 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.), comprehensively describes the instances of what may amount to an error of law:
- (1) a misinterpretation or misapplication of a section of the Act;
 - (2) a misapplication of an applicable principle of general law;
 - (3) acting without any evidence;
 - (4) acting on a view of the facts which could not be reasonably entertained; and
 - (5) adopting a method of assessment which is wrong in principle.
43. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal stated that the definition of error of law expounded by the Court of Appeal in *Gemex, supra*, should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law. The Tribunal in *Britco* also added that unless there is an allegation that the delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the delegate erred by applying the incorrect legal test to the facts.
44. I note further that the Tribunal has, time and time again, noted that it does not have jurisdiction over questions of fact (see *Re: Pro-Serve Investigations Ltd.*, BC EST # D059/05; *Re: Kovisto (c.o.b. Finn Custom Luminum)*, BC EST # D006/05, unless of course the matter involves errors on findings of fact which may amount to an error of law. The Tribunal in *Re: Funk*, BC EST # D195/04, expounded on the latter point stating that the appellant would have to show that the fact finder make a “palpable and over-riding error” or that the finding of fact was “clearly wrong” to establish error of law.
45. In this case, I note that the vast majority of Mr. LeRuyet’s submissions contain arguments challenging the delegate’s conclusions or findings of fact and assertions of how the evidence should have been weighed differently by the Delegate. It should be noted that the weight of evidence is a matter to be decided by the delegate in her sole discretion. It is a question of fact, not law (see *Beamriders Sound & Video*, BC EST # D028/06). The Tribunal does not have the jurisdiction to hear appeals based on questions of fact alone. However, where there is an allegation that the delegate acted without evidence or acted on a view of facts which could not reasonably be entertained, an error of law may be found based on the test set out in *Britco, supra*. In this case I am not persuaded that the delegate made any findings of fact without any evidence or a view of the evidence which could not reasonably be entertained.
46. I also note that the Tribunal is generally reluctant to substitute the delegate’s finding of facts even if it is inclined to reach a different conclusion on the evidence. Having said this, in this case I find that the delegate’s findings of fact, particularly as they relate to the determination of Mr. LeRuyet’s relationship with BTA, to be based on a view of evidence that could reasonably be entertained. I find that based on the evidence of all of the parties, it was open for the delegate to conclude as she did. She weighed the evidence of both parties and found the evidence of BTA and its witnesses more believable. It was also open to the

delegate to interpret the logs Mr. LeRuyet adduced into evidence as she did and it is not for this Tribunal to substitute the delegate's findings of fact and assessment in the circumstances.

47. I also find that there is no basis for Mr. LeRuyet to challenge the delegate's understanding of Mr. Baek's evidence that the latter's earnings from the Abbotsford location of BTA were \$6,000 to \$7,000 per year. While Mr. LeRuyet makes much of that and suggests that the income was \$6,000 to \$7,000 per month, as with the delegate, I find it improbable that Mr. Baek would have been earning that sort of income from the Abbotsford location when he was open three days a week at that location and, based on Mr. LeRuyet's own written submissions to the delegate, Mr. Baek had but only seven students in two years at the said location, paying \$120.00 each per month.
48. In summary, I find Mr. LeRuyet is largely disputing the delegate's conclusions of fact and intending to reargue the matters that were before the delegate during the hearing of his complaint. This is clearly inappropriate and impermissible on an appeal of a determination and contrary to the stated objective of the *Act* in section 2(d), namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. In the circumstances, I find the appeal, on the whole, is devoid of any presumptive merit and the purposes and objects of the *Act* would not be served by requiring BTA or the Director to respond to it.
49. Accordingly, pursuant to section 114(1)(f) of the *Act* this appeal is dismissed on the ground that there is no reasonable prospect that it will succeed.

ORDER

50. Pursuant to section 115 of the *Act* I order the Determination dated April 16, 2013, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal