



An appeal

- by -

Nathan Stanley
("Mr. Stanley")

- 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.: 2011A/75

DATE OF DECISION: August 4, 2011

DECISION

SUBMISSIONS

Nathan Stanley	on his own behalf
Brian August	on behalf of Kelowna Motors Ltd.
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Nathan Stanley (“Mr. Stanley”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), against a determination of the Director of Employment Standards (the “Director”) issued April 29, 2011 (the “Determination”).
2. On September 29, 2010, Mr. Stanley filed a complaint under section 74 of the *Act* alleging that his former employer, Kelowna Motors Ltd. (“Kelowna Motors”), a retail car dealership in Kelowna, British Columbia, contravened the *Act* by terminating his employment without notice or payment of compensation for length of service (the “Complaint”).
3. On February 16, 2011, a delegate of the Director (the “Delegate”) conducted a hearing of the Complaint (the “Hearing”) and concluded in the Determination that Kelowna Motors did not terminate Mr. Stanley’s employment as he quit on his own volition. As a result, the Delegate held that Kelowna Motors did not owe any compensation for length of service to Mr. Stanley.
4. In his Appeal Form, Mr. Stanley has checked off all three boxes setting out all three available grounds of appeal under section 112(1) of the *Act*. In particular, he alleges that the Director erred in law and failed to observe the principles of natural justice in making the Determination and there is new evidence that has become available that was not available at the time the Determination was being made.
5. Mr. Stanley is seeking a change or variation of the Determination. Based on his written submissions, it would appear that he wants the Tribunal to reverse or substitute the Director’s finding or conclusion that he quit or resigned from his employment with Kelowna Motors with a finding that his employment was terminated by Kelowna Motors without proper notice.
6. Pursuant to section 36 of the *Administrative Tribunal’s Act* (the “*ATA*”), which is incorporated in section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. Neither of the parties seeks an oral hearing on this appeal, although Mr. Stanley wishes “to have this matter reviewed by another director”. In my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

7. As indicated above, the issues identified in the Appeal Form are three-fold, namely:
 - a) Did the Director err in law in making the Determination?

- b) Did the Director breach the principles of natural justice in making the Determination?
- c) Is there new evidence that has become available that was not available at the time the Determination was being made and, if so, does this new evidence provide any basis to a change or vary the Determination?

FACTS

8. Mr. Stanley was employed as a Sales Representative with Kelowna Motors from June 20, 2005, until August 24, 2010. During his employment with Kelowna Motors, he was offered a managerial position with a Subaru dealership (the “Offer”) and decided to accept the position with Subaru. Subsequently, according to the Reasons for the Determination (the “Reasons”), Mr. Stanley stated, on August 23, 2010, he requested a meeting (the “Meeting”) with the owner of Kelowna Motors, Brian August (“Mr. August”) to advise him of the Offer with a view to discussing his notice period with Kelowna Motors.
9. At the Meeting with Mr. August and Hal Sandvold (“Mr. Sandvold”), the General Sales Manager of Kelowna Motors, Mr. Stanley announced his news and stated that the meeting turned sour. He stated that Mr. August became aggressive and angry and interrogated him about where he was going. Mr. August also declared in the Meeting that effective immediately when an employee left Kelowna Motors that employee would never be rehired and informed him that if he accepted the job offer, he could never come back and would have to leave immediately.
10. Mr. Stanley stated that he informed Mr. August that he had some unfinished customer business at Kelowna Motors but Mr. August told him that he could hand over everything to another sales representative. Mr. Stanley stated he found the employer’s response upsetting as he was hoping to work out his notice period.
11. Subsequent to the Meeting, Mr. Stanley stated he came back to work the next day and handed over his customer leads to another sales representative, cleaned out his desk and left. He also returned his office keys to Mr. Sandvold, although he testified that he was not asked or required to return his keys at the end of his Meeting because Mr. August had asked him to think about his decision to leave Kelowna Motors overnight and to speak with a co-worker named Jerry Feist (“Mr. Feist”) before making his final decision on the Offer.
12. Mr. Stanley stated that Mr. August might have assumed that he would change his mind after speaking with Mr. Feist, but he knew that he wanted to leave Kelowna Motors, although not immediately, and therefore decided not to speak with Mr. Feist. Mr. Stanley also noted that he was aware of other employees of Kelowna Motors who gave their notices of termination and were permitted to work out their notice periods with Kelowna Motors. He admitted also, on cross examination, that in 2007 he had given three weeks’ notice of his intention to terminate his employment to Kelowna Motors but after discussing the matter with a co-worker he changed his mind and continued employment with Kelowna Motors. When asked repeatedly by Mr. August why Kelowna Motors allowed him to work out his notice period in 2007 but not now, Mr. Stanley simply repeated that he had not been allowed to work out his notice period on this occasion.
13. In the Reasons, the delegate summarizes the evidence of Kelowna Motors noting that Mr. August testified that in March 2007 when Mr. Stanley decided to quit his employment and was working out his notice period, he asked Mr. Stanley to speak with another employee who was instrumental in convincing Mr. Stanley to change his mind and continue his employment with Kelowna Motors. After which, Mr. Stanley was promoted from his position as a Technician to Sales Representative.
14. With respect to the Meeting, Mr. August testified that he did not know the reason why Mr. Stanley wanted to have a meeting but discovered the reason only at the Meeting. Further, when Mr. Stanley spoke of the Offer at the Meeting, he only spoke of it as a “possible” offer and appeared to be unsure about what he should do,

according to Mr. August. Mr. August also noted that at the Meeting there was no discussion of any date or timeline for Mr. Stanley's departure from Kelowna Motors.

15. While Mr. August indicated that the Meeting was intense, he refuted Mr. Stanley's contention that he was angry or yelling at him in the Meeting. He argued that Mr. Stanley misinterpreted the tenor or the purport of the discussion at the meeting. He and Mr. Sandvold only intended to educate Mr. Stanley that the grass was not greener at other dealerships because they felt that he was not making an informed decision when contemplating leaving Kelowna Motors. Mr. August also admitted that he and Mr. Sandvold asked Mr. Stanley the source or origin of the Offer but Mr. Stanley refused to disclose this information. He and Mr. Sandvold then asked Mr. Stanley to think about the matter before making his decision and suggested to him that he speak with Mr. Feist, since the latter had also been offered positions at other dealerships but decided to stay with Kelowna Motors where he was promoted through the years.
16. Mr. August admitted that at the Meeting, he did state to Mr. Stanley that if he decided to leave, under no circumstances would he be allowed to come back. Mr. August indicated that this was the policy of Kelowna Motors because it did not want employees to test employment prospects elsewhere with the expectation that a job would be held for them at Kelowna Motors if things did not work out.
17. Mr. August denied telling Mr. Stanley, at the Meeting, that he would have to leave immediately, if he accepted the Offer. To the contrary, he stated he wanted Mr. Stanley to stay because otherwise he would have demanded Mr. Stanley's office keys, as he would not have allowed a terminated employee to have access to the office building after hours.
18. At the conclusion of the Meeting, Mr. August stated he understood or expected Mr. Stanley would continue the discussion with him the next day after he had spoken with Mr. Feist but when he arrived at work the next morning, he discovered Mr. Stanley had already packed up his desk and left. Mr. August says that he was shocked by this event.
19. Subsequently, two weeks later, Mr. August stated he received a self-help kit from Mr. Stanley. This then led him to speak with employees of Kelowna Motors to determine who had spoken with Mr. Stanley on the morning of August 24th. He asked employees who had spoken with Mr. Stanley to write down what they saw or heard on that day. He indicated that he did have the occasion to read out loud to Mr. Stanley the written statements of the employees over the phone, which he later submitted to the Employment Standards Branch in preparation for the Hearing.
20. In the Reasons, the Delegate notes that Mr. August adduced into evidence, at the Hearing, several written statements from employees of Kelowna Motors. These statements were sent to and received by the Employment Standards Branch (the "Branch") two days prior to the Hearing and scanned and emailed to Mr. Stanley immediately within an hour after the Branch received them. However, Mr. Stanley advised the Delegate that he had not been provided with copies of the statements prior to the Hearing, as he had not checked his email during the past few days. At which point, Mr. August or the employer pointedly shared that the statements had been read aloud to Mr. Stanley in a telephone conversation soon after he had submitted his self-help kit to Kelowna Motors in September 2010 and that most of the statements were written by witnesses who would actually be appearing by telephone at the Hearing.
21. The Delegate then adjourned the Hearing to allow Mr. Stanley to review all of the statements, totalling five, and decide whether he needed additional time to prepare a response. Mr. Stanley, after reading the statements, decided to carry on with the Hearing and confirmed that he did not require extra time to prepare a response to the statements.

22. The first written statement was from Mr. Feist, who also appeared by telephone at the Hearing. Mr. Feist testified that early in the morning on August 24, he walked into the key room at Kelowna Motors and saw Mr. Stanley shredding some documents. He asked Mr. Stanley a question relating to a customer and stated that Mr. Stanley responded, “it doesn’t matter because I quit”. He then asked Mr. Stanley where he was going and Mr Stanley responded that he could not say because it could affect someone at the business he was moving to.
23. In the Reasons the Delegate notes that Mr. Stanley, at the Hearing, made no comment in response to Mr. Feist’s written statement or testimony. That is, he did not choose to cross-examine Mr. Stanley.
24. The second written statement was from Mike Hansford (“Mr. Hansford”), a sales representative with Kelowna Motors. He also appeared by telephone and testified that Subaru contacted him on a number of occasions. He also said that he spoke about the latest recruitment attempt by Subaru in the presence of several sales representatives at Kelowna Motors and also mentioned to Mr. Stanley about it. He noted that Mr. Stanley’s desk is next to his and Mr. Stanley would also have overheard him speak about the matter. It was obvious to him that Mr. Stanley had followed up with Subaru, as he knew that Mr. Stanley had several interviews with Subaru. He did not recall Mr. Stanley mentioning any dates or time lines in relation to his leaving Kelowna Motors and states that Mr. Stanley gave him a list of customer leads on the day he left.
25. As with Mr. Feist, the Delegate notes in the Reasons that Mr. Stanley did not make any comments on Mr. Hansford’s written statement nor did he choose to cross-examine Mr. Hansford.
26. The third statement was from Linda McMillan (“Ms. McMillan”), a clerk with Kelowna Motors, who also attended the Hearing by telephone.
27. Ms. McMillan stated that she discovered Mr. Stanley had quit from another employee called Matt. She did not speak with Mr. Stanley on the day he left, but subsequently, on August 25 or 26; she left a telephone message for him. While he did not respond to the telephone message she stated that on August 27, Mr. Stanley came to Kelowna Motors to collect some money owed to him and mentioned the message she had left for him. During her conversation with him, she told Mr. Stanley that the comptroller of Kelowna Motors, Lorraine Mapleton (“Ms. Mapleton”), had left for Vancouver for a few days as her mother-in-law had passed. She was to return back on August 30 and at that time Mr. Stanley’s final pay and record of employment would be ready. She also told him that any commissions “in the works” will also be payable to him, although it did not appear there was anything additional due to him.
28. Ms. McMillan also testified that she discussed with Mr. Stanley not having his resignation letter on file and stated that he told her he had never prepared a resignation letter and was not sure how to word it. She stated that she explained to him that all he needed to do was to indicate the date he resigned and his response was “ok, no problem. I’ll bring it into Lorraine next week”.
29. On cross-examination, Mr. Stanley queried of Ms. McMillan whether he seemed uneasy or unclear about the matter of the resignation letter and she replied that he did not know what to write in the letter but agreed that he would be submitting one. She also added that he did not comment about the end of his employment or that he was fired.
30. In the Reasons, the Delegate notes that Mr. Stanley did not comment on any part of Ms. McMillan’s written statement.
31. The fourth written statement was of Sheri Dickson, a sales representative with Kelowna Motors. She also appeared by telephone and testified that she discovered Mr. Stanley had quit his employment the day after he left

Kelowna Motors. She stated that she called him on his cell phone to wish him well and asked him about his new job but he advised her he was not able to say where he was going as it would cause problems for the person he was replacing. Ms. Dickson stated she respected his privacy and did not probe any further although he did advise her that he would be starting his employment in two weeks time. She also noted that he did not share the circumstances leading to his departure from Kelowna Motors.

32. The Delegate notes in the Reasons that Mr. Stanley did not comment on Ms. Dickson's written statement nor did he cross-examine her.

33. The final written statement was of Lorraine Mapleton ("Ms. Mapleton"), the comptroller at Kelowna Motors who was responsible for preparing payroll. Ms. Mapleton was unable to attend at the Hearing, but in her written statement she indicated that she returned to work at Kelowna Motors on August 30 and immediately telephoned Mr. Stanley. In the telephone conversation, she advised Mr. Stanley that his pay and record of employment were ready to be picked up and reminded him to bring his letter of resignation. She stated that he responded that he would be in that week, but by the end of the week he had not shown up. As a result, she left several messages on his cell phone but was unable to reach him. At the end of the week, on September 3, she telephoned the Subaru dealership and was able to connect with him there. She asked him if he was coming to pick up his pay and advised him that she would be at work on the weekend, including on Labour Day, if he wanted to come in and pick up his pay. However, he did not come to pick up his pay over the weekend but sent her an email on September 6 advising her that he could not contact her. She then telephoned him and he advised her that he did not want to come in. Thereafter, she was engaged in telephone tag with Mr. Stanley for a few days and finally, on September 9, 2010, he left her a message requesting her to mail his final pay to him and she obliged.

34. The Delegate notes in the Reasons that Mr. Stanley did not comment on Ms. Mapleton's written statement nor raise any issues pertaining to her evidence.

35. In her analysis of the evidence of the parties in the Reasons, the Delegate notes that while there is no dispute between the parties that Mr. Stanley intended to quit his employment with Kelowna Motors and accept the Offer, Mr. Stanley states that it was his intention not to leave Kelowna Motors immediately. Therefore, the dispute between the parties is whether or not Mr. Stanley left Kelowna Motors on his own volition on August 24, 2010, or Kelowna Motors terminated his employment.

36. As both parties provided conflicting evidence pertaining to their discussions at the Meeting, which was crucial and determinative on the penultimate issue in this matter, the Delegate felt compelled to make findings of fact by assessing the credibility of the parties' evidence. In this regard, the Delegate was guided by the Court of Appeal's decision in *Farmya v. Chorny* [1952] 2 D.L.R. 354 (B.C. C.A.) and the following instructive and often quoted passage in the decision:

... In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions ...

37. The Delegate then went on to assess the credibility of the parties' evidence as follows:

Mr. Stanley argued that at the August 23rd meeting he was terminated by virtue of being told that if he decided to quit he must leave immediately. Conversely, the employer argued Mr. Stanley was not terminated at this meeting but was asked to consider his decision overnight and speak with a co-worker prior to making his final decision.

In this case, I find Mr. Stanley's evidence is not consistent with the probabilities of the situation and I prefer the evidence of the employer. There are several reasons for this. Mr. Stanley did not dispute the

employer's evidence that Mr. August and Mr. Sandvold tried to convince him *not* to quit during the meeting. However, the complainant did not provide any evidence that would support a finding that he told the employer his decision to quit was final; rather, under cross examination he agreed he was asked to think about things overnight and to discuss the situation with Mr. Feist. Mr. Stanley did not dispute the employer's evidence that no end date or time line was provided during the meeting. He agreed he was not asked for his keys at the end of the meeting. These undisputed facts are congruent with the employer's evidence regarding the August 23rd meeting. Mr. Stanley's own evidence is not consistent with his claim he was fired.

On August 24th, Mr. Stanley acted in a manner consistent with his intention to quit by cleaning out his desk and leaving Kelowna Motors. Further, Mr. Stanley did not challenge Mr. Feist's evidence that Mr. Stanley told him that he quit. In addition, Mr. Stanley did not dispute Ms. McMillan's evidence about his willingness to write a resignation letter. In my view, this is not the behaviour of someone who has been terminated.

38. Based on the foregoing analysis of the parties' evidence, the Delegate concluded that Kelowna Motors did not terminate Mr. Stanley's employment and the latter quit on his own volition. Therefore, Kelowna Motors did not owe him any compensation for length of service.

SUBMISSIONS OF MR. STANLEY

39. The written appeal submissions of Mr. Stanley, submitted with his Appeal Form, total seven pages and attached to these submissions are the written statements of employees of Kelowna Motors, which the latter relied upon at the Hearing. I also note that there is an additional two-page final reply submission of Mr. Stanley in the Appeal.
40. While it is not my intention to reiterate Mr. Stanley's written submissions in any great detail here, I have very carefully reviewed all his submissions and propose to describe them in a general way here.
41. I note that Mr. Stanley devotes several pages in his original and final reply submissions to a review of his employment background leading to the Meeting and the discussions between the parties at the Meeting as well as his impressions and belief that Kelowna Motors terminated his employment. These submissions largely reiterate and amplify his evidence at the Hearing and for the reasons set out in the "Analysis" part of my decision, I do not find it necessary to delineate those submissions in any detail here.
42. He also devotes several pages in his submissions to discuss the written statements and evidence of employees who submitted written statements that Kelowna Motors relied upon at the Hearing. He states that he was expecting to receive the statements in the mail two weeks prior to the Hearing and not by an email "less than 48 hours before the Hearing". He questions how he could possibly prepare to respond to the statements in such circumstances.
43. He also challenges Kelowna Motor's contention that the written statements were read out to him in a telephone call in September. He disputes that any such phone call happened and argues there was no reason for Mr. August to call him personally to read employee statements to him. He states some of the statements were dated in December and could not have existed in September when the purported call was made to him. I note here that with the exception of Ms. Dickson's statement, none of the other statements are dated in December. As for Ms. Dickson's statement, it shows two dates. On the top left-hand side of her statement the date August 25, 2010, appears but on the right-hand side December 15, 2010, is shown.
44. Mr. Stanley also, under headings listing the names of four of the five witnesses of Kelowna Motors who provided written statements - Mr. Hansford, Ms. McMillan, Ms. Dickson and Ms. Mapleton - provides his comments on their written statement or in the case of those who appeared at the Hearing by telephone, his comments on their

testimony. Again, for the reasons set out in the heading “Analysis” below, I do not find it necessary to reiterate these submissions of Mr. Stanley here.

45. Mr. Stanley also devotes at least a page in his submissions to further argue why the evidence adduced by Mr. August or the employer at the Hearing should not be believed and adduces further evidence here under his subheading “some points need to be clarified as they are not completely accurate”. Here he reiterates his evidence at the Hearing or adds further explanations why the evidence of the employer should be rejected.
46. Mr. Stanley also argues in his submissions that the Reasons for the Determination do not accurately set out the evidence at the Hearing. He suggests that at one point in the Hearing, Mr. August admitted “indirectly” that he was to leave Kelowna Motors immediately but that was never mentioned in the Determination.
47. He also indicates that he cross-examined Mr. Hansford but the Delegate has indicated in the Reasons that he did not examine Mr. Hansford. He also indicates that the Reasons state that he did not cross-examine Ms. McMillan but he claims that he did. Here, it should be noted, that on page 8 of the Reasons, the Delegate indicates that Mr. Stanley did cross-examine Ms. McMillan but did not make any comment on her written statement.
48. I also note that in the last part of the original written submissions of Mr. Stanley, particularly under the heading “Findings and Analysis”, with one exception, he is simply challenging the Delegate’s findings or conclusions of fact and for the reasons set out under the heading “Analysis” below, I do not find it necessary to reiterate those submissions. The exception in the submissions is that he raises a new issue on appeal, namely, that the employer contravened the *Act* by failing to give him his “final payments” until he “sign(ed) a release or letter of resignation” and that he was possibly owed commissions or wages for “unfinished business”, namely the customer leads he turned over to Mr. Hansford.
49. Mr. Stanley also complains that when he visited the Branch on April 27, approximately ten weeks after the Hearing, and enquired about the status of his case, he was told by a clerk at the Branch that she was surprised that he had not heard anything about his matter. She then went and checked with someone in the office and when she returned she told him the matter “would be finished when it is done”. Two weeks later he received the Determination. He believes his case was forgotten and his visit to the Branch was a reminder to the Branch or the Delegate about the matter. He feels that the Reasons for the Determination may be a reconstruction of the entire case from memory on the part of the Delegate or the Director and this would explain why “so many things were forgotten” in the Reasons.
50. In his final reply, Mr. Stanley does not deviate in any significant way from his challenge of the Delegate’s findings of facts and tries to further elaborate why his evidence should be preferred to the employer’s.
51. Mr. Stanley concludes his final reply submissions stating, “I wish to have this matter reviewed by another director as well as my original appeal letter as it very closely describes my concerns here”.

SUBMISSIONS OF THE DIRECTOR

52. The Director submits that several witnesses for Kelowna Motors appeared by telephone at the Hearing and Mr. Stanley had the opportunity to cross-examine them but chose not to ask questions of several witnesses and is now using the appeal process to question their evidence.
53. The Director also submits that Mr. Stanley is advancing the same issues and arguments he advanced during the Hearing in his appeal submissions and is simply re-arguing his earlier position.

54. As concerns Mr. Stanley's new evidence ground of appeal, the Director notes that Mr. Stanley has failed to specifically highlight what new evidence he is submitting except his elaborations of statements he made at the Hearing.
55. The Director also submits that Mr. Stanley was given an opportunity, at the commencement of the Hearing, to identify any other issues (other than compensation for length of service) for determination at the Hearing and he did not identify any but on appeal, he raises the issue of unpaid wages for the first time.
56. With respect to the written statements of employees of Kelowna Motors, the Director notes that while Mr. Stanley claims he did not receive the statements sufficiently in advance of the Hearing, the Branch emailed a scanned version of these statements to Mr. Stanley immediately after receiving them a couple of days before the Hearing and afforded Mr. Stanley an opportunity to adjourn the Hearing to allow him more time to consider and respond to the statements but he declined and expressed his intention to reconvene the Hearing.
57. The Director also argues that while Mr. Stanley disputes Mr. August's evidence that the latter telephoned him and read some of the statements over the telephone, what is important is that the Delegate gave Mr. Stanley an opportunity to review them and respond but Mr. Stanley chose to proceed with the Hearing.
58. Moreover, the Director submits that four out of five of the authors of the statements appeared at the Hearing and repeated the evidence they set out in the written statements and Mr. Stanley was afforded "ample opportunity to question or raise issues with these witnesses during cross-examination" but did not have questions for some of these witnesses.
59. The only individual who did not attend at the Hearing was Ms. Mapleton. However, the Director states that Mr. Stanley was given an opportunity to read her statement and raise any questions or objections he may have had regarding her statement but chose not to.
60. The Director also disputes that Mr. Stanley cross-examined or asked questions of Mr. Hansford. The Director states that when it was Mr. Stanley's turn to cross-examine Mr. Hansford, he had no questions at all and moved on to the next witness.
61. The Director also disputes Mr. Stanley's contention that the Delegate failed to note that he cross-examined Ms. McMillan. The Director points to page 8 of the Reasons wherein the Delegate clearly indicates that he cross-examined Ms. McMillan (but did not comment on Ms. McMillan's written statement). Further, the Director notes that Mr. Stanley's cross-examination of Ms. McMillan was unrelated to the penultimate issue before her, namely, whether he quit his employment on August 24, 2010, or was terminated by Kelowna Motors.
62. The Director concludes by noting that the Delegate carefully analyzed and weighed the evidence, and properly applied the *Act*. While Mr. Stanley may be unhappy with the Decision, the Director states that an appeal is not an opportunity for him to re-argue his case simply because he disagrees with the result. An appeal is also not an opportunity for him to adduce "new evidence (he) failed to give in the first instance", argues the Director.

SUBMISSIONS OF KELOWNA MOTORS

63. Kelowna motors, in its written submissions in response, addresses Mr. Stanley's dispute with the facts adduced by the employer at the Hearing and the findings of fact of the Delegate. While I have read those submissions, I do not find it necessary to reiterate Kelowna Motors' submissions here because of my reasons in the "Analysis" part of my decision below.

64. I also note that in its final reply submissions, Kelowna Motors has made submissions to address the new issue of unpaid wages by adducing written statements from Ms. Mapleton and Mr. Hansford. Again, I do not find it necessary to reiterate those submissions here because of my reasons on the matter of raising new issues on appeal set out in the “Analysis” part my decision below.

ANALYSIS

65. As indicated previously, Mr. Stanley appeals the Determination on all three available grounds of appeal in section 112(1) of the *Act* - “error of law”, “natural justice” and “new evidence”.

66. The onus, in every appeal, is on the appellant to establish, on a balance of probabilities, that there is a sufficient basis for the Tribunal to cancel, vary or change the Determination.

67. I will address each ground of appeal under separate descriptive headings below starting with the error of law ground of appeal.

a. Did the Delegate for the Director err in law in making the Determination?

68. In *Gemex Developments Corp. v. British Columbia (Accessor of Area #12 – Coquitlam)*, *supra*, the British Columbia Court of Appeal describes the following elements as constituting 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 reasonably be entertained; and
- (5) Exercising discretion in a fashion that is wrong in principle.

69. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal stated that the definition of error of law 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.

70. I also note that the Tribunal has indicated, time and time again, that it does not have jurisdiction over questions of fact (see *Re Pro-Serv 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 made a “palpable and overriding error” or that the finding of fact was “clearly wrong” to establish error of law.

71. This Tribunal has also noted previously that a delegate presiding over a hearing is far better positioned to deal with questions of credibility than the Tribunal sitting on an appeal. The appeal Tribunal is generally reluctant to substitute the delegate’s findings of facts even if it is inclined to reach a different conclusion on the evidence. In this case, having reviewed the Reasons, the section 112(5) “record” and the submissions of the parties, I find myself persuaded with the Delegate’s credibility analysis and findings of fact and I conclude, on the relevant or applicable tests for finding an error of law delineated in *Gemex, supra*, and as expounded in the Tribunal’s decisions in *Re Britco, supra*, that the Delegate made no palpable or overriding error or reach a clearly wrong

conclusion of fact or acted without any evidence or on a view of evidence that could not reasonably be entertained.

72. In the circumstances, I find that Mr. Stanley has failed to discharge the burden on him to establish that the Delegate erred in law in making the Determination and I dismiss this ground of appeal.

b. Did the Delegate for the Director fail to observe the principles of natural justice in making the Determination?

73. Principles of natural justice are essentially procedural rights that ensure that parties have a right to be heard by an independent decision maker. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST # D050/96).
74. In *Moon Arc Interiors Co. Ltd.*, BC EST # D200/04, the Tribunal described the natural justice ground of appeal as follows:

Such a challenge normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence.

75. In this case, the main contention of Mr. Stanley under this ground of appeal is that he was not provided with the witness statements of employees of Kelowna Motors sufficiently in advance to prepare his response. He was expecting to receive the statements two weeks before the Hearing and the Branch received them from Kelowna Motors two days before and within an hour of receiving them scanned and sent them by email to Mr. Stanley who did not see them before the Hearing. However, the delegate adjourned the Hearing and allowed Mr. Stanley to review the statements and decide whether he wanted an adjournment to properly review and respond to the statements but Mr. Stanley opted to proceed and now complains or suggests that he did not have a sufficient opportunity to consider or respond to the statements. I do not find Mr. Stanley's argument or suggestion compelling and reject his natural justice ground of appeal.
76. I also note under the natural justice ground of appeal Mr. Stanley's contention that the Delegate has failed to set out accurately the evidence adduced at the Hearing in the Reasons and his belief that the Delegate or the Branch forgot his case and therefore the Reasons may be constructed from the delegate's memory and therefore facts or "things were forgotten about or left out". I find no real basis for Mr. Stanley's allegations here and reject his arguments.

c. Is there new evidence that has become available that was not available at the time the Determination was being made and, if so, does this new evidence provide any basis to a change or vary the Determination?

77. The Tribunal in *Re: Merilus Technologies Inc.*, BC EST # D171/03, delineated the following four-part criteria for allowing new evidence on an appeal of a determination:
- The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - The evidence must be relevant to a material issue arising from the complaint;

- The evidence must be credible in the sense that it is reasonably capable of belief; and
- The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

78. This Tribunal has indicated time and again that the criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit any new evidence.

79. In the present case I am not convinced that Mr. Stanley has satisfied the criterion in *Re Merilus, supra*. Mr. Stanley, in his appeal, is amplifying or expounding further on the evidence he gave at the Hearing and this certainly would not qualify as new evidence under the first criterion in *Re Merilus*.

80. As for the evidence he adduces or comments he makes in his appeal submissions relating to the evidence of the employees whose written statements were relied upon by Kelowna Motors at the Hearing, I note that Mr. Stanley had the opportunity to respond to those statements at the Hearing having chosen to proceed with the Hearing and not adjourn it. He also had the opportunity to cross-examine all of the witnesses who attended at the Hearing by telephone but decided not to cross-examine most on their statements. He could have also presented his comments and evidence relating to the evidence and testimonies of those witnesses after the Hearing and before the Determination, if he wanted to. However, he decided to wait until the Determination was made. In the circumstances, he would fail on the first criterion in *Re Merilus* test.

81. Lastly, with respect to the new issue or issues Mr. Stanley raises on appeal pertaining to unpaid wages and withholding of wages by the employer pending his resignation letter or signing of a release, this would also not constitute new evidence under the criteria in *Re Merilus*. The Hearing is the place for all issues to be raised and the appeal is not an appropriate forum to raise issues for the first time. The appeal Tribunal does not conduct a *de novo* hearing.

82. In the result, I dismiss Mr. Stanley's appeal on the new evidence ground of appeal.

ORDER

83. I Order, pursuant to section 115 of the *Act*, that the Determination dated May5, 2011, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal