Employment Standards TRIBUNAL

An appeal

- by -

C. G. Motorsports Inc.
("CGM")

- 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/77

DATE OF DECISION: August 28, 2012

DECISION

SUBMISSIONS

Aidan P. Butterfield	counsel for C.G. Motorsports Inc.
Sukh Kaila	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 C.G. Motorsports Inc. ("CGM") of a determination that was issued on May 1, 2012 (the "Determination").

2. CGM operates an automotive repair shop in British Columbia and employed Kwok Chiu Yeung ("Mr. Yeung") as a mechanic from May 2003 to January 19, 2011. On January 31, 2011, Mr. Yeung filed a complaint with the Director of Employment Standards (the "Director") alleging that CGM contravened the *Act* in failing to pay him compensation for length of service. The delegate of the Director (the "Delegate") investigated Mr. Yeung's complaint and held a hearing on July 20, 2011 (the "Hearing"), which was attended by Mr. Yeung on his own behalf and by Chris Besemer ("Mr. Besemer"), an owner of CGM, on the latter's behalf. CGM also called two (2) witnesses, Kam Russell ("Mr. Russell") and Alexi Angelatos ("Mr. Angelatos") to give evidence at the Hearing on its behalf. Thereafter, on May 1, 2012, the Delegate, on behalf of the Director, issued the Determination ordering CGM to pay Mr. Yeung $7,396.61, representing compensation for length of service, annual vacation pay and accrued interest. The Delegate also imposed an administrative penalty in the amount of $500.00 for contravention of section 63 of the *Act*, for a total amount payable of $7,896.61.

3. The deadline for filing an appeal of the Determination was June 8, 2012. CGM appealed the Determination on July 4, 2012, almost one (1) month after the expiry of the appeal period deadline.

4. On its Appeal Form, CGM has checked off two (2) grounds of appeal, namely, the Director of Employment Standards erred in law and new evidence has become available that was not available at the time the Determination was being made.

5. CGM is seeking the Tribunal to cancel the Determination or to refer it back to the Director.

6. CGM also requests a suspension of the Determination pending the appeal, and deposited $700.00, or 10% of the amount of the Determination net of statutory deductions, with its appeal. The suspension request was separately decided by the Tribunal, and that decision is reported at BC EST # D086/12. In that decision, the Tribunal, for reasons I need not review here, allowed the application of CGM to suspend the effect of the Determination pending the outcome of the appeal on the express condition that CGM deposits the balance of the Determination, that is, $7,196.61, with the Director no later than August 28, 2012.

7. While the suspension request of CGM has been dealt with, the second preliminary issue remains; namely, the matter of the late-filed appeal and whether the Tribunal should extend the time for CGM to file its appeal. As indicated previously, the time limit for filing the appeal expired on June 8, 2012, and CGM filed its appeal on July 4, 2012. Section 109(1)(b) of the *Act* affords the Tribunal the discretion to extend the deadline for requesting an appeal when the appeal is filed after the expiry of the appeal period. In this decision I will only consider the matter of whether the Tribunal should exercise its discretion under Section 109(1)(b) and extend

the statutory time limit for CGM to appeal. If my decision is in the affirmative, then only will the parties be invited to make full submissions on the substantive issues raised in the appeal.

8. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in 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, the remaining preliminary issue I have to decide may be adjudicated on the basis of the section 112(5) "record", the Reasons for the Determination and the written submissions of the parties.

ISSUE

9. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* and allow the late-filed appeal?

THE FACTS

10. Based on my review of the Reasons for the Determination (the "Reasons") and the section 112(5) "record", the issue before the Director's Delegate, both during the investigation and at the Hearing, was whether Mr. Yeung quit his employment.

11. In considering this very question, the Delegate summarized in the Determination the evidence and argument of CGM as follows:

> The employer provided affirmed testimony stating Mr. Yeung quit his employment with C.G. Specifically, the employer states the complainant got into a heated argument with a client on January 19, 2011. The following day Chris Besemer ('Chris'), owner of C.G., spoke with Mr. Yeung regarding the incident with the client. It was at this time the employer offered the complainant [to] take time off to deal with personal matters, specifically, the passing of his mother. The complainant subsequently left the shop following the conversation and did not return until January 26, 2011 requesting compensation for length of service. The employer contends this action amounts to the complainant quitting his job. As part of its submission, the employer included a record of employment ('ROE') which indicates reason of termination of employment as 'Going through personal. [*sic*] Work affected negatively by personal issue. Mutually agree for him to leave.'.

12. The Delegate also summarized the evidence of CGM's witnesses, Mr. Russell and Mr. Angelatos, as follows:

> 1. Kam Russell: confirmed the argument between himself and Mr. Yeung on January 19, 2011. Claims Mr. Yeung initially honked the horn of his car for significant amount of time followed by yelling and profanities directed at him leaving him feeling threatened. Would like to highlight that the complainant was in volatile state of mind.
>
> 2. Alexi Angelatos: confirmed the argument which took place on January 19, 2011 between Kam Russell and the complainant. Alexi states Mr. Yeung instigated the argument by holding the horn of his car for a prolonged period of time followed by a verbal tirade directed at Kam Russell. Alexi also states he overhead Chris mention to the complainant that he needed to take time off to deal with his personal issues. Alexi claims he did not hear the complaint's [*sic*] response to this suggestion.

13. The Delegate then summarized Mr. Yeung's evidence in the Reasons as follows:

> The complainant provided affirmed testimony stating he did not quit his employment with C.G. The complainant confirmed he did in fact enter into an argument with a client on January 19, 2011. Following the argument, the complainant requested and received permission from Chris to leave work early as he

> was upset. The following morning, as the complainant was about to enter the shop he was intercepted by Chris who informed him not to come into work anymore. The reason provided to Mr. Yeung was that he had cost C.G. a loyal client as a result of the previous day's altercation. In addition, the employer also questioned the complainant's ability to effectively repair BMW's.
>
> Mr. Yeung claims he stayed away from C.G. until January 26, 2011 hoping Chris may calm down and he could return to work. However, upon his return on January 26, 2011 Mr. Yeung's final pay cheque and annual vacation pay cheque had been prepared and waiting for him [*sic*]. Mr. Yeung collected his tools and left C.G. The complainant claims no effort was made by the employer to clarify any miscommunication or to prevent him from leaving C.G.

14. In concluding that Mr. Yeung did not quit his employment, the Delegate noted that where disputes arise as to whether an employee quit or terminated his employment, the burden of proof is on the employer. The Delegate then referred to the Tribunal's decision in *Burnaby Select Taxi and Zoltan Kiss* (BC EST # D091/96 reconsidered and upheld in BC EST # D122/96) and quoted the following instructive passage from the said decision:

> The right to quit is personal to the employee and there must be clear and unequivocal fact to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit; subjectively, the employee must form intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her employment.

15. Relying upon the above excerpt, the Delegate reasoned as follows in concluding that Mr. Yeung did not quit his employment:

> The evidence indicates Mr. Yeung did not verbalize to the employer his intention to quit his job with C.G. The employer maintains the complainant's actions alone, following the January 19, 2011 incident, be interpreted as Mr. Yeung quitting his employment. Based on the employer's evidence, Mr. Yeung , arrived at C.G. on January 26, 2011 and requested compensation for length of service. The employer argues this action is equivalent to an individual quitting his employment. While it can be argued the employer interpreted this act as conduct that objectively showed Mr. Yeung was quitting his employment; the same can be said for the complainant's request for compensation for length of service, as it can also easily be interpreted as indication that Mr. Yeung believed his employment was being terminated when he was told by the employer to leave C.G. on January 19, 2011. In light of different interpretations of the evidence and considering the facts are uncertain and unclear, the events of January 26, 2011 cannot be understood as clear and unequivocal fact that Mr. Yeung exercised his right to quit his employment with C.G. Accordingly, I find the employer has not met the burden of proof necessary to discharge it from having to pay the complainant compensation for length of service.

16. The Delegate further stated:

> Compounding the lack of clear and unequivocal facts are inconsistencies in the employer's primary argument. The employer submitted as evidence a record of employment for Mr. Yeung which indicates that C.G. did not consider Mr. Yeung to have been terminated or to have quit. Such conflicting evidence casts doubt over the employer's argument and raises questions concerning its credibility. This conflicting evidence does not form the basis of my finding; however, it does aid to further reinforce it.

17. In so concluding, the Delegate went on to award Mr. Yeung compensation for length of service, as well as vacation pay and interest on both amounts.

SUBMISSIONS OF CGM

18. Counsel represented CGM in the Appeal. Counsel's written submissions in the Appeal may be delineated under three (3) subheadings below.

Error of Law

19. With respect to the error of law ground of appeal, counsel for CGM submits:

> (i) The Director erred in his selection and application of the standard of proof for determination of whether the complainant had resigned: 'clear and unequivocal fact' vs simple balance of probability per *Re Whitehall Bureau of Canada Ltd.* [2010] BCESTD No. 26.
>
> (ii) The Director erred in misconstruing the claimant's words and finding that 'at no time…did the complainant state he was quitting' and in finding that 'Mr. Yeung did not verbalize to the employer his intention to quit'.
>
> (iii) The Director erred in failing to give effect to s. 65(1)(f) of the *Employment Standards Act* as it applied to our circumstances.
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> (iv) The Director erred in failing to address the evidence of there having been just cause for such dismissal as may have been apprehended by the Director and hence in failing to give effect to s. 63(3)(c) of the *Act*.
>
> (v) The Director erred in giving determinative weight to the evidence of a 'record of employment': *Re Piney Creek Logging Ltd.* [1998] BCEST No. 572.

New Evidence

20. With respect to the new evidence ground of appeal, counsel for CGM states, in support of CGM's contention that Mr. Yeung resigned or retired from his employment, that:

> …in the intervening year, the complainant has not accepted or sought employment and has evidenced no intention of taking work. This goes to the subjective element of the test for resignation, indicating from the date of severance an intention to not continue working.

Explanation for Late-Filed Appeal of CGM

21. With respect to CGM's late-filed Appeal, counsel submits:

> 1. The Appellant, CG Motorsports Inc. requests under s. 109(1)(b) of the *Employment Standards Act* that the Tribunal extend the time period for requesting an Appeal even though the period expired 27 days ago, on June 8.
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> 2. On receiving the Director's Determination, CG's principal, Chris Besemer, perceived the outcome to be incorrect in the circumstances and diligently set about preparing to mount an Appeal.
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> 3. Through an established, informal line of communication through mutual acquaintances, CG informed the complainant that the Director's Determination would be appealed.
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> 4. Between working on the shop floor and, after hours, dealing with all the ancillary aspects of operating the business, only very limited time was available to Mr. Besemer.
>
> 5. The upshot of this was that more than two weeks had passed before CG became aware that preparation of an Appeal was more than they could handle alone. In twelve years of operating the

business they had never before had to deal with an employment standards complaint or any other tribunal or judicial or semi-judicial proceedings.

6. Reviewing the Determination and as their preparations progressed they became aware that it was their unfamiliarity with such process that had made them unable to successfully present their case in the first instance.

7. On finding that effectively making an Appeal was beyond their capability, CG made enquiry of lawyers who advertized themselves as practitioners in employment law.

8. From these enquiries CG soon learned that the cost of representation through the appeal process would be prohibitive; they decided to approach Aidan Butterfield, their next-door neighbour and fellow-owner in the industrial strata corporation where their shop is located.

9. Mr. Butterfield operates a marine diesel engine rebuilding facility and also practices law part-time. Mr. Butterfield advised that he had never before acted on an employment matter, but that he would undertake CG's Appeal on terms manageable to CG.

10. It was just three days before the limitation date and the day before he was leaving for a week's work on the Queen Charlotte Islands that CG's lawyer became aware that the appeal submission was due on June 8 and that he would be unable to make a sufficient appeal submission by the due date as stipulated in the Tribunal's rules of practice.

11. He contacted the Tribunal's office on the morning of June 5, giving notice of CG's intent to appeal and asking whether, as an interim measure, a simple unsupported Appeal Form, with no accompanying material would be acceptable. Alternatively, could a request for extension be made in advance, i.e. at that time. He was told no, that a full and complete submission was required and that a request for suspension of time was to be made with the Appeal when that was submitted.

12. On returning from working out of town and dealing with emergent matters arising from a sudden and unexpected death, CG's lawyer made all possible haste to complete and submit this Notice of Appeal.

13. Failure to meet the limitation date resulted from no fault of CG, who requests this extension so that a full and fair review of the Director's Determination may be made.

14. The Appellant submits that no prejudice to the complainant will result from the granting of the requested time extension.

22. I also note that counsel for CGM has submitted a final reply, which I have carefully reviewed, although I do not find it necessary to delineate verbatim the submissions here. I would like to note however that, in the final reply, counsel refers to the Tribunal's decision in *Re: Niemisto* (BC EST # D099/96) delineating the criteria the Tribunal will consider in context of the facts in the case when deciding whether or not to exercise its discretion to extend the time period for filing an appeal and submits that CGM satisfies the criteria in *Re: Niemisto* for the Tribunal to exercise its discretion to extend the statutory time limit for filing the Appeal.

SUBMISSIONS OF THE DIRECTOR

23. The Director submits that CGM has failed to provide a reasonable or credible explanation for failing to request an appeal within the statutory time limit.

24. The Director further submits that CGM's submissions on appeal are insufficient and do not allow the Tribunal to assess the likelihood of success of CGM on appeal. The Director also adds that the findings in the Determination are based on a balance of probabilities standard of proof, and the Delegate's reliance on the quoted passage from *Burnaby Select Taxi and Zoltan Kiss*, *supra*, only "serves as an approach which aids with the analysis of the evidence".

25. Furthermore, the Director contends the Delegate did not err or misconstrue the complainant's evidence leading to his conclusion in the Determination that Mr. Yeung did not verbalize to CGM his intention to quit. To the contrary, the Director argues that CGM provided affirmative testimony at the hearing that Mr. Yeung did not "state he was quitting his employment with [CGM]."

26. The Director also states that the Delegate considered all the evidence of the parties and all appropriate sections of the *Act* and *Regulation* in making this Determination.

27. The Director also reiterates that the Record of Employment issued to Mr. Yeung did not form part of the findings upon which the Delegate relied in the Determination. However, the Director states that if the Record of Employment were relied upon, it would only serve to prove that CGM "has not met the burden of proof necessary to discharge it from having to pay [Mr. Yeung] compensation for length of service".

28. Finally, with respect to the new evidence ground of appeal, the Director argues that CGM's assertion in the form of new evidence "is unsupported and without relevance".

ANALYSIS

29. Section 112 of the *Act* serves as the code for any party wishing to appeal the Director's determination. It also sets out the appeal period or time limit for filing an appeal. In particular, Subsection 112(3)(a) and (b) of the *Act* provide:

> 112 (3) The appeal period referred to in subsection (2) is:
>
> (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
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> (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).

30. Section 122 of the *Act* provides:

> 122 (1) A determination … that is required to be served on a person under this Act is deemed to have been served if
>
> (a) served on the person, or
>
> (b) sent by registered mail to the person's last known address.
>
> (2) If service is by registered mail, the determination…is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.

31. In this case, the Determination was made on May 1, 2012, and sent on that very date by registered mail to CGM's registered and records office, which has the address of its law firm, Campbell Froh May & Rice, in Richmond, British Columbia. The Determination was also sent by mail to the residential address of Mr. Besemer, who is shown on the corporate search of CGM to be the sole director, President and Secretary of CGM.

32. CGM does not dispute receiving the Determination in a timely fashion, nor does CGM dispute the deadline for appealing set out in the Determination, namely, June 8, 2012. Instead, as indicated by counsel for CGM in his written submissions, when Mr. Besemer received the Determination, he "perceived the outcome to be incorrect" and, therefore, he "diligently set about preparing to mount an Appeal". However, as noted above, CGM's appeal was filed almost one (1) month after the expiry of the appeal period.

33. Having said this, as indicated previously, section 109(1)(b) of the *Act* sets out the Tribunal's authority to extend the time period for requesting an appeal under section 112. It states:

> 109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
>
> …
>
> (b) extend the time period for requesting an appeal even though the period has expired;

34. The Tribunal will exercise its statutory authority to extend the time for filing an appeal only where there are compelling reasons, and the burden, on the balance of probabilities, is on the appellant to show that such reasons exist. As indicated by the Tribunal in *Re: Tang* (BC EST # D211/96):

> Section 109(1)(b) of the Act provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

35. What then are the factors that the Tribunal should consider in determining whether compelling reasons exist for extending the time for filing an appeal? In *Re: Niemisto*, *supra*, the Tribunal delineated the following criteria which the appellant should satisfy in seeking an extension of time to file an appeal:

> (i) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
>
> (ii) There has been a genuine and on-going *bona fide* intention to appeal the Determination;
>
> (iii) The respondent party (i.e. the employer or employee), as well the Director, must have been made aware of this intention;
>
> (iv) The respondent party will not be unduly prejudiced by the granting of an extension; and
>
> (v) There is a strong *prima facie* case in favour of the appellant.

36. It should be noted that the above criteria are not intended to constitute an exhaustive list, nor are they conjunctive in nature (see *Re: Patara Holdings c.o.b. Best Western Canadian Lodge*, BC EST # D010/08, reconsideration dismissed BC EST # RD053/08). The Tribunal will consider and weigh these and any other factors it considers relevant and make its decision to, or to not, exercise its discretion to extend the time for filing the appeal based on the totality of all its considerations and not a single consideration.

37. In this case, having reviewed the criteria in *Re: Niemisto*, *supra*, in relation to the facts of the case, and for the reasons delineated below, I find that CGM, on the balance, has failed to satisfy the criteria for granting an extension of time to file an appeal. I will set out my reasons below.

38. With respect to the first criteria, I note that counsel for CGM has indicated that Mr. Besemer "diligently set about preparing to mount an Appeal" after receiving the Determination; however, he states that Mr. Besemer was very busy at work "working on the shop floor and, after hours, dealing with all the ancillary aspects of operating a business", leaving him very limited time to work on the appeal, and then two (2) weeks later, Mr. Besemer "became aware that preparation of an appeal was more than [he] could handle alone". Counsel also adds that Mr. Besemer had never before dealt with an Employment Standards complaint. It was his "unfamiliarity" with the Employment Standards process that hindered him "to successfully present CGM's appeal of the Determination", according to counsel. I am, frankly, not persuaded that Mr. Besemer's busy

schedule at work and "unfamiliarity" with the appeal process prevented him from filing the appeal in a timely fashion. While I do not profess to know the schedules of all those appealing the Director's determinations, I would think that many appellants, like Mr. Besemer, are busy individuals, but do find time to appeal within the time limit permitted. I find "too busy with work to appeal in a timely fashion" is not a reasonable or credible explanation for failing to request an appeal within the statutory time limit for appealing.

39. I also find that most appellants or parties, corporate or non-corporate, are not completely familiar with the Employment Standards process and although they are free to retain legal counsel from the onset of an Employment Standards proceeding, in most cases they go unrepresented whether it is due to lack of financial resources or other reasons. Having said this, while I appreciate that Mr. Besemer desired legal representation for CGM to appeal the Determination and had meetings with some counsels practicing in the employment law area, but found it unfeasible financially to engage any counsel in a timely fashion or at all, to file CGM's appeal, I do not find this to be a reasonable or credible explanation for CGM's failure to request an appeal within the statutory time limits. More particularly, not having counsel or the inability to engage counsel for representation on appeal is not a credible or reasonable explanation for failing to file an appeal in a timely fashion.

40. I note, Mr. Besemer, perhaps perchance, met his neighbour, CGM's counsel in this Appeal, who, although admittedly inexperienced himself in the employment law arena, agreed to represent CGM in the Appeal. However, counsel notes it was only three (3) days before the expiry of the limitation period and the day before he was to leave for work on the Queen Charlotte Islands that he became aware that the appeal submission was due on June 8, 2012. While I am not certain from his submissions when he first spoke with Mr. Besemer and agreed to assist in the Appeal of CGM, I would think it was around the time he discovered only three (3) days remained before the expiry of the Appeal period. He states he did not have sufficient time to complete the appeal submission by the due date and he was only able to and assisted CGM to file its Appeal after his return from his business out of town. While he submits that the failure to meet the limitation date for filing the appeal was not CGM's fault, I am not persuaded with, nor do I share, counsel's view on this point. As suggested earlier, while appellants are entitled to retain counsel to file an appeal, lack of affordability to hire counsel or, for that matter, finding a counsel on the eve of the expiry of the appeal date when counsel does not have sufficient time to file an appeal in a timely fashion is not, in my view, a reasonable and credible explanation for failure to file an appeal within the statutory time limit for filing an appeal. As indicated previously, in my experience, more frequently than not, it is unrepresented appellants or parties engaged in the Employment Standards process whether at the complaint, investigation, hearing or appeal stages and even beyond, at the reconsideration stage. Therefore, I am unable to find that CGM has satisfied the first criteria for the Tribunal to grant an extension of time to file an appeal.

41. With respect to the second criteria, whether there was a genuine on-going *bona fide* intention to appeal the Determination, I note that counsel for CGM states he contacted the Tribunal's office on the morning of June 5, three (3) days before the expiry of the appeal period, and gave notice of CGM's intention to appeal and expressed his interest in filing an unsupported Appeal Form with no accompanying material, but he was told "that a full and complete submission was required and that a request for extension of time was to be made with the Appeal when that was submitted". While I do not find any evidence of counsel's call to the Tribunal in the materials before me save for counsel's assertion, I am prepared to accept that counsel made such a call and CGM therefore expressed a *bona fide* intention to appeal the Determination before the expiry of the time limit for appealing.

42. With respect to the third criteria, namely, whether the Director and Mr. Yeung were made aware of CGM's intention to appeal, I do not find any evidence of CGM contacting the Director or her Delegate and advising of its intention to appeal the Determination. While CGM's counsel makes a bare assertion that the parties

were contacted, in the case of the Director, there is no specific evidence to substantiate this point on a balance of probabilities. With respect to notification to Mr. Yeung of CGM's intention to appeal, counsel submits that there was some "informal line of communication through mutual acquaintances". I would have preferred more particulars with respect to this point, such as who contacted Mr. Yeung and what particularly was communicated to Mr. Yeung regarding CGM's intention to appeal, if anything. In the circumstances, I do not find that CGM, on a balance of probabilities, has established to my satisfaction that Mr. Yeung was made aware of its intention to appeal the Determination. I find, on the whole, CGM has failed to satisfy the third criteria in *Re: Niemisto*.

43. With respect to the fourth criteria, while, *prima facie*, there is no undue prejudice to Mr. Yeung if the Tribunal were to grant CGM an extension of time to appeal, I am mindful of the need for a timely disposition of an appeal and the stated purpose in section 2(d) of the *Act* "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". In this case, even if I were to find in favour of CGM with respect to this consideration, in light of my decision on the prospect of success or lack thereof of CGM's appeal on the merits discussed below, I do not think a finding of no prejudice to Mr. Yeung assists CGM on the balance.

44. Finally, with respect to the final criteria, namely whether there is a strong *prima facie* case in favour of the appellant, it is important to note that except to the extent necessary to determine if there is a "strong *prima facie* case that might succeed", the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period (see *Re: Owolabi c.o.b. Just Beauty*, BC EST # RD193/04; *Re: BNN Enterprises Ltd.*, BC EST # D165/04).

45. Having said this, with respect to the first of the five (5) points CGM raises under the error of law ground of appeal, namely, the assertion that the Director erred in applying the "clear and unequivocal fact" standard of proof as opposed to the balance of probability standard, I do not find this to be the case. In my reading of the Reasons, I did not find the Delegate deviated from the balance of probability standard in assessing the evidence adduced by the parties at the Hearing. However, with respect to the Delegate's reliance on the instructive passage in *Re: Burnaby Select Taxi and Zoltan Kiss*, *supra*, and particularly the requirement delineated therein that "there must be clear and unequivocal fact to support a conclusion" that an employee quit his employment, I do not find anything wrong with the Delegate's reliance thereon in determining whether or not Mr. Yeung had resigned. In *Re: Krazy Willy's Buy & Sell Ltd.* (BC EST # D473/00), the Tribunal unequivocally stated that it is not an error for the Director to require "clear and unequivocal" evidence that an employee has quit or abandoned her employment. I share that view and find the first point of CGM under the error of law ground of appeal unpersuasive and unmeritorious.

46. With respect to the second point under the error of law ground of appeal, I am also not persuaded with CGM's assertion that the Director erred in misconstruing the claimant's words and concluding that Mr. Yeung did not state he was quitting or did not verbalize his intention to quit. I find this assertion of CGM to be nothing more than a bare assertion. Against that assertion, there is not only the evidence of Mr. Yeung, as recorded in the Reasons, that he did not quit his employment, but also the evidence, as recorded in the Reasons, that CGM, upon questioning at the hearing, confirmed that at no time during the material period did Mr. Yeung state he was quitting. Further, CGM's witnesses also did not hear Mr. Yeung say that he wanted to quit. Therefore, I find the second point of CGM also not persuasive or lacking any merit.

47. With respect to CGM's third point under the error of law ground of appeal, namely, that the Director failed to give effect to section 65(1)(f) of the *Act* as applied to the circumstances in this case, I find this contention without any merit as well. Section 65(1)(f) provides, *inter alia*, that the obligation under section 63 to pay

termination pay does not apply to an employee who has been offered and has refused reasonable alternative employment by the employer. I do not find any evidence of such to have existed during the investigation of Mr. Yeung's complaint or at the Hearing or at any material time. It is also something that appears not to have been argued by CGM at any time before the Determination was made.

48. With respect to the fourth point under the error of law ground of appeal, CGM contends that the Director erred in failing to address the evidence of there having been just cause for the dismissal of Mr. Yeung. However, I have reviewed the Reasons, as well as the record adduced in the Appeal, which includes an email of April 12, 2011, from the Delegate to Mr. Besemer reviewing the evidence of Mr. Besemer during the investigation of Mr. Yeung's complaint. In that email, as well as in the Reasons summarizing the evidence of CGM at the Hearing, CGM did not argue that Mr. Yeung was dismissed for just cause. The matter of just cause is raised by CGM for the first time on appeal. I also note that throughout the investigation and at the Hearing, CGM maintained that Mr. Yeung quit his employment. For CGM to now raise the issue of just cause for the first time in the Appeal and argue or suggest that the Director was remiss in failing to consider evidence of just cause to justify the termination of Mr. Yeung's employment when CGM never raised the matter before, during the investigation stage or at the Hearing, is not proper and frankly inconsistent with the objectives of the *Act*. It is for CGM to consider if just cause exists or not and it is for CGM to raise the issue of just cause, if it so desires, during the investigation stage or at the Hearing and not at the Appeal of the Determination for the first time. The Tribunal has decided on a number of occasions that the employer must raise such an issue with the Director during the course of the investigation or at the hearing of the complaint. In the circumstances, I find CGM to have failed to satisfy the fourth criteria in *Re: Niemisto*.

49. With respect to the last point under the error of law ground of appeal, CGM argues that the Director erred "in giving determinative weight to the evidence of a 'record of employment'". In my review of the Reasons, I find otherwise and do not find the Reasons to support CMG's contention. The Delegate, unequivocally, states in the Reasons that he did not rely upon the conflicting evidence in the record of employment of Mr. Yeung in making his determination that Mr. Yeung did not quit. More specifically, the Delegate stated the "conflicting evidence [in the record of employment] does not form the basis of [his] finding" that Mr. Yeung did not quit, although it would serve to "aid to further reinforce it".

50. With respect to the new evidence ground of appeal, the Tribunal in *Re: Merilus Technologies Inc.* (BC EST # D171/03) adopted the following test applied in civil courts for admitting fresh evidence on an appeal of a determination:

> (a) 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;
>
> (b) The evidence must be relevant to a material issue arising from the complaint;
>
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) 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.

51. The fourfold criterion in the test above are conjunctive and, therefore, any party seeking the Tribunal to admit new evidence on appeal of a determination must satisfy each criterion before the Tribunal will admit the purported new evidence. In my view, the evidence CGM adduces as "new evidence" in the Appeal would likely fail to qualify as "new evidence" under the test in *Re: Merilus Technologies*. I find that the purported "new evidence" is a bare assertion on CMG's part that Mr. Yeung "has not accepted or sought employment and

has evidenced no intention of taking work" subsequent to his complaint against CGM. I find this assertion not relevant or material to the issue that was before the Delegate during the Hearing, namely, whether Mr. Yeung quit his employment with CGM. I respectfully disagree with counsel for CGM, even if there was some specific evidence going beyond a bare assertion that Mr. Yeung has not sought re-employment since the termination of his employment with CGM, that such evidence satisfies the subjective element of the test for resignation and evidences that Mr. Yeung quit his employment with CGM.

52. In summary, on the totality of the evidence and submissions of CGM, I am not persuaded that CGM has shown a strong *prima facie* case in its favour, and I am unconvinced of the prospects of CGM succeeding on appeal.

ORDER

53. I find that CGM has not met its burden of showing that the time limit for appealing the Determination dated May 1, 2012, should be extended in this case. Therefore, I decline to exercise my discretion to extend the appeal period. Accordingly, pursuant to section 114(1)(b) of the *Act*, this appeal is dismissed.

Shafik Bhalloo
Member
Employment Standards Tribunal