

An appeal

- by -

Jordan C. Gaudette  
(“Mr. Gaudette”)

- 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.:** 2012A/71

**DATE OF DECISION:** August 22, 2012

## DECISION

### SUBMISSIONS

Jordan C. Gaudette	on his own behalf
Israel Chafetz, Q.C.	counsel for Surfwood Equipment Limited Partnership
Tyler Siegmann	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Jordan C. Gaudette (“Mr. Gaudette”) of a Determination of the Director of Employment Standards (the “Director”) issued May 18, 2012, (the “Determination”). The Determination was issued by a delegate of the Director of Employment Standards (the “Delegate”) after an investigation of a complaint submitted by Mr. Gaudette on December 2, 2011. In his complaint, Mr. Gaudette alleged that Surfwood Equipment Limited Partnership (“Surfwood”) contravened section 8 of the *Act* by misrepresenting to him the availability of a sales position, the wages and conditions of employment. The Delegate concluded in the Determination that Surfwood did not so mislead or misrepresent to Mr. Gaudette and that no further action would be taken with respect to his complaint.
2. Mr. Gaudette appealed the Determination on two (2) grounds, namely, the Director breached the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was made.
3. Mr. Gaudette is seeking the Tribunal to vary or change the Determination. His written submissions however suggest that he wants the Tribunal to cancel the Determination and find Surfwood contravened section 8 of the *Act*.
4. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated into the *Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the parties’ written submissions, the Reasons for the Determination and the record forwarded by the Delegate under section 112(5) of the *Act*.

### THE DETERMINATION

5. While I do not intend to reiterate all of the submissions of the parties set out in the Reasons for the Determination (the “Reasons”) or contained in the record forwarded by the Delegate, I find very instructive and helpful the following analysis of the Director in the Determination which delineates the relevant background of Mr. Gaudette’s complaint, as well as a review and assessment of the evidence adduced by both Mr. Gaudette and Surfwood and, particularly, the latter’s General Manager, Mr. Phillips:

The Complainant and Mr. Phillips provided conflicting versions of the pre-hiring process. As there is little agreement, I must first determine the facts before I can determine whether Surfwood contravened section 8 of the Act. The essential task is to decide what is most likely to be the truth based on the evidence and the circumstances.

Given the labels of Mr. Phillips' e-mail and letter dated August 26, 2011, I am not convinced Mr. Phillips intended the correspondence to be merely a sample employment letter outlining a typical compensation package for sales representatives. The subject of the email 'offer of employment' and the title of the letter 'Confirmation of Employment Terms' demonstrate the letter's purpose was more than a sample. Furthermore, the fact that Mr. Phillips e-mailed the Complainant specifications for truck decals indicates Mr. Phillips was seriously considering employing the Complainant. Based on this evidence and balance of probabilities, I find Surfwood was attempting to induce, influence and persuade the Complainant to become an employee and be available for work.

While Surfwood may have been actively pursuing the Complainant, I am not satisfied Surfwood misled the Complainant during the pre-hiring process. The Complainant stated that on August 26, 2011 Mr. Phillips verbally offered him a sales position, and they agreed his employment would commence in two weeks. I am not persuaded this was the case. Mr. Phillips letter [*sic*] dated August 26, 2011, said the hire date was 'TBA'. The Complainant acknowledged this term was an abbreviation for 'to be announced'. Mr. Phillips notation [*sic*] 'TBA' is consistent with Surfwood's assertion that no position was available, but instead it anticipated the redefining of the sales territories might create an opportunity for an additional sales person in the future.

The oral evidence of the Complainant and Mr. Phillips demonstrate [*sic*] they discussed the sales position in the context of a possibility. Mr. Phillips advised the Complainant that he was unsure whether Surfwood's acquisition of Bobcat Country would create any new job opportunities. Surfwood was still working out logistics to determine whether additional sales coverage was needed. The Complainant understood that North Fraser was a new sales territory as a result of Surfwood expanding its operations. He further understood Surfwood was in the midst of shuffling personnel to create this new sales territory. This evidence is consistent with Surfwood's position that Mr. Phillips did not hire the Complainant because Surfwood was still assessing the need for additional personnel. Based on the evidence, I find on balance the conversation and correspondence between Mr. Phillips and the Complainant was about the possibility of a position becoming available. Employment at Surfwood was contingent on a sales position becoming available.

The Complainant's letter dated August 29, 2011 does not lead me to believe that Surfwood offered or agreed to a hire date of September 6, 2011. There is no evidence to corroborate the assertion. Mr. Phillips directly challenged this evidence. I am not prepared to accept the Complainant's oral evidence given internal inconsistencies. The Complainant said there as no discussion about the letter, which suggested he unilaterally imposed a hire date on Surfwood. Subsequently, the Complainant explained the hire date was agreed to by Mr. Phillips during a telephone call. This evidence is not consistent with his written timeline documents titled 'detail sequence of communication with Surfwood Equipment'.

I prefer Mr. Phillips' evidence that Surfwood did not offer or agree to a hire date. I find this evidence to be more credible than the Complainant's given that Mr. Phillips' evidence is consistent with e-mail correspondence and verbal discussions dating from August to October 2011. During these conversations and e-mails Mr. Phillips never provided or committed to a hire date because of uncertainty about the sales structure and territories. Moreover, is it not likely that the Complainant was provided a hire date given Mr. Crisanti and Mr. Phillips had the Complainant participate in an interview and testing. Based on the evidence, I find Surfwood did not offer or accept a hire date of September 6, 2011.

The findings of fact demonstrate that Surfwood did not misrepresent the availability of a sales position. Mr. Phillips only informed the Complainant about the possibility of a position becoming available. Employment was contingent on a sales position becoming available. Since Surfwood did not offer or agree to a hire date, Surfwood did not mislead the Complainant on the availability of a position, the wages or conditions of employment.

Section 8 of the Act allows an employer to induce, influence or persuade a person to be available for work provided there is no misrepresentation of the four identified matters during the pre-hiring process. Given my findings of fact, I find there was no misrepresentation. The Complaint is dismissed.

## ISSUES

6. The issues in this appeal are twofold, namely:
  - (i) Did the Director fail to observe the principles of natural justice in making the Determination?
  - (ii) Did new evidence become available that was not available at the time the Determination was being made and, if so, does that new evidence affect the outcome of the Determination?

## SUBMISSIONS OF MR. GAUDETTE

7. I have read and considered Mr. Gaudette's appeal submissions and found a large part of those submissions consist of reiteration of evidence he provided during the investigation of his complaint. Therefore, I will not repeat those submissions here but only refer to the evidence and submissions that are relevant to the issues to be decided in this appeal.
8. Having said this, with respect to his natural justice ground of appeal, I find only three (3) passages in his appeal submissions are related, directly or indirectly, to this ground of appeal and I propose to set them out verbatim:

I feel the director Mr. Tyler Siegman [sic] failed to consider that I was genuinely nervous as I could not afford legal council, and I was under oath which I take very seriously. I had no legal representation as the defendants did and I was forced to recall an abundance of email, phone conversations, and meetings over a period of 2 months, 5 months after it had happened. I do not work well under pressure, given the perceived 'internal inconsistencies' of my statement. (*Page 11, paragraph 2*) The defendants only had to respond to my testimony of the sequence of events, which I put together with my wife who witnessed every step of this disappointing process. The defendants did not produce a single document of evidence to prove that they did not persuade or influence me throughout the whole process. Their entire defense is hearsay.

...

Mr. Siegmann stated in the determination (*page 10, paragraph 3*) that he recognized that Mr. Phillips 'Confirmation of Employment' was definitely more than a 'sample' employment letter as Mr. Phillips claimed. Mr. Siegmann also said that he '*did feel Surfwood was attempting to induce, influence and persuade the complainant to become an employee and be available for work*'. This combination of statements goes along [sic] way towards the credibility of the defendant. I believe this is a failure to observe the principles of natural justice.

...

Regarding the acronym TBA- (*page 10, paragraph 4*) The first phone meeting Mr. Phillips was late, Mr. Chafetz his lawyer was on the line and insisted we proceeded without him, he would arrive shortly. I went through the sequence of events with Mr. Siegman [sic], with a bit of intimidation to getting it right. The meeting was longer than anticipated and Mr. Chafetz insisted he had another appointment and we would have to continue with Mr. Phillips testimony [sic] next time. However towards the end of my interview with Mr. Siegmann, Mr. Chafetz had a few things he wanted to say. One of those items was that his client understood TBA meant To Be Agreed. I imagine notes, or a recording were made of this conversation. The second phone meeting (*Page 10 Paragraph 4*) Mr. Phillips claims his interpretation of TBA is To Be Announced. Although the acronym TBA means many different things I just wanted to point out his discrepancy in the 2 separate statements. I do believe in that case it was To Be Announced. Mr. Phillips and I discussed the start date on August 31, 2011 when he called me on my wife's phone. (604-786-\_\_\_\_) *See below.*

(I have deleted the last four (4) digits of this phone number for privacy reasons)

9. Other than the above three (3) passages, I do not find anything in the submissions of Mr. Gaudette to be connected in any way with the natural justice ground of appeal.
10. With respect to the new evidence ground of appeal, Mr. Gaudette attaches a redacted invoice from the telephone company, Telus, for his wife's cellular phone in Kamloops showing a telephone call on August 31 at 5:33 p.m. from a phone number 604-540-\_\_\_\_ (I have deleted the last four (4) digits of this phone number for privacy reasons) for a call length of 13 minutes which Mr. Gaudette states was from Mr. Phillips. During this phone call, Mr. Gaudette states he discussed with Mr. Phillips the contents of the latter's email of August 29, 2011.
11. Mr. Gaudette also attaches a redacted invoice from Telus for his wife's telephone account showing a call from 604-313-\_\_\_\_ (I have deleted the last four (4) digits of this phone number for privacy reasons.), on October 14 at 4:16 p.m. Mr. Gaudette states that this call was from Mr. Phillips cell phone after he was returning from his office retreat. He states Mr. Phillips ended up speaking with his wife who directed him to a temporary cell phone number of Mr. Gaudette. Thereafter, Mr. Gaudette's states he received a call on the same date at 6:56 p.m. from Mr. Phillips while he was at a local hockey game. Mr. Gaudette states that during this telephone call, Mr. Phillips indicated to him that he should not accept any other offers of employment unless he was offered a \$1 million signing bonus. Mr. Gaudette states that while he is unable to produce the invoice for the temporary cell phone number, he is able to and attaches a picture of the phone showing the incoming call from the phone number he presents as Mr. Phillips' cell phone number.
12. The reason, states Mr. Gaudette, why he is presenting the telephone records in question as "new evidence" is to show that Mr. Phillips contacted him after he made the amendments to the "Confirmation of Employment Terms" document he received and also to show that Mr. Phillips contacted him subsequently to encourage him not to look for alternative employment as he would be "starting any day".

### **SUBMISSIONS OF SURFWOOD**

13. Counsel for Surfwood, in his written submissions, responds to Mr. Gaudette's appeal submissions. While I have read all of counsel's submissions, I will only set out those submissions of counsel that are relevant to the issues to be decided in this appeal, and not those that respond to Mr. Gaudette's reiteration of the evidence he adduced during the investigation of his complaint, nor those submissions of Mr. Gaudette that dispute or disagree with the Delegate's findings or conclusions of fact.
14. Having said this, with respect to the submissions of Mr. Gaudette pertaining to the natural justice ground of appeal and particularly relating to Mr. Gaudette's complaint that he was not represented by counsel and was very nervous when presenting his evidence in the investigation, counsel for Surfwood states:
  - 1) We cannot comment on the demeanor of Mr. Gaudette when he gave his evidence because it was given over the phone. Also, we cannot comment on Mr. Gaudette's decision not to retain counsel. However, Mr. Gaudette did not say anything about not having counsel nor did he say that he felt at some disadvantage representing himself. He was a vocal advocate on his own behalf. Also, the record would support that Mr. Gaudette had many weeks to prepare and consider his options. The designate was sensitive to him being his own advocate and gave him every opportunity to speak his mind, refer to documents and say what he considered to be relevant in his case.
15. Paragraphs 2 to 9 inclusive in counsel's written submission appear to be a reiteration of evidence adduced during the investigation of the complaint, although the submissions address Mr. Gaudette's challenge to the Delegate's findings or conclusions of fact. As indicated, I do not find it necessary to set out those submissions here.

16. With respect to the new evidence ground of appeal and, in particular, the telephone records Mr. Gaudette adduces as new evidence in his appeal, counsel for Surfwood states:
- 10) The telephone record that Mr Gaudette is presenting for the first time in his appeal submission proves nothing. Nothing in the documents indicate the content of any conversations nor does it impact the essential issue of offer and acceptance. Throughout the summer and fall months of 2011 Mr Gaudette continued to pursue the company for a job. He had been given no assurance and none of the emails produced acknowledges that a position awaited him. These telephone records, at best, only show a continuation of that process and nothing more. Further, after all these calls, he still ultimately advises the company that if there is no offer forthcoming he is going elsewhere and that is exactly what occurred.
17. Counsel for Surfwood also responds to Mr. Gaudette's suggestion that the first telephone meeting or hearing of the parties was cut short because counsel had some other engagement to attend to. More particularly, counsel for Surfwood states that Mr. Gaudette in making the said allegation fails to mention that the first hearing was set for one (1) hour by agreement of all parties, including the Delegate. However, counsel states that Mr. Gaudette's oral submissions and responses to questions took up the entire hour, leaving no time for counsel to continue due to other commitments. Counsel also submits that the Delegate gave Mr. Gaudette "every opportunity to answer the questions in any manner he chose and say anything he wanted by way of summation" and that Mr. Gaudette was not under "any time pressure or restricted in what he wanted to say".
18. Counsel concludes his submissions by stating that Mr. Gaudette's appeal submissions are a repetition of what he said to the Delegate during the investigation, and nothing more than a disagreement with the Delegate's conclusions of fact.

## **SUBMISSIONS OF THE DIRECTOR**

19. With respect to the natural justice ground of appeal, the Director submits that Mr. Gaudette has failed to discharge the burden placed upon him to show the Director breached principles of natural justice. The Director argues that the section 112(5) "record" presented in the appeal shows that Mr. Gaudette was afforded an opportunity to present evidence and know the case against him. The Director further states that Mr. Gaudette attended two (2) fact-finding meetings to present his evidence and listened to Surfwood's oral evidence. At the conclusion of these meetings, the Director states, Mr. Gaudette said he was satisfied with his opportunity to present evidence.
20. The Director also notes that the Delegate invited both parties to submit a final reply to the other's evidence, and Mr. Gaudette, on April 8, 2012, made a final reply in writing. Thereafter, on April 18, 2012, Mr. Gaudette, via email, confirmed to the Delegate that he was satisfied with the evidence that he had presented. In the circumstances, the Director states that there was no breach of the principles of natural justice and that the natural justice ground of appeal should be dismissed.
21. With respect to the new evidence ground of appeal, the Director states that while Mr. Gaudette contends that it was only upon reviewing the Delegate's findings and analysis in the Reasons that he realized that Surfwood's evidence was in conflict with his with respect to the amendments in the letter entitled "Confirmation of Employment Terms", Mr. Gaudette was afforded an opportunity to hear directly Surfwood's evidence and respond to any conflicts.
22. According to the Director, Mr. Gaudette, with the exercise of due diligence, could have discovered and presented to the Delegate the telephone records he now produces in the appeal. The Director submits that it would be inappropriate to disturb the findings in the Determination on the basis of the purported new evidence as it is not new evidence, and it could have been provided to the Delegate prior to the

Determination being made. Therefore, the new evidence ground of appeal should also be denied or dismissed.

23. The Director also submits that Mr. Gaudette's appeal submissions, predominantly, are in the nature of a dispute with the Delegate's view of the evidence or findings of fact. In the Director's view, there is no error of law on the part of the Delegate in arriving at the conclusions or findings of fact in the Determination. The Director concludes by stating that Mr. Gaudette is simply using the appeal process to re-argue his case with a view to persuading the Tribunal "to reach a different conclusion". The Director argues that this is an inappropriate use of the appeal mechanism of the *Act*, and Mr. Gaudette's appeal should be dismissed and the Determination confirmed.

## ANALYSIS

24. Section 112(1) of the *Act* delineates the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It states:

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; or
- (c) evidence has become available that was not available at the time the determination was being made.

25. On the Appeal Form, while Mr. Gaudette has checked off boxes for the "natural justice" and "new evidence" grounds of appeal, I note that the Director has correctly pointed out that a large part of Mr. Gaudette's submissions focus on the Delegate's "view of the evidence and findings of fact" and question the fairness of the Delegate's conclusions of fact. Therefore, this gives cause for me to consider also the error of law ground of appeal set out in section 112(1)(a) of the *Act*. In this regard, I note that this Tribunal in *Re: Flour Child Bakeries Corp.* (BC EST # D094/06), adopted the view of the Tribunal in *Triple S Transmission Inc.* (BC EST # D141/03), wherein the Tribunal expressed the view that it should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off". In *Triple S Transmission Inc.*, the Tribunal stated:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the director.

26. Having said this, I will consider under separate headings below each of the available grounds of appeal under section 112(1) of the *Act*, starting with the error of law ground.

### *(i) Error of Law*

27. Do the submissions of Mr. Gaudette invoke the error of law ground of appeal? In this regard, I note that the Tribunal has consistently adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA):

- (1) A misinterpretation or misapplication of a section of the Act;

- (2) A miscalculation of an applicable principle of general law;
- (3) Acting without any evidence;
- (4) Acting on a view of the facts which could not reasonably be entertained; and,
- (5) Adopting a method of assessment which is wrong in principle.

28. Based on the definitions of error of law in *Gemex, supra*, I am not persuaded that the Delegate committed an error of law in making the Determination. In particular, I do not find on the Delegate's part any misinterpretation or misapplication of a section of the *Act* or a misapplication of an applicable principle of general law. Based on the evidence adduced by the parties and the Delegate's weighing of that evidence as delineated in the parts of the Reasons quoted under the heading "The Determination" above, I am of the view that the Delegate cannot be said to have acted without any evidence or acted on a view of the facts which could not reasonably be entertained or adopted a method of assessment which is wrong in principle. Having said this, I find that it was open to the Delegate, based on the evidence adduced by both parties, to reach the conclusions of fact he did and to dismiss Mr. Gaudette's complaint.
29. I also reiterate and agree with both the Director and counsel for Surfwood that Mr. Gaudette is re-arguing his case based on his disagreement with the Delegate's findings or conclusions of fact, and this is not a proper basis to appeal a determination.

**(ii) Natural Justice**

30. In *Re: 607730 BC Ltd. (c.o.b. English Inn and Resort)* (BC EST # D055/05), the Tribunal explained the principles of natural justice are, in essence, procedural rights ensuring that 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.
31. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal expounded on the principles of natural justice as follows:

The 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.

32. The onus rests on Mr. Gaudette as the appellant to show that the Delegate failed to observe the principles of natural justice in making the Determination. While Mr. Gaudette claims that he did not have legal representation unlike Surfwood, the principles of natural justice do not require that each party appearing before an administrative tribunal must have or should be provided legal representation. As indicated previously, principles of natural justice are procedural rights ensuring that 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. In this case, there is no evidence that Mr. Gaudette was denied any of these procedural rights. To the contrary, I find that the Delegate, during the investigation of the complaint, provided Mr. Gaudette with ample opportunity to learn the case against him and to present his evidence. While Mr. Gaudette may have been nervous and not as prepared as he would have liked to have been in presenting his evidence at either or both of the telephone meetings of the parties during the investigation of his



complaint, he had ample opportunity to provide to the Delegate any evidence that he may not have provided during those telephone meetings subsequently and before the Determination was made.

33. With respect to Mr. Gaudette's allegation that the Delegate failed to observe the principles of natural justice in dismissing his complaint while agreeing in the Reasons that Surfwood was attempting to induce, influence and persuade him to become an employee and be available for work, I find Mr. Gaudette has omitted the balance of the Delegate's reasons which go on to explain why he felt Surfwood, although actively pursuing Mr. Gaudette, did not mislead him during the pre-hiring process. In the circumstances, I do not find Mr. Gaudette's aforementioned, incomplete or out-of-context, reference to the Delegate's reasons supports his claim of breach of natural justice on the Delegate's part.
34. I also do not find Mr. Gaudette's assertion that the first telephone meeting of the parties was cut short because counsel for Surfwood had another engagement, relevant or supportive of his natural justice ground of appeal. I am persuaded by the submissions of Surfwood's counsel that the first telephone meeting was set for one (1) hour and Mr. Gaudette consumed most of the time in the meeting with making his submissions and responding to questions. Moreover, there was a subsequent telephone meeting of the parties at which both parties were afforded an opportunity to present their evidence and did so. In addition, Mr. Gaudette was afforded yet another opportunity by the Delegate to make any further submissions he wished in response to Surfwood's submissions arising from the telephone meetings.
35. In the circumstances, I do not find any evidentiary basis to support Mr. Gaudette's contention that there was a breach of natural justice on the part of the Delegate in making the Determination. Therefore, I dismiss this ground of appeal.

***(iii) New Evidence***

36. With respect to the new evidence ground of appeal, the criteria for allowing new evidence on appeal of a determination is delineated by the Tribunal in *Re: Merilus Technologies Inc.* (BC EST # D171/03) as follows:
- 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.
37. This Tribunal has indicated time and again that the four (4) 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.
38. In this case, I am not convinced that Mr. Gaudette has met the first criterion in the *Re: Merilus* test above. More particularly, the telephone records Mr. Gaudette wishes to adduce in the appeal existed and could have been provided at the investigation stage, and also before the Determination was made. However, Mr. Gaudette failed to do that.
39. Furthermore, while Mr. Gaudette is of the view that the telephone records he has adduced prove that Mr. Phillips contacted him after his amendments to the "Confirmation of Employment Terms" and support

his assertion that Mr. Phillips encouraged him “to not source another job” and that he would be “starting (work) any day”. I am unable to interpret these records as proof of anything other than calls made to Mr. Gaudette by Mr. Phillips at most, even if I were to admit them as new evidence, which I do not, as these records fail the first of the fourfold requirements in the *Re: Merilus* test.

40. Having said this, I also point out that I share both the Director’s and Surfwood’s view that Mr. Gaudette’s appeal, in large measure, is a re-argument of the evidence he adduced during the investigation of his complaint and, therefore, I dismiss his appeal.

### **ORDER**

41. Pursuant to section 115 of the *Act*, I order the Determination dated May 18, 2012, be confirmed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**