Employment Standards TRIBUNAL

An appeal

- by -

Northern Hardware & Furniture Co., Ltd.
("Northern")

- 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.: 2017A/81

DATE OF DECISION: July 31, 2017

DECISION

SUBMISSIONS

Kelly Green — on behalf of Northern Hardware & Furniture Co., Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Northern Hardware & Furniture Co., Ltd. ("Northern") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on June 8, 2017 (the "Determination").

2. The Determination found that Northern had contravened Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Glen Harbour ("Mr. Harbour") and ordered Northern to pay Mr. Harbour $8,359.59 inclusive of annual vacation pay (section 58 of the *Act*) and accrued interest (section 88 of the *Act*). The Determination also ordered Northern to pay administrative penalties under section 29 of the *Employment Standards Regulation* ("*Regulation*") in the amount of $500. The total amount of the Determination is $8,859.59.

3. Northern appeals the Determination, alleging there is new evidence available that was not available at the time the Determination was being made. Northern seeks to have the Determination changed or varied or cancelled.

4. In correspondence dated June 15, 2017, the Tribunal notified the parties, among other things, that no submissions are being sought from any of them pending review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed. If the Tribunal does not dismiss all of the appeal or does not confirm all of the Determination, the Tribunal will invite Mr. Harbour and the Director to file reply submissions on the appeal. Northern will then be given an opportunity to make a final reply to the submissions, if any.

5. The Tribunal received the section 112(5) "record" (the "Record") from the Director on June 19, 2017, and forwarded a copy of the same to Northern, and provided the latter an opportunity to object to its completeness. Northern did not object to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.

6. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the appeal form, written submissions of Northern and my review of the Record that was before the Director when the Determination was being made. Under subsection 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection, which provides:

> **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;
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> (b) the appeal was not filed within the applicable time limit;
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> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
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> (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 that 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.

7. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Harbour will, and the Director may, be invited to file further submissions. Conversely, if I am satisfied the appeal has no reasonable prospect of succeeding; it will be dismissed under section 114(1) of the *Act*.

ISSUE

8. The issue, at this stage of the proceeding, is whether the appeal should be dismissed under subsection 114(1) of the *Act*.

THE FACTS

9. Northern is a company duly incorporated under the laws of British Columbia. It is a wholesale supplier and also operates a retail housewares store in Prince George.

10. A BC Online: Registrar of Companies – Corporation Search indicates that Kelly Green ("Ms. Green") is its sole director and Clare Hilliard its officer.

11. Mr. Harbour was employed by Northern, as of April 9, 2007, as an outside sales representative at a wage of $15.75 per hour plus commissions.

12. On February 18, 2017, Mr. Harbour filed a complaint under section 74 of the *Act* alleging that Northern terminated his employment, without notice, on March 30, 2016, and contravened the *Act* by failing to pay him compensation for length of service (the "Complaint").

13. Northern countered Mr. Harbour's stated position in the Complaint stating that Mr. Harbour had abandoned his position or, alternatively, he was still employed.

14. On May 17, 2017, the delegate of the Director conducted a hearing by telephone conference (the "Hearing"). The Hearing was attended by Mr. Harbour on his own behalf and by Ms. Green on behalf of Northern.

15. At issue before the delegate was weather Northern terminated Mr. Harbour's employment, and if so, is Northern relieved of the obligation to pay compensation for length of service by virtue of the employment contract being impossible to perform due to an unforeseeable event or circumstances.

16. The delegate notes in the Determination that there was no written contract of employment between the parties but the parties agreed that for the purpose of calculating compensation for length of service, if owed, Mr. Harbour normally worked 40 hours per week and earned commissions (in addition to the hourly rate of pay) averaging $325.00 per week.

17. At pages R2 and R3 of the Reasons for the Determination (the "Reasons"), the delegate summarizes the facts not in dispute between the parties as follows:

> **Work and disability**
>
> - Mr. Harbour commenced employment on April 9, 2007.
> - His last working day occurred sometime in November 2013. He suffered from scoliosis. It was not work-related.
> - On December 3, 2013, Mr. Harbour commenced short-term disability leave and received benefit payments administered by an insurance company.
> - On March 25, 2014 Mr. Harbour commenced long-term disability leave and continued to receive benefit payments and, extended health and dental coverage free of premium charges.
> - On or around July 14, 2015, La Capitale Insurance and Financial Services Inc. ("La Capitale") advised Mr. Harbour that his "own occupation" period would end on March 24, 2016, after which he had to demonstrate that his medical condition prevented him from engaging in any gainful occupation for which he was reasonably suited.
> - Mr. Harbour's-long-term disability benefits continued into the "any occupation" period, commencing March 25, 2016. He was considered to have "total disability", defined as a state of incapacity resulting from an illness or an accident that prevents the participant from engaging in any gainful activity for which he or she is reasonably suited due to education, training or experience,
> - In accordance with the provisions of his group insurance policy, Mr. Harbour's long-term disability benefits ceased when he reached the age of 65 on March 19, 2017.
>
> **Pension and alleged termination**
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> - On April 1, 2009, Mr. Harbour joined a Northern employee pension plan administered by the Manufacturers Life Insurance Company ("Manulife").
> - On January 12, 2017, Manulife advised Mr. Harbour by email that his pension plan was "terminated" by his "supervisor". Mr. Harbour requested more information.
> - On January 16, 2017, Manulife confirmed by email that his pension plan was terminated and added that his account was closed, and a cheque was issued for $626.93 (it did not explain what the funds represented).
> - On January 18, 2017, Manulife informed Mr. Harbour by email that Northern had advised Manulife that his employment was terminated effective March 30, 2016. The last contribution to the pension plan was received February 25, 2016. Manulife provided Ms. Green's contact information.
> - On January 19, 2017, Mr. Harbour emailed Ms. Green, stating that Manulife had advised that his employment had been terminated effective March 30, 2016, and that his "Registered Retirement Plan had been terminated and cashed out." He requested, "Would you please advise if this is in fact true."
> - The following day Mr. Harbour forwarded the same email to Ms. Green, adding "second request" to the subject line and flagging the email as "high importance". Approximately 30 minutes later, Ms. Green replied: "Looking into this matter and will be in contact as soon as I can."
> - On January 26, 2017, Ms. Green forwarded an email from Northern's actuary. The email contained information about Mr. Harbour's pension. The actuarial associate added that she could prepare a retirement package for Mr. Harbour and forward the notice to Manulife.

- The following day Mr. Harbour replied, stating that the email was "interesting reading, but totally useless," as his retirement plan was already "terminated and cashed out as per your directive." It did not answer the question regarding whether his employment was terminated. He wrote:

  > This requires a simple yes or no answer. Did you terminate my employment and my RRP in March of 2016 … If need be, I can forward the e-mail I received from Manulife to you.

- Ms. Green did not respond to that email.

18. At pages R4 and R5, the delegate summarized the evidence and argument of Northern at the Hearing, as presented by Ms. Green.

19. The delegate notes that Ms. Green testified that Mr. Harbour abandoned his employment or, alternatively, he is still employed with Northern who never terminated his employment.

20. With respect to the former argument, that is, Mr. Harbour abandoned his employment, Ms. Green submitted that Mr. Harbour failed to keep in contact with Northern and did not advise when he would be able to return to work. She also said that he has relocated his residence 11 hours away from work and still awaiting surgery. She also said that La Capitale's correspondence stated that Mr. Harbour had a "total disability" which disqualified him from any occupation and this served as further evidence that he is unlikely to ever return to work with Northern.

21. With respect to the alternative argument, that is, Mr. Harbour's employment is not terminated and he continues to be employed with Northern, Ms. Green pointed out that Northern did not issue a Record of Employment (ROE) in 2016 or 2017 like it did in 2013 when he went on medical leave. She also pointed out that Northern maintained Mr. Harbour on its long-term disability benefits plan up until March 19, 2017, when he turned 65 and his benefits terminated under the terms of the benefits plan.

22. As for the correspondence from Manulife stating that Mr. Harbour's employment was terminated, she explained that only the contributions to Mr. Harbour's pension plan were terminated but not his employment. She explained further that Mr. Harbour was a member of two pension plans - defined benefit and defined contribution plans. Contributions to the defined benefit plan, which was the older of the two plans, remained in place until that plan ceased in 2014. Contributions to the defined contribution plan are based on a percentage of hours worked and Northern contributed to this plan until February 2016. Thereafter, Northern stopped contributions to the defined contribution plan because Mr. Harbour was approaching pension age. Following this decision of Northern, she states Manulife paid out the contributions to him and closed the account, but Mr. Harbour remained entitled to the defined benefit pension.

23. Ms. Green further testified that in January 2017 she received some emails from Manulife as Mr. Harbour was upset about his pension contributions being paid out. At that point, she contacted Northern's pension actuary who advised her in an email, on January 25, 2017, that Mr. Harbour did not qualify to accrue service for either benefit plans during the period of his disability as he had not completed 10 years of service at the onset of his disability.

24. With respect to her email of January 19, 2017, to Northern's pension actuary in which she referred to Mr. Harbour as an "ex-employee", Ms. Green explained that she only used the term to indicate that Mr. Harbour was not actively working.

25. When questioned by the delegate at the Hearing as to why she did not respond to Mr. Harbour's January 27, 2017, email asking her to confirm whether his employment was terminated in March 2016, Ms. Green said she did not feel comfortable answering Mr. Harbour's question because it "could have been a trap." She also

acknowledged to the delegate that Mr. Harbour sent her three requests by email to confirm the status of his employment.

26. At pages R5 and R6 of the reasons, the delegate summarizes the evidence and argument of Mr. Harbour.

27. The delegate notes that Mr. Harbour contended that he did not retire or resign but Northern terminated his employment on March 30, 2016, and he is owed compensation for length of service.

28. Mr. Harbour stated that he underwent surgery on his spine on October 27, 2014, but the surgery was partially successful and he requires a further surgery. Had the first surgery been successful, he stated that he would have been fully recovered and back to work long ago.

29. Because of the need for a second surgery, and in accordance with the advice of his doctors, Mr. Harbour moved from Prince George to Parksville on August 30, 2016, to be closer to Vancouver General Hospital. While the second surgery was scheduled for September 2016, it was postponed due to a nursing shortage and rescheduled for August 2017.

30. Mr. Harbour testified that his doctors would not be performing the second surgery if they did not believe he could make a full recovery. He anticipated being able to return to work in approximately three months following the second surgery if he had a job to return to. He also noted that none of the documentation from the insurance companies used the word "permanent" in describing his disability.

31. Mr. Harbour also testified that in January 2017, when he contacted Manulife to update his mailing address, Manulife advised him that his employment had been terminated in March 2016, and a cheque had been issued for the contributions to his pension shortly thereafter. He said he did not receive that cheque and a new one was subsequently issued, along with a T4A indicating a lump sum payment of $696.59, less income tax deducted. He argued that Manulife would not have told him that his employment was terminated if Northern had not clearly communicated that it was terminating his employment.

32. Mr. Harbour also presented at the Hearing a document from Manulife containing information about his plan that stated "You are 100% vested in your plan. This means when you leave the plan, you are entitled to the full value of your employer's contributions." He also provided a one-page excerpt from a "Digest of Benefit Entitlement Principles" from the employment and social development section of the website www.canada.ca that states that "contributions to which the employee has a vested right under the terms of the plan, but which are not locked in, will be paid to the employee on termination of employment." Based on the foregoing information, Mr. Harbour argued that contributions to a pension plan can only be paid out upon termination of employment and his employment, in the circumstances, was terminated by Northern.

33. Mr. Harbour also submitted that in addition to emailing Ms. Green on January 19, 20, and 26, 2017, he also telephoned her several times on and between those dates but to no avail as she did not return his messages.

34. After reviewing the evidence of both parties, the delegate first considered the question of whether Northern terminated Mr. Harbour's employment in the Reasons. The delegate reviewed the requirements of section 63 governing liability resulting from length of service and when that liability is discharged. More particularly, the delegate stated that this section imposes an obligation on an employer to provide written working notice, or compensation in lieu of notice, upon terminating an employee of at least three months' service. The liability for notice or compensation in lieu of notice is discharged if, among other circumstances, the employee quits or the contract is impossible to perform due to an unforeseeable event or circumstance. The burden is on

the employer to prove, on a balance of probabilities, that it was relieved of the obligation to give compensation for length of service.

35. Having said this, the delegate then considered Northern's argument that its obligation to pay compensation for length of service was discharged because Mr. Harbour abandoned his employment. The delegate explained that abandonment is an employment law concept similar to "voluntary quit" and the employer is required to "demonstrate a clear intention on the part of the employee to no longer be bound by the employment contract" if it is going to be able to successfully treat the contract as being at an end.

36. In concluding that there was insufficient evidence that Mr. Harbour abandoned his employment, the delegate relied on the following evidence and considerations:

- Ms. Green did not provide a date at which point Northern decided to treat the contract as being at an end.
- Before treating a contract as abandoned, employers are expected to take, at minimum, reasonable steps to contact the employee, which Northern did not do.
- Where the employee is on disability leave, as Mr. Harbour was, employers are expected to be particularly diligent in attempting to contact the employee, given that several months may pass without contact if the disability status remains unchanged. Northern provided no evidence that it attempted to contact Mr. Harbour to confirm his employment status at any time.
- As of January 2017, Mr. Harbour was still interested in returning to work, as evidenced by his emails seeking confirmation of his employment status.
- While Mr. Harbour did not dispute that he relocated 11 hours away from his workplace, he explained that he did so in order to be closer to medical treatment. There was no evidence that the move was permanent or that he would not move back to Prince George after treatment.

37. The delegate next considered Northern's alternative argument that Mr. Harbour continues to be an employee and Northern did not terminate his employment. In rejecting this argument and finding that Northern did indeed terminate Ms. Harbour's employment on the preponderance of the evidence, the delegate explained his reasons as follows:

- Northern relied on the fact that it did not issue an ROE to Mr. Harbour as evidence, in part, that it did not terminate his employment. While an ROE can be evidence of a termination of employment, the absence of ROE does not mean the employment relationship of Mr. Harbour persisted.
- Northern also submitted as evidence of continuing employment relationship with Mr. Harbour that it maintained Mr. Harbour on long-term disability benefits. However this is not conclusive evidence that he was still employed and Northern failed to produce any evidence to show that it was obligated to make payments or take any action to ensure that Mr. Harbour continued to receive benefit payments from the insurer. Further, post-employment continuation of benefits is normally governed by the terms of the benefits plan.
- While Ms. Green denied telling Manulife that Mr. Harbour's employment was terminated and argued that Northern only terminated contributions to Mr. Harbour's defined benefit plan because Mr. Harbour was "coming to pension age", Northern, in fact, stopped contributing to

the plan in February 2016, when Mr. Harbour was 63, about to turn 64 in March. Northern did not explain if there was some significance to Mr. Harbour's 64th birthday.

- After Manulife informed Mr. Harbour that his employment had been terminated, Mr. Harbour sought clarification from Northern and, on January 19, 2017, he emailed Ms. Green and asked her to advise if Manulife was correct that Northern had terminated his employment. When she responded the following day to his email, she did not confirm his employment status but stated that she was looking into the matter.
- About one week later, Ms. Green sent Mr. Harbour information about retirement rather than confirm to him that he was still employed.
- Mr. Harbour responded with a final request to confirm whether or not Northern had terminated his employment, and Ms. Green did not answer his email.
- In addition to the emails, Mr. Harbour attempted to call Ms. Green several times during this period without any success.
- Ms. Green's conduct in January 2017 was incompatible with Northern's assertion that it had not terminated Mr. Harbour's employment.
- If Ms. Green, in February 2016, only intended to stop making contributions to Mr. Harbour's defined contribution plan but not terminate his employment, she could have easily confirmed to him in January 2017 that he was still employed but she did not.
- Ms. Green said she did not want to answer Mr. Harbour's question pertaining to his employment status because it could have been a trap. However, it is incomprehensible how Mr. Harbour's inquiry as to his employment status can reasonably be interpreted this way.
- If Northern did not terminate Mr. Harbour's employment in early 2016 and Manulife misinformed him of the termination of his employment, then the latter was in the best position to produce corroborating evidence in the form of Mr. Green's correspondence with Manulife to shed light on how the mistake occurred but Northern failed to produce any such evidence.

38. The delegate then went on to consider the question of whether Mr. Harbour's Complaint, which was filed on February 18, 2017, outside of the six-month time limit prescribed by section 74 of the *Act*, could be accepted. The delegate exercised his discretion pursuant to section 76 of the *Act,* and accepted the late filed Complaint. I do not find it necessary here to review the delegate's decision which I find very well-reasoned, persuasive and within his authority to make. Moreover, Northern is not challenging this decision in its appeal.

39. The delegate next considered the question of whether Northern is relieved of the obligation to pay compensation for length of service by virtue of the employment contract being impossible to perform due to an unforeseeable event or circumstance. Here, the delegate considered section 65 of the *Act*. He noted that under this section an employer does not have to pay compensation for length of service to an employee employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance. He noted that this section effectively codifies the common law doctrine of "frustration of contract" which recognizes that a contractual obligation may become incapable of being performed due to some external event beyond the control of either party.

40. The delegate elaborated further on the subject of the nature of disability that may give rise to a frustration of a contract of employment. More particularly, he stated there is a distinction between an absence that makes performance of an employment contract impossible such as when an employee suffers a permanent disability,

and a temporary absence in which the employee is merely unavailable for work due to a medical reason. In determining whether an illness should be considered temporary or permanent, the delegate noted that Canadian courts have referred to the following factors set out in the English decision of *Marshall v. Harland & Wolff Ltd.,* [1972] 2 ALL E.R. 715:

a) the terms of the contract, including the provisions as to sickness pay;

b) how long the employment was likely to last in the absence of illness;

c) the nature of the employment;

d) the period of past employment; and

e) the nature of the illness or injury, how long, it has continued, and the prospects of recovery.

41. In concluding that Mr. Harbour's extended absence from work was temporary and did not render his employment contract impossible to perform or frustrated, the delegate considered the following factors:

- While there was no written employment contract, the contract of employment provided for short-term and long-term disability leave with benefits paid by a third party insurer.
- The employment was for an indefinite term and there was no indication it would not have continued in the absence of the illness.
- There was no evidence that Mr. Harbour's position as an outside sales representative was a key post that could not be temporarily replaced and needed to be filled on a permanent basis.
- Mr. Harbour was a long-term employee, having been employed since April 9, 2007, although the disability leave commenced approximately six and a half years into that term.
- As concerns the length of illness or disability, while Mr. Harbour's absence was an extended one – approaching three years - it was less than half of the time he worked as an active employee.
- As concerns the nature of the disability and Mr. Harbour's prospects for recovery, although the insurers used the term "total disability" for "any occupation", there was no evidence that his disability was permanent.
- Northern failed to show any medical opinion, or attempts to obtain such an opinion, that Mr. Harbour was permanently disabled or even likely to be permanently disabled.
- Mr. Harbour's unchallenged evidence was that his expected prompt return to work was delayed by the need for a second surgery, which itself was delayed by the shortage of medical staff.
- Mr. Harbour's further unchallenged evidence was that he would make a full return to work in approximately three months following the surgery, which is scheduled for August 2017.

42. After determining that Mr. Harbour's absence was temporary and did not render his employment contract impossible to perform, and having previously determined that his contract was terminated by Northern effective March 30, 2016, the delegate proceeded to decide Mr. Harbour's entitlement to compensation for length of service as follows:

> At that time, Mr. Harbour had been employed more than eight years and so he was entitled to eight weeks' wages as compensation for length of service. The parties agreed that Mr. Harbour normally worked 40 hours per week at $15.75 per hour ($630.00) and earned commissions averaging $325.00 per

week. I find Northern owes compensation of $7,640.00 (($630.00 + $325.00) x 8). 1 find Northern owes vacation pay of 6% on this amount ($458.40).

SUBMISSIONS OF NORTHERN

43. In her written appeal submissions on behalf of Northern, Ms. Green reiterates Northern's position at the hearing that Mr. Harbour's employment was never terminated by Northern. She states it was Manulife, in its email to Mr. Harbour in regards to his pension plan, that mistakenly used the words "terminated employee" instead of "membership termination" when he reached his 65th birthday that caused the confusion.

44. She also explains that she did not "reply immediately" to Mr. Harbour's email inquiry about his employment status because she "detected hostility in his email" towards her and wanted "to investigate the facts before replying". She states she did not want to use "the wrong wording" which could make the situation worse.

45. She further submits that the delegate has incorrectly calculated Mr. Harbour's severance. It should be based on what the insurance company was paying him from 2013 – 2016 while he was on short term and long term disability. She states "[t]his would have paid him 66.67% / 60% with no commission or vacation pay".

46. She also states that she does not have any "documentation from Labour Standards stating that it is the employer's responsibility to ensure workers come to work" and requests a copy of such document.

47. She states that Mr. Harbour relocated 11 hours' drive away from Northern's office and said "he was waiting for back surgery… he did not have a firm date yet and could not do the job in the meanwhile."

48. She questions how the delegate is "qualified" to make a prediction about when Mr. Harbour "would have ma[d]e a full recovery and be able to return to work … when a medical professional would never predict the outcome of [a] surgery".

49. She also states "I was not allowed to talk about our RWAM (insurance carrier) who's [*sic*] monthly payments were outstanding with us when Glen filed for bankruptcy".

50. Finally, she states the day after the Hearing, Mr. Harbour "sent an email to get his pension started." She states [h]e has never indicated to me that he ever intends on coming back to work after his surgery."

ANALYSIS

51. Section 112(1) of the *Act* provides that a person may appeal the determination on the following grounds:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination; and
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> (c) evidence has become available that was not available at the time the determination was being made.

52. The Tribunal has consistently stated that an appeal is an error correction process, with the burden on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1) above.

53. The grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual

conclusion than was made by the Director unless the Director's findings raise an error of law. The test for establishing an error of law is rather strict, requiring the appellant to show, on a balance of probabilities, that the Director's findings of facts are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation (see *Britco Structures Ltd.*, BC EST # D260/03). Short of the appellant discharging this burden to show an error of law, the Tribunal must respect and defer to the findings of fact made by the Director.

54. As indicated previously, Northern has based its appeal on the "new evidence" ground of appeal in subsection 112(1)(c) of the *Act*.

55. In *Bruce Davies and others*, *Directors or Officers of Merilus Technologies Inc.*, (BC EST # D171/03), the Tribunal delineated four conjunctive requirements that must be met before new evidence will be considered. More particularly, the appellant must establish that:

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

56. Having reviewed the appeal submissions of Ms. Green, I find that Northern has not presented any evidence that would qualify as "new evidence" under the fourfold conjunctive criteria for admitting new evidence in *Re Merilus Technologies, supra,* or within the meaning of 112(1)(c) of the *Act*.

57. I find that Ms. Green's appeal submissions, in part, consist of re-argument of Northern's position at the Hearing and a disagreement with the findings of fact made by the delegate in the Reasons for the Determination. More particularly, I find that the submissions of Ms. Green that Northern did not terminate Mr. Harbour's employment and that the email communication from Manulife to Mr. Harbour that used the words "terminated employee" was a "miscommunication" was argued by Northern at the Hearing and evidently rejected by delegate.

58. I also find that Ms. Green is rearguing why she did not respond to Mr. Harbour's emails requesting clarification on his employment status with Northern. At the Hearing, the delegate notes, she said she thought Mr. Harbour's query "could have been a trap" and in the appeal she is arguing "she detected hostility" in Mr. Harbour's emails and wanted "to investigate the facts before replying" but did not want to use "the wrong wording". There is no "new evidence" in this argument. It is simply an attempt on Northern's part to reargue or present a new argument to persuade the Tribunal to cancel the Determination that Northern is dissatisfied with. This argument could have been made at the time of the Hearing. An appeal is not a second opportunity for a party dissatisfied with the Director's decision to take the proverbial "second kick at the can" and re-argue its position.

59. With respect to Ms. Green's assertion that the delegate miscalculated Mr. Harbour's compensation for length of service by failing to consider the amounts the insurance company was paying him when he was receiving short and long term disability benefits, I am not persuaded with the merits of her argument. The delegate

correctly applied section 63(4) of the *Act* to calculate Mr. Harbour's entitlement for termination pay. That is, he considered Mr. Harbour's weekly wages, at the regular wage rate, during his last 8 weeks in which he worked normal or average hours of work for Northern, divided the total by 8 and then multiplied it by 8 which is the number of weeks' wages Northern is liable to pay Mr. Harbour. I also note that Northern and Mr. Harbour agreed that that he normally worked 40 hours per week at $15.75 per hour and earned commissions averaging $325 per week which information the delegate appropriately relied upon in calculating Mr. Harbour's termination pay.

60. With respect to Ms. Green's comment that she does not have any "documentation from Labour Standards stating that it is the employer's responsibility to ensure workers to come to work", I note that this comment appears to be in response to the delegate's comment in the Reasons that before treating a contract of employment as abandoned, employers are expected to take, at a minimum, reasonable steps to contact the employee, which Northern did not do. In the case of disabled employees such as Mr. Harbour, the delegate added that employers are expected to be particularly diligent in attempting to contact the employee especially because several months may pass without contact if the disability status remains unchanged. In this case, the delegate found that Northern failed to provide any evidence that it attempted to contact Mr. Harbour to confirm his employment status. I find nothing wrong or objectionable in the delegate's comment about the responsibility of the employer *vis-a-vis* its employee and particularly its disabled employee before treating a contract as abandoned. To the contrary, I would find it peculiar if the employer were held to a lesser standard.

61. With respect to Ms. Green's submissions that Mr. Harbour relocated 11 hours' drive away from Northern's office while waiting for a back surgery which was unscheduled and he "could not do the job in the meanwhile", I am a bit unsure what she is arguing here. If she is saying that Mr. Harbour's actions above indicate that he abandoned his employment, this argument was made at the Hearing by Northern and rejected by the delegate. The delegate expressly concluded in the Reasons that Mr. Harbour's move was in order to be close to medical treatment and there was no evidence that the move was permanent or that he would not move back to Prince George after treatment or surgery. I do not find the delegate, in so concluding, made a palpable or overriding error or reached a clearly wrong conclusion of fact or acted on a view of evidence that could not be reasonably entertained. I find that it is inappropriate for Northern take the proverbial "second kick at the can" and reargue the matter on appeal.

62. Ms. Green also submitted that the delegate is not qualified to predict that Mr. Harbour would have made a full recovery and be able to return to work when a medical professional cannot. I do not find that the delegate made such a prediction. The delegate simply noted that Mr. Harbour's unchallenged evidence was that he would make a full return to work in approximately three months following the surgery, which surgery is scheduled for August 2017. This was one of *many* other considerations (set out at paragraph 40 of this decision) the delegate weighed in concluding that Mr. Harbour's absence from work was temporary. I do not find the delegate to have erred in considering this unchallenged piece of evidence in his decision.

63. As for Ms. Green's submission that she was not allowed to " talk about our RWAM (insurance carrier) who's [*sic*] monthly payments were outstanding with us when Glen filed for bankruptcy", I did not find any evidence beyond this bare assertion of Mr. Green that she was prevented from giving any evidence at the Hearing. I am not convinced that Northern was denied any natural justice rights at the Hearing.

64. With respect to Ms. Green's assertion that Mr. Harbour sent an email to Northern the day after the Hearing to get his pension started, I do find this evidence only became available after the Hearing and would not have been available during adjudication of the Complaint. However, I do not find this evidence is relevant to a material issue arising from the Complaint. If am wrong in this assessment then, in the alternative, I find this

evidence lacks high potential probative value in the sense that, if believed, it could have led the Director to a different conclusion on the material issue. I also note, for what it is worth, that Ms. Green has not disclosed a copy of the purported email in the appeal.

65. Finally, with respect to Ms. Green's submission that Mr. Harbour never told her he would be coming back to work after his surgery, this assertion was made at the Hearing by Northern and is simply a re-argument and not "new evidence". It appears that Ms. Green is again making this assertion in support of Northern's contention at the Hearing that Mr. Harbour abandoned his employment. I find that the delegate has persuasively determined that Mr. Harbour did not abandon his employment based on the evidence and considerations I have delineated at paragraph 36 of this decision and I find no reason to conclude otherwise.

66. Having addressed specifically each argument advanced by Northern in its appeal and concluded that there is no reasonable prospect of the appeal succeeding under the new evidence ground of appeal, I have also considered the natural justice and the error of law grounds of appeal, although not relied upon by Northern in its appeal.

67. With respect to the natural justice ground of appeal, it is important to understand that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05.

68. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. 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)

69. The onus is on Northern, as the appellant, to demonstrate, on a balance of probabilities, a violation of its natural justice or procedural rights. Having reviewed the Determination including particularly the Record and the written appeal submissions of Ms. Green, I am convinced that there is no basis whatsoever for the natural justice ground of appeal. I find that the Director and his delegate afforded sufficient opportunities to Northern to know the case against it, the right to present its evidence and the right to be heard by an independent decision maker. Therefore, I find no evidence to support a finding of a breach of natural justice in this case.

70. With respect to the error of law ground of appeal, I have previously indicated that while the Tribunal lacks jurisdiction over questions of fact, it has jurisdiction when the matter involves errors on findings of fact which may amount to an error of law. However, the onus is on the appellant to show that the delegate or the Director made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish error of law (see *Re: Funk*, BC EST # D195/04). In this case, I am not persuaded that the delegate, in making his findings of fact on each of the issues in dispute, made any palpable or overriding error, or reached a clearly wrong conclusion of fact, or acted without any evidence, or on a view of evidence that could not reasonably be entertained. To the contrary, I find the delegate's conclusions of fact on all material issues supported in evidence and do not find any reason to disturb those conclusions.

71. For all of the above reasons, I find that there is no prospect that Northern's appeal will succeed and I dismiss it.

ORDER

72. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. In accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal