

An appeal

- by -

6673538 Canada Inc. carrying on business as Strauss Herb Company  
("Strauss")

– 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)

and

An application for suspension

- by -

6673538 Canada Inc. carrying on business as Strauss Herb Company  
("Strauss")

– of a Determination issued by –

The Director of Employment Standards  
(the "Director")

Pursuant to section 113 of the  
*Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2010A/83 & 2010A/84

**DATE OF DECISION:** September 14, 2010

## DECISION

### SUBMISSIONS

Karen Lofgren	on behalf of 6673538 Canada Inc. carrying on business as Strauss Herb Company
Garee Prue	on her own behalf
John Dafoe	on behalf of the Director of Employment Standards

### OVERVIEW

1. Ms. Garee Prue (“Ms. Prue”) worked as a product demonstrator from July 4, 2008, to June 30, 2009, with 6673538 Canada Inc., carrying on business as Strauss Herb Company (“Strauss”), a company in the herbal product business. On September 28, 2009, Ms. Prue filed a complaint pursuant section 74 of the *Employment Standards Act* (the “*Act*”) alleging that Strauss contravened the *Act* by failing to pay her annual vacation pay, statutory holiday pay and compensation for length of service (the “Complaint”). On January 19, 2010, the Delegate of the Director of Employment Standards (the “Director”) held a hearing of the complaint (the “Hearing”), which was attended by Ms. Prue on her own behalf and by Ms. Shirley Coulter (“Ms. Coulter”) and Ms. Karen Lofgren (“Ms. Lofgren”) on behalf of Strauss. At the Hearing, Strauss did not dispute Ms. Prue’s calculations of her claims in the Complaint but argued that it did not pay her anything in respect of her claims because she was an independent contractor and not an employee of Strauss.
2. On May 18, 2010, the Delegate issued his determination of the Complaint (the “Determination”) and in the Reasons for the Determination he held, on the penultimate issue at the Hearing, that Ms. Prue was an employee and not an independent contractor and ordered Strauss to pay her precisely what she sought in her Complaint: vacation pay of \$844.39, statutory holiday pay of \$488.75, and compensation for length of service of \$559.50. In addition, the Delegate ordered Strauss to pay Ms. Prue interest of \$37.69 pursuant to section 88 of the *Act* and levied three (3) administrative penalties of \$500.00 each against Strauss pursuant to section 29 of the *Employment Standards Regulation*, B.C. Reg 396/95 (the “*Regulation*”) for contraventions of Sections 45, 58 and 63 of the *Act*.
3. Strauss, through its Key Account Manager, Ms. Lofgren, now appeals the Determination pursuant to Section 112(1)(b) of the *Act* asserting that the Director failed to observe the principles of natural justice in making the Determination.
4. By way of a remedy, Strauss is seeking the Tribunal to cancel the Determination.
5. Strauss is also seeking a suspension of the Determination pending the appeal but fails to provide any explanation or reason for its request.
6. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (pursuant to s. 103) and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the reasons for the Determination.

## ISSUES

7. Is there any basis to grant Strauss' request to suspend the Determination pending the appeal?
8. Did the Director breach the principles of natural justice in making the Determination?

## FACTS

9. As indicated, Strauss is in the herbal product business and Ms. Prue worked for Strauss as a product administrator from July 4, 2008, to June 2009.
10. In her complaint, Ms. Prue claimed that she was owed a total of \$1,892.64 consisting of \$844.39 in annual vacation pay, \$488.74 in statutory holiday pay and \$559.50 in compensation for length of service. The Delegate, in his Reasons for the Determination, noted that the only issue between the parties was whether Ms. Prue was an employee or an independent contractor, as Strauss did not dispute Ms. Prue's calculations of her claims if it were determined that she was an employee of Strauss.
11. At the Hearing, Ms. Prue testified that in early June 2008, while she was performing a product demonstration for another company at the IGA store in West Vancouver, she met Ms. Nina Wang ("Ms. Wang"), who was performing a product demonstration for Strauss. She asked Ms. Wang if Strauss was in need of product demonstrators. Ms. Wang said Strauss was and took her name and telephone number and agreed to pass it on to Ms. Lofgren, Strauss's Key Account Manager.
12. Some few days later, Ms. Lofgren contacted Ms. Prue to discuss the product demonstrator job. According to Ms. Prue, Ms. Lofgren advised that she would be expected to perform two (2) to three (3) product demonstrations per week in North Vancouver, Vancouver and Burnaby while Ms. Wang would retain responsibility for demos in the Langley and Surrey areas. She was further advised that she would be paid at the rate of \$12 per hour for the demonstrations and the same rate for her travel time to and from the demonstrations. She would also receive an additional amount of \$20 as travel allowance for each demo and reimbursement for any out-of-pocket expenses for purchase of any demo supplies she was required to purchase. She also submitted that Ms. Lofgren advised her that Strauss would pay her upon receipt of an invoice from her on a daily, weekly, bi-weekly or monthly basis.
13. Subsequently, on June 23, 2008, Ms. Prue indicates she met with Ms. Lofgren and the latter provided her with all the necessary supplies and equipment for conducting demos and on July 4, 2008, she conducted her first demo with Ms. Wang present to train her.
14. I observe that in the Reasons for the Determination it states "Ms. Strauss indicates that it was her understanding that Nina was paid as an employee of Strauss rather than an independent contractor". I find the reference to "Ms. Strauss" in this passage to be an error, as the context in the Reasons for the Determination would suggest that the reference is to Ms. Prue. I do not think much, if anything, turns on what Ms. Prue thought of Ms. Wang's relationship with Strauss insofar as her own status with Strauss is concerned. I simply wish to point out this error in the Reasons, as there is no evidence of any witness at the Hearing by the name of Ms. Strauss and the context, I think, suggests that the reference is to Ms. Prue.
15. Subsequently, on June 23, 2008, Ms. Prue states that she met with Ms. Lofgren as well as Strauss's Mr. Brian Kettle ("Mr. Kettle"). At this meeting she was advised that Ms. Wang's employment was terminated with Strauss and she was offered, in addition to her existing areas for demos, Ms. Wang's areas of Surrey and

Langley. She was also offered a raise in pay to \$15 per hour and provided a cheque for \$250 as an advance for expenses.

16. In January 2009, Ms. Prue indicates that Strauss advised her that it was changing its earlier payment arrangement with her to a bi-weekly pay schedule which would result in payments to her on every second Friday, by direct deposit into her bank account.
17. In early March 2009, Ms. Prue indicates that, on the advice of her accountant, she approached Strauss with a view to having Strauss document, in a formal contract, the terms of her agreement with Strauss. She states Strauss agreed with her but only provided her with a proposed contract on June 15, 2009. She states she had some concerns with the terms of the proposed contract and disagreed with some of the language in the contract. When she failed to return the contract to Strauss, Strauss terminated her position on June 23, 2009.
18. With respect to her status with Strauss while she was performing demos for the latter, Ms. Prue states she considered herself an employee of Strauss as the latter hired her as an individual to perform the demos and she was not allowed to have others perform demos for her. She also testified that Strauss scheduled the demos for her, controlled the number of locations for demos and the timing of the demos and further provided her all the equipment for the demos. She also submitted that she was paid an hourly rate for the work she did and reimbursed for all expenses and, therefore, she undertook no risk of loss or opportunity for maximizing her profit. She also states that Strauss encouraged sale of the products and she sold products at demos and subsequently reported to Strauss by email the sales as well any orders from stores where she did demos. While Strauss submits that any sales at the demos by Ms. Prue were done on a voluntary basis, Ms. Prue states she would not have known how to send orders to Ms. Lofgren unless she knew the procedure.
19. Ms. Prue also notes that as of June 2009, Strauss employed a national trainer, Mr. Beau Blunden (“Mr. Blunden”) for the development of Strauss’s demo team and all demonstrators for Strauss were advised that he would book demos.
20. On cross examination at the Hearing, when asked by Strauss whether other companies she did demos for would book demos for her, Ms. Prue stated that it depended on the company concerned. When asked by Strauss why she wanted a contract if she considered herself an employee of Strauss, she responded that her accountant advised her that she should have her status clarified in a contract.
21. As for the evidence of Strauss at the Hearing, the Delegate notes in the Reasons for the Determination that Ms. Lofgren led in Strauss’s evidence, while Ms. Coulter submitted supporting documents and written argument for Strauss in advance of the Hearing.
22. One of the documents Strauss submitted in advance of the Hearing was Canada Revenue Agency’s (“CRA”) ruling regarding the pensionability and insurability of Ms. Prue’s employment with Strauss. CRA’s ruling was that Ms. Prue’s “employment was not pensionable and not insurable” because the “requirements of a contract of service were not met” and, therefore, according to CRA, there did not exist an employer-employee relationship between Ms. Prue and Strauss. Strauss wished to rely upon this document to assert that the Director should adopt the conclusion of CRA in determining the status of Ms. Prue in determining the Complaint.
23. In the written submissions of Ms. Coulter on behalf of Strauss, the Delegate notes that Ms. Coulter submits that Strauss hired Ms. Prue after she was recommended by a former employee (referring to Ms. Wang). According to Ms. Coulter, Ms. Prue was hired as Strauss’ first demonstrator and paid \$12 per hour, plus \$20 for vehicle expense. Ms. Prue’s wage was subsequently increased to \$15 per hour when Strauss needed to

hire additional demonstrators and considered the industry standards for such work to determine a competitive wage for its demonstrators.

24. Ms. Coulter also submits that when additional demonstrators were hired Strauss determined that it would be easier and perhaps more efficient to pay demonstrators bi-weekly when Strauss did its payroll for its employees, rather than whenever the demonstrators invoiced Strauss. Ms. Coulter also stated in her written submissions that none of the demonstrators, including Ms. Prue, objected to this change, although Strauss encountered some difficulty with making a direct deposit to Ms. Prue's bank account. Ms. Prue was also provided a float of \$250 so that when Strauss's payment to her was late, she would have some cash to fall back on.
25. The Delegate also notes that Ms. Coulter, in her submissions, produced several emails from Ms. Prue and drew attention to at least two (2) emails where Ms. Prue referred to doing her books for year-end and opening a business account. Ms. Coulter relied upon these emails to question why Ms. Prue would consider herself an employee of Strauss.
26. With respect to the scope of Ms. Prue's work, Ms. Coulter noted that Ms. Prue was not asked to take or send orders nor was she provided proper company order forms or apprised of procedures. Any order taking on Ms. Prue's part was on a voluntary basis, although Ms. Coulter acknowledged that Strauss encouraged demonstrators to check inventory levels of products and to pass on that information to Strauss' sales representatives.
27. With respect to Ms. Prue's allegation that regular staff or employees of Strauss also performed the demonstrator work, Ms. Coulter submitted that this only occurred when Strauss had committed to perform a demo at a store and the demonstrator was not available due to illness or due to unanticipated or unexpected circumstances.
28. With respect to the termination of Ms. Prue's engagement as a demonstrator with Strauss without notice, Ms. Coulter submitted that Ms. Prue did not agree with, nor sign, any contract with Strauss. Ms. Prue wanted to check with her lawyer and accountant before she did anything and did not provide any feedback on Strauss's format of the contract except to state that Strauss's contract was different than anyone else's and that she was not agreeable to the terms in the contract. As a result, Strauss did not deem it necessary to provide her with termination notice.
29. Ms. Lofgren, in her testimony at the Hearing, submitted that Ms. Prue was provided with product sheets by Strauss which also were price sheets, but Ms. Prue was not asked to go from store to store to take orders for Strauss. While Ms. Lofgren admitted that many companies used merchandisers or demonstrators to take orders for them and fax them in, these workers are subcontractors. She further submitted that Ms. Prue was always informed that there was no opening for her for an employment relationship with Strauss. Ms. Lofgren also noted that product demonstrators were required to have FoodSafe certification and Ms. Prue had such a certification. Ms. Lofgren also stated that it was common for demonstrators to take outdated product out of the store, a task that Strauss's sales representatives, as employees, also performed.
30. Finally, Ms. Lofgren noted that Ms. Prue had requested on various occasions to be an employee of Strauss but was advised that employment was not available with Strauss. According to Ms. Lofgren, Ms. Prue was paid exclusively on the basis of invoices she submitted and this was characteristic of a contractor and not an employment relationship.

31. The Delegate, in considering the issue of the status of Ms. Prue was not persuaded with the CRA's ruling which Strauss wanted the Delegate to adopt or rely upon. The Delegate noted that the CRA, in its decision making, relied upon definitions in its governing legislation for its distinct statutory purpose, and that CRA's determination was not determinative of Ms. Prue's status under the *Act*.
32. The Delegate then reviewed the definitions of "employee" and "employer" in section 1 of the *Act* and considered the common law tests for considering whether an individual is an employee or an independent contractor, namely: control, ownership of tools, chance of profit and risk of loss. More specifically, the Delegate noted that in the conduct of Ms. Prue's demos for Strauss, the latter exercised control and direction over Ms. Prue. Strauss scheduled the demos and the demos were carried out according to the directions and standard practices of Strauss. The Delegate also noted that Strauss provided Ms. Prue the supplies and equipment required to conduct demos.
33. With respect to remuneration, Ms. Prue was paid an hourly wage and given a car allowance and reimbursement for all expenses related to her work. She had no chance of maximizing her profits and, correspondingly, there was no risk of loss to her, concluded the Delegate.
34. The Delegate also noted that while Ms. Prue worked as a demonstrator for other companies while Strauss engaged her, it was not clear whether an examination of those relationships would result in a finding of employment between Ms. Prue and those companies.
35. On the balance, based on the definitions of "employee" and "employer" in the *Act* as well as the common law tests, the Delegate concluded that Ms. Prue was an employee of Strauss and proceeded to determine the amounts she was owed by Strauss for annual vacation pay, statutory holiday pay and compensation for length of service. It is not necessary in this appeal for me to review the calculations of the delegate and the evidence of Ms. Prue surrounding the calculation of the said claims, as there is no dispute with respect to those calculations in the appeal. The dispute at the Hearing was with the status of Ms. Prue and the dispute on appeal is with the determination of the Director on that same issue.

## SUBMISSIONS OF STRAUSS

### *(i) Suspension Request*

36. As indicated previously, Strauss has not provided separate or any submissions with respect to its request for a suspension of the Determination pending appeal.

### *(ii) Natural Justice*

37. Strauss's submissions, including the final submissions, are very brief and I propose to set out the substantive parts verbatim below. In particular, Ms. Lofgren's written submissions accompanying the Appeal Form of Strauss provide:

Our information all remains the same but we have added a contract that we issued to Nina Wang who introduced us to Garee. One of the issues that Garee had was of our employees performing demos. Ms. Wang was hired with a contract stating that she would have to perform demos on occasion as part of her employment and we have included this document. There was no such employment contract with Ms. Prue. We trust this is in order, and we look forward to hearing from you.

38. Ms. Lofgren attaches an employment letter or what she describes as an employment contract of Ms. Wang without explaining why it was not produced previously at the Hearing of the Complaint. It is a document dated

March 29, 2008, and appears to have been in existence since that date, well in advance of the Hearing. The document, *inter alia*, sets out Ms. Wang's "(r)esponsibilities will include all aspects of servicing retail accounts, with primary focus on developing and managing a system to perform product demos at retail stores in the greater Vancouver area." The document also, under the heading "Workload adjustment" states "(w)hen personally doing product demos for the public at retail stores, an additional \$10 per hour will accrue for the duration of the demo." On the subject of expense reimbursement, under the heading "Automobile", it states in the document "(m)ileage will be paid for travel to retail clients and prospects @\$0.42/km. Logbook is required."

39. In the final submissions of Strauss, Ms. Lofgren submits:

In my final reply I would like to stress that Garee was not an employee of Strauss and even offered to become an employee as in her own admission. She even stayed [sic] that the only time she considered herself an employee was after we were not going to use her as a subcontractor any longer. Another point I wanted to ask if she thought she was an employee and entitled to the benefits of an employee, why would she not have asked for sick pay when she was off with her heart attack. If she was an employee she would have been on our benefits as all employees are offered them. Please consider this information I have suggested again.

## SUBMISSIONS OF THE DIRECTOR

### *(i) Suspension Request*

40. The Director submits that no reason has been advanced for a suspension of the effect of the Determination. The Director also submits that if the full amount of the Determination is deposited in the trust account of the Director, the Director would take no objection to the suspension of the Determination pending the outcome of the appeal.

### *(ii) Natural Justice*

41. The Director submits that while the natural justice ground of appeal has been identified in the Appeal Form, nothing in the appeal submissions addresses this ground of appeal. According to the Director, "the actual basis for the appeal is an assertion that [the Delegate has] erred in law in determining that Ms. Prue was an employee of the Employer". In the Director's view, the latter issue "has been sufficiently addressed in the Determination".

## SUBMISSIONS OF MS. PRUE

### *(i) Suspension Request*

42. As with the Director's submissions, Ms. Prue states that Strauss has failed to identify its reasons for the suspension request and furthermore there is no indication that Strauss has paid any monies required by the Director to be deposited with the Director pending the outcome of the appeal. Therefore, Ms. Prue submits that the request for suspension should be denied.

### *(ii) Natural Justice*

43. With respect to the natural justice ground of appeal, as with the Director's submissions, Ms. Prue contends that nothing in Strauss's submissions suggest a basis for invoking this ground of appeal. Ms. Prue asserts that each party was provided with the documents of the other party and afforded sufficient time to review them and respond with their positions. She also notes that at the Hearing both parties had sufficient time to state their cases and cross examine the other party and the Delegate acted impartially in making the Determination.

44. Ms. Prue then proceeds in her written submissions to largely reiterate the evidence she gave at the hearing and reassert the position she took at the Hearing. I have read those submissions carefully and I do not find it necessary or helpful to reiterate them here.

## ANALYSIS

45. I have reviewed the Determination, the section 112(5) “record” and the submissions of the parties and I propose to examine the parties’ submissions on both the suspension request of Strauss and the natural justice ground of appeal under separate subheadings below.

### *(i) Suspension Request*

46. Section 113 of the *Act* and Rule 31 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) govern applications for a suspension of a determination.

47. Section 113 of the *Act* provides:

- 113 (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
- (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
- (a) the total amount, if any, required to be paid under the determination, or
  - (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

48. Rule 31 of the *Rules* provides:

#### **Rule 31 Request to Suspend a Determination**

##### **Requirements for suspending a determination**

- (1) At the request of an appellant or applicant, the tribunal may suspend a determination under section 113 of the *Act* for any period and subject to any conditions it considers appropriate.
  - (2) An appellant or applicant requesting a suspension must deposit with the director the amount that the director requires to be paid, if any, or a lesser amount as may be ordered by the tribunal.
  - (3) In order to request a suspension an appellant or applicant must, in writing, at the same time as filing the appeal or application for reconsideration:
    - (a) state the reasons for the request to suspend the determination;
    - (b) state the amount to be deposited with the director; and
    - (c) if that amount is less than the amount required to be paid by the director, state the reason why depositing a lesser amount would be adequate in the circumstances.
49. In this case, the combined effect of section 113 of the *Act* and Rule 31 of the *Rules* requires the applicant, Strauss, to provide in writing its reasons for requesting a suspension of the Determination and deposit with the director either the total amount of the Determination, or a lesser amount, if the Tribunal considers a lesser amount is adequate or appropriate in the circumstances. However, Strauss has not fulfilled any of the prerequisites for successfully requesting a suspension of the Determination. That is, Strauss has neither provided any reasons for its suspension request, nor deposited any amount required to be paid under the Determination with the Director



nor requested to deposit a lesser amount. As indicated by this Tribunal in other similar cases where suspension of a determination has been requested, it is not for the Tribunal to divine the basis of an applicant's suspension application. The onus is clearly on the applicant to persuade the Tribunal, on a balance of probabilities, the merits of its suspension request. In the circumstances, I reject Strauss' application for a suspension of the Determination. I also note that the effect of my decision here is moot as it is issued at the same time as the appeal decision.

**(ii) Natural Justice**

50. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal succinctly summarized 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.

51. Strauss, as the appellant, has the onus to satisfy the Tribunal, on a balance of probabilities, that the Director breached the principles of natural justice in making the Determination. Based on my careful review of the submissions of Strauss and the other parties as well as the section 112(5) record produced by the Director in this appeal, I can say unequivocally that there is no evidence of Strauss being denied procedural fairness during the Hearing or at any other time. Strauss appears to have been afforded full opportunity to learn and respond to the case against it, including challenge the evidence of Ms. Prue by cross-examining her at the Hearing.

52. I agree with the Director that based on its appeal submissions, Strauss is more likely invoking the error of law ground of appeal in its challenge of the Director's conclusion that Ms. Prue is an employee of Strauss. I note that while Strauss failed to identify the error of law ground of appeal in the Appeal Form, failure to check-off the appropriate box identifying the grounds of appeal in the appeal form is not in itself fatal to Strauss's appeal. In *Re Flour Child Bakeries Corp.*, BC EST # D094/06, this Tribunal adopted the view of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, wherein the Tribunal expressed the view that it should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off":

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

53. Having said this, has Strauss in its submissions established an error of law on the part of the Director in the latter's determination of Ms. Prue's employment status with Strauss? In this regard, I note that the Tribunal has consistently adopted the following definitions of "error of law" set out 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;
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 be reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

54. Based on the above definitions of error of law, I find there is no basis for Strauss to ground its appeal on the error of law ground of appeal. In my view the Delegate did not misinterpret the *Act* nor misapply any principles of law in determining Ms. Prue's employment status. I also find that this is not a case of the Delegate acting without any evidence or on a view of the facts that could not be reasonably entertained. Instead, I find that this is a case of Strauss being dissatisfied with the Delegate's finding of an employment relationship between Strauss and Ms. Prue and desiring a reargument or a second hearing of its case before the appeal Tribunal with a view to obtaining a favorable result this time. This is not an appropriate reason or basis for appealing the Determination. As indicated by the Tribunal in *Chilcotin Holidays Ltd.*, BC EST # D139/00:

The purpose of an appeal is not simply to allow an aggrieved party a second chance to argue the same case that was argued unsuccessfully to the Director during the investigation. A party appealing a Determination must show it is wrong, in fact or in law. In the context of an appeal based on an alleged error on the facts or the conclusion to be drawn from the facts, a party saying, in effect: "I don't disagree that these are the facts and that the Director had all these facts, but I disagree with the result", will not be successful. The Tribunal is not a forum for second guessing the work of the Director.

55. I also note that Strauss has adduced new evidence on appeal in the form of Ms. Wang's employment agreement or contract with Strauss. Strauss has not explained why it did not produce this document previously at the hearing or before the Determination was made as this document appears to have been in existence since before Strauss engaged Ms. Prue as a demonstrator. In my view the document would not satisfy the criteria for allowing new evidence on an appeal of a determination delineated by the Tribunal in *Re: Merilus Technologies Inc.*, BC EST # D171/0. Further, even if accepted as new evidence the document is unhelpful to Strauss. It appears to actually favour the Delegate's conclusion that Ms. Prue was an employee of Strauss as Ms. Wang's employment with Strauss entailed "personally doing product demos for the public at retail stores", a task Ms. Prue was engaged by Strauss to do.

56. For all of the above reasons, I dismiss Strauss's appeal.

## **ORDER**

57. Pursuant to Section 115 of the *Act*, I order the Determination dated May 18, 2010, be confirmed.

---

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