Employment Standards TRIBUNAL

An appeal

- by -

Jeff Rolando
("Rolando")

- 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: Yuki Matsuno

FILE No.: 2010A/82

DATE OF DECISION: September 14, 2010

DECISION

SUBMISSIONS

Jeff Rolando	on his own behalf
Tammy Saunderson	on her own behalf carrying on business as Simply Music
Robert W. Joyce	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 Jeff Rolando ("Rolando") of a Determination of the Director of Employment Standards issued May 11, 2010 (the "Determination"). The Determination was issued by a delegate of the Director of Employment Standards (the "Delegate") after an investigation of a complaint submitted by Mr. Rolando on December 4, 2009. Mr. Rolando's complaint alleged that the Employer contravened the *Act* by misrepresenting the terms and conditions of employment, failing to pay regular wages and moving expenses, and making unauthorized deductions.

2. The Employee appeals the Determination on the ground that the Director erred in law and failed to observe the principles of natural justice in making the Determination. I am able to decide this appeal on the basis of the written materials submitted before me, namely: Mr. Rolando's appeal form and submissions; the submissions of the Employer; the submissions of the Delegate on behalf of the Director; and the record forwarded by the Delegate under section 112(5) of the *Act*.

THE DETERMINATION

3. The Determination outlined the following background information: Mr. Rolando was hired under a Labour Market Opinion ("LMO") issued by Service Canada on September 4, 2009. He moved from the United States to Fort St. John as a foreign worker employed as a music instructor by the Employer from starting October 19, 2009, and ending November 16, 2009, when the Employer terminated his employment.

4. The LMO, issued to both Mr. Rolando and the Employer, listed Mr. Rolando's title as Music Instructor, and indicated that the duration of employment was 3 years and the wage rate was $20.81 per hour, with 10 days of holidays and a 35-hour work week. The Employer forwarded two letters to Mr. Rolando, one dated July 22, 2009, and the other September 10, 2009; both letters offered "an opportunity to work as a guitar instructor with our company on a permanent basis starting, [sic] Sept. 01, 2002" (collectively, the "Letters"). The two letters differed only in their wage rate ($20.00/hour and $21.00/hour, respectively). Mr. Rolando began his employment at $21.00/hour and his wage was raised to $25.00/hour effective November 1, 2009.

5. During the period of Mr. Rolando's employment, the Employer gave Mr. Rolando an advance of $1075.00 which was subsequently deducted from his pay without objection. The Employer's husband also gave Mr. Rolando two cash payments of $500.00 each which were also later deducted from Mr. Rolando's pay. Mr. Rolando asserted that these payments were personal loans while the Employer stated they were cash advances on his wages.

6. In the Determination, the Delegate found that that Mr. Rolando's complaint regarding unpaid regular wages was not made out because there was no evidence that the wage raise effective November 1, 2009, should have been

implemented earlier. With respect to moving expenses, the Delegate quoted from the Employment Standards Fact Sheet on Foreign Workers (the "Fact Sheet") and noted that while such fact sheets provide general information they are not the law, which is contained in the *Act*, nor do they form part of the law. He went on to hold that the issue of an employer's obligation to pay for the transportation of a foreign worker to Canada arises where there is a contract that clearly sets out that obligation; in that case, the Employment Standards Branch could enforce that contractual obligation and if the expense is paid by the employer, the employer would be prohibited from subsequently deducting the cost of the expense from the employee's wages. In this case, the Delegate concluded that there was no evidence before him to show that the Employer was obligated to pay Mr. Rolando's moving expenses and dismissed that aspect of the complaint.

7. The Delegate also dismissed the complaint with respect to the deductions from Mr. Rolando's wages on account of the two payments to him of $500.00 each. The Delegate considered the evidence and found that the payments were cash advances on Mr. Rolando's wages. He also found that the first $500.00 payment, paid to Mr. Rolando during the first pay period, was improperly partially deducted from wages earned in the second pay period. The Delegate found that the amount improperly deducted had been returned by the Employer to Mr. Rolando.

8. Finally, with respect to Mr. Rolando's complaint that the Employer misrepresented the conditions of employment before he moved to Fort St. John to begin employment, the Delegate found that the Letters were offers of employment that clearly stated three pieces of information (wage rate, hours per week, and the position) and found that there was nothing misleading in those offers. The Delegate found that the Employer made no other representations to Mr. Rolando. The Delegate noted that Mr. Rolando, after starting work, engaged in meetings and discussions with the Employer with respect to the Employer's policies and procedures; took exception to some of the Employer's requests; and was presented with a contract by the Employer (the "Contract") and took exception to some of the clauses contained in the Contract. The Delegate reviewed the Contract and found nothing in the Contract that would change the conditions of employment; further, he found nothing in the Contract that concerned him except a clause which requires the employee to forfeit their last paycheque in certain circumstances, which would be contrary to the *Act*. The Delegate found that this latter clause, in spite of being in contravention of the *Act*, did not result in a misrepresentation of the conditions of employment. The Delegate also found that the very existence of the Contract did not constitute misrepresentation and that it contained policy and procedural issues for the most part. He found that the Employer did not misrepresent any of the conditions of employment prior to or after hiring Mr. Rolando.

ISSUES

9. Did the Director err in law in making the Determination? Did the Director fail to observe the principles of natural justice?

ARGUMENT AND ANALYSIS

10. The onus rests on Mr. Rolando as the appellant to show that the Director, as represented by the Delegate, erred in law or failed to observe the principles of natural justice. Although I have read and considered all of the submissions before me, I will refer only to those that are relevant to the issues to be decided in this appeal.

Error of Law

11. In Mr. Rolando's submissions I am able to identify three issues that relate to his contention that the Delegate erred in law, which I briefly outline below:

1. Did the Delegate err in law when he found that the $1,000.00 given to Mr. Rolando by the Employer's husband was a cash advance on his wages and not a loan? Mr. Rolando's submission is that the $1,000.00 was a personal loan given to him by the Employer's husband which was completely unrelated to his employment relationship with the Employer. I note that he presented this argument to the Delegate during the investigation.

2. Did the Delegate err in law when he found that the travel costs that Mr. Rolando incurred to come to Fort St. John for the job was not a business cost of the Employer and therefore the Employer was not obliged to recompense Mr. Rolando for these travel costs? As he did before the Delegate, in his appeal submissions Mr. Rolando relies on the Employment Standards Fact Sheet for Foreign Workers to argue that the Employer should have paid for his moving costs.

3. Did the Delegate err in law when he found that the Employer did not misrepresent the conditions of employment to Mr. Rolando before Mr. Rolando accepted the job? Mr. Rolando submits that the Employer misrepresented the conditions of employment by not informing Mr. Rolando about the content of the Contract. The particular provisions of the Contract to which Mr. Rolando specifically takes exception as either "objectionable" or "illegal" are:

    - A clause setting the term of employment at 10 months;
    - A clause prohibiting Mr. Rolando from teaching music within a 60 mile radius of Fort St. John for a period of one year after ending employment with the Employer;
    - A clause providing for the payment of a reduced wage for carrying out non-instructional work such as distribution of promotional materials;
    - A clause compelling Mr. Rolando to forfeit his last paycheque for the last two weeks worked should the Contract be breached for any reason other than serious illness and/or death (the Delegate noted in the Determination that this clause was contrary to the *Act*); and
    - A lack of a clause providing for severance pay.

12. Mr. Rolando says that he did not see the contract until three weeks after his arrival in Canada and that had the contract been sent to him before he left for Canada, he would not have agreed to accept the job because he would have rejected the conditions contained in the contract, particularly the ones listed above, and therefore would not have incurred his moving expenses. Mr. Rolando says that the Delegate was wrong in deciding that nothing in the Contract changed his working conditions. He says that because he refused to sign the contract presented to him, his employment was terminated. He argues that due to the alleged misrepresentation, the Employer should be made to pay for his moving expenses as well as wages lost between the time his employment with the Employer was terminated and the time he left Canada.

13. In response, the Delegate submits that Mr. Rolando has failed to establish that natural justice was denied or that an error of law was made. He submits that Mr. Rolando is "attempting to reargue his position" which I understand to mean that Mr. Rolando is putting forward the same arguments that were put to the Delegate in the course of the investigation.

14. With respect to error of law generally, the leading case is *Britco Structures Ltd.*, BC EST # D260/03, in which the Tribunal 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), [1988] B.CJ. No. 2275 (B.C.C.A.):

    1. a misinterpretation or misapplication of a section of the *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 (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05).

Loan or Cash Advance?

15. The issue of whether the $1,000.00 in cash given to Mr. Rolando was a loan or an advance on wages is an issue of fact. Errors of fact made by the Director are reviewable by the Tribunal only if they amount to errors of law, i.e. if a Delegate acted without any evidence in making a finding of fact or acted on a view of the facts which could not reasonably be entertained. The Delegate's determination that this money was an advance on wages was grounded on several facts in the evidence before him, namely (1) that the request for the money came from Mr. Rolando; (2) that the Employer's manager was involved in the transaction and (c) the information about the money being given to Mr. Rolando was provided to the bookkeeper. The Delegate clearly acted with evidence and his perspective of the facts could reasonably be entertained.

Compensation for Moving Costs

16. Mr. Rolando objects to the Delegate's finding that the Employer is not obligated to pay for his moving expenses. Mr. Rolando made the argument to the Delegate during the investigation, and again in his appeal submissions, that the Fact Sheet provides for payment of the moving costs of foreign workers such as himself. The Determination laid out the relevant portion of the Fact Sheet:

> Deduction from Wages
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> An employer may only deduct wages as require by law (e.g. income tax, Canada Pension Plan contributions . . .). An employer cannot require an employee to pay any portion of a business cost, including:
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> - costs of bringing a foreign worker to Canada, or
> - costs due to theft, damage, breakage, poor quality of work, failure to pay by a customer, etc.

17. As the Delegate points out in the Determination, the Fact Sheet is not law; rather, the provisions of the *Act* govern employment standards in British Columbia. With respect to a claim by an employee for moving costs, section 21 of the *Act* must be considered:

> 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

18. Section 21(2) in particular is germane to the instant matter of compensation for moving costs, as Mr. Rolando paid for the moving costs himself and there is no allegation that the Employer withheld, deducted or required payment for moving costs out of Mr. Rolando's wages. Section 21(2) was considered at length by a three-person reconsideration panel of the Tribunal in *Director of Employment Standards (Re Park Hotel (Edmonton) and Hunter's Grill Ltd.)*, BC EST # D257/99. Although the particular issue before the panel was the interpretation of "require" in section 21(2), the panel also provided several general principles to guide those interpreting the section:

> Any provision of the *Act* must be interpreted in the context of the purposes and objects of the Act, bearing in mind the consequences our decision might have on employment relationships in general. The objective of Section 21(2) is to prevent employers from unilaterally seeking contribution from employees to the cost of doing business. The experience of the Tribunal has shown that the ingenuity of some employers to avoid the prohibition contained in Section 21 justifies a broad and liberal interpretation of that provision. Accordingly, we agree with the Director that by construing the term "require" in subsection 21(2) as excluding a "request" by an employer that an employee pay part of the employer's business costs, the adjudicator has misinterpreted that provision of the *Act*.
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> We agree with the adjudicator that the touchstone of the term "require" implies some form of coercion. However, if the adjudicator has concluded that the term is limited to forms of coercion demonstrated by insistence or compelling, an order, a command, or an authoritative demand, to the exclusion of other, more subtle, forms of coercion, and must be accompanied by consequences for non compliance, we do not agree. The Tribunal must be conscious of the fact of employee dependence on the employer and the opportunity this gives the employer to unduly influence an employee. What might seem like an innocuous request in most situations may, in an employer/employee context, take on a very different hue. Whether such a request contravenes the prohibition found in Section 21 of the *Act* will be a question of fact to be decided in all the circumstances. Additionally, the presence or absence of consequences for non compliance is not determinative of whether an employee has been "required" to pay all or part of an employer's business costs, but is a factor which, along with others, must be considered when deciding that question.
>
> We do not accept the Director's position that *any* participation by an employee to the employer's cost of doing business is prohibited by subsection 21(2). Purely voluntary payments to the employer's business costs would not be prohibited by subsection 21(2). As above, issues about the "voluntariness" of such payments will be questions of fact to be decided in all the circumstances.
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> . . . . As we said earlier, coercion is the touchstone of subsection 21(2). The absence or presence of coercion is a question of fact to be decided in all the circumstances of the case.

19. More recently, in *Whitehall Bureau of Canada Limited*, BC EST # D026/10 (reconsideration application not allowed, BC EST # RD075/10) the Tribunal commented on the effect of section 21(1) and 21(2) and outlined the elements that must be established for an employee to make a claim successfully under section 21(2):

> The Determination correctly notes the effect of subsection (1) is to prohibit an employer from withholding wages from an employee for any reason and the effect of subsection (2) is to prohibit an employer from making an employee responsible for any of an employer's business costs. The Determination also correctly notes the cost imposed on an employee may be direct or indirect.
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> . . .
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> A plain reading of section 21 of the *Act* as it relates to the claim being made by [the employee] required him to establish the following:
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> (i) [the employee] incurred costs during the course of his employment;
>
> (ii) the costs incurred were required, as that term has been accepted and applied by the Tribunal (see for example *Director of Employment Standards (Re Park Hotel and Hunter's Grill*, BC EST # D257/99), by [the employer]; and

(iii) the costs incurred were business costs.

20. The general principles that should govern the interpretation of section 21(2), as revealed by these authorities, may be summarized as follows:

- The object of section 21(2) of the *Act* is to prohibit employers from making an employee responsible for any of an employer's business costs.
- Like any provision of the *Act*, section 21(2) must be interpreted in the context of the purposes and objects of the *Act*, keeping in mind the effect of any interpretation on employment relationships in general.
- Section 21(2) must be interpreted broadly and liberally.
- The term "require" in section 21(2) implies some form of coercion, but is not limited to forms of coercion that are expressed through command or compulsion; other, more subtle forms of coercion may be determined to fall within the ambit of "require" in this provision. The decision maker must be conscious of the fact of employee dependence on the employer and the opportunity this gives the employer to unduly influence an employee.
- The absence or presence of coercion is a question of fact to be decided in all the circumstances.
- The absence or presence of consequences for non compliance is not determinative of whether an employee has been "required" to pay all or part of an employer's business costs, but is a factor which, along with others, must be considered when deciding that question.
- Purely voluntary payments to the employer's business costs would not be prohibited by section 21(2). As above, issues about the "voluntariness" of such payments will be questions of fact to be decided in all the circumstances.
- On a plain reading of section 21(2), an employee who claims that an employer breached the section would have to establish the following:

  (a) the employee incurred costs during the course of his employment;
  (b) the costs incurred were required by the employer, as that term has been accepted and applied by the Tribunal; and
  (c) the costs incurred were business costs.

21. Turning to the Determination, there is no indication that the Delegate turned his mind to section 21(2) or its application and interpretation in dealing with Mr. Rolando's complaint about moving costs. The Delegate makes no reference to section 21(2), referring only to the Fact Sheet and the *Act* generally; therefore it cannot be ascertained on the face of the Determination whether he considered the specific provisions of the section. Further, again on the face of the Determination, it is not apparent that the Delegate considered the general principles that guide the interpretation of this section as decided by past Tribunal decisions, as summarized above. Instead, the Delegate considered the issue very narrowly by characterizing the employer's obligation to pay for the transportation of a foreign worker to Canada as being engaged only where there is a clear contractual obligation for the employer to pay for that expense. Based on that narrow and incomplete view of section 21(2), the Delegate found that since there was no evidence before him (presumably in the form of a clear contractual obligation, though this is not made clear) to show that the Employer was obligated to pay for Mr. Rolando's moving expenses, Mr. Rolando's complaint on this point should be dismissed.

22. However, there is nothing in the *Act* and section 21(2) that limits an Employer's obligation to pay for a business cost to those cases where the Employer's obligation is expressed in a clear contractual term. In some cases, no contractual terms exist, and the determination is made on the basis of other evidence. In one particular recent case, a provision in the employment contract provided for repayment of travel costs to the employees, who were foreign workers, after 24 months; however, the Director in that case found that the travel costs were a business cost within the meaning of section 21(2) solely on the basis of the requirements of the statute and independent of any contractual obligation. The Director's conclusion was confirmed by the Tribunal: *Glacier Park Lodge*, BC EST # D059/09 (reconsideration application on this point declined, BC EST # D094/09).

23. As a consequence, I find that the Delegate misinterpreted and misapplied section 21(2) of the *Act* and therefore erred in law. By narrowing the scope of his investigation to the issue of whether or not the Employer had a contractual obligation to pay for Mr. Rolando's moving costs, the Delegate failed to apply the provision correctly. Further, it does not appear that the Delegate investigated the facts and gathered evidence from the parties to answer the questions that need to be answered to make a determination: Did Mr. Rolando incur the moving cost during the course of his employment? Were the moving costs required by the Employer? Are the moving costs appropriately characterized as the Employer's business costs? Before a determination can be made regarding this aspect of Mr. Rolando's claim, further investigation by the Director is necessary, and the parties must have an opportunity to make submissions and tender evidence on this issue.

Misrepresentation of Conditions of Employment

24. With respect to Mr. Rolando's assertion that the Employer misrepresented the conditions of employment, contrary to section 8(1) of the *Act* which provides:

> 8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
>
> (a) the availability of a position;
>
> (b) the type of work;
>
> (c) the wages;
>
> (d) the conditions of employment.

25. The term "conditions of employment" is defined in section 1 of the *Act* as "all matters and circumstances that in any way affect the employment relationship of employers and employees".

26. In previous cases dealing with the issue of misrepresentation, the Tribunal has considered section 8 of the *Act* and how it should be interpreted. In a recent case, *Agropur Cooperative carrying on business as Island Farms*, BC EST # D126/09, the Tribunal summarized the jurisprudence on this section:

> Section 8 is a pre-hiring provision and its protection covers only pre-hiring practices. . . . The provision does not prohibit an employer from inducing, influencing or persuading a person to become an employee, provided that in so doing there is no misrepresentation of any of the four matters identified: the availability of a position, the type of work, the wages and the conditions of employment. The Tribunal has adopted and applied a basic legal definition of misrepresentation when considering whether an employer has misrepresented any of those four matters: see *Chintz & Company Decorative Furnishings Inc.*, BC EST # D007/00; *Jeff Parsons*, BC EST # D110/00; *CYOP Systems International Incorporated and others*, BC EST # D02/03. That definition describes misrepresentation in the following terms:
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> > Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of

> fact. An incorrect or false misrepresentation, that which, if accepted, leads the mind to an apprehension of a condition other or different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.
>
> In a limited sense, an intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it.

In *Chintz & Company*, *supra*, the Tribunal acknowledged that a misrepresentation may be fraudulent, negligent or innocent. In *Parsons*, *supra*, the Tribunal stated the employer's intention is not relevant to whether there has been a contravention of section 8. The definition of misrepresentation adopted for section 8 indicates the matters of primary relevance are the untruth of the statement, its materiality to the contract and its influence on the party to whom it is made. The intention of the employer may bear on the remedy, but not on whether there has been a misrepresentation made.

27. Mr. Rolando argues that because the Employer did not inform him of the terms of the contract that he would be expected to sign until after he moved to Fort St. John and began working, the Employer misrepresented the conditions of employment contrary to section 8 of the *Act*. In other words, Mr. Rolando is saying that the Employer's lack of representation or silence regarding the conditions of employment amounted to his being induced, influenced, or persuaded by the Employer to become an employee, and that this lack of representation amounted to a misrepresentation.

28. The Delegate did not find Mr. Rolando's argument persuasive and concluded that the Employer did not misrepresent the conditions of employment to Mr. Rolando. I do not see that the Delegate erred in coming to this conclusion.

29. The evidence before the Delegate that touched on the information exchange between Mr. Rolando and the Employer regarding the conditions of the employment were the Letters; the LMO; and the Employer's verbal mention of "a contract". Mr. Rolando appears to agree with this and my own review of the Record and submissions have turned up no other discussions or representations about conditions of employment.

30. There is no evidence that any information that could be said to have induced, influenced, or persuaded Mr. Rolando to accept the position was untrue. The action of his moving to Fort St. John indicates that Mr. Rolando was persuaded to accept the position before he arrived there and the only manifestations or assertions regarding the conditions of his employment that he received from the Employer before his arrival were contained in the Letters, LMO, and Employer's verbal mention of "a contract". As the Tribunal noted in *Robert D. Clark*, BC EST # D536/02, it is difficult "to see how one could say that they were induced to enter into an employment contract as a result of a condition of employment of which they were wholly unaware." It appears that Mr. Rolando was induced by his own assumptions about the contract and the working conditions that would await him in Fort St. John; however, his own assumptions are not traceable to the Employer and are not the Employer's responsibility. If Mr. Rolando had thought to confirm his assumptions with the Employer, or if he was concerned about the contents of the contract that was going to be presented to him, it was incumbent on him to ask the Employer about the details of the contract and what would be expected of him until he was fully satisfied about the terms before agreeing to enter into an employment relationship. If, in response to Mr. Rolando's inquiries, the Employer had made statements that were untrue and that induced, influenced, or persuaded Mr. Rolando to accept the position, section 8 might have been engaged. However, it does not appear that Mr. Rolando made such inquires of the Employer before Mr. Rolando accepted the job offer.

31. The Delegate did not err in law in the Determination in finding that there was no misrepresentation under section 8 of the *Act*.

Natural Justice

32. Mr. Rolando's other ground of appeal is that the Delegate failed to observe the principles of natural justice. However, his arguments in this regard are more properly characterized as going to his first ground of appeal, namely error of law, in that he disputes the conclusions reached by the Delegate in the Determination. Some of these arguments are dealt with above.

33. In order to successfully appeal on the ground that the Director failed to observe the principles of natural justice, an appellant must prove a procedural defect, amounting to unfairness, in how the Director carried out the investigation or made the determination. Such procedural defects include failing to inform a person of the case against him or her; not allowing a person an opportunity to respond to a complaint; and failing to make a decision in an unbiased or impartial way. Mr. Rolando's submissions do not contain any indication that the Delegate breached the principles of natural justice in conducting the investigation and making the Determination. This aspect of the appeal is dismissed.

DISPOSITION OF THE APPEAL

34. The appeal is allowed in part.

ORDER

35. Pursuant to Section 115 of the *Act*, I order that Mr. Rolando's complaint regarding compensation for moving costs under section 21(2) of the *Act* be referred back to the Director of Employment Standards for a full investigation and determination in accordance with Tribunal jurisprudence. I order that the Determination dated May 11, 2010, be confirmed in every other respect.

Yuki Matsuno
Member
Employment Standards Tribunal