Employment Standards TRIBUNAL

An appeal

- by -

Shelley Brennan
("Ms. Brennan")

- 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: David B. Stevenson

FILE No.: 2015A/62

DATE OF DECISION: September 10, 2015

DECISION

SUBMISSIONS

Shelley Brennan	on her own behalf
Scott MacKenzie	counsel for Irma Tumanan
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Shelley Brennan ("Ms. Brennan") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 31, 2015.

2. The Determination found that Ms. Brennan had contravened Part 3, sections 16 and 28, Part 4, section 40, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Irma Tumanan ("Ms. Tumanan") and ordered Ms. Brennan to pay Ms. Tumanan an amount of $4,485.61, an amount that included wages and interest under section 88 of the *Act*.

3. The Director imposed administrative penalties on Ms. Brennan under section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $2,500.00.

4. The total amount of the Determination is $6,985.61.

5. In this appeal, Ms. Brennan alleges the Director erred in law and failed to observe principles of natural justice in making the Determination. Ms. Brennan contends the Director committed reviewable errors in finding Ms. Tumanan was entitled to annual vacation pay and by finding she had contravened sections 16, 40 and 58 of the *Act* and by imposing administrative penalties for those contraventions. The appeal also refers to what Ms. Brennan apparently believes was a finding that she had contravened section 18 of the *Act*, but the Determination contains no such finding.

6. The appeal does not challenge the Director finding wages were earned by Ms. Tumanan during the last six months of her employment but not fully paid and that Ms. Tumanan was entitled to length of service compensation.

7. This appeal was initially assigned for consideration under section 114 of the *Act*. After assessing the arguments made in the appeal, I determined it was appropriate to have the positions of all of the parties on the issues raised. Accordingly, I requested, and have received, responses to the appeal from the Director and from counsel for Ms. Tumanan.

8. I now have before me the Appeal Form and the appeal submission provided by Ms. Brennan, the Determination, the Reasons for the Determination, the section 112(5) "record" provided by the Director, the objection by Ms. Brennan to the completeness of the "record", the submissions made on behalf of the Director on the completeness of the "record" and the merits, and a submission on behalf of Ms. Tumanan on the merits of the appeal.

9. When Ms. Brennan was provided with the "record", she objected to the omission of material which she says was used at the complaint hearing, described as an Excel file showing pay reconciliation records kept by Ms. Brennan from 2010 – 2012, the period of Ms. Tumanan's employment. Her objection was recorded in a communication to the Tribunal delivered June 1, 2015. The Director replied to the objection on June 17, 2015, indicating the material could not be located in the file and the Director could provide no response to the objection, since the delegate of the Director who conducted the complaint hearing was on leave and not available. The objection and the reply of the Director have been noted.

10. Most of the documents Ms. Brennan says are omitted from the "record" are in fact included in the "record" at pages 130 – 143. There appear to be only three pages of the file Ms. Brennan says was omitted that do not appear in the "record". These have been included with the appeal as documents "C, D and E". They appear to have been part of a package provided to the Director on May 14, 2013, as "details of the information" Ms. Brennan was providing for the hearing. In the absence of response from the Director to the objection raised by Ms. Brennan, I accept these documents were included as part of what is referred to in the Determination as the "spreadsheet of hours worked by Ms. Tumanan" and find, on balance, they should have been included as part of the "record". Accordingly, these documents will be considered to be the part of the "record" I have before me.

11. In a communication dated May 13, 2015, Ms. Brennan was notified by the Tribunal that her appeal was received by the Tribunal on May 11, 2015, and was missing one page of the Reasons for the Determination. Ms. Brennan delivered the missing page to the Tribunal on May 15, 2015, and explained that she had submitted her appeal just before the appeal deadline but because of the size of the file, the Tribunal seems not to have received all of it before the cut-off time on May 8, 2015. In the circumstances I do not consider the delay in filing all to be fatal to the appeal. Applying the criteria and considerations described in *Re Niemisto*, BC EST # D099/96, I am satisfied this is an appropriate case to extend the time limits for allowing the appeal. It is apparent Ms. Brennan had a genuine intention to file the appeal, attempted to make the filing within the statutory time period and the delay in the Tribunal receiving all of the pages of the appeal was of the most technical and insignificant nature.

12. The Director conducted a hearing on Ms. Tumanan's complaint on May 30, 2013, and July 18, 2013. As indicated above, the Determination was issued on March 31, 2015. That is a delay of nearly 20 months from the completion of the complaint hearing to the issuance of the Determination. Some aspects of the appeal question whether details from the evidence were lost or forgotten. While I will not speculate on the impact this delay may have had on the findings made in the Determination, and it is unnecessary to make any definitive finding on whether there was any impact, this decision recognises that such a delay is troubling and unacceptable when considered against the stated purposes of the *Act*.

13. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. I find the matters raised in this appeal can be decided from the material in the file, which consists of the section 112(5) "record", any additional evidence allowed by the Tribunal to be added to the "record" and the submissions of the parties.

ISSUE

14. The issues in this appeal are whether Ms. Brennan has shown the Director made an error of law or failed to observe principles of natural justice in making the Determination.

THE FACTS

15. The Determination contains an extensive recitation of the evidence submitted by and on behalf of both Ms. Brennan and Ms. Tumanan. A restatement of the entirety of that evidence in this decision is unnecessary. It will, however, be necessary, in order to address the appeal arguments, to refer to some of the evidence and, more particularly, to the analysis by the Director of that evidence.

16. Ms. Tumanan was a live-in caregiver for Ms. Brennan from January 2010 to March 31, 2012. From April 1, 2012, to June 8, 2012, Ms. Tumanan resided in the residence of Ms. Brennan and her spouse and performed some work for them. The Determination identifies five issues:

1. the timeliness of the complaint;
2. whether Ms. Tumanan was owed wages, which included wages for hours worked and moneys held in a "savings account";
3. whether Ms. Tumanan was entitled to compensation for length of service;
4. whether Ms. Tumanan was owed annual vacation pay; and
5. whether Ms. Tumanan was entitled to be reimbursed for a deduction from wages.

17. The findings of the Director on the first, third and fifth issues are not under appeal.

18. On the second issue, Ms. Brennan's concern is not so much with the result, but with some of the findings made by the Director while considering that issue. In that respect, Ms. Brennan takes issue with several statements in the Determination that refer to "banking" of overtime hours. She acknowledges a temporary agreement to put $100.00 per pay period from Ms. Tumanan's wages into a savings account, but says calling the arrangement an overtime bank is an inaccurate description of it. I do not consider Ms. Brennan's concern with the Director's description of the agreement to be particularly troubling. Notwithstanding the variety of terminology used by the Director to describe the agreement, the Director seems to have understood the essence of the agreement, finding in the Determination was that there was an accord between Ms. Brennan and Ms. Tumanan to "bank" $100.00 a month that probably included amounts attributable to regular hours worked, overtime hours and "extra hours" worked by Ms. Tumanan but that, overall, the arrangement did not conform to the requirements of section 42 of the *Act*. The evidence recorded in the Determination concerning the banking of that amount of money was as follows:

> In November 2010, Ms. Brennan and Ms. Tumanan agreed that $100.00 from Ms. Tumanan's pay cheque would also be held in the "savings account". This continued until June 2011, when the minimum wage rate increased. At that time, the parties agreed Ms. Tumanan would continue to be paid $8.00 per hour and the difference in earnings based on the required minimum wage rate would be put into the "savings" account.
>
> …
>
> Each time the minimum wage rate increased, Ms. Tumanan continued to be paid $8.00 per hour as [sic] the parties agreed to "bank" the difference into the "savings account".
>
> Neither party kept an accurate record of the "bank" or "savings account" maintained by the Employer during the course of Ms. Tumanan's employment. The only evidence the parties were able to produce with respect to the amounts accrued in the bank was an email from Ms. Brennan to Ms. Tumanan on June 3, 2011. The parties agreed at that time there was $2,062.00 in the savings account . . . (page R3)

> Ms. Tumanan agreed she received [$1,675.00 ($1,300.00 from the savings account)] in addition to the payment of her regular wages . . . (page R4)
>
> … The Complainant indicated she had no idea what was going in and out of the bank as she never kept her own record and left it to the Employer to keep track of. (Ms. Tumanan's evidence at page R8)
>
> Ms. Brennan indicated that from the start of Ms. Tumanan's employment up until November 2010 she paid Ms. Tumanan cash for her overtime pay and for any work she performed babysitting her children on the weekends at the rate of $12.00 per hour. Ms. Brennan was not able to provide any documentation regarding the cash payments for the overtime pay and for the "extra hours" of work Ms. Tumanan performed on the weekends babysitting the kids. (Ms. Brennan's evidence at page R12)

19. My concern with the above excerpts, which I shall address later, is not about the nature of the agreement, but about whether the findings of the Director about this agreement are accurate and whether the analytical framework within which the agreement was considered misled the Director in certain findings related to that agreement.

20. On the fourth issue, the Director, broadly speaking, accepted that Ms. Tumanan took vacation days off, but was unable to find, as Ms. Brennan contended, that Ms. Tumanan had been paid eight hours wages for each vacation day taken. The factual conclusions made by the Director in the analysis of the vacation pay issue include the following:

- under her employment contract Ms. Tumanan was entitled to three weeks' vacation a year;
- all vacation pay that was payable during Ms. Tumanan's period of employment fell within the recovery period under section 80 of the *Act*;
- in her testimony, although initially stating she never took or requested any vacation days, Ms. Tumanan eventually acknowledged she had taken "approximately" 16 vacation days in each of the years 2010 and 2011;
- the Director could not find Ms. Tumanan had been paid eight hours for each vacation day taken, indicating there was difficulty reconciling "what may have been paid as vacation days" as Ms. Tumanan "did not receive the payment of her wages at the required minimum wage rate for the hours worked in a pay period" and "did not receive the wages she earned in full in each pay period", thus "making it impossible" to conclude what monies were for vacation pay and what money was for "other things";
- Ms. Brennan did not maintain proper payroll records and that failing contributed to the impossibility of determining whether excess payments made in certain pay periods were possibly for vacation pay, since "it could be" the excess payments were for overtime wages or the difference between what Ms. Tumanan should have earned at the proper rate of pay;
- It was "impossible" to determine what exactly went into the "time bank/savings account and what was paid to the Complainant from this account"; and
- Ms. Brennan and Ms. Tumanan agreed some of the payments from this account were made in cash, yet no record of these payments was kept.

21. The "lack of payroll records and evidence regarding vacation pay paid" led the Director to find Ms. Tumanan was owed vacation pay, which was calculated as 6% of the total of the gross wages earned by Ms. Tumanan during her employment and the amount of compensation for length of service awarded in the Determination.

22. The Director preferred the evidence of Ms. Brennan on the matters that were in dispute, noting her evidence was "more consistent, coherent and reasonable", that she was able to recall events in greater detail, provided statements without hesitation and acknowledged if she was not certain about something "even if it was detrimental to her position".

23. The Determination records Ms. Brennan as testifying that Ms. Tumanan "took her vacation when the family took theirs and was paid in full for her vacation at eight hours a day" and, until November 2010, that she paid Ms. Tumanan cash for her overtime pay and for extra work she performed babysitting the children on weekends.

24. Ms. Brennan provided evidence of monies paid to Ms. Tumanan by direct deposit from May 2010 onward.

ARGUMENT

25. Ms. Brennan identifies several areas where she says the Director misunderstood statements made by both of the parties and submits that as a result the Director reached a decision on annual vacation pay that was not supported by the evidence. She submits many of the misunderstandings are due to the passage of time between the hearing and issuance of the Determination. It is helpful to summarize each of the misunderstandings that the Director is alleged to have made.

1. Ms. Brennan says Ms. Tumanan was never "scheduled to work Monday to Friday from 8:00 am to 6:00 pm" (at page R2). Ms. Brennan acknowledges Ms. Tumanan originally worked those hours, but in May 2010 her hours were reduced to 9 hours a day – eight regular hours and one overtime hour each day worked – and in June 2011 the hours were reduced again to eight a day. After June 2011, Ms. Tumanan's work schedule did not include any scheduled overtime. She submits this is supported by the evidence presented by both parties.

2. With respect to the finding in the Determination that "[t]he parties agreed that the overtime hours worked by Ms. Tumanan as part of her regular schedule were "banked" and held in a "savings account" by the Employer", Ms. Brennan says there was no "banking" of overtime, nor any "agreement" between the parties that such "banking" of overtime occurred. Ms. Brennan says there was a "savings account" comprised of $100.00 a pay period that was kept for a period of time and was fully paid out. The evidence was that this amount was paid out and its payment was acknowledged by Ms. Tumanan.

3. Ms. Brennan says that the Determination states she did not pay time and a half for overtime work. She says there was no dispute that she paid time and a half for overtime work.

4. The Director incorrectly states that Ms. Brennan did not pay the correct minimum wage. There was no allegation made by Ms. Tumanan to that effect. Ms. Brennan submits the evidence shows each payroll was "correctly calculated and $100 saved".

5. With respect to the amount in the savings account, Ms. Brennan agrees the email dated June 3, 2011 referenced in the Determination shows the amount of savings in the account the parties had agreed to. She says the account had $1,600 - $100 per pay over 16 pay periods. Ms. Brennan says the account would also have $375 for "extra" hours that Ms. Brennan had given her as a "gift" for helping out at her children's birthday party and $87 because Ms. Brennan missed the minimum wage increase for 3 pay periods. Ms. Brennan says the parties agreed that the total owing to Ms. Tumanan was $2,062. Ms. Brennan notes there was a dispute about

"another $270" which had also gone "into savings over a few pay periods". Ms. Brennan says she paid this amount "in cash and payroll", but Ms. Tumanan said it wasn't paid at all. Ms. Brennan says Ms. Tumanan admitted that $1,675 of the savings was paid out after the termination of her employment, which would leave a disputed amount of $487 plus $270.

6. Ms. Brennan says the statement in the Determination that says she testified that Ms. Tumanan's vacation entitlement would begin in her second year of employment is inaccurate. Ms. Brennan says the employment letter offered 3 weeks of vacation yearly starting in her first year of employment. Ms. Brennan says she did not state she thought Ms. Tumanan's three week vacation period started in her second year.

7. With respect to the reference in the Determination that Ms. Brennan assigned Ms. Tumanan "duties" while Ms. Brennan was on vacation, Ms. Brennan says that between vacation time, Christmas. and the grandparents taking the kids for 2 weeks yearly, Ms. Tumanan was, in fact, getting 5 – 6 weeks of vacation yearly. As such, Ms. Brennan said she would leave Ms. Tumanan a list of work to do before she took her vacation days. Ms. Brennan says "[b]ecause of this she took around 4 full weeks' vacation instead of the full time we were away since we were paying her, we expected that she would do some work while we were away…". Ms. Brennan notes that Ms. Tumanan acknowledged she had 16 vacation days in each of 2010 and 2011, which more than fulfilled the 3 weeks offered.

26. With respect to the Director's calculation of annual vacation pay owed to Ms. Tumanan, Ms. Brennan submits that because of the errors above, a decision was made which constitutes a breach of natural justice principles. She says if the statements made in evidence were properly recorded and considered, the Director could not have found Ms. Tumanan was entitled to annual vacation pay set out in the Determination.

27. She says Ms. Tumanan never claimed she was not paid for the days she admitted at the complaint hearing to having taken as vacation days. Ms. Brennan says the documents attached to the appeal as "C, D and E" shows vacation hours and how much Ms. Tumanan was paid for them. None of the payments that are shown on these documents was ever disputed by Ms. Tumanan and were all supported by email transfer records that were provided to the Director during the complaint process. I should reiterate here that the documents "C, D and E" were part of the material Ms. Brennan claims was used at the complaint hearing but omitted from the "record". I also reiterate the reference in the "record", in an email to a delegate of the Director dated May 14, 2013, to Ms. Brennan having found her payroll file on a flash drive she had used for file backup.

28. Ms. Brennan submits there was no evidence that Ms. Tumanan was ever paid less that minimum wage over her period of employment, although she acknowledges, and did so in the complaint process to have missed the start date for a minimum wage increase, an amount of $87.00 over three pay periods, which was later rectified by paying that amount to Ms. Tumanan. Ms. Brennan disagrees with the Director finding Ms. Tumanan "did not receive the wages she was paid in full", submitting the only period of time she was paid less than her full wages in any pay period was between November 2010 and June 2011, when $100.00 a pay period was being placed in a savings account and the money in that account was fully paid out to her.

29. Ms. Brennan says the misunderstandings of the evidence displayed by the Director in the Determination led to a decision that does not accurately reflect the facts.

30. Finally, Ms. Brennan disagrees with the administrative penalties imposed for contravening sections 16, 40 and 58 of the *Act*.

31. The Director and Ms. Tumanan have filed replies to the appeal.

32. The Director submits the findings of fact made in the Determination on what wages were owed were made "in the context of inconsistent testimony and the employer's records". The Director says the findings made were reasonable and based on the best evidence available.

33. Counsel for Ms. Tumanan submits the delegate correctly determined that Ms. Tumanan was owed vacation pay on her total gross earnings. He says Ms. Tumanan maintained a claim for unpaid vacation pay before the Director and while the delegate determined that Ms. Tumanan took vacation during her employment, the lack of evidence regarding vacation pay, including a lack of payroll records, supported a finding that Ms. Tumanan is owed vacation pay on her gross earnings. He submits the Determination did not display a "misunderstanding of statements" and does not constitute a breach of natural justice. Rather, the evidence showed Ms. Brennan consistently underpaid Ms. Tumanan (and that she was overpaid on certain occasions). As the delegate was unable to determine whether the excess payments made to Ms. Tumanan were for vacation pay or for unpaid/withheld wages, the delegate found Ms. Tumanan was owed vacation pay. Counsel asserts this finding of fact is supported by the evidence, and should not be changed or varied absent a palpable and overriding error.

ANALYSIS

34. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

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

35. An appeal to the Tribunal under section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

36. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112 of the *Act*. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. This appeal is grounded in error of law and failure to observe principles of natural justice.

37. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

> 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)

38. Ms. Brennan does not claim that she did not know the case against her or have an opportunity to respond to the case. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. I cannot find on the available facts that the Director failed to observe principles of natural justice in making the Determination and need not address that ground of appeal any further. It is clear from the "record" that Ms. Brennan was afforded the procedural rights contemplated by the above statement, which, I note, are also statutorily protected by section 77 of the *Act*.

39. At its core, the appeal challenges findings and conclusions of fact made in the Determination. In dealing with an appeal against findings of fact, it is well established that the grounds of appeal listed in subsection 112(1) of the *Act* do not allow for an appeal that simply challenges findings and conclusions of fact. The Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

40. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. 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.

41. In this case, it must be demonstrated that the challenged facts are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.

42. It is also an error of law to fail to provide reasons for the Determination: see *Michael Bishop, a Director or Officer of Mosaic Technologies Corporation*, BC EST # D120/04 (applying *R. v. Sheppard*, 2002 SCC 26, 162 C.C.C. (3d) 298).

43. Ms. Brennan's appeal does not challenge the Director's finding that wages earned by Ms. Tumanan during the last six months of her employment were not fully paid and that Ms. Tumanan was entitled to compensation for length of service. Instead, this appeal questions whether the Director was correct to find Ms. Tumanan is owed vacation pay and whether the Director properly assessed administrative penalties for this and for failure to pay minimum wage and overtime in accordance with the *Act*.

44. I will address the "minimum wage" argument at this point. I accept Ms. Brennan's submission concerning the global findings relating to her not paying minimum wage, or more accurately, only paying Ms. Tumanan at $8.00 an hour over the course of her employment. Such a conclusion is not supported on a reasonable and

objective view of the totality of the evidence. With respect to the finding that Ms. Tumanan did not receive the payment of her wages at the required minimum wage rate, I agree with Ms. Brennan that Ms. Tumanan's complaint did not allege a failure to pay minimum wage and nothing in the "record" or in the recording of Ms. Tumanan's evidence in the Determination raises a claim or concern about minimum wage. The Director does not identify the evidence from which she makes this finding and that finding cannot stand.

45. However, there is no disputing that in the last six months of Ms. Tumanan's employment Ms. Brennan failed to pay Ms. Tumanan the equivalent of minimum wage during some pay periods. That is apparent from the effect of the wage calculations done by the Director for that period. That consequence, in itself, justifies the administrative penalty relating to the minimum wage contravention that was imposed in the Determination and I may not interfere with it. The same comments apply to the administrative penalty for contravening section 40 of the *Act*.

46. In respect of the vacation pay entitlement issue, I find Ms. Brennan has met the burden on her and the appeal must succeed on that matter. I do not accept the submission of either the Director or counsel for Ms. Tumanan that the appeal should be dismissed.

47. My first comments on this point concern the Director's use of section 42 of the *Act* in the analysis of the "savings account". In my view, the Director has made an analytical error by attempting to shoe-horn what was intended and agreed between Ms. Brennan and Ms. Tumanan concerning the savings account into the requirements of section 42 of the *Act*. On the evidence it is clear that the agreement was simply to place $100.00 a pay period aside. There was no consideration given to what comprised this amount. Some additional amounts were added and were identified. The evidence from Ms. Brennan was that the amount in the time bank was fully paid. Based on the Director's decision to prefer Ms. Brennan's evidence, the reasons for which are set out in six paragraphs on pages R14 – R15 of the Determination, it is curious the Director would ignore her oral evidence and fall back on the absence of written records in reaching conclusions about the savings account. The Determination contains no reasons why the Director would choose not to accept Ms. Brennan's evidence on this point. That is a deficiency in the reasons for Determination.

48. More to the point, however, there is simply no evidence in any of the material that indicates Ms. Brennan "banked overtime" for Ms. Tumanan. The only evidence is that there was an agreement between them – an agreement that lasted for 16 pay periods between November 2010 and June 2011 – to allocate $100.00 a pay period as a savings account for Ms. Tumanan, that an amount of $375.00 for "extra work" and another amount of $87.00 was put into the savings account. The evidence from Ms. Brennan was that all of the money that was in that savings account was paid out to Ms. Tumanan. There was, in fact, also objective evidence supporting that oral evidence.

49. In my assessment, the decision of the Director to utilize section 42 of the *Act* in the analysis of the savings account led to some conclusions that were not justified from the evidence. I will detail these later.

50. In respect of the decision regarding annual vacation pay, I first note that Ms. Tumanan's annual vacation pay claim in her complaint was $2,987.56. That claim was based on Ms. Tumanan's position that she had taken no vacation days during her employment and, consequently, had received no annual vacation pay at all during her employment. However, the evidence provided to the Director, and accepted, was that Ms. Tumanan took 16 days of vacation in each of the years 2010 and 2011. The vacation periods are identified in the Determination. The evidence provided by Ms. Brennan, both orally and in documented form was that Ms. Tumanan was paid wages during those periods. That evidence is consistent with the records provided by Ms. Brennan, which when examined, shows Ms. Tumanan continuing to receive wages during the periods accepted by the Director (and acknowledged by Ms. Tumanan) as vacation days. The Director does not

explain why this evidence is not accepted. I appreciate the evidence shows some inconsistency in the calculation of the amounts paid in those pay periods where vacation was taken by Ms. Tumanan, but in my view those inconsistencies are minor and insufficient to cast doubt on the evidence that vacation pay was paid in that period.

51. In any event, it simply does not matter what the money in the savings account comprised. Ms. Brennan gave evidence that the "savings account" had been paid out in full. The logical conclusion from that evidence is that whatever comprised the savings account was paid to Ms. Tumanan. The Director has ignored the evidence and the finding in the Determination relating to that matter is inconsistent with it.

52. As well, if the comment that Ms. Tumanan did not receive the payment of her wages at the required minimum wage rate is intended to reflect a finding that Ms. Tumanan was receiving her wages at a rate of $8.00 an hour throughout her employment notwithstanding the increases to the minimum wage rate during her employment period, that comment does not accord with the evidence that was provided to the Director; it is, simply put, wrong. I agree with Ms. Brennan that Ms. Tumanan's complaint did not allege a failure to pay minimum wage and nothing in the "record" or in the recording of Ms. Tumanan's evidence in the Determination raises a claim or concern about minimum wage. Nowhere does the Director identify the evidence from which she makes this finding. In my view, that finding is an error of law within the definition adopted by the Tribunal from the *Gemex* decision of the Court of Appeal, which is set out above. However, as noted above, my conclusion on this matter does not affect the validity of the administrative penalty for contravention of section 16 of the *Act*; other facts support that result.

53. Finally, there is no evidence that any of the amounts paid to Ms. Tumanan while she was on vacation time off was "for other things". That is pure speculation by the Director, not based on any facts or evidence provided. In the same vein, the Director states "there is no way of reconciling the monies paid to the Complainant and determining for sure that the excess payments made in certain pay periods were possibly for vacation pay". There was no such contention relating to "excess payments". Ms. Brennan's position was, and is, that vacation pay was paid as eight hours for each day Ms. Tumanan took off. There was no lack of evidence that vacation pay was paid; it is in the documents. The Director has ignored that evidence.

54. I find it perverse and inexplicable that the Director, in the face of the evidence that Ms. Tumanan took 16 annual vacation days in each of 2010 and 2011 for which the records show she was paid eight hours a day, to find it was "impossible to conclude what monies were for vacation pay" and find, as a result, Ms. Tumanan was entitled to an amount of vacation pay totalling nearly $2400.00. The rationale of the Director, when examined against the evidence as a whole, does not bear up under scrutiny and does not support the finding made. It is an unreasonable assessment of the evidence.

55. In sum, I find the Director has committed an error of law in the finding on vacation pay and that part of the Determination is set aside.

56. I do not say Ms. Tumanan is not entitled to some annual vacation pay. My conclusion is that more work is required in order to determine what Ms. Tumanan's annual vacation entitlement will be and the result must accept the clear evidence that Ms. Tumanan had received payment of wages during annual vacation time taken in 2010 and 2011. The fact the amount paid to her for annual vacation may not be determined with complete accuracy does not justify ignoring it completely. As one of its purposes, the *Act* directs the promotion of fairness to the parties and in the procedures for resolving disputes.

57. Ms. Brennan contests some of the administrative penalties that have been imposed on her for several contraventions of the *Act*, including failure to pay annual vacation pay as required by the *Act*.

58. At this juncture, I can find no basis for cancelling any of the administrative penalties. Administrative penalties are mandatory where the Director makes a Determination and imposes a requirement: see section 98 of the *Act*. As I have indicated above, regardless of the effect of this decision, there is a basis for the contraventions found. Ms. Brennan does not contest all of the administrative penalties imposed, just those based on a contravention of sections 16, 40 and 58 of the *Act*. Nor does Ms. Brennan contest the finding of wages owed during the last six months of Ms. Tumanan's employment. The uncontested findings reflect a failure to pay all wages owed, a failure to pay overtime wages owed and a failure to pay all annual vacation pay owed. In other words, there is a statutory basis for the administrative penalties imposed in any event of this decision. The contraventions in this case are clear and discrete, relating to separate and distinct obligations under the *Act*, none of which are exclusive to the question being addressed in this decision. The Director was required to impose a penalty in respect of each of the contraventions found to have occurred: see *537370 B.C. Ltd. operating as Ponderosa Motor Inn*, BC EST # D011/06, at paras. 15 – 16.

59. In result, I vary the Determination to cancel the finding that Ms. Tumanan was entitled to annual vacation pay in the amount of $2,369.54 and refer the Determination back to the Director.

ORDER

60. Pursuant to section 115 of the *Act*, I order the Determination dated March 31, 2015, be varied to cancel the annual vacation entitlement found owing to Ms. Tumanan and the matter referred back to the Director. If the delegate who made the determination is unavailable, I would implore the Director to minimize any further delay by having this matter addressed as quickly as possible.

David B. Stevenson
Member
Employment Standards Tribunal