Employment Standards TRIBUNAL

An appeal

- by -

Attitudestudios Art Ltd. carrying on business as atMusic - The Music Store of Burnaby

("atMusic")

- 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.: 2016A/66

DATE OF DECISION: July 13, 2016

DECISION

SUBMISSIONS

Ran Zhu	on behalf of Attitutestudios Art Ltd. carrying on business as atMusic – the Music Store of Burnaby

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Attitudestudios Art Ltd. carrying on business as atMusic – The Music Store of Burnaby ("atMusic") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on April 14, 2016 (the "Determination").

2. The Determination concluded that atMusic contravened Part 3, section 18 (wages); Part 4, section 40 (overtime); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act*, and ordered atMusic to pay Peii Huang ("Ms. Huang") wages in the amount of $5,104.74 and to pay administrative penalties under section 29 of the *Employment Standards Regulation* (the *"Regulation")* in the amount of $3,000.00 for breaches of sections 18, 40, 45, 46, 58 and 17 of the *Act*. The total amount of the Determination is $8,104.74.

3. atMusic appeals the Determination on the grounds that the Director erred in law and breached the principles of natural justice in making the Determination. atMusic seeks the Employment Standards Tribunal ("Tribunal") to vary or cancel the Determination.

4. By way of a letter dated May 18, 2016, the Tribunal informed Ms. Huang and the Director that it had received an appeal by atMusic dated May 16, 2016, and enclosed the same for information purposes only. In the same letter, the Tribunal also requested the Director to provide the section 112(5) "record" (the "Record") by June 2, 2016.

5. On May 26, 2016, the Tribunal disclosed the Record to atMusic and provided the latter with an opportunity to object to its completeness. atMusic did not submit any objections within the time permitted and, therefore, the Tribunal accepts the Record as complete.

6. I have reviewed the appeal, including the submissions of atMusic's director, Ran Zhu ("Mr. Zhu"), the Reasons for the Determination ("Reasons") and the Record. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, I will decide the appeal solely on the Reasons, the appeal submissions of Mr. Zhu and my review of the Record that was before the Director when the Determination was being made. Pursuant to section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons in subsection 114(1). If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under subsection 114(1) of the *Act*, Ms. Huang will and the Director may, be invited to file further submissions. On the other hand, if it is found that the appeal is not meritorious, it will be dismissed under subsection 114(1) of the *Act*.

ISSUE

7. The issue to be considered at this stage is whether there is any reasonable prospect that atMusic's appeal can succeed.

THE FACTS

8. The facts delineated under this heading are derived from the Reasons and the Record.

9. atMusic operates a music store and lessons studio business.

10. Ms. Huang taught piano lessons primarily to children at different levels at atMusic from December 2009 to August 2015.

11. Each piano lesson was of 30, 45 or 60 minutes' duration. atMusic billed and collected the tuition from students. Students, in most cases, paid tuition upfront to atMusic for a set number of lessons and received a punch card. Before each lesson with the teacher, a staff member or teacher at the atMusic studio marked the punch card denoting that the student attended for a lesson. When the card was completely used up, the student would have to purchase another before attending more lessons.

12. Ms. Huang's compensation atMusic was based on a percentage split between her and atMusic. atMusic would tally up her entire month's lessons and then pay her the appropriate split they agreed to at the start of her relationship with atMusic. During the "probationary period" she received 50% of the amount atMusic received from each lesson Ms. Huang gave and thereafter 60% when her position became "permanent".

13. The piano lessons Ms. Huang gave to students took place at atMusic's studio which atMusic leased from its landlord. The pianos Ms. Huang used to teach lessons belonged to atMusic. Some sheet music and books Ms. Huang used in giving her piano lessons belonged to atMusic. Sometimes she also used her own materials that she had purchased atMusic or elsewhere. She also used her own metronome and sometimes, atMusic's.

14. atMusic assigned students to teachers based on various criteria including the student's skill level and the teachers' availability. atMusic provided Ms. Huang a steady workload for the most part during her relationship with atMusic.

15. At around the time Ms. Huang joined atMusic, she also became a Student Teacher Auxiliary member of the British Columbia Registered Music Teachers' Association ("BCRMTA"). Her name and telephone number was published on the BCRMTA's website. The Student Teacher Auxiliary group hosted one piano recital each year and Ms. Huang and her students from atMusic participated in the recital which was about an hour long. Ms. Huang prepared her students for the recital and contributed $50 towards the cost of putting on the recital. She received no compensation from the students or anyone else for participating in the recitals. The students were expected to either make a small donation or bring some food to share at the event.

16. On July 29, 2015, an argument arose between Ms. Huang and Mr. Zhu because Ms. Huang gave a lesson to one of her atMusic students that day without noticing that the punch card of the student was finished or exhausted. The student should have obtained a new punch card. The dispute between Mr. Huang and Mr. Zhu centered on the question of whose responsibility it was to check the punch cards before the lesson. This dispute led to numerous heated text exchanges between Mr. Zhu and Ms. Huang. The exchanges culminated in Ms. Huang's letter of resignation to atMusic on July 31, 2015, advising that her last day of work will be September 30, 2015.

17. After her letter of resignation, from August 1 to 16, 2015, Ms. Huang taught lessons to students and then went on her pre-arranged vacation until August 31, 2015.

18. After returning from her vacation, on September 1, 2015, she called atMusic and inquired about her teaching schedule for September. Mr. Zhu informed her that she did not have any lessons scheduled in the month of September. When Ms. Huang called atMusic the next day, Mr. Zhu again told her that she had no lessons scheduled. She then told him that she quit.

19. On September 7, 2015, Mr. Zhu texted Ms. Huang that her final paycheque was ready for pickup provided she returned all contact information she had for atMusic's clients. Ms. Huang responded by asking Mr. Zhu to send her by mail her paycheque. Mr. Zhu responded by reiterating that she would only get her paycheque once she returned all contact information of atMusic's clients.

20. On September 9, 2015, Ms. Huang texted Mr. Zhu that she would be at atMusic later in the day to pick up her paycheque but he texted back that he was not available that day. There were numerous texts back and forth between Ms. Huang and Mr. Zhu. Mr. Zhu was not prepared to give Ms. Huang her paycheque for the month of August unless she returned contact information for atMusic's clients in her possession. Ms. Huang advised Mr. Zhu she "will not have the list". Later, on the same day, when Ms. Huang attended at atMusic, she was unsuccessful in picking up her paycheque.

21. On October 24, 2015, pursuant to section 74 of the *Act*, Ms. Huang filed a complaint with the Employment Standards Branch ("Branch") alleging that atMusic contravened the *Act* by failing to pay regular wages (the "Complaint").

22. On January 29 and February 12, 2016, the delegate of the Director conducted a hearing of the Complaint ("Hearing"). The Hearing was attended by Mr. Zhu on behalf of atMusic and Ms. Huang on her own behalf. At the conclusion of the Hearing, the delegate afforded the parties an opportunity to provide written submissions on all of the issues that he would be considering in making a determination. Ms. Huang provided her written submissions to the delegate on February 24, 2016, and Mr. Zhu followed with his written submission on behalf of atMusic on February 29, 2016.

23. In the Reasons, the delegate sets out the following eight (8) issues or questions he considered in making the Determination:

1. Were Ms. Huang and atMusic in an employment relationship such that the Act has jurisdiction over their dispute?
2. Does atMusic owe Ms. Huang wages for the lessons she taught in August 2015, and, if so, in what amount?
3. Does atMusic owe Ms. Huang minimum daily wages, and, if so, in what amount?
4. Does atMusic owe Ms. Huang overtime wages, and, if so, in what amount?
5. Does atMusic owe Ms. Huang statutory holiday pay, and, if so, in what amount?
6. Does atMusic owe Ms. Huang compensation for length of service, and, if so, in what amount?
7. Does atMusic owe Ms. Huang vacation pay, and, if so, in what amount?
8. What administrative penalties are imposed against atMusic?

24. Further, in the Reasons, the delegate delineates the evidence of the parties which was presented by Ms. Huang on her own behalf and Mr. Zhu, on behalf of atMusic. I have carefully reviewed the parties' evidence in the Reasons and in the Record. While I do not intend to reiterate this evidence, I will refer to pertinent parts of the evidence the delegate considered in the Reasons, under the heading "Findings and Analysis", to decide the eight (8) questions set out above.

25. With respect to the first question relating to the status of Ms. Huang, the delegate notes that for the *Act* to apply to Ms. Huang, the relationship between Ms. Huang and atMusic must be shown to be an employment relationship. In deciding whether the parties were in an employment relationship, the delegate was guided by both the common law tests for determining employment and independent contractor relationship and by statutory definitions of "employee", "employer", and "work" in the *Act*.

26. The delegate notes that the common law test for employment developed by courts are subordinate to the statutory definitions in the *Act* but the factors delineated in the common law tests informed his interpretation and application of the *Act* in this case. In particular, the delegate found most useful in analysing the relationship between Ms. Huang and atMusic the following elements: "control over the 'what and how' of the work, the intention of the parties, opportunity for profit and risk of loss, hiring and dismissal, and specificity of tasks and term."

27. With respect to the elements of "control and direction", in concluding that atMusic had more direction and control over Ms. Huang than she did over the "what and how" of her work, the delegate reasoned as follows:

> I accept that Ms. Huang had autonomy over the way in which she taught piano lessons at atMusic. atMusic did not require that she follow certain standards of curricula as long as her lessons were appropriate for the assigned grade level. For example, she was free to choose what books and sheet music to use in lessons. I further accept that Ms. Huang enjoyed flexibility in deciding who she taught, at what level, and when, and in deciding when she took vacation. In this sense, she exercised control over her work. Although I note from the September 9, 2015 text exchange between the parties that Mr. Zhu expressed dissatisfaction with Ms. Huang's "repeated vacation requests this past summer." The very fact that Ms. Huang was required to request vacation shows some lack of control. Mr. Zhu also told Ms. Huang that her resignation letter did not release her from her "regular teaching duties and responsibilities at the shop", despite having unilaterally reassigned all of her students to other teachers. So the aspects of Ms. Huang's work over which she did enjoy some control were still fettered by atMusic. Nonetheless, I find that the scheduling flexibility and classroom autonomy enjoyed by Ms. Huang weigh in favour of her having limited control over the "what and how" of her work.
>
> On the other hand, atMusic owned and controlled the tools necessary for Ms. Huang to teach students, including the pianos and the store itself. More importantly, atMusic owned and controlled the intangible assets necessary to run the studio, including the client base, the tuition billing system, and the scheduling system. I find from the evidence that atMusic exercised, or attempted to exercise, significant control over these aspects of atMusic's operation. Mr. Zhu's preoccupation with retrieving student contact information and obtaining a no contact agreement from Ms. Huang after her departure from atMusic shows that atMusic claimed ownership of Ms. Huang's students and wished to guard its client base. atMusic also enjoyed total control over the financial transactions for Ms. Huang's services through its tuition billing system. All money from student to teacher flowed through atMusic. That this created an imbalance of control between Ms. Huang and atMusic is illustrated by atMusic's withholding of Ms. Huang's earnings for August 2015, just as Mr. Zhu had threatened to do in his July 29, 2105 text to Ms. Huang. Had the situation been reversed, by, for example, Ms. Huang collecting all tuition and then paying atMusic its cut each month, then atMusic might have found itself in the disadvantaged position of pursuing Ms. Huang for damages, rather than the other way around. Finally, although I found above that Ms. Huang enjoyed some scheduling flexibility, ultimate control remained with atMusic. In his September 2, 2015 text to Ms. Huang, Mr. Zhu wrote, "We have every right to reassign students to any teachers of ours we see fit at my discretion at any time for any reasons …" By the time Ms. Huang returned from vacation at the end of August 2015, Mr. Zhu had reassigned every single one of Ms. Huang's students.
>
> I find atMusic's argument unpersuasive that Ms. Huang's activities outside of atMusic demonstrate that she had control over her work. Although I accept that Ms. Huang was free to teach piano on her own (as long as it was not to atMusic students), the large majority of Ms. Huang's lessons occurred at atMusic, and the lessons she taught outside of atMusic were too few and infrequent to have any impact on the control

> of her work. Rather, the fact that Ms. Huang almost exclusively taught only at atMusic tends to show that she relied on atMusic to generate a steady workload of students. With respect to Ms. Huang's membership in the BCRMTA Student Teacher Auxiliary, I accept her explanation that it was not to attract business, but to become involved in the music community, which included attending the BCRMTA recitals with her atMusic students. The recitals were held only once per year and were not for profit. I do not accept that Ms. Huang's participation in the recitals interfered with her work at atMusic's.
>
> On balance, I am satisfied that the evidence establishes that atMusic had more direction and control than Ms. Huang did over the "what and how" of her work.

28. With respect to the question of the "intention of the parties", the delegate notes that without a written contract of employment between the parties, it is difficult to determine precisely how the parties intended their relationship should be characterized. Notwithstanding, in concluding that the parties intended their relationship to be an employment one, the delegate reasoned as follows:

> Mr. Zhu asserted that he made it clear to all teachers that they were hired as contractors. He said he told this to Ms. Huang during her interview. He argued that if Ms. Huang intended on being an employee, then why did she not raise issue with the T4A slip and the lack of vacation pay during her time with atMusic? Ms. Huang testified that she never put her mind to the question until this dispute arose and she contacted the Employment Standards Branch.
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> The issuance of a T4A slip, instead of a T4 slip, does point toward the parties' intention of a contractual, rather than employment, relationship for tax purposes. Yet this is certainly not determinative of the issue under this Act.
>
> I find that the text exchanges between Mr. Zhu and Ms. Huang provide the most probative and reliable insight into how Mr. Zhu perceived the relationship. In his July 20, 2015 text, he used words such as "boss," "workplace," "policies," "manager," and "pay cheque." He suggested that Ms. Huang submit her "resignation." He called himself the "shop manager" in his July 30, 2015 text. He told Ms. Huang in his July 31, 2015 text that he was "rightfully exercising [his] management duty of authority." And perhaps most evincing of his intentions, in a September 9 text he used the phrase, "during your employment with us." I find that this particular language used by Mr. Zhu, and the overall theme of the texts when read as a whole, tend to show that Mr. Zhu thought of himself as the employer and Ms. Huang as the employee.

29. With respect to Ms. Huang's "opportunity for profit and risk of loss", the delegate found that the overall evidence of the parties, on this factor, tended to favour a finding of an employment relationship for the following reasons:

> Besides providing her own labour, Ms. Huang did not contribute financially to atMusic. She had no investment in atMusic, besides her time, at risk to loose. Yet she did have the opportunity for profit to a limited extent. The more lessons she taught, the more money she earned. Presumably she could have also opted to only teach higher level and more lucrative lessons. But this opportunity was restricted by the fixed lesson prices and the 60/40 split set by atMusic. Ms. Huang could not leverage assets or hire her own employees to increase her profit, and she had no direct stake in how well or how poorly the store performed as a whole. On balance, this factor tends to indicate an employment relationship between Ms. Huang and atMusic.

30. With respect to the procedures and language used by atMusic in the hiring and dismissal of Ms. Huang, the delegate found sufficient indicia of an employment relationship in the evidence for the following reasons:

> The way in which Ms. Huang began working for atMusic resembled a typical job interview process. She responded to an advertisement for a job by submitting a resume. She met with Mr. Zhu for an in-person interview. Mr. Zhu evaluated her and offered her a job. The terms of the job were not negotiated – Mr. Zhu told Ms. Huang what they were – and they included a "probationary period" before Ms. Huang became permanent teacher. Likewise, Ms. Huang's departure from atMusic resembled the end of an

> employment relationship. Mr. Zhu requested that Ms. Huang provide a "resignation letter noting us no later than 2 month in advance from the day we receive your letter". After Ms. Huang provided the letter, Mr. Zhu reminded her that her "resignation letter does not release you from regular teaching duties and responsibilities at the shop…" Resignation, in the ordinary understanding of the word, means the formal withdrawal from one's position of employment.

31. With respect to the elements of "specificity of tasks and term" in the relationship, the delegate noted evidence in favour of both an employment relationship and independent contractor relationship but went on to conclude that, on the balance, the evidence did not favour an independent contractor relationship:

> Mr. Zhu argued that Ms. Huang was hired to teach and only to teach, although he berated her later on for not properly administrating the tuition billing and collection system, a task that went beyond simply teaching piano. Nevertheless, I accept that Ms. Huang performed a fairly specific task for atMusic and that this tends to favour her being considered an independent contractor. Yet her tasks were not specific to the point of only teaching one student or one level for a set period of time. She taught many different students at many difference [*sic*] levels at many different times. Furthermore, her term at atMusic was undefined. By the time of her departure, Ms. Huang had been with the company for over five and half years. As such, I find that this factor, on balance, does not suggest Ms. Huang was an independent contractor.

32. The delegate next turned to section 1 of the *Act* and specifically the definitions of "employee", "employer" and "work". He analysed those definitions in the context of the evidence of the parties to conclude that the relationship of the parties, under the *Act,* is that of an employer-employee. More particularly, the delegate stated that Ms. Huang comes within the meaning of "employee" in subsection 1(a) of the *Act* because:

> … Ms. Huang performed work for atMusic in the form of her labour and services as a teacher. She did not provide products or capital. Ms. Huang did not risk financial loss in her work and she enjoyed only minimal opportunity for profit. atMusic exercise direction and control over Ms. Huang's work.

33. The delegate also found that Ms. Huang met the definition of "employee" in subsection 1(b) of the *Act* because:

> [She] performed work normally performed by an employee. Namely, she performed work normally performed by a music teacher working for the owner of a music school. The language and processes used by Mr. Zhu reinforces this finding and tends to indicate that he considered Ms. Huang to be an employee and atMusic the employer. Ms. Huang's term of employment was undefined and her tasks were not so specific as to undermine the fact that she performed work normally performed by an employee.

34. He also concluded that atMusic met the definition of "employer" within section 1(1)(a) of the *Act* because atMusic had significant control and direction of Ms. Huang. He further added:

> … atMusic fettered the limited control Ms. Huang had over her work and owned the tools necessary to carry out the work. Mr. Zhu's language establishes that he considered himself to be an authority figure over Ms. Huang and that she was to follow his direction.

35. The delegate also determined that atMusic met the definition of "employer" under section 1(1)(b) of the *Act* because atMusic was:

> … responsible, directly or indirectly, for the employment of Ms. Huang. Ms. Huang's limited activities outside of atMusic do not counteract this finding. Ms. Huang's hiring and termination from atMusic, atMusic's control of the students and the tuition, and Mr. Zhu's language establish that atMusic was directly responsible for Ms. Huang's employment.

36. The delegate also found Ms. Huang performed "work" as defined in section 1(1) of the *Act* as she provided atMusic "labour and services" and not "products or financial investments".

37. In the result, the delegate concluded that Ms. Huang was in an employment relationship with atMusic and, therefore, the *Act* applied in this case.

38. Having determined that Ms. Huang was an employee, the delegate proceeded to consider if atMusic owed her any regular wages, minimum daily wages, overtime wages, annual vacation pay, statutory holiday pay and compensation for length of service.

39. With respect to Ms. Huang's claim for regular wages, the delegate noted that Mr. Zhu acknowledged at the Hearing that she earned $960.00 for the lessons she taught in August 2015. Therefore, these wages were not in dispute and atMusic owed her $960.

40. With respect to the question of minimum daily wages under section 34 of the *Act*, the delegate noted that he would need to find evidence that Ms. Huang was "required" by atMusic to report to work each day, even if very few lessons were scheduled. The delegate not only did not find such evidence but found evidence that established that Ms. Huang enjoyed some flexibility in setting her own schedule and could have arranged her lessons such that she would report for work only on those days she saw fit. In the circumstances, the delegate concluded that section 34 of the *Act* did not apply in this case and atMusic did not owe Ms. Huang minimum daily wages.

41. With respect to the question of overtime wages, the delegate meticulously reviewed the parties records of hours Ms. Huang worked during the six (6) month recovery period between March 1 and September 1, 2015. He found that the record of lessons that Ms. Huang provided was a "reasonably accurate reflection of the hours she actually worked at atMusic" and found she worked a total of 1¾ hours of overtime during the recovery period allowed under the *Act*. More particularly, he found that Ms. Huang worked 8¼ hours on March 21, 2015, 8¼ hours on May 2, 2015, 8¾ hours on June 6, 2015, and 8½ hours on June 13, 2015, for a total of 1¾ hours of overtime. He also found that Ms. Huang was paid straight time for all the overtime hours she worked. As a result, he calculated the different regular wage rates of Ms. Huang during all the different periods when she worked overtime (which I do not find necessary to delineate here) and determined that Ms. Huang was owed overtime wages of $3.85 for March 21, 2015, $3.83 for May 2, 2015, and $19.00 for June 6 and 13, 2015, for a total of $26.68.

42. With respect to the question of whether atMusic owed Ms. Huang statutory holiday pay, the delegate noted that during the six (6) month recovery period between March 1 and September 1, 2015, there were four statutory holidays, namely, Good Friday (April 3, 2015), Victoria Day (May 18, 2015), Canada Day (July 1, 2015), and B.C. Day (August 3, 2015). He also noted that Ms. Huang worked two of these holidays – Good Friday and Canada Day. Based on the delegate's previous calculation of Ms. Huang's "regular wage" for a "specific pay period", the delegate calculated Ms. Huang's statutory holiday pay for all four statutory holidays she qualified for. In the case of Good Friday, the delegate noted Ms. Huang was entitled to an average day's pay of $103.69 and 1½ times her regular wage for each hour she worked that day for a total of $114.11. She only received a pay of $78.60. Therefore, she is owed $139.20 for working on Good Friday.

43. With respect to Victoria Day, the delegate noted that Ms. Huang did not work and was entitled to an average day's pay of $115.27. For Canada Day, she was entitled to an average day's pay of $126.25 and also 1½ times her regular wage for each hour she worked that day for a total of $90.39. Ms. Huang was only paid $60.60 and, therefore, she was owed $156.04 for working on Canada Day.

44. For B.C. Day, Ms. Huang did not work and was entitled to an average day's pay of $96.15. The total for all statutory holidays, including those statutory holidays she worked, Ms. Huang was owed $506.66.

45. With respect to the question of whether atMusic owed Ms. Huang compensation for length of service, the delegate reviewed sections 63 and 66 of the *Act* noting that under the former, upon termination of a five (5) year employee like Ms. Huang, an employer is liable to pay compensation for length of service in the amount of five (5) weeks wages unless the employee terminated her employment. Under the latter section (section 66), the delegate noted an employer may be deemed to have terminated the employment if it is found that the employer unilaterally and fundamentally changed the conditions of the employment of the employee significantly such as to cause the employee to quit. In this case, the delegate concluded that atMusic's conduct led Ms. Huang to resign from her employment and therefore atMusic is deemed to have terminated her employment pursuant to section 66 of the *Act*:

> The basic facts of Ms. Huang's departure from atMusic are undisputed. On July 31, 2015 she provided a resignation letter to atMusic, advising that the last day she would teach would be September 30, 2015. She taught a full lesson-load from August 1 to 15, 2015, and then went on vacation for the rest of the month. By the time she returned, atMusic had reassigned every one of her students to different teachers. Mr. Zhu acknowledged as such during the hearing. Mr. Zhu did this without providing any notice to or receiving any input from Ms. Huang. In response to my questions during the hearing, Mr. Zhu stated that during their phone conversation on September 1, 2015, he made it clear to Ms. Huang that she had no lessons to teach for the remainder of the month.
>
> I find it was a condition of Ms. Huang's employment that when she submitted her resignation on July 31, 2015, atMusic would continue to facilitate Ms. Huang's regularly scheduled lessons up to an[d] including September 30, 2015. I find that atMusic unilaterally changed this condition by rescheduling all of Ms. Huang's lessons for the month of September. I further find that this change was fundamental to the employment relationship and detrimental to Ms. Huang's interest. She went from teaching a regular lesson-load with atMusic for several years to teaching zero lessons. She expected to be able to teach and earn an income until the end of September 2015. When her expectation was frustrated by atMusic, she decided to quit. Accordingly, I am satisfied from the evidence that, pursuant to s. 66 of the Act, atMusic terminated Ms. Huang's employment.

46. In the result, the delegate concluded Ms. Huang was entitled to compensation for length of service under the *Act*. In calculating her compensation under the *Act*, the delegate noted that Ms. Huang provided her notice of resignation to atMusic prior to her termination and therefore, her entitlement to compensation is the lesser of the notice she provided and her entitlement under the *Act*. Ms. Huang's entitlement under the *Act* is five (5) weeks because she was employed by atMusic for over five (5) years, however, the delegate concluded that her compensation for length service should be limited to four (4) weeks and one (1) day which is the period between her termination date on September 1, 2015, and September 30, 2015, her last day of work in her resignation notice. The delegate then applied the method prescribed in section 63(4) of the *Act* for calculating compensation for length of service and concluded that atMusic owed Ms. Huang $1,544.25 for compensation for length of service.

47. With respect to the question of whether atMusic owed Ms. Huang vacation pay, the delegate noted that atMusic did not contest that it failed to pay her vacation pay during her entire period of employment at atMusic. He then calculated the total vacation pay owed to Ms. Huang to be $1,982.24.

48. Lastly, pursuant to section 98(1) of the *Act* and section 29(1) of the *Regulation*, the delegate imposed six (6) penalties of $500.00 each against atMusic for contraventions of sections 17, 18, 40, 45, 46 and 58 of the *Act*.

SUBMISSIONS OF atMUSIC

49. As indicated previously, atMusic appeals the Determination based on the natural justice and error of law grounds of appeal. However, Mr. Zhu does not clearly separate his submissions under each ground of appeal. On closer examination of his submissions, I find that Mr. Zhu's submissions that the delegate failed to afford atMusic an opportunity to cross-examine Ms. Huang's witnesses relate to the natural justice ground of appeal and his submissions challenging the delegate's finding of an employment relationship between Ms. Huang and atMusic relate to the error of law ground of appeal.

50. I will summarize both these submissions under separate headings below.

(i) Natural Justice

51. Mr. Zhu contends that the delegate did not allow atMusic to cross-examine Ms. Huang's witnesses who were long-term students with atMusic. He states that after these students learned of Ms. Huang's resignation they continued their lessons with Ms. Huang "outside of atMusic". He states atMusic was denied the opportunity to "hear valuable detailed information from [the] witnesses" about their relationship with Ms. Huang "outside of atMusic."

(ii) Error of law

52. In almost twelve (12) pages of his written submissions, Mr. Zhu disputes the delegate's conclusion that the parties were in an employment relationship. I have very carefully read Mr. Zhu's submissions and do not find it necessary to set them out in any detail here. Mr. Zhu has largely repeated the evidence he provided at the Hearing and evidence which atMusic supplied to the delegate before the Determination was made and contained in the Record. More specifically, Mr. Zhu has, under similar headings and subheadings the delegate uses in the Reasons, reiterates the evidence and arguments previously submitted by atMusic and buttresses previous arguments and evidence with further explanations to challenging the delegate's conclusion that Ms. Huang was in an employee-employer relationship with atMusic.

53. I also note that Mr. Zhu disputes all of the wage awards the delegate makes – regular wages, overtime wages, statutory holiday pay, vacation pay and compensation for length for service. His appeal submissions disputing these awards are largely, if not wholly, based on the premise that the delegate wrongly concluded Ms. Huang was an employee of atMusic. For the reasons set out below, under the heading "Analysis", I do not find it necessary to set out these submissions here.

54. I also note that Mr. Zhu has provided, with his written submissions, a "transcript of all text messages" exchanged between him and Ms. Huang, a copy of the resignation notice of Ms. Huang and a copy of the listing of Ms. Huang's name and telephone number on BCRMTA's website. None of these documents are in dispute. The documents or pertinent details in these documents were previously disclosed by Mr. Zhu and form part of the Record.

ANALYSIS

55. Section 112(1) of the *Act* specifies the following limited grounds upon which a person may appeal a determination:

> (a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

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

56. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the above statutory grounds.

57. In this case, I find that atMusic has not demonstrated either an error of law or a denial of natural justice. I will set out my reasons below.

(i) Error of Law

58. The Tribunal has adopted the following definition of "error of law" as set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] BCJ No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

59. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.,* BC EST # D260/03. In *Britco Structures Ltd.,* the Tribunal noted that the test for establishing an error of law on this basis is stringent requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with, and are contradictory to, the evidence or they are without any rational foundation. In a subsequent decision, in *Rose Miller, Notary Public,* BC EST # D062/07, the Tribunal elaborated further on the subject, at para. 48:

> In order to show that an error of fact amounts to an error of law, an appellant must show what the authorities refer to as palpable and overriding error, which involves the finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she is establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination. … This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

60. In this case, as previously alluded, Mr. Zhu's submissions primarily challenge the delegate's conclusions or findings of fact that Ms. Huang was an employee of atMusic and not an independent contractor. I do not find Mr. Zhu's submissions (which I have carefully read) establish that the factual findings of the delegate were inadequately supported or wholly unsupported by the evidentiary record, such that there is no rational basis for the delegate's finding that Ms. Huang was an employee. In other words, Mr. Zhu's submissions do not establish palpable and overriding error or errors of fact by the delegate. Instead, I find that Mr. Zhu's

submissions amount to an attempt by atMusic to reargue its position at the Hearing and subsequently before the Determination was made. I find that atMusic is effectively attempting to take the proverbial "second kick at the can" before this Tribunal with a view to obtaining a favourable outcome this time. The Tribunal has consistently dismissed appeals where the sole purpose of the appeal is to reargue the case made by the appellant during the investigation or hearing before the determination is made. I do not find this to be an exceptional case to cause this Tribunal to break with the past approach. I also add that to allow atMusic to reargue its position in the appeal is contrary to the stated objective of the *Act* in section 2(d), namely, to provide fair and efficient procedure for resolving disputes over the application and interpretation of the *Act*.

61. Having said this, I note that Mr. Zhu, in his written submissions, does not challenge the applicable test for employee status the delegate employed in making the Determination. The approach the delegate employed in this case is consistent with that which is summarized by the Tribunal in *Kimberley Dawn Kopchuk,* BC EST # D049/05 (Reconsideration denied BC EST # RD114/05):

> The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin,* BC EST #D015/96), and have become less thoughtful as the nature of employment has evolved (*Kelsey Trigg,* BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.,* BC EST #D026/05). Despite the limitations of the common law test, the factors identified in them may also provide a useful framework for analysing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] 2 S.R.C. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or a independent contractor. Instead, the Court held, at paras. 47 – 48:
>
> > The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will also be a factor. However, other factors to consider include whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her own tasks.
> >
> > It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. A relative weight of each will depend on the particular facts and circumstances of the case.

62. In this case, the delegate properly considered the evidence of the parties in the context of the definitions of "employee", "employer" and "work" under the *Act*. Alongside those definitions, the delegate also considered a number of common law tests. He noted that some of the factors led to the conclusion that the relationship between Ms. Huang and atMusic was that of employee-employer while others led to an opposite conclusion. However, in reaching the conclusion that Ms. Huang's relationship with atMusic was one of employee-employer, I am satisfied that the delegate conducted a thorough analysis of the both statutory and common law tests, and carefully considered the evidence adduced by both parties. I find that it was open for the delegate to reach the conclusion he did with respect to Ms. Huang's status and it is not for this Tribunal to second guess his conclusion, particularly absent any error of law. In the result, I find that atMusic's appeal on the error of law ground is without merit.

(ii) Natural Justice

63. In the *Imperial Limousine Service Ltd.,* BC EST # D014/05, the Tribunal explained 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)

64. In this case, Mr. Zhu argues that atMusic was denied natural justice because the delegate did not afford atMusic the opportunity to cross examine Ms. Huang's witnesses who were long term students with atMusic. He contends that the students carried on their piano lessons with Ms. Huang after she resigned from atMusic. He expected to obtain this evidence from these witnesses.

65. I note that while the Record contains a document entitled "List of Witnesses for Complaint Hearing" submitted by Ms. Huang with names of the five (5) students with an explanation indicating that the witnesses were to give evidence that Ms. Huang provided them piano lessons during August 2015, I am uncertain whether these witnesses appeared at the Hearing or testified at the Hearing. There is no mention of these witnesses in the Reasons. Having said this, I note that the delegate, as an adjudicator of a complaint hearing, has a duty to ensure fairness and if a party is prevented in any way from cross examining a witness of the opposing party, then this *may* amount to a denial of natural justice. However, in this case, I am not convinced that atMusic was denied natural justice. *If* the witnesses did not give evidence on behalf of Ms. Huang then atMusic has no legitimate complaint that it was denied an opportunity to cross-examine them.

66. I also note that, in the Reasons, the delegate states that Mr. Zhu acknowledged that Ms. Huang earned $960.00 from piano lessons she taught in the month of August 2015. Therefore, the evidence of these witnesses, to establish that they received piano lessons from Ms. Huang, seems unnecessary. It seems probable, for this reason that the witnesses in question did not testify at the Hearing, although they were listed on the List of Witnesses for Complaint Hearing.

67. Lastly, Mr. Zhu states that he wanted to examine these witnesses to obtain evidence to prove that Ms. Huang continued providing lessons to these students after she resigned from atMusic. The evidence Mr. Zhu was intending to get from them is irrelevant to the Complaint of Ms. Huang and does not relate to any of the questions decided by the delegate in the Determination. Whether or not Ms. Huang, after her termination, is providing atMusic's students with piano lessons, whether or not in breach of her agreement with atMusic, is not a question that is within the jurisdiction of the Director or this Tribunal under the *Act* and the response to which does not, in my view, impact the determination of any questions the delegate decided in the Determination.

68. In the circumstances, I do not find that atMusic was denied natural justice.

69. In conclusion, I find there is no basis for me to interfere with the Determination on either of the appeal grounds advanced by atMusic. In the result, I find that there is no possibility that this appeal can succeed and, therefore, I dismiss it under section 114(1)(f) of the *Act*.

ORDER

70. Pursuant to section 115 of the *Act*, I order that the Determination, dated April 14, 2016, be confirmed together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal